Article

Firearms and the Homeowner: Defending the Castle, the Curtilage, and Beyond

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In the spring of 2023, a series of back-to-back shootings shook the nation. A Black teenager in Missouri trying to pick up his two younger siblings went to the wrong door and rang the doorbell. The homeowner came to the door with a gun and, without saying a word, fired two shots at the Black teenager, hitting him in the face and the arm. A few days later, a Caucasian woman and her friends in upstate New York, looking for a party, drove up the wrong driveway. The homeowner came out of his house with a shotgun and fired two shots at the car; one of those shots killed the woman. That same day in South Florida, two Instacart

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delivery shoppers were having trouble finding a customer's home and mistakenly pulled up onto the wrong property. As they were trying to leave, the homeowner came out of his house and fired three shots at them, hitting the car. A few nights later, a cheerleader got into a car in a supermarket parking lot in Texas, thinking it was her own. Startled when she saw a man she didn't know in the passenger seat, she went back to her friend's car, then realized she had gotten into the wrong car. The man who was in that car shot the cheerleader and one of her friends as she was trying to apologize to him.

When we think of gun violence, we usually think about mass shootings or drive-by shootings by gang members. We don't expect to get shot if we knock on the wrong door or get into the wrong car. Recently, the United States has seen a marked increase in gun violence initiated by homeowners and other individuals attempting to protect their property. Regardless of whether these tragic events were the result of ringing the wrong doorbell or driving up the wrong driveway, many people may be surprised to learn that the individuals pulling the trigger may not be held criminally liable for their actions if they are in a state with a relaxed form of a little-studied criminal law defense called the defense of habitation that allows homeowners and others to use deadly force in defense of their homes, cars, and workplaces, even if they are not being threatened with deadly force. This Article examines the defense of habitation and issues of accountability arising from the use of deadly force by homeowners and others who can utilize this defense.

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INTRODUCTION

April 2023. Another month of senseless gun violence. But it wasn't just mass shootings that made the headlines. This time, homeowners were the ones toting guns and shooting people they thought were trespassing on their property. In each instance, the person shot was just a regular civilian who either mistakenly rang the wrong doorbell or drove up the wrong driveway.

For example, on April 13, 2023, around 10:00 p.m., a sixteen-year-old Black[1] teenager named Ralph Yarl rang the doorbell of a home, trying to pick up his two younger brothers.[2] Unfortunately, it was the wrong house.[3] Yarl had gone to Northeast 115th Street instead of Northeast 115th Terrace, which was one block away.[4] The homeowner, Andrew Lester, an eighty-four-year-old White man, had just gone to bed when he heard the doorbell ring.[5] Lester grabbed his .32 caliber Smith & Wesson revolver, went to the front door and opened it.[6] Lester said he

1. The Author purposely capitalizes the words "Black" and "White," except when the words are lowercase in quotations, to highlight that these terms, when used as adjectives to describe individuals or groups of persons, refer to racial categories. For arguments on why Black and White should be capitalized, see Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackandwhite/613159 [https://perma.cc/7L9Z-XUG8]; Lori L. Tharps, Opinion, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html [https://perma.cc/N29F-HDE4]; Brooke Seipel, *Why the AP and Others Are Now Capitalizing the 'B' in Black*, HILL (June 19, 2020), https://thehill.com/homenews/media/503642-why-theap-and-others-are-now-capitalizing-the-b-in-black [https://perma.cc/HZZ5-J7HU].

2. Derrick Bryson Taylor et al., *What We Know About the Ralph Yarl Shooting in Kansas City*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/18/us/ralph-yarl-shooting-kansas-city.html [https://perma.cc/R72G-NPG7].

3. *Id.*

4. *Id.*

5. Deon J. Hampton et al., *Andrew Lester, 84-Year-Old Kansas City Man Accused of Shooting Ralph Yarl, Is in Custody*, NBC NEWS (Apr. 18, 2023), https://www.nbcnews.com/news/us-news/andrew-lester-kansas-city-man-accused-shooting-ralph-yarl-custody-rcna80147 [https://perma.cc/HG3F-4RTJ].

6. *Id.*

saw a Black male approximately six feet tall,[7] pulling on the handle of the exterior storm door and thought the man was trying to break into his home.[8] Without saying a word, Lester fired two shots through the storm door at the suspected intruder.[9] One shot hit Yarl in the head just above his left eye and the other shot hit him in his right arm.[10]

Just two nights later, around 10:00 p.m., Kaylin Gillis, a twenty-year-old White female, and a group of friends were traveling in a caravan of two cars and a motorcycle looking for a friend's house in upstate New York.[11] The three vehicles mistakenly drove up the wrong driveway.[12] Upon realizing they were at the wrong house, they began turning around to leave when the homeowner, Kevin Monahan, a sixty-five-year-old White man, stepped out of his house with a shotgun.[13] A neighbor heard a shot, followed by several seconds of silence.[14] Then he heard a second shot ring out.[15] Apparently two shots were fired from Monahan's shotgun at the car,[16] one of which struck and killed

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7. Rachel Hatzipanagos & Timothy Bella, *A White Man Was 'Scared to Death' of Ralph Yarl. For Black Boys, This Isn't New.*, WASH. POST (Apr. 19, 2023), https://www.washingtonpost.com/nation/2023/04/19/ralph-yarl-andrew-lester-shooting-black-fear [https://perma.cc/JS3S-LZHR]. Yarl was actually five foot eight and 140 pounds. *Id.*

8. Hampton et al., *supra* note 5.

9. *Id.*

10. *Prosecutor in Ralph Yarl Case Says Legal Precedent Favors Keeping Court Records Open*, AP NEWS (May 17, 2023) [hereinafter *Prosecutor in Ralph Yarl Case*], https://apnews.com/article/yarl-motion-court-records-sealed-0bb0bab807449b383d243f450624b89a [https://perma.cc/DYL6-RXR7].

11. Jesse McKinley et al., *New Details Emerge in Deadly Upstate Shooting of Woman in Wrong Driveway*, N.Y. TIMES (Apr. 18, 2023) [hereinafter McKinley et al., *New Details Emerge*], https://www.nytimes.com/2023/04/18/nyregion/kaylin-gillis-ny-shooting.html [https://perma.cc/6KEQ-UZF7].

12. Jesse McKinley et al., *Victim's Father Breaks Down as Bail Is Denied in Wrong-Driveway Shooting*, N.Y. TIMES (Apr. 19, 2023) [hereinafter McKinley et al., *Victim's Father Breaks Down*], https://www.nytimes.com/2023/04/19/nyregion/kaylin-gillis-father-wrong-driveway-shooting.html [https://perma.cc/7H4Q-AGMD].

13. *Id.*

14. McKinley et al., *New Details Emerge*, *supra* note 11.

15. *Id.*

16. McKinley et al., *Victim's Father Breaks Down*, *supra* note 12. At trial, Monahan claimed he first fired a warning shot and then the gun went off by accident when he stumbled on his deck. Michael Hill, *Murder Trial Begins*

Gillis.[17] Monahan's attorney said his elderly client was alarmed when several vehicles sped up his driveway with their engines revving and lights shining, hinting at a possible self-defense or defense of habitation claim.[18]

Also on April 15, 2023, but this time in South Florida, two Instacart delivery shoppers, nineteen-year-old Waldes Thomas Jr. and eighteen-year-old Diamond D'arville, were having trouble finding a customer's home and mistakenly pulled into the wrong property.[19] Once they realized they had the wrong address, they attempted to reverse out of the area, accidentally hitting a boulder on the property.[20] As they were trying to leave, Antonio Caccavale, the homeowner, came out of his house with

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Months After Young Woman Driven into Wrong Driveway Shot in Upstate New York, AP NEWS (Jan. 11, 2024), https://apnews.com/article/gillis-monahan-wrong-driveway-shooting-new-york-398c49ad671d32e3798a48bcf32f36a4 [https://perma.cc/SB7H-PZQT].

17. Ed Shanahan, *Man Charged with Murder in Shooting of Woman Who Went up Wrong Driveway*, N.Y. TIMES (Apr. 17, 2023), https://www.nytimes.com/2023/04/17/nyregion/man-charged-kaylin-gillis-driveway-shooting.html [https://perma.cc/4VU6-6MS2].

18. Julie Bosman et al., *Hundreds of Miles Apart, Separate Shootings Follow Wrong Turns*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/us/yarl-gillis-shooting-missouri-ny.html [https://perma.cc/2UBJ-AG86]. At his trial in January 2024, Monahan did not argue either self-defense or defense of habitation, but instead claimed the fatal shooting was an accident caused by a defective gun that went off by itself when Monahan stumbled and fell on his deck after firing a warning shot. Hill, *supra* note 16. Prosecutors presented evidence that the gun was tested and the tester had a hard time getting the gun to fire on its own. *See* Ashley Cusicanqui, *Closing Statements and a Guilty Verdict, the Final Day of the Trial of Kevin Monahan*, MICROSOFT START (Jan. 23, 2024), https://www.msn.com/en-us/news/crime/closing-statements-and-a-guilty-verdict-the-final-day-of-the-trial-of-kevin-monahan/ar-BB1hamEP [https://perma.cc/KP8Q-BGTW] (noting that "Victoria O'Conner, Forensics Investigation Unit Supervisor, had testified she performed several 'drop tests' on the shotgun used in the shooting, dropping the gun on a rubber mat from different heights," and concluded that the gun was not defective).

19. Teddy Grant, *Instacart Delivery Workers in Florida Shot at After Going to the Wrong Address, Police Say*, ABC NEWS (Apr. 25, 2023), https://abcnews.go.com/US/instacart-delivery-drivers-shot-after-wrong-address-florida/story?id=98788128 [https://perma.cc/NJ4E-56TY]; Claudia Dominguez & Nouran Salahieh, *Instacart Delivery Drivers' Vehicle Was Fired at After They Went to the Wrong Address While Delivering Groceries, South Florida Police Say*, CNN (Apr. 25, 2023), https://www.cnn.com/2023/04/25/us/florida-instacart-drivers-shot-wrong-address/index.html [https://perma.cc/88GJ-8ZDS].

20. Dominguez & Salahieh, *supra* note 19.

a 9mm handgun and fired three shots at their car.[21] Fortunately, the shots hit the rear bumper and the rear passenger tire of the car, not the workers.[22] Caccavale told police that when he came out of the house, the driver drove in his direction, causing him to dive out of the way, and then reversed and sideswiped him, running over his right foot.[23] He said he fired several rounds towards the tires of the vehicle to disable it, "fearing that he [was] going to be further injured by the vehicle."[24] The police decided not to arrest Caccavale because they thought the homeowner was justified in his actions based on the circumstances he perceived.[25]

These were just some of the incidents that occurred across the nation in 2023 in which a gun owner shot someone for making a mistake—whether that mistake was ringing the wrong doorbell or driving up the wrong driveway. Many would be surprised to learn that an individual who shoots a firearm under circumstances similar to those in the cases described above could end up escaping criminal liability for their actions depending on their state's law governing when a homeowner may use deadly force against persons intruding upon their dwelling. Under a little-studied criminal law defense called the defense of habitation or defense of premises, a homeowner or occupant of the dwelling may, under certain conditions, use deadly force against a person who has unlawfully entered or is in the process of unlawfully entering the person's dwelling.[26] Many states have extended the reach of the defense of habitation beyond the four corners of the dwelling, allowing individuals to use deadly force against supposed intruders in the workplace and cars.[27] Some states have even extended the defense of habitation to the area immediately

21. *Id.*; Grant, *supra* note 19.

22. Dominguez & Salahieh, *supra* note 19.

23. *Id.*

24. *Id.*

25. Grant, *supra* note 19.

26. *See infra* Part I (exploring the defense of habitation doctrine, variations across jurisdictions, and the doctrine's relationship to traditional self-defense principles).

27. *See infra* Part I.C.3 (discussing how some jurisdictions extend the defense of habitation beyond the home itself).

surrounding the home known as the curtilage,[28] allowing a homeowner or occupant of the dwelling to shoot someone who mistakenly comes onto their property without their permission.[29]

At least thirty-seven of the fifty states in the United States and the District of Columbia do not require a homeowner to reasonably believe they are being threatened with imminent death or serious bodily injury when they use deadly force in defense of habitation,[30] even though such a belief is usually required when one uses deadly force in self-defense. Many of these states allow the finder of fact to presume the homeowner had such a belief.[31] In states with a self-defense presumption, a homeowner could shoot an intoxicated neighbor who mistakenly entered their home and not face criminal charges, even if the homeowner knew the person was their intoxicated neighbor who wasn't intending any harm.

While they may not know about the defense of habitation itself, many people have heard that if someone breaks into one's home, one has greater license to protect oneself than if one is threatened on the street. Moreover, individuals who take a firearms training course are often taught that laws exist to protect them from criminal liability should they shoot someone who intrudes into the home.[32] This, coupled with a heightened fear of

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28. The term "curtilage" is used in the Fourth Amendment context to reference the area immediately surrounding the home, which is subject to Fourth Amendment protection. *See* United States v. Dunn, 480 U.S. 294, 301 (1987) (identifying four factors a court should weigh when trying to determine whether land surrounding the home constitutes curtilage or open fields: (1) the area's proximity to the home, (2) whether the area is within an enclosure surrounding the home, (3) the nature of the area's uses, and (4) steps taken to protect the area from observation).

29. *See infra* Part I.C.3 (discussing how various jurisdictions treat the curtilage as part of the home for purposes of the defense of habitation).

30. *See infra* Appendix F (listing states requiring loose proportionality); Appendix G (listing states requiring no proportionality).

31. *See infra* Appendix A (listing the twenty-one states with a self-defense presumption).

32. *See, e.g.*, *Civilian Wear and Carry Training Class*, MD. STATE POLICE 8 (2023), https://mdsp.maryland.gov/Organization/Documents/Firearms%20Training%20Course%20Instructional%20Material.pdf [https://perma.cc/JM53-J94R] ("[W]hen one is in one's home, one may use deadly force against an attacker if deadly force is necessary to prevent the attacker from committing a

crime, may explain why some homeowners have been so quick to use their firearms against individuals who were not actually threatening them with any physical harm.

This Article critically examines the defense of habitation and argues for its reform. As a normative matter, this Article seeks to reduce the number of shootings of innocent individuals by well-meaning but fearful gun owners in an era in which an increasing number of civilians own firearms.[33] But this Article has another, more practical goal. It seeks to provide a more balanced perspective to inform the ongoing debate over how to keep people safe at a time when many individuals feel a need to exercise their Second Amendment right to keep and bear arms. This debate has for too long been commandeered by the gun lobby, which has successfully steered state legislatures to relax the requirements for the use of deadly force in both self-defense[34] and defense of habitation laws.[35] The gun lobby has also been behind the push towards fewer restrictions on the right to keep and bear arms, and worked to bring about the Supreme Court's gun-friendly decisions in *N.Y. State Rifle & Pistol Ass'n v. Bruen*[36]

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felony that involves the use of force, violence, or surprise (such as murder, robbery, burglary, rape, or arson)." (citing Crawford v. State, 190 A.2d 538 (Md. 1963))).

33. *See* Alexandra Marquez, *Poll: Gun Ownership Reaches Record High with American Electorate*, NBC NEWS: MEET THE PRESS BLOG (Nov. 21, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-gun-ownership-reaches-record-high-american-electorate-rcna126037 [https://perma.cc/5UGQ-PANW] (describing the results of a national poll suggesting that a larger share of Americans own guns today than at any time in the past twenty-five years).

34. Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509, 532–36 (2023) (noting that the NRA and other gun lobby groups have been behind efforts to promote Stand Your Ground and immunity provisions in self-defense statutes).

35. *See infra* note 224 (noting that the NRA has also supported the inclusion of self-defense presumption provisions in defense of habitation laws).

36. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); *see, e.g.*, Brief for Amicus Curiae NRA Civil Rights Defense Fund in Support of Petitioners, *Bruen*, 597 U.S. 1 (No. 20-843) (supporting a state gun owners association's challenge to New York's licensing and public carry requirements).

and *District of Columbia v. Heller*.[37] Other voices need to be part of the debate.

Part I provides an overview of how the defense of habitation operates in the fifty states and the District of Columbia. Instead of a uniform set of laws, defense of habitation laws vary from state to state. Only a handful of states require proportionality akin to that required under self-defense law, while most states allow the use of deadly force in defense of habitation even if the actor is not facing a threat of death or serious bodily injury. Some states limit the defense to entries or attempted entries into the dwelling while other states have expanded the defense to apply to entries or attempted entries into the curtilage, the workplace, and the car. Some states require that the entry or attempted entry be forcible and unlawful, while other states require only that the entry or attempted entry be unlawful.

Part II uses a handful of recent cases to show how the defense of habitation operates in three different states: North Carolina, Florida, and Missouri. This analysis highlights why the defense of habitation is in dire need of reform.

Part III proposes several ways the defense can be reformed. First, this Article proposes that states should require those who use deadly force, i.e., force likely to result in death or serious bodily injury,[38] and claim they acted in defense of the habitation to have reasonably believed they were being threatened with death or serious bodily injury. The use of deadly force in defense of the habitation should be a complete justification only if the homeowner or occupant of the dwelling reasonably believed the intruder was threatening the homeowner or another occupant of

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37. District of Columbia v. Heller, 554 U.S. 570 (2008)*; see, e.g.*, Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent, *Heller*, 554 U.S. 570 (No. 07-290) (supporting relaxed regulations on handgun ownership within the home).

38. "Deadly force" is generally defined as force intended or likely to cause death or serious bodily injury. *See, e.g.*, VT. STAT. ANN. tit. 13, § 3251(7) (2024) ("'Deadly force' means physical force that a person uses with the intent of causing, or that the person knows or should have known would create a substantial risk of causing, death or serious bodily injury."); TEX. PENAL CODE ANN. § 9.01(3) (West 2023) ("'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."); 10 C.F.R. § 1047.7(a) (2023) ("Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm.").

the dwelling with death or serious bodily injury or was threatening to commit a violent felony. If the homeowner reasonably believed the intruder was threatening some physical injury—not death or serious bodily injury—or was threatening to commit some non-violent crime within the dwelling, this should be considered a partial defense akin to imperfect self-defense, mitigating the charged offense to a lesser offense but not completely absolving the homeowner of criminal liability. If the homeowner did not reasonably believe the intruder was threatening any physical injury, the homeowner should be held liable for his or her use of deadly force. In line with this first proposal, the Article proposes that jurisdictions with self-defense presumptions—which eliminate the requirement that the defendant reasonably believed the intruder was threatening them with death or serious bodily injury—should repeal these presumptions. Like the defense of self-defense, the defense of habitation should value human life over property, even if that property is one's home.

Second, this Article proposes that jurisdictions that have expanded the defense of habitation beyond the four corners of the dwelling should reverse that expansion by limiting the defense of habitation to the four corners of the dwelling. The defense of habitation should not be used to justify the use of deadly force in defense of one's car or workplace. It also should not allow one to use deadly force against a person who has merely entered or is attempting to enter the curtilage of a home, not the actual home itself, unless the intruder is threatening the homeowner or another person with deadly force.

Finally, this Article proposes that states should apply the initial aggressor rule that applies in self-defense cases to the defense of habitation. Under the initial aggressor rule, a person who was the initial aggressor to a physical confrontation loses the right to claim self-defense.[39] This Article proposes that an initial aggressor should also lose the right to claim defense of habitation. A handful of states already apply the initial aggressor limitation to both self-defense and defense of habitation. This Article argues that other states should follow their lead. This Article also proposes that if an individual in a state that has extended the defense of habitation beyond the four corners of the

39. Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1, 19 (2022) [hereinafter Lee, *Firearms and Initial Aggressors*].

dwelling shoots someone who was entering or attempting to enter the curtilage, the workplace, or a car, the judge should be required to give an initial aggressor instruction to the jury. The giving of such a jury instruction does not mean the jury must find that the defendant was the initial aggressor. It simply means the jury will be able to consider the issue and decide whether the defendant was the initial aggressor. The defendant can explain to the jury why he shouldn't be considered the initial aggressor and why his use of deadly force was justified, and the jury can either find that the defendant was the initial aggressor or that he wasn't the initial aggressor. This proposal simply makes sure the jury gets to make this determination. Moreover, this Article proposes that an individual who shoots a person who is entering or attempting to enter the curtilage, workplace, or car should not get the benefit of a self-defense presumption.

The law needs to send a clear message that using deadly force against another human being is wrong and should be employed only as a last resort if one is being threatened with deadly force. Necessity and proportionality in the use of deadly force should be required not just when one acts in self-defense but also when one acts in defense of one's habitation, one's car, or one's workplace.

I. OVERVIEW OF THE DEFENSE OF HABITATION

The defense of habitation—colloquially known as the "Shoot the Burglar" law—allows a homeowner or an occupant of a dwelling to use deadly force against a person who is entering or attempting to enter the dwelling without their permission.[40] This Part starts by situating the defense of habitation in relation to the more familiar defenses of self-defense and defense of property. It then provides an overview of the law surrounding the defense of habitation.

40. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 20.03[B], at 259–60 (9th ed. 2022) ("A person may use deadly force to defend his home.").

A. THE DEFENSE OF SELF-DEFENSE

The defense of habitation is a close cousin to that of self-defense.[41] It is therefore helpful to understand the requirements for a claim of self-defense before examining the requirements for a defense of habitation claim.

The defense of self-defense permits an individual to use deadly force against another individual if they honestly and reasonably believe they are being threatened with imminent death or serious bodily injury and it is necessary to use deadly force to avoid the threatened harm.[42] The defense thus includes a necessity requirement, an imminence requirement, and a proportionality requirement, all with a reasonable belief overlay.[43]

As I have explained elsewhere, "The necessity requirement seeks to ensure that people not use force against others unless and until it is reasonably necessary to do so."[44] The term necessity in the context of using deadly force in self-defense implies that the actor truly had no choice but to use deadly force.[45] If, for example, the actor could have used nondeadly force to escape the threatened harm, then the use of deadly force was not necessary.[46] Similarly, if the actor could have stepped back or stepped aside to avoid the threatened harm, then using deadly force was not actually necessary.[47]

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41. *See* People v. Eatman, 91 N.E.2d 387, 390 (Ill. 1950) ("As a matter of history, the defense of habitation has been the most favored branch of self-defense from the earliest times.").

42. DRESSLER, *supra* note 40, § 18.01[E], at 219 (noting that the defendant must have "subjectively believed that he needed to use deadly force to repel an imminent unlawful attack" and "[his] belief in this regard must be one that a reasonable person in the same situation would have possessed"); *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, 195–208 (1998) [hereinafter Lee, *The Act-Belief Distinction*] (providing a detailed discussion of the elements of the defense of self-defense).

43. Lee, *The Act-Belief Distinction*, *supra* note 42, at 195–208; *see also* Cynthia Lee, *Strengthening the Law of Self-Defense After* Bruen, 98 N.Y.U. L. REV. 1905, 1909 (2023) [hereinafter Lee, *Strengthening the Law*] (describing how reasonability of belief affects consideration of the elements of self-defense).

44. Lee, *The Act-Belief Distinction*, *supra* note 42, at 200.

45. *Id.*

46. *See id.* at 201 (describing a scenario in which use of nondeadly force may be a reasonable alternative).

47. *Cf. id.* at 201–02 (discussing the no duty to retreat rule as it relates to the use of deadly force).

Despite the necessity requirement, most states today do not require an individual to retreat before using deadly force in self-defense, even if a safe retreat is known to the individual and reasonably available.[48] If the actor could have retreated before using deadly force in self-defense, then arguably it was not in fact necessary to use deadly force to avoid the threatened harm. Yet, most states will nonetheless allow the person who used deadly force without retreating to claim he acted justifiably in self-defense.[49] In some of these so-called "Stand Your Ground" states, a person can simply assert that she acted in self-defense and be completely immunized from criminal prosecution and civil action.[50] A minority of states still require retreat prior to using deadly force in public,[51] but even in these duty-to-retreat states, one does not have a duty to retreat in one's own home under what is known as the Castle Doctrine.[52]

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48. *Id.* (discussing the no duty to retreat rule). In many states today, under what have become known as Stand Your Ground laws, there is no duty to retreat before using deadly force, even in public. *See* Cynthia V. 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."); *Stand Your Ground*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws [https://perma.cc/2FNZ-GEPX] (noting that thirty states have enacted Stand Your Ground laws and court decisions in eight states have removed the duty to retreat in public).

49. Lee, *The Act-Belief Distinction*, *supra* note 42, at 200–01.

50. *See* Ruben, *supra* note 34, at 532–36 (describing immunity laws in Colorado and Florida).

51. *See, e.g.*, 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.").

52. 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 co-habitants and require retreat prior to using deadly force in the home if the defendant and the victim are cohabitants. *Id.* at 659. Catherine Carpenter argues that these jurisdictions have improperly rejected the

An additional requirement under self-defense law is that one must be threatened with unlawful force or what one reasonably believes to be unlawful force.[53] An individual is justified in using physical force against another person in self-defense only if the threatened attack was, or the defendant reasonably believed it to be, unlawful.[54] If, for example, an individual knows

Castle Doctrine in cases involving attacks by co-habitants, pointing 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*; see also* Brandi L. Jackson, Note, *No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER, L. & JUST. 154, 176–78 (2015) (arguing that women in abusive relationships who kill their abusers in the home should be allowed to benefit from Stand Your Ground laws regardless of the attacker's property rights and thus be granted immunity from prosecution); Judith E. Koons, *Gunsmoke and Legal Mirrors*: *Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617, 643 (2006) (critiquing defense of habitation presumptions because they contemplate stranger violence through unlawful entry rather than violence at the hands of intimate partners and arguing that "the standard of imminence [in self-defense law] effectively functions as a retreat rule" for women who live with their abusers).

53. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4, at 192 (3d ed. 2017) ("One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes [] that he is in immediate danger of unlawful bodily harm from his adversary . . . .").

54. 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) (finding that Missouri's self-defense 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)

or reasonably believes that she is being lawfully arrested by a police officer, she is not justified in using physical force to resist that arrest.[55]

A final requirement in most self-defense statutes is that one must not have been the initial aggressor.[56] If one was the initial aggressor to a confrontation, one loses the right to claim self-defense.[57]

B. THE DEFENSE OF PROPERTY

In contrast to the defense of self-defense is the defense of property. As a general matter, a person may *not* use deadly force to protect their personal property.[58] The prohibition on using deadly force in defense of property is premised on the idea that "[t]he preservation of human life and limb from grievous harm is of more importance to society than the protection of property."[59] As Joshua Getzler explains, "property cannot easily be conceived as a value worth protecting by force when no accompanying threat to the person is involved."[60]

In prohibiting the use of deadly force when one is doing so only to protect one's personal property, not one's life, the defense of property echoes the notion reflected in self-defense law that

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(rejecting the defendant's argument that defense of habitation statute requires only a reasonable belief that the victim unlawfully entered his residence, explaining that "[t]his Court has consistently refused to apply the defense of an occupied structure statute to 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.").

55. 2 LAFAVE, *supra* note 53, § 10.4(h), at 219–21 (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).

56. *See, e.g.*, Lee, *Firearms and Initial Aggressors*, *supra* note 39 (examining the initial aggressor rule in each of the fifty states).

57. *See, e.g.*, *id.*

58. *E.g.*, People v. Ceballos, 526 P.2d 241, 249 (Cal. 1974) (en banc) ("[A]t common law in general deadly force could not be used solely for the protection of property.").

59. *Id.* (quoting Commonwealth v. Emmons, 43 A.2d 568, 569 (Pa. Super. Ct. 1945)).

60. Joshua Getzler, *Use of Force in Protecting Property*, 7 THEORETICAL INQUIRIES L. 131, 135 (2006).

proportionality is required when one uses deadly force. A person may use deadly force against another person only when imminently threatened with deadly force.[61] A person may not use deadly force to protect their personal property unless they are also being imminently threatened with death or serious bodily injury.[62]

C. THE DEFENSE OF HABITATION

The defense of habitation, also known as the defense of premises, sits somewhat uneasily between the defense of self-defense and the defense of property. Like the defense of self-defense, which allows an individual to use deadly force against another person,[63] the defense of habitation permits a homeowner, under certain conditions, to use deadly force against a person who is entering or has entered the homeowner's dwelling without the homeowner's permission.[64] Unlike the defense of self-defense, the defense of habitation—at least in most states today—allows the use of deadly force even in the absence of a threat of death or serious bodily injury.[65] As Stuart Green observes, "The

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61. Lee, *The Act-Belief Distinction*, *supra* note 42, at 14 (discussing the imminent threat element of the defense of self-defense).

62. As Joshua Dressler explains,

> Deadly force is not permitted in defense of property, even if it is the only means available to prevent the loss. However, the right to use *non*-deadly force to protect property is sometimes transformed into an independent right to use *deadly* force in self-protection or defense of a third party.

DRESSLER, *supra* note 40, § 20.02[B][3], at 256 (footnote omitted).

63. *See supra* Part I.A (describing the closely related defense of self-defense).

64. *See supra* text accompanying note 40 (explaining the defense of habitation).

65. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 4 ("Such [defense of habitation and crime prevention] laws, in one way or another, allow a defender to use deadly force even when there is no threat, real or perceived, of death or serious bodily injury."); *see also* Getzler, *supra* note 60, at 151 (explaining that at early common law, defense of habitation in England was less restricted than self-defense in that "violence [in defense of home] could be used in the absence of a direct personal threat"); C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. WOMEN & L. 477, 489 (2017) ("The degree to which the home is violated, however, need not precipitate a threat of violence to the body for defense of habitation to justify or excuse the use of deadly force.").

most significant feature of the defense of premises doctrine is that there need not be any actual or perceived threat of death or serious bodily injury. Thus, . . . the harm inflicted may be disproportionate to the harm threatened."[66]

Like the defense of property, the use of force in such cases is in the name of defending property, albeit a particular type of property—the dwelling or the habitation.[67] Unlike the defense of property, which forbids the use of deadly force to protect personal property, the defense of habitation allows the use of deadly force to protect a certain type of property—one's dwelling.[68] As Joshua Getzler explains, "[T]he law may . . . see a presumptive identity between an owner's person and his property that is external to his person so that violent defence of property becomes justified, even where there is no threat to bodily or personal safety."[69]

Many people—including attorneys, judges, legislators, and legal scholars—use the term "Castle Doctrine" when referencing the defense of habitation, but these two doctrines are not the same and should not be conflated. The Castle Doctrine is part of the doctrine of self-defense and simply eliminates the duty to retreat if one is attacked inside one's home.[70] In contrast, the defense of habitation is a stand-alone affirmative defense that can lead to an acquittal.[71] As Renée Lettow Lerner explains, "The castle doctrine simply does away with the duty to retreat inside one's home; it still permits use of force only to counter a threat to one's person. Defense of premises statutes allow use of force in response to an entry."[72]

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66. Green, *supra* note 65, at 9.

67. *See* DRESSLER, *supra* note 40, §§ 20.02–.03, at 255–62 (comparing the purposes of and rationales behind the defense of property and the defense of habitation).

68. *Compare supra* note 58 (showing that defense of property did not warrant deadly force at common law), *with* Green, *supra* note 65, at 4 (showing that deadly force is allowed for defense of habitation).

69. Getzler, *supra* note 60, at 135.

70. *E.g.*, Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L., ECON. & POL'Y 331, 336 (2006).

71. *See* Green, *supra* note 65, at 8–9 (discussing the differences between the castle doctrine and defense of premises).

72. Lerner, *supra* note 70, at 336.

Several rationales, which are explored at greater length in Part III, have been put forth in support of the defense of habitation.[73] A leading rationale underlying the defense of habitation is the idea that "the threat of deadly force *should be presumed*, as a factual matter, whenever an intruder unlawfully (or perhaps feloniously or violently) attempts to enter one's premises."[74] Reflecting agreement with this idea, twenty-one states have adopted a statutory presumption that an individual reasonably believes deadly force is necessary to protect against a threat of death or serious bodily injury when another person has unlawfully entered or attempted to enter their home.[75] I call this presumption a "self-defense presumption"[76] because it allows the jury to presume that one of the essential conditions for using deadly force in self-defense is satisfied when an individual uses deadly force against an intruder: that the individual reasonably believed deadly force was necessary to protect against an

73. *See* Green, *supra* note 65, at 6 ("There are five principles under which the defense of premises privilege might be viewed as consistent with the requirement of proportionality . . . .").

74. *Id.* (emphasis added).

75. *See infra* Appendix A (listing states with a self-defense presumption). In addition to the twenty-one states listed in Appendix A, South Dakota has a presumption, but unlike the other states, South Dakota's self-defense presumption does not say that it is presumed the homeowner had a reasonable belief that the intruder was threatening death or serious bodily injury; instead, it says it is presumed that the intruder had the intent to commit an unlawful act involving force or violence. *See* S.D. CODIFIED LAWS § 22-18-4.5 (2023) ("A person who unlawfully enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.").

76. I am not the first to use the term "self-defense presumption" or something similar to describe the presumption in defense of habitation law that a homeowner reasonably believed an intruder was threatening death or serious bodily injury. *See* Alexis M. Haddox, Comment, *The Ohio Castle Doctrine: Shielding Criminals with a Presumption of Self-Defense*, 41 CAP. U. L. REV. 1105, 1117 (2013) ("Ohio Revised Code . . . section 2901.05 creates a *presumption of self-defense* . . . ." (emphasis added)); Amanda M. Yeaples-Coleman, Comment, *Reviving the Knock and Announce Rule and Constructively Abolishing No-Knock Entries by Giving the People a Ground They Can Stand on*, 37 U. DAYTON L. REV. 381, 383 (2012) (noting that "[u]nder Ohio law, a person is given a presumption of having acted in self-defense, but only when he is acting against another who has entered unlawfully" and arguing that to "minimize the practice of no-knock entries, the legislature should amend the law to allow *the self-defense presumption* to apply to unannounced forced entry by government actors" (emphasis added)).

imminent threat of death or serious bodily injury.[77] In essence, a self-defense presumption shortcuts the proportionality requirement for those who use deadly force in defense of habitation.[78] Self-defense presumptions in defense of habitation laws also "shortcut the imminence requirement" that is a standard feature of self-defense doctrine.[79]

The conditions under which one can justifiably use deadly force against another individual under the defense of habitation vary across the fifty states.[80] Below, I explain the primary ways in which states differ in the application of the defense of

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77. For example, South Dakota's defense of habitation statute provides:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. CODE ANN. § 16-11-440(A) (2023).

78. In most states, the self-defense presumption is a rebuttable presumption. *See infra* Appendix B (listing states with a rebuttable self-defense presumption). Florida courts appear to be alone in finding that that the self-defense presumption for individuals using deadly force in defense of habitation is irrebuttable. Bartlett v. State, 993 So. 2d 157, 163 (Fla. Dist. Ct. App. 2008) ("The creation of section 776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such." (citing State v. Heckman, 993 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2007))). Patrick Hubbard argues that interpreting the self-defense presumption as an irrebuttable or conclusive presumption violates the Constitution. *See* F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 640–47 (2014) (critiquing conclusive presumptions in the defense of habitation). While the Supreme Court has indicated that presumptions that conclusively relieve the government of its burden of proving guilt beyond a reasonable doubt are unconstitutional, *see* Sandstrom v. Montana, 442 U.S. 510, 524 (1979), it is not clear that a presumption that favors the defendant is also unconstitutional.

79. Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1680 n.150 (2019) (citing Green, *supra* note 65, at 28).

80. Lerner, *supra* note 70, at 336 ("Defense of premises statutes use different standards for allowing deadly force against intruders.").

habitation. I also highlight the ways in which the defense of habitation differs from self-defense.

1. The Entry

Some states allow a homeowner to use deadly force against another person to prevent or terminate an unlawful entry into the dwelling but do not require the entry to be forcible or violent.[81] Other states allow the use of deadly force only if necessary to prevent or terminate an unlawful *and forcible* entry.[82]

In some respects, the defense of habitation requires more in the way of proof than the defense of self-defense. For example, in self-defense cases, courts typically require only a reasonable belief that the triggering factor—the force—was unlawful, not that the force was in fact unlawful.[83] In contrast, in defense of habitation cases, courts typically require that the triggering factor—the entry or attempted entry—was in fact unlawful.[84] This means that if a homeowner with a gun shoots a police officer who is lawfully executing a no-knock warrant,[85] that homeowner

81. *See infra* Appendix C (listing seven states that allow the use of deadly force to protect against an unlawful entry without requiring that entry to be forceful). An entry is considered unlawful if the person did not have permission to enter the dwelling. State v. Hight, No. COA11-1153, 2012 WL 2552165, at *6 (N.C. Ct. App. July 3, 2012) (finding that victim's entry through an unlocked door into defendant's dwelling was not unlawful because victim "had ongoing permission and authorization from both [the defendant's wife] and defendant to intervene during their domestic disputes and to enter defendant's home"); Harris v. State, 793 S.E.2d 417, 421–22 (Ga. Ct. App. 2016) (finding that victim's entry into defendant's house was neither unlawful nor forcible given that victim was a periodic guest and defendant had let the victim into the house through the front door that evening).

82. *See infra* Appendix D. There is scant case law on what the term "forcible" means in the context of the defense of habitation, but one court has observed that if one is invited by the homeowner to enter the home, one's entry into the dwelling cannot be considered forcible. *See Harris*, 793 S.E.2d at 422 (finding no forcible entry because victim was an invited guest).

83. *See supra* note 54.

84. *See supra* note 54; *see also* State v. Daniels, 265 P.3d 623, 636 (Mont. 2011) ("[A]n unlawful entry is a prerequisite to asserting the defense of justifiable use of force in defense of an occupied structure." (quoting State v. Hagen, 903 P.2d 1381, 1386 (Mont. 1995))).

85. The Supreme Court has held that, as a general matter, officers executing a search warrant must knock and identify themselves as police prior to entering a home. Wilson v. Arkansas, 514 U.S. 927, 929 (1995) (holding that the

cannot claim his use of deadly force was justifiable in defense of habitation even if the homeowner honestly and reasonably believed the officer was a criminal unlawfully entering the home.[86] That homeowner, however, could still assert a claim of justifiable self-defense as long as it was reasonable to believe deadly force

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Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity before forcibly entering). The Fourth Amendment's knock-and-announce requirement, however, is not an absolute rule. In *Richards v. Wisconsin*, the Court held that if there is reasonable suspicion that knocking and announcing would be futile or dangerous, then officers do not have to knock and announce. *See* Richards v. Wisconsin, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."). In addition, "[a] number of States give magistrate judges the authority to issue 'no-knock' warrants if the officers demonstrate ahead of time a reasonable suspicion that entry without prior announcement will be appropriate in a particular context." *Id.* at 396 n.7. A judicial officer may issue a no-knock warrant if the judicial officer finds reasonable suspicion that knocking and announcing would be dangerous or lead to the destruction of evidence. *Id.* at 394; *Wilson*, 514 U.S. at 936.

86. One state appears to have relaxed the usual rule requiring an unlawful entry in fact, permitting a homeowner to use deadly force against a police officer who was lawfully entering the home if the homeowner reasonably believed that the police officer was acting unlawfully. Indiana's defense of habitation statute provides that:

> A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless:
>
> (1) the person reasonably believes that the public servant is:
>
> (A) acting unlawfully; or
>
> (B) not engaged in the execution of the public servant's official duties; and
>
> (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person.

IND. CODE § 35-41-3-2(k); *see also* Chase Patterson, Note, *Don't Forget to Knock: Eliminating the Tension Between Indiana's Self Defense Statute and No-Knock Warrants*, 47 IND. L. REV. 621, 626–34 (2014) (arguing that IND. CODE § 35-41-3-2 now allows an individual charged with shooting a police officer who was lawfully executing a no-knock warrant on their home to argue that they were justified in using deadly force against that police officer because they reasonably believed the officer was acting unlawfully and arguing that police officers should always be required to knock and announce prior to entering a home).

was necessary to protect against an unlawful and imminent threat of death or serious bodily injury.[87]

Consider, for example, the case involving the fatal shooting of Breonna Taylor—a case that received a lot of attention during the racial justice protests in 2020 following the killing of George Floyd by former Minneapolis officer Derek Chauvin.[88] Taylor, an African American emergency medical technician, and her boyfriend, Kenneth Walker, had retired for the night when they heard loud banging on the door to their apartment.[89] They called out, "Who's there?" but did not hear a response.[90] Thinking they were about to be robbed by home invasion robbers, Walker, a licensed gun owner, grabbed his gun.[91] When two plainclothes police officers burst through the door, Walker fired one shot, which hit one of the officers in the leg.[92] The two officers who were in the entryway to Taylor's apartment and a third officer standing

87. *See supra* Part I.A (discussing the general requirements for a claim of self-defense).

88. *See generally* Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 13, 2023), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/LK5K-PYVZ] (summarizing the incident); Ava Wallace & Roman Stubbs, *Louisville Protesters Decry Police Shooting That Killed Breonna Taylor in Her Apartment*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/politics/louisville-protestors-decry-police-shooting-that-killed-apartment-resident/2020/05/29/f7dd8e72-a1f0-11ea-b5c9-570a91917d8d_story.html [https://perma.cc/7TVP-6A8R] (connecting the Breonna Taylor incident to the George Floyd incident); Katie Shepherd, *Louisville Bans 'No-Knock' Warrants After Police Killing of Breonna Taylor Inside Her Home*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/nation/2020/06/12/louisville-breonna-taylor-law [https://perma.cc/EZ4C-66VV] (noting the City of Louisville's response); Tim Arango et al., *Derek Chauvin Is Found Guilty of Murdering George Floyd.*, N.Y TIMES (June 25, 2021), https://www.nytimes.com/2021/04/20/us/chauvin-guilty-murder-george-floyd.html [https://perma.cc/UK3F-JNLP] (confirming Derek Chauvin to be the officer responsible for George Floyd's death).

89. Darcy Costello & Tessa Duvall, *Minute by Minute: What Happened the Night Louisville Police Fatally Shot Breonna Taylor*, LOUISVILLE COURIER J. (Sept. 15, 2020), https://www.courier-journal.com/story/news/2020/05/14/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5182824002 [https://perma.cc/5PZQ-SHA8].

90. *Id.*

91. *Id.*; Oppel et al., *supra* note 88.

92. Costello & Duvall, *supra* note 89 ("When police entered, Walker fired one shot — which he described as a 'warning,' because he thought intruders were breaking in — and struck Mattingly in the leg.").

immediately outside the apartment returned fire.[93] One of their shots hit and killed Taylor who was standing near Walker in the hallway.[94] After the shooting, Walker was arrested and charged with attempted murder.[95] These charges were later dropped.[96]

If the charges had not been dropped, a successful defense of habitation would have been challenging for Walker because the magistrate appears to have authorized a no-knock warrant, which gave the officers the lawful right to enter Taylor's apartment without knocking and announcing their identity in advance.[97] Walker could, however, have claimed he acted in self-

93. *20/20: Say Her Name: Breonna Taylor*, ABC, at 23:07 (Nov. 21, 2020), https://abc.com/shows/2020/episode-guide/2020-11/20-say-her-name-breonna-taylor [https://perma.cc/9AKM-KR9V].

94. *Id.* at 22:03.

95. *See* Costello & Duvall, *supra* note 89.

96. *See id.* ("Commonwealth's Attorney Tom Wine dismissed those charges on May 22 . . . .").

97. Search Warrant for 3003 Springfield Drive #4, Louisville, KY 40214, No. 20-1371 (Mar. 12, 2020). The validity of the search warrant has been called into question. Attorneys for the family of Breonna Taylor have asserted there was a false statement in the affidavit supporting the search warrant and, therefore, the entire warrant should be invalidated. Darcy Costello, *Breonna Taylor Attorneys: LMPD Supplied 'False Information' on 'No-Knock' Warrant*, LOUISVILLE COURIER J. (May 16, 2020), https://www.courier-journal.com/story/news/local/2020/05/16/breonna-taylor-attorneys-say-police-supplied-false-information/5205334002 [https://perma.cc/3SS4-ZRGE]. The Supreme Court has held that if there is a false statement in the affidavit supporting a search warrant and that statement was made either knowingly or with reckless disregard for the truth, then that statement must be stricken from the affidavit. Franks v. Delaware, 438 U.S. 154, 155–56 (1978). Given the allegation of a false statement in the warrant affidavit, a judicial officer would need to decide whether the rest of the information in the affidavit was sufficient to support a finding of probable cause to believe there was contraband or evidence of a crime in the residence. *See id.* at 156 (holding that if the "allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence" and "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided"). If the judge were to find that the remaining information in the affidavit was insufficient to support such findings, then the entire warrant would have to be voided. *See id.* (describing conditions where a court could void a warrant containing false statements).

The family's attorneys have alleged that the following sentence in the affidavit is false: "Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4." Costello, *supra*; Search Warrant for 3003 Springfield Drive #4, *supra*. In August 2022, four current and former Louisville Metro Police officers were charged with federal

defense, which does not require a person to be correct in the belief that they were facing an unlawful and imminent threat of death or serious bodily injury as long as their belief was reasonable.[98] Since Walker did not know that the armed, plainclothes officers who burst through the door of Taylor's apartment with guns drawn were law enforcement officers, he probably could have satisfied the requirement in self-defense law that he had a reasonable belief that he and Taylor were being imminently threatened with death or serious bodily injury.

2. Proportionality

In other respects, the defense of habitation is less strict than the defense of self-defense. As noted above, one who uses deadly force and claims they acted in self-defense must have been facing what appeared to be an imminent threat of deadly force.[99] Self-defense thus requires a form of strict proportionality—there must be a grave threat to one's personal safety before one can justifiably use deadly force against another person.[100] In contrast, a person who uses deadly force and claims they acted in defense of habitation does not necessarily have to have been facing a threat of death or serious bodily injury.[101]

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crimes related to Breonna Taylor's death. Billy Kobin & Andrew Wolfson, *'Breonna Taylor Should Be Alive Today': 4 Current & Ex-LMPD Officers Charged in Her Death*, LOUISVILLE COURIER J. (Aug. 9, 2022), https://www.courier-journal.com/story/news/crime/2022/08/04/ex-lmpd-detective-joshua-jaynes-charged-fbi-breonna-taylor-case/65391852007 [https://perma.cc/YGP3-C3V8]. Three of the charged officers were accused of making false statements and omitting material information on the affidavit in support of the search warrant. *Id.* ("[Officer] Jaynes wrote [in the affidavit that] he'd verified through a U.S. Postal inspector that Taylor's ex-boyfriend Jamarcus Glover, a suspected drug trafficker, was having packages delivered to her apartment . . . . Jaynes had actually spoken to [Officer] Mattingly, who had gotten information from Shively Police, not the postal inspector. According to those Shively officers, postal inspectors said there were no packages."). As of the writing of this Article, it appears the court has not yet ruled on the validity of the search warrant.

98. *See supra* Part I.A (describing the usual requirements for a self-defense claim); *supra* note 54 discussing the differences between self-defense and defense of habitation).

99. *See supra* note 42 and accompanying text (defining self-defense requirements).

100. *See infra* Part I.C.2.a (discussing strict proportionality statutes).

101. *See supra* notes 65–66 and accompanying text (distinguishing the defense of habitation from self-defense).

Elaine Chiu observes that there are broad and narrow versions of the defense of habitation, with narrow versions of the defense permitting the use of deadly force only when there is a threat to life and broad versions permitting deadly force simply to prevent a forcible entry into the home even when there is no concomitant threat to human life.[102] In this Subsection, I outline the three main ways states vary in the amount of proportionality they require in the defense of habitation.

a. Strict Proportionality

A mere nine states appear to require proportionality akin to that required by the law of self-defense.[103] In these states—which I call "strict proportionality" states—the homeowner must have reasonably believed that the intruder was threatening an occupant of the home with death or serious bodily injury or was threatening to commit a serious or violent felony within the dwelling.[104] In some of these strict proportionality states, however, no proportionality is required if the victim was trying to dispossess the defendant of his dwelling other than under a claim of right.[105]

b. Loose Proportionality

At least thirteen states and the District of Columbia require what might be called "loose proportionality" in the use of deadly force in defense of the habitation.[106] Loose proportionality is somewhat of a misnomer because proportionality is not actually required in those states. A person in a "loose proportionality" state is not limited to using deadly force only against persons who are threatening death, serious bodily injury, or a crime of violence. Instead, the homeowner or occupant of a dwelling is justified in using deadly force against an intruder if that person is threatening them with *some* kind of physical injury (not necessarily *serious* bodily injury or death) or is threatening to

102. *See* Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 247–56 (2006) (discussing the variations in the defense of habitation).

103. *See infra* Appendix E (listing strict proportionality states).

104. MASS. GEN. LAWS ch. 278, § 8A (2023).

105. *E.g.*, DEL. CODE ANN. tit. 11, § 466I (2024); HAW. REV. STAT. § 703-306(3)(a) (2023); NEB. REV. STAT. § 28-1411(6)(a) (2023).

106. *See infra* Appendix F (listing loose proportionality states).

commit *some* felony (not necessarily a *violent* felony) within the dwelling.[107]

c. No Proportionality

The largest number of states—at least twenty-four—do not require any proportionality in the use of deadly force in defense of the habitation.[108] In these states, a homeowner can shoot someone they reasonably believe is unlawfully entering the dwelling even if the person is not threatening the homeowner or any other occupant of the dwelling with any physical force.[109] Many of these states appear to require proportionality, but do not actually require proportionality because they have enacted a self-defense presumption that allows the jury to presume that a homeowner or other occupant of the dwelling reasonably believed a person who was unlawfully entering or had unlawfully entered the dwelling was threatening them with death or serious bodily injury.[110]

For example, at first glance, Florida's defense of habitation statute appears to require strict or loose proportionality in providing that "[t]he use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be."[111] However, another statutory provision—a provision establishing a self-defense presumption—essentially eliminates the proportionality requirement, providing:

> A person is *presumed* to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> > (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was

107. *See, e.g.*, COLO. REV. STAT. § 18-1-704.5(2) (2024) (allowing the use of deadly force when an occupant reasonably believes another person has committed or intends to commit a crime in the dwelling and may use "force, no matter how slight").

108. *See infra* Appendix G (listing no proportionality states).

109. *See infra* Appendix G.

110. *See infra* Appendix A (listing states with a self-defense presumption).

111. FLA. STAT. § 782.02 (2023).

> attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[112]

Given this self-defense presumption, a person in Florida is justified in using deadly force so long as he or she reasonably believed an unlawful and forcible entry to a dwelling, residence, or occupied vehicle had occurred or was occurring. It is not necessary that the person also believed the other person was threatening death or bodily injury. It is not even necessary that the person believed the other person was threatening some type of physical harm to them or another occupant of the dwelling.

Similarly, Louisiana appears to require loose proportionality in one part of its defense of habitation statute, permitting a person who is present in a dwelling, place of business, or motor vehicle to use deadly force against a person whom they reasonably believe is attempting to use any unlawful force against them.[113] However, another part of the same statute provides that one is permitted to use deadly force against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle or who has made an unlawful entry into a dwelling, place of business, or motor vehicle even if that person is not threatening any physical force.[114]

Like Florida, Louisiana also provides a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that deadly force was necessary to prevent an unlawful entry as long as the person against whom

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112. *Id.* § 776.013(2) (emphasis added).

113. LA. STAT. ANN. § 14:20(A) (2023) ("(3) When committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present in a dwelling or a place of business, or when committed against a person whom one reasonably believes is attempting to use any unlawful force against a person present in a motor vehicle . . . while committing or attempting to commit a burglary or robbery of such dwelling, business, or motor vehicle.").

114. *Id.* ("(4)(a) When committed by a person lawfully inside a dwelling, a place of business, or a motor vehicle . . . when the conflict began, against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle, or who has made an unlawful entry into the dwelling, place of business, or motor vehicle, and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the dwelling, place of business, or motor vehicle.").

deadly force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered the dwelling, place of business, or motor vehicle and the person who used deadly force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred.[115] This self-defense presumption eliminates the need for the homeowner, business owner, or vehicle owner to show that there were circumstances leading them to reasonably believe that deadly force was necessary to protect against physical injury or a crime.

The move away from strict proportionality is against our criminal law tradition. Self-defense presumptions, like those adopted by Florida and Louisiana, were not part of the defense of habitation at early common law. Such presumptions were not on the books until the mid-1980s when California became the first state to enact a self-defense presumption.[116] Nevada followed by adopting a self-defense presumption in 1989.[117] Many years passed before another state, Florida, enacted its infamous "Stand Your Ground" statute along with a self-defense presumption in 2005.[118] A number of states followed Florida's lead,

115. *Id.* § 14:20(B) ("[T]here shall be a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that the use of deadly force was necessary to prevent unlawful entry thereto, or to compel an unlawful intruder to leave the dwelling, place of business, or motor vehicle when the conflict began, if both of the following occur:

> (1) The person against whom deadly force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered the dwelling, place of business, or motor vehicle.
>
> (2) The person who used deadly force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred.").

Compare this language with FLA. STAT. § 782.02 (2023).

116. It appears California was the first state to enact a self-defense presumption when it passed what has been called California's Home Protection Bill of Rights in 1984, codified at section 198.5 of the California Penal Code. *See* CAL. PENAL CODE § 198.5 (Deering 2023) (noting history of being added by Stats. 1984, ch. 1666 § 1).

117. NEV. REV. STAT. § 41.095(1)(a) (2023) (noting history beginning in 1989). The Author has not been able to confirm when Alabama, New Jersey, Rhode Island, and Utah enacted their self-defense presumptions.

118. *See* S.B. 436, 2005 Leg., 107th Reg. Sess. (Fla. 2005) (showing that FLA. STAT. § 776.013—Florida's defense of habitation statute along with its self-defense presumption—was enacted in 2005).

enacting self-defense presumptions after 2005.[119] The most recent state to adopt a self-defense presumption is South Dakota, which enacted a presumption in 2021.[120]

States that do not require proportionality in the use of deadly force in defense of habitation have strayed from the

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119. In 2006, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, and South Carolina followed Florida's example by enacting self-defense presumptions. Act of Apr. 21, 2006, ch. 192, § 2(1)(a), 2006 Ky. Acts 713, 714 (codified at KY. REV. STAT. ANN. § 503.055(1)(a)) (enacting a defense of habitation statute that includes a self-defense presumption); Act of June 2, 2006, § 1(B), 2006 La. Acts 1113 (codified at LA. STAT. ANN. § 14:19(B)) (amending Louisiana's defense of habitation law to include a self-defense presumption); Act effective Oct. 1, 2006, § 1, 2006 Mich. Pub. Acts 138 (codified at MICH. COMP. LAWS § 780.951(1)(1)) (enacting a defense of habitation statute that includes a self-defense presumption); Act of Mar. 27, 2006, ch. 492, § 1, 2006 Miss. Laws 940 (codified at MISS. CODE ANN. § 97-3-15(3)) (amending Mississippi's defense of habitation statute to create a presumption of the right to use defensive force); Stand Your Ground Law, ch. 145, § 2, 2006 Okla. Sess. Laws 624 (codified at OKLA. STAT. tit. 21, § 1289.25(B)) (amending Oklahoma's defense of habitation law to create a "Stand Your Ground" law with a self-defense presumption); Act of June 7, 2006, No. 379, § 1, 2006 S.C. Acts 2908 (codified at S.C. CODE ANN. § 16-11-440(A)(1)) (enacting a defense of habitation statute that includes a self-defense presumption).

In 2007, Tennessee enacted a self-defense presumption. Act of May 3, 2007, ch. 210, § 1, 2007 Tenn. Pub. Acts 1 (codified at TENN. CODE ANN. § 39-11-611(c)). Ohio and Wyoming followed in 2008. Act of May 29, 2008, § 1, 2008 Ohio Laws 1154 (codified at OHIO REV. CODE ANN. § 2901.05(B)(1)) (amending an existing defense of habitation law to include a self-defense presumption); Act of Mar. 13, 2008, ch. 109, § 1, 2008 Wyo. Sess. Laws 362 (codified at WYO. STAT. ANN. § 6-2-602(b)) (codifying the castle doctrine with a self-defense presumption). Kansas adopted a self-defense presumption in 2010. Act of Apr. 19, 2010, ch. 124, § 3, 2010 Kan. Sess. Laws 1040 (codified at KAN. STAT. ANN. § 21-5224(a)(1)(A)) (enacting a defense of habitation law with a self-defense presumption). In 2011, North Carolina, Pennsylvania, and Wisconsin followed suit. Act of June 17, 2011, § 1, 2011 N.C. Sess. Laws 1002 (codified at N.C. GEN. STAT. § 14-51.2(b)) (enacting a defense of habitation law with a self-defense presumption); Act of June 28, 2011, § 2, 2011 Pa. Laws 48 (codified at 18 PA. CONS. STAT. § 505(b)) (amending Pennsylvania's defense of habitation statute to include a self-defense presumption); Act of Dec. 7, 2011, § 1, 2011 Wis. Sess. Laws 949 (codified at WIS. STAT § 895.62) (creating a defense of habitation statute with a self-defense presumption). In 2017, Iowa adopted a self-defense presumption. Act of Apr. 13, 2017, ch. 69, § 39, 2017 Iowa Acts 168 (codified at IOWA CODE § 704.2A) (enacting a defense of habitation statute with a self-defense presumption).

120. An Act to Clarify the Use of Force, ch. 93, §§ 4–7, 2021 S.D. Sess. Laws 202 (codified at S.D. CODIFIED LAWS §§ 22-18-4.2 to 4.5) (enacting a defense of habitation law with a self-defense presumption).

defense of habitation as originally conceived. While early common law sources are mixed in terms of the precise contours of the right to use deadly force in defense of one's habitation, proportionality appears to have been a signature feature of the defense of habitation at early common law in at least several states.

For example, in the 1853 case of *Carroll v. State*, the Supreme Court of Alabama held that a homeowner has no right to use deadly force against a trespasser unless necessary to prevent a felonious destruction of the house or to defend against loss of life or great bodily harm.[121] The court explained, "The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm."[122]

Similarly, in the 1896 case of *Carpenter v. State*, the Supreme Court of Arkansas started by noting that the existing statutes:

> make homicides in self-defense excusable, and justify those committed by the slayer in defense of "person, *habitation*, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either," as at common law.[123]

The court went on to explain that:

> no one . . . is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it *necessary to kill the assailant to save his own life, or to prevent a great bodily injury*, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing.[124]

In other words, one acting in self-defense or in defense of habitation would not be excused or justified unless it was necessary to use deadly force to prevent death or great bodily injury.

In the 1897 case of *State v. Countryman*, the Supreme Court of Kansas noted that a mere trespass upon one's property without any threat of harm to the homeowner or his family was not sufficient to permit the use of a firearm or other deadly weapon

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121. 23 Ala. 28, 36 (Ala. 1853).

122. *Id.*

123. 62 Ark. 286, 306 (Ark. 1896) (emphasis added) (quoting 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 271 (Philadelphia, P. Byrne 1806)).

124. *Id.* at 306 (emphasis added).

upon those trespassers.[125] The court explained that even a genuine "[f]ear upon the defendant's part that the rioters would assault him or his family, or injure his property, did not justify the use upon them of a deadly weapon."[126] Rather,

> The use of a deadly weapon by a person in defense of himself, his family, or his property [was] unjustifiable except where the assault [was] felonious in character, [was] impending, and [was] so near to being made as to prevent its consummation by the use of other means adequate to repel the same.[127]

In other words, a bare fear of a simple assault was not sufficient to justify the use of a deadly weapon; one could use a deadly weapon against someone who had trespassed on one's property only if necessary to prevent the impending commission of a felonious assault, which by definition involved "means or force likely to produce death or great bodily harm."[128]

Some states appeared to require loose proportionality at early common law, allowing one to use deadly force in defense of habitation against a trespasser who merely threatened to commit a felony, suggesting that any felony—including a nonviolent felony—would be sufficient. For example, in *State v. Taylor*, the Supreme Court of Missouri rejected the contention that a mere trespass was sufficient to invoke the use of deadly force under the defense of habitation,[129] explaining that "[one] has no right to kill unless it becomes necessary to prevent a felonious destruction of his property or the commission of *a felony* therein, or to defend himself against a felonious assault against his life or person."[130] Similarly, in *People v. Payne*, the Supreme Court of

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125. 48 P. 137, 140–41 (Kan. 1897).

126. *Id.* at 141.

127. *Id.*

128. In 1897, the crime of "felonious assault" in Kansas was defined as follows:

> Every person who shall, on purpose and of malice aforethought shoot at or stab another, or assault or beat another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish, or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by confinement and hard labor for a term not exceeding ten years.

2 W.C. WEBB, GENERAL STATUTES OF THE STATE OF KANSAS, 1897 § 39, at 302 (Topeka, W.C. Webb 1897).

129. 44 S.W. 785, 788 (Mo. 1898).

130. *Id.* at 789 (emphasis added).

California noted that "[j]ustifiable homicide is defined by our statute to be 'the killing of a human being in necessary self-defense, or *in defense of habitation*, property, or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit *a felony*.'"[131] Likewise, in *State v. Kuhns*, a North Carolina court noted that "[a]t common law, the use of deadly force in *defense of the habitation* was justified only to prevent a forcible entry under circumstances where the occupant reasonably apprehended death or great bodily harm to himself or others, or believed that the assailant intended to commit *a felony*."[132]

While these authorities appear to have endorsed a form of loose proportionality, they actually required something akin to strict proportionality because at early common law, there were only a few felonies on the books.[133] Most of these felonies were violent felonies,[134] and all of the felonies that existed at that time were punishable by death.[135] Therefore, even though these courts appeared to permit one to use deadly force against a person who was merely threatening to commit a felony—not necessarily a violent felony—a person in these states would have been justified in using deadly force only if the other person was threatening to commit a serious or violent felony punishable by death because most of the felonies at that time were violent felonies and all felonies at that time were thought to be so serious that they were punishable by death. Thus, what may have appeared

131. 8 Cal. 341, 343 (Cal. 1857) (emphasis added).

132. 817 S.E.2d 828, 830 (N.C. Ct. App. 2018) (emphasis added).

133. Paul J. Larkin, Jr. & John-Michael Seibler, Sturgeon v. Frost*: Alaska's Wild Lands and Wild Laws Prove the Need for a Mistake-of-Law Defense*, 72 WASH. & LEE L. REV. ONLINE 376, 385 (2016) ("There were only nine felonies at common law . . . ."); *Criminal Law*, LEGAL INFO. INST. (last updated Aug. 2022), https://www.law.cornell.edu/wex/criminal_law [https://perma.cc/4CWR-4JEX] ("At common law, there were nine major felonies (Murder, Robbery, Manslaughter, Rape, Sodomy, Larceny, Arson, Mayhem, and Burglary) . . . .").

134. Francis H. Bohlen & John J. Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525, 542 (1926) ("If the crimes are of violence, *such as were the great majority of early common law felonies*, they are usually committed by such persons and under such circumstances as to threaten a very real risk of serious bodily injury to their victims." (emphasis added)).

135. 1 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW, § 2:3, at 28 (16th ed. 2021) ("At common law, all felonies were subject to capital punishment.").

to be loose proportionality was actually closer to strict proportionality.

The early American cases that suggested something akin to strict proportionality was required to use deadly force in defense of habitation were in line with several early common law English treatises. For example, in the 1806 edition of the *Treatise of the Pleas of the Crown*, Edward Hyde East wrote that "where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon."[136] East continued, "if upon sight of one breaking his hedges the owner take up an hedge stake, and knock him on the head and kill him; this would be murder; because it was an act of violence much beyond the proportion of the provocation."[137]

Similarly, in 1883, Sir James Fitzjames Stephen, the author of *A History of the Criminal Law of England*, spoke of proportionality in the use of force against a trespasser when he wrote that a person "may put a trespasser out of his house, or out of his field by force, but he may not strike him, still less may he shoot or stab him."[138] Stephen explained that, "[i]f the wrongdoer resists, the person who is on the defensive may overcome his resistance, and may proportion his efforts to the violence which the wrongdoer uses."[139] He further noted that "[i]f the wrongdoer assaults the person who is defending his property, that person is in the position of a man wrongfully assaulted, and may use whatever violence may become necessary for the protection of his person."[140]

Even William Blackstone in his *Commentaries on the Laws of England*, published in 1769, noted that one could use deadly force against another person only if one was seeking to prevent that person from committing a forcible crime, writing that "homicide, as is committed *for the prevention of any forcible and atrocious crime*, is justifiable by the law of nature; and also by the

136. EAST, *supra* note 123, at 288.

137. *Id.*

138. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 15 (London, MacMillan & Co. 1883).

139. *Id.*

140. *Id.*

law of England."[141] One could not use deadly force against an intruder who had merely trespassed into one's home during the day unless that intruder was threatening a forcible crime like robbery, which involved "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear."[142] As Blackstone explained, "This reaches *not to any crime unaccompanied with force*, *as* picking of pockets; or to *the breaking open of any house in the day time*, unless it carries with it an attempt of robbery also."[143]

Similarly, William Hawkins in *A Treatise of the Pleas of the Crown*, published in 1716, wrote that "the killing of a Wrongdoer . . . may be justified in . . . as where . . . *the Owner of a House*, or any of his Servants or Lodgers[] *kill one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony . . . .*"[144] Just as felonies in the United States at early common law were few in number, mostly violent, and punishable by death, felonies in England at that time were also few in number and most were violent and punishable by death.[145]

3. Beyond the Dwelling

Another way states today vary in their application of the defense of habitation is in whether the defense applies beyond the four corners of the dwelling. At least twenty-eight states and the District of Columbia have broadened the defense of habitation to apply to places of business or occupied cars.[146] For example, in

141. 4 WILLIAM BLACKSTONE, COMMENTARIES 180 (Oxford, Clarendon Press 1769) (emphasis added).

142. *Id.* at 241.

143. *Id.* at 180 (emphasis added).

144. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (London, Eliz. Nutt 1716) (emphasis added).

145. 2 STEPHEN, *supra* note 138, at 192–93 ("Felony was substantially a name for the more heinous crimes, and all felonies were punishable by death, with two exceptions, namely, petty larceny and mayhem, which came by degrees to be treated as a misdemeanor.").

146. *See infra* Appendix H (listing states that extend defense of habitation to workplaces and/or motor vehicles). In Wyoming, the presumption explicitly applies only to the home or habitation. *See* WYO. STAT. ANN. § 6-2-602(b)(i) (2023). However, in 2022, the Supreme Court of Wyoming opened the door to extending the defense of habitation to occupied vehicles. *See* Howitt v. State, 521 P.3d 314, 322–33 (Wyo. 2022) (endorsing a jury instruction which allowed

Louisiana, one is justified in using deadly force "against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle, or who has made an unlawful entry into the dwelling, place of business, or motor vehicle" if one "reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the dwelling, place of business, or motor vehicle."[147]

Louisiana's expansion of the defense of habitation to motor vehicles has been called the "Shoot the Carjacker" law.[148] According to Stuart Green, passage of this law "was prompted by . . . two particular carjackings . . . : one in which an eleven-month-old baby was killed after a bungled carjacking in New Orleans' Irish Channel section, and another in which the reigning Miss Louisiana, Erika Schwartz, had her pageant prize, a new Ford Taurus, stolen from her at gunpoint."[149] Importantly, Green observes that it was not necessary to expand the defense of habitation to vehicles to justify the use of deadly force in either of these two cases. He explains that "given the nature of the threat to the defenders, the then-existing law of self-defense or defense of others would clearly have permitted the use of deadly force."[150] Green also notes that "the immediate impact of the 'Shoot the Carjacker' law seems to have been, first, that prosecutors are less likely even to file charges in cases involving defensive killings committed by drivers; and, second, that drivers in Louisiana now feel freer to use deadly force in such situations than before."[151]

When Green wrote about Louisiana's "Shoot the Carjacker" law in 1999, he noted that "Louisiana [was] the only state with such a statute,"[152] but today—twenty-five years later—eighteen

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the jury to consider whether the defendant's car was his habitation for the purposes of defense of habitation).

147. LA. STAT. ANN. § 14:20(A)(4)(a) (2023). Similarly, in Georgia, one may argue defense of habitation if one uses deadly force to repel an attempted carjacking. Salazar-Balderas v. State, 806 S.E.2d 644, 647 (Ga. Ct. App. 2017) (allowing a defense of habitation jury instruction when testimony showed that driving away and causing serious injury with a vehicle was done to prevent a violent entry into the vehicle).

148. Green, *supra* note 65, at 3.

149. *Id.* at 13.

150. *Id.*

151. *Id.* (footnotes omitted).

152. *Id.* at 14.

states have similar laws permitting the use of deadly force in defense of one's motor vehicle.[153] There were no cars at early common law, so the defense of habitation could not have applied to cars back then.

Some states have gone even further, extending the defense of habitation to the curtilage, the area immediately surrounding the home.[154] For example, Idaho defines the term "habitation" as "Any building, inhabitable structure or conveyance of any kind . . . designed to be occupied by people lodging therein at night, . . . and *includes the curtilage* of any such dwelling."[155] Similarly, Indiana allows the use of deadly force against another person if one "reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry [into] the person's dwelling, *curtilage*, or occupied motor vehicle."[156]

In expanding the reach of the defense of habitation beyond the four corners of the dwelling, these states have strayed from the original meaning of the defense of habitation. Several early authorities explicitly state that the defense of habitation applied to the four corners of the dwelling, rejecting attempts to apply it to the land outside the home. For example, in the 1878 case of *Davison v. People*, Peter Davison was convicted of murdering of a man named John Robertson and sentenced to a term of fourteen years.[157] Davison objected to one of the jury instructions, which informed the jury that he "would not be justified in killing [the] deceased to prevent a trespass to his real estate, unless it was upon his dwelling house."[158] The Supreme Court of Illinois rejected Davison's objection, noting that "no well considered case has gone the length of holding that a person may kill another to prevent a mere trespass to his property."[159] The court went on to explain that "[t]he law affords ample redress for trespasses committed on a man's land, but does not sanction the taking of life

153. *See infra* Appendix I (listing states that extend defense of habitation to motor vehicles).

154. *See infra* Appendix J (listing states that extend defense of habitation to the curtilage).

155. IDAHO CODE § 18-4009(3)(a) (2024) (emphasis added).

156. IND. CODE § 35-41-3-2(d) (2023) (emphasis added).

157. 90 Ill. 221, 224–25 (Ill. 1878).

158. *Id.* at 229.

159. *Id.*

to prevent it."[160] In contrast, the court recognized that "[a] man's house is his castle, and he may defend it even to the taking of life, if necessary or apparently necessary to prevent persons from forcibly entering it against his will, and when warned not to enter and to desist from the use of force."[161]

Similarly, in the 1891 case of *Lee v. State*, the Supreme Court of Alabama noted that "[a] killing in defense of one's dwelling may be excusable in the eye of the law, when there would be no legal justification for the taking of human life, in like circumstances, to prevent a trespass upon property not the dwelling-house."[162] The court explained that "[t]his shows the solicitude of the law to secure one's abode as a haven of protection for him and that the peculiar inviolability attaching to a man's habitation does not extend to his other property."[163]

These early American cases are in line with several early American criminal law treatises, affirming the right of a homeowner or other occupant of a dwelling to use deadly force against an intruder into the home or dwelling. For example, in the tenth edition of *A Treatise on Criminal Law*, published in 1896, Francis Wharton and Wm. Draper Lewis wrote, "[a]n attack on a house or its inmates may be resisted by taking life."[164] They continued, "[t]his may be when burglars threaten an entrance, or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house, or when an attempt is made violently to enter the house in defiance of the owner's rights."[165] Wharton and Lewis explained that "the occupant of a house has a right to resist, even to the death, the entrance of persons attempting to force themselves into it against

160. *Id.* at 229–30.

161. *Id.* at 229.

162. 9 So. 407, 408 (Ala. 1891).

163. *Id.* It should be noted that this case involved the question of whether the defendant had a duty to retreat before using deadly force when he was on his own property but not in his dwelling-house, so the issue before the court was on the reach of the castle doctrine as opposed to the defense of habitation. *Id.* at 407.

164. 1 FRANCIS WHARTON WITH WM. DRAPER LEWIS, A TREATISE ON CRIMINAL LAW § 503 (10th ed. Philadelphia, Kay & Brother 1896).

165. *Id.* (footnote omitted).

his will, when no action less than killing is sufficient to defend the house from entrance."[166]

Similarly, in the seventh edition of *Commentaries on the Criminal Law*, published in 1882, Joel Prentiss Bishop noted, "while a man keeps the doors of his house closed, no other has the right to break in, under any circumstances; except in particular cases where it becomes lawful for the purpose of making an arrest of the occupant, or the like."[167] He further noted that "the persons *within the house* may exercise all needful force to keep aggressors out, even to the taking of life."[168]

Early English treatises echoed this view that while an occupant of a dwelling had the right to use deadly force against one who tried to break into the dwelling, there was no such right to use deadly force against a person who merely trespassed onto one's land. Recall that Edward Hyde East, author of the *Treatise of the Pleas of the Crown*, wrote in 1806 that "where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon."[169] East continued, "if upon sight of one breaking his hedges the owner take up an hedge stake, and knock him on the head and kill him; this would be murder; because it was an act of violence much beyond the proportion of the provocation."[170]

In sum, the defense of habitation in modern times is racked with inconsistency in the way it is applied across the fifty states and the District of Columbia. Some states require the entry or attempted entry to be forcible as well as unlawful, while others merely require the entry or attempted entry to be unlawful.[171] Some states require strict proportionality in the use of deadly force, while other states require loose proportionality or no

166. *Id.*

167. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 858 (7th ed. Boston, Little, Brown & Co. 1882).

168. *Id.* (emphasis added).

169. EAST, *supra* note 123, at 288.

170. *Id.*

171. *Compare infra* Appendix C (listing states requiring an unlawful entry), *with infra* Appendix D (listing states requiring an unlawful and forcible entry).

proportionality at all.[172] Some states limit the defense to the four corners of the dwelling, while others have extended the defense to the workplace, the car, or the curtilage.[173] Additionally, even though there has always been inconsistency in its application—even at early common law—in relaxing the proportionality required for the use of deadly force and in extending the defense beyond the four corners of the dwelling, the defense of habitation in modern times appears to be a far cry from the defense of habitation as originally conceived in a number of jurisdictions.

II. THE DEFENSE OF HABITATION IN THREE JURISDICTIONS

The defense of habitation in its current form is deeply flawed. It places a thumb on the scale in favor of the homeowner against anyone perceived to be an intruder or a would-be intruder. When that homeowner has a firearm and the other person is unarmed, the defense as it currently exists in most states helps to exculpate the homeowner even if the other person was not posing a threat of death or physical harm to the homeowner or anyone else in the dwelling. We also know from decades of research that Black and brown individuals are likely to be viewed with more suspicion than White individuals,[174] which means the fearful homeowner is more likely to think that an

172. *Compare infra* Appendix E (listing strict proportionality states), *with infra* Appendix F (listing loose proportionality states), *and infra* Appendix G (listing states with no proportionality requirement).

173. *See infra* Appendix H (listing states that extend the defense of habitation to workplaces and/or motor vehicles); *infra* Appendix I (listing states that extend the defense of habitation to motor vehicles); *infra* Appendix J (listing states that extend the defense of habitation to curtilage).

174. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876 (2004) (noting that stereotypes that link Black individuals with violence, dangerousness, and criminality have been documented by social psychologists for over half a century); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–46 (2003) [hereinafter LEE, MURDER AND THE REASONABLE MAN] (discussing the deeply rooted association people tend to make linking Black individuals with dangerousness and crime); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–22 (1996) [hereinafter Lee, *Race and Self-Defense*] (discussing the Black-as-criminal stereotype and its influence on cases involving claims of self-defense by individuals charged with crimes of violence against Black individuals).

innocent Black person who is knocking on their door poses a threat than they would if that person were White.

This Part examines the defense of habitation law in three jurisdictions—North Carolina, Florida, and Missouri—and uses a few recent cases in which homeowners with firearms shot innocent persons who were not posing a threat of any physical injury to illustrate how the defense of habitation works. While well-intended, the defense of habitation in many jurisdictions may unwittingly encourage homeowners with firearms to use them when such use should be discouraged.

A. NORTH CAROLINA'S DEFENSE OF HABITATION

Tuesday, April 18, 2023. A group of children were playing basketball in the street in North Carolina, when their ball rolled into the yard of a home where Robert Louis Singletary was staying.[175] When the kids went into the yard to retrieve the ball, Singletary, a twenty-four-year-old African American man, yelled at them.[176] One boy went back and told his father that Singletary had yelled at him, prompting the boy's father to go over to Singletary and tell him, "stop cussing my kid out, if you got a problem come to me and we can work it out."[177]

In response, Singletary walked inside the home, came out with a gun, and started shooting at the kids and the father who had verbally confronted him.[178] The father was able to run away and was not injured.[179] However, six-year-old Kinsley White—a blond-haired, blue-eyed little White girl—and her parents were not so lucky. According to one account, Kinsley wasn't even part of the group of children who were playing basketball; she and

175. Teddy Grant & Peter Charalambous, *NC Man Released from Hospital After Being Shot When Basketball Rolled into Neighbor's Yard*, ABC NEWS (Apr. 24, 2023) https://abcnews.go.com/US/nc-man-released-hospital-after-shot-basketball-rolled/story?id=98803436 [https://perma.cc/VF5U-HA4K]; *see also* Dianne Gallagher et al., *Suspect Who Allegedly Shot 6-Year-Old Neighbor and Her Parents in North Carolina Has Been Apprehended in Florida*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/20/us/neighbor-child-shooting-basketball-singletary/index.html [https://perma.cc/4QVM-RUUW] (indicating in a video embedded in the article that Singletary was an occupant of the dwelling, not the homeowner).

176. Gallagher et al., *supra* note 175.

177. *Id.*

178. *Id.*

179. *Id.*

her parents happened to be walking home when Singletary came out of his house shooting.[180] According to another account, Kinsley was playing with the other children when their basketball rolled into Singletary's yard.[181] When Singletary came out of his house shooting, Kinsley's father, William "Jamie" White, told Singletary to stop shooting because of the kids.[182] Singletary responded, "I'm going to shoot your a—," and then pointed his revolver at White and his daughter Kinsley and started shooting.[183] One of the bullets grazed Kinsley's cheek and her mother's elbow.[184] White, who had run towards his daughter to protect her, had to be hospitalized after bullets from Singletary's gun pierced his lung and liver.[185]

In an interview, Singletary's grandmother said that one of Singletary's neighbors had threatened to shoot Singletary's home during the turmoil.[186] In other words, Singletary was simply defending his home against a threat of deadly force. While the home wasn't actually Singletary's,[187] under North Carolina's defense of habitation statute, as long as Singletary was a lawful occupant of the home, Singletary had the same right to use deadly force in defense of the habitation just as if he had been the owner.[188] Singletary's grandmother also said that Singletary himself was shot when he was fifteen-years-old and

180. Maham Javaid & Ellen Francis, *Arrest Made in Shooting of 6-Year-Old Girl, Father in North Carolina*, WASH. POST (Apr. 20, 2023), https://www.washingtonpost.com/nation/2023/04/20/north-carolina-shooting-girl-basketball [https://perma.cc/LR79-ST6W].

181. *'I Was on Fire': Dad Shot by Neighbor While Protecting Girl*, AP NEWS (Apr. 24, 2023) [hereinafter *I Was on Fire*], https://apnews.com/article/north-carolina-shooting-neighbor-basketball-2f18b236901ff997eabe3d10d0058e4b [https://perma.cc/V3PM-B3GP].

182. *Id.*

183. *Id.*

184. Gallagher et al., *supra* note 175.

185. *I Was on Fire*, *supra* note 181.

186. *Id.*

187. Gallagher et al., *supra* note 175 (video embedded in article shows neighbor saying Singletary's girlfriend rented a room in the house and Singletary started staying with her a few weeks before the shooting).

188. *See* N.C. GEN. STAT. § 14-51.2(b) (2023) (giving "[t]he lawful occupant of a home, motor vehicle, or workplace" a self-defense presumption).

suffers from post-traumatic stress disorder stemming from that shooting.[189]

North Carolina has one of the worst defense of habitation laws in the country. A lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious bodily harm if they use deadly force against a person whom they know or reasonably believe to be unlawfully and forcefully entering the home.[190] North Carolina has also extended its defense of habitation by statute to motor vehicles and the workplace.[191] The expansion to motor vehicles and workplaces means that any person with a firearm in a home, car, or workplace in North Carolina is presumed to have justifiably used deadly force against a person whom they reasonably believed was unlawfully and forcefully entering or had unlawfully and forcefully entered the home, car, or workplace even if that person was not actually or even apparently threatening them or anyone else with deadly force.

In the case at hand, there is no evidence that anyone—child or adult—had entered or was attempting to enter Singletary's home, car, or workplace. North Carolina case law, however, defines the "home" expansively to include its curtilage.[192] As the Supreme Court of North Carolina explained in 1955, "[O]ne's own premises . . . will not be limited to his dwelling house only, but . . . will extend to attacks within the curtilage of the home."[193] The court continued, "And the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings."[194]

In Singletary's case, a child had gone onto the front yard—the curtilage—to retrieve a basketball, and that child's father may have also gone onto the curtilage to tell Singletary to stop cussing at his son.[195] Because North Carolina's defense of

189. *I Was on Fire*, *supra* note 181.

190. N.C. GEN. STAT. § 14-51.2(b) (2023).

191. *Id.*

192. N.C. GEN. STAT. § 14-51.2(a) (2023) ("Home. — A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.").

193. State v. Frizzelle, 89 S.E.2d 725, 726 (N.C. 1955).

194. *Id.*

195. *See* Gallagher et al., *supra* note 175.

habitation law allows the use of deadly force against individuals who have unlawfully entered the curtilage, Singletary may try to argue that he was acting lawfully when he shot at the kids and the father, thinking that his curtilage was under attack.

Fortunately, North Carolina requires the person using deadly force to have known or reasonably believed that the other person was engaging in an unlawful *and forceful* entry or had already unlawfully *and forcibly* entered the premises,[196] but there is little to no case law in North Carolina on what constitutes a "forcible" or "forceful" entry into the home or curtilage. It is hard to imagine how an entry into someone's front yard could be considered forcible if that front yard has no gate or fence surrounding it, and it does not appear that there was a fence surrounding Singletary's home.[197] It is, however, possible that a judge—especially one sympathetic to a homeowner with a firearm saying he was defending his habitation—could find that the act of running into someone's front yard without their permission constitutes both an unlawful and forceful entry into that yard. Hopefully the North Carolina courts will clarify what is meant by the terms "forceful" and "forcible" and hold that a person who merely walks or runs onto a person's unfenced front yard, without more, has not *forcibly* entered the curtilage of the home. The Singletary case may offer North Carolina courts the opportunity to make such a determination.

Despite North Carolina's very expansive defense of habitation and its self-defense presumption, I would not be surprised if a jury were to find Singletary was *not* justified in shooting at Kinsley and her parents who just happened to be walking past Singletary's home and had nothing to do with the incident that prompted Singletary to get his gun. Singletary's reaction to a basketball coming into the yard of the home where he was staying and a father telling Singletary not to cuss out his son was quite disproportionate. Singletary was not even remotely threatened with any physical harm, let alone a threat of death or serious bodily injury, yet his response was to get his gun and start

196. N.C. GEN. STAT. § 14-51.2(b) (2023).

197. All the cited sources indicate that the ball "rolled" into the front yard, suggesting there was no fence surrounding the yard. *See* Grant & Charalambous, *supra* note 175; Javaid & Francis, *supra* note 180; Gallagher et al., *supra* note 175; *I Was on Fire*, *supra* note 181.

shooting at the father and others who happened to be in the vicinity. Even though North Carolina's defense of habitation law suggests that an occupant of a dwelling may justifiably use deadly force against a person who has unlawfully and forcefully entered the curtilage of that dwelling, a jury may find Singletary guilty, which would be a fair and just result and completely within their discretion. The law should not allow anyone—regardless of their race—to shoot at another person simply because they ran into their front yard without permission.[198]

198. Because Singletary is a Black man, *Inmate Summary - Singletary, Robert Louis*, GASTON CNTY. SHERIFF'S OFF., https://tepsweb.cityofgastonia.com/newworld.aegis.webportal/Corrections/InmateSummary.aspx?ID=3878077 [https://perma.cc/YF62-V56T], and Kinsley and her parents appear to be White, implicit racial bias may also work against Singletary and his claim that he acted justifiably in defense of his habitation when he shot at Kinsley and her parents. *See* LEE, MURDER AND THE REASONABLE MAN, *supra* note 174, at 138–54 (explaining how the Black-as-criminal stereotype can lead jurors and other legal decisionmakers to view self-defense claims by Black individuals—particularly Black individuals who are charged with killing or assaulting White individuals—with more skepticism than when White individuals who are charged with killing or assaulting other individuals claim self-defense). As David Frum has aptly noted, "the [Second Amendment] right to carry arms is America's most unequally upheld right." David Frum, *The Chilling Effects of Openly Displayed Firearms*, ATLANTIC (Aug. 16, 2017), https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-meancharlottesville-could-have-been-graver/537087 [https://perma.cc/M3D6-RW8V]. Black individuals with guns are often seen as threats even when they have a license to carry. For example, in 2016, Philando Castile, a Black man, was shot and killed during a traffic stop just seconds after informing the officer that he was licensed to carry a gun and had a gun in the car. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html [https://perma.cc/K62S-WESL] ("Mr. Castile was licensed to carry a gun and was recorded on a dashboard camera video calmly telling Officer Yanez that he had a weapon in the car."). The officer testified that he shot Castile because he "thought [he] was going to die." Ralph Ellis & Bill Kirkos, *Officer Who Shot Philando Castile Found Not Guilty on All Counts*, CNN (June 16, 2017), https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict/index.html [https://perma.cc/X9VY-FECN]. Castile's girlfriend, Diamond Reynolds, who was in the car at the time with her four-year-old daughter, said Castile was reaching for his identification in his back pocket, not his gun, when he was shot. *Id.* The officer was charged with second degree manslaughter and two counts of intentional discharge of firearm that endangers safety. *Id.* After a trial before a twelve-person jury with one Black male juror and one Black female juror, the officer was found not guilty on all charges. *Id.* The officer was discharged from the police force. *Id.* For additional examples of Black men with guns who were shot and killed by police

B. FLORIDA'S DEFENSE OF HABITATION

Saturday, April 15, 2023. Two Instacart delivery workers—nineteen-year-old Waldes Thomas Jr. and his girlfriend, eighteen-year-old Diamond Harley D'arville[199]—were trying to make a delivery in South Florida and went to the wrong address.[200] Forty-three-year-old Antonio Caccavale saw the vehicle on his property and told his twelve-year-old son to go outside and ask the driver to leave.[201] Caccavale heard his son call for help and told police he saw the vehicle "driving erratically and running into items on the property."[202] Upon exiting his home, Caccavale claimed that "[t]he vehicle . . . drove toward his direction, causing him to dive out of the way. The vehicle then reversed and side swiped him, causing his right foot to be run over."[203] He fired several rounds toward the tires of the vehicle to try to disable it, claiming that he feared "he or his son were going to be further injured by the vehicle."[204]

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who erroneously thought they were criminal suspects, see Cynthia Lee, *It Looks Like Another Black Man with a Gun Was Killed by Police After Trying to Help*, SLATE (Nov. 29, 2018), https://slate.com/news-and-politics/2018/11/ej-bradford-jemel-roberson-police-shootings-good-guy-with-gun.html [https://perma.cc/6LK2-SA33] (reporting on the murder of E.J. Bradford Jr., a Black man with a license to carry, who was shot and killed by police while attempting to help apprehend a shooting suspect in an Alabama mall). *See also* Cynthia Lee, Opinion, *Jemel Roberson's Avoidable Death: Reform Deadly Force Laws, Require Police to De-escalate*, USA TODAY (Nov. 15, 2018) [hereinafter Lee, *Jemel Roberson*], https://www.usatoday.com/story/opinion/2018/11/15/jemel-roberson-killed-deadly-forcerequire-police-de-escalation-column/2002341002 [https://perma.cc/5G5H-3TL5] (commenting on the police shooting of Jemel Roberson, a Black security guard who had just apprehended a shooting suspect outside of a Chicago bar, because police thought Roberson was the shooting suspect).

199. Grant, *supra* note 19; Dennis Romero, *Florida Police Decline to Make Arrests After Neighbor Shoots at Grocery Delivery Car*, NBC News (Apr. 22, 2023), https://www.nbcnews.com/news/us-news/florida-police-decline-make-arrests-neighbor-shoots-grocery-delivery-c-rcna81007 [https://perma.cc/97VL-PBYR].

200. Dominguez & Salahieh, *supra* note 19 (noting that a neighbor told police that his wife had ordered groceries on Instacart and was on the phone with the Instacart driver because he could not locate the home).

201. *Id.*; Grant, *supra* note 19.

202. Dominguez & Salahieh, *supra* note 19.

203. *Id.*

204. *Id.*

Thomas and D'arville, both Black,[205] told police that after Caccavale's son approached and asked them to leave, they tried to reverse out of the driveway and struck a boulder on the property.[206] Then a man came out of the house and began grabbing onto the driver's side door window.[207] As they tried to leave, they "heard three gunshots in close proximity."[208]

The police found two bullet holes in the rear bumper and one in the rear passenger tire of the Instacart delivery workers' car.[209] After determining that both the Instacart workers' and the homeowner's actions were justified based on the circumstances, the police declined to press criminal charges against Caccavale, the homeowner.[210]

The decision not to arrest Caccavale was likely influenced by Florida's infamous Stand Your Ground self-defense statute and its defense of habitation statute.[211] In 2005, Florida enacted a so-called "Stand Your Ground" law.[212] Prior to 2005, Florida had required individuals to retreat if a safe retreat was available and known prior to using deadly force in public.[213] Florida's

205. Sharelle Burt, *Florida Man Shoots at Black Instacart Delivery Workers Who Accidentally Went to Wrong Address*, BLACK ENTER. (Apr. 24, 2023), https://www.blackenterprise.com/its-not-right-florida-man-shoots-at-black-instacart-delivery-workers-who-accidentally-went-to-wrong-address [https://perma.cc/E6DK-P4B6].

206. Dominguez & Salahieh, *supra* note 19.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Florida's Stand Your Ground law was the reason law enforcement officers initially declined to arrest George Zimmerman, who told them he shot Trayvon Martin in self-defense. *See* Letter from Norton N. Bonaparte, Jr., City Manager, Sanford, Florida, to the Citizens of Sanford, Florida (Mar. 19, 2012) (on file with the *Minnesota Law Review*) (explaining that "law enforcement was PROHIBITED from making an arrest based on the facts and circumstances they had at the time," citing the immunity provision in Florida's self-defense statute).

212. *See* S.B. 436, 2005 Leg., 107th Reg. Sess. (Fla. 2005) (showing that FLA. STAT. § 776.013—Florida's Stand Your Ground law—was enacted in 2005); *see also* Ruben, *supra* note 34, at 534 (noting that Florida's 2005 Stand Your Ground law was "aggressively promoted by the NRA and the conservative American Legislative Exchange Council ('ALEC')").

213. *See* All Things Considered, *A History of 'Stand Your Ground' Law in Florida*, NPR (Mar. 20, 2012), https://www.npr.org/2012/03/20/149014228/a-history-of-stand-your-ground-law-in-florida [https://perma.cc/2GNV-6898] (describing the changes brought on by the 2005 statute).

Stand Your Ground law eliminated this duty to retreat, allowing individuals to use deadly force in public even if a safe retreat was known to them and available.[214] The Florida law also gives individuals who claim they acted in self-defense immunity from prosecution and civil lawsuits.[215] After Florida enacted its Stand Your Ground law, many other states followed suit.[216]

Stand Your Ground laws have been critiqued for encouraging gun owners to use deadly force in situations where they could have avoided a physical confrontation without such force.[217] Studies suggest that Stand Your Ground laws have led to an increase in the number of homicides in the states that have such laws.[218] Florida's Stand Your Ground law has also been criticized

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214. *See id.*; FLA. STAT. § 776.012(1) (2022) ("A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.").

215. FLA. STAT. § 776.032(1) (2023) ("A person who uses or threatens to use force . . . is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force . . . ."); *see also* Ruben, *supra* note 34, at 533–34 (describing the development of the self-defense immunity law over time).

216. Ruben, *supra* note 34, at 529 (noting that Florida's 2005 Stand Your Ground law "served as a model that influenced legal changes across the country"); *see also* All Things Considered, *Florida Lawmakers Debate to Repeal Infamous Stand Your Ground Law*, NPR (Feb. 4, 2021), https://www.npr.org/2021/02/04/964172326/florida-lawmakers-debate-to-repeal-infamous-stand-your-ground-law [https://perma.cc/D6VS-5SQZ] ("After Florida passed the first Stand Your Ground law in 2005, . . . many other states followed suit, largely because of intense lobbying by the National Rifle Association.").

217. *E.g.*, Tamara F. Lawson, *A Fresh Cut in an Old Wound—a Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 301–02 (2012) (suggesting that Florida legislators review and amend the state's Stand Your Ground law to ensure it does not "inappropriately encourage negligent or reckless use of firearms under the guise of self-defense"); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIA. L. REV. 827, 834 (2013) (critiquing Stand Your Ground laws for expanding the right to use deadly force and making it easier for a person claiming self-defense to prevail).

218. 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, 3189–92 (2015) (noting empirical data suggesting that Stand Your Ground laws are associated with an increase in homicides); Cynthia V. Ward, *Three Questions About "Stand Your Ground" Laws*, 95 NOTRE DAME L. REV. REFLECTION 119, 133 (2020) ("[R]ecent empirical studies suggest that the Stand Your Ground provisions in Florida may be causally linked to an increase in gun violence in the state.").

for its disparate racial impacts.[219] One study that looked at 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."[220]

While Florida became notorious for the Stand Your Ground portion of its self-defense statute after George Zimmerman's shooting of Trayvon Martin,[221] another part of the 2005 statute—Florida's defense of habitation[222]—received much less attention. Under section 776.013(1) of the Florida statute:

> A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use:
>
> . . .
>
> (b) Deadly force if he or she reasonably believes that using or threatening to use 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.[223]

At first glance, Section 776.013(1) appears to echo self-defense law in requiring both imminence and strict proportionality in the use of deadly force. It suggests that one can only use deadly force if one reasonably believes that doing so is necessary to prevent imminent death or great bodily harm or an imminent forcible felony. However, the next subsection gives such a person—someone in a dwelling or residence who uses or threatens to use

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219. *Id*. at 3192–96 (noting that several studies have found that Stand Your Ground laws have significant racial effects); *see also* All Things Considered, *supra* note 216 (noting that Stand Your Ground laws "put[] Black people and other people of color at greater risk of gun violence").

220. 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) (alteration in original) (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/9J9W-VG38]).

221. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1559 (2013) [hereinafter Lee, *Making Race Salient*] ("Amidst the calls for justice [following the death of Trayvon Martin], Florida's 'Stand Your Ground' law, which was cited by the City of Sanford as the reason why Zimmerman could not be arrested, became the subject of intense scrutiny.").

222. *See* S.B. 436, 2005 Leg., 107th Reg. Sess. (Fla. 2005) (showing that FLA. STAT. § 776.013—Florida's defense of habitation statute—was enacted in 2005).

223. FLA. STAT. § 776.013(1) (2023).

deadly force—a *presumption* of a reasonable fear of imminent death or great bodily harm if:

> The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle . . . [and the] person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[224]

In other words, even if the person who used deadly force did not actually or even reasonably fear death or serious bodily injury, that person can be exonerated because the law presumes that such a threat or at least a reasonable belief in such a threat existed. And the Florida courts have held that this presumption is conclusive.[225]

Not only does Florida have a mandatory, irrebuttable self-defense presumption, it also equates the curtilage with the home. In *State v. Vino*, a Florida court found that the term "dwelling" as used in Florida's burglary statute includes the curtilage.[226] Since the Instacart delivery workers arguably had unlawfully, i.e., without Caccavale's permission, and forcefully (apparently they hit a boulder on Caccavale's property and Caccavale claimed they ran over his foot) entered the curtilage of Caccavale's home,[227] Florida law would require a jury to presume that Caccavale had a reasonable fear of imminent death or great bodily harm and was therefore justified in using deadly force against the Instacart workers.

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224. *Id.* § 776.013(2). This self-defense presumption was part of the same model statute with the Stand Your Ground provisions promoted by the NRA and ALEC. *See* CASTLE DOCTRINE ACT § 1.1 (AM. LEGIS. EXCH. COUNCIL 2005).

225. State v. Heckman, 993 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2007) ("The creation of section 776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such."); *see also* Bartlett v. State, 993 So. 2d 157, 163 (Fla. Dist. Ct. App. 2008) (reiterating the presumption from *Heckman*).

226. 100 So. 3d 716, 719 n.2 (Fla. Dist. Ct. App. 2012) ("[T]he definition of dwelling for purposes of the burglary statute is as follows: 'a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the cartilage [sic] thereof.'" (citing FLA. STAT. § 810.011 (2007)).

227. The Instacart delivery workers' entry onto Caccavale's driveway was arguably not forceful, because the alleged forceful acts occurred after entry.

Another recent shooting may allow the Florida courts to squarely address the question of whether Florida's defense of habitation law applies to the curtilage. On June 2, 2023, a fifty-eight-year-old White woman named Susan Louise Lorincz fatally shot her thirty-five-year-old Black female next-door neighbor, Ajike "AJ" Owens, through her front door after Owens, a mother of four children, knocked on her door.[228] The day of the shooting, several neighborhood children, including Owens's kids, were playing in a field close to Lorincz's home.[229] Lorincz got angry and engaged in an argument with the kids.[230] According to one neighbor, kids would often play in a field near the apartment complex where Lorincz lived and Lorincz would get angry, wave guns, and hurl racial slurs and other insults at them.[231] On June 2, Lorincz not only argued with the kids in the field, she also threw a roller skate at Owens's ten-year-old son, hitting his foot, and swung an umbrella at him and his siblings.[232] After Owens's children told their mother what happened, Owens went over to Lorincz's apartment and knocked on her door multiple times, demanding that she come outside.[233] Without opening the door, Lorincz fired one shot through the door, hitting Owens in the upper right part of her chest and killing her.[234]

Lorincz was arrested four days after the shooting and told police that she acted in self-defense.[235] She was later charged with one count of manslaughter with a firearm and one count of

228. Minyvonne Burke & Antonio Planas, *Florida Woman Charged with Fatally Shooting Her Neighbor Has a History of Harassing Area Children, Residents Say*, NBC NEWS (June 7, 2023), https://www.nbcnews.com/news/us-news/woman-charged-fatally-shooting-neighbor-history-harassing-children-res-rcna88138 [https://perma.cc/2AP9-K3J4]; John Yoon, *Florida Woman Charged with Manslaughter, Not Murder, in Fatal Shooting*, N.Y. TIMES (June 26, 2023), https://www.nytimes.com/2023/06/26/us/susan-lorincz-manslaughter-charges-florida.html [https://perma.cc/A8LA-JXR4].

229. Burke & Planas, *supra* note 228.

230. *Id.*

231. *Id.*

232. *Id.*; Derrick Bryson Taylor, *Florida Woman Arrested in Fatal Shooting of Her Neighbor*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/07/us/florida-neighbor-shooting-ajike-owens-arrest.html [https://perma.cc/7E7Q-44LU].

233. Yoon, *supra* note 228; Burke & Planas, *supra* note 228.

234. Burke & Planas, *supra* note 228.

235. Taylor, *supra* note 232 (noting that the shooting took place on a Friday night and Lorincz was arrested the following Tuesday).

assault in connection with Owens's death.[236] Lorincz also told police that Owens was trying to break down her door and that Owens had attacked her before.[237] Remember that Florida law gives a person in a dwelling or residence who uses or threatens to use deadly force a presumption of a reasonable fear of imminent death or great bodily harm if:

> The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle . . . [and the] person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.[238]

Lorincz's allegation that Owens was trying to break down her door might be used to support a claim that she was acting in defense of her habitation and that the jury should presume she had a reasonable belief that she was facing an imminent threat of death or serious bodily injury, even though there is no evidence that Owens was threatening to kill or harm Lorincz in any way. Lorincz's claim that she believed Owens was trying to break down her door does not seem reasonable at all, but Lorincz's attorney might use Lorincz's allegation that Owens had attacked her in the past to argue that her belief that Owens was attempting to break down her door was reasonable.[239] Apparently, Lorincz claimed in her first 911 call on June 2nd that one of the children had threatened to beat her up,[240] which could also be used by her attorney to bolster a claim that Lorincz reasonably thought Owens was attempting some kind of harm to her.

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236. *White Florida Woman Charged with Manslaughter in Shooting of Black Neighbor*, AP NEWS (June 26, 2023), https://apnews.com/article/neighbor-shooting-florida-manslaughter-ocala-6335ba4b640d69272c85e7676b702fc5 [https://perma.cc/TUS2-6XKN]; *see also* Yoon, *supra* note 228 (noting that Susan Lorincz faced thirty years in prison if convicted of all charges).

237. Taylor, *supra* note 232.

238. FLA. STAT. § 776.013(2) (2023).

239. *See* Taylor, *supra* note 232.

240. Thomas Mates, *Listen: Calls to 911 After Shooting of Ocala Mother Ajike Owens*, CLICKORLANDO (June 9, 2023), https://www.clickorlando.com/news/local/2023/06/08/listen-calls-to-911-after-shooting-of-ocala-mother-ajike-owens [https://perma.cc/4NU6-RY75].

C. MISSOURI'S DEFENSE OF HABITATION

Finally, consider Ralph Yarl, the Black teenager in Kansas City, Missouri, who went to the wrong house trying to pick up his two younger siblings and got shot by the homeowner.[241] Yarl was not unlawfully entering Andrew Lester's home. He was not even attempting to unlawfully enter Andrew Lester's home. He simply rang the doorbell and was greeted by Lester and his .32 caliber Smith & Wesson revolver.[242]

Lester first shot Yarl in the forehead and then shot him again in the arm after Yarl was on the ground.[243] He claimed he thought Yarl was trying to break into his home because Yarl was pulling on the handle of the exterior storm door.[244] Lester told police he was "scared to death" because of his own advancing age and the size of the person at his front door.[245] Yarl was just five feet, eight inches tall and weighed only 140 pounds at the time.[246]

At Lester's preliminary hearing, Yarl testified that he had lost his phone at school and therefore could not call his mom to check on the address which she had given him to pick up his twin brothers.[247] Yarl said he rang the doorbell and waited for what seemed to be a "longer than normal" time.[248] When he saw the inner door start to open, he assumed it was the parents of his brothers' friends, so he reached to open the outer storm door.[249] Yarl said that while he touched the storm door handle when he saw the front door start to open, he didn't pull or open the storm

241. Taylor et al., *supra* note 2.

242. Hampton et al., *supra* note 5.

243. Taylor et al., *supra* note 2; *Prosecutor in Ralph Yarl Case*, *supra* note 10.

244. Hampton et al., *supra* note 5.

245. *Id.*

246. Hatzipanagos & Bella, *supra* note 7.

247. Adela Suliman, *White Man Who Shot Black Teen Ralph Yarl to Stand Trial, Judge Rules*, WASH. POST (Sept. 1, 2023), https://www.washingtonpost.com/nation/2023/09/01/ralph-yarl-shooting-andrew-lester-trial [https://perma.cc/6JKQ-MHEJ].

248. *Id.*

249. *Id.*

door and he backed away once he saw Lester with a gun.[250] He heard a man say, "Don't come here ever again," before being shot in the head.[251]

Even if Yarl had pulled on the handle of the storm door, as Lester claimed, it does not seem reasonable for Lester to have jumped to the conclusion that Yarl was attempting to enter his home. When someone wants to knock on a front door and there is a storm door in front of the front door, one must pull on the storm door handle to open the storm door before one can knock on the front door. Delivery persons frequently are asked to hide packages in between the front door and the storm door to reduce the risk of package theft. To do so, they must open the storm door by using the storm door handle. Our postman opens the storm door all the time in order to push our mail through our mail slot in the front door. I have opened the storm doors of my neighbors' homes when delivering flyers or trying to hide newspapers or packages that have been left on the front stoop. Opening or trying to open a storm door is a far cry from trying to break down a front door and enter the home.[252]

One part of this story that has not received as much attention is that after Lester shot Yarl, Yarl managed to get up and run away from Lester's house.[253] Yarl went to several homes

250. Mitch Smith, *Teenager Who Rang Wrong Doorbell Faces Homeowner Who Shot Him*, N.Y. TIMES (Aug. 31, 2023), https://www.nytimes.com/2023/08/31/us/ralph-yarl-shooting-testimony.html [https://perma.cc/J7U6-4KA3]. Initially, Yarl told police that he only rang the doorbell and never reached for the storm door handle. Taylor et al., *supra* note 2. When asked about this discrepancy between what he told police and his testimony at the preliminary hearing, Yarl explained that his interview with police happened the same day he had neurological surgery following the shooting. Suliman, *supra* note 247.

251. Suliman, *supra* note 247.

252. *But see* People v. Wafer, 907 N.W.2d 584, 588 (Mich. 2018) (Markman, C.J., dissenting) ("[A]ssuming that the deceased [Renisha McBride] broke through the screen door to access the front door, as the evidence suggests, she [was] successful in breaking one of two barriers to the home and thus was 'in the process of' breaking and entering." (emphasis omitted)).

253. Mitch Smith & Julie Bosman, *Shooting of Teen Who Rang Doorbell at Wrong House Unsettles Kansas City*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/us/ralph-yarl-shooting-suspect-charges.html?searchResultPosition=5 [https://perma.cc/8R4S-2QED] ("[Yarl] was shot in the head and then the arm . . . . He got up and ran away, trying to elude more gunshots, he told the police.").

trying to get help without success.[254] It wasn't until the third home that someone came out to help him.[255] That home was where Zach Dovel, age twenty, lived with his mother.[256] Startled by a bang on the front door, and thinking someone was trying to break into the house, they called 911.[257] The 911 operator told them there was a gunman on the loose and they should stay inside.[258] Instead, when they looked outside and saw a teenager in their driveway get down on his knees in what looked like a praying position, they went out and found Yarl, bleeding from the gunshot wounds.[259] Dovel ran back in to get some towels while his mother stayed with Yarl, trying to keep him alert until the ambulance arrived.[260]

This was not the first time an injured Black individual sought help from strangers but was viewed with fear and suspicion. In the early morning hours of November 2, 2012, in Dearborn, Michigan, a nineteen-year-old Black female named Renisha McBride banged multiple times on the door of a house seeking help after being in a car accident and was shot to death by a fifty-four-year-old White man named Theodore Wafer.[261] Wafer fired a lawfully owned shotgun through his screen door, striking McBride in the face.[262] He told police that he was afraid for his safety and shot McBride in self-defense.[263]

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254. *Id.*

255. *Id.* Those neighbors testified at Lester's preliminary hearing that they were afraid when they heard Yarl outside their homes yelling that he had been shot and needed help and did not know whether it would be safe to answer the door or go outside to help. Smith, *supra* note 250.

256. Smith & Bosman, *supra* note 253.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Monica Davey, *Murder Charge in a Shooting on Doorstep*, N.Y. TIMES (Nov. 15, 2013), https://www.nytimes.com/2013/11/16/us/michigan-homeowner-charged-in-renisha-mcbrides-death.html [https://perma.cc/JSJ4-CKU2]; Tell Me More, *Renisha McBride Shooting: 'We May Never Know' Why*, NPR (Nov. 18, 2013), https://www.npr.org/templates/story/story.php?storyId=245967473 [https://perma.cc/6DXB-2NSJ].

262. Davey, *supra* note 261.

263. Tell Me More, *supra* note 261 ("[Wafer] told investigators that he was afraid for his safety, and that he had not intended to fire his 12 gauge shotgun."); Davey, *supra* note 261 ("The prosecutor rejected [Wafer's] assertion that he had

The shooting of Ralph Yarl by Andrew Lester and the shooting of Renisha McBride by Theodore Wafer appear to reflect "threat perception failure," which occurs when a person mistakenly views another person as a threat to their personal safety.[264] Decades of social science research demonstrates that individuals tend to view Black individuals as dangerous, violent, and criminal.[265] Similarly, shooter bias studies show that when individuals see a Black person with an object in hand and are told they have to make a quick decision about whether to shoot that person (or risk getting shot) or refrain from shooting, they tend to assume the object is a gun and they shoot.[266] This is in large part because of deeply rooted stereotypes associating Black

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been acting in self-defense when he opened his front door and fired a shotgun at the woman through a locked screen door, striking her in the face."); *see also* Jelani Cobb, *The Killing of Renisha McBride*, NEW YORKER (Nov. 16, 2013), https://www.newyorker.com/news/news-desk/the-killing-of-renisha-mcbride [https://perma.cc/5KRR-T5Z2] (discussing how self-defense claims are heavily influenced by racial stereotypes). Wafer, who claimed he acted in self-defense, was convicted of second-degree murder after a jury trial. Elisha Fieldstadt et al., *Renisha McBride's Killer Found Guilty of Murder*, NBC NEWS (Aug. 7, 2014), https://www.nbcnews.com/news/us-news/renisha-mcbrides-killer-found-guilty-murder-n175306 [https://perma.cc/532N-WRJ9]. He was sentenced to a minimum of seventeen years in prison. Elizabeth Chuck & Scott Newell, *Renisha McBride Killer Gets Minimum of 17 Years in Prison*, NBC NEWS (Sept. 3, 2014), https://www.nbcnews.com/news/us-news/renisha-mcbride-killer-gets-minimum-17-years-prison-n194366 [https://perma.cc/AE37-8RKE].

264. Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY & PUB. POL'Y 309, 329 (2017) (noting that "threat perception failure" occurs when "officers subconsciously perceive[] minority civilians to have been a greater threat than they [actually] were"); *see also* Jennifer M. Page, *Defensive Killing by Police: Analyzing Uncertain Threat Scenarios*, 24 J. ETHICS & SOC. PHIL. 315, 325 (2023) ("'[T]hreat perception failure' shootings, where an officer wounds or kills an unarmed civilian because of a movement or misperceiving a non-weapon object [constituted] 7.3 percent of police shootings [in Philadelphia] from 2007 to 2013 . . . , accounting for around half of all shootings of unarmed people, disproportionately . . . Black civilians.").

265. *See supra* note 174.

266. *See, e.g.*, Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 295 (2012) ("[P]articipants were especially likely to favor the 'shoot' response over the 'don't shoot' response when the target was Black rather than any other race."). For references to additional shooter bias studies, see Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, LAW & CONTEMP. PROBS., 2016, at 145, 152–60.

individuals with dangerousness, criminality, and violence.[267] Neither Yarl nor McBride had an object in their hand, yet the homeowners who shot them said the reason they shot them was because they were afraid for their lives.[268] When Yarl sought help from neighbors after getting shot, it took three tries before neighbors helped him and even those neighbors admitted they were initially reluctant to help due to concern for their safety.[269]

The shooting of Ralph Yarl took place in Missouri. Prior to 2007, Missouri courts had held that "the defense of habitation only applied to entries into the dwelling or the home, not entries into places outside the home like the front porch or the front yard."[270] In 2007, the Missouri General Assembly repealed its original defense of habitation statute and folded its defense of habitation into its self-defense statute.[271] In 2010, the Missouri General Assembly expanded the defense of habitation to apply beyond the dwelling to any and all private property.[272] Missouri's

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267. LEE, MURDER AND THE REASONABLE MAN, *supra* note 174, at 138–46 (discussing the Black-as-criminal stereotype); Lee, *Race and Self-Defense*, *supra* note 174, at 402–23 (same).

268. Hampton et al., *supra* note 5 (reporting that Lester told police he shot Yarl because he was "scared to death"); Tell Me More, *supra* note 261 (reporting that Wafer said he shot McBride because was "afraid for his safety").

269. Smith & Bosman, *supra* note 253.

270. *See* Lee, *Firearms and Initial Aggressors*, *sura* note 39, at 70 (first citing State v. Lawrence, 569 S.W.2d 263, 266 (Mo. Ct. App. 1978) ("We find no case in which the mere breaking of the curtilage is sufficient to support a defense of habitation."); and then citing State v. Goodine, 196 S.W.3d 607, 613 (Mo. Ct. App. 2006) ("[A]s used in section 563.036, 'premises' is usually understood to constitute the house, or dwelling, and not broadly to include all of the defender's property.")).

271. S.B. 62 & 41, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007); *see also* State v. Whipple, 501 S.W.3d 507, 514 (Mo. Ct. App. 2016) ("In 2007, the Missouri General Assembly repealed the statute relating specifically to defense of premises and incorporated provisions relating to that defense into section 563.031, the self-defense statute.").

272. H.B. 1692, 1209, 1405, 1499, 1535 & 1811, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010) (amending MO. REV. STAT. § 563.031.2(3) to permit the use of deadly force against "a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter *private property* that is owned or leased by an individual claiming a justification of using protective force under this section." (emphasis added)); *see also* Sarah A. Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to the Defense of Habitation*, 56 ST. LOUIS U. L.J. 857, 857 (2012) ("Effective August 28, 2010, a person can use

defense of habitation law now permits the use of deadly force "against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person; *or . . . private property that is owned or leased by an individual*."[273] Today, Missouri's self-defense and defense of habitation statute reads as follows:

> 1. A person *may*, subject to the provisions of subsection 2 of this section, *use physical force* upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person, unless:
>
> (1) The actor was the initial aggressor; except that in such case his or her use of force is nevertheless justifiable provided:
>
> (a) He or she has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or
>
> (b) He or she is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or
>
> (c) The aggressor is justified under some other provision of this chapter or other provision of law;
>
> (2) Under the circumstances as the actor reasonably believes them to be, the person whom he or she seeks to protect would not be justified in using such protective force;
>
> (3) The actor was attempting to commit, committing, or escaping after the commission of a forcible felony.
>
> 2. A person *shall not use deadly force* upon another person under the circumstances specified in subsection 1 of this section *unless*:
>
> (1) He or she reasonably believes that such deadly force is necessary to protect himself, or herself or her unborn child, or another against death, serious physical injury, or any forcible felony;
>
> (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person; or
>
> (3) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual, or is occupied by an individual who has been given specific authority by

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deadly force against those unlawfully entering or remaining not only in his residence, car, or dwelling, including any building, inhabitable structure, tent, or conveyance which is temporary, permanent, mobile or immobile, as provided already, but also on his private property." (footnotes omitted)).

273. MO. REV. STAT. § 563.031.2(2)–(3) (2023) (emphasis added).

> the property owner to occupy the property, claiming a justification of using protective force under this section.[274]

Of note, subsection 1 of the statute specifies the conditions under which one may use *physical force—not* including deadly force—in self-defense, while subsection 2 specifies the conditions under which one may use *deadly force* both in self-defense (subsection 2(1)) and in defense of habitation (subsections 2(2) and 2(3)).[275] On their face, the sections of the statute that permit the use of deadly force in defense of habitation appear to allow a homeowner to use deadly force against one who is unlawfully entering or attempting to enter[276] the dwelling, residence, occupied vehicle, or private property even if the person does not pose any threat of physical harm to the resident of the dwelling or others. Because Missouri does not require that the entry or attempted entry be both unlawful and forceful,[277] the statute suggests deadly force can be used against a person who has simply entered one's private property unlawfully or without permission, even if the entry is not forceful.[278]

Reading section 563.031 subsection 2(2)–(3) on its face, one might conclude that it does not matter whether Yarl was attempting to enter Lester's home. By walking up to Lester's front door without Lester's permission, arguably Yarl had unlawfully entered Lester's private property, giving Lester the right to use deadly force against Yarl. Interpreting the Missouri law this way, however, would mean that a Missouri homeowner could shoot a Girl Scout trying to sell cookies who came onto their property without their permission, which would be absurd.[279]

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274. *Id.* § 563.031(1)–(2) (emphasis added).

275. *Id.*

276. Another part of the statute defines the terms "[e]nter unlawfully or remain unlawfully" as follows: "a person enters or remains in or upon premises when he or she is not licensed or privileged to do so." MO. REV. STAT. § 569.010(2) (2023).

277. MO. REV. STAT. § 563.031.2(3) (2023) (requiring entry or attempted entry to be unlawful, but not necessarily forceful).

278. *Id.* (permitting the use of deadly force against a person who simply "unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property").

279. One might respond that a Girl Scout has an implied license to walk up to the front door of a home and ring the bell. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 8 (2013) ("[T]he knocker on the front door is treated as an invitation or

Moreover, it is unlikely Lester would have shot a skinny White girl in a Girl Scout uniform—or even a skinny White male wearing exactly what Yarl was wearing—who rang his doorbell and reached for the storm door handle when he opened the front door. Nonetheless, the bare text of subsection 2(3) of the Missouri statute—the subsection outlining the conditions under which a person may use deadly force upon another person in defense of their private property—seems to permit the use of deadly force under such circumstances.

This, fortunately, is not the way the Supreme Court of Missouri has interpreted the statute. In 2022, that court relied on the language of subsection 2 of Missouri's self-defense and defense of habitation statute[280] to conclude that one using deadly force against a person who unlawfully entered a dwelling, residence, or occupied vehicle must have reasonably believed that deadly force was necessary to defend against the use or imminent use of unlawful force.[281] In *State v. Straughter*, the Supreme Court of Missouri first explained that under what it called Missouri's "castle doctrine,"[282] i.e., Missouri's defense of habitation, "a person need not face death, serious physical injury or any forcible felony to respond with deadly force."[283] In other words, strict proportionality is not needed when one uses deadly force in defense of one's habitation. The court then stated, "Missouri's

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[implied] license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds." (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951))). If a Girl Scout would have an implied license to walk up to the front door of a home and ring the doorbell, then a boy trying to pick up his siblings, as Yarl was trying to do, should also have an implied license to walk up to the front door and ring the doorbell.

280. Subsection 2 of the Missouri statute starts by stating: "A person shall not use deadly force upon another person *under the circumstances specified in subsection 1 of this section* unless . . . ." MO. REV. STAT. § 563.031.2 (2023) (emphasis added).

281. State v. Straughter, 643 S.W.3d 317, 321–22 (Mo. 2022).

282. The term "castle doctrine" is often used to describe the defense of habitation but, as noted in Part I, the two terms really should not be conflated. The term "castle doctrine" reflects the rule that one has no duty to retreat in one's home and is a part of self-defense law, whereas "defense of habitation" is the term of art used to describe the criminal law defense that authorizes a homeowner to use deadly force against a person who is unlawfully entering or has unlawfully entered the homeowner's dwelling. *See supra* text accompanying notes 70–72.

283. 643 S.W.3d at 321–22.

castle doctrine provides that a person is justified in using deadly force 'to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of *unlawful force* by such other person"[284] and "[s]uch force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or a vehicle lawfully occupied by such person."[285]

To reach this result, the court first quoted from subsection 1 of the statute—which sets forth the conditions under which one may use *physical force, not including deadly force*, in self-defense—stating, "Missouri's castle doctrine provides that a person is justified in using deadly force 'to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person'"[286] and then quoted from subsection 2(2) of the statute—which permits the use of *deadly force* against a person who unlawfully enters a dwelling, residence, or occupied vehicle when it added, "and '[s]uch force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or a vehicle lawfully occupied by such person.'"[287] In other words, the court read into the portion of the statute specifying the conditions under which *deadly force* may be used in defense of habitation (subsection 2(2)), a requirement from the portion of the statute specifying the conditions under which *nondeadly force* may be used in self-defense (subsection 1), to ensure that homeowners (or occupants of a dwelling or vehicle) in Missouri cannot use deadly force against persons who are not threatening them with any force at all. In a footnote, the court reiterated, "[t]he castle doctrine as set out in section 563.031.2(2) incorporates the requirements of the general statutory right of self-defense in section 563.031.1 and requires a reasonable belief in the use of actual or imminent unlawful force by another to justify deadly force."[288]

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284. *Id.* at 321–22 (emphasis added) (quoting MO. REV. STAT. § 563.031.1).

285. *Id.* at 322 (alteration in original) (quoting MO. REV. STAT. § 563.031.2(2)).

286. *Id.* at 321–22 (quoting MO. REV. STAT. § 563.031.1).

287. *Id.* at 322 (alteration in original) (quoting MO. REV. STAT. § 563.031.2(2)).

288. *Id.* at 322 n.7.

The Supreme Court of Missouri's decision in *Straughter* is a good decision as it imports some level of proportionality—what I would call loose proportionality—into Missouri's defense of habitation law.[289] Missouri's model jury instructions reflect this interpretation of the statute as well, so Missouri clearly requires a homeowner to have a reasonable belief that the intruder is using or will imminently use some unlawful force before the homeowner can use deadly force against the intruder.[290]

It should be challenging for Lester to show that it was reasonable to believe Yarl was using or about to use unlawful force since Yarl was unarmed and simply reached for the storm door handle when Lester opened the front door, but we know from decades of research that most people have implicit racial bias against African Americans.[291] Most people associate Black men—particularly young Black men—with dangerousness, violence, and criminality.[292] So, if Lester's attorney can convince just one juror that it was reasonable for Lester to believe that the young Black male (Yarl) standing at his front door at 10:00 p.m. was about to employ some unlawful force, he will be able to

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289. Even a Missouri criminal law treatise writer noted that the Missouri legislature's decision in 2007 to repeal the statute dealing specifically with the defense of premises and incorporate those provisions into the statute relating to self-defense resulted in ambiguity regarding whether the person using deadly force in defense of the dwelling, residence, or vehicle had to "reasonably believe that the use of force is necessary to defend against what he reasonably believes to be the use or imminent use of unlawful force against the defender by the victim" or whether "the statute intend[ed] to grant automatic authority to an occupant to use deadly force to repel any unlawful entry of the occupant's dwelling, residence or vehicle." 32 ROBERT H. DIERKER, MISSOURI PRACTICE, MISSOURI CRIMINAL LAW § 9:4 (2d ed. 2023).

290. MISSOURI APPROVED INSTRUCTIONS – CRIMINAL § 406.10 (4th ed. 2022) ("A person who is lawfully occupying a (dwelling) (residence) (vehicle) may use (physical force, including) deadly force (,) to defend himself against another person who (attempts to enter unlawfully) (enters unlawfully) (remains after an unlawful entry of) that (dwelling) (residence) (vehicle) if he reasonably believes the use of some physical force is necessary to defend himself from what he reasonably believes is the use or imminent use of unlawful physical force.").

291. *E.g.*, JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 38–42, 57–68 (2019) (exploring scientific studies about racial bias against Black Americans).

292. *Id.* at 35 ("In the United States, blacks are . . . strongly associated with threat and aggression . . . ."); *see also supra* note 174 (discussing research outlining bias against Black Americans).

escape conviction because just one juror voting not guilty will hang the jury and lead to a mistrial.[293]

When it comes to claims of self-defense—especially when asserted by individuals who have used deadly force against a young Black male—we have seen cases where jurors side with the person claiming self-defense, even when the Black male victim was unarmed.[294] For example, in 2013, a six-person jury in Florida found George Zimmerman not guilty of second-degree murder in the death of Trayvon Martin after a trial in which Zimmerman claimed he acted in self-defense.[295] Of course, very skillful lawyering on behalf of Zimmerman[296] was likely the primary reason the jury sided with him, and most of the jurors would deny that the fact that Trayvon Martin was a young Black male influenced their verdict.[297] But one has to wonder whether the jurors would have been as sympathetic to Zimmerman's claim of self-defense had he shot a young White teenager who had gotten him down on the ground and was beating him up.

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293. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (holding that the verdict in state criminal cases must be unanimous).

294. One of the most notorious examples of this was the Bernhard Goetz case, in which a White man shot four Black teens on a New York subway after two of them approached him and asked for $5.00. *See* LEE, MURDER AND THE REASONABLE MAN, *supra* note 174, at 148–54 (providing an overview of the Goetz case). Goetz told police that he intended to murder them and wanted to make them suffer as much as possible. *Id.* at 149. "Goetz was charged with assault, attempted murder, reckless endangerment, and illegal possession of a weapon." *Id.* At trial, Goetz claimed he acted in self-defense and the jury found him not guilty of all charges except illegal possession of a weapon. *Id.*

295. Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013), https://www.cnn.com/2013/07/13/justice/zimmerman-trial/index.html [https://perma.cc/9U8G-LMFR].

296. Zimmerman's lead defense counsel was Mark O'Mara, a prominent and skillful criminal defense attorney. Miranda Leitsinger, *Zimmerman's New Attorney: Who is Mark O'Mara?*, NBC NEWS (Apr. 12, 2012), https://www.nbcnews.com/news/world/zimmermans-new-attorney-who-mark-omara-flna713106 [https://perma.cc/92DA-B4KC] (describing O'Mara as "fearless" and "brilliant").

297. Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, *in* 1 TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG 31, 31 (Kenneth J. Fasching-Varner et al. eds., 2014) ("With the judge, prosecution, and defense in agreement that race was irrelevant, it is not surprising that the jury also thought the case had nothing to do with race." (citation omitted)).

It is beyond the scope of this Article to figure out how to mitigate the problem of racial bias in cases involving the defense of habitation. In previous scholarship, however, I have proposed that the judge give jurors a race-switching jury instruction in interracial cases involving claims of self-defense if either side requests such an instruction or if the judge decides sua sponte that such an instruction would be appropriate.[298] Under my race-switching proposal, jurors would be told that "[i]t is natural to make assumptions . . . based on stereotypes" but they "should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group."[299] Jurors would also be told that if they are not sure whether they have relied on racial stereotypes, they may switch the races of the defendant and the victim and reconsider the facts of the case with the races switched.[300] They would also be told that if they come to a different conclusion about the validity of the defendant's claim of self-defense after engaging in race-switching than their initial conclusion, this would suggest "a subconscious reliance on stereotypes" and they should go back to the drawing board and reconsider the defendant's claim of self-defense with this in mind.[301] While race-switching was a fairly novel proposition in the mid-1990s, and to the best of my knowledge had never before been proposed in a law review article prior to that time, race-switching is pretty common today.[302] A race-switching jury

298. LEE, MURDER AND THE REASONABLE MAN, *supra* note 174, at 224–25 (outlining Lee's race-switching proposal); Lee, *Race and Self-Defense*, *supra* note 174, at 481–83 (proposing a race-switching jury instruction as a way to highlight race and encourage jurors to set aside their unconscious racial biases).

299. Lee, *Race and Self-Defense*, *supra* note 174, at 482.

300. *Id.* ("If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you could imagine a Latino defendant and a White victim.").

301. *Id.*

302. *See, e.g.*, Masuma Ahuja, *These Photos Are Meant to Turn Our Racial Assumptions on Their Head*, CNN (May 19, 2017), https://www.cnn.com/2017/05/19/us/race-photo-series-o-magazine-trnd/index.html [https://perma.cc/37LS-EDZD] (showcasing a series of photos depicting race-switching); John Blake, *Why Civil Rights Attorney Ben Crump Can't Slow Down*, CNN (May 22, 2021),

instruction could be requested by the prosecutor trying Andrew Lester if the prosecutor is worried about unconscious racial bias helping Lester.[303]

Another strategy for decreasing racial bias that I have proposed in prior scholarship is making race salient to jurors if one is worried that implicit racial bias may color the jury's decision-making.[304] Decades of social science research has shown that when people are made aware of the racial implications of a given situation, they are more likely to act more fairly and treat Black and White defendants the same than when race is not made salient.[305] This is because most people believe in the principle of egalitarianism and want to treat people fairly, but when they are not aware that racial stereotypes may be coloring their view of the case, they cannot correct the automatic associations that link Black individuals with dangerousness, criminality, and violence.[306] Once they are aware of the possibility of racial bias, they can and usually do consciously correct the automatic

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https://www.cnn.com/2021/05/22/us/benjamin-crump-attorney-profile-blake/index.html [https://perma.cc/X6GD-M6VD] (describing how prominent civil rights attorney Benjamin Crump uses race-switching to demonstrate that "[t]he United States has a two-tiered justice system where even White mass shooters are routinely taken alive [b]ut 'hands up, don't shoot' doesn't work for unarmed Black people who 'continue to be gunned down, often on sight'").

303. Race switching has been an effective strategy for combating racial bias in criminal cases. *See, e.g.*, James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 CHAMPION 22 (Aug. 1999) (discussing Lee's race-switching jury instruction as one of several tools used to combat racial stereotyping in a case involving a Black youth charged with aggravated assault on a White classmate).

304. Lee, *Making Race Salient*, *supra* note 221, at 1589–90 ("The research on race salience suggests that it is important to highlight the relevance of race and make jurors aware of the possibility of racial bias if one is concerned that implicit racial bias might result in unfair treatment of either a Black defendant or a Black victim.").

305. *See id.* at 1586–90 (citing and describing research on race salience).

306. *Id.* at 1587 ("White jurors are more likely to demonstrate racial bias against a Black defendant in cases where racial issues are not highlighted. [Researchers] explain: 'When race is an obvious issue at trial, White jurors may be on guard against racial bias. However, in trials without salient racial issues, White jurors may be less likely to monitor their behavior for signs of prejudice, and therefore more likely to render judgments tainted by racial bias.'" (footnote omitted) (quoting Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCH., PUB. POL'Y & L. 201, 2010 (2001))).

associations that take place outside consciousness and try not to allow racial stereotypes to control their thinking.[307]

In Andrew Lester's case, to make race salient, the prosecutor could call expert witnesses to testify about the tendency of individuals to associate young Black males with violence and danger.[308] The prosecutor could also call Ralph Yarl to the stand so he could testify about what happened the evening he was shot by Lester and how he went to three different neighbors' homes before he could get help.[309] The prosecutor might even call the neighbors who ended up helping Yarl to testify about their initial fear of him.[310] Such testimony might help make race salient to the jury. It might also help jurors understand that Yarl was not looking to harm Lester, but Lester and Lester's neighbors assumed Yarl was a threat probably because Yarl is a young Black male. And finally, the prosecutor might ask the judge to give a race-switching jury instruction like the one described above.

D. CONCLUSION

These are just a few of the many instances in which individuals have been shot after doing something that any of us might do, whether it's ringing the doorbell of the wrong house, driving into someone's driveway, or going into someone's front yard to retrieve one's ball without their permission. In another fairly recent example of a person getting shot after making a mistake, just after midnight on April 18, 2023, two teenage cheerleaders were shot in a Texas supermarket parking lot after one of them mistakenly opened the door to a vehicle she thought was her own.[311] Heather Roth noticed a man sitting in the passenger seat

307. *Id.* (citing Sommers & Ellsworth, *supra* note 306, at 210–12) ("Sommers and Ellsworth found evidence of White juror bias when race was not salient, but no such evidence of bias when race was salient.").

308. *See id.* at 1596 ("[A]n attorney can make race salient is by calling an expert witness to testify about the extensive social science research that has been conducted on implicit bias.").

309. *See id.* at 1595 ("Using lay witness testimony to highlight the racialized nature of the case is another way race can be made salient to the jury.").

310. *See id.* (explaining how using lay-witness testimony to describe racial dynamics can be an effective strategy for the prosecution to counter implicit racial bias).

311. Rachel Treisman, *2 Texas Cheerleaders Were Shot After 1 Tried to Get in the Wrong Car After Practice*, NPR (Apr. 19, 2023), https://www.npr.org/2023/

and, thinking he was in her car, she panicked and returned to her friend's vehicle.[312] After getting into her friend's car, she realized her error.[313] In the meantime, the man got out of the car and approached. Seeing the man approaching, Roth rolled down the window to apologize to him, but instead of accepting her apology, the man pulled out a gun and started shooting.[314] Roth and her friend, Payton Washington, were shot as they drove away.[315]

Then, on August 26, 2023, just before two o'clock in the morning, a twenty-year-old University of South Carolina student was fatally shot when he tried to enter the wrong home.[316] Nicholas Anthony Donofrio was a sophomore studying kinesiology and exercise science at the University of South Carolina.[317] He had recently moved into a house on the same block as the home where he was shot and probably thought he was at his own home when he was shot.[318] The police determined that the man who shot Donofrio was justified in shooting him.[319]

04/19/1170823978/texas-cheerleaders-shot-car-parking-lot-practice [https://perma.cc/B7JJ-BET9].

312. Bess Levin, *Americans Are Now Being Shot and Killed Over Simple Misunderstandings—And Republicans Could Not Give Less of a F—k*, VANITY FAIR (Apr. 19, 2023), https://www.vanityfair.com/news/2023/04/ralph-yarl-kaylin-gillis-heather-roth-payton-washington-shootings [https://perma.cc/4E6A-P9V5].

313. *Id.*

314. *Id.*

315. Elizabeth Wolfe et al., *The More Seriously Wounded of 2 Cheerleaders Shot in Texas Parking Lot Is Recovering from Surgery, Team Official Says*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/20/us/texas-cheerleader-shooting-elgin-woodland-elite/index.html [https://perma.cc/GJ2G-H475].

316. Julianne McShane, *University of South Carolina Student Fatally Shot After Trying to Enter the Wrong Home*, NBC NEWS (Aug. 28, 2023), https://www.nbcnews.com/news/us-news/university-south-carolina-student-fatally-shot-trying-enter-wrong-home-rcna102104 [https://perma.cc/3LJK-QCYN].

317. *Id.*

318. Andrea Blanco, *Nick Donofrio's Family Pay Tribute to 'Loving' Son Who Was Shot Dead After Entering Wrong Home*, INDEPENDENT (Aug. 28, 2023), https://www.independent.co.uk/news/world/americas/crime/nick-donofrio-madison-south-carolina-shooting-b2400628.html [https://perma.cc/ZP8Z-JY2M].

319. Julianne McShane, *Fatal Shooting of University of South Carolina Student Who Tried to Enter Wrong Home Was 'Justifiable,' Police Say*, NBC NEWS (Aug. 31, 2023), https://www.nbcnews.com/news/us-news/fatal-shooting-university-south-carolina-student-tried-enter-wrong-hom-rcna102703 [https://perma.cc/M3U7-DBSS].

Shootings like these have been happening for many years but with little public attention.[320] It is time that we use the law to send a clear message that absent some indication that the person poses a threat of death or serious bodily harm, one may not justifiably use deadly force against a person who has mistakenly rung the wrong doorbell, gone into the wrong house, opened the wrong car door, or driven up the wrong driveway. And the law should make clear that it is not justifiable to shoot a kid who has simply come onto one's front yard to retrieve a basketball or anyone one thinks is associated with that kid.

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320. For example, in 2014, Caleb Gordley, a sixteen-year-old African American high school student, was shot and killed when he entered a house he thought was his own. *Police: Intruder Killed by Sterling Homeowner*, NBC NEWS (Mar. 18, 2013), http://www.nbcwashington.com/news/local/Police-Intruder-Killed-by-Sterling-Homeowner-198674301.html [https://perma.cc/9G6P-B6WZ]; *Parents Cry Murder After Drunk Teen Killed in Home Invasion*, ABC NEWS (Jan. 10, 2014), http://abcnews.go.com/US/parents-cry-murder-drunk-teen-killed-home-invasion/story?id=21474534 [https://perma.cc/PN84-VMFJ].

A week prior to the shooting, Caleb's dad had grounded him because he failed to do his house chores. *Id.* Caleb, a student-athlete, after almost a week of being grounded, snuck out of his house and went to a party with his friends. *Id.* There was a lot of alcohol at the party and Caleb, who was not used to drinking, had too much to drink. *Id.* By the time he left the party around 2:00 a.m., he was so intoxicated and uneasy on his feet that, Kory Carico, one of Caleb's friends had to help him walk home to the cul-de-sac where all the houses looked pretty similar. *Id.* When they reached the house they both believed to be Caleb's house, Kory walked with Caleb to the back of the house. *Id.* Caleb climbed through the unlocked back window because he didn't want his father to know that he had snuck out to go to the party. *Id.* Unbeknownst to Caleb, instead of going into his own home, he had instead entered his neighbor's house, just a few doors down from his own house. *Id.* An alarm system went off, waking up the homeowner. *Id.* Thinking there was a burglar in his home, Donald West Wilder, the homeowner, grabbed a .40 caliber pistol that he kept next to the bed and ran out of his bedroom. *Id.* Wilder saw Caleb, who was starting to come up the stairs, and shot at him four times. *Id.* Only one of the four shots hit Caleb, going through his back and killing him. *Id.* After conducting a review of the evidence, the Loudon County, Virginia, Commonwealth Attorney's Office decided not to press charges against the homeowner. Caitlin Gibson, *No Charges in Death of Sterling Teen Who Entered Wrong House*, WASH. POST (Sept. 10, 2013), https://www.washingtonpost.com/local/no-charges-in-death-of-sterling-teen-who-entered-wrong-house/2013/09/10/df45fb30-1a55-11e3-a628-7e6dde8f889d_story.html [https://perma.cc/GU9Q-WY6V]. For more on the shooting of Caleb Gordley, see Behind TRUE Crime, *20/20 Abc || Underage and Under the Influence || Full Episode | NEW June 3, 202*1, YOUTUBE (June 16, 2021).

III. REFORMING THE DEFENSE OF HABITATION

Contrary to what many assume, gun violence is not just a matter of mass shootings or out of control gang members engaging in drive-by shootings and carjackings. Instead, law-abiding civilians are taking up arms and using them against other law-abiding civilians in the name of defending their castle. In a country in which gun ownership is widespread,[321] defense of habitation laws may unwittingly be contributing to the problem of gun violence by encouraging homeowners with firearms to shoot anyone who appears to be an intruder—whether in the home, the curtilage, the workplace, or the car—if they feel even the slightest danger.

The defense of habitation needs to be reformed. In its current form—at least in most states—it gives the homeowner a license to kill anyone who is perceived to be unlawfully entering or attempting to enter the home, even when that other person is unarmed and is not threatening to harm anyone. In some states, it allows the homeowner to kill someone who has unlawfully entered or is attempting to unlawfully enter the land immediately surrounding their home. And in many states, it allows individuals to kill individuals who have unlawfully entered or attempted to enter the workplace or an occupied vehicle. The belief that one has a right to shoot anyone who dares to attempt to enter one's home or the land surrounding the home has already led to tragic

321. America has more guns than any other nation in the world. *How Many Guns are in the US? [2024]*, AM. GUN FACTS (Jan. 22, 2024), https://americangunfacts.com/gun-ownership-statistics [https://perma.cc/4HCB-CRJF]. It is estimated that there are "over 466 million [guns in the United States] due to record breaking sales during the pandemic." *Id.* Gun ownership is seen as such a plus, it is proudly promoted by some politicians. *E.g.*, Zach Everson, *Congressman Thomas Massie's Christmas-Card Arsenal Is Probably Worth Tens of Thousands*, FORBES (Dec. 24, 2021), https://www.forbes.com/sites/zacheverson/2021/12/24/congressman-thomas-massies-christmas-card-arsenal-is-probably-worth-tens-of-thousands/?sh=5cf879193054 [https://perma.cc/38V2-LCKJ] (reporting that Republican Representative Thomas Massie (KY-4) published a virtual Christmas card online featuring his family holding approximately $20,000 to $190,000 worth of firearms); Natasha Korecki, *AR-15 Raffle Video Puts Illinois Republican in Hot Seat After Parade Shooting*, NBC NEWS (July 6, 2022), https://www.nbcnews.com/politics/2022-election/ar-15-raffle-video-puts-illinois-republican-hot-seat-parade-shooting-rcna36951 [https://perma.cc/U8AF-DXGH] (noting how former Republican Illinois gubernatorial nominee Darren Bailey once raffled off a Smith & Wesson AR-15 similar to one that was used in a recent shooting at the time).

results with shootings of innocent unarmed individuals who have mistakenly knocked on the wrong door, driven up the wrong driveway, or entered the wrong house.

To try to discourage such shootings, this Article urges three doctrinal reforms. First, it proposes that legislatures revise their defense of habitation statutes to align more closely with the defense of self-defense. States that currently embrace loose proportionality or no proportionality in the use of deadly force against a person who is perceived to be entering or attempting to enter the dwelling should require proportionality akin to that required under self-defense law. In line with this first proposal, this Article suggests that states that have adopted a self-defense presumption within their defense of habitation statutes should repeal those presumptions because they essentially eliminate any requirement of proportionality—strict or loose.

Second, this Article urges legislatures in states that have expanded the defense of habitation beyond the four corners of the dwelling to limit the use of deadly force in defense of habitation to entries or attempted entries into the dwelling. States should not permit the use of deadly force against an individual who merely appears to be unlawfully entering or attempting entry into one's workplace or car.[322] A person in a workplace or a motor vehicle should only be able to use deadly force against another person who appears to be unlawfully entering or attempting entry into that workplace or car if they are being imminently threatened with deadly force. In other words, a person in a workplace or a car should only be able to use deadly force against another person if they satisfy the conditions of the defense of self-defense. Similarly, states that have expanded their defense of habitation to entries into the curtilage by statute should repeal such provisions. A homeowner should not be able to shoot someone who simply steps one foot into their front or backyard unless it is reasonable for the homeowner to believe that person poses a threat of imminent death or serious bodily injury to the homeowner or anyone else on the premises.

Third, this Article proposes that states apply the initial aggressor limitation that currently applies to claims of self-defense to the defense of habitation. The initial aggressor rule in self-

322. The situation might be different if that workplace or car is the person's actual habitation.

defense law bars initial aggressors[323] from claiming they acted justifiably in self-defense.[324] This Article proposes that initial aggressors also be barred from claiming they acted justifiably in defense of the habitation. Several states already apply the initial aggressor limitation to both the defense of self-defense and the defense of habitation.[325] Other states should do the same.

This Article also proposes that if an individual who is in a state that has extended the defense of habitation beyond the four corners of the dwelling uses deadly force against someone entering or attempting to enter the curtilage, the workplace, or a car, the judge should be required to give an initial aggressor instruction to the jury.[326] Requiring an initial aggressor instruction

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323. In light of the fact that most self-defense statutes that include the term "initial aggressor" do not define the term, in prior scholarship, I have proposed that states adopt a uniform definition of the term "initial aggressor" as "one whose words or acts first created a reasonable apprehension of physical harm in another person." *See* Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 54. Connecticut is one state that defines the term in this way. *Id.* at 54 n.249 (first citing State v. Ramos, 801 A.2d 788, 795 (Conn. 2002), *overruled by* State v. Elson, 91 A.3d 862 (Conn. 2014); then citing State v. Jones, 128 A.3d 431, 452 (Conn. 2015); and then citing State v. Rivera, 204 A.3d 4, 26 (Conn. App. Ct. 2019)) ("In Connecticut, '[t]he initial aggressor is the person who first acts in a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person or persons.'")).

Provocateurs constitute a type of initial aggressor. *Id.* at 23. A provocateur is a person "who provokes another person into attacking him so he can attack that other person and claim he acted in self-defense." *Id.* For more commentary on provocateurs and distinguishing their treatment in self-defense cases from that of initial aggressors, see Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597 (2013) (distinguishing provocateurs from their initial aggressor "cousins," and arguing that provocateurs forfeit their defensive rights upon provoking the respondent); Joshua D. Brooks, Note, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J.L. & PUB. POL'Y 533 (2015) (indicating that existing "provocateur limitations" on self-defense claims do not sufficiently cover "silent, subtle provocateurs").

324. *See* Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 7 ("As a general matter, initial aggressors have no right to claim self-defense.").

325. *See infra* note 456 (listing seven states in which the initial aggressor limitation to the defense of habitation applies).

326. *See* Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 58–61 (proposing that judges should generally be required to give an initial aggressor instruction in cases in which an individual displayed a firearm in a threatening manner or pointed a firearm at another person, is charged with a crime, and claims they acted in self-defense but allowing "a judge to decline to give an

simply means the judge would have to advise the jury that if it finds that the defendant was the initial aggressor, then the defendant's use of deadly force cannot be justified under the defense of habitation.[327] Importantly, the giving of such instruction does not mean the jury must find that the defendant was the initial aggressor; it merely ensures that the jury gets to make this determination.[328] The jury can find that the victim, not the defendant, was the initial aggressor; or it can find that the defendant, not the victim, was the initial aggressor; or it can find that both the victim and the defendant were initial aggressors.[329]

Additionally, if the defendant used a firearm to shoot an *unarmed* person who unlawfully entered or was attempting to unlawfully enter their workplace, car, or curtilage and is in a state with a self-defense presumption, the shooter should not get the benefit of the self-defense presumption. They should be required to show they had a reasonable belief that the unarmed person they shot was threatening them with either death or serious bodily injury or, if the state is a loose proportionality state, that the person was threatening them with some kind of physical harm.

These proposed reforms alone cannot prevent the use of deadly force by homeowners with firearms against individuals who were not threatening them with death or serious bodily injury, but hopefully can discourage some of these shootings. Ultimately, a change in cultural attitudes surrounding firearms is needed if we want to see a significant decrease in such shootings. Owning a firearm should be discouraged, not valorized the way it is now. As long as the law allows the use of deadly force in

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initial aggressor instruction upon finding that the defendant displayed or pointed the firearm in response to a credible threat of physical harm and the defendant's intent in pointing the firearm was to avoid a physical confrontation").

327. It is not uncommon to require certain jury instructions in criminal cases. *See id.* at 66–67 (listing several jury instructions that judges are typically required to give the jury).

328. *Id.* at 61 ("[I]f the judge does give the jury an initial aggressor instruction, this does not mean that the jury must view the defendant as the initial aggressor and reject the defendant's claim of self-defense. It merely means the jury will get to decide the question.").

329. If the jury finds that the victim and the defendant were both initial aggressors, then the defendant would lose the privilege of arguing his use of deadly force was justified in self-defense or defense of habitation. *Id.* at 34 ("Most courts recognize there can be more than one 'initial aggressor' in a conflict.").

defense of habitation when the person shooting does not reasonably believe there is an imminent threat of death or serious bodily injury to himself or others, we will continue to have tragic shootings by fearful homeowners and other otherwise law-abiding persons with guns. The expressive function of the law can help set the tone for what is—and what is not—acceptable behavior in society. Changing the law is an important first step towards changing attitudes.

A. REQUIRE STRICT PROPORTIONALITY FOR THE USE OF DEADLY FORCE IN DEFENSE OF HABITATION

One of the signature elements of the defense of habitation as it exists today in most jurisdictions is that it allows a homeowner or other occupant of the dwelling to use deadly force against an individual even when that individual is not threatening anyone in the dwelling with death or serious bodily injury. In most jurisdictions, the defense of habitation does not require strict proportionality as required for the use of deadly force under self-defense law.[330] Instead, the defense of habitation in most states allows a homeowner to use deadly force against an individual even if that individual is not threatening the homeowner with deadly force.[331]

As noted earlier, twenty-one states provide homeowners and other occupants of a dwelling with a presumption that they reasonably believed they were facing a threat of death or serious bodily injury if they use deadly force against someone who has unlawfully entered, was unlawfully entering, or was attempting to unlawfully enter the dwelling.[332] In these states with a self-defense presumption, as long as the homeowner or occupant of the dwelling reasonably believed the other person had unlawfully entered or was unlawfully entering or attempting to enter the home, the homeowner may use deadly force against that other person regardless of whether the homeowner actually or

330. At least thirty-seven states and the District of Columbia do not require proof that the homeowner actually or reasonably believed the intruder was threatening them with death or serious bodily injury. *See infra* Appendix F (listing thirteen states and the District of Columbia as jurisdictions with loose proportionality); *infra* Appendix G (listing twenty-four states with no proportionality).

331. *See supra* note 330 (discussing the various state laws).

332. *See infra* Appendix A (listing states with a self-defense presumption).

reasonably believed the intruder posed a threat of any physical harm to the homeowner or anyone else in the dwelling.[333]

This Article proposes that states should require those who use deadly force[334] in defense of habitation to have reasonably believed they were being threatened with death or serious bodily injury. The use of deadly force in defense of the habitation should be a complete justification only if the homeowner or occupant of the dwelling reasonably believed the intruder was threatening the homeowner or another occupant of the dwelling with death or serious bodily injury or was threatening to commit a violent felony. If the homeowner reasonably believed the intruder was threatening some physical injury—not death or serious bodily injury—or was threatening to commit some crime—not a violent crime or a crime involving the threat of physical harm—within the dwelling, this should be considered a partial defense akin to imperfect self-defense, mitigating the charged offense to a lesser offense, but not completely absolving the homeowner of criminal liability. If the homeowner did not reasonably believe the intruder was threatening any physical injury at all, the homeowner should be held fully liable for his or her use of deadly force.

In line with this first proposal, this Article proposes that states with a self-defense presumption—a presumption that eliminates the requirement that the defendant reasonably believed the intruder was threatening them with death or serious bodily injury—should repeal that presumption.[335] Like the defense of self-defense, the defense of habitation should value human life over property, even if that property is one's home.[336]

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333. *See* Green, *supra* note 65, at 5 (describing how defense of premise is in conflict with self-defense principles). It is worth noting that the word "forcibly" in these defense of habitation statutes refers to the entry, not to the threat of physical violence against the homeowner or any occupant within the dwelling. *See*, *e.g.*, ALA. CODE § 13A-3-23(a)(5) (2023) (permitting deadly force against another person if the person reasonably believes the other is "[i]n the process of unlawfully and *forcefully entering*, or has unlawfully and *forcefully entered*, a dwelling, residence, business property, or occupied vehicle" (emphasis added)).

334. *See supra* note 38 (defining "deadly force").

335. *See infra* Appendix A (listing the twenty-one states with a self-defense presumption).

336. *See generally* Part I.B (noting how at common law, deadly force could not be used solely for the protection of property).

B. RESTRICT THE SCOPE OF THE DEFENSE OF HABITATION TO THE FOUR CORNERS OF THE DWELLING

My second proposal is to urge states that have expanded the scope of the defense of habitation to the workplace, the car, or the curtilage, to restrict the scope of the defense to the four corners of the dwelling. The use of deadly force in defense of habitation should be limited to entries or attempted entries into the dwelling proper. A person in a workplace or motor vehicle should only be able to use deadly force against another person if they are being imminently threatened with deadly force, i.e., if they satisfy the conditions of the defense of self-defense. Similarly, a homeowner should not be able to shoot someone who simply steps one foot into their front or backyard unless it is reasonable for the homeowner to believe that person poses a threat of imminent death or serious bodily injury to the homeowner or someone else on the premises.

It is unnecessary to expand the scope of the defense of habitation to the workplace, cars, and the curtilage because self-defense law is sufficient to cover cases where an individual needs to use deadly force against another person who is entering or attempting to enter the workplace, the car, or the curtilage. Expanding the scope of the defense of habitation beyond the four corners of the dwelling encourages the use of deadly force in cases where such force is not proportionate or necessary.

1. Workplace

If an individual works in a building open to the public, expanding the defense of habitation to allow anyone in their workplace to use deadly force against another person who is unlawfully entering or attempting to enter that workplace without also requiring a reasonable belief that the individual is threatening someone in the building with death or serious injury encourages the use of deadly force in cases where it may not be necessary or proportionate. The person who has entered the building unlawfully could be an unarmed person seeking shelter. The person could be someone who simply needs to use the restroom. Today, it is very challenging to find a public restroom, let alone a private establishment that will allow a noncustomer to use the establishment's restroom. It hardly seems reasonable to allow a private citizen to use deadly force against another person who unlawfully entered an office building in search of a restroom.

If someone has unlawfully entered a workplace and is posing an imminent threat of death or serious bodily injury to a person in the building, an individual in that workplace would be able to use deadly force to defend against that threat under ordinary self-defense law.[337] If the person who has unlawfully entered the building is not posing a threat of death or serious bodily injury, then the use of deadly force against that person would not be proportionate and should not be considered justified.

Take, for example, Dudley Hay, a seventy-four-year-old man, who shot and killed a nineteen-year-old man he found hiding inside his business in Louisiana.[338] Apparently, shortly before midnight, Hay found out from his alarm company that someone had triggered the security alarm at his business next to his home.[339] Hay grabbed a pistol and went next door to his business, where he found a window open.[340] Hay entered the building and found a man named Eric Bryant hiding in a bathtub.[341] Hay claimed that when he pulled back the shower curtain, Bryant stood up and confronted him, so he shot Bryant.[342]

Upon reviewing the case, District Attorney Paul Carmouche concluded that Hay was justified in shooting Bryant.[343] Carmouche told reporters from the *Shreveport Times*, "Anyone that's lawfully inside of a dwelling or place of business may use deadly force against anyone who is attempting to make an unlawful entry or has made an unlawful entry."[344]

A review of Louisiana's defense of habitation statute suggests the District Attorney's decision was likely correct, even though one part of the statute seems to suggest, on first reading, that Hay was not justified in shooting Bryant. Louisiana's defense of habitation statute specifies that homicide is justifiable:

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337. *See generally supra* note 42 and accompanying text (explaining the usual elements of a claim of self-defense: an honest and reasonable belief of imminent death or serious bodily injury and the necessity to use deadly force to avoid the threatened harm).

338. Loresha Wilson, *Business Owner Not Charged in Shooting*, SHREVEPORT TIMES, Aug. 4, 2006, at 1B.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

> When committed by a person lawfully inside a dwelling, a place of business, or a motor vehicle . . . when the conflict began, against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle, or who has made an unlawful entry into the dwelling, place of business, or motor vehicle, and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the dwelling, place of business, or motor vehicle.[345]

In this case, by entering Hay's place of business without Hay's permission, Bryant made an unlawful entry. However, it is not clear that it was *reasonable* for Hay to believe deadly force was necessary to compel Bryant to leave his place of business. From what we know about the case, it appears Hay simply opened the shower curtain, found the unarmed Bryant in the bathtub, and shot him without any warning and without first asking Bryant to leave.[346] Hay said Bryant confronted him,[347] but because of the lack of publicly available information about this case, we do not know exactly what, if anything, Bryant did to make Hay feel that Bryant was confronting him. Bryant may have simply stood up after Hay opened the shower curtain. We do not know Bryant's race, but if Bryant was a Black man, it could be that Hay *felt* threatened by Bryant because of his race even if Bryant did not actually threaten Hay with any force. Without knowing more about what transpired, it is hard to say that Hay *reasonably believed* it was necessary to use deadly force to compel Bryant to leave the business.

If we were relying solely upon the above provision, we might have a reasonable doubt as to whether Hay was justified in using deadly force against Bryant. Another portion of Louisiana's defense of habitation statute, however, gives a person inside a dwelling, place of business, or motor vehicle who uses deadly force against a person who was attempting an unlawful entry or who had unlawfully entered that dwelling, business, or car, a presumption that they acted justifiably. Section 14:20(B) of the Louisiana statute provides:

> For the purposes of this Section, there shall be a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that the use of deadly force was necessary to prevent unlawful entry thereto, or to compel an unlawful intruder to

345. LA. STAT. ANN. § 14:20(A)(4)(a) (2023).

346. *See* Wilson, *supra* note 338, at 1B.

347. *Id.*

> leave the dwelling, place of business, or motor vehicle when the conflict began, if both of the following occur:
>
> (1) The person against whom deadly force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered the dwelling, place of business, or motor vehicle.
>
> (2) The person who used deadly force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred.[348]

Given this presumption, even if Hay did not actually or reasonably believe it was necessary to use deadly force to compel Bryant to leave the building, we are supposed to presume that his use of deadly force was necessary to compel Bryant to leave because (1) Hay, the owner of the business, was lawfully inside his place of business,[349] (2) Bryant, the person who was shot by Hay, had unlawfully and forcibly entered Hay's place of business,[350] and (3) as the owner of the business, Hay knew or had reason to believe that an unlawful and forcible entry had occurred.[351] Louisiana's self-defense presumption forces us to presume that Hay reasonably believed it was necessary to use deadly force to compel Bryant to leave even if it was not actually reasonable to believe deadly force was necessary.

There is one more reason to conclude that Hay was justified under Louisiana's defense of habitation law in his use of deadly force. Louisiana's defense of habitation statute also provides that homicide is justifiable:

> When committed against a person whom one reasonably believes to be likely to use any unlawful force against a person present in a dwelling or a place of business, or when committed against a person whom one reasonably believes is attempting to use any unlawful force against a person present in a motor vehicle . . . while committing or attempting to commit a burglary or robbery of such dwelling, business, or motor vehicle.[352]

Given that Bryant was in Hay's business without Hay's permission, one can see how a prosecutor or a jury could conclude that it was reasonable for Hay to believe that Bryant was likely to

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348. LA. STAT. ANN. § 14:20(B) (2023).

349. *Wilson*, *supra* note 338, at 1B.

350. Hay did not give Bryant permission to be in his business, making Bryant's entry unlawful. *Id.*

351. Someone (most likely Bryant since he was the only person Hay found in the building) had tripped the security alarm, giving Hay reason to believe there was a forcible entry into his business. *Id.*

352. LA. STAT. ANN. § 14:20(A)(3) (2023).

use some unlawful force to commit burglary in his business, even if that force did not amount to deadly force.

It is easy to sympathize with the business owner. What else was he to do after finding a man who had broken into his business, presumably to steal things from his business, hiding in the bathtub of the building in the dead of night? If he had simply pointed his gun at Bryant and asked him to leave, it is possible that Bryant could have tried to grab Hay's gun and shoot Hays with it.

While all this is true, if the law had encouraged Hay to preserve life by requiring proportionality in the use of deadly force, he might have backed away slightly, putting distance between himself and Bryant, and then told Bryant to leave with his gun trained on Bryant. Putting distance between himself and Bryant would have been safer for Hay. It is usually dangerous for one with a firearm to get close to another person who can grab the gun and use it for their own purposes.[353] If Hay had put some distance between himself and Bryant and if Bryant had made a threatening move towards him rather than exiting the building, Hay would have been justified in shooting Bryant under ordinary self-defense law.[354]

Of course, one could argue that it is not reasonable to require a person in his home or business to back away slightly from an intruder because this would be requiring retreat when one has no duty to retreat in one's home or business under the Castle Doctrine,[355] and one would be correct. Nonetheless, self-defense

353. USCCA, *Self Defense Mistakes You Never Want to Make: Into the Fray Episode 210*, YOUTUBE, at 1:59–2:21 (Mar. 19, 2018), https://youtu.be/KZjpd5JKuAc?si=K2utIWc4zk6QxeVH (explaining that if "somebody gets in arm's reach, anything can happen[,]" such as wrestling the gun away); *see also* Saul Jaeger, *How to Disarm a Criminal with a Handgun*, WIKIHOW (Oct. 16, 2023), https://www.wikihow.com/Disarm-a-Criminal-with-a-Handgun [https://perma.cc/RG6S-L3PX] (providing various techniques to gain possession of another person's gun when they are in close proximity).

354. *See generally supra* note 42 and accompanying text (explaining that self-defense allows deadly force if there is an honest and reasonable belief of imminent death or serious bodily injury and the necessity to use deadly force to avoid the threatened harm).

355. *See* Carpenter, *supra* note 52, at 656–57 (explaining that under the Castle Doctrine, those who are unlawfully attacked in their homes have no duty to retreat).

law ordinarily requires necessity and proportionality,[356] and therefore encourages individuals to be more careful before using deadly force, which is a good thing. In contrast, Louisiana's defense of habitation law encourages homeowners and business owners to use deadly force against intruders even if killing is not necessary or proportionate, and that is not something the law should encourage.

2. Cars

The extension of the defense of habitation to occupied vehicles is a nod to the use of deadly force against carjackers.[357] From a commonsense perspective, such statutes seem reasonable at first glance. After all, carjackers often threaten deadly force against car owners to steal cars,[358] so car owners should be allowed to use deadly force against carjackers to protect themselves from being shot and their cars from being stolen. The problem with extending the defense of habitation to occupied vehicles is that this may encourage the use of deadly force even in cases when the person in the car is neither being threatened with a carjacking nor with death or serious bodily injury.

For example, on April 23, 2021, a man named Brannon Shirley shot and killed a man named Joshua Ryan Dempsey in Georgia.[359] Several weeks before the shooting, Dempsey began a relationship with Shirley's former girlfriend, Kaylin Rogers.[360] In response, Shirley began to date Dempsey's former girlfriend,

356. *See supra* text accompanying note 43.

357. Green, *supra* note 65, at 13 (noting that passage of the Louisiana defense of vehicles law was prompted by two prominent carjackings and that in both cases "the then-existing law of self-defense or defense of others would clearly have permitted the use of deadly force").

358. The crime of carjacking involves the theft of a motor vehicle by force or threat of force. 2 JENS DAVID OHLIN, WHARTON'S CRIMINAL LAW § 31:16, at 644 (16th ed. 2021) ("Typically, by statute, a carjacking is committed when, with the intent permanently to deprive, a defendant takes and drives away the motor vehicle of another from the latter's person or presence by the use of force or threatened force.").

359. Kennae Hunter, *DA Closes Case in Death of Joshua Dempsey*, TIMES-GEORGIAN (Nov. 2, 2022), https://www.times-georgian.com/times_georgian/da-closes-case-in-death-of-joshua-dempsey/article_5ec3529c-b8b6-5097-99a2-47e70213f976.html [https://perma.cc/LA2S-DGT9].

360. *Id.*

Brittany Matthews.[361] This angered Dempsey, who sent several hostile communications to Shirley prior to the shooting.[362]

On the night of the shooting, Dempsey saw Shirley sitting in his car in the parking lot of a local bar.[363] Dempsey went over to talk to Shirley and the two men began to argue.[364] Shirley drove away from the parking lot, but returned to the parking lot a short time later, and parked next to Dempsey's vehicle.[365] Approximately five minutes later, Dempsey left the bar and approached his vehicle.[366] Seeing Shirley parked next to his vehicle, Dempsey exchanged more words with Shirley.[367]

After Shirley insulted Dempsey, "Dempsey reached into Shirley's truck and slapped or punched Shirley in the face."[368] Dempsey then tried to goad Shirley into shooting him, but Shirley simply continued to insult Dempsey.[369] In response, Dempsey struck Shirley a second time through the open window of Shirley's car.[370] When Shirley hurled yet another insult at Dempsey, he responded by running towards Shirley's truck and jumping onto the running board, apparently intending to hit Shirley again.[371] This time, Shirley fired one fatal shot from his 9mm pistol, striking Dempsey in the chest as Dempsey stood on his running board.[372]

It is unlikely that Shirley would have been justified in shooting Dempsey if he had relied on a claim of self-defense to justify his actions. Self-defense law typically requires a person using deadly force to have reasonably believed that deadly force was necessary to counter an imminent threat of deadly force.[373] Here, while Dempsey had hit Shirley more than once and was threatening to hit Shirley again, ordinarily one cannot shoot someone

361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *See supra* notes 44–47 and accompanying text.

in response to being punched and claim one acted justifiably in self-defense because shooting a firearm constitutes deadly force and is a disproportionate response to getting hit by another person.

The Coweta Circuit District Attorney's Office, however, declined to prosecute Shirley, stating that "it could not prove beyond a reasonable doubt that Shirley was not justified in shooting Dempsey."[374] The Office explained that "the more relevant legal defense" was not self-defense but defense of habitation because "a vehicle is defined as a habitation under Georgia law, and Shirley remained in his vehicle during the altercation."[375] The District Attorney's Office further explained that since Shirley was in his vehicle during the altercation, he had the right to use deadly force just "as if he were standing in the doorway of his own home."[376] Furthermore, when Dempsey struck Shirley in the vehicle, his hand and arm broke the pane of the driver's side window and thus was an "entry" under Georgia law.[377] The Office further explained that under Georgia's defense of habitation law, "there is no requirement that Shirley actually be injured or even that he be in fear."[378] Instead, "[a]ll that is required is that Dempsey 'offered personal violence' to Shirley."[379]

This was not a situation where someone needed to use deadly force to prevent a carjacking. Shirley shot a man he knew was dating his ex-girlfriend after egging that man on by insulting him over and over. It was almost as if Shirley wanted Dempsey to strike him so Shirley could shoot him and claim he acted justifiably under Georgia's defense of habitation (vehicle) law. Shirley might even be considered a provocateur if he hurled those insults at Dempsey with the intent of provoking Dempsey into hitting him, so he could shoot Dempsey and then claim self-defense.[380] Provocateurs, like other initial aggressors, lose the

374. Hunter, *supra* note 359.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* The District Attorney's Office also explained that it was necessary for Shirley to use deadly force against Dempsey because Dempsey was forty-five pounds heavier and five inches taller than Shirley and Shirley had a medical condition that rendered his chest weaker than the average person. *Id.*

380. *See supra* note 323 (discussing the term "provocateur").

right to claim self-defense and should also lose the right to claim defense of habitation.[381]

3. Curtilage

Extending the defense of habitation to the curtilage, i.e., the area immediately surrounding the home, is also unnecessary and unwise. A recognition that extending the defense of habitation to the curtilage is not a good idea may be the reason why only a few states have done so.[382] Nonetheless, because several states have extended the defense of habitation to include the curtilage and others may contemplate doing so in the future, this Subsection outlines the reasons why extending the defense of habitation to the curtilage is a bad idea.

First and foremost, self-defense law is sufficient to handle most cases where a homeowner or other occupant of the dwelling notices that someone has entered their property without their permission and is contemplating using deadly force against the trespasser. If a homeowner sees that someone who appears to be unarmed has come onto their property without their permission they should stay inside the home and call 911, not start shooting. If the homeowner notices that the person outside the dwelling has a gun or other deadly weapon and there is reason to believe they are about to use that weapon against the homeowner or another occupant of the dwelling, the homeowner would be justified in shooting the person under ordinary self-defense principles.[383] Likewise, if the person in the yard attempts to enter the dwelling, the homeowner would be justified in using deadly force if they satisfy the conditions of their state's defense of habitation law.[384]

Permitting a homeowner to shoot someone who simply enters the curtilage without the homeowner's permission without requiring that the homeowner reasonably believe the person

381. *See* Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 7–8 (noting that initial aggressors lose the right to claim self-defense).

382. *See infra* Appendix J (listing nine states that have extended the defense of habitation to the curtilage: Florida, Idaho, Indiana, Maryland, New Hampshire, North Carolina, Texas, Virginia, and Wisconsin).

383. *See generally* DRESSLER, *supra* note 40, § 18.01[E], at 219 (explaining that self-defense justifies the use of force when a non-aggressor reasonably believes such force is necessary to protect themselves from harm).

384. *See supra* Part I.C (explaining the defense of habitation defense).

poses an imminent threat of death or serious bodily injury to an occupant of the dwelling encourages disproportionate and unnecessary uses of force. Take, for example, a hypothetical based on the real life incident involving Mark and Patricia McCloskey, the two personal injury lawyers in Missouri who felt so threatened by Black Lives Matter protestors walking past their home in June 2020 that they came out of their home and pointed guns at the protestors, suggesting they would shoot anyone who dared step off the sidewalk and put one foot onto their property.[385] The McCloskeys could have stayed in their home and called 911, but instead they came out of their home with their guns and unnecessarily escalated the risk of a fatal confrontation.

Fortunately, none of the protestors, who were en route to the home of former St. Louis Mayor, Lyda Krewson, stepped off the street onto the McCloskeys' front yard and neither McCloskey fired their weapon.[386] Imagine however, if a protestor had stepped off the sidewalk and walked onto the McCloskeys' front lawn and either Mark or Patricia had shot that protestor. Would such a shooting be justified?

Ordinary self-defense law would not permit the shooting of an unarmed protestor who was not posing an imminent threat of death or serious bodily injury at the time because shooting that protestor would be disproportionate and unnecessary. As a general matter, self-defense law requires a reasonable belief that

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385. *See* Vanessa Romo, *The Couple Who Waved Guns at BLM Protesters Plead Guilty to Misdemeanors*, NPR (June 17, 2021), https://www.npr.org/2021/06/17/1007984646/patricia-mark-mccloskey-waved-guns-blm-protesters-plead-guilty-misdemeanors [https://perma.cc/4LQG-2R6V] (explaining the couple's background and subsequent charges); Mallika Kallingal & Keith Allen, *St. Louis Couple Who Waved Guns at Protesters Last Summer Plead Guilty to Misdemeanor Charges*, CNN (June 17, 2021), https://www.cnn.com/2021/06/17/us/st-louis-mccloskeys-plead-guilty-to-misdemeanors/index.html [https://perma.cc/FZ8D-W26T] (elaborating further on the events); s*ee also* Debra Cassens Weiss, *Are Lawyers Who Pointed Guns at Protesters Protected by the Castle Doctrine?*, ABA J. (June 30, 2020), https://www.abajournal.com/news/article/are-lawyers-who-pointed-guns-at-protesters-protected-by-the-castle-doctrine [https://perma.cc/U5ZG-7XDD] (noting that law professors Anders Walker and Corey Rayburn Yung disagreed on whether the McCloskeys had a right to point their guns at the protesters).

386. Romo, *supra* note 385.

deadly force was necessary to protect against an imminent threat of deadly force.[387]

Our hypothetical McCloskeys, however, might be able to claim that shooting a protestor who stepped onto their property was justified under Missouri's defense of habitation law (which, in Missouri, is called the castle doctrine), now part of Missouri's self-defense law.[388] As noted earlier,[389] in 2010, the Missouri legislature expanded the defense of habitation beyond the four corners of the dwelling to apply to entries onto a person's property. Moreover, like most jurisdictions, Missouri's defense of habitation law does not require strict proportionality,[390] so it would not be necessary for the McCloskeys to show that they reasonably believed they needed to use deadly force to protect against an imminent threat of death or serious bodily injury. Even under the Supreme Court of Missouri's interpretation of Missouri's defense of habitation statute,[391] as long as the McCloskeys could show they reasonably believed they needed to use deadly force to protect against some unlawful force, they would be justified. Unlawful force could include a push or a shove or even a slap. A good attorney could probably convince a jury that our hypothetical McCloskeys reasonably believed that our hypothetical protestor, who allegedly was part of a group that had already broken the gate protecting their gated community from intruders,[392]

387. *See* DRESSLER, *supra* note 40, § 18.01[B], at 217–18 (discussing elements of a self-defense claim).

388. *See* MO. REV. STAT. § 563.031 (2023) (including defense of habitation under the "Use of force in defense of persons" section); *see also* State v. Straughter, 643 S.W.3d 317, 321 (Mo. 2022) ("Missouri law also recognizes what is commonly known as the castle doctrine . . . . [under which] a person need not face death, serious physical injury or any forcible felony to respond with deadly force.").

389. *See supra* notes 270–78 (explaining the 2010 change in law).

390. *See infra* Appendix F (listing Missouri as a loose proportionality state).

391. *Straughter*, 643 S.W.3d at 321–22 (holding that Missouri's defense of habitation requires a reasonable belief that physical force was necessary to defend oneself from what is reasonably believed to be the imminent use of unlawful force).

392. There appears to be some dispute over whether the protestors broke the gate leading into the gated community where the McCloskeys lived. The McCloskeys claimed the protestors broke the gate. *See, e.g.*, Weiss, *supra* note 385; *White Couple Who Pointed Guns at St. Louis Protesters Claims "Angry Mob" Threatened Them*, CBS NEWS (July 1, 2020), https://www.cbsnews.com/

was threatening some kind of unlawful force by stepping off the public sidewalk and onto their private property despite their warning—through their very visible display of guns—not to do so.

One might object to the suggestion that the defense of habitation should be limited to the four corners of the dwelling and not apply to the curtilage given that the Supreme Court in two cases within the past decade has equated the curtilage with the home in the Fourth Amendment context. The first time this occurred was in the 2013 case of *Florida v. Jardines*, in which the Court had to decide whether a police officer walking up to the front porch of a home with a drug-sniffing dog constituted a "search" within the meaning of the Fourth Amendment.[393] Justice Scalia, writing for the Court, started by resurrecting the trespass doctrine despite the fact that the trespass doctrine had been roundly discarded by the Court in *Katz v. United States*,[394] stating "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[395]

One problem with invoking trespass doctrine in this case was that the officer had not physically intruded on a person, house, paper, or effect. The officer had merely walked up to the

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news/white-couple-guns-st-louis-protesters-felt-threatened [https://perma.cc/3XNS-CUWG]. However, other sources report that the gate was already open. *See* Ronald S. Sullivan Jr. & Intisar A. Rabb, *On the Decision by the Circuit Attorney for the City of St. Louis Whether to File Criminal Charges Against Mark and Patricia McCloskey*, HARV. L. SCH. CRIM. JUST. INST. 2 (July 17, 2020), http://clinics.law.harvard.edu/cji/files/2020/07/CJI-White-Paper-FINAL-1.pdf [https://perma.cc/E26K-XL58] ("Publicly available video footage shows protestors walking through an open gate in the neighborhood in which the Mayor's home is located and marching on the sidewalk or in the street.").

393. 569 U.S. 1, 3–5 (2013).

394. 389 U.S. 347, 353 (1967) ("[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."). *Katz* shifted the traditional Fourth Amendment analysis scheme from the long-established trespass doctrine to the reasonable-expectation-of-privacy analysis when it changed the Fourth Amendment's focus to people, not just places. *See id.*

395. *Jardines*, 569 U.S. at 5 (quoting United States v. Jones, 565 U.S. 400, 406 n.3 (2012)).

front door of Mr. Jardines's house with a drug-sniffing dog.[396] There was no physical intrusion into Mr. Jardines's house or anything else listed in the Fourth Amendment.[397] To get around this not-so-small textual problem, Justice Scalia declared that the curtilage enjoyed the same Fourth Amendment protection as the house itself, noting that "[t]he officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, *which we have held enjoys protection as part of the home itself*."[398] Despite suggesting there was precedent for this new understanding of the curtilage, Justice Scalia did not cite any prior cases in which the Court had said that the curtilage enjoys as much Fourth Amendment protection as the home itself here, probably because there were no such prior cases.[399]

A few paragraphs later, Justice Scalia noted that "when it comes to the Fourth Amendment, the home is first among equals," explaining that "[a]t the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[400] Of course, no one would dispute that the home is where Fourth Amendment protections are at their strongest, but Justice Scalia followed this statement by returning to his earlier claim that the curtilage enjoys just as much protection as the home itself:

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396. *Id.* at 3–4.

397. *Id. See generally* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …").

398. *Jardines*, 569 U.S. at 5–6 (emphasis added).

399. This was indeed a new understanding of how much Fourth Amendment protection the curtilage enjoyed. Prior Supreme Court cases had suggested that the curtilage enjoyed only moderate Fourth Amendment protection. For example, in *Florida v. Riley*, a plurality of the Court found that a police officer flying a helicopter 400 feet above a suspect's home and viewing marijuana growing in a greenhouse with missing roof slats in the backyard of Mr. Riley's home did not constitute a search within the meaning of the Fourth Amendment. 488 U.S. 445, 448–49, 451–52 (1989). It is unlikely that the Court would have come out the same way had the officer flown his helicopter 400 feet over Mr. Riley's home and peered down into the master bedroom or bathroom through a skylight and observed criminal activity in the house. That type of government action would likely have been seen as violating reasonable expectations of privacy regarding the interior of a home that one might not have with respect to a backyard.

400. *Jardines*, 569 U.S. at 6 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

> This right [to retreat into one's own home] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.[401]

To make crystal clear this notion that the curtilage was now to be considered part of the home, Justice Scalia stated, "We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'"[402]

To bolster this understanding of curtilage, Justice Scalia suggested that this view of curtilage as part of the home was grounded in history and tradition, writing "[t]hat principle has ancient and durable roots."[403] He then referenced Blackstone, noting "[j]ust as the distinction between the home and the open fields is 'as old as the common law,' so too is the identity of home and what Blackstone called the 'curtilage or homestall,' for the 'house protects and privileges all its branches and appurtenants.'"[404] Despite resurrecting trespass doctrine to decide this case, Justice Scalia covered all the bases by tying this new view of curtilage-as-equal-to-the-home to the *Katz* reasonable expectation of privacy test, writing, "[t]his area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'"[405]

In 2018, the Court repeated this understanding of curtilage-as-equivalent-to-the-home in *Collins v. Virginia*, a case involving "the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein."[406] The Court held that the automobile exception did not permit an officer to enter the curtilage to search a motorcycle parked therein without a warrant, explaining that because an officer would not have been able to enter a *home* without a warrant to search a motorcycle within the home,

401. *Id.*
402. *Id.* (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).
403. *Id.*
404. *Id.* at 6–7 (quoting 4 BLACKSTONE, *supra* note 141, at 223, 225).
405. *Id.* at 7 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)).
406. 584 U.S. 586, 588 (2018).

this officer could not enter the *curtilage* without a warrant to search a motorcycle within the curtilage.[407]

Continuing the conflation of the home with curtilage started by Justice Scalia in *Jardines*, Justice Sotomayor, writing for the Court, explained:

> Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "part of the home itself for Fourth Amendment purposes." "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[408]

Also echoing Justice Scalia's resurrection of trespass doctrine, Justice Sotomayor noted that "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant."[409]

It is interesting that Justice Sotomayor, one of the liberal Justices on the Court, chose to follow former Justice Scalia, who was known as one of the more conservative Justices on the Court, in both reaffirming the trespass doctrine and equating the curtilage with the home. These two moves are particularly striking given that the trespass doctrine, at least as originally understood, applied only to physical intrusions into constitutionally protected areas.[410] Constitutionally protected areas were those areas listed in the text of the Fourth Amendment, i.e., persons, houses, papers, and effects,[411] yet both Justice Scalia in *Jardines* and Justice Sotomayor in *Collins* applied trespass doctrine to the

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407. *Id.* at 601.

408. *Id.* at 592–93 (citations omitted) (first quoting *Jardines*, 569 U.S. at 6; and then quoting *Ciraolo*, 476 U.S. at 212–13).

409. *Id.* at 593.

410. Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that a wiretap did not amount to a Fourth Amendment search and seizure because no one *physically* entered his home and curtilage, nor was there seizure of *tangible* material effects).

411. U.S. CONST. amend. IV.

curtilage, an area conspicuously missing from the text of the Fourth Amendment. The Court had to equate the curtilage with the home for the governmental intrusions into the curtilage in both cases to pass muster under trespass doctrine.

Collins makes crystal clear that the Court now equates curtilage with the home for Fourth Amendment purposes, as Justice Sotomayor explains in the following passages:

> Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.
>
> The reason is that the scope of the automobile exception extends no further than the automobile itself. Virginia asks the Court to expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home *or its curtilage* to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue *the core Fourth Amendment protection afforded to the home and its curtilage* and "untether" the automobile exception "from the justifications underlying" it.[412]

In Collins *and the Invention of "Curtilage,"* Chad Flanders challenges the notion expressed in *Collins v. Virginia* and *Florida v. Jardines* that the curtilage-as-equivalent-to-the-home principle has deep historical roots going back to Blackstone.[413] Flanders shows that this idea of curtilage-as-equivalent-to-the-home actually has no support in either the text or history of the Fourth Amendment.[414]

Flanders starts by noting that Justice Scalia in *Florida v. Jardines* and Justice Thomas, concurring in *Collins v. Virginia*, both reference Blackstone's discussion of the curtilage in his chapter on burglary in his *Commentaries* as support for the view that the curtilage is part of the home.[415] Flanders notes that

412. *Collins*, 584 U.S. at 594–95 (emphasis added) (citations omitted) (quoting Riley v. California, 573 U.S. 373, 386 (2014)).

413. Chad Flanders, Collins *and the Invention of "Curtilage,"* 22 J. CONST. L. 755, 764–69 (2020).

414. *Id.* at 781.

415. *Id.* at 763.

what Blackstone actually said was that "the home protects not only the literal four walls of the home, but also 'all it's [sic] branches and appurtenants, if within the curtilage or homestall.'"[416] Digging deeper, Flanders provides fuller text from Blackstone relating to the curtilage:

> And, therefore, we may safely conclude, that the requisite of it's [sic] being *domus mansionalis* is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form it's [sic] guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi* [intending to return], is the object of burglary; though no one be in it, at the time of the fact committed. *And if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's [sic] branches and appurtenants, if within the curtilage or homestall.*[417]

Flanders notes that "Blackstone is clearly talking about *buildings* [barns, stables, and warehouses] in the run up to his invocation of 'curtilage' and 'homestall.'"[418] Flanders explains that "[w]hat the curtilage does, according to the [above] passage, is to designate certain areas of a person's property within which buildings will not be considered separate from the house, but as in fact part of the house."[419] Flanders adds that "the curtilage is important because it is by means of the curtilage that we can pick out the buildings that are rightly considered as branches of the mansionhouse, and not as separate from it."[420] Furthermore, "[d]istant barns and warehouses are not part of the home, even though they are buildings."[421] "It is only the buildings *within* the curtilage that get to be counted as part of the house."[422] Flanders

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416. *Id.* (alteration in original) (quoting 4 BLACKSTONE, *supra* note 141, at 225).

417. *Id.* at 764 (alteration in original) (quoting 4 BLACKSTONE, *supra* note 141, at 225).

418. *Id.* (quoting 4 BLACKSTONE, *supra* note 141, at 225).

419. *Id.* at 764–65.

420. *Id.* at 765.

421. *Id.*

422. *Id.*

reiterates, "That is the importance—and the function—of the curtilage. It tells us which buildings are part of the house . . . ."[423]

Flanders goes on to say, "It follows quite naturally from this that *the curtilage*—i.e., the land surrounding the house—*is not itself part of the house*. This seems clear from the passage."[424] Flanders notes that when Blackstone discusses the defense of habitation, the distinction between curtilage and house becomes even clearer, writing:

> [This] becomes even clearer in the context of the chapter which deals with crimes against habitation. In defining those crimes (burglary, arson, and the like) it is important to answer the prior question of what counts as a person's house. We need this in order to tell when we have something like a burglary, as opposed to a trespass or a stealing. Or we may need it to tell when the crime implicates not just the home but also other places, as when Blackstone says that arson could be the burning of a home, but also the burning of a barn full of corn, even if it is not part of the home . . . . So it is no surprise when Blackstone again defines "house" when he discusses burglary, and repeats that barns and stables and dairy houses that adjoin a house can be looked upon as "branches" thereof but not when the same buildings are "distant" from the home. The point could not be clearer—if the *buildings* are close to the home, they are part of the home. It is the feature of *being a building close to the home* that extends the boundary of the home, not merely being close to the home. The idea that the land surrounding the home is also the home does not find any support—*none*—in these passages. It is an invention borne of a misreading of Blackstone on burglary.[425]

Flanders concludes:

> [I]f the Court is using Blackstone as a common-law means of expanding "house" in the Fourth Amendment then there is a considerable obstacle—Blackstone does not say what the Court has taken him to be saying, and the Court has not really offered any other evidence in [its] opinions to defend its conception of curtilage as house *besides* Blackstone.[426]

As far as the text of the Fourth Amendment, Flanders notes that the word "curtilage" is never even mentioned there.[427]

I happen to find Flanders's account very persuasive, but even if one does not agree with Flanders, just because the Court has stated in the context of whether a *search* has taken place

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423. *Id.*

424. *Id.*

425. *Id.* at 765–66 (footnotes omitted).

426. *Id.* at 768.

427. *Id.* at 781 (finding no textual basis for "curtilage" in the Fourth Amendment).

within the meaning of the Fourth Amendment that the curtilage is equivalent to the home, this does not mean the curtilage should be treated as equivalent to the home in the defense of habitation context. Just because the Court has said something in one context does not mean that same something should be applied the same way in all contexts.

For example, the Court has made clear that in the interrogation context, the Sixth Amendment right to counsel does not attach until the commencement of formal adversarial proceedings by way of indictment, information, preliminary hearing, grand jury proceeding, or arraignment.[428] It has also made clear that an arrest is not sufficient to trigger the protections of the Sixth Amendment right to counsel.[429] The suspect has to have been formally charged or at least arraigned.[430] In the speedy trial context, in contrast, the Court has said that the Sixth

428. *See* Massiah v. United States, 377 U.S. 201, 204–05 (1964) (applying the Sixth Amendment right to counsel to the interrogation context for the first time)*; see also* Brewer v. Williams, 430 U.S. 387, 401 (1977) ("[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."); Texas v. Cobb, 532 U.S. 162, 167–68 (2001) (noting that the Sixth Amendment attaches only with respect to offenses for which judicial proceedings have commenced).

429. While the Court in *Escobedo v. Illinois* suggested that the Sixth Amendment right to counsel attaches when the investigation ceases to be a general investigation into an unsolved crime and begins to focus on the accused and the accused is arrested and taken into custody, 378 U.S. 478, 490–91 (1964), the Court later retreated from this position without overruling *Escobedo* by characterizing it as a Fifth Amendment case, not a Sixth Amendment case. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 440–42, 444 (1966) (characterizing *Escobedo* as a Fifth Amendment privilege against self-incrimination case); Moran v. Burbine, 475 U.S. 412, 429 (1986) ("Although *Escobedo* was originally decided as a Sixth Amendment case, 'the Court in retrospect perceived that the "prime purpose" of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, "to guarantee full effectuation of the privilege against self-incrimination . . . ."'" (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972))).

430. *See Kirby*, 406 U.S. at 689 (noting that the Sixth Amendment right to counsel does not attach until at or after initiation of adversary judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); Illinois v. Perkins, 496 U.S. 292, 299 (1990) ("In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.").

Amendment attaches at arrest or indictment.[431] In other words, the Sixth Amendment attaches earlier (upon arrest) for purposes of the right to a speedy trial than it does for purposes of the right to counsel.

In another example, whether someone is in the home or in public depends on the context. The Court has drawn a distinction between arrests in the home and arrests in public. In *United States v. Watson*, the Court held that police do not need an arrest warrant to arrest a person in public as long as they have probable cause to support that arrest.[432] In *Payton v. New York*, the Court held that police need an arrest warrant based on probable cause to arrest a person in their home.[433]

When asked to decide whether a woman standing in the doorway of the front door to her home was in public for purposes of determining whether her warrantless arrest based on probable cause was valid, the Court held the woman was in public, explaining:

> Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*.[434]

Yet as discussed above, the Court in *Florida v. Jardines* treats the front porch of a home, an area clearly outside the home, as part of the home.[435] If the front porch, which is outside the front door to a home, is considered part of the home, then surely the front doorway of a home should be considered part of the home as well, but the Court in *Santana* treated the front doorway as public space, not home space.

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431. Betterman v. Montana, 578 U.S. 437, 441 (2016) (noting that the Sixth Amendment right to a speedy trial "does not attach until . . . a defendant is arrested or formally accused").

432. 423 U.S. 411, 417–18, 423–24 (1976).

433. 445 U.S. 573, 589–90 (1980).

434. United States v. Santana, 427 U.S. 38, 42 (1976) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

435. 569 U.S. 1, 5–6 (2013) (finding a Fourth Amendment violation where a police officer and drug-sniffing dog inspected the front porch of the home); *see supra* note 398 and accompanying text.

Of course, *Santana* was decided decades ago,[436] and it is unclear whether today's Court would come out the same way. One could, however, defend these seemingly inconsistent decisions by simply recognizing that the Court in *Santana* was being asked a very different question than the question before it in *Jardines*. In *Santana*, the Court was being asked whether a person standing in the front doorway of her home, exposing herself to the public, should count as being in public for purposes of *arrest*.[437] In *Jardines*, the Court was being asked to decide whether a police officer bringing a drug-sniffing dog to a suspect's front porch was conducting a *search* within the meaning of the Fourth Amendment.[438] What counts as public space versus home space can and does appear to differ depending on the context.

Even more on point, in a lower court case entitled *Hopes v. State*, the defendant appealed his second-degree murder conviction in part because the trial court had refused his request to define the term "dwelling" to include the curtilage in the context of a statute giving one a right to use deadly force in self-defense without having to retreat within one's dwelling.[439] The defendant argued that the trial court erred in refusing his requested instruction because in a prior case the Supreme Court of Arkansas had treated the curtilage the same as the dwelling when it held that property located on one's person, at one's residence, or within the curtilage surrounding the residence may not be seized without a warrant.[440] The Supreme Court of Arkansas rejected the defendant's argument, noting that the defendant had failed to explain "how the right to be free of seizure of property without a warrant is connected to the right to use deadly force in self-defense."[441]

Even if the Supreme Court today equates curtilage with the home for purposes of deciding whether a "search" has taken place for Fourth Amendment purposes, whether under the trespass doctrine or the *Katz* reasonable expectation of privacy test, this does not mean that lower courts should equate the curtilage

436. The Court decided *Santana* in 1976. *See generally* 427 U.S. at 38.

437. *Id.* at 42.

438. 569 U.S. at 3.

439. 742 S.W.2d 561, 562 (Ark. 1988).

440. *Id.* at 564 (citing Sanders v. State, 264 Ark. 433 (1978)).

441. *Id.* (distinguishing *Hopes* from *Sanders*).

with the home in the context of the defense of habitation. In the Fourth Amendment search and seizure context, the primary concern of the framers was limiting the government's ability to intrude on the privacy and property interests of individuals.[442] Even though the text of the Fourth Amendment limits the areas protected to persons, houses, papers, and effects, interpreting the word "house" broadly to include the curtilage helps expand the protection we accord individuals against unwarranted government intrusion.

In the defense of habitation context, however, we are usually dealing with private individuals protecting their home against other private individuals.[443] It is understandable why we grant homeowners and other occupants of the dwelling a privilege to use deadly force to protect themselves when a stranger has unlawfully and forcibly breached the four corners of the dwelling, but expanding this privilege to the curtilage dangerously encourages homeowners with guns to shoot individuals who may not pose any threat of physical harm. A homeowner in a state with an expansive defense of habitation that includes the curtilage could, for example, shoot an arborist who comes onto the property to check a tree for disease after an inquiry from the homeowner's wife that the homeowner did not know about. A homeowner in a state with an expansive defense of habitation law could shoot the driver of a car who simply turns into their driveway to go the opposite direction if we follow *Collins v. Virginia* and say that the driveway is part of the curtilage and the curtilage is equivalent to the home.[444] The law should not be encouraging homeowners with guns to shoot at strangers who come onto their property unless they really need to do so to protect themselves or others.

In addition to the policy reasons advanced above for limiting the defense of habitation to the four corners of the dwelling, there are historical reasons to limit the defense. Recall that at common law, some states restricted the defense of habitation to the dwelling and did not allow homeowners to use deadly force against anyone who merely trespassed onto their property

442. *See generally* U.S. CONST. amend. IV.

443. *See supra* text accompanying notes 84–86.

444. 584 U.S. 586, 593–94 (2018) (finding that the driveway where the officer searched Collins's motorcycle was "properly considered curtilage").

outside the dwelling house.[445] This appears to have been the rule at early common law in England as well.[446]

Another reason to limit the defense of habitation to the four corners of the dwelling rather than extend it to the curtilage has to do with the fact that what constitutes the curtilage is by no means clear. While the Supreme Court has referred to the curtilage as the area "immediately surrounding and associated with the home,"[447] there is no bright line test for determining whether land around a home is or is not curtilage. Rather, whether property surrounding the home is or isn't curtilage depends on the facts and circumstances of the case. In *United States v. Dunn*, the Court noted that "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself."[448] To determine whether an area surrounding the home constitutes curtilage, the *Dunn* Court noted that the decisionmaker must consider four factors: (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by."[449] If we want to provide clarity in the law regarding when a person may use deadly force against another person in defense of habitation, limiting the defense to the four corners of the dwelling provides greater clarity than expanding it to include the murkier area known as the curtilage.

C. APPLY THE INITIAL AGGRESSOR LIMITATION TO THE DEFENSE OF HABITATION

My third proposal is to urge states to apply the initial aggressor limitation—which currently applies to the defense of self-defense—to the defense of habitation. As a general matter,

445. *See supra* notes 157–63 and accompanying text (describing the cases of *Davison v. Illinois* and *Lee v. State*) and *supra* notes 164–68 (noting that this view was reflected in early American treatises as well).

446. *See supra* notes 169–70 and accompanying text.

447. Florida v. Jardines, 569 U.S. 1, 6 (2013).

448. 480 U.S. 294, 300 (1987).

449. *Id.* at 301.

initial aggressors have no right to claim self-defense.[450] As I explain in *Firearms and Initial Aggressors*, all fifty states and the District of Columbia have adopted some type of an initial aggressor rule,[451] but the initial aggressor rules that exist across the nation are not at all uniform.[452] For example, some states require proof that the defendant intended to provoke the victim into attacking the defendant so the defendant could counterattack and claim self-defense.[453] Others do not require proof of intent to provoke, but require proof that the defendant was engaging in unlawful conduct before the defendant forfeits the right to claim self-defense.[454] Most states have not defined the term "initial aggressor," leaving it up to judges and juries to decide whether a defendant who claims self-defense was (or was not) the initial aggressor to the confrontation, which is why I have proposed that states define an initial aggressor as "one whose words or acts first created a reasonable apprehension of physical harm in another person."[455]

Currently, at least seven states apply the initial aggressor limitation to the defense of habitation.[456] Other states should do

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450. *See, e.g.*, ALA. CODE § 13A-3-23(c)(2) (2023) ("[A] person is not justified in using physical force [in self-defense] if . . . [h]e or she was the initial aggressor . . . ."); COLO. REV. STAT. § 18-1-704(3)(b) (2024) ("[A] person is not justified in using physical force [in self-defense] if . . . [h]e or she is the initial aggressor . . . ."); *see also* Thomas A. Mauet, *Defense of Person in Homicide Cases: The Law and the Investigative Approach*, POLICE L.Q., July 1975, at 5, 8 ("An aggressor . . . cannot claim self-defense.").

451. I use the term "initial aggressor rule" to broadly include rules that limit the defense of self-defense when the defendant does something that sets the conflict in motion, including provisions that use the language of provocation and those that use "aggressor" language. Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 21–31.

452. *Id.* at 19–20.

453. *Id.* at 25 & n.98.

454. *See id.* at 32 & n.132; *see also* DRESSLER, *supra* note 40, § 18.02[B][2], at 221–22 (discussing courts' applications of the initial aggressor limitation based on a defendant's unlawful conduct to provoke a victim).

455. *Supra* note 39, at 54.

456. *See* People v. Brown, 952 N.E.2d 32, 42–44 (Ill. App. Ct. 2011) (finding that a trial court did not err in giving the jury an initial aggressor instruction in a case where defendant claimed defense of habitation); IND. CODE § 35-41-3-2(g) (2023); KAN. STAT. ANN. § 21-5226 (2023) ("The justification [for defense of dwelling] . . . is not available to a person who . . . (b) initially *provokes* the use of any force against such person or another, with intent to use such force as an

so as well. Merely applying the initial aggressor rule to the defense of habitation, however, is not sufficient to ensure that the jury gets to decide whether the defendant was the initial aggressor. This is because the judge acts as a gatekeeper with full discretion over whether to give the jury an initial aggressor instruction.[457] If the judge decides in the first instance that the defendant was not the initial aggressor, the judge will not give the jury such an instruction and the jury will never get to decide this question.[458] Therefore, I propose that if an individual uses a firearm against a person who has entered or is attempting to enter the workplace, an occupied car, or the curtilage, is charged with a crime and claims his use of the firearm was justified under the defense of habitation in a state that has extended the defense of habitation beyond the four corners of the dwelling, the judge should be required to give the jury an initial aggressor instruction. This simply means the judge would have to advise the jury that if it finds that the defendant was the initial aggressor to the confrontation, then the defendant's use of deadly force cannot be justified under the defense of habitation. Importantly, the giving of such instruction does not mean the jury must find that the defendant was the initial aggressor; it merely ensures that the jury gets to make this determination.

If such an individual used a firearm to shoot an *unarmed* person who unlawfully entered or was attempting to unlawfully enter their workplace, car, or curtilage and is in a state with a self-defense presumption, that individual should not get the benefit of that presumption. The individual should be required to show they actually had a reasonable belief that the unarmed

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excuse to Inflict bodily harm upon the assailant; or (c) *otherwise initially provokes* the use of any force against such person or another . . . ." (emphasis added)); NEV. REV. STAT. § 200.130(2) (2023); N.H. REV. STAT. ANN. § 627:4(III) (2023) (eliminating the duty to retreat in defense of dwelling or curtilage only where a person "*was not the initial aggressor*" and providing that use of deadly force is not justifiable when "the person has provoked the use of force against himself or herself in the same encounter" (emphasis added)); N.J. STAT. ANN. § 2C:3-4(b)(2)(a) (West 2023); State v. Bottenfield, 692 S.W.2d 447, 452 (Tenn. Crim. App. 1985) ("While a person assaulted in his own home is not bound retreat, his right to invoke the doctrine of defense of home and habitation depends upon his being without fault in bringing on the difficulty.").

457. Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 35.

458. *Id.*

person they shot was threatening them with death or serious bodily injury.

D. POSSIBLE OBJECTIONS

In this Section, I address a few objections that may be raised in opposition to my proposals. Most of these objections are based on the idea that it makes sense to relax the proportionality requirement required by self-defense doctrine when a homeowner uses deadly force in defense of habitation, so I will focus on these objections. Stuart Green identifies, without necessarily endorsing, five possible rationales supporting the relaxation of proportionality rules when it comes to the defense of habitation.[459] The first rationale is that a deadly threat should be presumed whenever a person unlawfully attempts to enter another person's dwelling.[460] Second is the idea that persons are more vulnerable in their homes than they are anywhere else.[461] Third is the notion that the defense of habitation is a specialized form of the defense of property and that one's dwelling is such a valuable and significant possession that one should be able to kill, if necessary, to preserve it.[462] Fourth is the argument that an intrusion into the home involves a threat to privacy, dignity, and honor akin to the threat present in crimes like rape and kidnapping.[463] Fifth, the use of deadly force in defense of premises is thought to be justified as a means of deterring and punishing criminal behavior.[464] These purported rationales for relaxing the proportionality requirement do not hold up under scrutiny.

1. Objection 1: A Deadly Threat Should Be Presumed Whenever a Person Unlawfully Attempts to Enter Another Person's Dwelling

The first possible argument supporting the use of deadly force against an intruder entering or attempting to enter the

459. *See* Green, *supra* note 65 (identifying five possible rationales for lethal force in defense of the home). Green ultimately concludes that none of these five rationales, on their own, suffices to satisfy the requirement of proportionality. *Id.* at 6.

460. *Id.* at 25–30.

461. *Id.* at 30–32.

462. *Id.* at 32–35.

463. *Id.* at 35–37.

464. *Id.* at 37–39.

home is that a deadly threat should be presumed whenever a person unlawfully attempts to enter another person's dwelling.[465] Stuart Green explains that this argument posits "that people whose homes are intruded upon are so likely to be threatened with death or serious physical injury that it [is] *reasonable to presume the existence of such a threat* whenever there is an intrusion."[466]

When Green made this observation in 1999, only five states had a presumption of a valid fear of death or great bodily harm in their defense of premises statutes.[467] The number of states recognizing such a presumption has more than quadrupled in the last twenty-five years to a current total of twenty-one states.[468]

This "deadly threat should be presumed" argument appeals to our commonsense intuition about intrusions into the home. Such intrusions often do pose a threat to human life and is likely one of the reasons why so many states have enacted a self-defense presumption that gives the homeowner virtual carte-blanche to use deadly force against anyone who appears to be entering or attempting to enter the home.[469] However, it is neither always nor necessarily the case that persons unlawfully entering or attempting to enter another person's dwelling pose a threat of death or serious bodily injury to the occupants within. Sometimes the person who is entering the home is just an intoxicated teenager or college student who thinks he is entering his own home.[470] At other times, the person is a would-be burglar hoping to steal some things within the dwelling with no intent to harm the occupants of the home.[471] As Joshua Getzler notes, burglars who break into homes during the daytime usually do so

465. *Id.* at 25–30.

466. *Id.* at 25–26 (emphasis added).

467. *Id.* at 28 nn.122–23 (citing pertinent code sections from California, Rhode Island, Tennessee, Utah, and New Jersey).

468. *See infra* Appendix A (listing states whose defense of dwelling defense contains a self-defense presumption).

469. Green, *supra* note 65, at 25–26 (discussing the rationale of likely threat underlying the deadly force presumption in defense of residence defenses).

470. *See, e.g.*, sources cited *supra* notes 316–21.

471. *See* Green, *supra* note 65, at 15–16.

in the hopes that the homeowner will not be present so they can avoid a physical confrontation.[472]

Even the Supreme Court has observed that burglary, while a serious crime, is not a crime of violence.[473] In *Tennessee v. Garner*, the Court rejected the government's argument that the use of deadly force against a suspected burglar was justified because, the government urged, burglary is a violent crime.[474] The Court noted that "the available statistics demonstrate[d] that burglaries only rarely involve physical violence" and that the FBI classified burglary as a "property" rather than a "violent" crime.[475] Even today, the FBI classifies burglary as a property crime.[476]

Presumptions are dangerous and are generally disfavored in the criminal law. They are so disfavored that the Supreme Court flat-out prohibits conclusive or irrebuttable presumptions in criminal cases when the presumption favors the government because a presumption that removes the government's burden of proving every element of the charged offense beyond a reasonable doubt violates due process.[477]

In defense of habitation cases in states that have enacted a presumption that the intruder was threatening deadly force from the mere fact of unlawful entry or attempted entry, the

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472. Getzler, *supra* note 60, at 143; *cf. id.* at 142 n.28, 143 n.29 (discussing ancient law examples providing complete defense of dwelling defense in cases of nighttime burglary and theft, but limited defense for daytime burglary and theft).

473. Tennessee v. Garner, 471 U.S. 1, 21 (1985) ("While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force.").

474. *Id.*

475. *Id.*

476. *See Crime in the United States, 2019: Property Crimes*, FED. BUREAU OF INVESTIGATION 1 (2020), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/property-crime [https://perma.cc/B8JK-56KN] ("[P]roperty crime includes the offenses of burglary, larceny-theft, motor vehicle theft, and arson. The object of the theft-type offenses is the taking of money or property, but there is no force or threat of force against the victims."); *see also UCR Summary of Crime in the Nation, 2022*, FED. BUREAU OF INVESTIGATION 10 (2022), https://www.hsdl.org/c/view?docid=883640 [https://perma.cc/5AW7-JYK8] (classifying "burglary/breaking and entering" as a property crime).

477. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that an instruction which a jury could interpret as creating a conclusive or burden-shifting presumption on an element of a charged offense violated the defendant's Fourteenth Amendment due process rights).

presumption favors the defendant rather than the government so the due process concerns that usually attend criminal law presumptions are not present. Nonetheless, such presumptions should be repealed because they sweep too broadly and encourage homeowners to use deadly force against any person entering the home even if the person is not a wrongdoer and was simply entering the home or attempting to enter the home by mistake.

One might argue that even if the intruder might be an intoxicated teenager or college student who thought they were entering their own home, the fact remains that the intruder might also be a home invasion robber, a would-be rapist, or a burglar with a gun. It is not fair, the argument would continue, to make the homeowner bear the burden of being injured or killed by the culpable wrongdoer who has no business intruding into someone else's home, and this is why presuming a threat of death or serious bodily injury make sense.

I agree that a homeowner or occupant of the home should not have to bear an unjust risk of being physically injured by someone who has entered their home without their permission. A homeowner with a gun, however, is a lot more deadly than an unarmed intruder and should not shoot the intruder unless that intruder is acting in a way that suggests he poses a threat of death or serious bodily injury to the homeowner or another occupant of the dwelling.

If an intruder is armed and indicates through his actions that he intends to kill or cause serious bodily injury to the homeowner, the homeowner would have every right to use deadly force against that intruder. Even if the intruder is unarmed, if he indicates through his actions that he intends to kill or cause serious bodily injury to the homeowner, the homeowner would be justified in using deadly force against that intruder. If the intruder has no weapon and is not doing anything to suggest that he intends any physical harm to the homeowner or anyone else in the home, the law should not encourage the homeowner to shoot the intruder. Justifying the use of deadly force when the intruder does not appear to pose an imminent threat of death or serious bodily injury—as the defense of habitation in most states currently does—encourages the homeowner with a firearm to shoot first and ask questions later. A homeowner who shoots and kills an unarmed neighbor who has mistakenly entered their home has irreparably removed that person from this earth. The

law should seek to discourage homeowners with firearms from using those firearms unless they are facing an apparent threat of death or serious bodily injury.

2. Objection 2: People Are More Vulnerable in Their Homes

A second rationale for loosening the proportionality requirement in defense of habitation cases is that people are more vulnerable in their homes than they are anywhere else.[478] Green explains:

> At home, it might be argued, one is more vulnerable than in the street. At home, one is usually at ease, often even asleep. And because the homeowner has let down her defenses, she is more vulnerable. . . . A statute that allowed a homeowner to use deadly force on the grounds of greater vulnerability would be analogous to one that allowed deadly force to be used whenever a defender was elderly or physically disabled or infirm.[479]

While it is true that individuals usually do relax and let down their guard in their homes, individuals are not necessarily *more vulnerable* in their homes than they are outside their homes. In one's home, one has the home field advantage. The homeowner and other occupants of the home know where all the exits are. They know or should know where any weapons or items that can be used as weapons are located. If one has a security alarm system, one can arm it when one goes to sleep so one can be awakened should anyone open a door or window. Inside the home, if one lives with others, one is not alone. Homeowners with large security-minded dogs have an additional advantage over anyone who enters or attempts to enter the home without an invitation. The intruder is likely to be met by the dog who is likely to bark and wake up the occupants. Additionally, a dog with protective instincts is not likely to allow the intruder to move freely inside the home.

Outside the home, one who is visiting a store or business may not know where all the exits are in a particular store or building. As a general matter, one has little to no control over the security of the building one is visiting. I work in a building that has multiple exits, most of which are open for much of the day. Even when those doors are locked after six o'clock in the evening and can only be opened by someone with an identity card

478. Green, *supra* note 65, at 30–32.

479. *Id.* at 30.

with tap access, it is easy for someone who doesn't have a card with tap access to get into the building by simply waiting outside the door for someone going in or coming out. While one can certainly take precautions like not walking in dark alleys or parking in isolated places, one cannot control whether a person looking to rob or carjack another person decides to target them. Crime can happen anywhere, even in supposedly safe neighborhoods.[480]

I admit that a homeowner is vulnerable against an intruder who intends to use violence to achieve their objectives, and a homeowner would be justified in using deadly force against such an intruder under ordinary self-defense doctrine because that intruder would be threatening the homeowner or others within the home with death or serious bodily injury. It is unnecessary to relax the proportionality requirement when an intruder threatens death or serious bodily injury against the homeowner or another occupant of the dwelling because deadly force would be justified in such circumstances even without the defense of habitation.

While self-defense law allows the jury to take the relative height and weight of the defendant and victim into account when deciding whether the defendant acted reasonably in self-defense,[481] it does not provide one rule for healthy individuals and another rule for the physically infirm or elderly. All individuals claiming self-defense in the use of deadly force need to convince the jury that they reasonably believed they needed to use that amount of force to protect themselves against imminent death or

480. *Cf. Crime in the United States 2019: Table 23*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-23 [https://perma.cc/L5MJ-BLQ3] (indicating the wide range of locations where crimes of robbery, burglary, and larceny-theft occurred during the period reported).

481. *See, e.g.*, State v. Quevedo, 357 So.3d 1249, 1250, 1252 (Fla. Dist. Ct. App. 2023) (taking note of the discrepancy between the parties' height and weight at a "stand your ground" hearing); Lewis v. Brewer, No. 2:18-cv-12801, 2020 WL 6867795, at *3 (E.D. Mich. Nov. 23, 2020) ("[T]he trial court properly instructed the jury to take the actors' relative size and strength into consideration when assessing self-defense."). *But cf.* Rodriquez v. State, 710 S.W.2d 60 (Tex. Crim. App. 1986) (en banc) (finding no error in trial court's denial of defendant's request that jury be instructed on the parties' relative height and weight).

serious bodily injury.[482] The defense of habitation, in contrast, provides a special rule for homeowners, treating them as more vulnerable than individuals outside the home and allowing them to use deadly force when an individual outside the home in similar circumstances would not be allowed to use deadly force. If the homeowner has a firearm, however, the homeowner is not more vulnerable inside the home than he is outside the home. And the homeowner with a firearm is not necessarily more vulnerable vis-à-vis an unarmed intruder. Arguably, the homeowner with a firearm and home field advantage is in a stronger position than an unarmed intruder. If the intruder is armed, then the homeowner doesn't need a relaxed defense of habitation because he may use deadly force to counter a threat of deadly force under ordinary self-defense law.

A homeowner who knows or reasonably believes someone has unlawfully and simply entered their home should be able to use deadly force against that intruder only if they reasonably believe the intruder poses an imminent threat of death or serious bodily injury. Defense of habitation laws that do not require proportionality in the use of deadly force encourage homeowners to shoot first and ask questions later. We should design our laws to discourage—not encourage—the use of deadly force.

3. Objection 3: One's Dwelling Is Such a Valuable and Significant Possession that One Should Be Able to Kill, if Necessary, to Preserve It

A third justification for reducing or eliminating the proportionality requirement usually found in self-defense law is grounded in the idea that the defense of habitation is a specialized form of defense of property and the home is a special kind of property.[483] Stuart Green explains:

> Perhaps the most straightforward theory underlying the defense of premises doctrine is the most literal one. Under this theory, when a person defends his "premises" or "dwelling," he is not protecting the persons who occupy the house, but rather the house itself, the physical building, and perhaps the personal property that is inside the house.

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482. In all but two jurisdictions, the government bears the burden of persuasion in disproving a defendant's claim of self-defense, once a defendant's burden of production is satisfied. *See* Lee, *Strengthening the Law*, *supra* note 43, at 1922–23.

483. Green, *supra* note 65, at 32–35.

> Under this formulation, the defense of premises (or vehicles) does not involve the traditional defense of persons justification at all, but is instead a specialized, and heightened, form of defense of property.[484]

Green points out that some early courts viewed the home as a special kind of property more important than an intruder's life, explaining "[s]ome courts did not find it necessary to regard the attack on the home as synonymous with an attack on the occupants but regarded the home as something peculiarly sacred because of the function it fulfills, and thought that its value outweighed that of the life of an intruder."[485]

This view of the home as a special kind of property deserving of protection finds support in high places. In its 2008 decision in *District of Columbia v. Heller*, ruling for the first time that individuals have a Second Amendment right to keep and bear arms for self-protection in the home,[486] the Supreme Court also suggested that the home is a special type of property.[487] As C.D. Christensen points out, the Court in *Heller* did not simply construe the Second Amendment as providing an individual right of gun ownership for the purpose of self-protection *in* the home.[488] The Court also spoke about the right to bear keep arms for the protection "of" the home.[489]

It is dangerous to view property as more important than human life, even when that property is one's home. Of course, it would be devastating to lose one's home in a flood or a fire, but it would be even more devastating to lose a loved one's life. Even though it might not be easy to think of an intruder's life as equal to the life of a loved one, the wrongdoer's life is still a human life, which society should value more than property. That wrongdoer may also be loved by others.

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484. *Id.* at 32 (footnote omitted).

485. *Id.* (quoting MODEL PENAL CODE § 3.06 cmt. at 92 (AM. L. INST. 1985)).

486. 554 U.S. 570, 635 (2008) ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment …").

487. *Id.* at 628 (referring to the home as the place "where the need for defense of self, family, and property is most acute").

488. Christensen, *supra* note 65, at 488–90 (arguing that *Heller* entangled elements of defense of home with personal self-defense which had previously had distinct rationales and limitations).

489. *Id.*; *see also Heller*, 554 U.S. at 632 ("In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense *of the home*." (emphasis added)).

Allowing the use of deadly force to protect property—even if that property is our home—gets things backwards. Human life is more valuable than property, so if the law is going to relax the requirements for the use of deadly force, it should do so only when one is acting in self-defense or in defense of others, not when one is acting solely in defense of the home or habitation.

4. Objection 4: The Threat to the Homeowner's Dignity, Privacy, and Honor Is So Great when Another Person Is Entering or Attempting to Enter the Home that This Justifies Killing the Intruder

A fourth justification for relaxing the proportionality requirement in defense of habitation cases is the idea that the threat to the homeowner's dignity, privacy, and honor is so great when another person is entering or attempting to enter the dwelling that this justifies the use of deadly force against the intruder.[490] "Dignity," "privacy," and "honor," however, are fairly vague and intangible concepts compared to human life. The negative consequences of having one's dignity, privacy, and honor intruded upon seem minor when compared to the very permanent loss of human life that can result when a homeowner uses deadly force against a perceived intruder and kills the person—especially when that perceived intruder is an intoxicated teenager or someone who mistakenly knocked on the wrong door. Only when the homeowner reasonably believes the other person poses a threat of death or serious bodily injury should that homeowner be justified in using deadly force against that other person.

Some supporters of this rationale suggest that using deadly force to protect one's dignity, privacy, and honor in one's home is akin to using deadly force to prevent a rape or kidnapping.[491] The analogy to rape and kidnapping falls short, however, because when one is faced with an imminent rape, one is facing an imminent threat of serious bodily injury, which makes the use of deadly force proportionate to the threatened force.[492] Similarly,

490. Green, *supra* note 65, at 35–37.

491. *Id.*

492. *See, e.g.*, People v. Heflin, 456 N.W.2d 10, 22 (Mich. 1989) ("Only an archaic system of justice would suggest that a woman cannot use deadly force

a person who is kidnapped often faces an imminent threat of serious bodily injury because kidnappers often resort to force or the threat of force to effectuate the kidnapping.[493]

In contrast, when a homeowner is faced with a person entering or attempting to enter a home, a supposed threat to the homeowner's dignity, privacy, and honor should not outweigh the value of the intruder's life even if that intruder is a wrongdoer by virtue of having trespassed into the home. The homeowner should only be justified in using deadly force against an intruder if the homeowner reasonably believes that the intruder is posing a threat of death or serious bodily harm to the homeowner or another person in the home.

5. Objection 5: The Use of Deadly Force in Defense of Habitation Is Justified as a Means of Deterring and Punishing Criminal Behavior

Finally, the use of deadly force in defense of premises is thought to be justified as a means of deterring and punishing criminal behavior.[494] This rationale has intuitive appeal. After all, if a would-be trespasser knows that a homeowner is armed, that would-be trespasser is less likely to try to enter that homeowner's home because of the risk of getting shot.[495]

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to defend herself against common-law rape. Therefore, it necessarily follows that a woman who fears being raped, also fears the threat of serious bodily harm.").

493. *See*, *e.g.*, United States v. Kaplansky, 42 F.3d 320, 324 (6th Cir. 1994) ("[T]he essence of kidnapping is requiring another to do something against his or her will; and because physical force or restraint is usually the best way to overbear the will of another, physical force or threat of force is a latent, but more often actual, companion of the coercive element. . . . Thus, the potential for violence against the victim is an inherent aspect of the crime of kidnapping . . . ."); United States v. Altsman, 89 F. App'x 357, 361 (3d Cir. 2004) ("[A]ttempted kidnapping categorically 'involves conduct that presents a serious potential risk of physical injury to another . . . .'" (citation omitted)).

494. Green, *supra* note 65, at 37–39.

495. *See* ROBERT J. COTTROL & BRANNON P. DENNING, TO TRUST THE PEOPLE WITH ARMS: THE SUPREME COURT AND THE SECOND AMENDMENT 174 (2023) (citing JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (1986)) (reporting on a 1986 survey of convicted felons which found that "encountering armed civilians was a major concern among criminals, indeed a greater concern than the fear of arrest and conviction"). Cottrol and Denning note that "[m]ost of the

One problem with this deterrence and punishment rationale is that it assumes that the only time a person would enter or try to enter another person's home is if they intend to commit a crime within. We know from the tragic shootings of intoxicated teens and young adults mistakenly thinking they are entering their own homes that this is not true. Even if many, if not most, of the persons who enter or attempt to enter other people's homes are individuals who intend to commit crimes within the home, the more homeowners take up firearms, the more likely those breaking into homes are likely to arm themselves. As the likelihood that a homeowner is armed goes up, calculating criminals will feel more pressure to arm themselves. Homeowners buying firearms to protect themselves in the home inadvertently feed the arms race, making it more likely that intruders who break into homes will also be armed.[496]

This highlights one problem with the adage that the only thing that "will stop a bad guy with a gun is a good guy with a gun."[497] Paradoxically, possessing a firearm for self-defense often does not lead to good outcomes for private civilians. To the contrary, possession of a firearm is associated with an increased risk of dying from suicide and being the victim of homicide.[498]

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respondents indicated that they took pains to avoid potential victims who they suspected were armed. . . . 64 percent of the felons surveyed stated that one reason burglars avoided entering houses when people were home was fear of being shot." *Id.*

496. *See* WRIGHT & ROSSI, *supra* note 495, at 234–35 (finding through a survey of gun-owning felons that "self-protection" is a primary motivation for firearm possession and that "perhaps the larger part [of this protection] means protection against *armed innocents*, against the police, against the prospects of apprehension during a crime, etc." (emphasis added)).

497. Former NRA CEO Wayne LaPierre's 2012 claim that "the only way to stop a bad guy with a gun is a good guy with a gun," has become a well-worn refrain of gun enthusiasts. *See* Susanna Lee, *How the 'Good Guy with a Gun' Became a Deadly American Fantasy*, Opinion, PA. CAP. STAR (June 9, 2019), https://www.penncapital-star.com/commentary/how-the-good-guy-with-a-gun-became-a-deadly-american-fantasy-opinionn [https://perma.cc/A8J5-L8TK]; *see also* Mark Memmott, *Only 'a Good Guy with a Gun' Can Stop School Shootings, NRA Says*, NPR (Dec. 21, 2012), https://www.npr.org/sections/thetwo-way/2012/12/21/167785169/live-blog-nra-news-conference [https://perma.cc/4VRT-6EYE].

498. Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members*, 160 ANNALS INTERNAL MED. 101 (2014) (concluding from meta-analysis of studies

Additionally, firearms purchased by well-intentioned private civilians are often stolen from their homes and cars and later used to commit crimes.[499]

Another problem with the "good guy with a gun" adage is that too often people can't tell whether a person with a gun is "good" or "bad."[500] As I have previously noted:

> [W]hen the good guy with the gun is Black, law enforcement officers—who have a lot more training than civilians and presumably should be better at distinguishing good guys with guns from bad guys with guns—often assume that the Black guy with a gun is a bad guy and end up shooting him.[501]

One might respond by saying it is better for the homeowner to have a gun than to be unarmed so she can at least protect herself and her family against an intruder. Under this view, if an intruder is armed, the armed homeowner at least has a chance of survival whereas if the homeowner is not armed, the armed intruder will be able to take whatever property he or she wants to take and harm the occupants of the home who will be defenseless. While this may be true, it does not support relaxing the proportionality requirement in defense of habitation law. If

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comparing the odds of suicide or homicide victimization between persons with and without reported firearm access and concluding that access to firearms is associated with higher risk for completed suicide and being the victim of homicide).

499. *Part V: Firearm Thefts*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 1 (Jan. 11, 2023), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download [https://perma.cc/GYZ9-PCZE] ("The primary source of stolen firearms is theft from private citizens vehicles, homes, and persons."); *see also, e.g.*, Patrick Nelson, *Stolen Guns Fuel Pueblo Crime, Investigators Use Technology, Tie Back to Crime Scenes*, KOAA NEWS5 (July 6, 2023), https://www.koaa.com/news/deep-dive/stolen-guns-fueling-crime-in-pueblo-investigators-using-technology-to-tie-guns-back-to-crime-scenes [https://perma.cc/VG9X-R372] ("While crooks at times have broken into gun stores to steal weapons, federal investigators say more often guns are being stolen from people's homes and even their vehicles.").

500. *See* Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 65. As my colleague Mary Anne Franks astutely notes, when LaPierre and his wife got "swatted" in 2013, even they couldn't tell whether the police surrounding their house were good guys with guns or bad guys with guns. Mary Anne Franks, *For the NRA's Leaders, Lives of Privilege and Private Security*, WASH. POST (Dec. 23, 2021), https://www.washingtonpost.com/outlook/for-the-nras-leaders-lives-of-privilege-andprivate-security/2021/12/22/1f7b4b22-496b-11ec-b8d9-232f4afe4d9b_story.html [https://perma.cc/Z89R-ZUME].

501. Lee, *Firearms and Initial Aggressors*, *supra* note 39, at 65–66; *see also* Lee, *Jemel Roberson*, *supra* note 198.

an intruder is armed, the homeowner would be justified in using deadly force under ordinary self-defense law, which allows an individual to use deadly force to counter what one reasonably believes is an imminent threat of deadly force. She would also be justified under my proposed amendment to defense of habitation law. It is not necessary to relax the proportionality requirement in defense of habitation law to protect the homeowner who faces an armed intruder.

Another problem with the deterrence rationale is that it suggests private citizens should be the ones deterring and punishing crimes. One of the hallmarks of a civilized society, however, is that members of that society agree to give up certain things, like the right to engage in vigilante self-help actions, and entrust the government with ensuring the collective security.[502] When private citizens start taking up arms, this signals a lack of trust in the government's ability to protect the citizenry. In recent years, many local governments have cut funding for police departments, which has undermined the ability of the police to protect the public safety.[503] But the solution is not for civilians to take up arms. Rather, governments should ensure that police have sufficient funding so they can do their job safely.

Finally, shooting a firearm is not an appropriate response to an unarmed intruder who poses no threat of death or serious bodily injury to the homeowner or others, even if that intruder intends to commit a crime in the home, such as burglary. Recall that in *Tennessee v. Garner*, the Court rejected the argument that police need to be able to use and threaten deadly force to

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502. THOMAS HOBBES, LEVIATHAN 78–79 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

503. *See* Ernesto Londoño, *How 'Defund the Police' Failed*, N.Y. TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/defund-police-minneapolis.html [https://perma.cc/BL3N-XLZG] (noting that efforts to defund the police, even if ultimately unsuccessful, have led many police officers to leave the policing profession in droves); Paul G. Cassell, *Explaining the Recent Homicide Spikes in U.S. Cities: The "Minneapolis Effect" and the Decline in Proactive Policing*, 33 FED. SENT . REP. 83 (2020) (suggesting that de-policing has contributed to the spike in homicides); Jason L. Riley, *The Predictable Consequences of 'Defund the Police,'* WALL ST. J. (Dec. 7, 2021), https://www.wsj.com/articles/consequences-of-defunding-the-police-libby-schaaf-violent-crime-rate-murder-public-safety-11638915238 [https://perma.cc/BA7B-FZJU] (opining that because of the movement to defund the police, crime is up and "cities are having trouble retaining and recruiting cops").

deter individuals from committing crimes and seeking to escape in cases involving no immediate threat to the officer or public safety.[504] That case involved an officer who shot a Black teenager[505] suspected of having just committed a burglary of a residence as the teenager was trying to evade arrest, even though the officer was reasonably certain the teenager was unarmed.[506]

Seeking to justify the use of deadly force in cases where a law enforcement officer does not reasonably believe the suspect poses an immediate threat of serious bodily injury to the officer or others, the government in *Tennessee v. Garner* argued that "overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee."[507] In short, the government relied on a deterrence argument similar to the deterrence rationale asserted to support relaxation of the proportionality requirement in defense of habitation law. The Court rejected the government's deterrence argument, explaining:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.[508]

Similar reasoning applies in cases where a homeowner or other individual shoots a person who has entered or is attempting to enter their home but does not pose an imminent threat of death or serious bodily harm to the homeowner or anyone else. Until an immediate threat of serious bodily harm to the homeowner or

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504. Tennessee v. Garner, 471 U.S. 1 (1985); *see supra* notes 473–75 and accompanying text.

505. *See* Jannell Ross, *How Police Justify Shootings: The 1974 Killing of an Unarmed Teen Set a Standard*, NBC NEWS (Jan. 23, 2020), https://www.nbcnews.com/news/nbcblk/officer-killed-unarmed-teen-1974-it-changed-how-police-justify-n1120611 [https://perma.cc/2JBJ-CP4Z].

506. *Garner*, 471 U.S. at 3–4.

507. *Id.* at 9.

508. *Id.* at 11.

others materializes, the use of deadly force to deter such intrusions is unjustified.

CONCLUSION

Recall that on April 15, 2023, just before 10:00 p.m., twenty-year-old Kaylin Gillis and a group of friends were looking for a friend's house in upstate New York[509] when they mistakenly drove up the wrong driveway.[510] Upon realizing they were at the wrong house, they began turning around to leave when the homeowner, Kevin Monahan, a sixty-five-year-old White man, stepped out of his house with a shotgun.[511] Apparently, two shots from Monahan's gun were fired at the car,[512] one of which struck Gillis and killed her.[513]

It initially appeared that Monahan might try to argue self-defense or defense of habitation when his attorney said his client was alarmed when he heard several vehicles with engines revving and lights shining coming up his driveway.[514] At Monahan's trial in January 2024, however, Monahan argued that his shotgun was defective and the shooting was an accident.[515] Monahan testified that when he heard the cars in his driveway, he came out and fired a warning shot.[516] After that, he said he tripped over some nails on his deck, lost his balance, and the gun fired the fatal shot accidentally.[517]

Why didn't Monahan try to argue he was justified in using deadly force in defense of his habitation? Monahan could not assert this defense because New York has a very limited defense of

509. McKinley et al., *New Details Emerge*, *supra* note 11.

510. McKinley et al., *Victim's Father Breaks Down*, *supra* note 12.

511. *Id.*

512. *Id.*

513. Shanahan, *supra* note 17.

514. Bosman et al., *supra* note 18 ("[A] lawyer for Mr. Monahan, Kurt Mausert, disputed the authorities' account of the shooting on Saturday night, saying that several vehicles were speeding up Mr. Monahan's driveway, with engines revving and lights shining, which 'certainly caused some level of alarm to an elderly gentleman who had an elderly wife.'").

515. Cusicanqui, *supra* note 18.

516. Emily Shapiro, *New York Man Found Guilty of Fatally Shooting Woman After Friend Pulled into Wrong Driveway*, ABC7 NY (Jan. 24, 2024), https://abc7ny.com/kevin-monahan-kaylin-gillis-wrong-driveway-shooting-trial/14353831 [https://perma.cc/LU9H-XEM5].

517. *Id.*

premises law.[518] Additionally, Monahan could not credibly argue that he acted in self-defense because he was not facing an imminent threat of death or serious bodily injury.[519] The cars in his driveway had already turned around and started to leave when he fired the first shot.[520] Finding little support in New York's defense of premises and self-defense law based on the factual circumstances, Monahan was left to explore legal defenses other than defense of habitation.

Even when the defense of habitation applies in criminal cases, it has received too little scholarly attention. Once one sees how the defense operates in the fifty states and the District of Columbia, it becomes painfully clear that the defense—at least as it exists in many jurisdictions—needs to be reformed. States that have relaxed the proportionality required for the use of deadly force in defense of habitation should require strict proportionality. States with self-defense presumptions should eliminate those presumptions. States that have applied the defense of habitation beyond the four corners of the dwelling should reverse course and limit the defense to entries or attempted entries into the dwelling itself, not entries into the curtilage, the car, or the workplace. Finally, states should apply the initial aggressor rule to the defense of habitation. Implementing these solutions not only would strike the right balance between the need for safety and the protection of Second Amendment rights, but would also reduce senseless acts of violence that have come to dominate today's headlines.

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518. N.Y. PENAL LAW § 35.20 (McKinney 2023) (permitting one to use deadly force in defense of premises only to prevent or terminate an arson, burglary, or attempted burglary). Because New York's defense of premises law is limited as such, one who uses deadly force against another person who is not trying to commit arson or burglary must satisfy the elements of New York's self-defense statute, which requires strict proportionality in the use of deadly force. *Id.* § 35.15 (specifying the conditions under which one may use deadly force in self-defense or defense of others). Under New York's self-defense statute, one may use deadly force in self-defense only if one reasonably believes the other person is using or about to use deadly force or is committing or about to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery—crimes which typically involve the use or threatened use of deadly force. *Id.* § 35.15(2)(b).

519. *See id.* § 35.15 (permitting the use of deadly force against another person only if the actor "reasonably believes that such other person is using or about to use deadly physical force").

520. McKinley et al., *Victim's Father Breaks Down*, *supra* note 12.

APPENDIX A: STATES WITH SELF-DEFENSE PRESUMPTION

Alabama	
ALA. CODE § 13A-3-23(a) (2024)	"A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (5), if the person reasonably believes that another person is . . . (5) In the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered, a dwelling, residence, business property, or occupied vehicle . . . ."
California	
CAL. PENAL CODE § 198.5 (West 2024)	"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred."
Florida	
FLA. STAT. § 776.013(2) (2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."
Iowa	
IOWA CODE § 704.2A(1) (2024)	"[A] person is presumed to reasonably believe that deadly force is necessary to avoid injury or risk to one's life or safety or the life or safety of another in either of the following circumstances: *a.* The person against whom force is used, at the time the force is used, is doing any of the following: (1) Unlawfully entering by force or stealth the dwelling, place of business or employment, or occupied vehicle of the person using force, or has unlawfully entered by force or stealth and remains within the

	dwelling, place of business or employment, or occupied vehicle of the person using force."
Kansas	
KAN. STAT. ANN. § 21-5224(a) (2023)	"[A] person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if: (1) The person against whom the force is used, at the time the force is used: (A) Is unlawfully or forcefully entering, or has unlawfully or forcefully entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force . . . ."
Kentucky	
KY. REV. STAT. ANN. § 503.055(1) (West 2024)	"A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle . . . ."
Louisiana	
LA. STAT. ANN. § 14:20(B) (2024)	"For the purposes of this Section, there shall be a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that the use of deadly force was necessary to prevent unlawful entry thereto, or to compel an unlawful intruder to leave the dwelling, place of business, or motor vehicle when the conflict began, if both of the following occur: (1) The person against whom deadly force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered the dwelling, place of business, or motor vehicle. (2) The person who used deadly force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred."
Michigan	
MICH. COMP. LAWS § 780.951(1) (2024)	"[I]t is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under section 2 of the self-defense act has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur if both of the following apply: (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and

	entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will. (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a)."
Mississippi	
MISS. CODE ANN. § 97-3-15(3) (2024)	"A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or the immediate premises thereof . . . ."
Nevada	
NEV. REV. STAT. § 41.095(1) (2023)	"[A]ny person who uses: (a) While lawfully in his or her residence, in transient lodging or in a motor vehicle that is not his or her residence, force which is intended or likely to cause death or bodily injury is presumed to have had a reasonable fear of imminent death or bodily injury to himself or herself or another person lawfully in the residence, transient lodging or motor vehicle if the force is used against a person who is committing burglary, invasion of the home or grand larceny of the motor vehicle with the use or threatened use of a deadly weapon and the person using the force knew or had reason to believe that burglary, invasion of the home or grand larceny of the motor vehicle with the use or threatened use of a deadly weapon was being committed."
New Jersey	
N.J. STAT. ANN. § 2C:3-6(b)(3)(c) (West 2023)	"Deadly force does not become justifiable under subparagraphs (a) and (b) of this subsection unless the actor reasonably believes that: . . . (ii) The use of force other than deadly force to terminate or prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of bodily harm. An actor within a dwelling shall be presumed to have a reasonable belief in the existence of the danger."

North Carolina	
N.C. GEN. STAT. § 14-51.2(b)(1) (2023)	"The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace. (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred"
Ohio	
OHIO REV. CODE ANN. § 2901.05(B)(2) (LexisNexis 2023–2024)	"[A] person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force."
Oklahoma	
OKLA. STAT. ANN. tit. 21, § 1289.25B. (West 2024)	"A person, regardless of official capacity or lack of official capacity, within a place of worship or a person, an owner, manager or employee of a business is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: 1.a. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, occupied vehicle, place of business or place of worship, or if that person had removed or was attempting to remove another against the will of that person from the dwelling, residence, occupied vehicle, place of business or place of worship."
Pennsylvania	
18 PA. CONS. STAT. § 505(b)(2.1) (2023)	"[A]n actor is presumed to have a reasonable belief that deadly force is immediately necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat if both of the following conditions exist: (i) The person against whom the force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered and is

	present within, a dwelling, residence or occupied vehicle; or the person against whom the force is used is or is attempting to unlawfully and forcefully remove another against that other's will from the dwelling, residence or occupied vehicle [and] (ii) The actor knows or has reason to believe that the unlawful and forceful entry or act is occurring or has occurred."
Rhode Island	
11 R.I. GEN. LAWS § 11-8-8 (2024)	"In the event that any person shall die or shall sustain a personal injury in any way or for any cause while in the commission of any criminal offense enumerated in §§ 11-8-2 – 11-8-6, it shall be rebuttably presumed as a matter of law in any civil or criminal proceeding that the owner, tenant, or occupier of the place where the offense was committed acted by reasonable means in self-defense and in the reasonable belief that the person engaged in the criminal offense was about to inflict great bodily harm or death upon that person or any other individual lawfully in the place where the criminal offense was committed." [Note: § 11-8-2 – Unlawful Breaking and Entering of Dwelling House provides: "Every person who shall break and enter at any time of the day or night any dwelling house or apartment, whether the dwelling house or apartment is occupied or not, or any outbuilding or garage attached to or adjoining any dwelling house, without the consent of the owner or tenant of the dwelling house, apartment, building, or garage, shall be imprisoned for not less than two (2) years and not more than ten (10) years for the first conviction, and for the second and subsequent conviction shall be imprisoned for not less than four (4) years and not more than fifteen (15) years, or fined not more than ten thousand dollars ($10,000), or both."
South Carolina	
S.C. CODE ANN. § 16-11-440(A) (2023)	"A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle . . . ."
Tennessee	
TENN. CODE ANN. § 39-11-611(c) (2023)	"Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as

	an invited guest, when that force is used against another person, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, business, dwelling or vehicle, and the person using defensive force knew or had reason to believe that an unlawful and forcible entry occurred."
Utah	
UTAH CODE ANN. § 76-2-405(2) (LexisNexis 2023)	"The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony."
Wisconsin	
WIS. STAT. § 939.48(1)(ar) (2024)	"If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies: 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring. 2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business."
Wyoming	
WYO. STAT. ANN. § 6-2-602(b) (2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to himself or another when using defensive force, including deadly force if: (i) The intruder against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, another's home or habitation or, if that intruder had removed or was attempting to remove another against his will from his home or habitation . . . ."

APPENDIX B: STATES WITH REBUTTABLE SELF-DEFENSE PRESUMPTION

California	
People v. Silvey, 68 Cal Rptr. 2d 681, 684 (Cal. Ct. App. 1997)	Noting that California Penal Code § 198.5 creates a "rebuttable presumption that anyone who employs deadly force against an intruder '*within his residence*' has done so in reasonable fear of imminent peril of death or great bodily injury." (citing CAL. PENAL CODE § 198.5 (West 2024)).
Louisiana	
State v. Ingram, 71 So. 3d 437, 444 (La. Ct. App. 2011)	"The statute says that there 'shall' be a presumption of reasonableness but not that the presumption is irrebuttable."
Michigan	
MICH. COMP. LAWS ANN. § 780.951(1) (2024)	"Except as provided in subsection (2), it is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under section 2 of the self-defense act has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur if both of the following apply (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will. (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a)."
Mississippi	
Husband v. State, 204 So. 3d 353, 359 (Miss. Ct. App. 2016)	Referring to the presumption as a rebuttable presumption.
Nevada	
NEV. REV. STAT. § 200.130(2) (2023)	"There is a rebuttable presumption that the circumstances were sufficient to excite the fears of a reasonable person and that the person killing really acted under the influence of those fears and not in a spirit of revenge if the person killing: (a) Knew or

	reasonably believed that the person who was killed was entering unlawfully and with force, or attempting to enter unlawfully and with force, the occupied habitation or occupied motor vehicle, of another."
New Jersey	
N.J. STAT. ANN. § 2C:3-6(b)(3)(c)(ii) (West 2023)	"An actor within a dwelling shall be presumed to have a reasonable belief in the existence of the danger. The State must rebut this presumption by proof beyond a reasonable doubt."
North Carolina	
N.C. GEN. STAT. § 14-51.2(c) (2023)	"The presumption set forth in subsection (b) of this section shall be rebuttable . . . ."
Pennsylvania	
Commonwealth v. Childs, 142 A.3d 823, 831 n.9 (Pa. 2016)	"Section 505(b)(2.1) does not create a mandatory conclusive presumption. Nothing in the language of the provision suggests that the presumption is not rebuttable, and the parties do not so contend."
Rhode Island	
11 R.I. GEN. LAWS § 11-8-8 (2024)	"In the event that any person shall die or shall sustain a personal injury in any way or for any cause while in the commission of any criminal offense enumerated in §§ 11-8-2 – 11-8-6, it shall be rebuttably presumed as a matter of law in any civil or criminal proceeding that the owner, tenant, or occupier of the place where the offense was committed acted by reasonable means in self-defense and in the reasonable belief that the person engaged in the criminal offense was about to inflict great bodily harm or death upon that person or any other individual lawfully in the place where the criminal offense was committed." [Note: Section 11-8-2 provides, "Every person who shall break and enter at any time of the day or night any dwelling house or apartment, whether the dwelling house or apartment is occupied or not, or any outbuilding or garage attached to or adjoining any dwelling house, without the consent of the owner or tenant of the dwelling house, apartment, building, or garage, shall be imprisoned for not less than two (2) years and not more than ten (10) years for the first conviction, and for the second and subsequent conviction shall be imprisoned for not less than four (4) years and not more than fifteen (15) years, or fined not more than ten thousand dollars ($10,000), or both."]

Utah	
State v. Moritzsky, 771 P.2d 688, 691 (Utah Ct. App. 1989)	"Where a defendant entitled to assert the defense establishes the factors articulated in subsection (2), the presumption is necessarily triggered and the burden shifts to the State to rebut it, i.e., to prove that in fact defendant's beliefs and actions under subsection (1) were not reasonable."
Wisconsin	
Brown v. Eplett, 48 F.4th 543, 555 (7th Cir. 2022)	"The castle doctrine also grants the defendant the benefit of a (rebuttable) presumption that he reasonably believed that his use of force in defending himself was reasonable."
Wyoming	
Howitt v. State, 521 P.3d 314, 321 (Wyo. 2022)	"The castle doctrine establishes certain rebuttable presumptions that apply when defensive force is used against someone who was in the process of unlawfully and forcefully entering a home or habitation . . . ."

APPENDIX C: STATES REQUIRING UNLAWFUL (NOT FORCIBLE) ENTRY

Indiana	
IND. CODE ANN. § 35-41-3-2(d) (2023)	"A person . . . is justified in using reasonable force, including deadly force, against any other person . . . if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle."
Maine	
ME. REV. STAT. ANN. tit. 17-A, § 104.3 (West 2024)	"A person in possession or control of a dwelling place or a person who is licensed or privileged to be therein is justified in using deadly force upon another person . . . [w]hen the person reasonably believes that deadly force is necessary to prevent or terminate the commission of a criminal trespass by such other person, who the person reasonably believes: (1) Has entered or is attempting to enter the dwelling place or has surreptitiously remained within the dwelling place without a license or privilege to do so; and (2) Is committing or is likely to commit some other crime within the dwelling place."
Missouri	
MO. ANN. STAT. § 563.031(2) (West 2023)	"A person shall not use deadly force upon another person . . . unless . . . (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person; or (3) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual, or is occupied by an individual who has been given specific authority by the property owner to occupy the property . . . ."
Montana	
MONT. CODE ANN. § 45-3-103(1) (2023)	"A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the use of force is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure."
North Dakota	
State v. Landrus, 930 N.W.2d 176 (N.D. 2019)	Noting that the defense of premises jury instruction, which tracks the language of the statute, informs the jury that "[f]orce is justified if it is used by a person to prevent or terminate an unlawful entry or other trespass in or upon premises . . . ."

Ohio	
OHIO REV. CODE ANN. § 2901.05(B)(2) (LexisNexis 2023–2024)	"[A] person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force."
South Dakota	
S.D. CODIFIED LAWS § 22-18-4.3 (2024)	"[A] person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm, to himself, herself, or another, when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm if: (1) The person against whom the defensive force was used or threatened: (a) Was in the process of unlawfully entering a dwelling, residence, or occupied vehicle; (b) Had unlawfully entered, a dwelling, residence, or occupied vehicle; or (c) Had removed or was attempting to remove another against the other's will from a dwelling, residence, or occupied vehicle; and (2) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful entry or an unlawful and forcible act was occurring or had occurred."

APPENDIX D: STATES REQUIRING AN UNLAWFUL AND FORCIBLE ENTRY

Alabama	
ALA. CODE § 13A-3-23(a) (2024)	"A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (5), if the person reasonably believes that another person is: . . . (5) In the process of unlawfully and *forcefully* entering, or has unlawfully and *forcefully* entered, a dwelling, residence, business property, or occupied vehicle . . . ." (emphasis added).
California	
CAL. PENAL CODE § 198.5 (West 2024)	"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury . . . when that force is used against another person, not a member of the family or household, who unlawfully and *forcibly* enters or has unlawfully and *forcibly* entered the residence and the person using the forced knew or had reason to believe that an unlawful and *forcible* entry occurred." (emphasis added).
Connecticut	
CONN. GEN. STAT. § 53a-20 (2023)	"A person . . . may use deadly physical force under such circumstances only . . . (3) to the extent that he reasonably believes such to be necessary to prevent or terminate an unlawful entry *by force* into his dwelling as defined in section 53a-100, or place of work, and for the sole purpose of such prevention or termination." (emphasis added).
Florida	
FLA. STAT. § 776.013 (2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and *forcefully* entering, or had unlawfully and *forcibly* entered, a dwelling, residence, or occupied vehicle . . . and (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and *forcible* entry or unlawful and *forcible* act was occurring or had occurred." (emphasis added).

Georgia	
GA. CODE ANN. § 16-3-23 (2022)	"A . . . person is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) The entry is made or attempted in a *violent and tumultuous* manner and he or she reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence; (2) That force is used against another person who is not a member of the family or household and who unlawfully and *forcibly* enters or has unlawfully and *forcibly* entered the residence and the person using such force knew or had reason to believe that an unlawful and *forcible* entry occurred . . . ." (emphasis added).
Idaho	
IDAHO CODE § 18-4009(1) (2024)	"Homicide is justifiable when committed by any person in any of the following cases: . . . (b) When committed in defense of habitation, a place of business or employment, occupied vehicle, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, *in a violent, riotous or tumultuous manner,* to enter the habitation, place of business or employment or occupied vehicle of another for the purpose of offering violence to any person therein . . . ." (emphasis added).
Illinois	
720 ILL. COMP. STAT. 5/7-2(a) (2024)	"However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) The entry is made or attempted in a *violent, riotous, or tumultuous* manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling . . . ." (emphasis added).
Iowa	
IOWA CODE ANN. § 704.2A (West 2023)	"[A] person is presumed to reasonably believe that deadly force is necessary to avoid injury or risk to one's life or safety or the life or safety of another in either of the following circumstances: a. The person against whom force is used, at the time the force is used, is doing any of the following: (1) Unlawfully entering *by force* or stealth the dwelling, place of business or employment, or occupied vehicle of the person using force, or has unlawfully entered *by force* or stealth and remains within the dwelling, place of business or employment, or occupied vehicle of the person using force." (emphasis added).

Kansas	
KAN. STAT. ANN. § 21-5224(a) (2023)	"For the purposes of . . . [Kansas Statutes Annotated Section] 21-5223, and amendments thereto, a person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if: (1) The person against whom the force is used, at the time the force is used: (A) Is unlawfully or *forcefully* entering, or has unlawfully or *forcefully* entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force; or (B) has removed or is attempting to remove another person against such other person's will from the dwelling, place of work or occupied vehicle of the person using *force* . . . ." (emphasis added).
Kentucky	
KY. REV. STAT. ANN. § 503.055(1) (West 2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used was in the process of unlawfully and *forcibly* entering or had unlawfully and *forcibly* entered a dwelling, residence, or occupied vehicle . . . ; and (b) The person who uses defensive force knew or had reason to believe that an unlawful and *forcible* entry or unlawful and forcible act was occurring or had occurred." (emphasis added).
Louisiana	
LA. STAT. ANN. § 14:20(B) (2024)	"[T]here shall be a presumption that a person lawfully inside a dwelling, place of business, or motor vehicle held a reasonable belief that the use of deadly force was necessary to prevent unlawful entry thereto . . . if both of the following occur: (1) The person against whom deadly force was used was in the process of unlawfully and *forcibly* entering or had unlawfully and *forcibly* entered the dwelling, place of business, or motor vehicle. (2) The person who used deadly force knew or had reason to believe that an unlawful and *forcible* entry was occurring or had occurred." (emphasis added).
Maryland	
Crawford v. State, 190 A.2d 538, 543 (Md. 1963)	Noting that the defendant has the "burden of proving by a preponderance of the evidence that he acted reasonably in defense of his habitation against *forcible* entry." (emphasis added).

Nevada	
NEV. REV. STAT. § 200.130(2) (2023)	"There is a rebuttable presumption that the circumstances were sufficient to excite the fears of a reasonable person and that the person killing really acted under the influence of those fears and not in a spirit of revenge if the person killing: (a) Knew or reasonably believed that the person who was killed was entering unlawfully and *with force*, or attempting to enter unlawfully and *with force*, the occupied habitation or occupied motor vehicle, of another . . . ." (emphasis added).
North Carolina	
N.C. GEN. STAT. § 14-51.2(b) (2023)	"The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and *forcefully* entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace . . . . (2) The person who uses defensive force knew or had reason to believe that an unlawful and *forcible* entry or unlawful and forcible act was occurring or had occurred." (emphasis added).
Oklahoma	
OKLA. STAT. ANN. tit. 21, § 1289.25(B) (West 2024)	"A person . . . is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: 1. a. The person against whom the defensive force was used was in the process of unlawfully and *forcefully* entering, or had unlawfully and *forcibly* entered, a dwelling, residence, occupied vehicle, place of business or place of worship . . . . b. The person who uses defensive force knew or had reason to believe that an unlawful and *forcible* entry or unlawful and *forcible* act was occurring or had occurred . . . ." (emphasis added).
Pennsylvania	
18 PA. CONS. STAT. § 505(b)(2) (2024)	"Except as otherwise provided in paragraph (2.2), an actor is presumed to have a reasonable belief that deadly force is immediately necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat if both of the following conditions exist: (i) The person against whom the force is used is in the process of unlawfully and *forcefully* entering, or has

	unlawfully and forcefully entered and is present within, a dwelling, residence or occupied vehicle; or the person against whom the force is used is or is attempting to unlawfully and *forcefully* remove another against that other's will from the dwelling, residence or occupied vehicle. (ii) The actor knows or has reason to believe that the unlawful and *forceful* entry or act is occurring or has occurred." (emphasis added).
South Carolina	
S.C. CODE ANN. § 16-11-440(A) (2023)	"A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully and *forcefully* entering, or has unlawfully and *forcibly* entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2) who uses deadly force knows or has reason to believe that an unlawful and *forcible* entry or unlawful and forcible act is occurring or has occurred." (emphasis added).
Tennessee	
TENN. CODE ANN. § 39-11-611(c) (2023)	"Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as an invited guest, when that force is used against another person, who unlawfully and *forcibly* enters or has unlawfully and *forcibly* entered the residence, business, dwelling or vehicle, and the person using defensive force knew or had reason to believe that an unlawful and *forcible* entry occurred." (emphasis added).
Utah	
UTAH CODE ANN. § 76-2-405(1) (LexisNexis 2023)	"A person . . . is justified in the use of force which is intended or likely to cause death or serious bodily injury only if: (a) the entry is made or attempted in a *violent and tumultuous manner*, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence . . . ." (emphasis added).

Wisconsin	
WIS. STAT. § 939.48(ar) (2024)	"If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if . . . either of the following applies: 1. The person against whom the force was used was in the process of unlawfully and *forcibly* entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and *forcible* entry was occurring. 2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and *forcibly* entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and *forcibly* entered the dwelling, motor vehicle, or place of business." (emphasis added).
Wyoming	
WYO. STAT. ANN. § 6-2-602(b) (2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to himself or another when using defensive force, including deadly force if: (i) The intruder against whom the defensive force was used was in the process of unlawfully and *forcefully* entering, or had unlawfully and *forcibly* entered, another's home or habitation or, if that intruder had removed or was attempting to remove another against his will from his home or habitation; and (ii) The person who uses defensive force knew or had reason to believe that an unlawful and *forcible* entry or unlawful and *forcible* act was occurring." (emphasis added).

APPENDIX E: STRICT PROPORTIONALITY STATES

Arizona	
ARIZ. REV. STAT. § 13-407(A)–(B) (LexisNexis 2024)	Allowing one to *threaten* deadly force if "a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises," but only allowing one to *use* deadly physical force if "in the defense of himself or third persons as described in [Arizona's self-defense statute]."
Arkansas	
ARK. CODE ANN. § 5-2-608 (2023)	Providing that a person in lawful possession or control of premises or a vehicle is justified in using deadly physical force upon another person only under the circumstances provided in Arkansas's self-defense statute or if one "reasonably believes the use of deadly physical force is necessary to prevent the commission of arson or burglary by a trespasser."
Delaware	
DEL. CODE ANN. tit. 11, § 466(c) (2024)	"The use of deadly force for the protection of property is justifiable only if the defendant reasonably believes that: (1) The person against whom the force is used is attempting to dispossess the defendant of the defendant's dwelling otherwise than under a claim of right to its possession; or (2) The person against whom the deadly force is used is attempting to commit arson, burglary, robbery or felonious theft or property destruction and either: a. Had employed or threatened deadly force against or in the presence of the defendant; or b. Under the circumstances existing at the time, the defendant reasonably believed the use of force other than deadly force would expose the defendant, or another person in the defendant's presence, to the reasonable likelihood of serious physical injury."
Hawaii	
HAW. REV. STAT. § 703-306(3) (2024)	"The use of deadly force for the protection of property is justifiable only if: (a) The person against whom the force is used is attempting to dispossess the actor of the actor's dwelling otherwise than under a claim of right to its possession; or (b) The person against whom the deadly force is used is attempting to commit felonious property damage, burglary, robbery, or felonious theft and either: (i) Has employed or threatened deadly force against or in the presence of the actor; or (ii) The use of force other than deadly force to prevent the commission of the crime would expose the actor or another person in the actor's presence to substantial danger of serious bodily injury."

Massachusetts	
MASS. GEN. LAWS ch. 278, § 8A (2023)	"In the prosecution of a person who is an occupant of a dwelling charged with killing or injuring one who was unlawfully in said dwelling, it shall be a defense that the occupant was in his dwelling at the time of the offense and that he acted in the reasonable belief that the person unlawfully in said dwelling was about to inflict great bodily injury or death upon said occupant or upon another person lawfully in said dwelling, and that said occupant used reasonable means to defend himself or such other person lawfully in said dwelling."
Nebraska	
NEB. REV. STAT. § 28-1411(6) (2024)	"The use of deadly force is not justifiable under this section unless the actor believes that: (a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or (b) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either: (i) Has employed or threatened deadly force against or in the presence of the actor; or (ii) The use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm."
New York	
N.Y. PENAL LAW § 35.20(1) (McKinney 2024)	"Any person may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a crime involving damage to premises. Such person may use any degree of physical force, other than deadly physical force, which he or she reasonably believes to be necessary for such purpose, and may use deadly physical force if he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of arson."
N.Y. PENAL LAW § 35.20(2) (McKinney 2024)	"A person in possession or control of any premises, or a person licensed or privileged to be thereon or therein, may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a criminal trespass upon such premises. Such person may use any degree of physical force, other than deadly physical force, which

	he or she reasonably believes to be necessary for such purpose, and may use deadly physical force in order to prevent or terminate the commission or attempted commission of arson, as prescribed in subdivision one, or in the course of a burglary or attempted burglary, as prescribed in subdivision three."
N.Y. PENAL LAW § 35.20(3) (McKinney 2024)	"A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary."
North Dakota	
N.D. CENT. CODE § 12.1-05-07(2)(c) (2023)	Specifying that deadly force is justified "[w]hen used by an individual in possession or control of a dwelling, place of work, motor vehicle, or an occupied motor home or travel trailer . . . , or by an individual who is licensed or privileged to be there, if the force is necessary to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling, place of work, motor vehicle, or occupied motor home or travel trailer, and the use of force other than deadly force for these purposes would expose any individual to substantial danger of serious bodily injury."
Oregon	
OR. REV. STAT. § 161.225(2) (2023)	Providing that a person in lawful possession or control of premises is justified in using deadly physical force against another person when and to the extent that the person reasonably believes it necessary to prevent or terminate what the person reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises only if acting in self-defense or if "the person reasonably believes it necessary to prevent the commission of arson or a felony by force and violence by the trespasser."

APPENDIX F: LOOSE PROPORTIONALITY STATES

Colorado	
COLO. REV. STAT. § 18-1-704.5(2) (2024)	"[A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit *a crime* against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use *any physical force*, no matter how slight, against any occupant." (emphasis added).
District of Columbia	
1 CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION 9.520(A) (2024)	"[A person may use deadly force to protect [[his/her [home] [business]] [a home in which s/he is a lawful occupant] if s/he has a reasonable belief that an intruder is entering the home or business with the intent to commit *a felony* or to do serious bodily harm to any of the occupants.]" (emphasis added).
Georgia	
GA. CODE ANN. § 16-3-23 (2023)	"A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation; however, such person is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) The entry is made or attempted in a violent and tumultuous manner and he or she reasonably believes that the entry is attempted or made for the purpose of *assaulting or* offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence; (2) That force is used against another person who is not a member of the family or household and who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using such force knew or had reason to believe that an unlawful and forcible entry occurred; *or* (3) The person using such force reasonably believes that the entry is made or attempted for the purpose of committing *a felony* therein and that such force is necessary to prevent the commission of the felony." (emphasis added). Arguably, Georgia could be considered a "no proportionality" state because the three clauses listed in GA. CODE ANN. § 16-3-23 (2023) are separated by the

	word "or." Under subsection (2), a person can use deadly force against someone who has unlawfully and forcibly entered the residence or habitation if the person using deadly force knows or has reason to believe that an unlawful and forcible entry has occurred by a person who is not a member of the family or household. There is no further requirement that the person using deadly force reasonably believe that the intruder is threatening them with death or serious bodily injury or threatening to commit a violent felony within the residence. GA. CODE ANN. § 16-3-23 (2) (2023).
Idaho	
IDAHO CODE ANN. § 18-4009(1) (West 2023)	"Homicide is justifiable when committed by any person in any of the following cases: . . . ; (b) When committed in defense of habitation, a place of business or employment, occupied vehicle, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit *a felony*, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation, place of business or employment or occupied vehicle of another for the purpose of offering violence to any person therein." (emphasis added).
Illinois	
720 ILL. COMP. STAT. 5/7-2(a) (2024)	"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent *an assault* upon, or offer of personal violence to, him or another then in the dwelling, or (2) He reasonably believes that such force is necessary to prevent the commission of *a felony* in the dwelling." (emphasis added).
Maine	
ME. REV. STAT. ANN. tit. 17-A, § 104 (West 2023)	"A person in possession or control of a dwelling place or a person who is licensed or privileged to be therein is justified in using deadly force upon another person: . . . B. When the person reasonably believes that deadly force is necessary to prevent or terminate the commission of a criminal trespass by such other person, who the person reasonably believes: (1) Has entered or is attempting to enter the dwelling place or has surreptitiously remained within the dwelling place without a license or privilege to do so; and (2) Is committing or is likely to commit *some other crime* within the dwelling place." (emphasis added).

Maryland	
Crawford v. State, 190 A.2d 538, 541 (Md. 1963)	"Most American jurisdictions in which the question has been decided have taken the view that if an assault on a dwelling and an attempted forcible entry are made under circumstances which would create a reasonable apprehension that it is the design of the assailant *to commit a felony* or to inflict on the inhabitants injury which may result in loss of life or great bodily harm, and that the danger that the design will be carried into effect is imminent, a lawful occupant of the dwelling may prevent the entry even by the taking of the intruder's life."
Minnesota	
MINN. STAT. § 609.065 (2024)	"The intentional taking of the life of another is not authorized by section 609.06, except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of *a felony* in the actor's place of abode." (emphasis added).
Missouri	
State v. Straughter, 643 S.W.3d 317, 322 (Mo. 2022)	Holding that homeowner is justified in using deadly force "to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of *unlawful force* by such other person" against "a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or a vehicle lawfully occupied by such person." (emphasis added) (citations omitted).
MO. REV. STAT. § 563.031(2) (2023)	Missouri's defense of habitation statute suggests Missouri is a no proportionality state, but in *State v. Straughter* the Missouri Supreme Court interpreted Missouri's defense of habitation statute as requiring that the user of deadly force reasonably believe that the intruder was using or imminently about to use unlawful force, making Missouri a loose proportionality state. Section 2 reads as follows: A person shall not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless: . . . ; (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person; or (3) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual, or is occupied

	by an individual who has been given specific authority by the property owner to occupy the property, claiming a justification of using protective force under this section.
Montana	
MONT. CODE ANN. § 45-3-103 (2023)	"(1) A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the use of force is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure. (2) A person justified in the use of force pursuant to subsection (1) is justified in the use of force likely to cause death or serious bodily harm only if: (a) the entry is made or attempted and the person reasonably believes that the force is necessary to prevent *an assault* upon the person or another then in the occupied structure; or (b) the person reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure." (emphasis added).
New Hampshire	
N.H. REV. STAT. ANN. § 627:4(II) (2023)	"A person is justified in using deadly force upon another person when he reasonably believes that such other person: . . . ; (b) Is likely to use *any unlawful force* against a person present while committing or attempting to commit a burglary; . . . ; or (d) Is likely to use *any unlawful force* in the commission of *a felony* against the actor within such actor's dwelling or its curtilage." (emphasis added). Although section 627:4 appears in the portion of the New Hampshire Code that applies to physical force in defense of a person, it is incorporated by reference as an appropriate justification in section 627:7, which concerns use of force in defense of premises. N.H. REV. STAT. ANN. § 627:7 (2023).
New Mexico	
N.M. STAT. ANN. § 30-2-7 (West 2023)	"Homicide is justifiable when committed by any person in any of the following cases: A. when committed in the necessary defense of his life, his family or his property, or in necessarily defending against *any unlawful action* directed against himself, his wife or family; B. when committed in the lawful defense of himself or of another and when there is a reasonable ground to believe a design exists to commit *a felony* or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished; or C. when necessarily committed in attempting, by lawful ways and means, to apprehend any

	person for *any felony* committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace." (emphasis added).
Washington	
WASH. REV. CODE. § 9A.16.050 (2023)	"Homicide is also justifiable when committed . . . (2) In the actual resistance of an attempt to commit *a felony* upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is." (emphasis added).
West Virginia	
State v. W.J.B., 276 S.E.2d 550, 556 (W. Va. 1981)	"We believe that there are sound policy reasons for permitting the homeowner to repel with deadly force a violent intrusion into his home where he has reasonable grounds to believe the intruder will commit *a felony or personal injury* on the occupant and that deadly force is the only means available to prevent it." (emphasis added).

APPENDIX G: NO PROPORTIONALITY STATES

Alabama	
ALA. CODE § 13A-3-23(a) (2024)	"A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person . . . if the person reasonably believes that another person is . . . (5) In the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered, a dwelling, residence, business property, or occupied vehicle, . . . provided that the person using the deadly physical force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring."
California	
CAL. PENAL CODE § 198.5 (West 2024)	"Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred."
Connecticut	
CONN. GEN. STAT. § 53a-20 (2023)	"A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises . . . may use deadly physical force . . . only . . . to the extent that he reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling as defined in section 53a-100, or place of work, and for the sole purpose of such prevention or termination."
Florida	
FLA. STAT. § 776.013(2) (2024)	"A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the

	dwelling, residence, or occupied vehicle; and (b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."
Indiana	
IND. CODE ANN. § 35-41-3-2(d) (West 2024)	"A person: (1) is justified in using reasonable force, including deadly force, against any other person; and (2) does not have a duty to retreat; if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle."
Iowa	
IOWA CODE § 704.2A(1) (2024)	"For purposes of this chapter, a person is presumed to reasonably believe that deadly force is necessary to avoid injury or risk to one's life or safety or the life or safety of another in either of the following circumstances: *a*. The person against whom force is used, at the time the force is used, is doing any of the following: (1) Unlawfully entering by force or stealth the dwelling, place of business or employment, or occupied vehicle of the person using force, or has unlawfully entered by force or stealth and remains within the dwelling, place of business or employment, or occupied vehicle of the person using force. (2) Unlawfully removing or is attempting to unlawfully remove another person against the other person's will from the dwelling, place of business or employment, or occupied vehicle of the person using force. *b*. The person using force knows or has reason to believe that any of the conditions set forth in paragraph '*a*' are occurring."
Kansas	
KAN. STAT. ANN. § 21-5224 (2023)	"[A] person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if: (1) The person against whom the force is used, at the time the force is used: (A) Is unlawfully or forcefully entering, or has unlawfully or forcefully entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force; or (B) has removed or is attempting to remove another person against such other person's will from the dwelling, place of work or occupied vehicle of the person using force; and (2) the person using force knows or has reason to believe that any of the conditions set forth in paragraph (1) is occurring or has occurred."

Kentucky	
KY. REV. STAT. ANN. § 503.055 (West 2024)	"(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. . . . (4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."
Louisiana	
LA. STAT. ANN. § 14:20(A) (2024)	"A homicide is justifiable: . . . (4)(a) When committed by a person lawfully inside a dwelling, a place of business, or a motor vehicle as defined in R.S. 32:1(40) when the conflict began, against a person who is attempting to make an unlawful entry into the dwelling, place of business, or motor vehicle, or who has made an unlawful entry into the dwelling, place of business, or motor vehicle, and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the dwelling, place of business, or motor vehicle."
Michigan	
MICH. COMP. LAWS § 780.951(1) (2024)	"Except as provided in subsection (2), it is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under section 2 of the self-defense act has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur if both of the following apply: (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the

	dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will. (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a)."
Mississippi	
MISS. CODE ANN. § 97-3-15(3) (2023)	"A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or the immediate premises thereof . . . ."
Nevada	
NEV. REV. STAT. § 41.095(1)(a) (2023)	"[A]ny person who uses: (a) While lawfully in his or her residence, in transient lodging or in a motor vehicle that is not his or her residence, force which is intended or likely to cause death or bodily injury is presumed to have had a reasonable fear of imminent death or bodily injury to himself or herself or another person lawfully in the residence, transient lodging or motor vehicle if the force is used against a person who is committing burglary, invasion of the home or grand larceny of the motor vehicle with the use or threatened use of a deadly weapon and the person using the force knew or had reason to believe that burglary, invasion of the home or grand larceny of the motor vehicle with the use or threatened use of a deadly weapon was being committed."
New Jersey	
N.J. STAT. ANN. § 2C:3-6(b)(3)(c)(ii) (West 2023)	"An actor within a dwelling shall be presumed to have a reasonable belief in the existence of the danger. The State must rebut this presumption by proof beyond a reasonable doubt."

North Carolina	
N.C. GEN. STAT. § 14-51.2(b) (2023)	"The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace. (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."
Ohio	
OHIO REV. CODE ANN. § 2901.05(B)(2) (LexisNexis 2023–2024)	"[A] person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force."
Oklahoma	
OKLA. STAT. tit. 21, § 1289.25(B) (2024)	"A person, regardless of official capacity or lack of official capacity, within a place of worship or a person, an owner, manager or employee of a business is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: 1. a. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, occupied vehicle, place of business or place of worship [and] b. The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred . . . ."
OKLA. STAT. tit. 21, § 1289.25(E) (2024)	"A person who unlawfully and by force enters or attempts to enter the dwelling, residence, occupied vehicle of another person, place of business or place of worship is presumed to be doing so with the intent to commit an unlawful act involving force or violence."

Pennsylvania	
18 PA. CONS. STAT. § 505(b)(2.1) (2024)	"Except as otherwise provided in paragraph (2.2), an actor is presumed to have a reasonable belief that deadly force is immediately necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat if both of the following conditions exist: (i) The person against whom the force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered and is present within, a dwelling, residence or occupied vehicle; or the person against whom the force is used is or is attempting to unlawfully and forcefully remove another against that other's will from the dwelling, residence or occupied vehicle [and] (ii) The actor knows or has reason to believe that the unlawful and forceful entry or act is occurring or has occurred."
18 PA. CONS. STAT. § 505(b)(2.5) (2024)	"Unless one of the exceptions under paragraph (2.2) applies, a person who unlawfully and by force enters or attempts to enter an actor's dwelling, residence or occupied vehicle or removes or attempts to remove another against that other's will from the actor's dwelling, residence or occupied vehicle is presumed to be doing so with the intent to commit: (i) an act resulting in death or serious bodily injury; or (ii) kidnapping or sexual intercourse by force or threat."
Rhode Island	
11 R.I. GEN. LAWS § 11-8-8 (2024)	"In the event that any person shall die or shall sustain a personal injury in any way or for any cause while in the commission of any criminal offense enumerated in §§ 11-8-2 — 11-8-6 [enumerating breaking and entering offenses], it shall be rebuttably presumed as a matter of law in any civil or criminal proceeding that the owner, tenant, or occupier of the place where the offense was committed acted by reasonable means in self-defense and in the reasonable belief that the person engaged in the criminal offense was about to inflict great bodily harm or death upon that person or any other individual lawfully in the place where the criminal offense was committed."
South Carolina	
S.C. CODE ANN. § 16-11-440(A) (2023)	"A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

	(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred."
South Dakota	
S.D. CODIFIED LAWS § 22-18-4.5 (2024)	"A person who unlawfully enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."
Tennessee	
TENN. CODE ANN. § 39-11-611(c) (2023)	"Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as an invited guest, when that force is used against another person, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, business, dwelling or vehicle, and the person using defensive force knew or had reason to believe that an unlawful and forcible entry occurred."
Utah	
UTAH CODE ANN. § 76-2-405(2) (LexisNexis 2023)	"The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony."
Wisconsin	
WIS. STAT. § 939.48(1m)(ar) (2024)	"If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:

	1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring [or] 2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business."
Wyoming	
WYO. STAT. ANN. § 6-2-602(b)(i)–(ii) (2023)	"A person is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to himself or another when using defensive force, including deadly force if: (i) The intruder against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, another's home or habitation or, if that intruder had removed or was attempting to remove another against his will from his home or habitation; and (ii) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring."

APPENDIX H: STATES WHERE DEFENSE OF HABITATION EXTENDS TO WORKPLACES AND/OR MOTOR VEHICLES

Alabama	
ALA. CODE § 13A-3-23 (a)(5) (2024)	Applying defense of habitation to dwellings, residences, business property and occupied vehicles.
Alaska	
ALASKA STAT. § 11.81.350 (2023)	Applying defense of habitation to dwellings, occupied buildings, and occupied vehicles.
Connecticut	
CONN. GEN. STAT. § 53a-20 (2023)	Applying defense of habitation to dwelling and place of work.
District of Columbia	
1 CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION 9.520(A) (2024)	Applying defense of habitation to home and business.
Florida	
FLA. STAT. § 776.013(2)(a) (2023)	Applying presumption of reasonable fear of imminent peril of death or great bodily harm when one uses defensive force against a person who was in the process of lawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle.
Georgia	
GA. CODE ANN. § 16-3-24.1 (2023)	For purposes of defense of habitation, "the term 'habitation' means any dwelling, motor vehicle, or place of business . . . ."
Idaho	
IDAHO CODE § 18-4009(1)(b) (2024)	Stating that homicide is justifiable "[w]hen committed in defense of habitation, a place of business or employment, occupied vehicle, property or person . . . against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation, place of business or employment or occupied vehicle of another for the purpose of offering violence to any person therein."
Iowa	
IOWA CODE § 704.2A(1)(a)(1) (2024)	Applying self-defense presumption to one who uses deadly force against a person "[u]nlawfully entering by force or stealth the dwelling, place of business or employment, or occupied vehicle . . . ."

Kansas	
KAN. STAT. ANN. § 21-5223 (2023)	Applying defense of habitation to the dwelling, place of work, or occupied vehicle.
Kentucky	
KY. REV. STAT. ANN. § 503.055(1)(a) (West 2024)	Applying the defense of habitation to dwellings, residences, and occupied vehicles.
Louisiana	
LA. STAT. ANN. § 14:20(A)(3), (4); 14:20(B) (2024)	Applying defense of habitation to dwellings, places of business, and occupied motor vehicles.
Michigan	
MICH. COMP. LAWS § 780.951 (2024)	Applying presumption to dwelling and business premises.
Mississippi	
MISS. CODE ANN. § 97-3-15(e) (2024)	Applying defense of habitation to the dwelling, any occupied vehicle, and any place of business or place of employment, or "in the immediate premises thereof . . . ."
Missouri	
MO. REV. STAT. § 563.031(2)(2) (2024)	Applying defense of habitation to dwellings, residences, and occupied vehicles.
Nevada	
NEV. STAT. § 41.095 (2023)	Applying self-defense presumption to the residence, transient lodging, and motor vehicles.
North Carolina	
N.C. GEN. STAT. § 14-51.2 (2023)	Applying presumption to the home, motor vehicle and workplace.
North Dakota	
N.D. CENT. CODE § 12.1-05-07 (2023)	Applying defense of habitation to the dwelling, place of work, motor vehicle, or occupied motor home or travel trailer.
Ohio	
OHIO REV. CODE ANN. § 2901.05(B)(2) (LexisNexis 2023–2024)	Applying presumption to the residence and vehicles.
Oklahoma	
OKLA. STAT. tit. 21, § 1289.25 (2024)	Applying presumption to dwelling, residence, occupied vehicle, place of business, and place of worship.
Pennsylvania	
18 PA. CONS. STAT. § 505(b)(2.1)(i) (2024)	Applying presumption to dwellings, residences, and occupied vehicles.

Rhode Island	
11 R.I. GEN. LAWS § 11-8-8 (2024)	Applying rebuttable presumption to, *inter alia*, dwelling houses, buildings, ships, business places, and public buildings, as indicated in §§ 11-8-2 through 11-8-8.
South Carolina	
S.C. CODE ANN. § 16-11-440 (2023)	Applying presumption to dwellings, residences, and occupied vehicles. In another statutory provision, the South Carolina legislature clarified that its intent was to apply the common-law Castle Doctrine to places of business. *See* S.C. CODE ANN. § 16-11-420(A) (2023).
H.B. 3008, 125th Gen. Assemb., Reg. Sess. (S.C. 2023)	Further, in 2023, the South Carolina General Assembly was considering a bill that would add places of worship to section 16-11-420.
South Dakota	
S.D. CODIFIED LAWS § 22-18-4.5 (2024)	Applying presumption that someone unlawfully entering or attempting unlawful entry of a dwelling, residence, or occupied vehicle has the intent to commit an unlawful act involving force or violence.
Tennessee	
TENN. CODE ANN. § 39-11-611(c) (2023)	"Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as an invited guest, when that force is used against another person, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, business, dwelling or vehicle, and the person using defensive force knew or had reason to believe that an unlawful and forcible entry occurred."
TENN. CODE ANN. § 39-11-611(a)(5) (2023)	"'Dwelling' means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, that has a roof over it, including a tent, and is designed for or capable of use by people . . . ."
Texas	
TEX. PENAL CODE ANN. § 9.42 (West 2023)	A person may use deadly force against another to protect land or tangible, movable property as long as the person using deadly force reasonably believed the deadly force was immediately necessary to prevent the other from committing one of a short list of crimes, including theft during the nighttime and burglary, and the person reasonably believed the

	land could not be protected by any other means or that the use of anything less than deadly force would expose him or another to a substantial risk of death or serious bodily injury.
Vermont	
State v. Cleveland, 72 A. 321 (Vt. 1909)	Allowing a man who struck a road commissioner with a hoe because the commissioner was working on his land and refused to desist to argue defense of property.
Virginia	
Fortune v. Commonwealth, 112 S.E. 861 (Va. 1922)	Extending defense of habitation to the curtilage.
West Virginia	
State v. Laura, 116 S.E. 251 (W. Va. 1923)	Suggesting that the defense of habitation could extend to one's place of business and if one is living in a hotel, to one's hotel room.
Wisconsin	
WIS. STAT. § 939.48(1m)(a)(1) (2024)	Applying defense of habitation to driveways, sidewalks, patios, and fences by adopting the meaning of "dwelling" in WIS. STAT. § 895.07(1)(h) (2024).

APPENDIX I: STATES WHERE DEFENSE OF HABITATION EXTENDS TO MOTOR VEHICLES

Alabama	
ALA. CODE § 13A-3-23 (a)(5) (2024)	Applying defense of habitation to dwellings, residences, business property and *occupied vehicles* (emphasis added).
Florida	
FLA. STAT. § 776.013(2)(a) (2023)	Applying presumption of reasonable fear of imminent peril of death or great bodily harm when one uses defensive force against a person who was in the process of lawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, *or occupied vehicle* (emphasis added).
Georgia	
GA. CODE ANN. § 16-3-24.1 (2023)	For purposes of defense of habitation, "the term 'habitation' means any dwelling, *motor vehicle*, or place of business . . . ." (emphasis added).
Idaho	
IDAHO CODE § 18-4009(1)(b) (2024)	Stating that homicide is justifiable "[w]hen committed in defense of habitation, a place of business or employment, *occupied vehicle*, property or person . . . against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation, place of business or employment or *occupied vehicle* of another for the purpose of offering violence to any person therein" (emphasis added).
Iowa	
IOWA CODE § 704.2A(1)(a)(1) (2024)	Applying self-defense presumption to one who uses deadly force against a person "[u]nlawfully entering by force or stealth the dwelling, place of business or employment, *or occupied vehicle*" (emphasis added).
Kansas	
KAN. STAT. ANN. § 21-5223 (2023)	Applying defense of habitation to dwellings, places of work or *occupied vehicles* (emphasis added).
Kentucky	
KY. REV. STAT. ANN. § 503.055(1)(a) (West 2024)	Applying the defense of habitation to dwellings, residences, and *occupied vehicles* (emphasis added).
Louisiana	
LA. STAT. ANN. §§ 14:20(A)(3), (4), 14:20(B) (2024)	Applying defense of habitation to dwellings, places of business, and *occupied motor vehicles* (emphasis added).

Missouri	
MO. REV. STAT. § 563.031.2(2) (2024)	Applying defense of habitation to dwellings, residences, *occupied vehicles* and private property (emphasis added).
North Carolina	
N.C. GEN. STAT. § 14-51.2 (2023)	Applying presumption to homes, *motor vehicles* and workplaces (emphasis added).
North Dakota	
N.D. CENT. CODE ANN. § 12.1-05-07(2)(c) (2023)	Applying defense of habitation to dwellings, places of work, *motor vehicles*, or occupied motor homes or travel trailers (emphasis added).
Ohio	
OHIO REV. CODE ANN. § 2901.05(B)(2) (LexisNexis 2023–2024)	Applying presumption to residences and *vehicles* (emphasis added).
Oklahoma	
OKLA. STAT. tit. 21, § 1289.25 (2024)	Applying presumption to dwellings, residences, *occupied vehicles*, place of business and place of worship (emphasis added).
Pennsylvania	
18 PA. CONS. STAT. § 505(2.1)(1)(i) (2024)	Applying presumption to dwellings, residences, and *occupied vehicles* (emphasis added).
South Carolina	
S.C. CODE ANN. § 16-11-440 (2023)	Applying presumption to dwellings, residences, *and occupied vehicles* (emphasis added).
South Dakota	
S.D. CODIFIED LAWS § 22-18-4.5 (2024)	Applying presumption that someone unlawfully entering or attempting unlawful entry of a dwelling, residence, *or occupied vehicle* has the intent to commit an unlawful act involving force or violence (emphasis added).
Tennessee	
TENN. CODE ANN. § 39-11-611(c) (West 2023)	"Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling *or vehicle* is presumed to have held a reasonable belief of imminent death or serious bodily injury to self, family, a member of the household or a person visiting as an invited guest, when that force is used against another person, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, business, dwelling *or vehicle*, and the person using defensive force knew or had reason to believe that an unlawful and forcible entry occurred." (emphasis added).

Texas	
TEX. PENAL CODE ANN. § 9.42 (West 2023)	Texas does not have a defense of habitation statute per se but has enacted a very broad defense of property statute that permits a person to use deadly force against another to protect land or tangible, movable property. > A person is justified in using deadly force against another to protect land or tangible, movable property: (1) if he would be justified in using force against the other under Section 9.41; and (2) when and to the degree he reasonably believes the deadly force is immediately necessary: (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and (3) he reasonably believes that: (A) the land or property cannot be protected or recovered by any other means; or (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury. The Texas courts have applied this broad defense of property statute to motor vehicles, so a person in Texas may use deadly force against another person who is attempting to steal or commit arson to their vehicle. *See* McFadden v. State, 541 S.W.3d 277, 290 (Tex. App. 2018) (holding defendant was entitled to an instruction on the defense of property because "there is some evidence from which a jury could have found that [the defendant] reasonably believed the use of deadly force was immediately necessary to prevent [the victim] from committing arson" to her vehicle).

APPENDIX J: STATES WHERE DEFENSE OF HABITATION EXTENDS TO THE CURTILAGE

Florida	
State v. Vino, 100 So. 3d 716, 719 n.2 (Fla. Dist. Ct. App. 2012)	"[T]he definition of dwelling for purposes of the burglary statute is as follows: 'a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the *cartilage* [sic] thereof.'" (emphasis added) (quoting FLA. STAT. § 810.011(2) (2023)).
Idaho	
IDAHO CODE § 18-4009(1), (3) (2024)	"(1) Homicide is justifiable when committed by any person in any of the following cases: . . . (b) When committed in defense of habitation, a place of business or employment, occupied vehicle, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation, place of business or employment or occupied vehicle of another for the purpose of offering violence to any person therein . . . . (3) For purposes of this section: (a) 'Habitation' means any building, inhabitable structure or conveyance of any kind, whether the building, inhabitable structure or conveyance is temporary or permanent, mobile or immobile, including a tent, and is designed to be occupied by people lodging therein at night, and includes a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest, *and includes the curtilage of any such dwelling*." (emphasis added).
Indiana	
IND. CODE § 35-41-3-2(d) (2023)	"A person: (1) is justified in using reasonable force, including deadly force, against any other person; and (2) does not have a duty to retreat; if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, *curtilage*, or occupied motor vehicle." (emphasis added).

Maryland	
Powell v. State, No. 119009017, 2022 WL 884392, at *8 (Md. Ct. Spec. App. Mar. 25, 2022)	"However, there are exceptions to the duty to retreat, including an exception for circumstances where the defendant is attacked within his home. This exception extends to the *curtilage* of a home." (emphasis added) (citation omitted).
New Hampshire	
N.H. REV. STAT. ANN. § 627:4(II)(d) (2022)	Permitting the use of deadly force upon another person when the actor reasonably believes that such other person "[i]s likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling *or its curtilage*" (emphasis added).
State v. Pugliese, 422 A.2d 1319, 1322 (N.H. 1980)	"[W]e construed a person's home to include the buildings and grounds within the *curtilage* . . . ." (emphasis added).
North Carolina	
N.C. GEN. STAT. § 14-51.2(a)(1) (2023)	Defining the term "Home" for purposes of defense of habitation as "[a] building or conveyance of any kind, to include its *curtilage*, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence" (emphasis added).
Texas	
TEX. PENAL CODE ANN. § 9.42 (West 2023)	Texas does not have a defense of habitation statute per se but has enacted a very broad defense of property statute that permits a person to use deadly force against another to protect land or tangible, movable property. A person is justified in using deadly force against another to protect land or tangible, movable property: (1) if he would be justified in using force against the other under Section 9.41; and (2) when and to the degree he reasonably believes the deadly force is immediately necessary: (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and (3) he reasonably believes that: (A) the land or property cannot be protected or recovered by any other means; or (B) the

	use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury. The Texas courts have applied this broad defense of property statute to motor vehicles, so a person in Texas may use deadly force against another person who is attempting to steal or commit arson to their vehicle. *See* McFadden v. State, 541 S.W.3d 277, 290 (Tex. App. 2018) (holding defendant was entitled to an instruction on the defense of property because "there is some evidence from which a jury could have found that [the defendant] reasonably believed the use of deadly force was immediately necessary to prevent [the victim] from committing arson" to her vehicle).
Virginia	
Fortune v. Commonwealth, 112 S.E. 861, 867 (Va. 1922)	"One in his own *curtilage*, who is free from fault in bringing on the combat, when attacked by another, has the same right of conduct, without any retreat (i. e., to stand at bay and resist assault), even to the taking of life, that one has when within his own home." (emphasis added).
Wisconsin	
WIS. STAT. § 939.48(1m)(a)(1) (2023)	Noting that the term "dwelling" has the meaning given in WIS. STAT. § 895.07(1)(h) (20223), which provides, "'Dwelling' means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. 'Dwelling' includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements."