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The Castle Doctrine: An Expanding Right to Stand Your Ground Comment.

Denise M. Drake

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COMMENTS

THE CASTLE DOCTRINE: AN EXPANDING RIGHT TO STAND YOUR GROUND

DENISE M. DRAKE

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I. INTRODUCTION

In 1912, a banker was chatting with his friend in the lobby of an upscale Fort Worth, Texas hotel when an Amarillo tycoon entered and, without warning, shot him.¹ The victim was unarmed, the shooter was not insane, and following two trials, a jury found the shooter “not guilty.”² As the courtroom dispersed that afternoon, a curious reporter asked one of the jury members why the shooter was not convicted.³ He replied, “Well, because this is Texas.”⁴

Almost 100 years later, some might argue Texas has not changed. The idea that Texas has reverted back to its “Wild West” days centers around a new law that critics have dubbed “shoot first, ask questions later.”⁵ Senate Bill 378, which took effect in Texas on September 1, 2007, essentially eliminates a person’s “duty to retreat” in the face of a criminal attack.⁶ It expands upon the common law exception to the duty to retreat, known as the Castle Doctrine—the idea that a person’s home is his

1. BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS 4 (2006).

2. *Id.*

3. *Id.*

4. *Id.*

5. See Gerald S. Reamey, Op-Ed., *Law Encourages ‘Shoot First, Ask Questions Later’*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2007, at H4 (asserting that the new Castle Doctrine will invite needless deaths as people may shoot before calculating the true danger of the situation).

6. See TEX. PENAL CODE ANN. §§ 9.31–.32 (Vernon Supp. 2007) (codifying and expanding the common law exception to the duty to retreat, known as the Castle Doctrine); see also Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm> (asserting that a person should not have to retreat when faced with a criminal attack); Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (finding that the Castle Doctrine, enacted by the 80th Legislature, eliminates a person’s duty to retreat).

castle, and therefore he may stand his ground and defend his dwelling from intruders.⁷ The bill, also known as the “King of the Castle” bill, broadens the scope of what may be considered one’s castle.⁸ The definition now includes cars, places of business, and virtually any place a person has a legal right to be present—so long as the person was not engaged in criminal activity or in some way provoked the attack.⁹ This creates the presumption that someone who acted in self-defense found it reasonably necessary to use deadly force.¹⁰

The text of the bill, initially drafted by the National Rifle Association (NRA), has become increasingly popular among state legislators.¹¹ Texas is now one of fifteen states that have codified a

7. See Press Release, Senator Jeff Wentworth, “Castle Doctrine” Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm> (noting that a man’s home is his castle, therefore this new law allows a man to defend his castle without penalty); see also Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm> (highlighting the Texas Penal Code amendment that states a person does not have to retreat when faced with an unlawful attack that was unprovoked).

8. See Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (pointing out that Senate Bill 378 expands the boundaries of the “no retreat” concept).

9. See TEX. PENAL CODE ANN. §§ 9.31–.32 (Vernon Supp. 2007) (listing the broad areas where self-defense and the use of deadly force are justified, so long as the attack was unprovoked and the person was not engaged in criminal activity); see also Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (explaining how the new Texas Penal Code amendments expand one’s “castle” to places of business, vehicles, and any place a person has a legal right to be present); Press Release, Senator Jeff Wentworth, “Castle Doctrine” Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm> (stating that people who are attacked in their homes, businesses, or vehicles should be allowed to defend themselves so long as they are not engaged in criminal activity and do not provoke the attack); Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm> (evaluating the Penal Code amendment that states a person does not have to retreat when faced with an unlawful attack that was unprovoked).

10. See TEX. PENAL CODE ANN. §§ 9.31–.32 (Vernon Supp. 2007) (establishing that a person’s use of force is presumed to be reasonable and immediately necessary); see also Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (addressing how the new law creates a presumption of reasonableness that deadly force was immediately necessary); Press Release, Senator Jeff Wentworth, “Castle Doctrine” Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm> (affirming that the changes to the Penal Code presume a person acted reasonably in using deadly force).

11. See Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 199 (2006) (reporting that the Florida Protection of Persons Bill, drafted by the NRA, was passed in its original form in 2005 by an overwhelming majority of house votes: 94-20); see also Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway*

version of the castle doctrine.¹² Supporters of the bill dismiss claims that the law encourages a vigilante society.¹³ Instead, they argue that it eliminates the need to make split second decisions in the face of a life and death situation.¹⁴ Marion Hammer, former President of the NRA, said the bill allows her “to use deadly force against an intruder without having to ask, ‘Are you here to rape me and kill me, or are you just here to beat me and steal my jewelry?’”¹⁵ In fact, the law “has never turned on the criminal’s *intent*,” but instead on whether the defender acted with a

for Self-Defense: NRA to Promote Idea in Other States, WASH. POST, Apr. 26, 2005, at A1 (discussing how the Florida gun bill “passed unanimously in the state [s]enate” and received a majority in the house); cf. Kelley Beaucar Vlahos, *Floridians’ Self-Defense Rights Expanded*, FOX NEWS, May 3, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,155303,00.html (quoting Florida State Representative Dennis Baxley as a supporter who touts the new law as a “reasonable, self-protection bill [that] defends innocent life”).

12. Press Release, Senator Jeff Wentworth, “Castle Doctrine” Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm> (highlighting the key points of the Castle Doctrine as it was proposed to the senate in 2006 and stating that in passing the bill, Texas joins “fifteen other states, including Alabama, Florida, Georgia, Louisiana, Oklahoma, and Michigan”).

13. See Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 203 (2006) (explaining that supporters believe the law merely places people in a better position to defend themselves from criminals). *But see* Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 504 (2007) (stating that critics of Florida’s Castle Doctrine fear that people will go beyond using the law to protect themselves, their families, and their fortresses and “turn the state into a modern Wild West”); Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway for Self-Defense: NRA to Promote Idea in Other States*, WASH. POST, Apr. 26, 2005, at A1 (arguing that Florida’s Castle Doctrine could be interpreted as a revival of the Wild West, where enemies who invade one’s personal space do so at their own peril); Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1 (claiming that when Florida’s bill was enacted in 2005, critics argued more people would start “carrying guns and other deadly weapons,” thus reverting back to the Wild West).

14. Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 203 (2006); cf. Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1 (examining how promoters of the Florida Castle Doctrine believe it aids would-be victims). The bill’s sponsor in Florida, Representative Dennis Baxley, said it was a necessary measure to protect crime victims: “Criminals will know the public has the full backing of the law This sends a message that we’re going to stand behind anybody that has the guts to stand up and defend themselves.” Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1.

15. Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 203 (2006).

reasonable belief that the defender's life was in grave danger.¹⁶ As various scenarios play out in court, judges must be careful to interpret the new law with caution.

This Comment addresses the problems that could arise with the Castle Doctrine in Texas. It begins by looking at the history of self-defense in Texas over the span of three distinct time periods: the frontier days of the 1800s, the oil boom of the 1900s, and post-World War II to the present. The second part of the Comment focuses on the present state of Texas law. It analyzes the scope and language of the Castle Doctrine and identifies recent cases in which the wording of the law has been confused. It also provides current examples in Texas where interpretation of the law might have been abused. Finally, this Comment concedes that the fear of violence in modern society has demanded more leeway in the law of self-defense. While it may be too soon to tell what effect this law will have on society, there is always the possibility that self-defense will turn into self-justice. Judges must rein in people who appear to be taking the law into their own hands without a reasonable belief that such action is immediately necessary.

II. BACKGROUND

A. *History of Texas as the Wild West*

Laws are often a reflection of societal values, and prior to 1973, Texans had no duty to retreat in the face of a criminal attack.¹⁷ Perhaps this is because in the late 1800s, Texas was still rife with images of the Wild West.¹⁸ “Up until about a decade after the

16. *Id.* (emphasis added).

17. See *Sternlight v. State*, 540 S.W.2d 704, 705 (Tex. Crim. App. 1976) (discussing how prior to the 1973 Penal Code amendments, there was no duty to retreat in Texas); see also *Renn v. State*, 64 Tex. Crim. 639, 645–56, 143 S.W. 167, 170–71 (1911) (charging the jury that when a person is unlawfully attacked, he is not bound to retreat, but instead may stand his ground and repel the attack with whatever force may be reasonably necessary); *Arto v. State*, 19 Tex. Ct. App. 126, 135 (1885) (finding that it was reversible error for the judge to omit from the jury instruction that the defendant was not bound to retreat before killing his assailant in the face of an unlawful attack); BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS 14 (2006) (recognizing that the early laws of Texas imposed no duty to retreat when faced with a criminal attack).

18. See generally BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS 5–17 (2006) (noting Texas

Civil War, no formal law existed in West Texas,” and the state was still a frontier land plagued by cattle rustlers, horse thieves, and Indian raids.¹⁹ Given that livestock and land were a family's livelihood, settlers had little use for statutes passed by politicians in Austin, who were far removed from everyday lawlessness.²⁰ Self-help was the remedy of choice, often handled by “Judge Winchester” or “Judge Lynch,” and even as a formal legal system took root in Texas, judges relied less on statutes and more on common sense.²¹ Killing was often justified under “codes of fairness” and when that failed, there was always the ever-popular defense that “the-sorry-son-of-a-bitch-needed-killing-anyhow.”²²

In addition to self-defense and protection of property, Texans, like most Americans of the 1800s, had an unshakable dedication to defending their honor.²³ In grand tradition, Texans adhered to the Old South's “Code of Honor” that “[s]elf-respect . . . has always demanded much fighting.”²⁴ This led to many disagreements being settled by duels.²⁵ “Dueling reached its peak in Texas” around 1837, when the state was still a republic.²⁶ Many men considered it a “public duty” to duel, and believed it earned

settlers tended towards shooting in self-defense, self-respect, and protection of property).

19. *Id.* at 5.

20. *Id.*

21. *Id.*

22. *Id.* at 14–17. “One of the first district judges in Dallas County,” Nathaniel Macon Burford, said, “Gentleman of the Grand Jury . . . they tell us that more men are killed in Texas than in any other country in the world, and I guess that's a fact, but . . . I tell you that more men need killing in Texas than in any other country in the world.” BILL NEAL, *GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS* 13–14 (2006).

23. *Id.* at 12.

24. *Id.* at 12–13; cf. H.C. Brearley, *The Pattern of Southern Violence*, in *CULTURE IN THE SOUTH* 678, 678 (W. T. Couch ed., 1934) (referring to the South as “below the Smith and Wesson line”); Richard Maxwell Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Towards Southern Homicide in Historical Perspective*, 32 *VAND. L. REV.* 225, 229 (1979) (declaring that between the end of the Civil War and 1880, it is estimated more than 40,000 homicides were committed in the southern states).

25. See Handbook of Texas Online, *Dueling in the Republic of Texas*, <http://www.tshaonline.org/handbook/online/articles/DD/jgd1.html> (last visited Feb. 12, 2008) (recognizing that dueling was a practice adopted from the South and quickly became a popular way of settling arguments in Texas); cf. PBS.org, *The History of Dueling in America*, <http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html> (last visited Mar. 6, 2008) (examining how dueling was an American fixture in 1804 and noting how its popularity grew quickly and continued for thirty years).

26. Handbook of Texas Online, *Dueling in the Republic of Texas*, <http://www.tshaonline.org/handbook/online/articles/DD/jgd1.html> (last visited Feb. 12, 2008).

them respect.²⁷ However, public opinion of dueling, rather than legislation, eventually led to its decline.²⁸ To become a civilized nation, Americans realized that publicly sanctioned bloodshed must end.²⁹ No doubt Texas eventually adhered to that mentality as well.

B. *Texas Growth*

1. An Economic Boom

The state's violent and rustic frontier image was one of many obstacles Texas faced in becoming a "civilized" state.³⁰ Its limited commercial and industrial development, along with poor transportation facilities, stymied the kind of cosmopolitan growth found in northeastern states.³¹ In the 1860s, however, the cotton and cattle industries exploded and, with the rise of the railroads, small towns vanished as cities like Dallas, Houston, Austin, and San Antonio became economic hubs.³² Finally, in 1901, Texas

27. Handbook of Texas Online, *Dueling in the Republic of Texas*, <http://www.tshaonline.org/handbook/online/articles/DD/jgd1.html> (last visited Feb. 12, 2008). One of the most notorious duels in Texas took place between two officers of the Texas Army. *Id.* Felix Huston, a general, considered it a stigma to his character when he was replaced by Albert Sidney Johnston. *Id.* Johnston accepted Huston's challenge and was seriously wounded in his hip as a result. *Id.* However, Johnston considered it a "public duty" to accept the challenge of a duel and believed he would have lost the respect of his men if he had hesitated in accepting the challenge. *Id.*

28. See PBS.org, *The History of Dueling in America*, <http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html> (last visited Mar. 6, 2008) (claiming that as people began to recognize dueling as "cold-blooded murder," the formal process headed toward an irreversible decline).

29. *Id.* Benjamin Franklin and George Washington were among those who openly condemned dueling. *Id.* "Franklin called duels a "murderous practice[,] . . . they decide nothing." *Id.* (omission in original).

30. See JAMES L. HALEY, *TEXAS: FROM THE FRONTIER TO SPINDLETOP* 133 (1985) (portraying Texas as a state whose people "still had a ways to go in their quest for civilization"). While traveling through Texas in 1954, Frederick Law Olmstead, a renowned landscape architect, commented on a house that was extremely neat, with silver drinking cups; yet, "there was no other water-closet than the back of a bush or the broad prairie." *Id.*

31. See Randolph B. Campbell, *Statehood, Civil War, and Reconstruction, 1846-1876*, in *TEXAS THROUGH TIME: EVOLVING INTERPRETATIONS* 165, 175 (Walter L. Buenger & Robert A. Calvert eds., 1991) (indicating that Texas did not have many large cities during the Civil War and Reconstruction eras because the state was overwhelmingly agricultural).

32. See JAMES L. HALEY, *TEXAS: FROM THE FRONTIER TO SPINDLETOP* 133-34 (1985) (proclaiming that those towns which did not foresee the impact of the railroads

discovered oil like it never had before.³³ The Spindletop Gusher was an oil well that spewed petroleum two hundred feet in the air for nine days, and the phenomenon heralded an economic transformation for Texas.³⁴ With Texas's massive supply of oil, the thrust of the oil industry shifted and changed the Texas economy forever.³⁵ "Further discoveries, each more wondrous than the last, made millionaires out of hog callers. Things were never the same again."³⁶

2. New Growth, New Laws

Texas was changing and soon the laws would have to adapt.³⁷ Although Texas is rarely considered a historically progressive state, it adopted many reforms implemented by the nation's most progressive leaders in the 1930s.³⁸ After World War II, further socioeconomic changes in Texas dramatically transformed the state and its politics: "Here was a state and a people deeply attached to nineteenth-century southern rural values, now suddenly faced with demands they were reluctant to meet."³⁹ Texas's location along the Sunbelt, along with an economic boom

eventually withered away). In 1850, the population of Texas was 212,000. *Id.* A decade later, it was 600,000. *Id.* In each town, "shops, mills, and forges could hardly keep pace with the growth." *Id.*

33. *Id.* at 268 (describing how the giant dome of Spindletop near Beaumont, Texas, became the oil phenomenon heard around the world).

34. JAMES L. HALEY, *TEXAS: FROM THE FRONTIER TO SPINDLETOP* 268 (1985); *see also* JOSEPH SHADE, *PRIMER ON THE TEXAS LAW OF OIL AND GAS* C8 (3d ed. 2004) (remarking on how the Spindletop Gusher produced 75,000–100,000 barrels a day).

35. JAMES L. HALEY, *TEXAS: FROM THE FRONTIER TO SPINDLETOP* 270 (1985); *see also* DAVID G. MCCOMB, *TEXAS: A MODERN HISTORY* 117 (1989) (illustrating how North America and Europe demanded petroleum products to fuel engines, factory machines, and home lanterns; thus, Texas's discovery of oil was directly related to the global dependence on oil).

36. JAMES L. HALEY, *TEXAS: FROM THE FRONTIER TO SPINDLETOP* 270 (1985).

37. *See* Larry D. Hill, *Texas Progressivism*, in *TEXAS THROUGH TIME: EVOLVING INTERPRETATIONS* 229, 229–30 (Walter L. Buenger & Robert A. Calvert eds., 1991) (explaining that as Texas grew, so did its laws).

38. *See id.* (stating that Texas in the early twentieth century is never mentioned as "progressive," but, between 1900 and 1930, Texas adopted many reforms advocated by the nation's progressive leaders). However, the enemies of progressivism regained ascendancy from 1938–1957 with an unbroken line of conservative governors. *Id.* Typical laws during this period included harsh anti-labor laws and a regressive tax structure. *Id.*

39. Kenneth E. Hendrickson, Jr., *Texas Politics Since the New Deal*, in *TEXAS THROUGH TIME: EVOLVING INTERPRETATIONS* 251, 253–54 (Walter L. Buenger & Robert A. Calvert eds., 1991).

in the 1970s, brought migrants from outside the rural South.⁴⁰ These migrants settled within the large population centers of Texas, prompting the legislature to adopt laws that reflected the needs of an urban society.⁴¹ Perhaps that is why in 1973, the 63rd Legislature imposed a duty to retreat when a person was met with a criminal attack.⁴² As Texas tried to overcome its Wild West image, it adopted more civilized laws that reflected the values of those migrating from other parts of America.⁴³

3. The Duty to Retreat

The duty to retreat in Texas was a modified version of English common law, which held that if the defender was assailed with a fear of either great bodily injury or death, he was required to avoid

40. Char Miller, *Sunbelt Texas*, in *TEXAS THROUGH TIME: EVOLVING INTERPRETATIONS* 278, 281 (Walter L. Buenger & Robert A. Calvert eds., 1991).

41. *See id.* (declaring that Texas's location along the Sunbelt was attractive to migrants because it provided a warmer climate and offered a variety of new jobs); *see also* Handbook of Texas Online, Texas Since World War II, <http://www.tsha.utexas.edu/handbook/online/articles/TT/npt2.html> (last visited Feb. 12, 2008) (proclaiming that as Northerners migrated to Texas they brought with them their political ideals).

42. *See Sternlight v. State*, 540 S.W.2d 704, 705 (Tex. Crim. App. 1976) (commenting on the weight of the change to the Penal Code caused by the addition, in the 1973 session, of a duty to retreat before deadly force was excusable). In particular, "before deadly force may be used in self-defense the actor (defendant) is required to retreat if a reasonable person in the actor's (defendant's) situation would have retreated." *Id.*; *see also* Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (reiterating that in 1973 the Texas Legislature permitted deadly force only if a reasonable person would not have retreated).

43. *Cf.* Handbook of Texas Online, Texas Since World War II, <http://www.tsha.utexas.edu/handbook/online/articles/TT/npt2.html> (last visited Feb. 12, 2008) (discussing how the changing demographics of Texas reflected the values of those who migrated into the state). In addition to changing values, Texas's adoption of a duty to retreat was likely influenced by proposals made by the American Law Institute. *See generally* MODEL PENAL CODE § 3.04 cmt. at 53–55 (1985). Commentaries from the Model Penal Code, as adopted at the 1962 Annual Meeting of the American Law Institute (ALI), indicate that the ALI had taken a minority view by imposing a duty to retreat. *Id.* at 54. Retreat was not required under the Model Penal Code unless "the actor [determined] that he [would] need to use deadly force to defend himself if he [stood] his ground, and even then retreat [was] only a requisite if the actor [knew] that he [could] avoid the need to use such force with complete safety by retreating." *Id.* at 54–55. Prior to the Model Penal Code, jurisdictions had been sharply divided on the question of one's right to stand one's ground; however, these jurisdictions' position rested upon the view of protecting life, rather than one's honor. *Id.* at 53. "A really honorable man . . . would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands." *Id.* at 54.

a confrontation.⁴⁴ The extent of the duty was to “retreat to the wall’ behind [one’s] back before resorting to the use of lethal force to repel the attacker.”⁴⁵ The English common law duty to retreat imposed a heavy burden on one’s self-esteem.⁴⁶ It recognized the shame and dishonor in asking people to run away from danger.⁴⁷ However, at the cost of one’s pride, it also showed a compassion for life,⁴⁸ recognizing that the life of one’s assailant is still valuable despite an apparent criminal act, and that any punishment rendered should be meted out by the courts.⁴⁹ This duty exemplified the rationale that killing was only to be done as a last resort.

The Texas duty to retreat was less restrictive than the English duty. A person was justified in using deadly force if the following criteria were met: the defendant reasonably believed the assailant was using or attempting to use unlawful deadly force; the defendant reasonably believed the use of force and degree of force used were immediately necessary for self-protection; and a reasonable person in the situation would not have retreated.⁵⁰

44. BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS 17 (2006).

45. *Id.*

46. Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 200 (2006).

47. *See id.* (claiming that the law burdened a person’s sense of pride by asking him to run away).

48. *Id.*

49. *Id.*

50. *See Henderson v. State*, 906 S.W.2d 589, 594–95 (Tex. App.—El Paso 1995, no writ) (establishing that in order for a defendant to be entitled to a jury instruction on self-defense there must be evidence on three essential elements: that the defendant was justified in using deadly force, that a reasonable person in defendant’s position would not have retreated, and that the use of deadly force was reasonably believed to be immediately necessary under the circumstances as a whole); *see also Valentine v. State*, 587 S.W.2d 399, 400–01 (Tex. Crim. App. 1979) (deciding it was sufficient to charge the jury based on whether the appellant reasonably believed, as viewed from his standpoint under the circumstances, that deadly force was immediately necessary to defend against an unlawful attack); *Sternlight v. State*, 540 S.W.2d 704, 706–07 (Tex. Crim. App. 1976) (stating that a person is justified in using deadly force if a reasonable person in the defendant’s situation would not retreat). The *Sternlight* court recognized that the common law doctrine of “retreat to the wall” was established at a time when the weapons used were fists, sticks, and knives. *Sternlight*, 540 S.W.2d at 706–07. Now, the use of guns makes it necessary to determine whether the defendant had the opportunity to retreat “considered as a part of all the circumstances of the moment.” *Id.* Thus, depending on the situation, the court would look at whether the defendant had the ability and

The extent of one's retreat did not require a person to be backed against a wall; instead, it merely required that a person attempt to "withdraw; retire; go back."⁵¹ Moreover, the court would examine the situation from a totality of the circumstances: "The relevant circumstances to examine in determining whether a reasonable person would not have retreated are those existing at the moment force is applied."⁵² Regardless of the more

opportunity to retreat. *Id.*

51. *Bartmess v. State*, 708 S.W.2d 905, 909–10 (Tex. App.—Tyler 1986, no writ). In *Bartmess*, the court held that the extent of one's retreat must be measured against the response of a reasonable person in the defendant's situation. *Id.* The court determines the reasonable person test is an objective one and thus, the jury must decide whether a reasonable person under the same circumstances would have withdrawn, and not whether the defendant or the jurors themselves would have withdrawn. *Id.* *But see Newman v. State*, 58 Tex. Crim. 443, 446–47, 126 S.W. 578, 580 (1910) (finding that a defendant's right to jury instructions on self-defense should be viewed in light of the circumstances "as they appeared to him at the time"); Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 4–5 (1998) ("[C]ourts routinely allow juries to consider a wide variety of a defendant's personal characteristics when determining . . . objective reasonableness . . ."). Courts examine evidence such as Battered Woman Syndrome, fear caused by past abuses by the police, past assaults, and physical disabilities to determine reasonableness. Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 4–5 (1998). "[I]n self-defense cases, some courts do not even require the defendant's act to be objectively reasonable, insisting that an individual who honestly believed that she was acting in self-defense should not be punished." *Id.*

52. *Bartmess*, 708 S.W.2d at 908; *see also Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984) (recognizing that the defendant's subjective belief was relevant and should not have been excluded from the evidence admitted at trial). In *Dyson*, the trial court found that it was immaterial that the defendant was not in fact attacked and excluded the evidence. *Dyson*, 672 S.W.2d at 463. The Texas Court of Criminal Appeals held that the trial court abused its discretion in finding the evidence irrelevant. *Id.* Instead, the issue was whether the defendant had a reasonable belief that the use of deadly force was immediately necessary to protect herself from the use or attempted use of unlawful force. *Id.*; *see also Warren v. State*, 565 S.W.2d 931, 933–34 (Tex. Crim. App. 1978) (determining that a defendant is entitled to an instruction on self-defense if any evidence is produced showing that the defendant reasonably believed the attempted use of force against him was unlawful). In *Warren*, the court noted that regardless of whether the evidence is "strong, feeble, unimpeached, or contradicted," the defendant is entitled to an affirmative defensive instruction. *Warren*, 565 S.W.2d at 933–34; *see also Jones v. State*, 544 S.W.2d 139, 142 (Tex. Crim. App. 1976) (proclaiming that the test used to determine whether a person has a reasonable apprehension of danger should be viewed from the standpoint of the defendant at the time of the offense); *Burns v. State*, 159 Tex. Crim. 183, 184–85, 262 S.W.2d 406, 407 (1953) (emphasizing that the attack must be serious enough to give rise to an apprehension of death, as viewed from the standpoint of the accused). In *Burns*, the court also held that self-defense only arises as a fact question to be determined by the jury. *Burns*, 159 Tex. Crim. at 184–85, 262 S.W.2d at 407.

permissive use of deadly force, the duty to retreat still signaled a shift in societal values. No longer wanting to be associated with the laws of the Wild West, which seemed to reflect an “almost callous disregard for human life,”⁵³ Texas was proving it had come into the modern era.

4. The “Castle” Exception

Although Texans had a duty to retreat, the legislature reserved an exception for situations where an individual was attacked in the person’s home.⁵⁴ This common law exception was based on the idea that a person’s home is his castle; therefore, he should be able to stand his ground.⁵⁵ The earliest reference to this exception can be found in the Bible: “If a thief break into a man’s house by night, and he be there slain the slayer shall not be guilty of manslaughter.”⁵⁶ There are many theories for this exception. One is grounded in the frontier belief that a person’s “home [is] the ultimate place of safety,”⁵⁷ and requiring one to leave would subject the person to greater dangers outside.⁵⁸ Another theory

53. See BILL NEAL, GETTING AWAY WITH MURDER ON THE TEXAS FRONTIER: NOTORIOUS KILLINGS AND CELEBRATED TRIALS 15 (2006) (asserting that some of the early Texas statutes evidenced “an almost callous disregard for life”).

54. See *Edmonson v. State*, 384 S.W.2d 702, 704 (Tex. Crim. App. 1964) (establishing that every person has a right to protect his home from an unlawful attack and may use whatever force is necessary); see also Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007) (writing that the Texas Legislature reserved an exception to the duty to retreat when a person was attacked in the person’s home).

55. See *Beard v. State*, 158 U.S. 550, 555 (1895) (declaring that a man need not retreat from danger when he is in his house); see also *People v. Eatman*, 91 N.E.2d 387, 390 (Ill. 1950) (stating that the most favored branch of self-defense has always been defense of habitation; thus, a man is not required to retreat from his home); Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 207 (2006) (commenting that the sanctity of one’s home at common law was not rooted in the property rights of the owner, but in the protection that a home provides).

56. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 4 n.15 (quoting *Exodus* 22:2).

57. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d)(3), at 86 (1984).

58. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9; see also PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 31(d)(3), at 86 (1984) (suggesting that the home is the utmost place of safety and it would be illogical to require a man to leave and create an even greater risk to his own life); Daniel Michael, Recent Development, *Florida’s Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 207 (2006) (claiming that at common law, people who were forced out of their castles became vulnerable to the

reflects the sense of ownership and pride in one's dwelling.⁵⁹ In *People v. Tomlins*,⁶⁰ Justice Cardozo said, "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground. He is under no duty to take to the fields and the highways, a fugitive from his own home."⁶¹

C. The Law Today

1. The Castle Doctrine Codified

Today, this common law exception has been codified in many jurisdictions into what is popularly known as a "castle doctrine."⁶² In Texas, the Castle Doctrine accomplishes three things: first, it broadens the boundaries of one's castle so that in addition to dwellings, people no longer have a duty to retreat from businesses, cars, and essentially any places a person has the legal right to be located; second, it creates a presumption that the use of force or deadly force by the defendant was both reasonable and immediately necessary; and lastly, it provides civil immunity for a defendant who uses justifiable force.⁶³ In total, it mitigates any duty to retreat and grants people the right to stand their ground. Senator Jeff Wentworth, who championed the bill in Texas, reasoned that people should have a right to protect themselves from an attack in their home, business, vehicle, and any other place they have a legal right to be: "I believe Texans . . . should have the right to defend themselves from attack without fear of

dangers outside, which were just as harmful as the threat posed by any intruder).

59. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9 ("[N]o one should have to face the indignity of what Justice Cardozo called being 'a fugitive from his own home.'"); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 8.03(c)(2), at 205 (1995) (explaining that the home was considered "a natural sanctuary from external aggression" at common law).

60. *People v. Tomlins*, 107 N.E. 496 (N.Y. 1914).

61. *Id.* at 497; cf. *Beard v. United States*, 158 U.S. 550, 555 (1895) (deciding that a person's house is the one place that person need not retreat when trying to escape danger).

62. See Press Release, Senator Jeff Wentworth, "Castle Doctrine" Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm> (asserting that Texas joins fifteen other states, including Alabama, Florida, Georgia, Louisiana, Oklahoma, and Michigan by codifying the "castle exception" into the Castle Doctrine).

63. Allen Place, *Criminal Law*, 70 TEX. B.J. 676, 678 (2007).

being prosecuted criminally, and if unsuccessfully sued in civil court by the attacker, all costs at court will be paid by the attacker.”⁶⁴

2. The Push Behind Codification

The adoption of a castle doctrine in Texas and other states was in no small part due to the political backing of the NRA.⁶⁵ When Florida's bill passed in 2005, Wayne LaPierre, former Vice President of the NRA, was quoted as saying the measure was “the first step of a multi-state strategy”⁶⁶ and that the NRA would “start with red and move to blue” states.⁶⁷ So far, it has worked. As similar laws spread across the country, even the Brady Campaign, the nation's largest gun control group, has been unsuccessful in thwarting the NRA.⁶⁸ In response to the law adopted in Florida, the Brady Campaign fought back with billboards and travel brochures warning potential tourists of being shot on the beach and at Disneyworld.⁶⁹ This move, however,

64. Press Release, Senator Jeff Wentworth, “Castle Doctrine” Bill Gives Texans Right of Self-Defense (Jan. 31, 2007), <http://www.wentworth.senate.state.tx.us/pr07/p013107a.htm>; cf. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 340 (2006) (examining how Florida's law, along with other similar state laws, evolved because people were afraid of being criminally prosecuted for defending their home, lives, and property). Lerner writes that Florida's law was intended to protect innocent victims, rather than attackers, from the discretion of prosecutors, police, judges, and juries. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 340 (2006). In one particular instance, Jared L. Fowler of Florida was prosecuted for shooting a drunk man who came to his mobile home and threatened him after midnight. *Id.* at 341. Although the grand jury refused to indict Fowler, legislators took it as a sign that the law needed to be changed. *Id.* Florida legislators drafted the bill to provide a clear presumption in favor of the victim, rather than the criminal. *Id.* at 342.

65. See Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 199 (2006) (noting the involvement of a former NRA president in the conception of Florida's castle doctrine).

66. Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway for Self-Defense: NRA to Promote Idea in Other States*, WASH. POST, Apr. 26, 2005, at A1.

67. Michelle Cottle, *Shoot First, Regret Legislation Later: Why Florida's "Stand Your Ground" Law Is a Bad Idea and One That Could Spread*, TIME, May 9, 2005, at 80.

68. Rachel Graves, Op-Ed., *Gun Debate Muzzles the Middle Ground*, CHRISTIAN SCI. MONITOR, Sept. 5, 2007, at Opinion 9.

69. *Id.*; see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 343 (2006) (reporting that the Brady Campaign attacked the Florida tourism industry by passing out leaflets at airports and issuing press releases).

played right into the hands of the NRA—as controversy behind the bill grew, so did financial backing.⁷⁰ In addition to the organization’s increased cash flow, the NRA was accused of bullying politicians into voting for the measure.⁷¹ Tough talk by LaPierre seemed to echo that sentiment when he said: “Politicians would be putting their careers in jeopardy if they opposed the bill.”⁷²

Regardless of scare tactics by political lobbyists, however, public perception of violence certainly had a hand in changing the law. In recent years, there has been a growing fear of violence in America.⁷³ Day-to-day images of carjackings, home invasions, and muggings have prompted many people to arm themselves with a “fight back” mentality.⁷⁴ A 2005 Gallup Poll showed that 42% of American households own a gun, of which 67% possess it for the purpose of self-defense.⁷⁵ One author writes, “[P]rotection gun owners feel safer because they have a gun in their home [T]he net effect of home gun possession on gun owners is to reduce fear of crime.”⁷⁶ Rather than being a victim, people want

70. Rachel Graves, Op-Ed., *Gun Debate Muzzles the Middle Ground*, CHRISTIAN SCI. MONITOR, Sept. 5, 2007, at Opinion 9.

71. See Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway for Self-Defense: NRA to Promote Idea in Other States*, WASH. POST, Apr. 26, 2005, at A1 (“[P]rosecutor groups . . . stayed out of the fight and many lawmakers supported the bill because they fear the NRA.”).

72. Michelle Cottle, *Shoot First, Regret Legislation Later: Why Florida’s “Stand Your Ground” Law Is a Bad Idea and One That Could Spread*, TIME, May 9, 2005, at 80.

73. See generally BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* 23–49 (1999) (arguing that Americans are bombarded everyday by grossly exaggerated images of violence on the news); Bud Valley, *Media Influence on the American Perception of Reality*, ASSOCIATED CONTENT, Jan. 21, 2007, http://www.associatedcontent.com/article/122606/media_influence_on_the_american_perception.html (stressing that mass media sensationalizes reports of war, destruction, and world chaos, and inevitably impacts people’s attitude and demeanor regarding violence).

74. See Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1 (illustrating how some Floridians find the Castle Doctrine allows them to fight back against violence in their community). Helen Harmon, who lives in a neighborhood north of downtown Tampa, thinks the bill acts as a warning to potential attackers: “If there’s the potential that a victim can legally retaliate, they’ll think twice about carjacking someone or getting violent[.] It’s one added step of protection for the times we live in.” *Id.*

75. Joseph Carroll, Gallup, Inc., *Gun Ownership and Use in America* (Nov. 22, 2005), <http://www.gallup.com/poll/20098/Gun-Ownership-Use-America.aspx>.

76. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 29 (1991).

to take a proactive step in defending themselves. One study indicates that “each year in the U.S. there are about 2.2 to 2.5 million DGUs [defensive gun use incidents] of all types by civilians, with about 1.5 to 1.9 million of the incidents involving use of handguns.”⁷⁷ As more people own guns to protect themselves, and the laws of self-defense continue to expand, we must analyze the language of these laws, any potential problems with interpreting the laws, and the effects they could have on society.

III. ANALYSIS

A. *The Scope of the Castle Doctrine*

1. The Language of the 2007 Amendments

The Castle Doctrine in Texas can be found in sections 9.31 and 9.32 of the Texas Penal Code.⁷⁸ The new amendments to these sections expand where and how a person is justified in using force, including deadly force:

[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary . . . is presumed to be reasonable if the actor:

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

(a.) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment.⁷⁹

77. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). *But see* David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1430 (1997) (challenging the Kleck and Gertz study as being fatally flawed). Hemenway argues that the Kleck and Gertz study was subject to extremely exaggerated numbers because self-report surveys of rare events often lead to overestimates of the true incidence. *Id.* at 1431. The main problem, Hemenway states, is that the study fails to show how false positives were eliminated: “The conclusion seems inescapable: the Kleck and Gertz survey results do not provide reasonable estimates about the total amount of self-defense gun use in the United States.” *Id.* at 1444.

78. TEX. PENAL CODE ANN. §§ 9.31–.32 (Vernon Supp. 2007) (listing the scope of self-defense and the permissible use of deadly force).

79. *Id.* § 9.31(a)(1)(A); *see also id.* § 9.32 (stating that a person is justified in using

The broad language of this statute raises practical questions regarding the scope of employing such a privilege.⁸⁰ For example, does the privilege apply only when you are in your own car, or does it extend to you as a passenger in someone else's vehicle?⁸¹ Does the privilege apply only to you on the premises of your own business or to you as the patron of someone else's business?⁸² Does the privilege apply to the "curtilage of the house as well as the house itself?"⁸³ It could be argued that section 9.32(1)(c) would answer those questions affirmatively. In this catchall provision, the statute grants you the right to defend yourself so long as you have the legal right to be in that location:⁸⁴

A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at

deadly force so long as the person meets the requirements of § 9.31(a)(1)(A) and did not provoke the attack or was not engaged in criminal activity).

80. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 7–13 (questioning the scope of laws that allow people to defend themselves using deadly force). Green cites an example from a situation that happened in New York City, where until recently it was common for the homeless to walk up to cars and offer to clean windows for money. *Id.* at 12–13. In this particular example, Green hypothesizes about the homeless man who ignores the driver's request to stop panhandling. *Id.* at 13. Under a law such as the Castle Doctrine, it is questionable whether the driver would be entitled to shoot the homeless man despite the fact that he posed no real threat and the driver could have just as easily driven away without incident. *Id.*

81. *Id.* at 7.

82. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 7.

83. *Id.* at 7.

84. TEX. PENAL CODE ANN. § 9.32(1)(c) (Vernon Supp. 2007) (allowing a person to use deadly force so long as the person did not instigate the attack, did not commit any criminal activity, and was in a place the person had a legal right to be); cf. Jessica Slatten, *Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law—Fla. Stat. § 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 351–52 (2005) (claiming that this "catchall provision" of the bill has been the most controversial for legislators); Kelley Beaucar Vlahos, *Floridians' Self-Defense Rights Expanded*, FOX NEWS, May 3, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,155303,00.html (quoting Florida State Senator Steven Geller saying, "I hate this bill and I voted for it Here's the problem—the first two parts of the bill are mom and apple pie and American flags and Chevrolet, so you can't vote against it . . . the third part is terrible"). Critics, like Geller, are afraid that in abrogating a duty to retreat before using deadly force in a place where a person is lawfully entitled to be will result in everyday situations resulting in deadly confrontations that can be overcome by arguing self-defense. Kelley Beaucar Vlahos, *Floridians' Self-Defense Rights Expanded*, FOX NEWS, May 3, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,155303,00.html.

the time the deadly force is used is not required to retreat before using deadly force⁸⁵

Without defined boundaries, one's castle could potentially be anywhere, including a public street.⁸⁶

2. A Rebuttable Presumption

Perhaps a safeguard on the Castle Doctrine's broad scope remains embedded in the actor's reasonable belief that the use of force was "immediately necessary." Although the new language creates a presumption of reasonableness that the use of force was immediately necessary, like most legal presumptions it is rebuttable.⁸⁷ The Senate Committee Report on the Texas Castle Doctrine states that the jury should be instructed to "presume the victim's actions were reasonable" if there is evidence that someone unlawfully entered the victim's home, office, or vehicle, "unless the state can prove otherwise beyond a reasonable doubt."⁸⁸ Thus, a jury is free to overcome that presumption should the evidence and circumstances indicate that deadly force was not justified.⁸⁹

85. TEX. PENAL CODE ANN. § 9.32(c) (Vernon Supp. 2007).

86. See Larry Keller, *Self-Defense Law Troubles Prosecutor*, PALM BEACH POST, June 27, 2007, at B1 (examining how prosecutors and defense attorneys feel about the scope of the Castle Doctrine in Florida). Nellie King, a West Palm Beach criminal defense attorney said, "The days when they said, 'shoot someone and drag them inside' are over. Now they can just leave them in the yard." *Id.*

87. See Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 201 n.20 (2006) (citing FLA. S. REP. NO. 107-436, 6 pt. III, at 6 (2005) (Judiciary Rep.)) (stating that most legal presumptions are rebuttable).

88. Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm>.

89. See Murl A. Larkin, *Article III: Presumptions*, 30 HOUS. L. REV. 241, 276 (1993) (discussing the rule of presumptions in Texas criminal law). The law of presumptions holds that once a court determines a fact or group of facts, it is required to assume the existence of another fact until a party rebuts it. *Id.* at 241. In criminal proceedings there are various types of presumptions, including conclusive presumptions and rebuttable presumptions. *Id.* at 268-70. The author states, "A conclusive presumption . . . 'relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts.'" *Id.* at 269 (citing *Francis v. Franklin*, 471 U.S. 307, 317 (1985)). The author later states that "[a] mandatory rebuttable presumption requires the jury to find the elemental fact if convinced of basic facts triggering the presumption." *Id.* at 270.

If sufficient evidence exists of the basic facts that give rise to the presumption, the court must submit the issue of the existence of the presumed fact to the jury unless

This is the critical distinction between the Castle Doctrine in Texas and Florida law.⁹⁰ Although the language of the law in Texas and Florida is essentially the same, Florida's Senate Committee Report indicates that the presumption was intended to be conclusive.⁹¹ Thus, "a [Florida] court will not entertain arguments showing the non-existence of the presumed fact, even in the face of overwhelming evidence."⁹² Instead, a Florida court will instruct jurors that if they find the basic fact—that the victim was unlawfully in the actor's home or vehicle—then the actor is presumed to have "a reasonable fear of imminent death or bodily injury."⁹³

Although the Texas presumption is rebuttable, the text of the Texas law provides no guidance to prosecutors on how to successfully rebut the presumption.⁹⁴ Courts are implicitly

the judge believes that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact.

Murl A. Larkin, *Article III: Presumptions*, 30 HOUS. L. REV. 241, 276 (1993).

90. Compare Daniel Michael, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 201 (2006) (finding that the Florida Senate Committee intended for the Castle Doctrine presumption to be irrebuttable), with Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm> (providing that the presumption holds unless the prosecutor can bring forth other evidence beyond a reasonable doubt).

91. See Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 201 (2006) (explaining that the Florida Senate Committee intended for the bill's presumption to be irrebuttable).

92. *Id.*

93. See *id.* (using *Quaggin v. State* as an illustration of how the Florida presumption would work). In *Quaggin*, the defendant lived next door to two abandoned trailers that were surrounded by junk piles. *Quaggin v. State*, 752 So. 2d 19, 20 (Fla. Dist. Ct. App. 2000) (per curiam). Two children were scavenging the junk piles and decided they should look for the owner of the premises so they could ask for permission to keep whatever they found. *Id.* The children entered one of the trailers through an unlocked sliding glass door and startled the owner. *Id.* The owner asked what the children were doing there, but did not give them a chance to respond; he fired on them at close range, killing one. *Id.* at 21. The court instructed the jury that the necessity of using deadly force must be reasonable, such that a reasonably prudent person in the same circumstances would have believed that any danger posed could only be avoided through deadly force. *Id.* at 22. Under the 2005 Florida bill, there would be a conclusive presumption that automatically establishes that there was a reasonable belief in the necessity of using deadly force because the children were unlawfully in the defendant's dwelling. Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 202 (2006).

94. See TEX. PENAL CODE ANN. § 9.32 (Vernon Supp. 2007) (addressing the presumption of reasonableness that a person found it immediately necessary to use deadly force, but remaining silent on how to rebut that presumption); cf. Senate Jurisprudence Comm., Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007), <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/sb00378F.htm> (asserting that the presumption in Texas can be

charged with the responsibility of determining how the presumption may be rebutted.⁹⁵ Thus, it appears that this law could easily turn any situation into one where there was a reasonable belief that the use of force was necessary.⁹⁶ After all, once an intruder has already been shot dead, who is there to contradict the actor's story that he had a reasonable belief that the use of deadly force was immediately necessary?

B. *Potential Flaws in the Law*

1. What is a Reasonable Belief?

Take, for example, an incident that happened in San Antonio, Texas, in August 2007.⁹⁷ Early Saturday morning, Raymond Lemes awoke to screams that someone was inside his home.⁹⁸ He found Tracy Glass, a teenager, inside his living room.⁹⁹ "Believing Glass was an intruder," Lemes chased him to the street and "shot him in the neck, arm, and chest."¹⁰⁰ It appeared that Glass may have entered Lemes's house through an unlocked, sliding glass door, under the mistaken belief that the house was his sister's.¹⁰¹ Glass, a college student who had been staying with his sister, had taken a walk earlier that night.¹⁰² Autopsy reports indicate that Glass was intoxicated—apparently his blood alcohol level was

overcome by evidence beyond a reasonable doubt); David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas and Federal Courts*, 54 BAYLOR L. REV. 605, 609 (2002) ("Once a presumption is established it only shifts the burden of production, and places the burden on the opposite party to produce evidence to the contrary.").

95. See Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 359 (2006) (suggesting that the court must infer, where the law is silent, on how to rebut a presumption).

96. See Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings: Cases Involving the New Deadly-Force Law Are Handled in a Broad Range of Ways*, ORLANDO SENTINEL, June 11, 2006, at A1 (reporting that some police officers feel the new law is too vague on what is considered a reasonable belief). Rather than requiring proof that there was an unlawful attack, the victim need only show and articulate a reasonable fear of death or bodily harm to invoke the presumption. *Id.*

97. Brian Chasnoff, *Was It a Tragic Mistake or a Justified Reaction?*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 2007, at A1.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Brian Chasnoff, *Was It a Tragic Mistake or a Justified Reaction?*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 2007, at A1.

“twice the legal limit of intoxication for drivers.”¹⁰³ Lemes’s house was behind Glass’s sister’s house on the same cul-de-sac and painted the same color.¹⁰⁴ Police reports did not indicate if Glass had attempted to take anything from the house or if he was armed, but Lemes told police Glass had “lunged at him.”¹⁰⁵

There is no doubt that Glass was in the wrong house. Lemes, who was distraught by the idea of an intruder in his house, probably did not stop to ask Glass why he was there, and nor should he have to.¹⁰⁶ His first instinct, like most reasonable people, was simply to react.¹⁰⁷ However, there are some facts surrounding this incident that raise concerns, especially in light of the recent Texas Penal Code amendments.¹⁰⁸ First, it proved how easy it was for Lemes to say he had a reasonable belief that deadly force was immediately necessary, because who would be able to contradict Lemes’s story that Glass did in fact “lunge at him”? The only other eyewitness is dead. Furthermore, can a person’s reasonable belief that force was justified ever terminate? Here, Glass was shot in the street, after he had run out of Lemes’s house.¹⁰⁹ He was found lying with his hands above his head.¹¹⁰ Once Glass had left the house, did Lemes have the right to chase him to the curtilages of his home and shoot Glass in the street?

103. Brian Chasnoff, *Man Killed by Homeowner Was Drunk*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B1.

104. Brian Chasnoff, *Was It a Tragic Mistake or a Justified Reaction?*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 2007, at A1.

105. *Id.*

106. See Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 29 (proposing that homeowners should have a wider degree of discretion in what is considered reasonable when they are frightened by an intrusion).

107. See *id.* (challenging that a homeowner cannot reasonably be expected to interview an intruder about the intruder’s intentions before using deadly force: “To be sure, having one’s home invaded by an unknown intruder, particularly at night, is likely to be a terrifying experience for most homeowners.”).

108. See Brian Chasnoff, *Man Killed by Homeowner Was Drunk*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B1 (writing that the circumstances surrounding the shooting seemed to “raise more questions than answers”). According to the news article, police reports indicate that Glass was found shot dead in the street with his arms over his head, indicating he might have surrendered. *Id.*

109. Brian Chasnoff, *Was It a Tragic Mistake or a Justified Reaction?*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 2007, at A1.

110. Brian Chasnoff, *Man Killed by Homeowner Was Drunk*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B1.

2. Defining an Immediate Threat

Lemes may have been justified in shooting because Glass was already inside his house. But what about situations where there is only a threat that someone is attempting to enter? The Castle Doctrine justifies using deadly force in instances where someone is *forcibly* attempting to enter.¹¹¹ On its face, the statute seems like a reasonable law. If someone is pointing a gun at you and trying to open your car door, it is logical that you should have the right to protect yourself before the assailant enters. However, tragic mistakes are bound to occur if people choose preemptive deadly force before their lives are in immediate danger.¹¹²

For example, the Dallas music community was grief-stricken last year when a musician was mistaken for a burglar and shot to death.¹¹³ Carter Albrecht, a keyboard and guitar player in the band New Bohemians, had too much to drink on the night he was killed.¹¹⁴ After being locked out of his house by his girlfriend, Albrecht was in a drunken rage.¹¹⁵ He wandered to the back of a neighbor's home and began beating on the door.¹¹⁶ The neighbor yelled for Albrecht to stop, but to no avail.¹¹⁷ The homeowner shot once at the top of the door in an attempt to scare Albrecht away, but instead struck him fatally in the head.¹¹⁸

Under the Castle Doctrine, the homeowner was well within his right to shoot at Albrecht who was attempting to forcibly enter the home.¹¹⁹ The question, however, is whether this should be a right.

111. TEX. PENAL CODE ANN. § 9.32 (b)(1)(a) (Vernon Supp. 2007).

112. See Gerald S. Reamey, Op-Ed., *Law Encourages 'Shoot First, Ask Questions Later'*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2007, at H4 (stressing that people should be required to calculate whether deadly force is immediately necessary in order to preserve innocent lives and criminals' lives).

113. Tanya Eiserer & Mike Daniel, *Dallas Musician Carter Albrecht Killed at Neighbor's Home: Gifted Member of New Bohemians Was Mistaken for Burglar*, DALLAS MORNING NEWS, Sept. 4, 2007, at B1.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Tanya Eiserer & Mike Daniel, *Dallas Musician Carter Albrecht Killed at Neighbor's Home: Gifted Member of New Bohemians Was Mistaken for Burglar*, DALLAS MORNING NEWS, Sept. 4, 2007, at B1.

119. See TEX. PENAL CODE ANN. § 9.32 (b)(1)(a) (Vernon Supp. 2007) (stating that a person may use deadly force when someone is attempting to forcibly enter the person's dwelling, vehicle, or place of business).

At the moment Albrecht was kicking at the homeowner's door, there was no immediate threat to the homeowner's life.¹²⁰ Certainly the homeowner was afraid and had a desire to protect his home, but does that fear grant him the right to shoot blindly at someone through a locked door?¹²¹ The more logical approach might have been to call 911 and wait for the police to arrest Albrecht. And should Albrecht have managed to break down the door before the police arrived, the homeowner, now fearing imminent grave danger, likely would have been justified in shooting. This is the approach police would endorse, but some people are wary of its effectiveness.¹²²

C. People Protecting Themselves

1. Trading the Police for a Gun

The state encourages people to rely on the police when faced with a criminal attack.¹²³ It argues that officials are more "competent to use firearms to fight crime" and that civilians who possess firearms only increase the danger to society.¹²⁴ But many

120. Cf. Mark Totten, *Using Force First: Moral Tradition and the Case for Revision*, 43 STAN. J. INT'L L. 95, 125 (2007) (examining the rule that deadly force may be used, so long as there is an imminent threat to one's life). An imminent attack is defined as "so near in space and time that the potential victim has no alternative but to attack first, if she is to avoid taking the first blow." *Id.*

121. See generally *Valentine v. State*, 587 S.W.2d 399, 400–02 (Tex. Crim. App. 1979) (stating that a jury need only be instructed to decide if appellant reasonably believed deadly force was necessary as viewed from the defendant's standpoint). The facts in *Valentine* are somewhat similar to those in the Albrecht situation. See *id.* at 400 (describing a case in which a man was fatally shot as he beat on the front door while shouting at his estranged wife). In *Valentine*, the defendant testified that her estranged husband began beating on her door early one morning. *Id.* He attempted to enter by prying the door open from the outside. *Id.* Valentine fired two shots into the door, one of which struck the man "in the back of the head and killed him." *Id.* However, despite the evidence and a correct jury instruction regarding self-defense, the jury found Valentine guilty of voluntary manslaughter. *Valentine*, 587 S.W.2d at 400–03.

122. Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 266 (2006).

123. *Id.*

124. *Id.*; see also Steven Riczo, *Guns, America, and the 21st Century*, USA TODAY MAG., Mar. 1, 2001, at 16, reprinted in *OPPOSING VIEWPOINTS: CRIME AND CRIMINALS* 104, 104–07 (James D. Torr ed., 2004) (arguing against gun ownership as a way to deter criminals because the inexperienced homeowner who pulls a gun on a known felon only increases the danger to the homeowner). The chances are great that the felon has more firearm experience than the law-abiding citizen who draws a gun for the first time in

people lack confidence in the criminal justice system and feel they must rely on their own resources, rather than depending on law enforcement.¹²⁵ One author says, “There is a powerful reason why citizens may be more inclined to take deterrence and retribution into their own hands: the sense that the state is failing to do it.”¹²⁶ Some lack confidence because they believe police response times are too slow.¹²⁷ Others believe that even if a criminal is caught, the criminal will simply be released to commit the same crime at a later date.¹²⁸ According to a 2007 Gallup poll,

response to a life-threatening situation. *Id.* at 107. “Without extensive” training in handgun use comparable to law enforcement or military personnel, the homeowner’s odds of successfully shooting to kill are slim. *Id.*

125. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 32 (1991) (asserting that many people own guns for self-defense because the criminal justice system cannot protect them); see also Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 535–36 (2007) (discussing that in Miami, a city infamous for its violence, people find police protection to be of little use; thus, Florida’s law may be necessary to protect Floridians against the dangers that surround their urban castles); Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 362 (2006) (finding that many people take matters into their own hands because they feel the government cannot protect them). According to Lerner, “the justice system is not capable of punishing and deterring criminals” but instead harasses law-abiding citizens. *Id.*; see also Alfredo Triff, *Miami, Crime, and Urban Design: This Is a Dangerous Place, and Dangerously Divided As Well*, MIAMI NEWS TIMES, May 20, 2004, at Culture (claiming that in Florida’s inner cities, police response times are often slow to non-existent).

126. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 362 (2006).

127. See CLICK2HOUSTON, *Police Shortage Could Affect Response Times*, May 20, 2005, <http://www.click2houston.com/news/4512431/detail.html> (reporting that citizens are concerned about the longer response times to police calls in Houston). According to the report, response times vary depending on the city, the police department, and priority of the call. *Id.* The typical response time for life-threatening 911 calls in Houston is between five and eleven minutes, which some argue is plenty of time for a criminal to commit harm. *Id.* Mark Brown lives on the backside of Lake Houston where the police average about 10.3 minutes to respond to life-threatening calls. *Id.* Brown said it scares him: “A whole lot can go wrong in 10 minutes.” *Id.*; see also Official Website of the City of San Antonio Police, POLICE—Basic Personnel Information, <http://www.sanantonio.gov/sapd/infopersonnel.asp#AGE> (last visited Feb. 3, 2008) (averaging statistics on San Antonio police times). According to data collected in January 2007, San Antonio has a total of 2,085 sworn officers with 1,449 being patrol officers. Official Website of the City of San Antonio Police, POLICE—Basic Statistical Information, <http://www.sanantonio.gov/sapd/infobasic.asp#response> (last visited Feb. 3, 2008). In 2006, response time for crimes that were in-progress was about 5.34 minutes. *Id.* For all other calls the response time was about 17.30 minutes. *Id.*

128. See Gallup, Inc., *Confidence in Institutions* (June 11–14, 2007), <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx> (highlighting the statistics indicating people lack confidence in the criminal justice system).

only 19% of Americans trusted that the criminal justice system was effective.¹²⁹ By contrast, more than half of Americans expressed confidence in the police.¹³⁰

The perception that law enforcement and the criminal justice system are ineffective can be directly linked to gun ownership.¹³¹ One study found that a majority of people own guns because they believe they must rely on themselves—rather than the police—for adequate protection.¹³² But legalizing preemptive shootings (i.e.,

129. See *id.* (reporting that 19% of those polled had “quite a lot” of confidence in the criminal justice system); see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 362 (2006) (indicating that many people throughout the United States think the criminal justice system is incapable of punishing and deterring criminals and instead tends to harass law-abiding citizens).

130. See Gallup, Inc., Confidence in Institutions (June 11–14, 2007), <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx> (reporting that 54% of those polled had a “great deal” or “quite a lot” of confidence in the police); see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 333–34 (2006) (suggesting that proportionality standards in self-defense have changed due to global distrust of the criminal defense system). Lerner argues that if the state is incapable of protecting law-abiding citizens from crime, then citizens should be allowed to defend themselves. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 333 (2006); see also Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL’Y 265, 277 (2006) (citing *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (noting the government’s immunity from civil claims as one reason the public may lack confidence in the criminal justice system)). In *Warren*, the court held that when the government or municipality offers police services, it assumes a general duty to the public at large but not to any particular individual. Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL’Y 265, 279 (2006) (citing *Warren*, 444 A.2d at 3–4). Thus, when the police failed to respond to a crime in progress, leaving three women to be raped and sodomized by burglars, the police were acquitted of any negligence charges. *Id.*

131. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 32 (1991) (referring to a study which found that gun ownership was higher among persons with less confidence in the ability of the police to provide adequate protection); see also MARC RIEDEL & WAYNE WELSH, CRIMINAL VIOLENCE: PATTERNS, CAUSES, AND PREVENTION 302 (2002) (discussing that self-defense is often reported as the primary motive for owning a gun); Symposium, *Taking a Stand: Reducing Gun Violence in Our Communities—A Report from the International Association of Chiefs of Police 2007*, <http://www.theiacp.org/documents/pdfs/Publications/ACF1875.pdf> (last visited Feb. 21, 2008) (recognizing that in 2007 the Small Arms Survey reported the United States as “the most highly armed country in the world . . . [with] 90 guns for every 100 citizens”). In the rest of the world, the rate is ten firearms for every 100 citizens. Symposium, *Taking a Stand: Reducing Gun Violence in Our Communities—A Report from the International Association of Chiefs of Police 2007*, <http://www.theiacp.org/documents/pdfs/Publications/ACF1875.pdf> (last visited Feb. 21, 2008).

132. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 32 (1991)

killing before there is an immediate threat to one's life) could potentially lead to unnecessary, tragic deaths.¹³³ In some ways it is a no-win situation: the greater the restraint the law imposes on a person not to use preemptive deadly force, the greater the risk a person will not survive an unlawful attack.¹³⁴ On the other hand, with fewer restraints on shooting in self-defense, there is an increased risk that a person will shoot in error.¹³⁵

2. The Effects of Protecting a Trigger Finger

Professor Gerald S. Reamey of San Antonio explains how the Castle Doctrine could lead to innocent deaths.¹³⁶ He wrote about an incident that happened to him some years ago while employed by a Texas police department as a legal advisor.¹³⁷ Reamey had asked the police to patrol his home for a week while he was on vacation.¹³⁸ Due to a scheduling mistake, however, the police

(claiming that those who lack confidence in the police often own a gun in order to protect themselves from crime); *see also* Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 211–12 (2006) (reasoning that when a person is met by an aggressor who has the ability to attack before the state can intervene, the citizen should have the right to resist by any means possible).

133. *See* Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 33 (establishing various hypotheticals in response to laws that grant a privilege to people who shoot when protecting their home or vehicle). Green hypothesizes about a teenage boy who is shot when he wanders into his neighbor's garage, without first obtaining permission, merely to borrow a basketball. *Id.*; *see also* Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 480–81 (2006) (discussing how people who shoot in response to fear may shoot in error). Sangero gives an example of a wife whose husband is gone for the evening. Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 480–81 (2006). At midnight she is startled by a knock on the door and later the sound of someone opening the shutter windows. *Id.* Afraid that someone is breaking in, she fires three shots through the window, killing her drunken husband who had lost his keys. *Id.*; *see also* Gerald S. Reamey, Op-Ed., *Law Encourages 'Shoot First, Ask Questions Later'*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2007, at H4 (arguing that tragic mistakes will be made when people shoot first and ask questions later).

134. Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 270 (2006).

135. *Id.*

136. Gerald S. Reamey, Op-Ed., *Law Encourages 'Shoot First, Ask Questions Later'*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2007, at H4; *cf.* Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1 (reporting that local Florida police officers fear that people who are eager to exercise their rights under the new law might mistakenly shoot undercover police officers as intruders).

137. Gerald S. Reamey, Op-Ed., *Law Encourages 'Shoot First, Ask Questions Later'*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2007, at H4.

138. *Id.*

began the patrol on a night when Reamey and his wife were still at home.¹³⁹ Reamey recounts realizing that someone was lurking right outside his front door, and unaware that it was a police officer, he aimed a pistol at the door as he watched the knob slowly begin to turn.¹⁴⁰ Fortunately, he waited for his wife to call 911 and discovered that it was a police officer at their door and not a burglar.¹⁴¹ By taking a moment to stop and assess the situation, Reamey saved the life of an innocent peace officer. If he had taken the view of “shoot first, ask questions later,” an officer merely doing his job might have suffered the same fate as Carter Albrecht.¹⁴²

Some argue, however, that a “stop and assess” attitude is unreasonable in the heat of the moment;¹⁴³ they maintain that when one is attacked, there is often no time to calculate the situation and determine the best method of preserving one’s life.¹⁴⁴ Instead, people must make split-second decisions and should not be forced to examine “fine-grained distinctions” about whether the circumstances warrant deadly force or not.¹⁴⁵ Thus, the law is intended to protect the innocent victim who fears an attack by creating a presumption that the victim had a reasonable

139. *Id.*

140. *Id.*

141. *Id.*

142. See Tanya Eiserer & Mike Daniel, *Dallas Musician Carter Albrecht Killed at Neighbor’s Home: Gifted Member of New Bohemians Was Mistaken for Burglar*, DALLAS MORNING NEWS, Sept. 4, 2007, at B1 (outlining the circumstances of Carter Albrecht’s death).

143. See Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL’Y 265, 273 (2006) (noting that if a defender must stop and reason about a threatened attack, it would burden her with “one thought too many”).

144. See Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 533 (2007) (stating that although the new Castle Doctrine in Florida creates bright line rules and presumptions, it allows people to act without having to stop and analyze the circumstances); see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 359 (2006) (determining that in certain circumstances it may be difficult to assess the situation and react with a proportionate use of force). For example, if an intruder enters one’s house at night, it may be impossible to tell if the intruder is armed. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 359 (2006).

145. Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 533 (2007).

belief of imminent danger.¹⁴⁶ However, perhaps more emphasis *should* be placed on the facts in every circumstance to determine whether or not there was an imminent attack, whether the victim had time to reasonably calculate the situation, and whether the victim placed his life in the dangerous situation.

D. *The Law of Self-Justice*

1. Seeking Out the Criminal

As people rely less on calling 911, the more likely it is for homeowners to engage in self-help rather than rely on trained law enforcement. Imagine that instead of fearing an intruder who forcibly enters your home, you simply hear a noise outside and decide to investigate on your own. If you used deadly force against another, should you be acquitted because you were attempting to protect your property? Or should you be prosecuted for placing yourself in a potentially dangerous situation where deadly force might otherwise not have been necessary? Consider what happened to Ethel Sanders of Alabama when she thought she heard someone in her laundry room located outside her home.¹⁴⁷ Rather than calling 911 for a trained officer to investigate the noise, Sanders, who is disabled, grabbed her gun and walked outside, ready to take matters into her own hands.¹⁴⁸ When she opened the door to her laundry room, she found twenty-five year old James Penn in his underwear washing a load of dirty clothes.¹⁴⁹ She shot him in the stomach.¹⁵⁰

146. *Id.*; see also Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 270 (2006) (claiming that it may be hard-wired into human psychology to engage in a preemptive attack when one's life is endangered). Stell examines a statement by the philosopher Cicero in 52 BC[E]: "There exists a law, not written down anywhere, but inborn in our hearts; a law which lays it down that, if our lives are endangered by plots or violence, any and every method of protecting ourselves is morally right." Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 270 (2006) (citation omitted).

147. Sheldra Brigham, *Granny Shoots Laundry Intruder*, CNN, Oct. 16, 2007, <http://www.cnn.com/video/#/video/us/2007/10/16/brigham.al.granny.shoots.intruder.wala> (last visited Feb. 11, 2008).

148. *Id.*

149. *Id.*

150. *Id.*

Was Ethel Sanders within her right to shoot Penn? Alabama, like Texas, has a castle doctrine which may prevent Sanders from being prosecuted for her actions.¹⁵¹ But perhaps Sanders should be prosecuted. Penn was not attempting to forcibly enter the dwelling area where Sanders lived.¹⁵² He was not attempting to burglarize her home or steal something from her property.¹⁵³ He was trespassing, and he was shot for it.¹⁵⁴ Rather than sparking outrage that a twenty-five year old was shot for trespassing, the news broadcast shows a neighbor commending Sanders, stating, “She’s bedridden, but there ain’t nothing wrong with her trigger finger and that’s what it’s gonna take to stop this mess . . . [and] to stop these home invasions.”¹⁵⁵

Similar to the Sanders’s shooting is an event that happened in Texas. On November 19, 2007, Joe Horn of Pasadena, Texas, shot two men who were burglarizing his neighbor’s home.¹⁵⁶ Horn, sixty-one, called the police to report noises of broken glass coming from next door.¹⁵⁷ The 911 operator urged Horn to remain indoors and not confront the men with his gun.¹⁵⁸ “You’re gonna

151. See ALA. CODE § 13A-3-23(b) (2007) (“A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.”).

152. Sheldra Brigham, *Granny Shoots Laundry Intruder*, CNN, Oct. 16, 2007, <http://www.cnn.com/video/#/video/us/2007/10/16/brigham.al.granny.shoots.intruder.wala> (last visited Feb. 11, 2008).

153. *Id.*

154. *Id.*; cf. *Beard v. United States*, 158 U.S. 550, 555 (1895) (deciding that a man cannot take life merely because he is afraid or to prevent a trespass).

155. Sheldra Brigham, *Granny Shoots Laundry Intruder*, CNN, Oct. 16, 2007, <http://www.cnn.com/video/#/video/us/2007/10/16/brigham.al.granny.shoots.intruder.wala> (last visited Feb. 11, 2008).

156. Liz Austin Peterson, *Concerns Raised on Man’s Intent in Burglary Deaths*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B3; see also Cindy Horswell & Robert Stanton, *New Details in Pasadena Shootings*, HOUS. CHRON., Dec. 8, 2007, at A1 (highlighting the facts of a local shooting where a homeowner killed two men who were burglarizing his neighbor’s house). According to the police report, neither suspect was armed. Cindy Horswell & Robert Stanton, *New Details in Pasadena Shootings*, HOUS. CHRON., Dec. 8, 2007, at A1. It appears they were burglarizing an unoccupied home as they were carrying a bag filled with more than \$2,000 in cash and jewelry. *Id.*

157. Liz Austin Peterson, *Concerns Raised on Man’s Intent in Burglary Deaths*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B3.

158. *Id.*; see also Cindy Horswell & Ruth Rendon, *The Man Behind the Gun*, HOUS. CHRON., Dec. 16, 2007, at A1 (reporting that Joe Horn felt he had no choice but to shoot when his life was threatened by the burglars); Cindy Horswell & Robert Stanton, *New*

get yourself shot if you go outside that house with a gun,” the operator said on tape.¹⁵⁹ Horn replied, “You wanna make a bet? I’m gonna kill ‘em.”¹⁶⁰ Horn then went outside and shot the two men when they came onto his property.¹⁶¹ One man was shot in the neck and torso.¹⁶² The other man was shot in the back, but continued running until he collapsed in the street.¹⁶³ Horn argues that one or both of them “made lunging movements,” causing him to fire.¹⁶⁴

Critics feel Horn’s actions went beyond self-defense. Quanell X, a Houston Black Panther activist who is pushing for Horn’s prosecution said: “We believe that Mr. Horn became judge, jury, and executioner at the same time.”¹⁶⁵ According to the news article, however, the case will be difficult to prosecute, not just because the law requires a reasonable belief that the use of deadly force was necessary, but because people in Texas “have little sympathy for criminals and an almost religious belief in the right of self-defense.”¹⁶⁶ Thus, even if the case goes to trial, it is likely the jury will be more sympathetic toward Horn rather than the criminals he shot. Horn says he regrets the event and that it will weigh heavily on him forever, but he takes comfort in the letters, e-mails, and radio broadcasts of people who support his actions.¹⁶⁷

Details in Pasadena Shootings, HOUS. CHRON., Dec. 8, 2007, at A1 (indicating that a police officer witnessed the shootings as his squad car pulled up to the driveway just at the time Horn fired his shotgun).

159. Liz Austin Peterson, *Concerns Raised on Man’s Intent in Burglary Deaths*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B 3.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Liz Austin Peterson, *Concerns Raised on Man’s Intent in Burglary Deaths*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B 3.

165. *Id.*; see also Ruth Rendon, *Cheers, Jeers for Man in Slayings of Burglary Suspects*, HOUS. CHRON., Nov. 20, 2007, at B1 (profiling local reactions to Houston resident Joe Horn who shot two men burglarizing Horn’s neighbor’s home). According to the news report, local activists are concerned that the shooting was racially motivated since Horn is white and the two purported men he shot were black. Ruth Rendon, *Cheers, Jeers for Man in Slayings of Burglary Suspects*, HOUS. CHRON., Nov. 20, 2007, at B1. However, Horn’s neighbor’s say the only prejudice Horn has is against thieves. *Id.*

166. Liz Austin Peterson, *Concerns Raised on Man’s Intent in Burglary Deaths*, SAN ANTONIO EXPRESS-NEWS, Nov. 27, 2007, at B 3.

167. *Id.*; see also Ruth Rendon, *Cheers, Jeers for Man in Slayings of Burglary Suspects*, HOUS. CHRON., Nov. 20, 2007, at B1 (summarizing local reactions to the two self-defense shootings by Joe Horn). Robert Hammons, who lives in a nearby subdivision, stopped by Horn’s house hoping to shake his hand: “This was a man protecting his

2. The Theory of Deterring Violence

Horn's supporters believe guns and laws such as the Castle Doctrine actually curb violence.¹⁶⁸ Popular sentiment seems to be that shooting in self-defense goes beyond simply protecting one's life, home, and property.¹⁶⁹ Instead, people find it to be a way of

neighborhood. I would hope my neighbor would protect my house." Ruth Rendon, *Cheers, Jeers for Man in Slayings of Burglary Suspects*, HOUS. CHRON., Nov. 20, 2007, at B1. Another neighbor of Horn's said, "I'd like to give him a medal. I hope they don't press any charges at all." *Id.*

168. See Daniel Earnest, *Move, and You're Dead*, DAILY TEXAN, Nov. 28, 2007, at A1 (contending that Horn's actions will deter people from breaking into homes). Earnest believes people will think twice about breaking into homes if they know that a neighbor or someone behind the door is waiting with a shotgun. *Id.* He chastises those who believe Horn should be prosecuted because he was defending his *neighbor's* property rather than defending his *own* property. *Id.* Instead, Earnest believes Horn is a great man who was committed to punishing those who would rob his neighbors. *Id.* He believes those who say they would not want to live next to Horn are in essence lying. *Id.*; cf. Don B. Kates et al., *Bad Medicine: Doctors and Guns*, in GUNS: WHO SHOULD HAVE THEM? 233, 243–45 (David B. Kopel ed., 1995) (discussing how criminological data differs between supporters who believe guns deter violence and critics who argue guns worsen violence); John R. Lott Jr., *Half-Cocked: Why Most of What You See in the Media About Guns Is Wrong*, AM. ENTERPRISE, July/Aug. 2003, at 28, reprinted in OPPOSING VIEWPOINTS: CRIME AND CRIMINALS 94, 96 (James D. Torr ed., 2004) (arguing that guns deter crime, but examples of everyday defensive gun use are underreported in the media). Lott conducted a survey in which 95% of the time, merely brandishing a gun was sufficient to stop a crime. John R. Lott Jr., *Half-Cocked: Why Most of What You See in the Media About Guns Is Wrong*, AM. ENTERPRISE, July/Aug. 2003, at 28, reprinted in OPPOSING VIEWPOINTS: CRIME AND CRIMINALS 94, 96 (James D. Torr ed., 2004). However, the media would rather report someone who was shot by a gun rather than report someone who ran away and lived. *Id.*; see also David Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 346 (2001) (examining how widespread gun ownership in America reduces the rate of home invasion burglaries). According to Kopel, because it is difficult to determine which homes possess guns, most burglars choose to avoid entering an occupied home out of fear of being shot. David Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 346 (2001). Outside of home invasions, one study found that in over 90% of incidents involving citizen defensive gun use, "the mere display of the gun suffices to end the confrontation." *Id.* at 351; see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 344 (2006) (explaining that countries with strict gun control often exhibit high crime rates). England, for example, has one of the strictest gun control regimes. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 344 (2006). It is also renowned as having one of the highest crime rates in the industrialized world, along with exceptionally high burglary rates. *Id.*; see also Kevin Heilliker, *Pistol-Whipped: As Gun Crimes Rise, Britain Is Considering Cutting Legal Arsenal*, WALL ST. J., Apr. 19, 1994, at A1 (declaring that Britain's rising burglary rates prompted one reporter to call the country a "nation of thieves").

169. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 361 (2006).

detering theft and violent crimes.¹⁷⁰ For example, in cases such as Horn's where criminals are shot in the back, there can be "no pretending that there was an immediate continuing" threat.¹⁷¹ Rather, it can only be viewed as a way to deter future criminals from committing the same crime.¹⁷² In some cases, the mere threat of someone being armed, or even the display of a gun, is sufficient enough to deter an attack.¹⁷³ Some people find that guns, rather than law enforcement, are the great equalizers and protectors of our society:

The gun is the only personal weapon that puts a 100-pound woman on equal footing with a 220-pound mugger, a 75-year old retiree on equal footing with a 19-year old gang banger, and a single gay guy on equal footing with a carload of drunk guys with baseball bats. The gun removes the disparity in physical strength, size, or numbers between a potential attacker and a defender.¹⁷⁴

One author writes, "An individual who purchases a gun for self-defense and then uses it successfully to ward off a criminal is displaying the wisdom of his precautions and his capability in protecting himself, his loved ones, and his property. His action is to be commended."¹⁷⁵

170. *Id.*

171. *Id.*

172. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 133 (1991) (illustrating how felons were deterred by victims with guns). Of the felons who reported committing a violent crime or burglary, 42% said they encountered a victim who was armed and 38% admitted to being either scared off by the shot, wounded, or captured. *Id.* Additionally, 43% reported that they decided not to commit a crime because they knew a victim was carrying a gun. *Id.* More than half of the felons also agreed that "a store owner who is known to keep a gun" behind the counter is less likely to be robbed. *Id.*

173. See Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 276 (2006) (claiming that guns are a useful tool for preemptive intimidation because people who are armed have the power to inflict death or serious injury).

174. E-mail from Major L. Caudill, U.S. Marine Corps, Retired, to Sherry Barnash (Oct. 24, 2007, 12:16:45 PDT) (on file with *St. Mary's Law Journal*); see also GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 143 (1991) (highlighting the intimidating effect that guns have on both deterring and increasing criminal violence). Kleck states that because guns are frightening to both predator and prey, they effectively empower those who would be the victim and those who would be the aggressor. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 143 (1991).

175. David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1431 (1997); see also Lance K. Stell, *Self-Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 275 (2006)

In contrast, critics assert that guns merely increase the lethal nature of crimes.¹⁷⁶ In a twist on the bumper sticker slogan “Guns Don’t Kill People, People Kill People,” one author observes that “people kill people” because guns are readily available.¹⁷⁷ “According to recent estimates, there are about 200 million guns, including 70 million handguns” in the United States.¹⁷⁸ Unlike knives, sticks, and other deadly weapons, guns are the instrument of death in almost seven out of ten homicides in the United States, where “guns are quite literally everywhere, and their contribution to the country’s extraordinary rate of killing is clear.”¹⁷⁹ Guns make it all too easy to kill.¹⁸⁰ Rather than stopping to calculate the danger, a person can simply pull the trigger and end the episode.¹⁸¹

(concluding that not only do handguns create a disparity of force, but they also equalize it: “A handgun is the only practical means to enable smaller, weaker defenders to nullify the advantage that larger, stronger, or more numerous assaulters would otherwise enjoy in close encounters of the lethal kind.”).

176. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 429 (1991) (recognizing that a central rationale for gun control is that guns are dangerous and their use elevates the chance that a victim will die). Kleck states that gun control activists argue that disarming violent people could reduce death rates. *Id.*; see also Steven Riczo, *Guns, America, and the 21st Century*, USA TODAY MAG., Mar. 1, 2001, at 16, reprinted in *OPPOSING VIEWPOINTS: CRIME AND CRIMINALS* 104, 107–10 (James D. Torr ed., 2004) (asserting that the proliferation of gun ownership in America contributes to, rather than deters, crime).

177. See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 30–33 (2000) (stating that the more readily available guns are, the more likely people will use them); see also Steven Riczo, *Guns, America, and the 21st Century*, USA TODAY MAG., Mar. 1, 2001, at 16, reprinted in *OPPOSING VIEWPOINTS: CRIME AND CRIMINALS* 104, 106–10 (James D. Torr ed., 2004) (arguing the same). Riczo finds that Americans use guns for murder at a rate that is nineteen times higher than any other nation. Steven Riczo, *Guns, America, and the 21st Century*, USA TODAY MAG., Mar. 1, 2001, at 16, reprinted in *OPPOSING VIEWPOINTS: CRIME AND CRIMINALS* 104, 105 (James D. Torr ed., 2004). Moreover, Americans who keep a gun in their homes increase the risk of injury to themselves and family members. *Id.* at 106.

178. KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 32 (2000).

179. *Id.* at 30, 32.

180. Steven Riczo, *Guns, America, and the 21st Century*, USA TODAY MAG., Mar. 1, 2001, at 16, reprinted in *OPPOSING VIEWPOINTS: CRIME AND CRIMINALS* 104, 111 (James D. Torr ed., 2004).

181. *Id.*

3. Eliminating Proportionality in Self-Defense

In essence, gun ownership and the Castle Doctrine seem to eliminate all sense of proportionality and degree.¹⁸² It is a well-established principle of criminal law that one must use a proportionate degree of force when acting in self-defense.¹⁸³ Thus, if someone punches you, a proportionate response to that force would be to punch back.¹⁸⁴ How do we reconcile the proportionality principle with defensive deadly force? One could rationalize it as preservation of personal autonomy or the “absolute theory of self-defense.”¹⁸⁵ Under this theory, any kind

182. See Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 504 (2007) (conceding that Florida's law is built on bright-line rules and presumptions that appear to abrogate traditional notions of necessity and proportionality); see also Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 332–33 (2006) (discussing the difficulty in making a defender “balance his own interests against those of an aggressor” when deciding what is a reasonable use of force); cf. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9 (noting that when it comes to defending one's premises, “there need not be any actual or perceived threat of death or serious bodily injury”; thus, it seems that any “harm inflicted may be disproportionate to the harm threatened”).

183. See *Ross v. State*, 10 Tex. Ct. App. 455, 464 (1881) (holding that a person who is unlawfully assailed may stand his ground, taking care not to use more force than is necessary for his protection); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 19–20 (2d ed. 1995) (asserting that under the traditional rule of self-defense, the actor should not be permitted to use more force than is necessary for the defensive purpose; thus, it must be proportional to the perceived threat); SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE 227 (1994) (noting that there must be proportionality when responding in self-defense); Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 478–79 (2006) (stating that there are two conditions for using self-defense: first, there must be a “necessity to exert defensive force,” and second, there must be “proportionality in the use of force”).

184. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 8 (explaining that a disproportionate response to a self-defense claim would be shooting an elderly aggressor who attempted to stab the defendant). The defendant may not kill if he knows he could avoid death by merely disarming the victim. *Id.*

185. See *id.* at 23–24 (suggesting that one possible “theory of justified homicide is the ‘right to preserve personal autonomy’”). This theory focuses on the wrongfulness of forcing law-abiding citizens to succumb to the threats of criminals. *Id.*; see also George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1378 (1979) (considering two strategies regarding the right to defensive force: the absolute theory of self-defense and the relative theory of self-defense). The absolute theory of self-defense is similar to preservation of personal autonomy in that killing is permissible to prevent invasion of a minor interest.

of aggression—even aggression that does not threaten one’s life—is a violation of personal autonomy, and provides a justification that one may use whatever means one can to protect that autonomy, including deadly force.¹⁸⁶ At the most extreme application of the absolute theory of self-defense, “[k]illing an aggressor is permissible if it is the only means available to prevent the invasion of even a minor interest. Shooting an apple thief is rightful and proper if there is no other way to stop her.”¹⁸⁷

That was the belief of State Representative Borris Miles when he shot a man who was attempting to steal copper pipes from the palatial mansion Miles was building in Houston.¹⁸⁸ When Miles yelled at the man to stop, the thief threw a small pocket knife in Miles’s direction.¹⁸⁹ Miles then pulled a pistol and shot the man in his lower leg.¹⁹⁰ Miles called the incident “regrettable” and remarked, “Had I had the option of calling the authorities prior to the shooting, I would have done so, but with my life in clear and present danger and being immediately threatened by a knife-throwing burglar, I had no choice but to fire for my own protection.”¹⁹¹ Would a judge and jury find that Miles’s life was in imminent danger from a pocket knife? Or would he have been justified in the shooting because he was protecting his autonomy or property? Ironically, Miles—who had voted against the Castle Doctrine earlier in the year—could be discharged of any penalties under the new law.¹⁹²

George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1378 (1979). Under the relative theory of self-defense, killing is permissible only when protecting “particularly worthy interests, such as life, limb, and sexual integrity.” *Id.*

186. See Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 24 (proposing that any intrusion on a person’s dwelling triggers an automatic, justified response of self-preservation).

187. George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1378 (1979).

188. Kristen Mack & Kevin Moran, *State Legislator Shoots Theft Suspect at House: Borris Miles Voted This Year Against Expanding Self-Defense Law*, HOUS. CHRON., July 10, 2007, at B1.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

IV. CONCLUSION

Perhaps it is too soon to tell what effects the Castle Doctrine will have on our society. Will people turn into the vigilantes that the law's critics anticipate? Or will homicides remain at the status quo? Some believe it will have no effect at all.¹⁹³ Gary Kleck, Florida State University criminology professor said, "I don't think criminals really have any idea about the intricacies of the law on self-defense And the same folks who weren't likely to retreat before, will continue to not retreat."¹⁹⁴ Florida, which has now had a castle doctrine law in effect for two years, has few accurate statistics on how the new law is affecting crime.¹⁹⁵ In 2005, Marion Hammer of the NRA said that violent crime rates dropped in Florida after the law was passed; opponents countered that the drop had nothing to do with the gun law and merely reflected a national downtrend in violent crime.¹⁹⁶ The fact of the matter is that even in 2008, no one knows whether shootings have increased since the law was implemented.¹⁹⁷ The Brady Campaign, unlike the NRA, does not have the funds to track results of the law.¹⁹⁸ Therefore, any valid statistics remain unknown.

193. See Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETERSBURG TIMES, Apr. 8, 2005, at A1 (acknowledging those who believe the Florida law allowing self-defense of one's castle will have no effect on crime).

194. See *id.* (quoting Florida State University criminology professor, Gary Kleck, about whether criminals will abuse the new law); see also Larry Keller, *Self-Defense Law Troubles Prosecutor*, PALM BEACH POST, June 27, 2007, at B1 (quoting Florida defense attorney Michael Salnick in an interview as saying, "I think the Castle Doctrine is like anything else we look at in the law. It's confined to the facts of the case. No factual situation is ever the same in self-defense.").

195. Rachel Graves, Op-Ed., *Gun Debate Muzzles the Middle Ground*, CHRISTIAN SCI. MONITOR, Sept. 5, 2007, at Opinion 9; see also 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 A1 (reporting that the real impact of the law has been deciding whether or not to prosecute; thus, many cases are not being filed at all or they are being filed with reduced charges).

196. Manuel Roig-Franzia, *Florida Gun Law to Expand Leeway for Self-Defense: NRA to Promote Idea in Other States*, WASH. POST, Apr. 26, 2005, at A1; see also U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: JUSTIFIABLE HOMICIDES, <http://www.ojp.usdoj.gov/bjs/homicide/justify.htm> (last visited Feb. 11, 2008) (finding that the number of justifiable homicides has been declining).

197. Rachel Graves, Op-Ed., *Gun Debate Muzzles the Middle Ground*, CHRISTIAN SCI. MONITOR, Sept. 5, 2007, at Opinion 9.

198. *Id.*

While hard statistics linking criminal behavior to the Florida law are still unavailable, the effects of the law may be found in day-to-day news stories.¹⁹⁹ For example, in 2006, Norman Borden of Palm Beach, Florida, became a current day Bernhard Goetz when he unloaded his pistol into a group of gang members.²⁰⁰ His

199. See Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 543-44 (2007) (identifying the effects of the castle doctrine law in Florida by examining different events played out in the media and courtrooms). Catalfamo finds that despite concerns of vigilantism, the Florida "Stand Your Ground" law has had relatively little noticeable social effect: "[T]here continues to be a noticeable lack of duels and shootouts on Florida streets and shared apartment walkways." *Id.* Rather, cases tend to play out in courtrooms where people who legitimately acted in self-defense are acquitted. *Id.* Some examples include a cab driver who killed a drunk, knife-wielding passenger without having to retreat first, and a twenty-three year old prostitute who was permitted to wrestle a gun away from her client and used it to defend herself—rather than being required to flee from her attacker. *Id.* at 544; see also 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 A1 (highlighting an example of how the Florida Castle Doctrine has affected the community). Rushing reports that Doug Freeman escaped charges under the new law when he shot twenty-six year old Vincent Hudson five times during a confrontation at Freeman's Electronic Store. 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 A1. Hudson survived, and although the stories differ between Freeman and Hudson on whether the incident was an attempted robbery or merely a request for money, the Castle Doctrine prevented Freeman from going to jail. *Id.*

200. Larry Keller, *Murder Case Poses Early Test for 'Castle Doctrine' Law*, PALM BEACH POST, Apr. 12, 2007, at B1; cf. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 1 (1988) (illustrating how in December 1984, Bernhard Goetz opened fire on a group of four black youths who approached him on the New York Subway and asked for five dollars). The facts of the case focused on whether Goetz had a reasonable belief that the teens were about to mug him or whether his act was racially motivated. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 4 (1988). Goetz earned a place in history as a man who refused to be a victim and fought back when his life was threatened. *Id.* at 2.

From the very beginning, the Goetz proceedings are caught in a political dialectic between the rush of popular support for the "subway vigilante" and the official attitude of outrage that anyone would dare usurp the state's task of keeping law and order. While the public calls into the newly established police hotline to express support for the wanted man, public officials, ranging from President Reagan to black leaders to Mayor Koch, come out strongly against "vigilantism" on the streets. The general public might applaud a little man's striking back against uncontrolled violence, but the President speaks of the "breakdown of civilization" when people like Bernhard Goetz "take the law into their own hands."

Id. at 4.

defense attorney expected Borden's actions would make him the poster child for Florida's law, acquitting him of murder without even going to trial.²⁰¹ At the initial hearings, Borden, forty-four years old, told how he had been walking his dogs around three in the morning when two men in a Jeep approached him.²⁰² Words were exchanged between Borden and the men, who reportedly threatened to hurt Borden and his dogs.²⁰³ The men left, but returned later with a third man.²⁰⁴ As the Jeep headed directly at Borden, he fired five bullets into the car until it came to rest upon a fence.²⁰⁵ Then he emptied another nine bullets from the gun at close range, killing two men and injuring the third.²⁰⁶

It was those nine extra bullets which prevented Borden from having his case dismissed by a judge under the Castle Doctrine.²⁰⁷ He was forced to go to trial before a jury.²⁰⁸ Borden spent eight months in jail while the jurors decided whether his actions were reasonable and immediately necessary under the circumstances.²⁰⁹ In the end, they did.²¹⁰ Even the prosecutor had a hard time arguing Borden's guilt, especially after the surviving gang member admitted their intent that night was to "beat Borden up."²¹¹

201. Larry Keller, *Murder Case Poses Early Test for 'Castle Doctrine' Law*, PALM BEACH POST, Apr. 12, 2007, at B1.

202. *Id.*

203. *Id.*

204. *Id.*

205. Larry Keller, *Judge Rejects 'Castle' Law Claim*, PALM BEACH POST, May 15, 2007, at B1.

206. *Id.*

207. *Id.*

208. *Id.*; see also Larry Keller, *Self-Defense Law Troubles Prosecutor*, PALM BEACH POST, June 27, 2007, at B1 (reporting that at trial, Assistant State Attorney Craig Williams argued that the threat to Borden ended after he fired the first five shots; thus, the nine extra bullets fired after the car stopped were not in self-defense). However, with the new Castle Doctrine, also known as the "Stand Your Ground" law, the jury instructions were tilted in favor of the defendant, giving him the benefit of the doubt on his second round of shots. Op-Ed., *State's Self-Defense Law Could Cut Both Ways*, PALM BEACH POST, June 27, 2007, at A12. Borden admitted he could have called the police after the first confrontation, but did not. *Id.* The author speculates that one reason for not calling the police was a lack of faith in the Sheriff's office: "[P]eople must believe that law enforcement can protect them. When the public thinks that police can't control gangs, the public will be much more forgiving of people who defend themselves against gangs." *Id.*

209. Nancy L. Othón & Chrystian Tejedor, *Jury Acquits Westgate Man: They Find His Use of Deadly Force Justified*, SUN-SENTINEL, June 26, 2007, at B4.

210. *Id.*

211. Nancy L. Othón, *Suspect Must Face Charges, Judge Says: Man Wanted Murder*

“The truth hurt me in this case,” the prosecutor said.²¹² “They were bringing a lot of violence to this defendant. It’s tough to put yourself in that guy’s shoes and say he didn’t act appropriately. It’s really tough.”²¹³

One of the most interesting social factors surrounding the Borden case, however, was not his acquittal. Instead, it was the aftermath that rained down on him.²¹⁴ While he may have successfully defended himself and been acquitted of murder, his life will probably never be the same.²¹⁵ During his eight months in jail, Borden’s home was burned down—allegedly in retaliation for shooting one of the gang’s members.²¹⁶ Borden’s dogs were euthanized because no one could care for them.²¹⁷ So, is Borden really a role model?²¹⁸ Prosecutors, like the one in Florida, must pursue charges against defenders similar to Borden.²¹⁹ Forcing a jury to decide culpability will help curb vigilante justice, and hopefully rein in people who would take advantage of the laws of self-defense.²²⁰ However, Borden’s situation is proof that vigilante justice comes at a high price.²²¹ It is a stark reminder that while in Texas we now have the option under the Castle Doctrine to shoot first and ask questions later, such a law may not always “bring the kind of security and peace of mind intended.”²²²

Michael Brady, like Norman Borden, knows the fallout from shooting first.²²³ Brady said he has been psychologically scarred

Trial Dismissed, Saying He Killed in Self-Defense, SUN-SENTINEL, May 15, 2007, at B1.

212. Nancy L. Othón & Chrystian Tejedor, *Jury Acquits Westgate Man: They Find His Use of Deadly Force Justified*, SUN-SENTINEL, June 26, 2007, at B4.

213. *Id.*

214. *Id.*; see also Op-Ed., *Justice System; Issue: South Florida Man Acquitted of Killing Men Intent on Beating Him Up*, SUN-SENTINEL, June 27, 2007, at A28 (discussing the extreme aftermath of the Norman Borden incident through an opinion editorial).

215. Op-Ed., *Justice System; Issue: South Florida Man Acquitted of Killing Men Intent on Beating Him Up*, SUN-SENTINEL, June 27, 2007, at A28.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Op-Ed., *Justice System; Issue: South Florida Man Acquitted of Killing Men Intent on Beating Him Up*, SUN-SENTINEL, June 27, 2007, at A28.

221. *Id.*

222. *Id.*

223. Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings: Cases Involving the New Deadly Force Law Are Handled in a Broad Range of Ways*, ORLANDO SENTINEL, June 11, 2006, at A1.

since the night he shot a man: “I wish I could turn back time.”²²⁴ Brady claims the man, who was a friend of his next door neighbor, became drunk and threatened to punch him.²²⁵ Brady said he was scared and did not think twice about his rights when he pulled the trigger.²²⁶ The Castle Doctrine is meant to protect people like Brady.²²⁷ “Nobody has the right to decide what’s in your mind and heart when you’re under attack,” said Marion Hammer, former NRA President.²²⁸ “So the important thing is to make it more dangerous for the attacker than the victim.”²²⁹ But even though Brady was acquitted by a grand jury, his split-second decision to shoot the man has changed his life forever.²³⁰ Now, Brady keeps a rifle close at hand, fearing retribution from those who continue to send him and his wife hate mail and angry telephone calls.²³¹

The Castle Doctrine may have broadened the scope of self-defense so that people like Borden and Brady will not be considered murderers when they kill an aggressor, but that does not mean people will always gain an advantage from it.²³² Perhaps because no situation is black and white, there will never be a right or wrong answer. Rather than reacting to fear by pulling a trigger, people should be more conscientious of whether their lives are in real, imminent danger. Although the law allows someone to shoot in self-defense, there may still be some benefit to retreating.²³³ Walt Plath, for example, remains grateful he did

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings: Cases Involving the New Deadly-Force Law Are Handled in a Broad Range of Ways*, ORLANDO SENTINEL, June 11, 2006, at A1.

229. *Id.*

230. *Id.*

231. *Id.*

232. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 181 (1995) (examining defensive gun use in the United States). Kleck states that the victim who kills a criminal rarely finds it to be a social benefit. *Id.* Instead, it becomes a nightmare they must suffer for many years to come. *Id.*

233. See Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings: Cases Involving the New Deadly Force Law Are Handled in a Broad Range of Ways*, ORLANDO SENTINEL, June 11, 2006, at A1 (quoting Peter Hamm, a spokesperson of the Brady

not shoot to kill when he was attacked while walking his dogs in an Orlando, Florida, park.²³⁴ The attacker, who was mentally disabled, accused Plath of being a CIA agent and tackled him from behind.²³⁵ Plath retreated to his truck, retrieved a gun, and fired a warning shot at the ground so the man would remain still until the police arrived.²³⁶ Plath's story is not one commonly reported, yet it is a refreshing reminder of why it may not always be the best policy to shoot first and ask questions later: "I know I had the right, but I didn't want to live with having killed someone."²³⁷

Campaign, who believes that sometimes retreat may still be the best reaction).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*