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## UNLAWFUL/CRIMINAL ACTIVITY: THE ILL-DEFINED AND INADEQUATE PROVISION FOR A “STAND YOUR GROUND” DEFENSE

*R. Christopher Campbell\**

A person who is not engaged in an *unlawful activity*, and who is attacked in any other place where he or she has a right to be, has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a forcible felony.<sup>1</sup> – *Florida’s “Stand Your Ground” Law*

### I. INTRODUCTION

In 2013, the *Governor’s Task Force on Citizen Safety and Protection* released its Final Report on Florida’s controversial “Stand Your Ground” (“SYG”) law.<sup>2</sup> The task force, chaired by Lieutenant Governor Jennifer Carroll,<sup>3</sup> was appointed a year earlier in the wake of the shooting death of seventeen-year-old Trayvon Martin.<sup>4</sup> The shooting of the unarmed adolescent sparked an immense public outcry and ubiquitous debate over what role Florida’s SYG law had played in young Martin’s death.<sup>5</sup> The mission of the Task Force was to review the SYG law,

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1. FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (emphasis added).

2. The Honorable Jennifer Carroll, *Governor’s Task Force on Citizen Safety and Protection* (2013), available at <http://www.flgov.com/wp-content/uploads/2013/02/Citizen-Safety-and-Protection-Task-Force-Report-FINAL.pdf>.

3. *Id.* The Task Force also included several prominent Florida criminal attorneys, former judges, *inter alios*, as well as State Representative Dennis Baxley, member of the Florida House of Representatives, who initiated and developed the SYG law for the Florida Legislature; and State Senator David Simmons, member of the Florida Senate, who was the head of the Judiciary Committee and drafted the language of the current SYG statute. *Id.*

4. . *Id.* See also, Jonathan Feingold and Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 213 (2012) (Trayvon Martin was walking on the street after returning from a local convenience store when George Zimmerman, a neighborhood watch captain, spotted Martin and followed him because he “looked suspicious.” Although the facts of the encounter between the two are in dispute, what is not in dispute is that Zimmerman shot the unarmed adolescent in the chest, killing him.).

5. *Id.* at 215. See, e.g., Eric Deggans, *Trayvon Martin Update: Story Is Now More Covered Than Presidential Race*, THE TAMPA BAY TIMES BLOG (March 30, 2012, 12:10 PM), <http://www.tampabay.com/blogs/media/content/trayvon-martin-update-story-now-more-covered-presidential-race>. See also, Eric Lichtblau, *Martin Death Spurs Group to Readjust Policy Focus*, THE NEW YORK TIMES (April 17, 2012), [http://www.nytimes.com/2012/04/18/us/trayvon-martin-death-spurs-group-to-readjust-policy-focus.html?\\_r=1](http://www.nytimes.com/2012/04/18/us/trayvon-martin-death-spurs-group-to-readjust-policy-focus.html?_r=1) (The firestorm surrounding the Martin-Zimmerman shooting became so intense that it facilitated

*inter alia*,<sup>6</sup> and to make recommendations to the governor and the legislature on whether the law ensured the “rights of all Floridians and visitors, including the right to feel safe and secure in [the] state.”<sup>7</sup>

Though concluding that Florida’s SYG statute should not be overturned,<sup>8</sup> the Task Force most notably recommended that the law’s “conduct”<sup>9</sup> provision needed clarification to “ensure uniform application of the law with the intent to protect the innocent person.”<sup>10</sup> The Task Force cautioned that “without a clear definition of the term ‘unlawful activity’ the potential for inconsistent application of the law across the state may occur.”<sup>11</sup>

When the SYG law was enacted in 2005, the legislature incorporated the ambiguous provision in the statute<sup>12</sup> to deny the SYG affirmative defense to citizens engaged in “unlawful activity” at the time deadly force is used.<sup>13</sup> The SYG statute, however, does not define “unlawful activity,” and courts have yet to fill that void.<sup>14</sup> Further, without any guidance for the “unlawful activity” provision,

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a change in agenda within the American Legislative Exchange Council (ALEC), a conservative organization of state lawmakers who distributed the SYG bill to several states’ legislatures after Florida enacted the law. In the middle of public outcry following Martin’s death, ALEC declared that it would no longer enter law enforcement or social politics and would now focus only on economic issues.)

6. *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 3, at 10 (The Task Force’s purpose was to “thoroughly review Florida Statute Chapter 776 and any other laws, rules, regulations or programs that relate to public safety and citizen protection.”).

7. *Id.* at 11.

The Task Force on Citizen Safety and Protection will review Chapter 776, Florida Statutes and its implementation, listen to the concerns and ideas from Floridians, and make recommendations to the Governor and Florida Legislature to ensure the rights of all Floridians and visitors, including the right to feel safe and secure in our state. *Id.* at 3.

8. *Id.* at 5 (the Task Force concurred that, “all persons who are conducting themselves in a lawful manner have a fundamental right to stand their ground and defend themselves from attack with proportionate force in every place they have a lawful right to be.”).

9. Generally, the SYG laws across the country have two elements that apply specifically to the defender before he can violate his duty to retreat. A citizen is only able to stand his ground and use deadly force if: (1) he is not engaged in some form of unlawful or criminal activity, provoked the encounter, or was the initial aggressor; and (2) the person must be in a place where he or she has a right to be. The first element is a “conduct” provision; the second is a “location” provision.

10. *Id.* (some of the other recommendations by the Task Force included that state enforcement agencies, prosecutors, defense attorneys, and the judiciary should increase training and education regarding self-defense laws; to define the role of neighborhood watch participants; and whether the legislature should consider the extension of the civil immunity to cover innocent third-party victims.)

11. *Id.* Critics of the SYG law have long maintained that the law has potential to be easily corrupted by criminals, who will use the law to excuse otherwise unlawful deadly force. *See, e.g.*, Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to “Get Away with Murder”*, 34 AM. J. TRIAL ADVOC. 105, 114 (2010) (“[The SYG] laws are not only ripe for abuse by would-be criminals, but they also provide absolutely no guidance to law enforcement, prosecutors, defendants, or the courts on how to assert immunity or claim a presumption under the law.”). *See also* Zachary L. Weaver, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 424 (2008) (arguing that the unlawful activity element “should be defined or, on the other hand, stricken entirely from the [SYG law].”).

12. *See* FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (the SYG law was incorporated into the already existing Chapter 776 – *Justifiable Use of Force*).

13. *See* FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (emphasis added). The Florida SYG statute provides, in part: “A person who is not engaged in *unlawful activity* and is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force.” *Id.* (emphasis added).

14. *See generally*, BLACK’S LAW DICTIONARY (9th ed. 2009) (*unlawful* is defined as “not authorized by law.”). *See also*, *Activity*, MERRIAM-WEBSTER (2013), available at <http://www.merriam-webster.com/>

there is an uncertainty on whether there is a “nexus” requirement between the activities deemed unlawful and the force used.<sup>15</sup> The provision also neglects to shed light on the time frame or temporal scope within which the citizen must be engaged in the “unlawful activity” in relation to the use of deadly force.<sup>16</sup>

Since its enactment, the SYG law has received minimal treatment from legal commentators,<sup>17</sup> and its “conduct” provision has received almost none. Yet, because of the lack of guidance from the legislature and the courts, it is the opinion of this author that the “unlawful activity” provision is the crux of the uneasiness surrounding the controversial law. The “unlawful activity” provision should be *fundamental* in determining whether the use of deadly force was indeed justified; instead, the provision is considerably too narrow in some respects, and far too inclusive in others, rendering the provision wholly inadequate in giving any guidance in determining whether an actor’s conduct should preclude him from the law’s protection.

This article focuses on the SYG law’s “unlawful activity” provision and the need for its modification.<sup>18</sup> Section II looks briefly at the development of the SYG law, spelling out the original purpose for including the “unlawful activity” element within the SYG statute. Section II also outlines and examines the primary as well as the underlying deficiencies with the ambiguous provision. Section II concludes by revealing how citizens can potentially avoid the restrictions of the “unlawful activity” provision altogether and still stand their ground and use deadly force.

Section III suggests expunging the “unlawful activity” provision and proposes two alternative provisions to be used in its place. Part A of this section discusses the “true man” doctrine (the legislature’s primary influence for creating the SYG law), which permits only persons who are “without fault” to stand their ground and use deadly force in self-defense. And finally, Part B examines the lack of temporal scope in the “unlawful activity” provision. This section proposes that a citizen should only be afforded a *standard* self-defense and not an SYG defense if he intentionally, recklessly, or knowingly places himself in a foreseeably threatening situation.

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dictionary/activity (*activity* is defined as “the quality or state of being active; vigorous or energetic action; natural or normal function . . .”).

15. See, e.g., *Dawkins v. State*, 252 P.3d 214, 218 (Okla. Crim. App. 2011) (“The [SYG] statute neither specifies a type of unlawful activity nor requires that it be connected to the use of defensive force. That is, the statute contains no nexus requirement.”).

16. Zachary L. Weaver, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. Miami L. Rev. 395, 412 (2008) (“[I]t is impossible to know the precise time-framing and degree of unlawful activity that will cause a user of force not to be protected by the law.”)

17. See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 238 (2008) (The SYG law “has not yet received a thorough analysis in the criminal law literature.”).

18. See FLA. STAT. § 776.013 (2013) (amended June 20, 2014).

## II. UNLAWFUL ACTIVITY<sup>19</sup>

### A. Development and Deficiencies

With Florida leading the way in 2005, more than twenty states have re-envisioned the law of self-defense by enacting SYG laws.<sup>20</sup> The new wave of statutes affirmed that a person, not only at home, but also at work, in a car, or in “any location where the person is legally allowed to be,” can stand his or her ground and use deadly force in self-defense.<sup>21</sup> The new statutes are a large departure from the common law and the previous statutory law of self-defense, both of which mandated that a citizen had a *duty to retreat* prior to using deadly force.<sup>22</sup>

Florida State Representative Dennis Baxley, with the support of the NRA, championed the SYG law through the Florida legislature.<sup>23</sup> State Representative David Simmons, who was the head of the Judiciary Committee, penned the SYG statute by lifting Florida’s standard jury instructions from the Castle Doctrine<sup>24</sup> and using them as a template for the new law.<sup>25</sup> The stated objective of Florida’s SYG law was that “no person or victim of crime should be required to surrender his or her personal safety to a criminal.”<sup>26</sup>

19. Although this note primarily focuses on Florida’s SYG law and its “unlawful activity” provision, the Florida law is a fair representation of other SYG laws throughout the nation.

20. Adam Winkler, *Focus Must Be Narrower, in What Florida “Stand Your Ground” Law Says*, THE NEW YORK TIMES (March 21, 2012) (updated January 14, 2013 at 1:16 p.m.), <http://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/what-the-florida-stand-your-ground-law-says>.

21. See, e.g., Fla. Stat. § 776.013 (2013) (amended June 20, 2014).

22. *Weiland v. State*, 732 So. 2d 1044, 1049 (Fla. 1999) (“Under Florida statutory and common law, a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm . . . Even under those circumstances, however, a person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger, including retreat.”).

23. See Susan Ferris, *NRA Helped Spread ‘Stand Your Ground’ Laws Across Nation*, MCLATCHY DC (March 26, 2012), <http://www.mcclatchydc.com/2012/03/26/143145/nra-helped-spread-stand-your-ground.html#storylink=cpy#storylink=cpy#storylink=cpy> (the NRA worked closely with Rep. Dennis Baxley, a prior recipient of the NRA’s Defender of Freedom award, in supporting the passage of the SYG law.). See, Leonard Martino, *More Bad Law from the NRA, in Thursday’s Letters: Seek a Middle Ground on Open Carry, Letters to the Editor*, THE TAMPA BAY TIMES (August 12, 2012), <http://www.tampabay.com/opinion/editorials/open-carry-more-bad-law-from-nra/1245247> (the NRA not only pushed hard for the passage of the SYG law, but also pushed for open-carry laws in Florida, where citizens would be permitted to openly carry firearms in public and at work).

24. David Simmons, *Without ‘Stand Your Ground,’ Attacker Can Have Advantage*, THE ORLANDO SENTINEL (April 15, 2012), [http://articles.orlandosentinel.com/2012-04-15/opinion/os-ed-stand-your-ground-law-041512-20120413\\_1\\_innocent-victims-deadly-force-castle-doctrine](http://articles.orlandosentinel.com/2012-04-15/opinion/os-ed-stand-your-ground-law-041512-20120413_1_innocent-victims-deadly-force-castle-doctrine) (“we simply took Florida’s standard jury instruction regarding the Castle Doctrine permitting a victim who has a reasonable fear of death or great bodily injury to stand his or her ground, and meet force with force, in his or her own home. We then deleted the language limiting its application to the victim’s home.”).

25. *Id.* Simmons also stated that a citizen who uses the SYG defense “must show he was not engaged in an unlawful activity, such as threatening, stalking, assaulting or battering the alleged assailant.” (The article was written as an op-ed piece by Florida State Rep. Simmons in response to the public outcry over the SYG law following the Trayvon Martin shooting “to help clear up the confusion” over the law.) *Id.*

26. S.B. 436, 104th Gen. Assemb., Reg. Sess. (Fla. 2005).

The “unlawful activity” provision was included in the SYG statute as an “important limitation” on when the use of deadly force was justified under the new law.<sup>27</sup> Following the Trayvon Martin shooting, State Representative David Simmons publicly defended the SYG law and defined the “unlawful activity” provision as a “purity provision,” maintaining that it was included in the statute to deny the law’s protection to “aggressors,” people “waving a gun at someone,” and people “engaged in drug dealing.”<sup>28</sup> The SYG statute, however, provides no such insight into the lawmakers’ intent.<sup>29</sup>

The lack of clarity within the SYG statute conceivably allows criminals, who would otherwise have limited defenses to justify their use of deadly force, to be afforded a SYG defense.<sup>30</sup> To illustrate, studies by the *Washington Post* found that homicides in Florida classified as “justified” *tripled* in the first five years following the enactment of the SYG law,<sup>31</sup> even though the total number of homicides remained relatively the same.<sup>32</sup> In the five years before the law was enacted, “justifiable” homicides were about twelve killings per year, mostly committed by law enforcement.<sup>33</sup> In the first five years after the SYG law was enacted, “justifiable” homicides increased to thirty-six per year.<sup>34</sup> Similarly, a study by the *Tampa Bay Times*, which comprised over 200 cases where the affirmative defense was utilized, found that the accused was set free almost 70% of the time.<sup>35</sup>

In some instances, the “unlawful activity” provision’s lack of definition arguably has the opposite effect, where citizens believe they have a right to use

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WHEREAS, the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others, and WHEREAS, the castle doctrine is a common-law doctrine of ancient origins which declares that a person’s home is his or her castle, and; WHEREAS, Section 8 of Article I of the State Constitution guarantees the right of the people to bear arms in defense of themselves, and; WHEREAS, the persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles, and; WHEREAS, no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack, NOW, THEREFORE, Be It Enacted by the Legislature of the State of Florida.

*Id.*

27. See Simmons, *supra* note 23.

28. *Id.* See S.B. 436, 104th Gen. Assemb., Reg. Sess. (Fla. 2005) (“[N]o person or victim of crime should be required to surrender his or her personal safety to a criminal.”).

29. See Fla. Stat. § 776.013 (2013) (amended June 20, 2014).

30. See generally, Joe Palazzolo and Rob Barry, *More Killings Called Self-Defense*, THE WALL STREET JOURNAL, March 31, 2012, at A1 (a Wall Street Journal study found that since 2005, while overall homicide numbers in states with SYG laws have stayed nearly the same level as prior to the enacted law, homicides classified as “justified” have increased by more than fifty percent).

31. Marc Fisher and Dan Eggen *Justifiable Killings up as Self-Defense Is Redefined*, THE WASHINGTON POST, April 8, 2012, at A1 (The Washington Post study used data from the Florida Department of Law Enforcement and the FBI.).

32. See Palazzolo, *supra* note 29.

33. See Fisher, *supra* note 30.

34. *Id.*

35. Kris Hundley, Susan Taylor Martin & Connie Humburg. *Florida “Stand Your Ground” Law Yields Some Shocking Outcomes Depending on How Law Is Applied*. TAMPA BAY TIMES, available at <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133>.

deadly force only later to be proven wrong by the court's interpretation of the statute. For example, in *Dorsey v. State*, a convicted felon shot two students who threatened him at a high-school party.<sup>36</sup> The court rejected the claim of self-defense, holding that possession of a firearm by a convicted felon qualifies as "unlawful activity" within the meaning of the SYG law.<sup>37</sup>

The *Dorsey* court balked at the opportunity, however, to define "unlawful activity."<sup>38</sup> Instead, the court simply made a "plain language" interpretation of the statute,<sup>39</sup> holding that "[w]hatever the scope of that term [unlawful activity], we hold that possession of a firearm by a convicted felon qualifies as 'unlawful activity' within the meaning of the [SYG] law."<sup>40</sup> Unfortunately, the failure to define "unlawful activity" means that neither citizens nor courts have adequate notice of whether the provision applies to lesser offenses such as misdemeanors, minor traffic violations, or even ordinance infractions.<sup>41</sup> Moreover, neither the SYG statute nor *Dorsey* make it clear whether the citizen must be charged and/or convicted of the "activity" that is deemed "unlawful."<sup>42</sup>

These failures to clarify the "unlawful activity" provision are not unique to Florida. For example, in *Dawkins v. State*, an Oklahoma court held that any non-minor offense<sup>43</sup> committed by the person claiming a SYG defense at the time deadly force is used is satisfactory to render the SYG defense invalid.<sup>44</sup> The court did opine that the legislature's intent was to deny the SYG defense claim to those "actively" committing a crime;<sup>45</sup> but, as an example of "actively" committing a crime, the court listed "possession of illegal drugs on the premises," which

36. *Dorsey v. State*, 74 So. 3d 521, 522–23 (Fla. Dist. Ct. App. 2011) (the two assailants who were shot by the defendant had a reputation of violence and were known not to fight fairly).

37. *Id.* at 527. The *Dorsey* court opined that the evidence of the incident "showed an impulsive overreaction to an attack, warranting convictions for manslaughter . . ." *Id.* at 525. See *State v. Hill*, 95 So. 3d 434, 435 (Fla. Dist. Ct. App. 2012), *vacated in part*, 143 So. 3d 981 (Fla. Dist. Ct. App. 2014) (concurring with *Dorsey* holding that a "defendant's crime of possession of a firearm by a convicted felon precludes him from seeking immunity under the Stand Your Ground law.").

38. See *Dorsey*, 74 So. 3d 521 (the court did not consider whether the defendant drinking underage at the time of the incident was "unlawful activity.").

39. *Id.* at 527.

40. *Id.*

41. See Megale, *supra* note 11, at 122 (Arguing that the "term "unlawful activity" in the [SYG] law is vague, and it is applied inconsistently throughout the state. Notably, the alleged unlawful activity does not have to be related to the act of self-defense. For example, [presumably] a person who is driving without a license . . . is not entitled to the same presumption of reasonable fear if someone breaks into his occupied vehicle as someone who is not engaged in any illegal activity at all."); see *Governor's Task Force on Citizen Safety and Protection*, *supra* note 2, at 5.

42. See Megale, *supra* note 11, at 122 (Arguing that "[m]ust law enforcement charge the crime for it to be used in withholding the presumption of reasonable fear? Must the crime result in a conviction before it can be used to withhold the presumption of reasonable fear? [The SYG] statute fails to put the defendant on notice . . ."); see generally *Stiehf v. State*, 67 So. 3d 275, 278 (Fla. Dist. Ct. App. 2011) (note that courts have held that it is the state's burden to overcome the defendant's theory of self-defense and prove "beyond a reasonable doubt" that the defendant was not acting lawfully when he or she used deadly force).

43. *Dawkins v. State*, 252 P.3d 214, 218 (Okla. Crim. App. 2011).

44. *Id.*

45. *Id.* ("We therefore conclude that the Legislature's intent was to exclude from the benefit of this statute persons who are actively committing a crime, not persons who have or may have committed a crime in the past."). The *Dawkins* court also theorized that "current crimes" would include the use of an illegal weapon used in an SYG self-defense. *Id.*

unmistakably lacks any nexus between the unlawful activity and the force used.<sup>46</sup> The court also enumerated examples of minor offenses that do not qualify as unlawful activity, such as “persons who are illegally parked” or are in “arrears with child support payments.”<sup>47</sup> Thus, *Dawkins* did not require any nexus between the force used and the unlawful activity, yet precluded the affirmative defense if the unlawful activity was a higher grade of crime, even when unrelated to the incident.

The lack of any required nexus between the unlawful activity and the force used can innocently elude citizens who are supposed to be placed on notice by a statute<sup>48</sup> and may believe—in a heated moment—that they have a valid SYG defense claim. For instance, if a pedestrian carrying two grams of marijuana is walking on a street and is confronted by two armed assailants who demand his wallet, the law may require the pedestrian to flee before using deadly force in self-defense.

It is reasonable to believe that the legislators who included the “unlawful activity” element within the SYG law envisioned—and tried to avoid—a situation in which a person attempted a mugging, robbery, assault, stalking, or was involved in a drug deal gone wrong, and then when the tables were turned, asserted the SYG defense as justification for using deadly force.<sup>49</sup> It is not, though, within reason for a citizen to know—as in the aforementioned example—that possession of two grams of marijuana is grounds to make his SYG defense invalid.

In truth, the lack of any “nexus” requirement essentially results in a new unincorporated, yet contradictory, element within the SYG law. The foremost policy of the SYG statute is that it does not require citizens to pause to consider the possibility of safely fleeing,<sup>50</sup> and yet the *Dorsey* and *Dawkins* courts ultimately require citizens to pause to consider *all* possible reasons why they may be *compelled* to flee as their self-defense may be later found invalid due to unlawful activity entirely unrelated to the threatening encounter.

Justice Oliver Wendell Holmes—in overturning a conviction of a defendant who failed to retreat and instead shot an assailant who threatened him with a blade—famously opined that “detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>51</sup> Justice Holmes’s inference is that a citizen cannot possibly think of *all* reasonable responses to a threat of danger in a split second, including whether he can safely flee. *Dorsey* and *Dawkins* distance themselves from Justice Holmes’s perceptive notion, thereby muddling the SYG law by not requiring a “nexus” and, as a result, indirectly hold that “detached reflection” is in fact an element of the SYG law.

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46. *Id.*

47. *Id.*

48. *Id.* at 217 (“[A] statute’s text puts citizens on notice of prohibited conduct.”).

49. See Simmons, *supra* note 24 (Florida State Rep. David Simmons, who drafted the Florida SYG law, stated that the “unlawful activity” requirement is a “purity provision” included in the law to deny the affirmative defense to those who were engaged in “threatening, stalking, assaulting or battering the alleged assailant”; or to deny protection of the law to those who are the aggressor, waving a gun at someone, or engaged in drug dealing).

50. See, e.g., FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014).

51. *Brown v. United States*, 256 U.S. 335, 343 (1921).



## B. Road Map to Immunity

For all of its glaring deficiencies, the “unlawful activity” provision may have reached a new low point in 2013. Recent developments indicate that in an examination to determine whether a citizen is permitted to stand his ground and is not under a duty to retreat, the “unlawful activity” provision may be, above all, immaterial. Aside from the Castle Doctrine, Florida’s Justifiable Use of Force statute—which limits the use of force in almost all situations under Florida law—has two sections that authorize deadly force in public without a duty to retreat; but only one of them, oddly, has an “unlawful activity” provision.<sup>52</sup>

First, section 776.012(1) provides that a “person is justified in the use of deadly force and does not have a duty to retreat if . . . he or she reasonably believes that such force is necessary to prevent *imminent* death or great bodily harm.”<sup>53</sup> Then, section 776.013(3), better known as the SYG law, states that:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is *necessary* to do so to prevent death or great bodily harm.<sup>54</sup>

Pursuant to section 776.032(1), an actor in compliance with either of the aforementioned sections of the law is “immune from criminal prosecution and civil action.”<sup>55</sup>

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52. See FLA. STAT. § 776.012 (2013) (amended June 20, 2014)—Use of force in defense of person:

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if: (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or (2) Under those circumstances permitted pursuant to § 776.013.

*Id.* See also FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014):

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

*Id.*

53. See FLA. STAT. § 776.012(1) (2013) (current version at FLA. STAT. § 776.012(2) (2014)) (emphasis added).

54. See FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (emphasis added).

55. FLA. STAT. § 776.032(1) (2013) (current version at FLA. STAT. § 776.012(2) (2014)).

Although the two sections of the law appear eerily similar, it is easy to see the legislature's thought processes on why it created the two standards. If the threatened harm is *imminent*, under section 776.012(1), a citizen may not have an opportunity to retreat before utilizing deadly force; he therefore should still be permitted to protect himself and be afforded immunity under the law.<sup>56</sup> This goes back to Justice Oliver Wendell Holmes's perceptive notion that a person cannot think of all reasonable responses in a split second of danger, including whether he can safely flee.<sup>57</sup> Should there be an opportunity to retreat, and the SYG law would apply, giving the citizen more or less the option of whether to retreat or stand his ground if deadly force is *necessary*—but a citizen could *only* stand his ground if he was not engaged in unlawful activity and in a place that he had a right to be.<sup>58</sup> In having two different standards of when a citizen has no duty to retreat, a citizen could potentially skirt his duty to retreat, use deadly force, and then choose between the two standards to see which one better fits his circumstances in order to gain immunity from prosecution.

In 2013, *Little v. State* addressed this issue when it took on the question of whether a person who uses deadly force while engaged in “unlawful activity” can still be entitled to immunity under the law.<sup>59</sup> In *Little*, the defendant shot and killed a man who he claimed was the aggressor.<sup>60</sup> Little maintained that he reasonably believed that his use of deadly force was necessary to prevent *imminent* death or great bodily harm, and he therefore had no duty to retreat.<sup>61</sup> The trouble was that Little was a convicted felon in possession of a firearm at the time of the shooting.<sup>62</sup> Under *Dorsey v. State*, his possession of a firearm as a convicted felon would disqualify him from the SYG law's protection.<sup>63</sup> However, Little claimed that the authority for his use of deadly force came *not* from the SYG law, but from section 776.012(1), which has no “unlawful activity” provision.<sup>64</sup> Therefore, he should be provided immunity from criminal prosecution if shown by a preponderance of the evidence that his use of deadly force was in response to an *imminent* threat.<sup>65</sup>

The state, recognizing the gap between the two sections of the statute, argued that it was clearly not the legislature's intent that the “unlawful activity” provision should apply to just one of the two no-duty-to-retreat sections of the law; if so, section 776.012(1) would effectively undermine the SYG law.<sup>66</sup> But the court broadly rejected this argument, and, in finding for Little, reasoned that the two

56. See FLA. STAT. § 776.012(1) (2013) (current version at FLA. STAT. § 776.012(2) (2014)).

57. *Brown v. United States*, 256 U.S. 335, 343 (1921).

58. See FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (emphasis added).

59. *Little v. State*, 111 So. 3d 214, 216 (Fla. Dist. Ct. App. 2013).

60. *Id.* at 217. In *Little*, outside of a friend's home, the victim raised a gun, directed it at the defendant, who, in response, fired his gun at the victim several times with his eyes closed, killing him. *Id.*

61. *Id.* at 218.

62. *Id.* at 219.

63. *Dorsey v. State*, 74 So. 3d 521 (Fla. Dist. Ct. App. 2011); see also *State v. Hill*, 95 So. 3d 434 (Fla. Dist. Ct. App. 2012) (upholding *Dorsey*).

64. *Little*, 111 So. 3d at 222. See also FLA. STAT. § 776.012(1) (2013) (current version at FLA. STAT. § 776.012(2) (2014)).

65. *Horn v. State*, 17 So. 3d 836, 839 (Fla. Dist. Ct. App. 2009). See *Little*, 111 So. 3d at 222.

66. *Little*, 111 So. 3d 219.

sections of the law, although very similar, are plainly distinguishable: one section requires that the threatened harm be *imminent*, and the other—the SYG law—requires only that the use of force be *necessary*.<sup>67</sup> Since Little met his burden, that the threatened harm was imminent under section 776.012(1), the court held that he had no duty to retreat, which rendered his possession of the illegal firearm immaterial.<sup>68</sup>

Although the holding in *Little* maintains otherwise, it is unlikely that an actor would find it *necessary* to use deadly force in response to a threatened harm that is not *imminent*.<sup>69</sup> Thus, the practical effect of *Little* is that an actor can safely sidestep the “unlawful activity” provision by simply limiting the scope of the examination of his use of deadly force to the precise moment the force was used—in that moment was the threatened harm *imminent*?<sup>70</sup>

For instance, if a drug courier is transporting two pounds of marijuana and is confronted by armed assailants who demand his cargo, the SYG law may require the drug courier to flee before using deadly force. Under the law’s “unlawful activity” provision, the possession and transportation of drugs may nullify his right to stand his ground.<sup>71</sup> But if the courier can demonstrate that the threatened harm by the armed assailants was *imminent*, section 776.012(1) may find the drug courier’s use of deadly force justified.<sup>72</sup> Any time assailants brandish a gun or wield a knife with malicious intentions toward a person in close proximity, is not the threatened harm always *imminent*?

To the legal community and the general public at large, the court’s opinion in *Little* provides a road map to immunity in situations where a citizen’s duty to retreat is not satisfied. By limiting the scope of the encounter to the moment the threatened harm was imminent, an actor who violated his duty to retreat has a far greater advantage under section 776.012(1) than under the SYG statute in gaining

67. *Id.* at 221. The court reasoned that the

requirements under sections 776.012(1) and 776.013(3) are not identical. A person proceeding under section 776.013(3) would have to prove that he or she reasonably believed the use of deadly force was “necessary ... to prevent death or great bodily harm ... or to prevent the commission of a forcible felony.” Under section 776.012(1), a person would have to prove that he or she reasonably believed the use of deadly force was “necessary to prevent *imminent* death or great bodily harm ... or to prevent the *imminent* commission of a forcible felony.”

*Id.* For its reasoning, the court relied on the doctrine of *in pari material*, which is used for statutory construction. *In pari material* requires that “statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature’s intent.” (quoting Fla. Dep’t of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005)). *Id.*

68. *Id.* at 222.

69. *Id.* at 221–23 (majority claimed that the “burden of proof and the entitlement to the various presumptions to assist in meeting that burden varies depending upon which statute [section 776.012(1) or the SYG law] applies.”) (Northcutt, J., concurring opined that it was difficult to imagine a situation where a citizen could “reasonably think it necessary to use deadly force to prevent death or great bodily harm without believing that the threatened harm is *imminent*.”).

70. See FLA. STAT. § 776.012(1) (2013) (current version at FLA. STAT. § 776.012(2) (2014)).

71. See Dawkins v. State, 252 P.3d 214, 218 (Okla. 2011).

72. See Fla. Stat. Ann. § 776.012(1) (2013) (current version at Fla. Stat. § 776.012(2) (2014)).

immunity from the law. This advantage would effectively render the SYG law meaningless.<sup>73</sup> For this reason, the failure of the “unlawful activity” provision is now unmistakably complete—the provision is not just ill-defined and inadequate, it may also be of no consequence.

### III. PROPOSED MODIFICATIONS TO THE “STAND YOUR GROUND” LAW<sup>74</sup>

The Final Report of the *Governor’s Task Force on Citizen Safety and Protection* included recommendations for revisions to the “unlawful activity” element of the SYG law.<sup>75</sup> These recommendations proposed that any revision to the “unlawful activity” element should: (1) contain a provision excluding “noncriminal violations as defined in Section 775.08(3)”<sup>76</sup> of Florida Statutes;<sup>77</sup> (2) include some guidance with regard to the “temporal proximity of the *unlawful activity* to the use of force”;<sup>78</sup> (3) contain a provision excluding “some county and municipal ordinance violations”;<sup>79</sup> and (4) exclude, with any revision, “citizenship status.”<sup>80</sup>

The Task Force correctly pointed out that there is a lack of guidance on any “temporal proximity” between the force used and the “unlawful activity” within the SYG law, but failed to suggest any viable alternatives to remedy its absence.<sup>81</sup> Regrettably, the remaining recommendations would have a negligible impact on the current law. As previously stated, a fundamental objective of the SYG law is that “no person or victim of crime should be required to surrender his or her

73. See *Little*, 111 So. 3d at 219 (in acknowledging the opposing view point, *Little* paraphrased the State’s argument in that “section 776.012(1) cannot provide a separate basis for immunity because it would provide immunity for a person engaged in an unlawful activity and thus render section 776.013(3) meaningless.”).

74. *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 2, at 5. The modifications discussed in this section should be applied to both §776.012(1) and §776.013(3) of Florida’s *Justifiable Use of Force* statute, even though §776.012(1) does not presently have an “unlawful activity” provision for its use of deadly force. *Id.*

75. *Id.* In making its recommendations, the Task Force held public meetings, interviewed “subject matter experts,” and received thousands of correspondences from citizens. *Id.*

76. See FLA. STAT. § 775.08(3) (2013):

The term ‘noncriminal violation’ shall mean any offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense. The term ‘noncriminal violation’ shall not mean any conviction for any violation of any municipal or county ordinance. Nothing contained in this code shall repeal or change the penalty for a violation of any municipal or county ordinance.

*Id.*

77. See *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 2, at 5.

78. *Id.* (emphasis added).

79. *Id.*

80. *Id.*

81. See *id.* It is opinion of this author that the Task Force neglected to perform any substantive research on the “unlawful activity” provision, as its final report failed to cite any authority to support or challenge the provision’s effectiveness.

personal safety to a criminal.”<sup>82</sup> The Task Force’s recommendations egregiously fail to address this objective because the recommendations do not effectively distinguish criminals from law-abiding citizens. So how do you distinguish criminals from law-abiding citizens with such a law? The distinction between those who should be afforded the SYG defense and those who should be prohibited is certainly not located within the “unlawful activity” provision, as the courts and the legislature have both failed to define the ambiguous provision or its scope.<sup>83</sup> The distinction can instead be found in one of the SYG law’s foremost influences—the “true man” doctrine.<sup>84</sup>

### A. Without Fault and Did Not Provoke

The “true man” doctrine stems from the landmark 1895 United States Supreme Court case of *Beard v. United States*.<sup>85</sup> In *Beard*, the defendant was on his own land outside his home when three brothers approached and surrounded him.<sup>86</sup> Beard, holding a gun in his hand, assaulted one of the brothers with the gun’s barrel, killing him.<sup>87</sup> Beard was tried and found guilty of manslaughter in the United States Circuit Court for the Western District of Arkansas,<sup>88</sup> but appealed to the Supreme Court of the United States where his conviction was reversed and remanded for a new trial.<sup>89</sup> Justice John Harlan, writing for the Court, held that a person on his own premises, even though not inside his home, has no duty to retreat before using deadly force in self-defense.<sup>90</sup>

Perhaps *Beard* was merely extending the Castle Doctrine<sup>91</sup> to the surrounding premises and curtilage of the home. Justice Harlan’s rationale, however, is not clear on this point, as he never references the Castle Doctrine in the Court’s opinion.<sup>92</sup> Still, the *Beard* Court viewed the home as a place where a person was legally allowed to be; therefore, under the principle that outside the home was also

82. See S.B. 436, *supra* note 25.

83. See *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 2, at 5.

84. See *Beard v. United States*, 158 U.S. 550, 561 (1895).

85. *Id.*

86. *Id.* at 552.

87. *Id.* at 552–53.

88. *Id.* at 550. In *Beard*, the U.S. Circuit Court for the Western District of Arkansas had jurisdiction over the matter because the killing occurred in Arkansas Indian Territory. *Id.*

89. *Id.* at 567.

90. See *Beard*, 158 U.S. at 563–64.

91. The Castle Doctrine is a product of a motto widely recognized in the United States—the idea that “a man’s house is his castle,” and deadly force is generally permissible, without a duty to first retreat, for protection from intruders. See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREAFON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAULES 162 (London, 4th ed. 1669) (“[F]or a man’s house is his castle, & *domus sua cuique est tutissimum refugium*; for where shall a man be safe, if it be not in his house”). See also *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (Justice Cardozo opined that “[f]light is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England.”); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS; WITH AN ANALYSIS OF THE WORK 187 (New York, W.E. Dean 1838) (“But it is clear . . . that where I kill a thief that breaks into my house, the original default can never be upon my side”).

92. See *Beard*, 158 U.S. at 550.

a place a person was legally allowed to be, the Court declared that “a true man who is without fault is not obliged to fl[ee] from an assailant.”<sup>93</sup> The “true man” notion thus became a mode to expand the Castle Doctrine outside the home.<sup>94</sup>

The “true man” doctrine became the self-defense doctrine in a number of states following the *Beard* ruling.<sup>95</sup> Although some commentators have theorized that a “true man” is one who should not endure the loss of dignity and honor by fleeing from assailants,<sup>96</sup> the doctrine is ostensibly a mosaic of attributes based in part on the “tendency of the American mind,” which is “strongly against the enforcement of any rule that requires a person to flee when assailed.”<sup>97</sup>

Aside from the notions of honor and respect, the “true man” doctrine’s primary prerequisite is that only “one without fault” is permitted to use deadly force.<sup>98</sup> In *Voight v. State*, a 1908 Texas case upholding the doctrine, the court acknowledged that “the party in the wrong must do the retreating. Our law is more favorable to

93. *Id.* at 561.

94. See Suk, *supra* note 16, at 247 (“The home, traditionally the only place where there was no duty to retreat, became the means to perform the expansion to the ‘true man’ rule of no duty to retreat. The true man’s role . . . functioned as a model for the broader self-defense right of the true man.”).

Where *Beard* did not address whether the “true man” doctrine would have extended to one who is off his premises, *Brown v. United States*, written by Justice Oliver Wendell Holmes, acknowledged that a citizen could also have a valid self-defense claim without first retreating when using deadly force in a public place. *Brown v. United States*, 256 U.S. 335, 343-44 (1921). In *Brown*, where the defendant was threatened and previously assaulted by a man and was later approached again by the same man at a post office with a knife, the defendant retreated to his coat hanging on the wall, produced a gun, and shot the man. *Id.* at 342. The *Brown* court, in light of the *Beard* holding, agreed that the premises just outside the home was a place where a person was legally allowed to be, and, accordingly, held that any public place, as well, was a place a person was legally allowed to be. *Id.* at 344. Therefore, a citizen in any place he has a legal right to be has no duty to retreat under the same principle as one who is on his own property. *Id.*

95. See, e.g., *Alberty v. United States*, 162 U.S. 499, 505–08 (1896); *People v. Lewis*, 48 P. 1088, 1090 (Cal. 1897); and *Voight v. State*, 109 S.W. 205, 207 (Tex. Crim. App. 1908), all upholding the “true man” doctrine.

96. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 75 (2012) (“[The true man] doctrine holds that the true man cannot be expected to suffer the loss of dignity and honor that would result from fleeing his assailant because the virtue of the true man is worth more than the life of an aggressor.”). See also *State v. Renner*, No. 03C01-9302-CR-00034, 1994 WL 501778 at \*7 (Tenn. Crim. App. Sept. 12, 1994) (theorizing that “the rationale behind this [true man] rule comes from a policy against making a person act in a cowardly or humiliating manner”).

97. *Runyan v. State*, 57 Ind. 80, 84 (1877):

A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence [sic].

*Id.* See also Lydia Zbrzezni, *Florida’s Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FL. COASTAL L. REV. 231, 235 (2012) [hereinafter *Zbrzezni*] (stating that “the majority of states abandoned the duty to retreat. This shift was founded on ideals of strength and valor (such as the *American mind* and *true man* justifications for self-defense), along with a frontier-inspired abhorrence for the cowardice of retreat in the face of a wrongful attack.”).

98. See *Beard*, 158 U.S. at 561.

the man who is in the right, and places a less burden upon him in homicide cases than upon the man who is in the wrong and *produces* the occasion.”<sup>99</sup> Further stated, “[i]t is one of the fundamental principles of the law of homicide, whenever the doctrine of self-defense arises, that the accused himself *must always be reasonably free from fault*, in having provoked or brought on the difficulty in which the killing was perpetrated.”<sup>100</sup>

The Model Penal Code (“MPC”) as well does not have an “unlawful activity” barrier to the use of deadly force in self-defense.<sup>101</sup> The Code instead states that “[t]he use of deadly force is not justifiable . . . [if] the actor, with the purpose of causing death or serious bodily injury, *provoked* the use of force against himself in the same encounter.”<sup>102</sup> Courts have interpreted the *provoked* condition to mean that one who incites or inflames the confrontation is denied the use of deadly force.<sup>103</sup> Prior to the passage of the SYG law, several jurisdictions held that in order to establish a claim of self-defense, a slayer was required to prove by a preponderance of the evidence that “[he was] free from fault in *provoking* or continuing the difficulty which resulted in the slaying.”<sup>104</sup>

A handful of courts have extended the “provoke” provision by defining the term to include “speech” as well as “action.”<sup>105</sup> In these jurisdictions, words single-handedly are enough to provoke an attack.<sup>106</sup> Hence, an actor who instigates an attack by verbal taunts alone can conceivably be deprived the right of self-defense.<sup>107</sup> A majority of courts, however, declare that words alone cannot amount to sufficient provocation for an attack.<sup>108</sup> Nonetheless, even if the actor provoked the threatening encounter, a greater number of courts hold that the initial aggressor

99. *Voight*, 109 S.W. at 207 (emphasis added).

100. *Storey v. State*, 71 Ala. 329, 336 (1882) (emphasis added).

101. See MODEL PENAL CODE § 3.04(2)(b)(i) (2001). Self-defense statutes in several states mirror the MPC in denying a self-defense claim to those who *provoke* the threatening encounter. See also, e.g., N.H. REV. STAT. ANN. §§ 627(1)(a–b) (2014) (stating that force is not justifiable if: “(a) [w]ith a purpose to cause physical harm to another person, [the actor] provoked the use of unlawful, non-deadly force by such other person; or (b) [h]e was the initial aggressor . . . .”); NEB. REV. STAT. ANN. § 28-1409(4)(a) (LexisNexis 2014) (stating that force is not justifiable if: “(a) [t]he actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter.”); CONN. GEN. STAT. ANN. §§ 53a-19(c) (West 2010) (affirms that “a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor . . . .”).

102. MODEL PENAL CODE § 3.04(2)(b)(i) (emphasis added). Note that the MPC does not have what would be the equivalent of the Castle Doctrine; thus, the MPC implies that its self-defense provisions do not differentiate between whether one is at home or in public.

103. See, e.g., *Commonwealth v. Galloway*, 485 A.2d 776, 783 (Pa. Super. Ct. 1984) (“First, the actor must have reasonably believed himself to be in imminent danger of death or serious bodily harm, and that it was necessary to use deadly force against the victim to prevent such harm. Second, the actor must have been free from fault in provoking or continuing the difficulty [that] resulted in the slaying. Third, the actor must have violated no duty to retreat.”). See also *State v. Lewis*, 717 A.2d 1140, 1158 (Conn. 1998) (holding that “one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation”).

104. See, e.g., *Galloway*, 485 A.2d at 783 (emphasis added).

105. See *State v. Gorham*, 412 A.2d 1017, 1019 (N.H. 1980).

106. *Id.*

107. *Id.*

108. See, e.g., *State v. Stevenson*, 188 A. 750, 751 (Del. Oyer & Term. 1936) (“A person very plainly has not the right to provoke a quarrel and then take advantage of it to justify the homicide arising from the quarrel which he himself provoked . . . no looks, or gestures, however insulting, and no words, however offensive they may be, can amount in law to a provocation sufficient to justify an assault.”).

can still regain his right of self-defense if he effectively withdrew from the confrontation.<sup>109</sup>

If the “true man” doctrine were incorporated into the SYG law, citizens would be better apprised of the legislature’s intent to deny those who are “in the wrong” from using the affirmative defense.<sup>110</sup> By adding the “provoked” element, courts would also be better informed by the modified statute that only those who do not incite or inflame the confrontation are permitted to claim the right to stand their ground.

The commonsensical logic of the “true man” doctrine cannot be ignored. To illustrate, take the prior example of the pedestrian carrying two grams of marijuana who is confronted by armed assailants who demand his wallet—under the current law, courts would struggle weighing the threat of force by the assailants against the possession of drugs by the pedestrian in determining whether the pedestrian is afforded a SYG defense. Both aspects may be deemed “unlawful.” But under the suggested *not at fault in provoking the attack* provision, the pedestrian would be afforded the law’s protection since the two armed assailants were “at fault” in *provoking* the confrontation by demanding the pedestrian’s wallet by a threat of force. The pedestrian’s possession of drugs would only be significant if the possession motivated the attack.<sup>111</sup>

### B. Foreseeability of Attack

Without any guidance on the temporal scope of the “unlawful activity” provision, the circumstances taken into account in determining whether an actor should be afforded the SYG defense are presumably limited to the immediate events surrounding the threatening encounter.<sup>112</sup> Within this small window, if all of the SYG law’s elements are satisfied, including the “unlawful activity” provision, the law will provide a citizen its protection.<sup>113</sup> An unfortunate result of this partial inquiry is that citizens engaged in criminal activities (e.g., drug dealers or organized crime figures) who expose themselves to foreseeable dangerous encounters inherent in their criminal trades, will be able to end-run their duty to retreat. This end-run may permit the use of deadly force under circumstances that would otherwise be classified as murder.

For instance, in Florida in 2008, Tavarious China Smith was approached and threatened by two brothers who sought a percentage of his drug sales.<sup>114</sup> Smith

109. See, e.g., N.H. REV. STAT. ANN. § 627(I)(b) (2014); CONN. GEN. STAT. ANN. § 53a-19(c) (West 2010).

110. See Robert Stephens, *Life and Liberty: Seven Factors That Will Better Evaluate Self-Defense in Nevada’s Common Law on Retreat*, 8 NEV. L.J. 649, 666–67 (2008) [hereinafter *Stephens*] (The “true-man” doctrine, like standard self-defense, requires a defendant to prove that “a reasonable person in similar circumstances would believe that the aggressor would take his life or cause great bodily harm.”).

111. See *infra* p. 25, and note 134.

112. See FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014).

113. *Id.*

114. See Kris Hundley, *Drug Dealer Used ‘Stand Your Ground’ to Avoid Charges in Two Killings*, TAMPA BAY TIMES, June 16, 2012, available at <http://www.tampabay.com/news/courts/criminal/drug-dealer-used-stand-your-ground-to-avoid-charges-in-two-killings/1235650> [hereinafter *Hundley*].



refused to pay the percentage and subsequently armed himself with a gun.<sup>115</sup> A few weeks later, the brothers again confronted Smith; this time Smith shot and killed one of them and claimed the shooting was in self-defense under the SYG law.<sup>116</sup> Even though Smith was a known drug dealer<sup>117</sup> and the threatening encounter was instigated by a dispute over drug territory, the prosecutor declined to file charges.<sup>118</sup>

When analyzing the encounter between Smith and the brothers in a vacuum, Smith was in compliance with all provisions of the SYG law at the time of the shooting: his use of deadly force was necessary to prevent imminent and serious bodily harm, and he therefore had no duty to retreat and could “stand his ground.”<sup>119</sup> Yet, if the circumstances that preceded the incident were taken into account, it is unfortunate that the law would still provide Smith an SYG defense. Smith’s inherently dangerous line of work as a drug dealer was the primary circumstance that contributed to the threatening encounter.<sup>120</sup> Smith, as a drug dealer, knowingly or recklessly placed himself in a situation in which it was foreseeable or even probable that he would be subjected to an attack.<sup>121</sup> Accordingly, the law should not afford Smith the protection of an SYG defense; instead, Smith should have to prove a *standard* self-defense in that he satisfied his duty to retreat before shooting the assailant.<sup>122</sup>

A provision denying a defendant a specific defense if he “knowingly” or “recklessly” places himself in the predicament is not new to American Jurisprudence.<sup>123</sup> This provision is widely used under the law of “duress.”<sup>124</sup> In Utah, for example, a duress defense is unavailable to a person who “intentionally, knowingly, or recklessly places himself in a situation in which it is *probable* that he will be subjected to duress.”<sup>125</sup> In Colorado, a duress defense is not available when a person “intentionally or recklessly places himself in a situation in which it is *foreseeable* that he will be subjected to such force or threatened use thereof.”<sup>126</sup> The MPC, as well, affirms that duress is “unavailable if the actor recklessly placed

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115. *Id.*

116. *Id.*

117. *Id.* (Smith had a pending drug warrant at the time of the shooting).

118. *Id.*

119. FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (that Smith’s use of deadly force was necessary to prevent imminent and serious bodily harm and that he could stand his ground is presumably what the prosecutor concluded when he decided not to file charges).

120. *Hundley*, *supra* note 112. Smith had a history of misdemeanor drug possession. *Id.* Smith also had been charged for selling crack cocaine and marijuana to police officers on two occasions. *Id.*

121. Fact Sheet – Drug Related Crime, Drugs and Crime Data, U.S. Department of Justice, Office of Justice Programs - Bureau of Justice Statistics (1994), available at <http://bjs.gov/content/pub/pdf/DRRC.PDF> [hereinafter *Bureau of Judicial Statistics*] (Violent crimes tend to be associated with the sale of drugs—the reasons include: “competition for drug markets and customers” and “disputes and rip-offs among individuals involved in the illegal drug market.”).

122. *See Weiland v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

123. *See, e.g.*, MODEL PENAL CODE § 2.09(2) (2001).

124. *See id.*

125. UTAH CODE ANN. 1953 § 76-2-302(2) (West 2013); CONN. GEN. STAT. ANN. § 53a-14 (West 2013).

126. COLO. REV. STAT. § 18-1-708 (West 2013).

himself in a situation in which it was *probable* that he would be subjected to duress.”<sup>127</sup>

Courts have even denied the duress defense to an actor who recklessly places himself in the situation days, weeks, or even years prior to the time of the alleged duress.<sup>128</sup> In *Williams v. Maryland*, the defendant robbed an establishment with the purpose of settling a debt with a drug organization.<sup>129</sup> The defendant claimed a duress defense because the men to whom he owed the money coerced him to commit the robbery under a threat of force.<sup>130</sup> The court disagreed and held that since the situation was of Mr. Williams’s own making, he should not be afforded the defense.<sup>131</sup> The court stated that the defendant’s prior conduct “contributed mightily to the predicament” in which he later found himself.<sup>132</sup> The court reasoned that the defendant voluntarily became involved in the drug organization by borrowing money from it and by making previous drug runs for it.<sup>133</sup>

If the duress exception were modified to fit the SYG law, in that *an actor is denied the defense if he intentionally, knowingly, or recklessly places himself in a situation in which it is foreseeable that he will be subjected to attack*, a drug dealer, such as in the above case of Tavarious China Smith, would not be afforded an SYG defense if attacked by drug-dealing competitors. When applying the “foreseeability”<sup>134</sup> provision to Smith’s encounter with the brothers, the risk of

127. MODEL PENAL CODE § 2.09(2) (emphasis added):

The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

*Id.* Under the law of duress, “recklessly” is defined as:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.

*State v. Heinemann*, 920 A.2d 2708, 295 (Conn. 2007). *See also* *Commonwealth v. DeMarco*, 809 A.2d 256, 262 (Pa. 2002) (holding that, “like the test for determining whether the defendant was subject to duress, the test for determining whether a defendant acted recklessly . . . is a hybrid objective-subjective [standard].”) (Citations omitted).

128. *See Williams v. State*, 646 A.2d 1101, 1110 (Md. Ct. Spec. App. 1994). *See also Meador v. State*, 664 S.W.2d 878, 881 (Ark. Ct. App. 1984) (holding that “[d]uress is not a defense if [the actor] recklessly placed himself in a situation in which it was reasonably foreseeable that he would be subjected to the force or threatened force”).

129. *Williams*, 646 A.2d at 1103.

130. *Id.*

131. *Id.* at 1110

132. *Id.*

133. *Id.*

134. *See Benjamin Zipursky, Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE F. L. REV. 1247, 1254 (2009) [hereinafter *Zipursky*]. “Foreseeability” comes with an aspect of risk. Risk and foreseeability

Smith having violent encounters with other drug dealers is at or near the top of foreseeable dangers inherent in his criminal trade.<sup>135</sup> Therefore, Smith would not be afforded an SYG defense since he knowingly placed himself in the situation.<sup>136</sup>

If on the other hand, a homeless man attacked a known violent drug dealer with a knife demanding the drug dealer's coat, the proposed modification to the SYG law would still afford the drug dealer the law's protection. The drug dealer would not have recklessly or knowingly placed himself, by means of his of illegal profession, in a situation in which it was foreseeable that he would be subjected to attack. A drug dealer is no more likely than any ordinary citizen to be robbed of his coat by a homeless man in a non drug-related confrontation. That risk is simply not one inherent in the sale of drugs.<sup>137</sup>

In 2006, Jacqueline Galas, a prostitute, while at the residence of a client, shot and killed the client after he threatened to kill her.<sup>138</sup> The prosecutor declined to file charges against Galas, citing the SYG law.<sup>139</sup> Critics argued that the affirmative defense should not have applied to Galas since she shot her client while acting in the unlawful capacity as a prostitute.<sup>140</sup> Since Galas recklessly or knowingly placed herself in the situation in her capacity as a prostitute, the SYG law, modified with the above suggestions, would not afford her a SYG defense. Her encounter with a client who threatened to kill her was a foreseeable danger inherent in the prostitution trade.<sup>141</sup> For this reason, Galas would only have the standard self-defense available to her since she recklessly placed herself in the foreseeably dangerous situation.<sup>142</sup>

If the same man, however, confronted Galas after her car became stranded in a crime-ridden neighborhood because she recklessly forgot to fill her tank with gas, the proposed modification would provide her a SYG defense. Her profession as a prostitute would be irrelevant. The foreseeable risk of recklessly not filling her car

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are not one in the same but substantially overlap. *Id.* The classic example of the "risk test" is handing a loaded gun to a young child who drops the gun, breaking his foot. *Id.* at 1253. The law forbids recovery of damages against the actor who handed the loaded gun to the child, reasoning that the "risk" of handing a loaded gun to a child is that the gun may accidentally discharge, and not that it would break a child's foot when dropped. *Id.*

135. See *Bureau of Judicial Statistics*, *supra* note 119.

136. Take again the example of the pedestrian carrying two grams of marijuana who is confronted by armed assailants who demand his wallet—under this example, if it is determined that the marijuana, and not the wallet, motivated the attack, the pedestrian would not be afforded an SYG defense under the proposed "foreseeability" modification.

137. In this scenario, the homeless man is "at fault."

138. See *Zbrzezni*, *supra* note 95, at 261.

139. *Id.* at 262

140. *Id.*

141. *Prostitution: The "World's Oldest" and Most Dangerous Profession*, PROJECT SOCIAL ART.COM (November 12, 2011), <http://projectsocialart.com/blog/2011/11/12/prostitution-the-%E2%80%98world%E2%80%99s-oldest%E2%80%99-and-most-dangerous-profession/>. Some reports indicate that clients of street-prostitutes account for 60% of the abuse against them; police account for 20% of abuse; and partners account for 20% of abuse. *Id.* (citing to MARGO ST. JAMES, *WHAT'S A GIRL LIKE YOU...?* (1980)). Another study found that up to 80% of prostitutes have been assaulted. *Id.* (citing to SAN FRANCISCO BAY AREA HOMELESS PROJECT: HOMELESSNESS AND SURVIVAL SEX, <http://www.bayswan.org/homeless.html> (last visited October 10, 2014)).

142. See *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

with gas is that the car would stall; the risk is not that she would be accosted in a high-crime area.<sup>143</sup>

Combining the “true man” doctrine, the MPC, and the modified “foreseeable” exception borrowed from the law of duress, the “unlawful activity” provision should be expunged and the SYG law should be revised as follows:

A person who [] is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony, *unless the person was: (1) at fault in provoking the attack; or (2) intentionally, knowingly, or recklessly placed himself or herself in a situation in which it was foreseeable or probable that he or she would be subjected to attack.*<sup>144</sup>

One predictable criticism to the above-proposed modifications to the SYG law is that the modifications would do little to curtail the use of illegal firearms in the commission of a SYG defense. Under the aforementioned drug dealer example, if the drug dealer used an illegal gun in a SYG defense against the homeless man who demanded his coat, the proposed modification to the SYG law would do little to give a court any guidance. Since the use of the illegal weapon would have no nexus with the incident, a court may struggle with whether to deny the drug dealer the use of the affirmative defense.

To rectify this potential ambiguity in the proposed modification, the revised SYG statute should have an additional provision that simply states: “*A person is not justified under this statute if the deadly force used against another is with an illegal firearm.*”<sup>145</sup> Along with the additional provision giving more guidance to the courts, an added benefit of the provision is that it may potentially, albeit only slightly, curtail the purchase and/or carrying of illegal firearms. The provision would do so by placing citizens on notice that even the use of deadly force under

<sup>143.</sup> See *Zipurski*, *supra* note 132.

<sup>144.</sup> FLA. STAT. § 776.013(3) (2013) (amended June 20, 2014) (emphasis added). See *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 2, at 5.

<sup>145.</sup> See, e.g., 18 PA. CONSOL. STAT. ANN. § 505(b)(2.3) (2013), which implies that the use of an illegal firearm will invalidate an SYG defense claim by stating that simple possession of an illegal firearm is sufficient to void the affirmative defense:

An actor who is not engaged in a criminal activity, who is not in illegal possession of a firearm and who is attacked in any place where the actor would have a duty to retreat under paragraph . . . has no duty to retreat and has the right to stand his ground and use force. . . .

*Id.* See *Dawkins v. State*, 252 P.3d 214, 217 (Okla. 2011) (holding that use of an illegally modified weapon (sawed-off shotgun) in the commission of self-defense under the SYG law is an “unlawful act”).

valid circumstances pursuant to the SYG law would be unauthorized if it involved an illegal firearm.

#### IV. CONCLUSION

Justice Oliver Wendell Holmes once related, when opining on the law of self-defense, that the “failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went further than he was justified in doing; not a categorical proof of guilt.”<sup>146</sup> With this passage, some commentators have suggested that Justice Holmes was simply articulating that there is neither a duty to retreat nor a right to stand your ground when facing deadly encounters;<sup>147</sup> rather, there are just a plethora of subjective interpretations used by the court to determine whether the actor was justified in using deadly force in self-defense.<sup>148</sup>

The modifications proposed in this note are undeniably adding to the subjective interpretations already enveloping the law of self-defense. Still, since the SYG law endorses greater leeway than standard self-defense for an actor to use deadly force, the law should also provide greater safeguards to ensure that the use of deadly force is not pervasive.<sup>149</sup> Indeed, there is no greater demand on the laws of any society than to protect and value human life. Thus, framing the threatening encounter,<sup>150</sup> by factoring in all relevant circumstances leading up to it, should be essential in order for citizens to feel “safe and secure.”<sup>151</sup>

#### V. ADDENDUM: RECENT CHANGES TO THE “STAND YOUR GROUND” LAW

In 2014, less than ten years after being the first state to enact the SYG law, the Florida legislature incorporated several changes to the law.<sup>152</sup> On top of the public

146. *Brown v. United States*, 256 U.S. 335, 343 (1921).

147. *See Stephens*, *supra* note 108, at 653. Like-minded with Justice Holmes, some commentators argue that there should be a middle-ground analysis between the duty to retreat and the right to stand your ground, in that there should be “balance between the necessity of the non-aggressor to protect his life and liberty, and the value of the aggressor’s life.”

148. Garret Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the “Anglo-American Retreat Rule,”* 55 L. & CONTEMP. PROBS. 303, 322 (1992) (theorizing that there was no rule to retreat nor a rule to stand your ground, but just a “series of complex . . . subjective judgments” on the “physical movements of the actors, their spoken communications at the time of the incident, and their prior relationships [which] justified a finding of self-defense”).

149. *See Kay Steiger, Study: “Stand Your Ground” Laws Result in an Additional 4 to 7 Killings Per Month*, THE RAW STORY (June 27, 2012), <http://www.rawstory.com/rs/2012/06/27/study-stand-your-ground-laws-result-in-an-additional-4-to-7-killings-per-month/> (citing a study completed by the National Bureau of Economics concluding that homicide rates of white males have increased an additional four to seven killings per month from the rates prior to the law being enacted).

150. *See Margaret Raymond, Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 288 (2010) (“Framing” is when in order to determine whether the actor was “at fault” in producing the occasion, the court or fact-finder look backwards to frame the context of the encounter, reviewing all the circumstances that led up to the use of deadly force).

151. *See Governor’s Task Force on Citizen Safety and Protection*, *supra* note 7.

152. FLA. STAT. §776.013 (2013) (amended June 20, 2014); FLA. STAT. §776.012 (2013) (amended June 20, 2014).

outrage over the SYG law, the revisions were, undoubtedly, a response to the conflicting cases of *Little* and *Dorsey*. The most significant revision to the SYG law removed the “unlawful activity” provision and incorporated a “criminal activity” provision in its place.<sup>153</sup> By replacing the word “unlawful” with the word “criminal,” the legislature was also most likely responding to the recommendations by the *Governor’s Task Force*, which requested clarification for the “conduct” provision to “ensure uniform application” of the law across the state.<sup>154</sup> The new provision does shed a touch of light on some of the ambiguity in the previous provision. For instance, immigration status may be unlawful, but not criminal. Moreover, it is now clear that most ordinance infractions are no longer within the purview of the ‘conduct’ provision as those, too, may be deemed unlawful, but not criminal.<sup>155</sup>

Save for the prospective of additional guidance on ordinance infractions and immigration status, what the new provision noticeably leaves out is the most compelling issue the *Task Force* identified: the “conduct” provision’s lack of guidance on the “temporal proximity of the unlawful activity to the use of force.”<sup>156</sup> The revisions also failed to tackle many of the issues the *Task Force* neglected to point out, including the lack of a “nexus” requirement between the criminal (or unlawful) activity and the force used,<sup>157</sup> whether one is required to be charged and/or convicted of the activity that is deemed criminal;<sup>158</sup> and whether one should still be able to employ an SYG defense if he or she knowingly or recklessly placed himself or herself in a foreseeable threatening encounter.<sup>159</sup>

In its report, the *Task Force* also called for the legislature to supply a “statutory definition [of the term ‘unlawful activity’] to provide clarity to all persons, regardless of citizenship status, and to law enforcement, prosecutors, defense attorneys, and the judiciary.”<sup>160</sup> Florida’s SYG law, in its section on home

153. *Id.* Of the more than twenty states with an adaptation of the SYG law, only four states aside from Florida use some form of a “criminal activity” provision: Texas, Nevada, North Carolina, and Michigan.

154. *See Governor’s Task Force on Citizen Safety and Protection*, *supra* note 3, at 5. *See also American Bar Association National Task Force on Stand Your Ground Laws, Preliminary Report and Recommendations* (2014), p. 39 (The *American Bar Task Force* recommended that the “Stand Your Ground laws should clarify and specifically delineate the circumstances under which “unlawful activity” would operate as a bar to asserting a defense of the use of force. Specifically, the *Task Force* recommends evaluations address:

- i. Whether the commission of criminal misdemeanors, violations of municipal ordinances, or minor traffic infractions preclude the application of Stand Your Ground law; and
- ii. additional guidance to judges, prosecutors and defense attorneys of the original intent behind the unlawful activity prohibition.
- iii. Citizenship status should not be a justifiable basis to preclude individuals from utilizing a Stand Your Ground law defense.

*Id.*

155. *See Governor’s Task Force on Citizen Safety and Protection*, *supra* note 3, at 5. These recommendations were echoed by the *American Bar Association National Task Force on Stand Your Ground Laws, Preliminary Report and Recommendations* (2014), page 25.

156. *Id.*

157. *See Dawkins v. State*, 252 P.3d 214, 218 (Okla. Crim. App. 2011).

158. *See Megale*, *supra* note 11.

159. *See supra* Section III.

160. *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 3, at 5.

protection, wisely offers definitions on the terms *dwelling*, *residence* and *vehicle*,<sup>161</sup> but absent from any portion of the law, for a second straight time, is a definition for its “conduct” provision. *Black’s Law Dictionary* defines the word *criminal* as “[h]aving the character of a crime; in the nature of a crime.”<sup>162</sup> With such a broad and vague definition, it is challenging to identify, and agree on, the scope and application of the new “conduct” provision.

The Florida legislature has also now faltered twice in attaining its objective for including the “conduct” provision within the statute. Florida State Rep. David Simmons, who drafted the first SYG law, stated that the “unlawful activity” requirement was intended to exclude people from the law’s protection who were “threatening, stalking, assaulting, or battering”; were an aggressor, waving a gun at someone, or engaged in drug dealing.<sup>163</sup> Simply put, what the legislature wants is a “conduct” provision that denies someone who *initiated* the threatening encounter from using the SYG law as a defense.

Rep. Simmons’s above examples, by and large, refer to an aggressor who may wrongly use the SYG law as an affirmative defense after instigating the encounter; but in *all* of the examples conveyed by Rep. Simmons, there is a nexus between the force used and the criminal conduct. In none of his examples would the law not provide protection to an unsuspecting pedestrian carrying two grams of marijuana who is confronted by armed assailants that demand his wallet. Yet because the new provision so resembles “unlawful activity,” courts will continue to struggle mightily in weighing the threat of force by the assailant and the engagement in crime by the defender, no matter how remote the relationship with that crime is, or how distant in time that crime occurred.<sup>164</sup> Thus, even with the new revisions to the SYG law, the potential for inconsistent application of the law across the state continues to exist.<sup>165</sup>

<sup>161.</sup> The definitions were left intact following the 2014 revisions. FLA. STAT. § 776.013(5) (2013) (amended June 20, 2014).

<sup>162.</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>163.</sup> The new “criminal activity” provision is ostensibly being used for the same purpose.

<sup>164.</sup> See Hundley et. al, *supra* note 35 (finding that in almost a third of the cases the *Tampa Bay Times* reviewed, the accused was set free via the SYG law, even though the accused started the confrontation, chased the victim, or shot an unarmed citizen).

<sup>165.</sup> See *Governor’s Task Force on Citizen Safety and Protection*, *supra* note 3, at 5, (“without a clear definition of the term ‘unlawful activity’ the potential for inconsistent application of the law across the state may occur”).