

# STRENGTHENING THE LAW OF SELF-DEFENSE AFTER *BRUEN*

CYNTHIA LEE\*

*On June 22, 2022, the Supreme Court issued its opinion in New York State Rifle & Pistol Association v. Bruen, striking down New York's over 100-year-old law requiring individuals seeking to carry a firearm concealed in public to show a special need for self-protection. Holding that New York's law violated the Second Amendment, the Court rejected the means-end scrutiny that lower courts had previously used to determine whether firearms restrictions comported with the Second Amendment, explaining that the appropriate test for evaluating the constitutionality of a firearms restriction is whether it is consistent with the Second Amendment's text and historical understanding. The plain text of the Second Amendment, however, does not explicitly say private citizens have a right to carry firearms in public. Instead of acknowledging this, the Court focused on the fact that the text of the Second Amendment draws no distinction between the possession of firearms in the home and the possession of firearms in public. The Court then proceeded to cherry pick which historical sources it found relevant, rejecting sources that supported upholding the New York law and finding persuasive only those that supported its conclusion that individuals have a Second Amendment right to carry firearms outside the home. One result of Bruen is that states now have fewer tools to limit the number of individuals who can lawfully carry a firearm in public.*

*To reduce gun violence in public, legislators can try to regulate firearms on the front end by limiting those who can carry firearms in public. Alternatively, legislators can try to regulate firearms on the back end by discouraging those who choose to carry in public from unjustifiably using their firearms to injure or kill others. Since Bruen limits "front-end" regulation, it is a particularly opportune time to explore the effectiveness of "back-end" regulation.*

*This Article argues that lawmakers should add reform of back-end laws to their arsenal of tools to deal with the epidemic of gun violence that afflicts our country. While a variety of laws can be amended to discourage the unjustifiable use of firearms, this Article focuses on just one body of law that is uniquely situated to discourage the unjustifiable use of firearms: the law of self-defense. Self-defense law is uniquely positioned to inform whether and when an individual chooses to use their firearm to threaten, injure, or kill another person in light of the Supreme Court's declaration in Heller that self-defense is at the core of the Second Amendment. The Article examines a few ways the law of self-defense can be strengthened to discourage the unjustifiable use of firearms in public.*

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INTRODUCTION . . . . .	1906
I. A PRIMER ON THE LAW OF SELF-DEFENSE . . . . .	1909
II. STRENGTHENING THE LAW OF SELF-DEFENSE . . . . .	1915
A. <i>Substantive Strengthening</i> . . . . .	1916
1. <i>The Necessity Requirement</i> . . . . .	1917
2. <i>Proportionality</i> . . . . .	1919
3. <i>Imminence</i> . . . . .	1920
4. <i>Initial Aggressors</i> . . . . .	1921
B. <i>Procedural Strengthening</i> . . . . .	1922
1. <i>Burden of Proof</i> . . . . .	1922
2. <i>Immunity Provisions</i> . . . . .	1925
CONCLUSION . . . . .	1927

## INTRODUCTION

The Supreme Court's recent decision in *New York Rifle & Pistol Association v. Bruen* is highly consequential.<sup>1</sup> By holding unconstitutional New York's licensing scheme that required applicants seeking to carry a firearm concealed in public to show a special need for self-defense,<sup>2</sup> *Bruen* makes it harder for state legislatures to pass common-sense laws regulating firearms.

The United States already has the highest number of guns per capita in the world.<sup>3</sup> It also has the highest firearm homicide rate per capita in the developed world.<sup>4</sup> By relaxing the restrictions states can place on

<sup>1</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>2</sup> *Id.* at 2156.

<sup>3</sup> German Lopez, *America's Love for Guns, in One Chart*, Vox (June 21, 2018, 12:30 PM), <https://www.vox.com/2018/6/21/17488024/gun-ownership-violence-shootings-us> [<https://perma.cc/Z4QV-H97G>]; AARON KARP, SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 tbl.2 (2018), <https://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf> [<https://perma.cc/37RN-KLCQ>].

<sup>4</sup> See German Lopez, *America's Gun Problem*, N.Y. TIMES (May 26, 2022) <https://www.nytimes.com/2022/05/26/briefing/guns-america-shooting-deaths.html> [<https://perma.cc/3CWA-QWHQ>], for a chart entitled "Gun Ownership and Homicide Rates in Developed Countries," which depicts the drastic gap in homicide rates between the United States and countries such as Canada, France, Portugal, Germany, Spain, Belgium, and Australia. See also Kara Fox, Krystina Shveda, Natalie Croker & Marco Chacon, *How US Gun Culture Stacks Up with the World*, CNN (Apr. 10, 2023, 10:40 AM), <https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html> [<https://perma.cc/X4ZW-8SFG>]; Jaclyn Schildkraut, *Updated Insights from the Gun Violence Data Dashboard*, ROCKEFELLER INST. OF GOV'T, <https://rockinst.org/blog/updated-insights-from-the-gun-violence-data-dashboard> [<https://perma.cc/S5BX-SKBQ>] ("Firearm-related deaths in the United States rose again in 2021, with 48,830 people killed, the highest number ever recorded . . . This represents an 8 percent increase over the 45,222 gun deaths that occurred in 2020 and a 69.9 percent increase over the 28,663 in 2000.").

individuals wishing to carry a firearm in public, *Bruen* makes it more likely that these numbers will go up, not down, in the future.<sup>5</sup>

In attempts to reduce gun violence, one can try to regulate on the front end to limit purchase and public carry or on the back end to limit use. Since *Bruen* limits “front-end” regulation,<sup>6</sup> it is a particularly opportune time to explore the effectiveness of “back-end” regulation.<sup>7</sup> Indeed, the more we relax the laws regulating guns on the front end, the more important it becomes to strengthen the laws regulating guns on the back end. It is particularly important, in light of *Bruen*, to use both the expressive and deterrent function of the criminal law to send a clear message to those who own or possess firearms that it is not okay to use a firearm to unjustifiably threaten, harass, injure, or kill another person.

Aside from a few recently published or forthcoming articles,<sup>8</sup> reform of back-end laws as a means of dealing with permissive public

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<sup>5</sup> Following *Bruen*, there was an increase in applications for concealed carry gun permits, i.e., permits to carry firearms concealed in public, in states which previously required a showing of “good cause” to carry a firearm in public. See, e.g., Fredrick Kunkle, *Supreme Court Ruling Sets Off Rush for Concealed Gun Permits in Maryland*, WASH. POST (July 18, 2022), <https://www.washingtonpost.com/dc-md-va/2022/07/15/concealed-carry-maryland-guns-hogan> [<https://perma.cc/8FN9-8PT5>]; Robert Brodsky, *LI Applications Spike for Concealed Carry Gun Permits After Supreme Court Ruling*, NEWSDAY (July 9, 2022), <https://www.newsday.com/long-island/concealed-carry-gun-permit-application-spike-long-island-vne6998> [<https://perma.cc/5RQR-L5EL>] (describing increase in applications on Long Island); *The Future of Concealed Carry Permits in California*, SPECTRUM NEWS (July 12, 2022), <https://spectrumnews1.com/ca/la-west/inside-the-issues/2022/07/13/the-future-of-concealed-carry-permits-in-california> [<https://perma.cc/S4TX-HXSL>] (noting a post-*Bruen* increase in permits issued by the Los Angeles County Sheriff’s Department). Research suggests that permissive right-to-carry laws are associated with an increase in violent crime. See John J. Donahue, Abhay Aneja, & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 200 (2019) (noting that right-to-carry laws increase rather than decrease violent crime); Emma E. Fridel, *Comparing the Impact of Household Gun Ownership and Concealed Carry Legislation on the Frequency of Mass Shootings and Firearms Homicide*, 38 JUST. Q. 892, 904 (2021) (finding that “firearms homicide was more likely to occur in areas with more permissive concealed carry laws”).

<sup>6</sup> By “front-end” regulation, I mean the rules and regulations that apply before an individual uses a firearm. Front-end regulation would include laws governing the purchase of firearms and laws regulating the ability to carry guns in public.

<sup>7</sup> By “back-end” regulation, I mean rules and regulations that come into play after a firearm is used. Back-end regulation would, for example, include laws specifying the requirements for conviction of homicide and assault, legal rules making it easier for prosecutors to convict defendants charged with murder and other crimes of violence, laws regulating claims of self-defense, and laws increasing the penalties for crimes committed while using a firearm.

<sup>8</sup> See, e.g., Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1 (2022) (arguing that lawmakers should strengthen the initial aggressor doctrine to discourage gun violence); Eric Ruben, *Public Carry and Criminal Law After Bruen*, 135 HARV. L. REV. F. 505, 506 (2022) (noting ways that the criminal law both advantages and disadvantages gun carriers through the deadly weapon doctrine and what Ruben calls the “he was going for

carry laws and increasing gun violence in this country has largely been overlooked. Much of the post-*Bruen* focus in states that previously required a showing of special need has been on the front end, with legislators looking for ways to continue regulating public carry of firearms consistent with *Bruen*. For example, in the wake of *Bruen*, the New York legislature passed a law prohibiting the carrying of handguns in certain sensitive locations, including schools, libraries, and parks.<sup>9</sup> The new law also prohibits the bringing of concealed firearms into a private business unless the business expressly agrees to allow firearms.<sup>10</sup>

Given the increase in applications for public carry permits following *Bruen*<sup>11</sup> and the limitations on regulating public carry imposed by *Bruen*, I argue that states concerned about reducing gun violence should focus their efforts on strengthening back-end laws regulating the use of firearms, as opposed to simply modifying front-end laws regulating the public carry of firearms to comport with *Bruen*. I recognize that attempts to strengthen laws regulating gun use on the back end are likely to meet with objections from both the left and the right. Some on the left will argue that strengthening laws regulating the use of firearms is a bad idea because such efforts will worsen the problem of mass incarceration.<sup>12</sup> Some on the right will likely complain that such strengthening will infringe on individuals' Second Amendment rights.<sup>13</sup>

It is beyond the scope of this Article to comprehensively address these critiques. My quick response to the left is that if someone has

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my gun" defense); Eric A. Johnson, *When Provocation Is No Excuse: Making Gun Owners Bear the Risks of Carrying in Public*, 69 *BUFF. L. REV.* 943 (2021) (proposing that the heat-of-passion defense should not be available if the defendant carried a loaded gun in public and used that gun to kill his provoker).

<sup>9</sup> See, e.g., Praveena Somasundaram, Andrew Jeong & Meryl Kornfield, *N.Y. Passes Law on Guns, Starts Abortion Rights Process After Supreme Court Rulings*, *WASH. POST* (July 1, 2022), <https://www.washingtonpost.com/nation/2022/07/01/new-york-restrictions-guns-abortion-roe/> [<https://perma.cc/U9ZX-ZXUC>] (noting that "New York was forced to narrow its regulations after the Supreme Court ruled that the law was too restrictive" and that "Justice Clarence Thomas, who wrote the [*Bruen*] ruling, affirmed that authorities still could prohibit the carrying of firearms in specific 'sensitive places,' such as schools and government buildings").

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* note 51.

<sup>12</sup> See, e.g., Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 *U. MIA. L. REV.* 961, 1014–21 (2014) (arguing that attempts to narrow self-defense laws by progressives concerned about the racial inequities of Stand Your Ground laws reflect a punitive impulse that augments police and prosecutorial power).

<sup>13</sup> See Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 *U. COLO. L. REV.* 1029, 1080 (1998) (opposing attempts to strengthen self-defense doctrine on the ground that such efforts will work to the disadvantage of armed law-abiding citizens, making them "a more submissive population less capable of self-defense").

used a firearm to kill, injure, or threaten another person without justification, I don't think that person should be able to easily avoid being held accountable by simply asserting a claim of self-defense. My quick response to the right is that the Second Amendment right to keep and bear arms just gives one a right to possess or carry a firearm for the purpose of self-defense. It does not give one the right to *use* that firearm regardless of the circumstances.<sup>14</sup> Self-defense law controls whether one's use of a firearm was in fact in self-defense.<sup>15</sup>

While many different types of laws can apply on the back end to one who has used a firearm in a way that threatens or causes physical injury to another, I will focus on just one body of law in this essay: the law of self-defense. Part I provides a primer on self-defense law. Part II discusses a variety of ways in which the law of self-defense can be strengthened to discourage or punish firearm use in public.

## I

### A PRIMER ON THE LAW OF SELF-DEFENSE

As a general matter, a defendant claiming self-defense must have had an honest and reasonable belief that she was being threatened with an imminent threat of unlawful force and that the force she used was necessary to repel the threat and proportionate to the threatened force.<sup>16</sup> The law of self-defense thus includes an imminence or immediacy requirement,<sup>17</sup> a necessity requirement,<sup>18</sup> and a proportionality requirement,<sup>19</sup> all overlaid with an honest and reasonable belief requirement.<sup>20</sup> While the law of self-defense may vary from state to state, these general features of self-defense are present in the majority of states and serve as a useful basis from which to start our analysis.

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<sup>14</sup> E.g., Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1537 (2009) ("The right to keep and bear arms in lawful self-defense doesn't include the right to use those arms in a crime.").

<sup>15</sup> A Second Amendment enthusiast might argue that strengthening the law of self-defense will narrow the scope of situations in which individuals may legally keep and bear arms and thus infringe on their Second Amendment rights. Strengthening the law of self-defense, however, does not impinge on anyone's right to keep and bear arms. The Second Amendment right is *not* a right to *use* a firearm to threaten, injure, or kill another person. If one uses a firearm in a way that threatens or harms another person and claims one did so in self-defense, then one must answer to self-defense law, which controls whether one's use or threatened use of a firearm was in self-defense.

<sup>16</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01[B] (8th ed. 2018).

<sup>17</sup> 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(d) (3d ed. 2017).

<sup>18</sup> *Id.* § 10.4(c).

<sup>19</sup> 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d), Westlaw (database updated July 2023).

<sup>20</sup> DRESSLER, *supra* note 16, § 18.01[E].

Imminence, necessity, and proportionality in self-defense doctrine are not absolute requirements. As Professor Addie Rolnick observes, the defendant does not have to be correct in his or her belief that the force used was in fact necessary to defend against an imminent threat of unlawful force.<sup>21</sup> As long as the defendant honestly and reasonably believed in the need to act in self-defense, she may be acquitted even if her belief was mistaken.<sup>22</sup>

Even without the honest and reasonable belief overlay, necessity, imminence, and proportionality are not absolute requirements for a successful self-defense claim. Many states, for example, allow an individual who is in a public place to use deadly force in self-defense without retreating even if a safe retreat is available.<sup>23</sup> If an individual can safely retreat and avoid a conflict through means other than using deadly force, arguably their use of deadly force in self-defense is not truly necessary.<sup>24</sup>

No-duty-to-retreat provisions in self-defense statutes are often called “Stand Your Ground” laws because they allow individuals to stand their ground and use deadly force in self-defense rather than avoid a physical confrontation by retreating.<sup>25</sup> Legal scholars have discussed various ways in which Stand Your Ground laws are highly problematic. For example, Mario Barnes observes that some empirical data suggests that Stand Your Ground laws may be associated with an increase in homicides and may also have significant racialized effects.<sup>26</sup>

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<sup>21</sup> Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1660 (2019).

<sup>22</sup> *Id.*

<sup>23</sup> Cynthia C. Ward, “Stand Your Ground” and Self-Defense, 42 AM. J. CRIM. L. 89, 90 (2015) (“[M]ore than thirty states have adopted a ‘Stand Your Ground’ (No Retreat) rule which bars the prosecution of people who use deadly force against a deadly aggressor without first attempting to retreat, or offers such persons a valid self-defense claim against a charge of criminal homicide . . . .”); see also *Guns in Public: Stand Your Ground*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws> [<https://perma.cc/D89H-SKSF>] (noting that 30 states have enacted Stand Your Ground laws and in eight other states, courts have eliminated the traditional duty to retreat in public rule).

<sup>24</sup> *E.g.*, *People v. Riddle*, 649 N.W.2d 30, 40 (Mich. 2002) (“If it is possible to safely avoid an attack then it is not necessary, and therefore not permissible, to exercise deadly force against the attacker.”). *But see* *Commonwealth v. Hasch*, 421 S.W.3d 349, 361–62 (Ky. 2013) (“We do not consider, as part of the ‘necessity’ for using force, whether a victim of an actual attack could have averted the danger by evading the attacker.”).

<sup>25</sup> Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIA. L. REV. 827, 832–33 (2013); Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J. L. ECON. & POL’Y 331, 342 (2006); Kimberly Kessler Ferzan, *Stand Your Ground*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 731, 731 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

<sup>26</sup> Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179, 3192–96 (2015) (noting that while several reports indicate Stand Your Ground laws have racialized effects, the results from the available studies are inconclusive).



Similarly, Elizabeth Megale highlights the racial disparity in outcomes for individuals in Florida, a state with a Stand Your Ground law. She notes that a study of over 200 self-defense cases in Florida suggested that “people who killed a black person walked free 73[%] of the time, while those who killed a white person went free [only] 59[%] of the time.”<sup>27</sup> As Aya Gruber observes, “Stand-your-ground laws have come to symbolize, especially for many in the center-to-left, the intense racial injustice of the modern American criminal system.”<sup>28</sup>

States that impose a duty to retreat prior to using deadly force in public reflect stricter adherence to the idea that deadly force should only be used when necessary.<sup>29</sup> However, even in these duty-to-retreat jurisdictions, under what is known as the “castle doctrine,” one does not have a duty to retreat if attacked in the home.<sup>30</sup> As Catherine Carpenter explains, the castle doctrine serves as an exception to the duty to retreat in these jurisdictions.<sup>31</sup>

Courts also vary in terms of how rigorously they apply the imminence requirement. The word “imminence” in the context of self-defense is generally understood to mean impending or about to happen.<sup>32</sup> Some courts, however, have relaxed the imminence requirement in the

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<sup>27</sup> Elizabeth B. Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 273 (2013) (quoting Susan Taylor Martin, *Race Plays Complex Role in Florida’s ‘Stand Your Ground’ Law*, TAMPA BAY TIMES (Feb. 17, 2013), <https://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152> [<https://perma.cc/XK4N-URJQ>]).

<sup>28</sup> Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961, 962 (2014).

<sup>29</sup> See generally Commonwealth v. Toon, 773 N.E.2d 993, 1005 (Mass. App. Ct. 2002) (“Before either nondeadly force or deadly force may be invoked the duty to retreat must be observed.”); State v. Quarles, 504 A.2d 473, 475 (R.I. 1986) (“Before resorting to the use of deadly force, the person attacked must attempt retreat if he or she is consciously aware of an open, safe, and available avenue of escape.”).

<sup>30</sup> E.g., State v. Fetzik, 577 A.2d 990, 994–95 (R.I. 1990) (“[D]efendant was under no duty to retreat when the assailant had entered defendant’s dwelling.”); Commonwealth v. Gregory, 461 N.E.2d 831, 832 (Mass. App. Ct. 1984) (“[T]here is no obligation on the part of an occupant of a dwelling to retreat if he acts in a reasonable belief that a person unlawfully in his dwelling is about to inflict great bodily injury or death upon him”).

<sup>31</sup> Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 656–57 (2003) (“Generally, under the Castle Doctrine, those who are unlawfully attacked in their homes have no duty to retreat, because their homes offer them the safety and security that retreat is intended to provide.”). Some jurisdictions have recognized an exception to the castle doctrine for cohabitants and require retreat prior to using deadly force in the home if the defendant and the victim are cohabitants. *Id.* at 658–59. Catherine Carpenter argues that these jurisdictions have improperly rejected the castle doctrine and points out that “the effect of these rulings is to rob intimates who are faced with violence [in the home] of their basic and fundamental right of self-defense.” *Id.* at 660.

<sup>32</sup> See, e.g., Commonwealth v. Sands, 553 S.E.2d 733, 736 (Va. 2001); Porter v. State, 166 A.3d 1044, 1059 (Md. 2017).

domestic violence context, allowing homicide defendants who claim they were the victim of domestic violence to argue they acted in self-defense even if they killed their abuser during a lull in the violence when an attack was not impending or about to happen.<sup>33</sup> For example, in *State v. Gallegos*, a New Mexico court permitted a woman who shot and stabbed her abusive husband while he was lying in bed to argue that she had acted in self-defense.<sup>34</sup> Similarly, in *State v. Allery*, a woman shot and killed her abusive husband while he was lying on the couch.<sup>35</sup> Even though the decedent was not attacking the defendant when she shot him, the *Allery* court allowed the defendant to argue she acted in self-defense.<sup>36</sup> Many courts, however, do not allow an individual who kills an abuser during a lull in the violence to argue self-defense. These courts reason that self-defense does not apply unless the defendant was facing an imminent or immediate threat of death or serious bodily injury and if the victim was not attacking or about to attack the defendant, then there was no imminent threat.<sup>37</sup>

Proportionality is another element of self-defense doctrine that appears to have some elasticity. As a general matter, proportionality is only an issue when the defendant used deadly force. An individual's use of nondeadly force is rarely challenged on proportionality grounds because an individual may use nondeadly force against either nondeadly force or deadly force.<sup>38</sup> When an individual uses

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<sup>33</sup> See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 819–20 (N.D. 1983) (reversing conviction of a woman who stabbed her husband to death while he was sleeping and ordering a new trial on the ground that the trial court's instruction to the jury on self-defense erroneously applied an objective standard of reasonableness rather than a subjective standard); Dan Bilefsky, *Wife Who Fired 11 Shots is Acquitted of Murder*, N.Y. TIMES (Oct. 6, 2011), <https://www.nytimes.com/2011/10/07/nyregion/barbara-sheehan-who-killed-husband-is-found-not-guilty-of-murder.html> [<https://perma.cc/TW7V-TK22>] (reporting acquittal of woman charged with second-degree murder who allegedly shot her abusive husband eleven times with two different guns while he was shaving and argued that she acted in self-defense).

<sup>34</sup> *State v. Gallegos*, 719 P.2d 1268, 1269, 1275 (N.M. Ct. App. 1986).

<sup>35</sup> *State v. Allery*, 682 P.2d 312, 317 (Wash. 1984).

<sup>36</sup> *Id.* at 314.

<sup>37</sup> See, e.g., *State v. Stewart*, 763 P.2d 572, 577 (Kan. 1988) (rejecting claim of self-defense by a woman who killed her abusive husband, explaining that “to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor”); *State v. Walker*, 700 P.2d 1168, 1172, 1173 (Wash. Ct. App. 1985) (affirming a conviction where the defendant, the victim of an abusive relationship, stabbed her husband in the back when he was not making any threatening moves against her at that time, explaining, “Mrs. Walker’s own description of the confrontation did not supply a sense of imminent peril”); *State v. Norman*, 378 S.E.2d 8, 16 (N.C. 1989) (“[W]e decline to expand our law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified . . .”).

<sup>38</sup> DRESSLER, *supra* note 16, § 18.01[D] (“Assuming all of the other elements of the defense apply, a person *may* use non-serious force to repel a minor physical threat; he may also use such force against a *deadly* threat . . .”).



deadly force, however, the general rule is that the individual must have honestly and reasonably believed they were being threatened with deadly force.<sup>39</sup>

Deadly force is often defined as force likely or intended to cause death or serious bodily injury.<sup>40</sup> While one might think the proportionality requirement means that an individual with a gun could only shoot another individual armed with a gun, this is not the case. Even an unarmed individual can threaten another with deadly force. For example, an individual who is squeezing another person's neck with the capability and intent of killing that person is using force likely or intended to cause death or serious bodily injury.

In addition to imminence, necessity, and proportionality, an individual is justified in using physical force against another person only if the threatened attack was, or the defendant reasonably believed it to be, unlawful.<sup>41</sup> If, for example, a uniformed police officer is lawfully attempting to arrest an individual, many jurisdictions will preclude the

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<sup>39</sup> *People v. Riddle*, 649 N.W.2d 30, 34 (Mich. 2002) (“[T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if . . . he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force.”).

<sup>40</sup> *E.g.*, *Commonwealth v. Cataldo*, 668 N.E.2d 762, 764 (Mass. 1996) (“Deadly force is defined . . . as ‘force intended or likely to cause death or great bodily harm.’” (quoting *Commonwealth v. Klein*, 363 N.E.2d 1313, 1316 (Mass. 1977))); TEX. PENAL CODE ANN. § 9.01(3) (West 2021) (“‘Deadly force’ means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.”).

<sup>41</sup> *LAFAVE*, *supra* note 17, § 10.4(a). Courts interpreting self-defense statutes typically require only a reasonable belief that the triggering force was unlawful, not that the force was in fact unlawful. *See State v. Oliphant*, 218 P.3d 1281, 1290 (Or. 2009) (en banc) (“[I]n general, a person’s right to use force in self-defense depends on the person’s *own* reasonable belief in the necessity for such action, and not on whether the force used or about to be used on him actually was unlawful.”); *State v. Beck*, 167 S.W.3d 767, 787 (Mo. Ct. App. 2005) (“[Missouri’s statute] does not require proof that the victim’s acts of force were actually unlawful, but only proof that the defendant ‘reasonably believed’ that they were unlawful.”), *overruled on other grounds* by *State v. Bolden*, 371 S.W.3d 802 (Mo. 2012) (en banc); *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) (finding that the Texas statute does not require evidence that “the victim was actually using or attempting to use unlawful deadly force because a person has the right to defend himself from apparent danger as he reasonably apprehends it”). This approach, allowing for a reasonable belief that the threatened force is unlawful, contrasts with state court interpretations of the unlawful entry requirement in defense of habitation statutes, typically requiring that the entry must in fact be unlawful. *See Fair v. State*, 702 S.E.2d 420, 429 (Ga. 2010) (“[G]enerally the use of force in defense of habitation is justified only where there is an *unlawful* entry.”); *State v. Hagen*, 903 P.2d 1381, 1385 (Mont. 1995) (“This Court has consistently refused to apply the defense of an occupied structure statute in cases in which the initial entry into the structure was in fact lawful.”); *People v. McNeese*, 892 P.2d 304, 310 (Colo. 1995) (en banc) (“The plain language of the [defense of habitation] statute . . . requires proof of an actual unlawful entry and not merely a reasonable belief that the entry was unlawful.”).

arrestee from using force against the officer to resist that arrest.<sup>42</sup> If, however, the officer exceeds his lawful authority by using excessive force to effectuate the arrest, most jurisdictions will permit the person being arrested to use reasonable force,<sup>43</sup> including deadly force if threatened with death or serious bodily injury, to protect himself.<sup>44</sup>

It is important to realize that the unlawful force requirement may also preclude an individual from claiming self-defense against a non-law enforcement civilian. Here, the law draws a distinction between justified and excused attacks. Unlawful in this context means unjustified.<sup>45</sup> If the attacker is justified because he himself is acting in self-defense, in defense of others, or out of necessity, then his attack will be considered lawful and the defendant will not be allowed to claim self-defense.<sup>46</sup> If the attacker is excused because of insanity, duress, or some other excuse

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<sup>42</sup> See LAFAYE, *supra* note 17, § 10.4(h) (noting that many modern codes follow the Model Penal Code by including a provision outlawing the use of force against a known police officer making an arrest, even if the arrest is unlawful); see also *Commonwealth v. Biagini*, 655 A.2d 492, 497–98 (Pa. 1995) (explaining why there is no right to resist an unlawful arrest, e.g. one lacking probable cause); *State v. Ramsdell*, 285 A.2d 399, 403–04 (R.I. 1971) (explaining rationale for rule that a citizen yield to an unlawful arrest). An individual is typically prohibited from using force to resist an arrest by a peace officer, regardless of whether it is, or the arrestee reasonably believes it to be, an illegal arrest due to lack of probable cause. See LAFAYE, *supra* note 17, § 10.4(h). At common law, an individual was justified in using force to resist an unlawful arrest, but this right has been abolished by statute in most jurisdictions. See, e.g., *Ramsdell*, 285 A.2d at 402–03 (noting that the right to resist an unlawful arrest was cognizable at common law but abolished by statute in 1941); 12 R.I. GEN. LAWS § 12-7-10 (2020) (prohibiting the use of force in resisting all arrests, including unlawful ones); CAL. PENAL CODE § 834a (2020) (same); IOWA CODE § 804.12 (2020) (same); MONT. CODE ANN. § 45-3-108 (2020) (same).

<sup>43</sup> See, e.g., *State v. Copeland*, 850 S.E.2d 736, 743 (Ga. 2020) (compiling Georgia cases permitting reasonable force in resistance to an unlawful arrest); *State v. Holley*, 480 So. 2d 94, 96 (Fla. 1985) (distinguishing between resisting an arrest and resisting the use of excessive force in making that arrest); *State v. Wright*, 799 P.2d 642, 644 (Or. 1990) (en banc) (distinguishing between the use of physical force to resist an arrest, which is unlawful, and the use of physical force to defend oneself, which may be justifiable and not criminal).

<sup>44</sup> See, e.g., *Mullis v. State*, 27 S.E.2d 91, 98–99 (Ga. 1943); *Rodriguez v. State*, 544 S.W.2d 382, 383 (Tex. Crim. App. 1976); *Robison v. United States*, 111 P. 984, 987 (Okla. Crim. App. 1910).

<sup>45</sup> See *Bennett v. State*, 726 S.W.2d 32, 36 (Tex. Crim. App. 1986) (en banc) (“[I]n claiming self-defense appellant necessarily asserts that the deadly force used against him was unjustified, and hence, unlawful.”); *State v. Trombley*, 807 A.2d 400, 406–07 (Vt. 2002) (“[T]he aggressor may reasonably defend himself against the unjustified deadly force . . . because the person using unjustified deadly force is using excessive force and is therefore acting unlawfully.”).

<sup>46</sup> See *People v. Jones*, 434 P.3d 760, 765 (Colo. App. 2018) (“[T]he touchstone of self-defense is a belief that one is defending against the *unlawful* use of force . . . . The corollary to that principle is that a person is not justified in using force to defend against another person’s lawful use of force.”); *People v. Frandsen*, 126 Cal. Rptr. 3d 640, 646 (Ct. App. 2011) (“[A] defendant may not use force to defend himself against a victim’s resort to lawful deadly force.”).

defense, the defendant will be permitted to act in self-defense because excused but unjustified conduct is considered unlawful conduct.<sup>47</sup>

Finally, most jurisdictions impose a requirement that the defendant not be the initial aggressor.<sup>48</sup> The initial aggressor limitation on the defense of self-defense precludes an individual charged with a crime of violence from claiming that his use of physical force was justified if that individual was the person who instigated the conflict.<sup>49</sup>

## II

### STRENGTHENING THE LAW OF SELF-DEFENSE

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court struck down a New York law that required individuals seeking a license to carry a concealed firearm in public to show “proper cause,” finding that the law interfered with an individual’s Second Amendment right to keep and bear arms in public.<sup>50</sup> As a result of *Bruen*, states that previously required proof of some special need above and beyond the general desire for self-protection have had to relax their laws regulating the purchase and sale of firearms for public carry.<sup>51</sup> In forcing the relax-

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<sup>47</sup> DRESSLER, *supra* note 16, § 18.02[D][2] (“[I]f V, an insane person, uses unjustifiable force upon another, this constitutes ‘unlawful force,’ notwithstanding V’s potential excuse claim.”). See also Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 206 (1998) (“When the attacker (or to-be victim) is excused rather than justified, the defendant is permitted to resist the attack because excused but unjustified conduct is considered unlawful.”). Attacks by innocent aggressors raise a host of interesting issues. For discussion of these issues, see Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFFS. 53 (1993), and George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973).

<sup>48</sup> See Lee, *Firearms and Initial Aggressors*, *supra* note 8, at 23 (“[I]n most jurisdictions, a criminal defendant who is considered an initial aggressor loses the right to claim self-defense.”).

<sup>49</sup> See *id.* at 1 (“Under the initial aggressor doctrine, a person who initiates a physical confrontation loses the right to claim self-defense.”).

<sup>50</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>51</sup> See, e.g., Paul Duggan & Ovetta Wiggins, *Hogan Orders Relaxed Rules for Maryland Concealed Handgun Permits*, WASH. POST (July 6, 2022, 12:39 PM), <https://www.washingtonpost.com/dc-md-va/2022/07/05/maryland-handgun-rules-relaxed-hogan> [<https://perma.cc/Q4DM-8UMT>] (noting that following the *Bruen* decision, Governor Larry Hogan “ordered his administration to ease [Maryland]’s licensing rules for carrying a concealed handgun”). Under the New York law struck down by the Court in *Bruen*, to establish proper cause to obtain a license without any restrictions, an applicant had to “demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). “A generalized desire to carry a concealed weapon to protect one’s person and property [would] not constitute ‘proper cause.’” *Id.* Likewise, merely “living or being employed in a ‘high crime area’” would not constitute proper cause. *Id.* at 87. In one instance, a transgender female tried to obtain a license, arguing that she was more likely to be the

ation of these firearm licensing laws, the *Bruen* decision has encouraged a spike in public carry permit applications in states that, like New York, previously restricted public carry.<sup>52</sup>

In light of the relaxation of front-end laws regulating the licensing of firearms for public carry following *Bruen*, the need to strengthen back-end laws that regulate the *use* of firearms in public is imperative. Now that states have been forced on the front end to allow virtually anyone who applies for a permit to publicly carry a firearm, the only thing left to do—for those states that want to try to reduce the rise in gun violence that will likely come from the proliferation of guns on the street—is to strengthen the laws on the back end. This Article focuses on one body of law that indirectly regulates the use of firearms on the back end—the law of self-defense.

Over the past several decades, the law of self-defense has been weakened by the passage of laws allowing individuals to use deadly force in public even when there are safe ways to avoid the threatened force<sup>53</sup> and laws shifting the burden of proving self-defense from the defendant to the government.<sup>54</sup> This Part suggests a sampling of ways the law of self-defense can be strengthened both substantively and procedurally. An in-depth exploration of each possible reform is beyond the scope of this Article.

### A. Substantive Strengthening

The basic law of self-defense can be strengthened without being radically changed. Courts can start by more stringently enforcing the necessity, imminence, and proportionality requirements that are already a part of self-defense law.

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victim of violence because of her gender identity. *Id.* at 88. The court found this reason was insufficient because she had not reported any threat to her *own* safety. *Id.*

<sup>52</sup> See, e.g., Walter Morris, *Concealed Carry Permit Applications Soar in Maryland*, NBC NEWS4 (July 12, 2022, 8:07 AM), <https://www.nbcwashington.com/news/local/concealed-carry-permit-applications-soar-in-maryland/3098367> [<https://perma.cc/877L-CD6E>] (noting that applications for concealed carry permits in Maryland increased by over 700% after *Bruen*).

<sup>53</sup> Reforms that loosen self-defense law, like Stand Your Ground laws, have often been applied differently with the race of the defendant and victim factoring into whose claims of self-defense are most successful. See *supra* text accompanying note 27. To the extent these changes increase overall violence, that violence is also likely to fall disproportionately on marginalized communities of color. See Barnes, *supra* note 26. Strengthening the law of self-defense will likely make it more difficult for criminal defendants—who are disproportionately from racially marginalized communities—to invoke self-defense law successfully. Balancing these disparate impacts of violence and the application of self-defense law is beyond the scope of this Article but warrants attention in future work.

<sup>54</sup> See *infra* Section II.B.1.

### 1. *The Necessity Requirement*

If an individual who uses a firearm in public is charged with a crime and claims self-defense, the judge should remind the jury during jury instructions that it must find the defendant honestly and reasonably believed the use of that firearm was *necessary* to protect against an imminent threat of death or serious bodily injury before returning a not guilty verdict on the ground that the defendant acted justifiably in self-defense. If a defendant knew or should have known that he could have avoided the threat without resorting to deadly force, the defendant's use of deadly force was not actually nor reasonably necessary. In many jurisdictions, however, a defendant can be found not guilty on self-defense grounds even if there was—and even if the defendant knew there was—a safe way to avoid the threatened harm, i.e., a safe retreat, but nonetheless chose to use deadly force against another person rather than retreat.<sup>55</sup>

No-duty-to-retreat rules weaken the necessity requirement in self-defense law by allowing a defendant to be acquitted when it was not actually necessary for the defendant to use deadly force against the other person. For example, let's say A is being chased by B, an unarmed person intending to harm A, and A can duck into his home, lock the door, and take cover but instead decides to take out a firearm and shoot B.<sup>56</sup> In a jurisdiction with a no-duty-to-retreat rule, A could be found not guilty on the grounds that he acted in self-defense even though it was not actually nor even reasonably necessary for A to have used deadly force against B.

One way courts can address this problem is to recognize the legislature's choice not to require retreat if one is attacked in a public place—even if a safe retreat is known and available—but allow the jury to consider whether a safe retreat was known and available to the defendant as a factor in assessing the defendant's claim of self-defense.<sup>57</sup>

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<sup>55</sup> See *supra* text accompanying notes 20–24.

<sup>56</sup> See, e.g., *Laney v. United States*, 294 F. 412, 414 (D.C. Ct. App. 1923) (noting that “when defendant escaped from the mob into the back yard of the Ferguson place, he was in a place of comparative safety, from which, if he desired to go home, he could have gone by the back way” and therefore when “he adjusted his gun and stepped out into the areaway,” this conduct “was such as to deprive him of any right to invoke the plea of self-defense”).

<sup>57</sup> See, e.g., Sara L. Ochs, Comment, *Can Louisiana's Self-Defense Law Stand Its Ground?: Improving the Stand Your Ground Law in the Murder Capital of America*, 59 *LOX. L. REV.* 673, 716–17 (2013) (noting that under Louisiana law, the trier of fact may not consider whether a safe retreat was known and available to the defendant and arguing that “whether the defendant had an opportunity to retreat should . . . at least be a factor considered during trial”). But see *LA. STAT. ANN.* § 14:20(D) (2014) (“No finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who used deadly force had a reasonable belief that deadly force was reasonable and apparently

In keeping with the no-duty-to-retreat rule, defendants would not automatically be barred from claiming self-defense if they knew there was a way to avoid the threatened harm and chose to use deadly force against the other person, but the jury would be able to consider the availability of retreat when assessing the reasonableness of a defendant's use of a firearm in public.

This is already the rule in several jurisdictions.<sup>58</sup> In these jurisdictions, the court will instruct the jury to consider whether a safe retreat was known and available to the defendant as a factor in assessing whether the defendant reasonably believed the use of deadly force was necessary or whether the defendant's use of deadly force was reasonable. For example, Wisconsin's pattern jury instructions on self-defense provide that there is no duty to retreat, but whether a safe retreat was available is a factor the jury can consider.<sup>59</sup> Similarly, the model jury instructions in Washington, D.C. provide that in deciding whether the defendant acted reasonably in self-defense, the jury should consider whether the defendant could have taken reasonable steps, such as stepping back or walking away, to avoid the danger.<sup>60</sup>

At a minimum, more states should allow the jury to consider the availability of a safe retreat as a factor in assessing the reasonableness of a defendant's use of deadly force.<sup>61</sup> Even better, legislators should *require* individuals to retreat before using deadly force in public if a safe retreat is known and available. The law should encourage actions that safeguard human life because human life is more valuable than a legislatively created right to stand one's ground. To better enforce the necessity requirement, legislators in states that currently do not impose a duty to retreat prior to using deadly force in public should pass

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necessary . . ."); MISS. CODE ANN. § 97-3-15(4) (2016) (“[N]o finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable[.]”).

<sup>58</sup> See, e.g., *People v. Crow*, 340 N.W.2d 838, 844 (Mich. Ct. App. 1983) (noting that the jury “should be informed that the possibility of a safe retreat, if the jury finds that there was such a possibility, is one of the circumstances which the jury could consider in determining whether the defendant acted in lawful self-defense”); *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999) (“While Wisconsin has no statutory duty to retreat, whether the opportunity to retreat was available may be a consideration regarding whether the defendant reasonably believed the force used was necessary to prevent or terminate the interference.”); *State v. Charles*, 634 P.2d 814, 818 n.3 (Or. Ct. App. 1981) (“Whether deadly force is necessary or whether its use is unnecessary because it can be avoided by a safe retreat or other less drastic means would seem to be more properly a subject of jury argument.”).

<sup>59</sup> WISCONSIN CRIMINAL JURY INSTRUCTIONS § 810 (2019).

<sup>60</sup> *Dawkins v. United States*, 189 A.3d 223, 228 n.6 (D.C. Cir. 2018) (citing CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 9.503 (5th ed. 2013)).

<sup>61</sup> See Chad Flanders, *Interpreting the New “Stand Your Ground” Rule*, 73 J. MO. BAR 20 (2017) (arguing that the possibility of retreat should be a relevant factor for the factfinder to consider in deciding whether the use of force was reasonable).



legislation requiring such retreat if a safe retreat is available and the defendant knew or should have known of that retreat.

## 2. *Proportionality*

In addition to the necessity requirement, courts should also enforce the proportionality requirement more strictly. If a person uses deadly force in the commission of a crime and claims they acted in self-defense, the jury is supposed to find that the defendant honestly and reasonably believed they were being threatened with deadly force before it can find the defendant not guilty on the ground of self-defense.<sup>62</sup>

Deadly force is typically defined as force intended or likely to cause death or serious bodily injury.<sup>63</sup> Courts generally agree that one who discharges a firearm at another person has used deadly force.<sup>64</sup> However, there is a split of opinion as to whether brandishing a firearm or pointing a firearm at another person constitutes deadly force.<sup>65</sup> Some states provide that pointing a firearm at another person constitutes deadly force.<sup>66</sup> Other states follow the Model Penal Code and take the position that brandishing a weapon constitutes nondeadly force.<sup>67</sup>

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<sup>62</sup> See *supra* text accompanying note 39.

<sup>63</sup> See, e.g., TEX. PENAL CODE ANN. § 9.01(3) (West 2007) (“‘Deadly force’ means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.”).

<sup>64</sup> See, e.g., *Cunningham v. State*, 159 So. 3d 275, 277 (Fla. Dist. Ct. App. 2015) (“It is now well established by this court that the discharge of a firearm constitutes deadly force as a matter of law.”); N.H. REV. STAT. ANN. § 627:9(II) (“Purposely firing a firearm capable of causing serious bodily injury or death in the direction of another person or at a vehicle in which another is believed to be constitutes deadly force.”); *accord State v. Rice*, 159 A.3d 1250, 1258 (N.H. 2017) (“[I]f the actor purposely discharges a firearm in the direction of another person or of a vehicle in which another person is believed to be located, the actor has used deadly force as a matter of law . . .”).

<sup>65</sup> Kim Ferzan argues that further studies are needed to assess whether to classify pointing a gun at someone as “deadly force,” suggesting that “we need consensus” on how often any such incident ends in gun violence before we can correctly decide the question. Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen’s Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller*, *Pointing Guns*, 99 TEX. L. REV. 1173 (2021), 100 TEX. L. REV. ONLINE 1, 5–7 (2021).

<sup>66</sup> See, e.g., ALASKA STAT. ANN. § 11.81.900(b)(16) (West 2022) (“[D]eadly force’ includes intentionally discharging or pointing a firearm in the direction of another person or in the direction in which another person is believed to be and intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument[.]”); *State v. Foster*, 955 P.2d 993, 996 (Ariz. Ct. App. 1998) (“Certainly, pointing a gun at a person would be threat of deadly physical force.”).

<sup>67</sup> New Jersey, for example, considers the brandishing of a weapon to scare off a potential attacker a non-deadly use of force. N.J. STAT. ANN. § 2C:3-11b (West 2005) (production of a deadly weapon for the limited purpose of “creating an apprehension that [one] will use deadly force if necessary, does not constitute deadly force”). See also MODEL PENAL CODE § 3.11(2) (“A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor’s purpose is limited to creating an apprehension that he

The pointing of a firearm at another person or the display of a firearm in a threatening manner should be considered deadly force. Firing a firearm is force likely to cause death or serious bodily injury, so if one threatens another by pointing a firearm in their direction or displaying that firearm in a threatening manner, one is threatening force likely to cause death or serious bodily injury. One should only be allowed to do so and claim self-defense if one is facing an imminent threat of death or serious bodily injury.

One opposed to this suggestion might argue that eliminating the distinction between pointing a firearm at another person and firing that weapon by treating both as “deadly force” could incentivize persons who have pointed a weapon at another person to fire that weapon. A person handling a firearm, however, is likely to realize that if they shoot their firearm and kill or injure a person, the criminal justice system is more likely to see them as the culpable party than if they merely displayed or pointed a firearm at another person. Moreover, most individuals would probably realize that the penalties for causing physical harm are going to be much heavier than the penalties if one does not cause such harm, so it is unlikely that characterizing the pointing of a firearm at another as “deadly force” will incentivize a person who displays or points a firearm at another person to shoot it.

Because the risk of death or serious bodily injury from an intentional or accidental discharge of a firearm pointed at another person is substantial, courts should strictly enforce the proportionality requirement when an individual claiming self-defense displayed a firearm in a threatening manner or pointed that firearm at another person by telling jurors that such actions constitute deadly force and therefore the defendant must have honestly and reasonably believed he was being imminently threatened with deadly force in order to succeed on his claim of self-defense.

### 3. *Imminence*

Courts should also strictly enforce the imminence requirement, particularly in cases involving the use of a firearm outside the home. One who uses a firearm against another is more likely to cause irreparable harm than one who uses another type of weapon, such as a knife, or one who does not use any weapon at all.<sup>68</sup> Once a person shoots and

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will use deadly force if necessary, does not constitute deadly force.”); N.H. REV. STAT. ANN. § 627:9(IV) (“The act of producing or displaying a weapon shall constitute non-deadly force.”).

<sup>68</sup> See David B. Kopel, Clayton E. Cramer & Joseph Edward Olsen, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 183 (2013) (“[F]irearm injuries were 5.5 times more likely to result in death than were knife injuries.”); Linda E. Saltzman, James A.

kills another person, the victim's life is over, and nothing can bring the person back.

If a criminal defendant who uses a firearm claims he acted in self-defense, the judge will usually instruct the jury that they need to find that the defendant honestly and reasonably believed the threat of being attacked with deadly force was *imminent* before returning a not guilty verdict. The judge should also instruct the jury that the term "imminent" means impending or just about to happen.<sup>69</sup> If the threat of deadly force was not imminent, then it may not have been necessary to use deadly force against the victim at that time.

#### 4. *Initial Aggressors*

States can also strengthen their self-defense rules concerning initial aggressors. In almost every state, one who instigates a physical confrontation is barred from claiming they acted in justifiable self-defense.<sup>70</sup> However, as I explain in *Firearms and Initial Aggressors*, the rules concerning who qualifies as an initial aggressor are not a model of clarity.<sup>71</sup> Some states require that the defendant provoked the victim into attacking him with the intent of using the attack as a pretext for responding with physical force and then claiming self-defense.<sup>72</sup> Other states do not require such intent but may require the defendant to have been engaging in an unlawful act in order to qualify as an initial aggressor.<sup>73</sup>

Legislatures can and should clarify what it takes to become an initial aggressor. The term "initial aggressor" can and should be defined as one whose words or acts created a reasonable apprehension of physical harm in another person.<sup>74</sup> Moreover, judges should generally be required to give an initial aggressor instruction to the jury<sup>75</sup> whenever a

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Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3044 (1992) ("FIAs [Family and Intimate Assaults] involving firearms are 12 times more likely to result in death than all nonfirearm FIAs.").

<sup>69</sup> See *supra* text accompanying note 32.

<sup>70</sup> See, e.g., *People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999) ("Under the common law, a defendant could not avail himself of the defense of self-defense if the necessity for such defense was brought on by a deliberate act of the defendant, such as being the initial aggressor or acting with the purpose of provoking the victim into attacking.").

<sup>71</sup> See Lee, *Firearms and Initial Aggressors*, *supra* note 8, at 17, 21–22.

<sup>72</sup> *Id.* at 25–26.

<sup>73</sup> *Id.* at 32; see also *infra* text accompanying note 33.

<sup>74</sup> *Id.* at 52, 54–58. See also *State v. Jones*, 128 A.3d 431, 452 (Conn. 2015) (defining initial aggressor as "the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used [on] that other person"); *State v. Rivera*, 204 A.3d 4, 26 (Conn. App. Ct. 2019) (defining initial aggressor similarly).

<sup>75</sup> An initial aggressor jury instruction is an instruction that explains the jurisdiction's initial aggressor rule or rules to the jury. See generally Lee, *Firearms and Initial Aggressors*, *supra* note 8.

defendant who is claiming they acted in self-defense pointed a firearm at another person or displayed it in a threatening manner outside their home.<sup>76</sup>

## B. Procedural Strengthening

### 1. Burden of Proof

There are also some procedural changes that states could implement to strengthen the rules relating to the defense of self-defense. One such procedural change would be to place the burden of proof in self-defense cases on the defendant. A defendant claiming self-defense should have to prove that he honestly and reasonably believed it was necessary to use deadly force to protect against an imminent threat of death or serious bodily injury.<sup>77</sup>

For those who embrace the view that historical precedent—in particular, the laws in effect at the time of the founding—should control constitutional interpretation, placing the burden of proof on the defendant should be acceptable, as this would comport with founding era common law.<sup>78</sup> “[T]he common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove.”<sup>79</sup> Well into the twentieth century, “a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense.”<sup>80</sup>

By 1987, however, all but two states—South Carolina and Ohio—had abandoned the common law rule and required the prosecution to prove the absence of self-defense when a defendant asserted self-defense.<sup>81</sup> Today, every state except Virginia<sup>82</sup> and Louisiana (but only

<sup>76</sup> *Id.* at 58–63.

<sup>77</sup> Jurisdictions that decided to place the burden of proving self-defense on the defendant would also need to decide the quantum of proof for such defenses, such as whether to require proof beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence, or some other standard. See Eugene Volokh, *Burden and Quantum of Proof as to Self-Defense*, VOLOKH CONSPIRACY (July 14, 2013, 2:29 PM), <https://volokh.com/2013/07/14/burden-and-quantum-of-proof-on-self-defense> [https://perma.cc/XL5M-JBTS] (discussing the “interesting question” of who should bear the burden of proving or disproving self-defense in criminal cases and by what quantum of proof).

<sup>78</sup> *Id.* (“The English common law rule at the time of the Framing was that the defense must prove self-defense by a preponderance of the evidence . . .”).

<sup>79</sup> *Martin v. Ohio*, 480 U.S. 228, 235 (1987).

<sup>80</sup> *Id.* (citing George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880, 882 & n.10 (1968) (noting that “in many prominent common law jurisdictions” a defendant who claimed self-defense had to “go so far as to prove his claim of self-defense by a preponderance of the evidence”).

<sup>81</sup> *Id.* at 236.

<sup>82</sup> See, e.g., *Smith v. Commonwealth*, No. 0604-21-1, 2022 Va. App. LEXIS 383, at \*14 (Aug. 16, 2022) (“Self-defense is an affirmative defense that places the burden of persuasion

in non-homicide cases)<sup>83</sup> places the burden of disproving self-defense on the prosecution.<sup>84</sup>

on the accused to demonstrate to the fact finder that he acted in self-defense to the degree necessary to raise a reasonable doubt about his guilt.”); *Lynn v. Commonwealth*, 499 S.E.2d 1, 9 (Va. Ct. App. 1998) (“Self-defense and defense of others are affirmative defenses for which the accused has the burden of persuading the fact finder that he or she acted in defense of self or another to the degree necessary to raise a reasonable doubt about his or her guilt.”).

<sup>83</sup> *See, e.g.*, *State v. Ross*, 269 So. 3d 1052, 1074 (La. Ct. App. 2019) (“This circuit has repeatedly held that the burden of proving self-defense in a non-homicide case rests with the defendant to prove the defense by a preponderance of the evidence.”); *State v. Howard*, 182 So. 3d 360, 363 (La. Ct. App. 2015) (“When self-defense or the defense of another is claimed by the defendant in a non-homicide case, the defendant has the burden of proof by a preponderance of the evidence that his actions were in self-defense or in defense of others.”). In contrast, in homicide cases, the burden of disproving self-defense rests with the government. *State v. Woodburn*, 643 So. 2d 1263, 1265 (La. Ct. App. 1994) (recognizing that, in homicide cases, “the state has the burden of establishing beyond a reasonable doubt that [the defendant] did not act in self-defense”).

<sup>84</sup> *Manuel v. State*, 711 So. 2d 507, 509 (Ala. Crim. App. 1997) (placing burden on State to prove that the defendant did not act in self-defense); *Morrell v. State*, 216 P.3d 574, 577–78 (Alaska Ct. App. 2009); *State v. King*, 235 P.3d 240, 242 (Ariz. 2010); *Kinsey v. State*, 503 S.W.3d 772, 779 (Ark. 2016); *People v. Lee*, 32 Cal. Rptr. 3d 745, 756 (Ct. App. 2005); *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011); *State v. Riggsbee*, 963 A.2d 1122, 1127 (Conn. App. Ct. 2009); *Hamilton v. State*, 343 A.2d 594, 595 (Del. 1975); *Freeman v. United States*, 912 A.2d 1213, 1220 (D.C. 2006); *Morgan v. State*, 127 So. 3d 708, 717 (Fla. Dist. Ct. App. 2013); *Daniley v. State*, 554 S.E.2d 483, 485 (Ga. 2001); *State v. Feliciano*, 115 P.3d 648, 666 (Haw. 2005); *State v. Jimenez*, 362 P.3d 541, 545 (Idaho Ct. App. 2015); *People v. Zapata*, 808 N.E.2d 1064, 1070 (Ill. App. Ct. 2004); *Carroll v. State*, 744 N.E.2d 432, 433 (Ind. 2001); *State v. Ceaser*, 585 N.W.2d 192, 194 (Iowa 1998); KAN. STAT. ANN. § 21-5108 (West 2011); KY. REV. STAT. ANN. § 500.070 (West 1974); *State v. Domingue*, 244 So. 3d 489, 491 (La. Ct. App. 2018); *State v. Ouellette*, 37 A.3d 921, 929 (Me. 2012); *Jacobs v. State*, 363 A.2d 257, 261 (Md. Ct. Spec. App. 1976); *Commonwealth v. Williams*, 883 N.E.2d 249, 253 (Mass. 2008); *People v. Dupree*, 788 N.W.2d 399, 408 (Mich. 2010); *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012); *Hammond v. State*, 119 So. 3d 1074, 1078 (Miss. Ct. App. 2013); *State v. Minnis*, 486 S.W.2d 280, 284 (Mo. 1972); MONT. CODE ANN. § 46-16-131 (West 2009); *State v. Warren*, 608 N.W.2d 617, 621 (Neb. Ct. App. 2000); *Barone v. State*, 858 P.2d 27, 28 (Nev. 1993); *State v. Etienne*, 35 A.3d 523, 542 (N.H. 2011); *State v. Handy*, 73 A.3d 421, 434 (N.J. 2013); *State v. Benally*, 34 P.3d 1134, 1137 (N.M. 2001); *People v. Every*, 46 N.Y.S.3d 695, 701 (App. Div. 2017); *State v. McArthur*, 651 S.E.2d 256, 261 (N.C. Ct. App. 2007); *State v. Olander*, 575 N.W.2d 658, 664 (N.D. 1998); *McHam v. State*, 126 P.3d 662, 667 (Okla. Crim. App. 2005); *State v. Oliphant*, 218 P.3d 1281, 1292 (Or. 2009); *Commonwealth v. Houser*, 18 A.3d 1128, 1135 (Pa. 2011); *State v. Hallenbeck*, 878 A.2d 992, 1012 (R.I. 2005); *State v. Dickey*, 716 S.E.2d 97, 101 (S.C. 2011); *State v. Burtzloff*, 493 N.W.2d 1, 8 (S.D. 1992); TENN. CODE ANN. § 39-11-201 (West 1990); *Alonzo v. State*, 353 S.W.3d 778, 781 (Tex. Crim. App. 2011); *State v. Garcia*, 18 P.2d 1123, 1127 (Utah Ct. App. 2001); *State v. Barrett*, 266 A.2d 441, 443 (Vt. 1970); *State v. McCullum*, 656 P.2d 1064, 1071 (Wash. 1983); *State v. Kirtley*, 252 S.E.2d 374, 381 (W. Va. 1978); *State v. Head*, 648 N.W.2d 413, 419 (Wis. 2002); *Drennen v. State*, 311 P.3d 116, 125 (Wyo. 2013). As of 2010, Ohio placed the burden of proving self-defense on the defendant. *State v. Dykas*, 925 N.E.2d 685, 690 (Ohio Ct. App. 2010) (requiring defendant to prove elements of self-defense by a preponderance of the evidence). In 2018, however, the Ohio legislature passed a statute placing the burden of proof in alleged self-defense cases on the government if “evidence [is] presented that tends to support” self-defense. *See* H.B. 228,

Just because most States today place the burden of disproving self-defense on the prosecution does not mean that a State cannot choose to place the burden of proving self-defense on the defendant tomorrow. In 1987, a woman who was convicted of aggravated murder after shooting and killing her husband appealed her conviction on the ground that in placing the burden of proving self-defense on her, Ohio had forced her to prove her innocence in violation of the Due Process Clause.<sup>85</sup> In *Martin v. Ohio*, the Supreme Court rejected this argument and held that in placing the burden of proving self-defense on the defendant, Ohio did not violate the Due Process Clause.<sup>86</sup>

Importantly, the *Martin v. Ohio* Court stated that “the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—[does not] mean that those States that strike a different balance are in violation of the Constitution.”<sup>87</sup> Because the jury was instructed that it had to find each of the elements of the crime of aggravated murder had been proven by the government beyond a reasonable doubt in order to convict the defendant, the jury could also be told it could acquit if it found by a preponderance of the evidence that the defendant satisfied each of the elements of the affirmative defense of self-defense.<sup>88</sup>

There is very little recent scholarship on which party should bear the burden of proof in a self-defense case. Most legal scholars who have written on this subject support placing the burden of disproving self-defense on the government.<sup>89</sup> Less than a handful of legal scholars have suggested that the burden of proving self-defense should rest with the defendant. In 1983, for example, John Q. La Fond suggested that the defendant should bear the burden of proof in a self-defense case.

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132nd Gen. Assemb. § 2901.05(B)(1) (Ohio 2019) (passed over Governor’s veto, Dec. 27, 2018).

<sup>85</sup> *Martin v. Ohio*, 480 U.S. 228 (1987).

<sup>86</sup> *Id.* (rejecting the defendant’s argument that the Due Process Clause, which protects an accused from conviction except upon proof beyond a reasonable doubt of every element of the charged offense, was violated in placing the burden of proving self-defense on the defendant and noting that the State had not shifted the burden of proving the offense of murder from the government to the defendant).

<sup>87</sup> *Id.* at 232.

<sup>88</sup> *Id.* at 233.

<sup>89</sup> See, e.g., Evelyn L. Wilson, *Treading Through Murky Waters: The Burden of Proof for Self-Defense in Non-Homicide Cases in Louisiana*, 51 LOY. L. REV. 439 (2005); Randy R. Koenders, *Shifting the Burden of Proving Self-Defense—With Analysis of Related Ohio Law*, 11 AKRON L. REV. 717 (1978); George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968); David S. Klein, *Burden of Proof of Affirmative Defenses in Criminal Cases—Gunther v. State*, 24 MD. L. REV. 78 (1964); W.C.F., Jr., *The Burden of Proving Self-Defense*, 71 U. PA. L. REV. 376, 379 (1923).



La Fond argued that defendants would have better access than the government to evidence regarding their self-defense claim and that placing the burden of proof on the defendant would deter defendants from making false self-defense claims.<sup>90</sup> More recently, John Gross has suggested that self-defense should be viewed as an affirmative defense that must be proven by clear and convincing evidence, noting “[i]t is fair and reasonable to require that the person who felt privileged to use self-defense bear the burden of persuading the jury that they acted in self-defense.”<sup>91</sup>

It is beyond the scope of this Article to engage in a full-throated exploration of this topic, so I will leave this to be explored more fully elsewhere. I merely suggest that it may be time to reconsider the wisdom of placing the burden of disproving self-defense on the government.

## 2. *Immunity Provisions*

Another way to strengthen the law of self-defense would be to repeal the immunity provisions that have been adopted in a minority of states.<sup>92</sup> Immunity provisions are a relatively recent modification to self-defense law.<sup>93</sup> Such provisions shield individuals claiming self-defense from criminal prosecution.<sup>94</sup> If an immunity provision has been enacted as part of a state’s self-defense law, an individual who simply claims they acted in self-defense cannot be prosecuted for any crime arising from their use of force.<sup>95</sup> Immunity provisions not only provide individuals who use or threaten force and then claim self-defense immunity from criminal prosecution, but some also provide such individuals immunity from civil action.<sup>96</sup>

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<sup>90</sup> John Q. La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 279–84 (1983).

<sup>91</sup> John Gross, *Analysis: Here’s Why Kyle Rittenhouse is Likely to be Acquitted—and Why the Law on Self-Defense Must Change*, WIS. STATE J. (Nov. 19, 2021), [https://madison.com/wsj/opinion/column/analysis-heres-why-kyle-rittenhouse-is-likely-to-be-acquitted-and-why-the-law-on/article\\_f1e4edf4-6fd2-5004-ae14-d45b009ab5a9.html](https://madison.com/wsj/opinion/column/analysis-heres-why-kyle-rittenhouse-is-likely-to-be-acquitted-and-why-the-law-on/article_f1e4edf4-6fd2-5004-ae14-d45b009ab5a9.html) [https://perma.cc/UW8R-THHS].

<sup>92</sup> See Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509, 512 (2023) (noting that fourteen states have enacted immunity provisions, including Alabama, Colorado, Florida, Georgia, Kansas, Kentucky, Oklahoma, South Carolina, Michigan, Idaho, Utah, South Dakota, Iowa, and North Carolina).

<sup>93</sup> See *id.* (showing that most of the states with immunity provisions enacted them after 2005).

<sup>94</sup> See *id.*

<sup>95</sup> See Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 936 (noting that immunity provisions can shield the individual not only from prosecution but also from arrest and detention).

<sup>96</sup> See, e.g., FLA. STAT. § 776.032(1) (2022).

As Eric Ruben notes, the defense of self-defense is exceptional in granting immunity to individuals who simply assert they acted in self-defense.<sup>97</sup> No other criminal law justification or excuse defense provides an individual with immunity from prosecution.<sup>98</sup> Of note, “the loudest voices advocating for immunizing self-defense [are] those seeking to expand gun rights.”<sup>99</sup>

Support for immunity provisions appears to be growing. Ruben points out that a common view of the high-profile Kyle Rittenhouse case was, “as former President Donald Trump put it, that Rittenhouse ‘shouldn’t have been prosecuted in the first place.’”<sup>100</sup> Indeed, after Rittenhouse’s acquittal, one Rittenhouse supporter penned “Kyle’s Law,” which would immunize individuals claiming self-defense from prosecution altogether *and* make prosecutors subject to personal liability in self-defense cases.<sup>101</sup> Two state legislators introduced bills named Kyle’s Law in their states.<sup>102</sup>

Granting immunity from prosecution to individuals who simply claim they acted in self-defense is deeply problematic. As Ruben notes, “The message that self-defense immunity sends is troubling: that people can engage in defensive violence that *they believe* is lawful . . . .”<sup>103</sup> Moreover, as Ruben points out, “[s]elf-defense is inherently fact-based, calling for answering difficult questions about the reasonableness of a defendant’s perception of—and violent response to—a threat,”<sup>104</sup> yet

<sup>97</sup> Ruben, *supra* note 92 at 104–06.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 108.

<sup>100</sup> *Id.* at 103 (citing Fox News, *Trump on Rittenhouse Verdict*, YOUTUBE (Nov. 19, 2021), <https://www.youtube.com/watch?v=b0lReIesfZE&t=6s> [<https://perma.cc/J7FK-GPSB>]).

<sup>101</sup> *Id.* at 104 (citing Andrew Branca, *Kyle’s Law: Stopping Politically Motivated Prosecutions of Self-Defense*, THE LAW OF SELF-DEFENSE (Nov. 19, 2021), <https://lawofselfdefense.com/kyles-law-stopping-politically-motivated-prosecutions-of-self-defense> [<https://perma.cc/R6EX-2S2N>]).

<sup>102</sup> One week after Rittenhouse’s acquittal in November 2021, a lawmaker in Oklahoma introduced Senate Bill 1120, or “Kyle’s Law,” “to ensure that what happened to Kyle Rittenhouse cannot happen to the people of Oklahoma.” See Isa Cox, *State Senator Introduces ‘Kyle’s Law’ to Keep What Government Did to Rittenhouse from Happening Again*, W. J. (Nov. 26, 2021) <https://www.westernjournal.com/state-senator-introduces-kyles-law-keep-government-rittenhouse-happening> [<https://perma.cc/XXT8-DTQZ>] (noting that the proposed law “would hold the state accountable for ‘malicious prosecution’ should any overzealous prosecutors try to charge a person with murder who is found to have acted in self-defense”). In January of 2022, a Tennessee lawmaker followed suit. Valencia Wicker, *‘Kyle’s Law’: Tennessee Lawmaker Proposes Bill Named after Kyle Rittenhouse*, KXAN (Jan. 20, 2022, 12:59 CST), <https://www.kxan.com/news/national-news/kyles-law-tennessee-lawmaker-proposes-bill-named-after-kyle-rittenhouse> [<https://perma.cc/LR4C-Y9XT>] (noting that the law “would reimburse accused killers if it is proven they acted in self-defense and were acquitted of the charges against them”).

<sup>103</sup> See Ruben, *supra* note 92, at 133.

<sup>104</sup> *Id.* at 139.

“[o]ne consequence of granting a defendant immunity is to remove the jury’s opportunity to decide facts surrounding a properly charged crime.”<sup>105</sup> The states that have enacted immunity provisions should repeal those provisions.<sup>106</sup>

### CONCLUSION

Now that the Supreme Court in *Bruen* has made it difficult for states to regulate the licensing of firearms for public carry on the front end, states concerned about gun violence should take steps to strengthen laws that govern the use of a firearm on the back end, after a firearm has been used. The law of self-defense is one such body of law that can and should be strengthened in the ways described above to deter the use of guns outside the home.

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 136–37 for an additional discussion of immunity provisions.