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Firearms and Initial Aggressors

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FIREARMS AND INITIAL AGGRESSORS

Cynthia Lee*

ABSTRACT

Under the initial aggressor doctrine, an "initial aggressor" loses the right to claim self-defense. Until recently, judges, legal scholars, and others have paid relatively little attention to this doctrinal limitation on the defense of self-defense. Two high-profile criminal trials in 2021 put the initial aggressor doctrine front and center of the national conversation on issues concerning self-defense and racial justice. One involved Kyle Rittenhouse, the 17-year-old teenager who brought an AR-15 style rifle to Kenosha, Wisconsin during the third night of racial protests in August 2020, and ended up shooting three men, killing two and injuring the third. The other involved the February 2020 shotgun shooting by Travis McMichael of an unarmed Black man named Ahmaud Arbery as he was jogging in a predominantly white neighborhood in Satilla Shores, Georgia.

The question of how the display of a firearm in public should factor into a claim of self-defense has become more important than ever as the nation continues to relax its restrictions on firearm carrying in public and as criminal homicides by firearms rise. As laws regarding the carrying of firearms in public—laws on the front end—become less restrictive, the need to tighten up laws, like the law of self-defense, that apply on the back end to those who discharge or otherwise use their firearms in public becomes more pressing. Initial aggressor rules can serve this critical function and should be reformed accordingly to discourage gun owners from using their firearms to kill or injure others.

While all fifty states and the District of Columbia have placed some limitations on an initial aggressor's ability to justify the use of force in self-defense, current initial aggressor rules are ambiguous and often contradictory. Most state statutes do not define the term "aggressor" and no clear rules exist regarding whether and when an initial aggressor instruction must be given to the jury. This Article

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* © Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School. The author thanks Jeffrey Bellin, Joseph Blocher, Steve Koh, Eric Ruben, SpearIt, Jessica Steinberg, and Kate Weisburd for their feedback on earlier drafts of this article. She also thanks Hannah Shearer, Lisa Tu, and the Giffords Law Center to Prevent Gun Violence for early assistance with this Article. She also thanks participants at the Virtual Crim Law Workshop series, including I. Bennett Capers, Jake Charles, Alexis Hoag, Robert Leider, Benjamin Levin, Sandy Mayson, Rachel Moran, Justin Murray, Anthony O'Rourke, Ric Simmons, Megan Stevenson, and Adrian Zulfiger, who provided helpful comments when she presented this paper virtually on February 9, 2022. She also thanks her Research Assistants Neal Billig, Matthew Broussard, and Riven Lysander for providing excellent research assistance and GW Law Library Liaison Lesliediana Jones for providing additional research assistance. The author thanks the UC Davis Law Review and the Gifford Center for inviting her to take part in its Symposium on the Second Amendment on October 1, 2021. Finally, the author thanks the North Carolina Law Review for editorial assistance and choosing to publish this article.

attempts to strengthen the initial aggressor doctrine so it can help discourage gun violence. To this end, the Article makes three key contributions to existing legal scholarship. First, the Article clarifies the morass of confusing initial aggressor rules that currently exist across the nation. Second, the Article theorizes that one of the main problems with current initial aggressor doctrine is that it leaves too much discretion in the hands of the judge, which means the jury—the body that is supposed to decide whether a defendant qualifies as an initial aggressor—often never gets to decide this key question that can make or break a defendant's case. Third, this Article proposes a way to resolve this problem. It is the first to suggest that judges should be required to give an initial aggressor instruction whenever a defendant claiming self-defense brought a firearm outside the home and displayed it in a threatening manner or pointed it at another person. By lowering the threshold to get an initial aggressor instruction to the jury, the proposal ensures that the jury, rather than the judge, gets to decide whether the defendant was the initial aggressor.

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Introduction

On June 28, 2020, a White[1] couple garnered national attention after brandishing firearms at Black Lives Matter protesters marching past their home in St. Louis, Missouri.[2] Cell phone video footage shows Patricia McCloskey pointing a semi-automatic handgun at the unarmed protesters while her husband Mark McCloskey is seen behind her holding an AR-15 rifle.[3] Even though none of the protestors appeared to threaten

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[1]The author purposely capitalizes the words "Black" and "White" except where the words are lower case in quotations. *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-blackand-white/613159/ (https://perma.cc/ER4S-JVUD) (last visited April 2, 2022) (explaining why it is important to capitalize the words "Black" and "White" when referring to Black and White people); Lori L. Tharps, *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?smid=tw-share&_r=1 (https://perma.cc/YGG2-3XWS) (last visited April 2, 2022) ("When speaking of a culture, ethnicity or group of people, the name should be capitalized."); Brooke Seipel, *Why the AP and Others Are Now Capitalizing the 'B' in Black*, HILL (June 19, 2020, 5:25 PM), https://thehill.com/homenews/media/503642-why-the-ap-and-others-are-now-capitalizing-the-b-in-black (https://perma.cc/WE6C-KQPU) (last visited April 2, 2022).

[2] Laurel Wamsley, *Gun-Waving St. Louis Couple Plead Not Guilty To 2 Felony Charges*, NPR (Oct. 14, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/14/923674576/gun-waving-st-louis-couple-plead-not-guilty-to-2-felony-charges (https://perma.cc/EZ84-5W5G) (last visited April 2, 2022) (noting that the McCloskeys, both personal injury lawyers in their 60s, were captured on video outside their mansion brandishing firearms at Black Lives Matter protestors, with Mark carrying an AR-15 rifle and Patricia with her finger on the trigger of a semi-automatic handgun).

[3] Mary Papenfuss, *Mark McCloskey, Ordered To Surrender Gun He Aimed At Protesters, Poses With New AR-15*, HUFFPOST (June 23, 2021), https://www.huffpost.com/entry/mark-patricia-mccloskey-pointing-guns-black-protesters_n_60cfc28ce4b01af0c271a4fa (https://perma.cc/QDC6-3SWH) (last visited April 2, 2022) (showing footage of Patricia McCloskey pointing a handgun at protestors and Mark McCloskey holding his AR-15 rifle) ; Daniel Politi, *Remember the Couple Who Waved Guns at Protesters? The Missouri Governor Just Pardoned Them.*, SLATE (Aug. 4, 2021), https://slate.com/news-and-politics/2021/08/mark-patricia-mccloskey-missouri-governor-pardon.html

physical violence against the McCloskeys and no one tried to enter their home, the couple claimed they were simply acting in self-defense and in defense of their home.[4] When the two personal injury lawyers were charged with two felonies[5]–unlawful use of a weapon[6] and tampering with evidence,[7] their supporters asserted the McCloskeys were being persecuted for exercising their Second Amendment rights.[8]

(https://perma.cc/C6SY-SX8Y) (last visited April 2, 2022) ("Mark McCloskey carried an AR-15-style rifle, and Patricia McCloskey had a semi-automatic pistol.").

[4] Azi Paybarah, *St. Louis Couple Who Aimed Guns at Protesters Plead Guilty to Misdemeanors*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/us/mark-patricia-mccloskey-st-louis-couple-protesters.html (https://perma.cc/76FW-TSA9) ("[t]he couple maintained that they had acted in self-defense, in order to prevent the demonstrators from entering their home and harming them").

[5] Jack Suntrup, *Parson says he'd "certainly" pardon the McCloskeys, the St. Louis couple indicted on evidence tampering and gun charges*, ST. LOUIS POST-DISPATCH (Oct. 8, 2020), https://www.stltoday.com/news/local/govt-and-politics/parson-says-he-d-certainly-pardon-the-mccloskeys-the-st-louis-couple-indicted-on-evidence/article_e89c04a4-39e9-5dce-90ee-d6b5cb113a5a.html (https://perma.cc/GGH8-6DSE) (noting that in October 2020, a grand jury indicted the McCloskeys on felony charges of unlawful use of a weapon and evidence tampering).

[6] MO. REV. STAT. § 571.030 (1) (2021) ("A person commits the offense of unlawful use of weapons . . . if he or she knowingly . . . (4) exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner"); MO. REV. STAT. § 575.030 (8) (2021) ("A person who commits the crime of unlawful use of weapons under: (1) Subdivision (2), (3), (4), or (11) of subsection 1 of this section shall be guilty of a class E felony").

[7] MO. REV. STAT. § 575.100 ("A person commits the offense of tampering with physical evidence if he or she . . . [a]lters, destroys, suppresses or conceals any record, document or thing with purpose to impair its verity, legibility or availability in any official proceeding or investigation . . ."); MO. REV. STAT. § 575.100 (2) ("The offense of tampering with physical evidence is a class A misdemeanor, unless the person impairs or obstructs the prosecution or defense of a felony, in which case tampering with physical evidence is a class E felony.").

[8] Paybarah, *supra* note 2 (noting Senator Josh Hawley of Missouri, a Republican, remarked that "the case against the McCloskeys 'is a politically motivated attempt to punish this family for exercising their Second Amendment rights.' "). *See also Trump Defends St. Louis Couple Who Pointed Firearms at Protesters*, WASH. POST (July 15, 2020), https://www.youtube.com/watch?v=pfdQAl_TEgc&ab_channel=WashingtonPost (https://perma.cc/N55G-WMGV). It appears, however, that Kim Gardner, the prosecutor who decided to file charges against the McCloskeys was the one who was persecuted. Gardner was attacked by former President Trump who said thought the charges against the McCloskeys were "absolutely absurd" and "an extreme abuse of power by the prosecutor." Tom Jackman, *67 Current, Former Prosecutors Defend St. Louis Prosecutor from Attacks in McCloskey Gun Case*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/nation/2020/07/22/67-current-former-prosecutors-defend-st-louis-prosecutor-attacks-mccloskey-gun-case/ (https://perma.cc/758Z-6W2J). In an unusual move, the Attorney General of Missouri sought to have the charges dismissed. *Id.* (noting that "Attorney General Eric Schmitt (R) filed an amicus brief asking for the charges to be dismissed" even though "[t]he attorney general in Missouri has no jurisdiction in criminal cases"). The unprecedented attacks on the prosecutor appear to have worked. In April 2021, the Missouri Supreme Court removed Kim Gardner from the case on the ground that she brought the charges against the McCloskeys for political gain, relying on the fact that Gardner had mentioned the charges she brought against the McCloskeys in fundraising emails. Christine Byers, *Tampering charge against Patricia McCloskey dropped, could face harassment misdemeanor*, KSDK (May 25, 2021), https://www.ksdk.com/article/news/crime/special-prosecutor-drops-tampering-patricia-mccloskey-harassment-charge/63-2b617908-a10f-4f0f-a4e3-25cf55557a79 (https://perma.cc/9ZYR-WQ77). After former U.S. Attorney Richard Callahan took over the case, the McCloskeys pled guilty to misdemeanor charges. Kevin S. Held, *Parson pardons McCloskeys for gun-waving plea deal*, FOX2NOW (Aug. 3,

Fortunately, the couple did not fire their weapons, and no one was killed or injured as a result of their actions. The McCloskeys did not take their claim of self-defense to a jury but pled guilty to lesser charges.[9]

Imagine, however, if they had fired their weapons, killed a protester, and then were charged with a criminal homicide. Would a claim that they acted in self-defense succeed in such a case?

The answer to the question of whether our hypothetical McCloskeys would have a viable claim of self-defense depends in part on whom you ask. Self-defense doctrine turns in large part on whether a reasonable person in the defendant's shoes would have believed they were being imminently threatened with death or serious bodily injury.[10] The video footage does not appear to show any threat of death or serious bodily injury, let alone an imminent threat. No protestor is advancing towards the McCloskeys or making threatening gestures.[11] Even more importantly, not one of the protestors marching in front of the McCloskeys' home appears to have been armed, so it is hard to argue that a *reasonable* person would have believed they were facing an imminent threat of death or serious bodily injury.[12] Nonetheless, many prominent politicians rushed to defend the McCloskeys, stating that the

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2021), https://fox2now.com/news/missouri/parson-pardons-mccloskeys-on-gun-waving-convictions/ (https://perma.cc/B5GA-GBH4). Mark McCloskey pled guilty to fourth degree assault; Patricia pled guilty to harassment. *Id.* The couple were ordered to pay fines ($750 for him, $2,000 for her) and destroy the weapons they pointed at protestors. *Id.* On July 30, 2021, Missouri Gov. Mike Parsons pardoned the couple. *Id.* Jennifer Weiser & Mark Slavit, *McCloskey attends Missouri State Fair, thanks Parson for pardon*, KRCG (Aug. 19, 2021), https://krcgtv.com/news/local/mccloskey-attends-missouri-state-fair-thanks-parson-for-pardon (https://perma.cc/996N-5RA2).

[9] Meryl Kornfield, *St. Louis Couple Who Pointed Guns at Protesters Plead Guilty, Will Give Up Firearms*, WASH. POST (Nov. 17, 2021), https://www.washingtonpost.com/nation/2021/06/17/st-louis-couple-guns/ (https://perma.cc/7JKQ-NKQA) (noting that in exchange for dismissal of felony firearms charges, "Patricia McCloskey, 61, pleaded guilty to misdemeanor harassment and was fined $2,000. Mark McCloskey, 63, pleaded guilty to misdemeanor fourth-degree assault and was fined $750").

[10] For critique of the reasonableness requirement in self-defense cases, *see* Kevin Jon Heller, *Beyond the Reasonable Man - A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998) (examining reasonableness standards in self-defense and provocation cases); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L. A. L. REV. 435 (1981) (arguing that the reasonable man standard utilized in self-defense cases does not accurately reflect the experiences of women and minorities); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (NYU Press 2003) (examining ways in which racial stereotypes can influence the reasonableness determination in self-defense and provocation cases).

[11] Jessica Lussenhop, *Mark and Patricia McCloskey: What really went on in St Louis that day?*, BBC NEWS (Aug. 25, 2020), https://www.bbc.com/news/election-us-2020-53891184 (https://perma.cc/D37W-4U79); KMOV ST. LOUIS, *Charges filed against Mark and Patricia McCloskey*, YOUTUBE (July 2020), https://www.youtube.com/watch?v=sUMfKFLGDcE&t=43s (https://perma.cc/GJD7-R52A).

[12] *US Couple Who Pointed Guns At BLM Protesters 'To Speak At Republican Convention'*, BBC NEWS (August 18, 2020), https://www.bbc.com/news/world-us-canada-53819020 (https://perma.cc/43Z4-28FV).

couple were in fear for their lives and suggesting that it was reasonable for them to be afraid of violence from the protesters.[13]

Whether our hypothetical McCloskeys would have been justified in using deadly force[14] against a protester also turns in part on whether Missouri's self-defense doctrine recognizes an initial aggressor limitation on the defense of self-defense and what that initial aggressor limitation looks like.[15]

As a general matter, initial aggressors have no right to claim self-defense.[16] Initial aggressors also have a duty to retreat before using deadly force even in jurisdictions that ordinarily do not impose a duty to retreat.[17] Unlike the broader question of whether an individual acted justifiably in self-defense, which can turn in large part on the cultural

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[13] Tom Jackman, *67 current, former prosecutors defend St. Louis prosecutor from attacks in McCloskey gun case*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/nation/2020/07/22/67-current-former-prosecutors-defend-st-louis-prosecutor-attacks-mccloskey-gun-case/ (perma.cc/758Z-6W2J) (noting that Governor Mike Parson "called for [Kim] Gardner to resign, and then said if the McCloskeys were convicted, he would pardon them[,] U.S. Sen. Josh Hawley sent a letter to Attorney General William P. Barr demanding a civil rights investigation[, and the President]Trump said any attempt by Gardner to prosecute would be "a disgrace"); Brakkton Booker, *St. Louis Couple Who Waved Guns At Black Lives Matter Protesters To Speak At RNC*, NPR (Aug. 18, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/18/903478960/st-louis-couple-who-brandished-guns-at-black-protesters-to-speak-at-rnc (https://perma.cc/ZAQ7-HDR5) (quoting Senator Josh Hawley, who called the McCloskeys' felony charges "an outrageous abuse of power"); FOX NEWS, *St. Louis homeowner Mark McCloskey joins Tucker after being charged with felony for defending his home* (July 20, 2020), https://www.foxnews.com/transcript/st-louis-homeowner-mark-mccloskey-joins-tucker-after-being-charged-with-felony-for-defending-his-home (https://perma.cc/822U-LQSS) (transcript from "Tucker Carlson Tonight" with multiple quotes from anchor Tucker Carlson defending the McCloskeys who were "exercising the most basic right of all: the ancient and immutable right to self-defense" and "did nothing wrong."). The McCloskeys were even invited to give an address at the 2020 Republican National Convention. Brakkton Booker, *St. Louis Couple Who Waved Guns At Black Lives Matter Protesters To Speak At RNC*, NPR (Aug. 18, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/18/903478960/st-louis-couple-who-brandished-guns-at-black-protesters-to-speak-at-rnc (https://perma.cc/ZAQ7-HDR5). Mark McCloskey has since declared himself a Republican candidate for the U.S. Senate. Kevin S. Held, *Parson pardons McCloskeys for gun-waving plea deal*, FOX2NOW (Aug. 3, 2021), https://fox2now.com/news/missouri/parson-pardons-mccloskeys-on-gun-waving-convictions/.

[14] States are split over whether the display of a firearm constitutes deadly force. Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground, A Reply to* Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, *Pointing Guns*, 99 TEXAS L. REV. 1173 (2021), 100 TEX. L. REV. ONLINE (Sept. 29, 2021) (noting that Florida, Michigan, and Texas treat the display of a weapon as nondeadly force whereas Missouri, where the McCloskeys displayed their firearms, treats the display of a weapon as deadly force). Apparently, Florida courts have found that the pointing of a gun at another person's head is nondeadly force. *Id.*, *citing* Copeland v. State, 277 So.3d 1137, 1140, 1142 (Fla. Dist. Ct. App. 2019), *quoting* Jackson v. State, 179 So.3d 443, 446 (Fla. Dist. Ct. App. 2015).

[15] Missouri recognizes the initial aggressor limitation on the defense of self-defense. . Under Missouri law, "A person may…use physical force upon another person…unless the actor was the initial aggressor." MO. ANN. STAT. § 563.031(1)(1) (West 2021).

[16] Thomas A. Mauet, *Defense of Person in Homicide Cases: The Law and the Investigative Approach*, 4 POLICE L.Q. 5, 8 (1975).

[17] *Id.*

values of the person making that determination,[18] the initial aggressor limitation is a legal mechanism that has the potential to act as a deterrence mechanism and bring about more consistency in self-defense cases, but only if reformed.

All fifty states and the District of Columbia have adopted some type of an initial aggressor rule,[19] but the patchwork of initial aggressor rules that exist across the nation are not at all uniform. States differ on what it takes to be considered an initial aggressor. Some initial aggressor rules do not actually preclude the aggressor from claiming self-defense but simply impose a duty to retreat on initial aggressors[20] where a non-aggressor would have no corresponding duty.[21] Other initial aggressor

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[18] Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. l (2008).

[19] *See infra* note 62. 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.

[20] Michigan, Mississippi, Nevada, and Wyoming are Stand Your Ground states that have not adopted a traditional initial aggressor rule but do require initial aggressors to retreat when all other individuals claiming self-defense have no duty to retreat. *See, e.g.*, People v. Riddle, 649 N.W. 2d. 30, 39 (Mich. 2002) ("[W]here a defendant 'invites trouble' or meets non-imminent force with deadly force, his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense."); MISS. CODE ANN. § 97-3-15(4) (2021) (stating that "(4) A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force . . . if the person is in a place where the person has a right to be, and no finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable."). NEV. REV. STAT. § 200.120(2)(a) (2020) (stating that "2. [a] person is not required to retreat before using deadly force . . . if the person: (a) [i]s not the original aggressor."); WYO. STAT. ANN. § 6-2-602(e) (2021) ("A person who is attacked in any place where the person is lawfully present shall not have a duty to retreat before using reasonable defensive force pursuant to subsection (a) of this section provided that he is not the initial aggressor and is not engaged in illegal activity"). Missouri, like other Stand Your Ground states, does not ordinarily require individuals to retreat before using deadly force if they are in a place where they have a right to be. MO. ANN. STAT. § 563.031(3) (West 2021)**.** It does, however, require initial aggressors to retreat or withdraw. Under Section 563.031 of the Missouri Code, "A person may…use physical force upon another person…unless the actor was the initial aggressor; except that in such case his or her use of force is nevertheless justifiable provided…[h]e or she has withdrawn from the encounter." MO. ANN. STAT. § 563.031(1)(1) (West 2021).

[21] Stand Your Ground laws generally allow an individual to stand his ground if attacked in any place where that individual has a lawful right to be if the individual reasonably believes such force is necessary to prevent imminent death or great bodily harm. *See, e.g.*, FLA. STAT. §776.012 & 776.013 (3); Giffords Law Center, *Stand Your Ground*, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/ (https://perma.cc/TJC8-657D) (listing states with "Shoot First" or "Stand Your Ground" laws). For commentary on Stand Your Ground laws, *see* Cynthia V. Ward, *"Stand Your Ground" and Self-Defense*, 42 AM. J. CRIM. L. 89, 90 (2015); Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Laws*, 2 J. L. ECON. & POL'Y 331, 342 (2006); Kimberly Kessler Ferzan, *Stand Your Ground*, *in* THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 731, 731 (Alexander & Kessler eds. 2019). For racial critiques of Stand Your Ground laws, *see* Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 832-33 (2013); Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179, 3192-96 (2015). *Compare* Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 962 (2014) (arguing that progressives who have

rules preclude provocateurs and aggressors from claiming self-defense but make it challenging for the government to demonstrate initial aggressor status. For example, some require proof that the defendant intended to provoke the victim into attacking the defendant so the defendant could counterattack and claim self-defense.[22] Others require proof that the defendant was engaging in unlawful conduct before the defendant forfeits the right to claim self-defense.[23]

More importantly, there are no clear rules regarding whether and when an initial aggressor instruction must be given to the jury. An initial aggressor instruction is not an automatic, standard instruction given whenever the jury is charged on self-defense. Even when the defendant was the person who started the conflict, a judge may choose not to give an initial aggressor instruction.

Unfortunately, the McCloskey incident is not the only time in recent history that a firearm owner has felt so threatened by an unarmed person that they felt the need to point a loaded gun at that person. In July of 2020, for example, a White woman cocked a loaded gun and pointed it for several minutes at a Black woman in a Chipotle parking lot.[24] The incident apparently started when Jillian Wuerstenberg bumped Takelia Hill's 15-old-teenage daughter, Makayla, when Wuerstenberg was leaving and Makayla was entering the restaurant.[25] A verbal altercation ensued between Hill and Wuerstenberg as well as between Hill and Wuerstenberg's husband.[26]

When the Wuerstenbergs got into their minivan and started backing out of their parking spot, Hill, who was standing behind the vehicle, thought they were trying to use the vehicle to hit her and her daughter, so she hit the back of the vehicle with her hands to warn them to stop.[27] This prompted Wuerstenberg to load her gun and get

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called for the repeal of stand-your-ground laws have done so out of a misplaced punitive impulse and they should instead focus on trying to enact reform aimed at achieving racial equality).

[22] *See infra* Part I.A.

[23] *See infra* text accompanying note 109.

[24] According to one news source, 15-year-old "Makayla [Green] was walking through a strip mall on her way to the [Chipotle] restaurant as the woman was walking in the other direction . . . When the woman allegedly bumped into Makayla, the teenager called her out. 'I had moved out of the way so she [could] walk out,' Makayla told the News. 'She bumped me and I said, 'Excuse you.' And then she started cussing me out, and saying things like I was invading her personal space.'" Teo Armus & Ben Guarino, *She's Got the Gun on Me: White Woman Charged With Assault After Pulling Pistol On Black Mother, Daughter*, WASH. POST (July 2, 2020), https://www.washingtonpost.com/nation/2020/07/02/michigan-woman-gun-video/ (https://perma.cc/P58E-USS8). *See also First on 7: Couple Seen In Viral Video Pointing Gun at Family 'Feared For Their Lives;' Family Attorney Says There Was No Threat*, ABC7 WXYZ DETROIT (July 9, 2020), https://www.wxyz.com/news/america-in-crisis/only-on-7-couple-seen-in-viral-video-pointing-gun-at-family-feared-for-their-lives-family-attorney-says-there-was-no-threat (https://perma.cc/6SRV-ZPYA).

[25] *She's Got the Gun on Me*, *supra* note 24.

[26] Freda Kahen-Kashi & Kelly McCarthy, *White Woman Who Pointed Gun at A Black Mom and Her Teen Daughter Charged With Assault*, ABC NEWS (July 2, 2020), https://abcnews.go.com/US/white-woman-pointed-gun-black-mom-teen-daughter/story?id=71584436 (https://perma.cc/KK3K-JCYU).

[27] *Id.*

out of her vehicle, pointing her gun at Hill.[28] The incident was captured on cell phone video, showing Wuerstenberg with her finger on the trigger, cursing and yelling "Back the F___ up" several times at Hill.[29] In the end, Wuerstenberg returned to her vehicle without firing her weapon.[30] She and her husband were arrested and charged with one count of felonious assault.[31] Wuerstenberg claimed she pulled a gun on Hill because she feared for her life.[32]

The incident in the Chipotle parking lot is concerning because it serves as a reminder of our society's deeply engrained fear of the Black body, a fear rooted in stereotypes about Black people as dangerous, violent, criminals.[33] Since the death of George Floyd in May 2020, the movement for Black Lives has helped focus the nation's attention on the fact that Black men and women are disproportionately killed by police officers in the United States.[34] While not applicable in George Floyd's case since he was not shot to death, this disproportion is in part the result of threat perception failure, which occurs when an officer thinks an individual has a gun but the person is actually unarmed.[35]

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[28] *Id.*

[29] Mark Hicks, C*ouple Charged in Chipotle Incident Bound Over For Trial*, DETROIT NEWS (July 21, 2020), https://www.detroitnews.com/story/news/local/oakland-county/2020/07/21/couple-charged-chipotle-incident-trial-orion-township/5482934002/ (https://perma.cc/SC5U-9XYV) (showing video of incident).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (noting that the stereotype that links Blacks with violence, dangerousness, and criminality has 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 (NYU Press 2003) (discussing the tendency to associate Blacks with crime); Jonathan Markovitz, *"A Spectacle of Slavery Unwilling to Die": Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873 (2015); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (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). *See also* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976) (finding that 75% of individuals observing a Black person shoving a White person thought the shove constituted "violent" behavior while only 17% of individuals observing a White person shoving a Black person characterized the shove as "violent" and 42% characterized the shove as "playing around"). *See also* H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980) (finding that both Black and White children saw relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites).

[34] Deidre McPhillips, *Deaths from Police Harm Disproportionately Affect People of Color*, U.S. NEWS & WORLD REPORT (June 3, 2020, 4:07 PM), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color (noting that about a third of the more than 1,000 unarmed people who died as a result of police harm between 2013 and 2019. were Black).

[35] Lois James, Stephen M. James & Bryan J. Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black Than White Suspects?*, 15 CRIMINOLOGY & PUB. POL'Y 457, 458 (2016) (defining threat perception failure as akin to a mistake of fact situation when, for example, the officer mistakes a cellphone for a gun or thinks the suspect is reaching for a weapon when the suspect was reaching for his wallet).

Threat perception failure is more likely to occur when officers are confronting a Black individual than when they are confronting a White individual because of the Black-as-Criminal stereotype.[36]

Threat perception failure and the tendency to automatically associate Black individuals with danger and criminality is not just a problem for police officers, it is also a problem that afflicts laypersons. Numerous empirical studies have found that laypersons are quicker to perceive a weapon in the hands of a Black person, even if the Black person is in fact unarmed or holding a harmless object, than they are to perceive an actual weapon in the hands of a White person.[37]

Now we don't have any reason to think that Jilian Wuerstenberg pulled her gun on Takelia Hill because she thought the Black mother was armed, but we do know that Wuerstenberg said the reason she got out of her car and aimed her loaded gun at Hill was because she feared for her life.[38] The tendency to associate Black individuals with violence might have led to that fear. As Addie Rolnick observes, "[r]esearch on unconscious bias and cultural myths about criminality demonstrate that fear is racially contingent."[39]

Fear is often a driving force behind firearms incidents in which a person displays or points a gun at another person. These incidents are a serious concern and occur far more frequently than most of us recognize but often fly under the radar.[40] Moreover, as Joseph Blocher

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[36] *Why Do U.S. Police Keep Killing Unarmed Black Men?*, BBC (May 26, 2015), http://www.bbc.com/news/world-us-canada-32740523.

[37] *See* Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145 (2016) (providing a detailed analysis of shooter bias studies); 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) (noting that "participants were especially likely to favor the 'shoot' response over the 'don't shoot' response when the target was Black rather than any other race"); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015, 1020 (2007); Joshua Correll et al., *The Police Officers Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002) (finding that when participants were little time to decide whether to shoot, they mistakenly shot unarmed targets more often if they were Black than if they were White); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001) (finding "participants identified guns faster when they were primed by a Black face then by a White face" and "identified tools were quickly when primed with a White face, compared to a Black face"); Anthony G. Greenwald et al., *Targets of Discrimination: Effect of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 379, 401 (2000) (finding subjects had greater difficulty distinguishing weapons from harmless objects when the person holding one of these objects was Black and were quicker to see a weapon when they saw a Black individual holding a weapon than when they saw a White individual holding a weapon).

[38] When asked by one reporter why she loaded her gun, Wuerstenberg said, "That meant I am about to die and I don't want to die." *First on 7: Couple Seen In Viral Video Pointing Gun at Family 'Feared For Their Lives;' Family Attorney Says There Was No Threat*, ABC7 WXYZ DETROIT (July 9, 2020), https://www.wxyz.com/news/america-in-crisis/only-on-7-couple-seen-in-viral-video-pointing-gun-at-family-feared-for-their-lives-family-attorney-says-there-was-no-threat (https://perma.cc/6SRV-ZPYA).

[39] Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1639 (2019).

[40] Joseph Blocher, et al., *Pointing Guns*, 99 TEX. L. REV. 101, 104 (2021). *Cf.* Samantha Raphelson, *How Often Do People Use Guns In Self-Defense?*, NPR (Apr. 13, 2018),

has noted, current law inadequately answers the question of whether a person who displays a firearm in public has committed a crime or acted in self-defense.[41] This Article begins to address this question, using the initial aggressor limitation on the right of self-defense to provide guidance on how the display of a gun should impact one's ability to claim self-defense.

Until recently, judges, legal scholars, and others have paid relatively little attention to the initial aggressor limitation on the defense of self-defense.[42] Two high profile criminal trials in 2021—one involving Kyle Rittenhouse, the 17-year-old teenager who brought an AR-15 style rifle to Kenosha, Wisconsin during the third night of racial protests in 2020 over the police shooting of Jacob Blake, and ended up shooting three men, killing two and injuring the third,[43] and the other involving the shooting of an unarmed Black man named Ahmaud Arbery as he was jogging in a predominantly White neighborhood in Satilla Shores, Georgia[44]—put the initial aggressor limitation front and

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https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense (https://perma.cc/UW24-BHW3) (discussing critiques of 1995 Kleck and Gertz study that found between 2.2 and 2.5 million defensive gun uses annually).

[41] *Id.* at 110.

[42] *See* Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597 (2013); Kimberle Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. 669 (2012); Margaret Raymond, *Looking for Trouble*: *Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 294-99, 320 (2010) (arguing against a broad time frame that looks back to see if defendant's actions make him an initial aggressor). *Compare* Paul H. Robinson, *Causing the Conditions of One's Own Defense*: *A Study in the Limits of Theory in Criminal Law Doctrine* 71 Va. L. Rev. 1 (1985) (arguing for a broad time frame that looks at the actor's conduct and culpability at the time the actor creates the conditions leading to his defense). In addition, two student notes have highlighted this area of the law. *See* Joshua D. Brooks, Note, *Deadly-Force Self-Defense and the Problem of the Subtle Provocateur*, 24 CORNELL J.L. PUB. POL'Y 533 (2015); Alon Lagstein, Note, *Beyond the George Zimmerman Trial: The Duty to Retreat and Those Who Contribute to Their Own Need to Use Deadly Self-Defense*, 30 HARV. J. RACIAL & ETHNIC JUST. 367 (2014).

[43] Reis Therault & Ted Armus, *Competing Narratives Fuel Opposing Views of Kenosha Protest Shooting*, WASH. POST, Aug. 21, 2020, at A7(noting that at the end of the third night of protests over the police shooting of Jacob Blake in Kenosha, Wisconsin, "a 17-year-old wielding an AR-15-style rifle had shot and killed two men and injured a third" and that Rittenhouse "traveled 20 miles from his home in Antioch, Ill., to Kenosha . . ."); Haley Willis, Muyi Xiao, Christiaan Triebert, Christoph Koettl, Stella Cooper, David Botti, John Ismay, & Ainara Tiefenthäle, *Tracking the Suspect in the Fatal Kenosha Shootings*, N.Y. TIMES (Aug. 27, 2020) (updated Nov. 16, 2021), https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html (https://perma.cc/KM2R-WDV5) (providing photos and video footage from the night when Rittenhouse shot the three men).

[44] Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Nov. 24, 2021), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html (https://perma.cc/73P7-MVQ9) (noting that Gregory McMichael and his son, Travis McMichael "grabbed a .357 Magnum handgun and a shotgun, got into a pickup truck and chased Mr. Arbery. . . Travis fired a shot and then a second later there was a second shot"); Tim Craig, Emmanuel Felton, Hannah Knowles & Timothy Bella, *Jury Finds All 3 Men Guilty of Murder in Ahmaud Arbery's Death*, WASH. POST (Nov. 24, 2021), https://www.washingtonpost.com/nation/2021/11/24/ahmaud-arbery-trial-verdict/ (https://perma.cc/9PTB-SP2L) (reporting that "The violence at the center of the trial unfolded on Feb. 23, 2020, when the McMichaels spotted Arbery running past their house and took off after him in their truck").

center of the national conversation on issues concerning self-defense and racial justice.

The question of how the display of a firearm in public should factor into a claim of self-defense has become more important than ever as the nation continues to relax its restrictions on the carrying of firearms in public.[45] On November 3, 2021, the U.S. Supreme Court heard oral argument in *New York State Rifle & Pistol Association Inc. v. Bruen*.[46] At issue is whether the state of New York may require individuals applying for a license to carry a firearm in public to show "proper cause" or whether such a licensing regime violates the Second Amendment rights of individuals seeking to "keep" and "bear" arms in public.[47] Court observers have opined that the Court is likely to use the *Bruen* case to extend its *Heller* decision and declare that individuals have a Second Amendment right to keep and bear arms in public.[48] If this happens, gun enthusiasts may claim that people who carry firearms in public and display, point, or discharge those firearms are simply exercising their Second Amendment right of self-defense.

The existence of a Second Amendment right to keep and bear arms in the home or in public for the purpose of self-defense, however, says nothing about whether any particular use of a firearm constitutes a justified use of force. As a general matter, to succeed on a claim of self-defense, one needs to have honestly and reasonably believed it was necessary—at the time one acted—to use deadly force to counter an imminent threat of death or serious bodily harm.[49] That determination can only be made by considering the facts and circumstances facing the individual at the time the individual acted. Those facts and circumstances will differ from case to case. Whether one has a constitutional right to "keep" and "bear" a firearm in public is a

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[45] Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015) (discussing trend toward loosening restrictions on carrying guns in public).

[46] *See* Ariane de Vogue, *Supreme Court Seems Poised To Expand Second Amendment Rights And Strike Down NY Handgun Law*, CNN (Nov. 3, 2021), https://www.cnn.com/2021/11/03/politics/supreme-court-second-amendment-new-york-bruen/index.html (https://perma.cc/DSR4-T23H).

[47] Tom Kutch, *SCOTUS Takes on Gun Carrying in Public*, THE TRACE (Apr. 27, 2021), https://www.thetrace.org/newsletter/scotus-takes-on-gun-carrying-in-public/ (https://perma.cc/C5G9-6SFH); New York State Rifle & Pistol Association Inc. v. Corlett, No. 20-843 CJS, 2021 WL 1602643 (Apr. 26, 2021).

[48] Jennifer Mascia, *The Supreme Court's Next Big Gun Case, Explained*, THE TRACE (May 18, 2021), https://www.thetrace.org/2021/05/supreme-court-gun-rights-concealed-carry-new-york-corlett/ (https://perma.cc/7RM5-EDSG); Ian Millhiser, *The NRA had a very good day in the Supreme Court*, VOX (Nov 3, 2021, 2:00 PM), https://www.vox.com/2021/11/3/22761240/supreme-court-second-amendment-rifle-bruen-heller-amy-coney-barrett (https://perma.cc/HH8V-6XUU) (predicting after oral arguments in *Bruen* that New York's centuries old gun regulation law is likely to be struck down); Ian Millhiser, *The NRA had a very good day in the Supreme Court*, VOX (Nov 3, 2021, 2:00 PM), https://www.vox.com/2021/11/3/22761240/supreme-court-second-amendment-rifle-bruen-heller-amy-coney-barrett (https://perma.cc/HH8V-6XUU) (predicting after oral arguments in *Bruen* that New York's centuries old gun regulation law is likely to be ruled unconstitutional).

[49] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01 211-19 (8th ed. 2018).

separate and distinct question from whether one's use of that firearm constituted an act of self-defense.[50]

As the laws regulating guns in public become less restrictive and as more localities reduce funding for police departments in response to the racial justice protests following the death of George Floyd at the hands of former police officer Derek Chauvin in 2020, an increasing number of individuals may start to bring their firearms out with them when they leave their homes.[51] Unfortunately, more people with guns in public increases the risk that minor disputes will end in gun violence, serious injury, or fatalities.[52] If a gun owner, for example, mistakenly believes that another person has a gun, he may take out his own gun and discharge it to counter the perceived threat.[53] Joseph Blocher notes that in many cases where a gun owner mistakenly thinks another person poses a threat and pulls out a gun, the gun owner may think he has successfully defended himself against a perceived threat when he may have just committed a crime.[54] With the laws on carrying guns in public on the front end becoming less restrictive, it becomes increasingly important to strengthen the laws concerning gun use on the back end.

In light of the increasing number of incidents in which individuals are using or threatening gun violence in public spaces,[55] it is essential to focus attention on the initial aggressor limitation on the

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[50] Blocher, *Pointing Guns*, *supra* note 41, at 122 (noting "historical legal commentary and custom indicate that the question of whether a particular actual use of a gun constitutes self-defense is a question left to criminal and tort law, about which the Second Amendment is silent"), *quoting* Calderone v. City of Chicago, No. 18 C 7866, 2019 WL 4450496, *3 (N.D. Ill. Sept. 17, 2019, aff'd No. 19-2858, 2020 WL 6500933 (7th Cir. Nov. 5, 2020); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROB. 55, 81-82 (2017) (noting that the common law right of self-defense was well-established long before the Second Amendment and exists independently of the Second Amendment), *citing* Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realties*, 39 FORDHAM URB. L.J. 1695, 1703, 1707 (2012); Paul H. Robinson, *A Right to Bear Firearms But Not To Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-Lethal Weapons*, 89 BOSTON UNIV. L. REV. 251, 252 (2009) ("It is the criminal law's defensive force rules in the fifty-two American jurisdictions, however, not the Second Amendment . . . that govern the use of defensive force").

[51] Bellin, *supra* note 45 (discussing trend towards loosening restrictions on the carrying of guns in public).

[52] Despite the popularity of the slogan "More Guns, Less Crime," suggested by John Lott and David Mustard in 1997, *see* John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 18 (1997), recent studies have undercut that slogan, finding that permissive right-to-carry laws are associated with higher rates of violent crime. *See, e.g.*, John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 199-200 (2019) (finding that right-to-carry laws are associated with overall higher rates of violent crime). *See also* Emma E. Fridel, *Comparing the Impact of Household Gun Ownership and Conceal Carry Legislation on the Frequency of Mass Shootings and Firearms Homicide*, 38 JUST. Q. 892, 904-05, 907 (2021) (finding more permissive concealed carry legislation was associated with a 10.8 percent increase in firearms homicide incidence rate).

[53] Blocher, *Pointing Guns*, *supra* note 41, at 108.

[54] *Id.*

[55] *See infra* text accompanying notes 176-183.

defense of self-defense, a woefully understudied area of the law.[56] This Article attempts to fill the lack of legal scholarship in this area by shining a much-needed spotlight on the initial aggressor doctrine.[57]

The Article starts in Part I by examining the initial aggressor limitation on the defense of self-defense. Rather than one uniform definition of initial aggressor, states have embraced varying and sometimes inconsistent definitions. What is necessary to trigger initial aggressor status also varies from state to state. Part I demonstrates that the existing law on initial aggressors is in disarray and badly in need of reform.

Part II drills down and exposes additional problems with the initial aggressor limitation on the defense of self-defense, using two high profile cases as examples. Part II dissects the initial aggressor instruction given to the jury in the Kyle Rittenhouse case and exposes

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[56] *See supra* note 42.

[57] While many legal scholars have studied various aspects of the doctrine of self-defense, s*ee, e.g.*, Kevin Jon Heller, *Beyond the Reasonable Man - A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998) (examining reasonableness standards in self-defense and provocation cases); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L. A. L. REV. 435 (1981) (arguing that the reasonable man standard utilized in self-defense cases does not accurately reflect the experiences of women and minorities); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008) (arguing that people have polarizing reactions to self-defense cases because of the psychological tendency to resolve factual ambiguities in a way that supports one's defining values and comports with one's core beliefs); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001); Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFFALO CRIM. L. REV. 191, 206 (1998) (arguing that self-defense doctrine should focus on reasonableness of both the actions and beliefs of the defendant claiming self-defense rather than just the reasonableness of the defendant's beliefs); Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control*, 11 NEW CRIM. L. REV. 51 (2008) (arguing that juries should consider whether a person accused claiming self-defense acted with reasonable self-control, not whether the actor's reasonable beliefs about threatened harm justified his response); Jonathan Markovitz, *"A Spectacle of Slavery Unwilling to Die": Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 UC IRVINE L. REV. 873 (2015) (exploring ways to prevent racial bias from pervading self-defense trials); Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019) (exploring the relationship between race, fear, and place in the context of self-defense); Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (exposing how racial stereotypes can influence the reasonableness determination in self-defense cases); L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (exploring ways in which implicit bias skews reasonableness determinations in self-defense cases and contributes to errors of judgment); Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008) (arguing that the accused's racism alone should not defeat their claim of self-defense because criminal law should punish those who choose to cause unjustified harm, not those who simply possess racist beliefs and cause otherwise justifiable harm); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (examining ways in which racial bias pervades self-defense claims); Nicholas J. Johnson, *Self-Defense*, 2 J.L. ECON. & POL'Y 187 (2006) (arguing that the right of self-defense is constitutional); Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261 (2004) (explaining how racial bias influences reasonableness determinations in criminal law), few have focused extensively on the initial aggressor limitation on the defense of self-defense. *See supra* note 42.

problems with that jury instruction. Part II also theorizes that uncertainty as to whether the judge in the Rittenhouse case would even give the jury an initial aggressor instruction undercut the government's ability to prepare a stronger case from the outset. Part II then uses the George Zimmerman (Trayvon Martin) case to illustrate additional problems with initial aggressor rules. Because there is so little clarity regarding when an individual qualifies as an initial aggressor, reasonable minds can disagree about whether an initial aggressor instruction should be given. Indeed, in the Zimmerman case, legal scholars disagreed about this very question. When the trial judge has complete discretion over whether to give an initial aggressor instruction and the rules concerning whether such an instruction should be given are unclear, this can lead to inconsistency. Some defendants, like George Zimmerman, will benefit from a judge's decision not to give an initial aggressor instruction and other defendants will not get this benefit.

Part III offers two tentative proposals for reform. First, the Article attempts to clarify the meaning of the term "initial aggressor" by proposing that a criminal defendant who claims self-defense should be considered an initial aggressor if his or her words or acts created a reasonable apprehension of imminent death or serious physical harm. Unlike many self-defense statutes that utilize the language of provocation and require an intent by the defendant to provoke the victim into attacking so the defendant can counterattack and claim self-defense, the proposed definition does not require proof that the defendant had a pre-existing intent to harm the victim for initial aggressor status. It shifts the focus away from the mental state of the defendant and instead asks whether a reasonable person in the victim's shoes would have feared imminent death or physical injury from the defendant.[58] If so, this would be sufficient evidence of initial aggressor status to trigger an initial aggressor instruction.

Second, the Article proposes that an initial aggressor jury instruction be mandatory whenever a defendant brings a firearm outside of the home and displays it in a threatening manner or points it at another person, is charged with a crime, and claims self-defense. Pointing a firearm at another person and displaying a firearm in a threatening manner are threatening acts that as a general matter will create a reasonable apprehension of death or serious bodily injury and should therefore be viewed as prima facie evidence of aggression.

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[58] This Article does not suggest that States that currently have only a provocation with intent type of aggressor provision should replace that provision with an aggressor provision. It simply encourages such States to supplement their provocation with intent provision with an initial aggressor provision, using the proposed definition of aggressor. One virtue of the provocation with intent type provisions is that less conduct is required in order to make one an initial aggressor. Offensive words or insults could constitute provocation sufficient to remove one's right to claim self-defense as long as the defendant acted with the requisite intent to provoke in order to cause the victim to attack so he could counterattack and claim self-defense. Most jurisdictions with just an initial aggressor provision require more in the way of conduct before a defendant can qualify as an initial aggressor but do not require any specific intent. *See infra* Part III.

Displaying a gun in a threatening manner is already a crime in most jurisdictions. The proposal does not mandate that the jury find initial aggressor status for all defendants who display a firearm in a threatening manner or point a firearm at another person and then are charged with a crime. It does, however, ensure that the ultimate question of whether the defendant was an initial aggressor and thus should lose the right to claim self-defense is left with the jury. This Article also proposes that the jury may conclude that the defendant was *not* the initial aggressor if it finds 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.

Self-defense doctrine in general and the initial aggressor limitation in particular can play an important role in discouraging individuals from using their firearms to kill or injure others.[59] As Eric Ruben reminds us, "[t]he law of self-defense reflects a commitment to shepherding conflicts away from violence, especially lethal violence."[60] Legislators and judges should honor this commitment by adapting self-defense law to respond to the changed circumstances created by relaxed gun laws. With the expansion of Second Amendment rights currently overlapping with our nation's racial reckoning, the initial aggressor limitation on the defense of self-defense can be a powerful tool to help maintain public safety.

I. THE INITIAL AGGRESSOR DOCTRINE

As a general matter, a civilian criminal defendant who is determined to be an initial aggressor loses the right to claim self-defense.[61] All 50 states and the District of Columbia have placed some

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[59] In a related vein, scholars have proposed reforms to the doctrine of provocation, also known as the heat of passion defense, to discourage individuals from bringing their firearms out in public and then using those firearms to kill others. Eric A. Johnson, *When Provocation Is No Excuse: Making Gun Owners Bear the Risks of Carrying in Public*, 69 BUFFALO L. REV. 943 (2021).

[60] Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 104 (2020). Similarly, in writing about the Castle Doctrine and its applicability to co-habitants of a dwelling, Catherine Carpenter notes that many jurisdictions have found that "the defendant's interest in personal dignity of space—the sanctuary—is outweighed by the interests in the prevention of deadly affrays and in the preservation of life between those that share the sanctuary." Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 MARQUETTE L. REV. 653, 676 (2003).

[61] The initial aggressor limitation is a feature of self-defense doctrine that applies to ordinary civilians. It is not currently a limitation on police officers claiming justifiable force, the law enforcement version of self-defense. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Pre-seizure Conduct and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 661 ("most statutes on police use of force do not contain an initial aggressor limitation"). Some have argued that the initial aggressor limitation should be applied to law enforcement officers. Ben Jones, for example, argues that killings brought on by police officer conduct that created or increased the risk of an encounter turning deadly merit legal sanctions just as killings by civilians who are considered initial aggressors merit legal sanctions. Ben Jones, *Police-Generated Killings: The Gap Between Ethics and Law*, ___ POL. RES. Q. ___ (2021), https://journals.sagepub.com/doi/10.1177/10659129211009596.

limitation on an initial aggressor's ability to justify the use of force in self-defense, whether by statute, case law, or jury instruction.[62] It would, however, be a mistake to think that there is one uniform rule governing initial aggressors. Jurisdictions differ in terms of the ways in which their initial aggressor rules are expressed.[63] Some jurisdictions utilize the language of provocation and others utilize the language of aggression. States also differ in terms of how they define an initial aggressor.[64]

This Article uses the term "initial aggressor" as an umbrella term to capture the myriad of ways in which an individual can lose the right to claim self-defense through one's provocative or aggressive actions. The term "initial aggressor" is also used in opposition to the term "provocateur" to describe a particular category of initial aggressor. This Part starts by explaining the different ways one can be considered

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See also Toussaint Cummings, Note, *I Thought He Had a Gun: Amending New York's Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 781, 821 (2014) (arguing that when an officer kills an unarmed Black man not involved in any criminal activity at the time of his death, the officer should have to show he was not the initial aggressor and that his conduct was reasonable for his action to be deemed justified). Currently, however, the initial aggressor limitation on the doctrine of self-defense does not apply to police officers and this Article does not suggest that it should.

[62] ALA. CODE § 13A-3-23(c) (2021); Brown v. State, 698 P.2d 671, 674 (Alaska Ct. App. 1985); ARIZ. REV. STAT. ANN. §13-404(B)(3)(a)–(b) (2021); ARK. CODE ANN. § 5-2-606(b)(1) (2021); People v. Gleghorn, 238 Cal. Rptr. 82, 85 (Cal. Ct. App. 1987); COLO. REV. STAT. ANN. § 18-1-704 (3) (a)–(c) (2020); CONN. GEN. STAT. ANN. § 53a-19(c) (2019); DEL. CODE ANN. tit. 11, § 464(c)(1) (2021); D.C. CRIM. JURY INSTR. § 9.504 (2020); FLA. STAT. ANN. § 776.041(2) (2020); GA. CODE ANN. § 16-3-21(b) (2020); HAW. REV. STAT. § 703-304(5)(a) (2021); State v. Turner, 38 P.3d 1285, 1290–91 (Idaho Ct. App. 2001); 720 ILL. COMP. STAT. ANN. 5 / 7-4(b) (2012); IND. CODE § 35-41-3-2(g) (2020); State v. Badgett, 167 N.W.2d 680, 683 (Iowa 1969); KAN. STAT. ANN. §21-5226(b) (2020); KY. REV. STAT. ANN. § 503.060(2) (2019); LA. STAT. ANN. § 14:21 (2021); ME. REV. STAT. tit. 17-A, § 108(1) (2021); State v. Peterson, 857 A.2d 1132, 1147 (Md. Ct. Spec. App. 2004); Commonwealth v. Evans, 454 N.E.2d. 458, 463 (Mass. 1983); People v. Riddle, 649 N.W. 2d. 30, 38 (Mich. 2002); State v. Edwards, 717 N.W.2d 405, 410–11 (Minn. 2006); MISS. CODE ANN. § 97-3-15(4) (2021); MO. REV. STAT. § 563.031(1)(1)(a) (2016); MONT. CODE ANN. § 45-3-105(2) (2021); NEB. REV. STAT. § 28-1409(4) (2020); NEV. REV. STAT. § 200.200 (2020); N.H. REV. STAT. § 627:4 (2021); N.J. STAT. ANN. § 2C:3-4(2)(a) (West 2021); State v. Abeyta, 901 P.2d 164, 170–71 (N.M. 1995); N.Y. PEN. LAW § 35.15(1) (McKinney 2021); N.C. GEN. STAT. § 14-51.4(2) (2021); N.D. CENT. CODE § 12.1-05-03(2)(a) (2021); State v. Turner, 869 N.E.2d 708, 712 (Ohio Ct. App. 2007); Wilkie v. State, 242 P. 1057, 1059 (Okla. Crim. App. 1926); OR. REV. STAT. § 161.215 (2020); 18 PA. CONS. STAT. ANN. § 505(b)(2) (2021); State v. Guillemet, 430 A.2d 1066, 1068 (R.I. 1981); Jackson v. State, 586 S.E.2d 562, 563 (S.C. 2003); State v. Woods, 374 N.W.2d. 92, 97 (S.D. 1985); TENN. CODE ANN. § 39-11-611(b)(4)(e)(2) (2021); TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2021); UTAH CODE ANN. § 76-2-402(3)(a)(i) (LexisNexis 2021); State v. Trombley, 807 A.2d 400, 406–07 (Vt. 2002); Lynn v. Commonwealth, 499 S.E.2d 1, 9 (Va. Ct. App. 1998); State v. McConaghy, 146 P. 396, 397 (Wash. 1915); 11 WASH. PATTERN JURY INSTR. § 16.04; State v. Taylor, 50 S.E. 247, 251; WIS. STAT. § 939.48(2)(c) (2021)); WYO. STAT. ANN. § 6-2-602(e) (2021).

[63] In this Article, I use the term "initial aggressor" to include limitations on both provocateurs and initial aggressors. Despite obvious differences between the two categories, I include them both under the umbrella of initial aggressor rules because they share a key commonality: both provocateurs and initial aggressors lose the right to claim they acted justifiably in self-defense because of something they did to instigate the encounter that ended with physical violence being used against another person.

[64] *See infra* ___.

an initial aggressor. It then examines the various ways "initial aggressor" status can be triggered.

A. Categories of Initial Aggressors

Initial aggressors can be divided into three categories: (1) provocateurs or individuals who provoke their victims into physical violence and then counterattack, claiming they acted in self-defense, (2) initial aggressors, or simply aggressors, often defined as individuals who are the first to use or threaten physical force, and (3) individuals involved in mutual combat. Many states recognize only one of these categories,[65] some states recognize two categories,[66] and a few states recognize all three categories.[67] Some states conflate the categories,

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[65] For example, Delaware, Hawaii, Montana, Nebraska, New Jersey, Oklahoma, Pennsylvania, Texas, West Virginia, and Wisconsin appear to recognize only the provocateur with intent limitation on the defense of self-defense. *See* DEL. CODE ANN. tit. 11, § 464(c)(1) (2021); HAW. REV. STAT. § 703-304(5)(a) (2021); MONT. CODE ANN. § 45-3-105(2) (2021); NEB. REV. STAT. § 28-1409(4) (2020); N.J. STAT. ANN. § 2C:3-4(2)(a) (West 2021); Wilkie v. State, 242 P. 1057, 1059 (Okla. Crim. App. 1926); 18 PA. CONS. STAT. ANN. § 505(b)(2) (2021); TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2021); State v. Taylor, 50 S.E. 247, 251 (W. Va. 1905) (jury instruction "which told the jury the defendant could not justify the killing if he had brought on or begun the difficulty, although with no intent to kill or do bodily injury to the deceased, should have been refused" because "[a] man does not lose his right of self-defense unless he has done some wrongful act."); WIS. STAT. § 939.48(2)(c) (2021). California, Washington, DC, Idaho, Louisiana, Missouri, and the state of Washington appear to recognize only the initial aggressor with withdrawal limitation on the defense of self-defense. *See* People v. Gleghorn, 238 Cal. Rptr. 82, 85 (Cal. Ct. App. 1987); D.C. CRIM. JURY INSTR. § 9.504 (2020); State v. Turner, 38 P.3d 1285, 1290-91 (Idaho Ct. App. 2001); LA. STAT. ANN. § 14:21 (2021); MO. REV. STAT. § 563.031(1)(1)(a) (2016); State v. McConaghy, 146 P. 396, 397 (Wash. 1915). Arizona, Florida, Massachusetts, Minnesota, North Carolina, Tennessee, and Virginia appear to have adopted a blend of provocation and initial aggressor rules, using provocation language without requiring intent and including the withdrawal language typically seen in initial aggressor provisions. ARIZ. REV. STAT. ANN. §13-404(B)(3)(a)–(b) (2021); FLA. STAT. ANN. § 776.041(2) (2020); Commonwealth v. Evans, 454 N.E.2d. 458, 463 (Mass. 1983); State v. Edwards, 717 N.W.2d 405, 410–11 (Minn. 2006); N.C. GEN. STAT. § 14-51.4(2) (2021); TENN. CODE ANN. § 39-11-611(b)(4)(e)(2) (2021); Lynn v. Commonwealth, 499 S.E.2d 1, 9 (Va. Ct. App. 1998).

[66] Arkansas, Connecticut, Illinois, Kansas, Kentucky, Maine, New Hampshire, New York, Oregon, and Utah appear to recognize both the provocation with intent and initial aggressor with withdrawal categories. *See, e.g.*, ARK. CODE ANN. § 5-2-606(b)(1) (2021); CONN. GEN. STAT. ANN. § 53a-19(c) (2019); 720 ILL. COMP. STAT. ANN. 5/7-4(b) (2012); KAN. STAT. ANN. §21-5226(b) (2020); KY. REV. STAT. ANN. § 503.060(2) (2019); ME. REV. STAT. tit. 17-A, § 108(1) (2021); N.H. REV. STAT. § 627:4 (2021); N.Y. PEN. LAW § 35.15(1) (McKinney 2021); OR. REV. STAT. § 161.215 (2020); UTAH CODE ANN. § 76-2-402(3)(a)(i) (LexisNexis 2021).

[67] Alabama, Colorado, Georgia, Indiana, New Mexico, and North Dakota recognize all three categories of initial aggressor status: (1) provocation with intent, (2) initial aggressor with withdrawal provision, and (3) mutual combat. *See, e.g.,* ALA. CODE § 13A-3-23(c) (2021) ("a person is not justified in using physical force if: (1) With intent to cause physical injury or death to another person, he or she provoked the use of unlawful physical force by such other person, (2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force, [or] (3) The physical force involved was the product of a combat by agreement not specifically authorized by law"); COLO. REV. STAT. ANN. § 18-1-704 (3) (a)–(c) (2020) ("a

describing aggressors as individuals who provoke.[68] Regardless of which category or set of categories a state embraces, the bottom line is that a criminal defendant who is considered an initial aggressor usually loses the right to claim self-defense.[69]

1. Provocateurs

person is not justified in using physical force if: (a) With intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or He or she is the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force; [or] (c) The physical force involved is the product of a combat by agreement not specifically authorized by law"); GA. CODE ANN. § 16-3-21(b) (2020) ("[a] person is not justified in using force . . . if he: (1) [i]nitially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; . . . or (3) [w]as the aggressor or was engaged in a combat by agreement unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other, notwithstanding, continues or threatens to continue the use of unlawful force."); IND. CODE § 35-41-3-2(g) (2020) ("a person is not justified in using [reasonable] force if: (2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or (3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action"); N.D. CENT. CODE § 12.1-05-03(2)(a) (2021) ("A person is not justified in using force if: a. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other person; or b. He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances"). While New Mexico case law suggests a recognition of both the initial aggressor category, *see* State v. Abeyta, 901 P.2d 164, 170–71 (N.M. 1995) ("the claim of self-defense may fail if the defendant was the aggressor or instigator of the conflict . . ."), and the provocation category, *see* State v. Chavez, 661 P.2d 887, 889 (N.M. 1983) stating that "[t]he rule is well established in this jurisdiction that a defendant who provokes an encounter, as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot avail himself of the claim that he was acting in self-defense"), New Mexico's uniform jury instruction reflects all three variations of the initial aggressor limitation, providing that the defendant is the initial aggressor if the defendant "started the fight," "agreed to fight," or "intentionally provoked a fight in order to harm victim." NM REV. COURT RULES UNIFORM JURY INSTRUCTIONS § 14-5191 (West) (2020). New Mexico places the burden on the state to prove beyond a reasonable doubt that the defendant was the initial aggressor. *Id.*

[68] Iowa, Maryland, Ohio, Rhode Island, South Carolina, South Dakota, Vermont, and Alaska appear to conflate the provocation and initial aggressor categories. *See, e.g.*, State v. Badgett, 167 N.W.2d 680, 683 (Iowa 1969) ("[t]o justify homicide on the ground that it was committed in self-defense, four elements must be present: (1) the slayer must not be the aggressor in provoking or continuing the difficulty that resulted in the homicide; (2) he must retreat as far as is reasonable and safe before taking his adversary's life, except in his home or place of business; (3) he must actually and honestly believe he is in imminent danger of death or great bodily harm and that the action he takes is necessary for self-preservation—this danger need not be real, but only thought to be real in the slayer's mind, acting as a reasonable prudent person under the circumstances; (4) he must have reasonable grounds for such belief"); State v. Peterson, 857 A.2d 1132, 1147 (Md. Ct. Spec. App. 2004) (noting that for perfect self-defense, the person "claiming the right of self-defense must not have been the aggressor or provoked the conflict").

[69] Some states allow an individual who is an initial nondeadly aggressor to regain the right to self-defense if the other person responds to their nondeadly force with deadly force. *See infra* text accompanying note 116. Many states permit an initial aggressor to regain the right to act in self-defense if they successful withdraw from the conflict and communicate their withdrawal to the other person. *See infra* note ____.

One type of initial aggressor is an individual who provokes another person into attacking him so he can attack that other person and claim he acted in self-defense. These individuals are called provocateurs.

Kimberly Kessler Ferzan is one of the few legal scholars who has written about provocateurs.[70] To illustrate why provocateurs lose the right to claim self-defense, Ferzan provides an example of a person who provokes others into violence and then uses their attack as an excuse to kill them:

> Imagine a funeral ceremony with hundreds of mourners for a widely respected African-American civil rights leader. A white supremacist appears at the church and begins shouting nonthreatening, racial epithets. Enraged mourners rush the person, who pulls out a concealed gun and kills several of them.[71]

Ferzan notes that "[a]cross jurisdictions, the white supremacist's . . . claim[] of self-defense will likely fail."[72] This is because as a general matter, "when one intentionally provokes another, . . . the provocateur is barred from using deadly force to defend himself from the attack that he provoked."[73]

Not much is required to qualify as provocation sufficient to remove the ability to claim self-defense.[74] In contrast to the treatment of aggressors for whom mere words are usually insufficient for initial aggressor status,[75] insulting or offensive words can serve as the basis for a claim that the defendant provoked another into violence and thus is barred from claiming self-defense.[76] For example, in *Scott v. Commonwealth*, the Virginia Supreme Court barred the defendant from claiming self-defense because the defendant's insulting words—calling the victim's father a bootlegger and a gambler—with the intent of goading the victim into attacking him so he could kill the victim led to

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[70] Ferzan, *Provocateurs*, *supra* note 42.
[71] This hypothetical comes from a concurring opinion in an actual case. *Id.* at 598, citing State v. Riley, 976 P.2d 624, 631 (Wash. 1999) (en banc) (Talmadge, J. concurring).
[72] *Id.*
[73] *Id.*
[74] Brooks, *supra* note 42, at 541(explaining that "the term 'provocateur' is a term of art that describes someone who uses language or conduct that is non-threatening and nonviolent . . . to intentionally incite (or provoke) an attack so that the provocateur may then have a pretext for killing the other in ostensibly lawful self-defense").
[75] *See, e.g.*, State v. Jones, 128 A.3d 431, 452 (Conn. 2015) ("[T]he mere use of offensive words, without more, is insufficient to qualify a defendant as the initial aggressor") ; People v. Gordon, 223 A.D.2d 372, 373, (N.Y.S. 1st Dept. 1996) ("The court properly instructed the jury that the concept of 'initial aggressor' did not encompass mere insults as opposed to threats"); State v. Riley, 976 P.2d 624, 628-29 (Wash 1999) (noting that the mere use of words alone to provoke do not establish the defendant as a provocateur or aggressor).
[76] *See, e.g.*, Elizondo v. State, 487 S.W.3d 185, 198 (Tex. Crim. App. 2016) ("Words alone may provoke the difficulty, thereby justifying a provocation charge").

the killing.[77] In *People v. Santiago,* prosecution "witnesses testified defendant shouted hostile gang slogans, made antagonistic gang signals and then began shooting," which the Illinois court found "constituted evidence that defendant was the aggressor."[78] If hostile words and verbal insults are sufficient to eliminate one's ability to claim self-defense, surely displaying a firearm in a threatening manner or pointing a firearm at another person should be sufficient to remove one's ability to claim self-defense as well.

Perhaps because so little is required in terms of conduct to qualify as a provocateur, states that preclude provocateurs from claiming self-defense often impose a mens rea requirement before a defendant seeking to assert the defense of self-defense can be considered a provocateur.[79] In these jurisdictions, the defendant must

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[77] 129 S.E. 360, 361-62 (Va. 1925) ("one who applies to another the most vile and opprobrious epithet known to mankind, and thus brings on the combat, should not be permitted to justify the killing of another in resisting an assault so provoked on the ground of necessity").

[78] People v. Santiago, 515 N.E.2d 228, 234 (Ill. Ct. App. 1987).

[79] *See, e.g.*, DEL. CODE ANN. tit. 11, § 464 (c) (1) (2021); HAW. REV. STAT. § 703-304(5)(a) (2021) (deadly force is not justifiable if, "(a) [t]he actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter"); MONT. CODE ANN. § 45-3-105(2) (2021)(the justification of self-defense "is not available to a person who: (2) purposely or knowingly provokes the use of force against the person, unless: (a) the force is so great that the person reasonably believes that the person is in imminent danger of death or serious bodily harm and that the person has exhausted every reasonable means to escape the danger other than the use of force that is likely to cause death or serious bodily harm to the assailant; or (b) in good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that the person desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force"); NEB. REV. STAT. § 28-1409(4) (2020) (A person cannot justify the use of deadly force with self-defense if "(a) [t]he actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter or (b) [t]he actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that: (i) [t]he actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be."); N.J. STAT. ANN. § 2C:3-4(2)(a) (West 2021); Wilkie v. State, 242 P. 1057, 1059 (Okla. Crim. App. 1926) ("[a]n individual is not permitted to provoke willingly or knowingly a difficulty, and then, when the difficulty has resulted in his slaying an unarmed antagonist, justify such slaying on the ground of self-defense"); 8 PA. CONS. STAT. ANN. § 505(b)(2) (2021) ("[t]he use of deadly force is not justifiable . . . if: (i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be"); State v. Taylor, 50 S.E. 247, 251 (W. Va. 1905) (holding that jury instruction "which told the jury the defendant could not justify the killing if he had brought on or begun the difficulty, although with no intent to kill or do bodily injury to the deceased, should have been refused"); WIS. STAT. § 939.48(2)(c) (2021) ("[a] person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense"). While Texas' self-defense statute does not appear to require an intent to provoke, TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2021) ("[t]he use of force against another is not justified: (4) if the actor provoked the other's use or attempted use of unlawful force . . ."), case law in Texas appears to require such intent. *See* Mason v.

have acted with the intent or purpose of getting the other person to be the first to use physical force so the defendant could kill or injure the other person and then claim self-defense. For example, Delaware's self-defense statute provides, "The use of deadly force is not justifiable . . . if . . . [t]he defendant, *with the purpose of* causing death or serious physical injury, *provoked the use of force* against the defendant in the same encounter."[80] Similarly, New Jersey prohibits the justification of self-defense "if . . . [t]he actor, *with the purpose of* causing death or serious bodily harm, *provoked the use of force* against himself in the same encounter."[81]

In common law states, an individual acts intentionally if their conscious object was to cause the social harm or engage in the prohibited act.[82] The Model Penal Code uses the term "purposely" in lieu of intent but defines the term similarly. Under the Model Penal Code, "[a] person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . ."[83]

Because it is so challenging to prove an actor's intent to do a specific thing or achieve a specific result,[84] it is rare for a defendant to

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State, 228 S.W. 952, 954–55 (Tex. Crim. App. 1921) ("Before a party's right of self-defense can be impaired or limited by the issue of provoking the difficulty, three things must concur: (1) He must have intended to provoke his adversary to make the first overt act; (2) he must do or say something, one or both, with the intention of bringing about that result; and (3) the things that he does or says must be reasonably calculated to and do effect that object").

[80] DEL. CODE ANN. tit. 11, § 464 (c) (1) (2021) (emphasis added).

[81] N.J. STAT. ANN. § 2C:3-4(2)(a) (West 2021) (emphasis added). New Jersey also provides that an individual "is not obliged to retreat from his dwelling, unless he was the initial aggressor." N.J. STAT. ANN. § 2C:3-4(2)(b) (West 2021).

[82] State v. Hill, 408 S.W.3d 820, 822 (Mo. Ct. App. 2013) ("A person acts purposely or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result."); State v. Rothacher, 901 P.2d 82, 84 (Mont. 1995) ("A person acts purposely with respect to a result when it is his or her conscious object to cause that result."); Ta v. State, 459 S.W.3d 325, 328 (Ark. Ct. App. 2015) ("A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause the result.").

[83] MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST., Proposed Official Draft 1962).

[84] U.S. v. Camick, 796 F.3d 1206, 1220 (10th Cir. 2015)) ("Proving intent is often a difficult task…."); Eberhart v. State, 526 S.E.2d 361, 363 (Ga. Ct. App. 1999) ("It is often difficult to prove with direct evidence an individual's intent as it existed at the time of the act for which they are being prosecuted."). *See also* Colin Maher, *Crisis Not Averted: Lack of Criminal Prosecutions Leave Limited Consequences For Those Responsible For the Financial Crisis*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459, 466 (2013) ("One of the most difficult problems when attempting to obtain a conviction in a criminal prosecution is proving a defendant's intent."). In recognition of the fact that it is often impossible to prove an actor's intent, courts have adopted legal shortcuts in murder cases, allowing the jury to infer an intent to kill in certain cases where the prosecution may have difficulty proving the defendant intended to kill. For example, under what is known as the Deadly Weapon Rule, the jury may infer an intent to kill if the defendant killed the victim with a deadly weapon aimed at a vital part of the victim's body. *See* Couser v. State, 157 A.2d 426, 427 (Md. 1960) ("The use of a deadly weapon directed at a vital part of the body is a circumstance which indicates a design to kill"); Sharma v. State, 56 P.3d 868, 875 (Nev. 2002) ("a specific intent to kill may be inferred from . . . the intentional use of a deadly weapon upon the person of another at a vital part."); Commonwealth v. Green, 144 A. 743, 747 (Penn. 1929) ("where one . . . unlawfully kills another by the use of a deadly weapon

be deemed the initial aggressor in a state with a "provoke with intent" type of initial aggressor rule. A defendant can always take the stand and testify that it was not his intent to provoke the victim to physical violence and if the victim is dead, there will be no one to counter the defendant's story. A judge who gives the jury an initial aggressor provocateur instruction in a state that requires proof that the defendant provoked the victim into physical violence with intent to cause death or serious bodily injury to the victim also runs the risk of being reversed on appeal. An appellate court can always reverse the trial court on the ground that there was insufficient proof of the required intent to provoke.[85]

Perhaps in recognition of the difficulty of proving that an individual claiming self-defense acted with the purpose of provoking the other person into attacking him to give the individual a reason to kill or injure the other person, some states impose provocateur status on one who acts either purposely or knowingly. For example, in Montana, the justification of self-defense "is not available to a person who . . . purposely or knowingly provokes the use of force."[86] Similarly, in Oklahoma, "[a]n individual is not permitted to provoke willingly or knowingly a difficulty, and then, when the difficulty has resulted in his slaying an unarmed antagonist, justify such slaying on the ground of self-defense."[87]

A minority of states use provocation language in their self-defense statutes without requiring any type of mens rea.[88] For example,

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upon a vital part with a manifest intent so to use it, the presumption of fact arises, in the absence of qualifying circumstances, that he intended the consequence of his act and to kill his victim"). Under the natural and probable consequences doctrine, the jury may infer an intent to kill in cases if death was the natural and probable consequence of the defendant's actions. Keller v. People, 387 P.2d 421, 424 (Colo. 1963) ("an accused is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed."); Nichols v. State, 517 S.W.3d 404, 412 (Ark. 2017) ("a person is presumed to intend the natural and probable consequences of his actions."); State v. Copeland, 530 So.2d 526, 539 (La. 1988) ("the preferable instruction is 'you may infer that the defendant intended the natural and probable consequences of his acts. . . .'").

[85] *See, e.g.*, Elizondo v. State, 487 S.W.3d 185 (Tex. Crim. App. 2016) (finding that trial court erred in giving the jury a provocateur instruction because the evidence was insufficient to support a finding that defendant acted with an intent to harm the victim and create a pretext to shoot him in self-defense despite significant evidence that defendant was the one who started the affray). The Texas Court of Appeals was probably correct as a matter of law to conclude that there was insufficient evidence that Elizondo acted with an intent to create a pretext so he could shoot the victim and then claim self-defense. Proving that the defendant had this intent would be difficult, if not impossible, to satisfy in any case, which is why the intent requirement renders the provocation limitation on the defense of self-defense meaningless in most cases.

[86] MONT. CODE ANN. § 45-3-105(2) (West 2021).

[87] Wilkie v. State, 242 P.2d 1057, 1059 (Okla. Crim. App. 1926) (noting that "'[t]o provoke the difficulty' has been defined as willingly and knowingly using some language or doing some act after meeting the antagonist reasonably calculated to lead to the deadly conflict.").

[88] *See, e.g.*, ARIZ. REV. STAT. ANN. §13-404 (B) (3) (a) & (b) (2021) ("The threat or use of physical force against another is not justified . . . 3. If the person provoked the other's use or attempted use of unlawful physical force, unless: (a) The person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter, and (b) The other nevertheless continues or attempts to use unlawful physical force against the person"); FLA. STAT. ANN. § 776.041(2)

Michigan denies the defense of self-defense to anyone who "provoke[ed] the difficulty in which he finds it necessary to use deadly force."[89] Many of the states that use provocation language in their self-defense statutes without an intent requirement allow the provocateur to regain right to claim self-defense if they withdraw from the encounter or communicated an intent to withdraw and the other person persists in using physical force against them.[90] Jurisdictions that use provocation language without an intent requirement, particularly those that include withdrawal language, are almost indistinguishable from jurisdictions that use initial aggressor or aggressor language in their self-defense provisions.

To make things even more confusing, some states use provoke with intent language and include a withdrawal provision, allowing a provocateur who provokes with the intention of causing death or serious physical injury to regain the right to act in self-defense if he withdraws from the fight and gives adequate notice of his withdrawal thus combining aspects from the usual provocation and aggressor provisions. Wisconsin, for example, provides by statute that "[a] person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily

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(2020) (providing that the justification of self-defense "is not available to a person who: (2) [i]nitially provokes the use or threatened use of force against himself or herself, unless: (a) [s]uch force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or (b) [i]n good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force."); Commonwealth v. Evans, 454 N.E.2d. 458, 463 (Mass. 1983) ("the right of self-defense ordinarily cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire") (quoting Commonwealth v. Maguire, 378 N.E.2d 445, 448 (1978)); State v. Edwards, 717 N.W.2d 405, 410–11 (Minn. 2006) ("the absence of aggression or provocation by the actor is required before self-defense may be claimed") (citing State v. Thompson, 544 N.W.2d 8, 12 (Minn. 1996)); State v. Edwards, 717 N.W.2d 405, 411 (Minn. 2006) (noting that "if an aggressor withdraws from the conflict and communicates that withdrawal, expressly or impliedly, the right to claim self-defense is restored") (citing Bellcourt v. State, 390 N.W.2d. 269, 272 (Minn. 1986)); N.C. GEN. STAT. § 14-51.4(2) (2021) (the justification of self-defense "is not available to a person who used defensive force and who: (2) [i]nitially provokes the use of force against himself or herself"); TENN. CODE ANN. § 39-11-611(b)(4)(e)(2) (2021) (the threat or use of force against another is not justified "[i]f the person using force provoked the other individual's use or attempted use of unlawful force, unless: (A) [t]he person using force abandons the encounter or clearly communicates to the other the intent to do so; and (B) [t]he other person nevertheless continues or attempts to use unlawful force against the person").

[89] State v. Richardson, 670 N.W.2d 267, 278 (Minn. 2003).

[90] For example, Arizona's self-defense statute provides that "The threat or use of physical force against another is not justified . . . [i]f the person provoked the other's use or attempted use of unlawful physical force, unless: (a) The person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter, and (b) The other nevertheless continues or attempts to use unlawful physical force against the person." ARIZ. REV. STAT. ANN. §13-404 (B) (3) (a) & (b) (2021).

harm to his or her assailant is not entitled to claim the privilege of self-defense,"[91] but goes on to provide that "(b) [t]he privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his or her assailant."[92] Withdrawal language is usually found in aggressor provisions,[93] not provocation provisions.

2. Aggressors

A second category of individuals who can lose the right to claim self-defense by their actions is the aggressor, also known as the initial aggressor. An initial aggressor is generally understood as an individual who initiates the physical confrontation by using or threatening physical force.[94] As a general matter, aggressors lose the right to claim self-defense unless they withdraw from the conflict and communicate their intent to withdraw to the other person who nonetheless attacks.[95]

Unlike statutory provisions or case law that utilize the language of provocation and require an intent to cause the victim physical injury or death before the defendant can be precluded from claiming self-defense, states that utilize aggressor language tend *not* to specify a mens rea that must be present for one to be deemed an initial aggressor.[96] One can be deemed an aggressor through one's conduct alone.

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[91] WIS. STAT. § 939.48(2)(c) (2021).
[92] WIS. STAT. § 939.48(2)(b) (2021).
[93] *See infra* note 95.
[94] State v. Morse, 498 S.W.3d 467, 472 (Mo. Ct. App. 2016) ("An initial aggressor is one who first attacks or threatens to attack another") (quoting State v. Hughes, 84 S.W.3d 176, 179 (Mo. App. 2002)).
[95] *See* People v. Gleghorn, 238 Cal. Rptr. 82, 85 (Cal. Ct. App. 1987) ("if one makes a felonious assault upon another, or creates appearances justifying the other to launch a deadly counterattack in self-defense, the original assailant cannot slay his adversary in self-defense unless he has first, in good faith, declined further combat, and has fairly notified him that he has abandoned the affray"); U. S. v. Peterson, 483 F.2d 1222, 1231 (D.C. Cir. 1973) ("one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation [unless] he communicates to his adversary his intent to withdraw and in good faith attempts to do so"); State v. Turner, 38 P.3d 1285, 1290-91 (Idaho Ct. App. 2001) ("A person is not entitled to claim self-defense or justify a homicide when he or she was the aggressor or the one who provoked the altercation in which another person is killed, unless such person in good faith first withdraws from further aggressive action"); LA. STAT. ANN. § 14:21 (2021) ("[a] person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict") ; MO. REV. STAT. § 563.031(1)(1)(a) (2016) ("[a] person . . . may use physical force . . . unless: (1) The actor was the initial aggressor; except that in such case his or her use of force is nevertheless justifiable provided (a) [h]e 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."); State v. McConaghy, 146 P. 396, 397 (Wash. 1915) ("An accused person who is an aggressor in an affray, or by acts or words provokes or brings on an affray, cannot invoke the doctrine of self-defense or be justified in shooting to prevent injury, unless before such shooting, such aggressor in good faith sought and endeavored to withdraw from and abandon the conflict").
[96] *See, e.g.*, LA. STAT. ANN. § 14:21 (2021) ("[a] person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict

Additionally, unlike states that use the language of provocation to limit the defense of self-defense, many states that use aggressor language to limit self-defense provide that insulting or offensive words are not sufficient to make one an initial aggressor. In New York, for example, mere insults as opposed to threats are not sufficient to make one an initial aggressor.[97] Similarly, in Connecticut, mere use of offensive words without more is insufficient to make one the initial aggressor.[98] Some states, however, allow mere words to qualify one as the initial aggressor.[99]

In jurisdictions that utilize aggressor language, it is often difficult to predict whether a defendant will be deemed an initial aggressor because most self-defense statutes do not define the term "aggressor," leaving it to the courts to decide whether a particular defendant was the aggressor and thus should lose he right to claim self-defense. As discussed in more detail below, courts are not uniform in the ways they define an initial aggressor.[100] As a result, two similarly situated defendants can be treated very differently. Even if both defendants engaged in the exact same behavior, one might be precluded from arguing self-defense while the other might be allowed to argue self-defense.

3. Individuals Engaged in Mutual Combat

Some states recognize a third way an individual can lose the right to claim justifiable self-defense. In these states, individuals can lose the right to act in self-defense if they were involved in mutual combat.[101] In states with a mutual combat provision, if A and B agree to engage in combat, both A and B would be considered initial aggressors, and both would lose the right to claim they were acting in self-defense.

Some states require an antecedent agreement to fight before a court can limit a defendant's right to claim self-defense due to mutual

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in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict"); MO. REV. STAT. § 563.031(1)(1)(a) (2016) ("[a] person . . . may use physical force . . . unless: (1) The actor was the initial aggressor; except that in such case his or her use of force is nevertheless justifiable provided . . . (a) [h]e 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."); State v. Woods, 374 N.W.2d. 92, 97 (S.D. 1985) ("[g]enerally, the aggressor, or the one who produces the circumstances which make it necessary to take another's life, is not entitled to assert self-defense.").

[97] People v. Gordon 223 A.D.2d 372, 373 (N.Y. App. Div. 1996) ("The court properly instructed the jury that the concept of 'initial aggressor' did not encompass mere insults as opposed to threats").

[98] State v. Jones, 128 A.3d 431, 452 (Conn. 2015).

[99] People v. Dunlap, 734 N.E.2d 973, 981 (Ill. App. Ct. 2000) ("Even the mere utterance of words may be enough to qualify one as an initial aggressor").

[100] *See infra* text accompanying notes 104-111.

[101] *See, e.g.,* ALA. CODE § 13A-3-23(c) (2021); COLO. REV. STAT. ANN. § 18-1-704 (3)(c) (2020); GA. CODE ANN. § 16-3-21(b)(3) (2020); IND. CODE § 35-41-3-2(g)(3) (2020); N.D. CENT. CODE § 12.1-05-03(2)(b) (2021).

combat.[102] Other states limit mutual combat to cases in which the parties are armed with deadly weapons.[103]

B. No Uniform Definition of "Initial Aggressor"

If one looks for a standard definition of "initial aggressor," one is unlikely to find uniformity. Wayne LaFave broadly defines an "initial aggressor" as "one who brings about the difficulty with the other."[104] Joshua Dressler, in contrast, defines an "initial aggressor" more narrowly as one whose "affirmative unlawful act [is] reasonably calculated to produce an affray foreboding injurious or fatal consequences."[105]

Some states define the initial aggressor as simply the first person to use physical force or the first person to attack. California's standard jury instruction on self-defense, mutual combat or initial aggressor, for example, suggests that an initial aggressor is a person "who starts a fight."[106] Defining the initial aggressor as the first person to use physical force, however, is underinclusive because it would not capture an individual who, for no good reason, points a gun at an unarmed person and threatens to shoot, causing the other person to punch him. Under a definition that requires the initial aggressor to be the first person to use physical force, the puncher would be the initial aggressor because he was the first person to use physical force, even though the individual who threatened to shoot should be considered the initial aggressor since he was the one who started the confrontation.

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[102] Eckhardt v. People, 247 P.2d 673, 676 (Colo. 1952)) ("An agreement to combat and finish their troubles must exist and must be in the nature of an antecedent agreement to so fight"); Carson v. State, 230 S.W. 997, 998 (Tex. 1921) ("The issue of mutual combat as a limitation upon the right of self-defense does not arise alone from the fact that the parties to the affray are mutually engaged in it. The issue arises out of an antecedent agreement to fight. The agreement must exist").

[103] Flowers v. State, 247 S.E.2d 217, 218 (Ga. Ct. App. 1978) ("Mutual combat usually arises when the parties are armed with deadly weapons and mutually agree or intend to fight with them. Mutual combat does not mean a mere fist fight or scuffle."), *citing* Grant v. State, 170 S.E.2d 55 (Ga. Ct. App. 1969).

[104] WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW, 2 SUBST. CRIM. L. § 10.4(e) (3d ed.), *citing* State v. Jones, 128 A.3d 431, 452 (Conn. 2015).

[105] DRESSLER, *supra* note 49, § 18.01[B][1] 214 (8th ed. 2018), *citing* United States v. Peterson, 483 F.2d 1222, 1223 (D.C. Cir. 1973).

[106] CALCRIM No. 3471, which is entitled "Right to Self-Defense: Mutual Combat or Initial Aggressor," starts by providing, "A person who (engages in mutual combat/ [or who] starts a fight) has a right to self-defense only if . . .," suggesting that an initial aggressor is a person who starts a fight. *See also* In re Christian S., 7 Cal.4th 768, 773, fn. 1 (Cal. 1994) ("It is well established that the ordinary self-defense doctrine—applicable when a defendant reasonably believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., *the initiation of a physical assault* or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified") (emphasis added), *citing* 1 WITKIN & EPSTEIN, CAL. CRIMINAL LAW, Defenses, § 245 at 280 (2d ed. 1988); 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 131(b)(2) at 74–75 (1984).

In most states, being the first person to use physical force is not a necessary condition for initial aggressor status.[107] One who threatens to use physical force without justification upon another can usually be considered the initial aggressor even if the other person was the first person to actually use physical force. For example, Connecticut recognizes that the initial aggressor is not necessarily the first person to use physical force but rather is "the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used."[108] Under this definition, if A raises his hand and verbally threatens to slap B and B responds by punching A, A can be considered the initial aggressor even though B was the first person to use physical force.

Some jurisdictions impose an unlawful act requirement before one can be deemed an aggressor. For example, the D.C. Circuit has stated that an aggressor is one who engages in "an affirmative *unlawful* act reasonably calculated to produce an affray foreboding injurious or fatal consequences."[109] In requiring the defendant to have engaged in an unlawful act, these jurisdictions substantially limit the number of actors who can be considered initial aggressors. There are many things one can do without necessarily breaking the law that might cause another person to respond with violence.[110] For example, an individual in a state that freely allows the open carry of firearms could threaten another person by showing that person that he is carrying a firearm. If such conduct is not prohibited by statute, the person would not qualify as an initial aggressor even if he was in fact the one who initiated the conflict.[111]

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[107] DRESSLER, *supra* note 49, §18.01[B] at 215 (noting that "it is incorrect to state that the first person who uses force is always the aggressor"). *See also* State v. Jimenez, 636 A.2d 782, 785 (Conn. 1994) ("It is not the law . . . that the person who first uses physical force is necessarily the initial aggressor").

[108] State v. Jones, 128 A.3d 431, 452 (Conn. 2015).

[109] *See* United States v. Peterson, 483 F.2d 1222, 1223 (D.C. Cir. 1973).

[110] For example, if Patricia McCloskey had been prosecuted in a state that requires an initial aggressor to be acting unlawfully and law enforcement had not discovered that the gun she pointed at protesters was operable at one time and then altered to make it inoperable, she would be able to escape initial aggressor status. McCloskey was charged under section 4 of the unlawful use of a weapon statute, which requires that the weapon in question be capable of lethal use. MO. ANN. STAT. § 571.030 (4) (West 2020) (prohibiting the exhibiting a weapon capable of lethal use in an "angry or threatening manner."). The McCloskeys "told police the pistol was inoperable." Christine Byers, *Indictments show St. Louis prosecutors allege McCloskeys altered gun to "obstruct" prosecution*, KSDK (updated Oct. 9, 2020), https://www.ksdk.com/article/news/crime/indictments-show-st-louis-prosecutors-allege-mccloskeys-altered-gun-to-obstruct-prosecution/63-7eb9928d-1ff5-4033-86e2-c8ce387792f2 (https://perma.cc/D8KD-Q27K). Law enforcement authorities later discovered that the gun was inoperable because someone had altered it to make it inoperable. *Id.* Consequently, "tampering with evidence" charges were added to the "unlawful use of a weapon" charges against the McCloskeys. *Id.*

[111] Such threats in open-carry environments have been noted as tools of intimidation used by white supremacists and others. *See, e.g.*, David Frum, *The Chilling Effects of Openly Displayed Firearms*, THE ATLANTIC (Aug. 16, 2017), https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-mean-charlottesville-could-have-been-graver/537087/ (https://perma.cc/4SZ6-FNUT); *Prohibit Open Carry*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/solutions/prohibit-open-carry/.

Some jurisdictions are very minimalistic in defining those who will be considered initial aggressors and simply impose a clean hands rule, providing that one who is not "free from fault" will lose the right to claim self-defense.[112] A "free from fault" rule can be interpreted very broadly and make it very easy for someone to be considered an initial aggressor. A could mutter a snide remark about B under his breath, and B, a hot-headed individual might respond by viciously attacking A with a knife, causing A to have to defend himself. A, who arguably brought about the difficulty by muttering the snide remark under his breath and was not free from fault in bringing on the difficulty, could be denied the ability to claim he acted in self-defense in a state that requires one to be free from fault.

Most courts recognize there can be more than one "initial aggressor" in a conflict.[113] There are at least two ways in which there can be more than one initial aggressor in a conflict. First, the victim could be the first to use nondeadly force, and thus be considered an initial nondeadly aggressor,[114] and the defendant might respond with deadly force, making the defendant the initial deadly aggressor.[115] The initial nondeadly aggressor will often have the right to use deadly force in self-defense if the other person reacted to his use or threat of nondeadly force with deadly force.[116] Second, there can be two deadly

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[112] *See, e.g.,* Jackson v. State, 993 So. 2d 45, 47 (Ala. Crim. App. 2007) ("Generally, the party invoking the doctrine of self-defense must be 'entirely free' from fault") (citing Kilgore v. State, 643 So. 2d 1015, 1018 (Ala. Crim. App.1993); Brewer v. State, 49 So. 336, 338 (Ala. 1909) ("the accused must be wholly free from fault in provoking the difficulty"); State v. Zamora, 681 P.2d 921, 924 (Ariz. Ct. App. 1984) ("One who is at fault in provoking a difficulty which necessitates his use of force may not rely upon a plea of self-defense to justify or excuse his conduct"); State v. Stevenson, 188 A. 750, 751 (Del. Oyer & Term. 1936) (noting that one who kills another, to be justified or excused, must have been without fault in provoking the difficulty). Somewhat similarly, Louisiana defines an aggressor as one "who brings on a difficulty." LA. REV. STAT. §14:21 (2020) ("[a] person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.") (emphasis added).

[113] People v. Peterson, 652 N.E.2d 1252, 1261-62 (Ill. Ct. App 1995) (finding defendant and victim "were both aggressors"); Farrow v. State, 437 P.3d 809 (Wyo. 2019) ("in addition to [defendant] or [victim] being the first aggressor, it is possible that they were both aggressors or that neither one was. . . [I]f both were aggressors, '[o]ur case law also provides that two individuals who mutually agree to fight are both considered aggressors, making a self-defense theory unavailable to either of them.'").

[114] DRESSLER, *supra* note 49, §18.01[B][1] at 215 (noting that "a person is an aggressor even if he merely starts a *non*deadly conflict").

[115] *Id.* at §18.01[B][2][b] 215-16 (noting that where D wrongfully attempts nondeadly force upon V and V improperly responds with deadly force, courts are not uniform as to whether the initial nondeadly aggressor immediately regains the right to act in self-defense). For example, in People v. De Oca, 506 N.E.2d 332 (Ill. App. 1992), the appellate court acknowledged that "the victim and his cousin, Jesus Delgadello, instigated the initial confrontation." Id. at 367. After the fist fight ended, however, the defendant displayed a loaded shotgun, shouted at the crowd, and then shot the victim. Id. at 368. The appellate court found that "the trial court did not err in finding that the defendant was the aggressor at the time of the shooting." *Id.*

[116] *See* DRESSLER, *supra* note 49, § 18.02[B][2][b] (noting that "[s]ome courts provide that when the victim of a nondeadly assault responds with deadly force, the original aggressor immediately regains his right of self-defense" while other courts say that "D is not entitled

initial aggressors if, for example, both the defendant and the victim use or threaten deadly force upon the other[117] or agree to engage in mutual combat.[118] One court, however, has suggested that there can only be one "initial aggressor" to a conflict.[119]

C. Standard of Proof Necessary to Get an Initial Aggressor Instruction to the Jury

Very little has been written on the standard of proof needed for a jury instruction on the initial aggressor limitation on the defense of self-defense. Those courts that have opined on this issue appear to impose a fairly low bar. For example, Colorado courts apply the same standard for the giving of an initial aggressor instruction that is required for the giving of a jury instruction on an affirmative defense, requiring just "some evidence" to support an initial aggressor instruction.[120] Missouri courts have stated that "[t]he only time an initial aggressor instruction should *not* be given is when there is absolutely *no evidence* that the defendant was the initial aggressor.[121] Similarly, Illinois courts have indicated that courts should give the jury an initial aggressor instruction along with an instruction on self-defense whenever there is conflicting evidence regarding whether the defendant was the initial aggressor because this enables the jury "to resolve the issue on either hypothesis."[122]

D. Jury Decides Whether the Defendant Was the Initial Aggressor and Loses the Right to Claim Self-Defense

It appears undisputed that whether the defendant was the initial aggressor is a question of fact for the jury to decide.[123] Nonetheless, the

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to use deadly force against V unless and until he withdraws from the affray by availing himself of an obviously safe retreat").

[117] ALA. CODE § 13A-3-23(c) (2021); COLO. REV. STAT. ANN. § 18-1-704 (3)(c) (2020); GA. CODE ANN. § 16-3-21(b)(3) (2020); IND. CODE § 35-41-3-2(g)(3) (2020); N.D. CENT. CODE § 12.1-05-03(2)(b) (2021).

[118] *See supra* text accompanying notes 101-103.

[119] People v. Beasley, 778 P.2d 304 (Colo. App. Ct 1989) (providing that it was error to give an initial aggressor instruction when another individual, not the defendant, actually started the conflict).

[120] Castillo v. People, 421 P.3d 1141 (Colo. 2018) (assuming without deciding that the appellate division applied the correct standard when it said there must be "some evidence" to support the initial aggressor exception).

[121] State v. Burns, 292 S.W.3d 501, 505 (Mo. Ct. App. 2009).

[122] People v. Santiago, 515 N.E.2d 228, 234 (Ill. 1987) (holding trial court did not err in giving initial aggressor instruction because jury was also given jury instruction on self-defense and "was thereby enabled to resolve the issue on either hypothesis").

[123] DRESSLER, *supra* note 49, § 18.02[B][1] ("the issue of whether a defendant is the aggressor ordinarily is a matter for the jury to decide, based on a proper instruction on the meaning of the term"); People v. Edmondson, 767 N.E.2d 445, 449 (Ill. App. 2002) ("Identifying the initial aggressor is a question of fact for the jury to resolve"); Widdison v. State, 410 P.3d 1205, 1214 (W.Y. 2018) ("The identity of the initial aggressor, however, was a question of fact upon which the jury was instructed").

judge acts as a de facto gatekeeper and can prevent the jury from considering this question. This is because the decision whether to give or withhold an initial aggressor instruction rests entirely within the trial court's discretion.[124] If the judge personally believes the defendant was not the initial aggressor, the judge can refuse to give an initial aggressor instruction to the jury and the jury will not get to weigh the facts and decide whether the defendant was the initial aggressor. Even if the trial judge does not personally side with the defendant on this issue, the judge may be incentivized not to give an initial aggressor instruction out of fear that if convicted, the defendant will appeal the ruling and that ruling may be reversed on appeal.[125]

When judges refuse to give an initial aggressor instruction in cases when there is sufficient evidence to support the giving of the instruction, juries are prohibited from exercising their decision making authority over this critically important issue. To resolve this state of affairs, legislatures can and should step in to clarify the law in this regard. A clear rule requiring that an initial aggressor instruction be given whenever there is some evidence to support such an instruction would go a long way to ensure that juries can exercise their decision making authority on the question of whether a defendant was the initial aggressor in a particular case.

II. WHAT ELSE IS WRONG WITH CURRENT INITIAL AGGRESSOR RULES?

In addition to the problems identified in the previous section, another problem with current initial aggressor rules is that they are confoundingly ambiguous. Michael Mannheimer put it well when he stated, "I have always found [the question of what one has to do to be considered the initial aggressor] to be one of the most maddeningly indeterminate questions of criminal law."[126]

In this Part, I examine two high-profile cases to show just how ambiguous—and confusing—the initial aggressor rules really are. If the rules on initial aggressors are confusing to legal scholars, they undoubtedly are equally confusing to laypersons serving as jurors.

A. Kyle Rittenhouse and Wisconsin's Initial Aggressor Rule

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[124] Brooks, *supra* note 42, at 362, *citing* Campbell v. State, 812 So. 2d 540, 543 (Fla. Dist. Ct. App. 2002) ("[t]he decision of the trial court to give or withhold a proposed jury instruction is reviewed under an abuse of discretion standard").

[125] *See, e.g.,* Castillo v. People, 421 P.3d 1141, 1145 (2018) (holding trial court's decision to give an initial aggressor instruction to the jury was in error).

[126] Michael Mannheimer, *Trayvon Martin and the Initial Aggressor Issue*, PRAWFSBLAWG (Mar. 26, 2012), https://prawfsblawg.blogs.com/prawfsblawg/2012/03/trayvon-martin-and-the-initial-aggressor-issue.html (https://perma.cc/5WHE-964F).

Wisconsin's self-defense law and its initial aggressor rule garnered national attention after Kyle Rittenhouse, a 17-year-old White teenager, traveled to Kenosha, Wisconsin in August 2020 with an AR-15 style rifle on the third night of racial justice protests over the police shooting of Jacob Blake, and ended up shooting and killing two men and seriously injuring another.[127] Rittenhouse, who was charged with murder, manslaughter, and other counts, claimed he shot the men in self-defense.[128]

One question that loomed large in the background throughout Rittenhouse's trial was whether the judge would give the jury an initial aggressor instruction. The prosecution wanted such an instruction because it would allow them to argue that Rittenhouse provoked the violence and therefore could not legitimately claim to have acted in self-defense. The defense was opposed to such an instruction because they did not want the jury thinking about the ways in which Rittenhouse's own actions may have created the need for him to fire his weapon, undermining Rittenhouse's claim of self-defense.

Just before closing arguments, the judge ruled that he would give the jury a provocation instruction.[129] This was seen as a significant victory for the government for it allowed Assistant District Attorney Thomas Binger to argue during closing statements that by bringing a firearm to Kenosha, Rittenhouse was the aggressor and lost his right to act in self-defense.[130] As Binger explained to the jury, "You cannot claim self-defense against a danger you create. That's critical right here. If you're the one who is threatening others, you lose the right to claim self-defense."[131]

The prosecution's closing argument was quite powerful. If one had just listened to that closing argument and no other part of the trial, one might have been inclined to vote to convict. Prior to closing arguments, however, the prosecution had not done a very convincing job of explaining why Rittenhouse should be convicted of the crimes he was charged with. Several prosecution witnesses made statements when they were cross-examined by Rittenhouse's attorney that helped

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[127] Therault & Armus, *supra* note 43; Haley Willis, Muyi Xiao, Christiaan Triebert, Christoph Koettl, Stella Cooper, David Botti, John Ismay, & Ainara Tiefenthäle, *Tracking the Suspect in the Fatal Kenosha Shootings*, N.Y. TIMES (Aug. 27, 2020) (updated Nov. 16, 2021), https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html (https://perma.cc/KM2R-WDV5).

[128] Todd Richmond, Assoc. Press, *These Are The Charges Kyle Rittenhouse Faces In The Kenosha Shooting*, PBS.ORG (Nov. 2, 2021), https://www.pbs.org/newshour/nation/ap-explainer-what-charges-does-kyle-rittenhouse-face (https://perma.cc/FJM9-W6DR).

[129] Kim Bellware, *Jury In Rittenhouse Trial Can Consider Lesser Charges And Whether He Provoked Attack, Judge Says*, WASH. POST (Nov. 14, 2021), https://www.washingtonpost.com/nation/2021/11/14/rittenhouse-jury-instructions/ (https://perma.cc/LCQ4-BRMN).

[130] Mike Hayes, *Prosecution Argues Rittenhouse Can't Claim Self-Defense on "A Danger You Create,"* CNN (Nov. 15, 2021), https://www.cnn.com/us/live-news/kyle-rittenhouse-trial-11-15-21/h_038b4f7b62cb201f5d971f020ec21d1c (https://perma.cc/3YV2-Z4CB).

[131] *Id.*

Rittenhouse's claim of self-defense.[132] For example, when Gaige Grosskreutz, the sole surviving person shot by Rittenhouse, was on the stand, he admitted on cross-examination that he pointed a gun at Rittenhouse before Rittenhouse shot him.[133] Grosskreutz later backtracked and said he did not point his gun at Rittenhouse during a TV interview with Good Morning America following his testimony,[134] but the jury didn't hear this. They only heard his testimony in court. And when Rittenhouse took the stand to testify in his own defense, Binger's 3-hour cross examination of Rittenhouse was long and rambling, and it was not obvious what points he was trying to get across to the jury.[135]

The jury instruction on provocation, which the judge read to the jury along with 36 pages of other jury instructions after closing arguments, itself was not a model of clarity.[136] After reading the standard jury instruction on retreat, which basically told the jury that Rittenhouse had no duty to retreat even though provocateurs in Wisconsin do have a duty to retreat,[137] the judge told the jury:

> You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack. However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.[138]

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[132] Michael Tarm, *Explainer: Did State's Own Witnesses Hurt Rittenhouse Case?*, U.S. NEWS & WORLD REPORT (Nov. 10, 2021), https://www.usnews.com/news/us/articles/2021-11-10/explainer-did-states-own-witnesses-hurt-rittenhouse-case (https://perma.cc/2WX7-4KC5).

[133] Becky Sullivan, *The Only Person Who Survived Being Shot By Kyle Rittenhouse Takes The Stand*, NPR (updated Dec. 2, 2021), https://www.npr.org/2021/11/08/1053567574/kyle-rittenhouse-trial-gaige-grosskreutz-testimony-kenosha (https://perma.cc/48K8-DQBQ).

[134] *Gaige Grosskreutz Gives 1st Interview Since Testifying In Rittenhouse Trial*, ABC NEWS GMA (Good Morning America) (Nov. 11, 2021) (3:07-3:15; 3:31-3:40), https://www.youtube.com/watch?v=oocNVvTHP5M (https://perma.cc/GL4T-N68H).

[135] *Full Video: Prosecutors Cross-Examine Kyle Rittenhouse* (Nov. 11, 2021) (3 hour-long video of prosecutor's cross examination of Kyle Rittenhouse), https://www.youtube.com/watch?v=JG8PhtFrO0Y (https://perma.cc/M8PS-SH4B).

[136] Instructions to the Jury, State v. Rittenhouse (Case No. 20 CF 893) (Nov. 15, 2021) (copy on file with author); *Read the Jury Instructions*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/interactive/2021/11/17/us/rittenhouse-trial-jury-instructions.html (https://perma.cc/WT3Z-US5P).

[137] *See* Instructions to the Jury, State v. Rittenhouse, *infra* note 138 (providing that "the [provocateur] may not use or threaten force intended or likely to cause death unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm").

[138] Instructions to the Jury, State v. Rittenhouse (Case No. 20 CF 893) (Nov. 15, 2021) (copy on file with author).

If one reads Wisconsin's provocation instruction closely, one sees that unlike initial aggressor instructions in other states, Wisconsin's instruction doesn't actually prohibit an initial aggressor or provocateur from arguing self-defense.[139] While initially suggesting that a person who provokes an attack against him cannot use or threaten force in self-defense against that attack, the instruction immediately follows by saying that a person may act lawfully in self-defense if the attack he provoked[140] causes him to reasonably believe he is in imminent danger of death or great bodily harm.[141] But this is simply the law of self-defense without the provocation instruction. Instead of taking self-defense off the table, all Wisconsin's provocation instruction does is to impose a duty to retreat on one who provokes an attack[142] where non-aggressors have no duty to retreat.

Another problem with Wisconsin's provocation provision is that it comes into play only if the defendant engaged in "unlawful conduct of a type likely to provoke others to attack."[143] Wisconsin law makes the possession of a dangerous weapon by a person under the age of 18 a misdemeanor offense.[144] The government probably planned to argue that Rittenhouse was engaged in unlawful conduct by being in possession of a firearm in Wisconsin when he was just 17-years-old and that bringing an AR-15-style rifle to a tense racial justice protest was conduct likely to provoke others to attack. Indeed, the government had charged Rittenhouse with possession of a dangerous weapon by a minor and this charge would have allowed them to argue that Rittenhouse was engaged in unlawful conduct of a type likely to

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[139] *See* Cynthia Lee, *How a Vaguely Worded Wisconsin Law Could Let Rittenhouse Walk*, POLITICO (Nov. 17, 2021), https://www.politico.com/news/magazine/2021/11/17/wisconsin-self-defense-law-rittenhouse-522814 (https://perma.cc/SST8-RW3X).

[140] Interestingly, even though Wisconsin's self-defense statute requires an intent to provoke, the instruction on provocation that the judge chose to give to the jury did not tell the jury that Rittenhouse must have provoked the victim to attack him with the intent of using such attack as an excuse to cause death or great bodily harm to the other person. *See* WIS. STAT. § 939.48(2)(c) (2021) (providing "[a] person who provokes an attack, whether by lawful or unlawful conduct, *with intent* to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.") (emphasis added). The judge's provocation instruction largely tracked Wisconsin's model provocation instruction except it did not include language providing that the defendant must have intended to provoke the victim into attacking him in order to use the attack as an excuse to counterattack. *See* 815 WIS. JI CRIM (providing as optional language "A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in selfdefense.") (sic).

[141] *Id.*

[142] Instructions to the Jury, State v. Rittenhouse (Case No. 20 CF 893) (Nov. 15, 2021) ("But the person may not use or threaten force intended or likely to cause death unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.").

[143] *Id.*

[144] WIS. STAT. § 948.60(2)(a).

provoke others to attack.[145] Just before closing arguments, however, the judge dismissed this weapons charge on the ground that it was only unlawful to possess a rifle as a minor only if the rifle was short-barreled and the AR-15 Rittenhouse had was long-barreled.[146]

The government may have planned to argue in the alternative that Rittenhouse was engaged in unlawful conduct by being in Kenosha after curfew, but the judge also dismissed the violation of curfew charge on the ground that the prosecution presented insufficient evidence that a lawful order for a curfew was in effect that night.[147] Apparently, the judge did not think a police officer's testimony that a curfew order was in effect was sufficient proof of a curfew order[148] despite that fact that at least 150 peaceful protesters had been arrested over nine days following the shooting of Jacob Blake under this curfew order.[149] If the jury was looking for some unlawful conduct of a type likely to provoke others to attack, these rulings made it challenging for them to find such unlawful conduct.

In the end, the jury acquitted Rittenhouse of all charges.[150] If Rittenhouse had been Black, had brought an AR-15 style rifle to a White nationalist rally, and had shot three White individuals at that rally, killing two of them, it is hard to imagine a jury returning a verdict of not guilty on all charges.

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[145] Todd Richmond, Assoc. Press, *These are the charges Kyle Rittenhouse faces in the Kenosha shooting*, PBS.org (Nov. 2, 2021), https://www.pbs.org/newshour/nation/ap-explainer-what-charges-does-kyle-rittenhouse-face (https://perma.cc/FJM9-W6DR).

[146] Scott Bauer, Michael Tarm, & Amy Forliti, *Judge at Rittenhouse Trial Dismisses Charge of Possession of Dangerous Weapon*, WASH. TIMES (Nov. 15, 2021), https://www.washingtontimes.com/news/2021/nov/15/judge-at-kyle-rittenhouse-trial-dismisses-charge-o/ (https://perma.cc/U7F7-V5NR).

[147] Aaron Keller, *Judge Dismisses Count Accusing Kyle Rittenhouse of Violating Curfew Because State Presented Insufficient Evidence*, MSN NEWS (Nov. 9, 2021), https://www.msn.com/en-us/news/crime/judge-dismisses-count-accusing-kyle-rittenhouse-of-violating-curfew-because-state-presented-insufficient-evidence/ar-AAQvKpH (https://perma.cc/4WBM-PAX3).

[148] *Id.*

[149] Melissa Alonso, Sara Sidner and Eliott C. McLaughlin, *Kenosha Protesters Arrested for Breaking Curfew While Police Supporters Were Allowed to 'Roam,' Lawsuit Says*, CNN (Sept. 2, 2020), https://edition.cnn.com/2020/09/02/us/kenosha-curfew-lawsuit-protests-jacob-blake/index.html (https://perma.cc/YT9J-BZZL).

[150] Clare Hymes, *Kyle Rittenhouse Found Not Guilty of All Charges in Kenosha Shootings*, CBS NEWS (Nov. 19, 2021), https://www.cbsnews.com/live-updates/kyle-rittenhouse-verdict-acquitted-all-charges/ (https://perma.cc/FL5D-WTRX). I am not suggesting that the jury's verdict was completely unsupported by the evidence. Joseph Rosenbaum was chasing Rittenhouse and had lunged toward Rittenhouse just before Rittenhouse shot him. Therault & Armus, *supra* note 43. Anthony Huber had hit Rittenhouse with a skateboard while Rittehnouse was on the ground and tried to grab Rittenhouse's gun before Rittenhouse shot him. *Id.* And Gaige Grosskreutz had approached Rittenhouse with a handgun in his right hand with the intent of disarming Rittenhouse and admitted on the stand that Rittenhouse didn't shoot him until after he pointed his firearm at Rittenhouse. Sullivan, *supra* note 133. Grosskreutz later walked back this statement in a TV interview with Good Morning Amerca, *see Gaige Grosskreutz Gives 1st Interview Since Testifying In Rittenhouse Trial*, *supra* note 134, but the jury only heard what he said on the witness stand.

B. George Zimmerman and Florida's Initial Aggressor Rule

Wisconsin's provocation instruction is just one example of how confusing the rules surrounding the initial aggressor doctrine can be. Another example can be found in a case involving the shooting of a young Black teen named Trayvon Martin by George Zimmerman. Zimmerman was the Neighborhood Watch Captain who shot and killed Trayvon Martin in Sanford, Florida on February 26, 2012.[151] Just minutes before the shooting, Zimmerman had called 911 to report "a real suspicious guy."[152] Zimmerman told the dispatcher that it looked like the suspicious guy was up to no good or was on drugs.[153] After finding out that Zimmerman was following Martin in his vehicle, the 911 dispatcher told Zimmerman "Okay, we don't need you to do that."[154]

Despite this suggestion that he stop following Martin and wait for police to arrive, Zimmerman got out of his vehicle, followed Martin on foot, and then confronted Martin, who was returning to his father's home after going to the store to buy some Skittles for his nephew.[155] Within two minutes of getting off the phone with 911, Zimmerman had shot and killed Martin.[156] Zimmerman told police he shot Martin in self-defense, and was released without any charges.[157] It was only after thousands of people donned hoodies and held candlelight vigils to demand Zimmerman's arrest that Zimmerman was finally arrested and charged with murder.[158]

Trial courts have complete discretion over whether to give an initial aggressor instruction to the jury. In the Zimmerman case, even though the prosecution asked for an initial aggressor instruction, the trial court declined to give such an instruction.[159]

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[151] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1557 (2013).
[152] Dan Barry et al., *In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race and Outrage*, N.Y. TIMES, Apr. 2, 2012, at Al.
[153] Melanie Jones, *Trayvon Martin Case: 911 Tapes 'Not as Conclusive as People Think,' Says Defense Attorney*, INT'L BUS. TIMES (Mar. 23, 2012, 2:56 PM), http://www.ibtimes.com/trayvon-martin-case-911-tapes-not-concl usive-people-think-says-defense-a ttorney-429306.
[154] Barry, *supra* note 152.
[155] *Id.*
[156] *Id.*
[157] Zimmerman said that after he spoke with Martin, Martin ran off, but then doubled back and surprised Zimmerman, punched him, got him on the ground, and was smashing his head against the concrete. *Id.* Zimmerman said that he shot Martin because Martin was reaching for Zimmerman's gun and he thought Martin was going to kill him. *Id.*
[158] *NAACP Leads March on Sanford*, WASH. POST, Apr. 1, 2012, at A3; Ovetta Wiggins, *A Rallying Cry for Justice in Teen's Death*, WASH. POST, Mar. 25, 2012, at A3.
[159] *See* Alanna D. Coopersmith, *Were the jury instructions in George Zimmerman trial correct?*, EAST BAY DEFENSE (July 18, 2013), https://www.eastbaydefense.com/blog-post/incorrect-jury-instructions-in-the-zimmerman-trial/; Ola Abiose, *George Zimmerman Verdict Hinged On Definition Of 2 Words*, MIC (July 17, 2013), https://www.mic.com/articles/55195/george-zimmerman-verdict-hinged-on-definition-of-2-words.

Florida's initial aggressor rule, like Wisconsin's, is hardly a model of clarity.[160] As Michael Mannheimer observes, "Florida Stat. sec. 776.041(2) is decidedly ambiguous on what an aggressor is: it provides that the right of self-defense is 'not available to a person who [i]nitially provokes the use of force against himself . . . .' "[161] Mannheimer continues:

> The critical word there is "provokes." "Provokes" might imply that some intent to precipitate violence is necessary. On the other hand, "provokes" can be read more broadly as simply triggering a violent response without intent that it occur, as when, in the classic voluntary manslaughter example, a wife "provokes" a fatal attack by her husband when he catches her in the arms of her lover, even if she did not expect to be discovered. The problem with this broad a reading is that one could be said to be the initial aggressor even by engaging in behavior that is entirely innocent, such as by asking a passerby for a handout, or even constitutionally protected, such as by telling the passerby that he practices a false religion and will burn in hell for it.[162]

Concerning Zimmerman, Mannheimer asks, "[D]oes following someone, even with the intent only to ask questions, render Zimmerman the 'initial aggressor?'[163] Mannheimer would answer this question in the negative, explaining, "To me, the word 'provokes' encompasses something more than asking another person questions, even [if] one has to follow him down the street to do so."[164]

Legal scholars, however, were not of one mind on this question. In a provocative Huffington Post article, Alafair Burke wrote, "A properly instructed jury should have heard the complete law of self-defense in Florida, not just the portions that helped Zimmerman."[165] "Had the jury been instructed about the initial aggressor exception, it might have concluded that Zimmerman's following of Martin, though itself not criminal, was reasonably apprehended by Martin as a 'threat of

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[160] Florida provides by statute that the justification of self-defense "is not available to a person who: (2) [i]nitially provokes the use or threatened use of force against himself or herself, unless: (a) [s]uch force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or (b) [i]n good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force." FLA. STAT. ANN. § 776.041(2) (2020).

[161] Mannheimer, *Trayvon Martin and the Initial Aggressor Issue*, *supra* note 126.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] Alafair Burke, *What You May Not Know About the Zimmerman Verdict: The Evolution of a Jury Instruction*, HUFFPOST (July 15, 2013), https://www.huffpost.com/entry/george-zimmerman-jury-instructions_b_3596685 (https://perma.cc/MH2X-R9Z2).

force.'"[166] "Put another way," Burke explained, "the jury might have concluded that Martin was the one acting in self-defense during the physical confrontation that preceded the gunshot, making Zimmerman the aggressor."

Similarly, Jeffrey Fagan opined, "Whether George Zimmerman was the initial aggressor, or the provocateur of the incident, and whether he forfeited his self-defense claim by failing to withdraw from the confrontation with Trayvon Martin . . . should have been matters for the jury to decide."[167] Fagan notes that "following the summations, Judge Debra Nelson did not give an initial aggressor jury instruction, basically leaving it up to the jury to decide whether these facts matter[ed], how much, and in what way."[168] He concludes that the judge's "decision to not instruct the jury to consider this part of the law . . . may have contaminated the verdict by obscuring a crucial piece of the law."[169]

Likewise, Marjorie Cohn observed, "The jury was only given partial instructions on self-defense – those parts that helped Zimmerman." [170] "They were prevented from considering whether Zimmerman might have been the first aggressor, which would have negated his claim of self-defense."[171]

In contrast, Cynthia Ward argued that "under the "initial aggressor" doctrine . . . a defender is not deemed a provocateur for purposes of asserting self-defense unless the defender 'makes the first move' to assault, or attempt to assault, the other person."[172] Because Martin made the first move at least according to Zimmerman (no one else was there to witness what actually happened since Martin died after being shot by Zimmerman), Martin, not Zimmerman, was the initial aggressor. Ward concludes, "Whether one believes that George Zimmerman used good or bad judgment in following Trayvon Martin on the night that Martin died, Zimmerman's proven behavior almost certainly does not qualify him as the 'initial aggressor.'"[173]

In the end, Zimmerman was acquitted of all charges.[174] It is unclear what the jury would have done had it received an initial

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[166] *Id.*

[167] Jeffrey A Fagan, *The Zimmerman Verdict and the Initial Aggressor Exception*, COLUM. L. SCH. MAG. (Fall 2013), https://www.law.columbia.edu/news/archive/zimmerman-verdict-and-initial-aggressor-exception (https://perma.cc/93VC-5NGZ).

[168] *Id.*

[169] *Id.*

[170] Marjorie Cohn, *Key Mistakes Sway Jury in Zimmerman Trial*, TRUTHOUT (July 17, 2013), https://truthout.org/articles/zimmerman-vs-martin-racial-profiling-and-self-defense/ (https://perma.cc/3QXZ-UJEY).

[171] *Id.*

[172] Ward, *supra* note 21, at 115.

[173] Ward, *supra* note 21, at 115.

[174] Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html (https://perma.cc/S7DF-ZFXH). If Zimmerman had been Black and Trayvon Martin had been White, it is difficult to imagine the jury coming back with a not guilty verdict. Pulling out a gun and shooting someone who is beating you in a fistfight does not seem to be a reasonable act in self-defense.

aggressor instruction, but whether or not Zimmerman was the aggressor should have been for the jury to decide. Instead, because the judge declined to give an initial aggressor instruction to the jury, the jury was not permitted to consider the issue.

III. PROPOSALS FOR REFORM

In 2020 and 2021, while this nation was battling COVID-19, the virus that had caused over 800,000 deaths and 7.5 million hospitalizations by the end of 2021,[175] the nation witnessed many incidents in which individuals became physically violent[176] after simply being asked to comply with mask mandates designed to stop the spread of COVID.[177] Some anti-maskers didn't just threaten violence but

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[175] According to the Centers for Disease Control and Prevention (CDC), between February 2020 and September 2021, there were 921,000 total deaths and 7.5 million hospitalizations due to COVID-19. *Estimated COVID-19 Burden*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html (https://perma.cc/A4BL-FL22). *See also* Becky Sullivan, *New Study Estimates More Than 900,000 People Have Died Of COVID-19 In U.S.*, NPR (May 6, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/05/06/994287048/new-study-estimates-more-than-900-000-people-have-died-of-covid-19-in-u-s () (reporting on a study by the University of Washington's Institute for Health Metrics and Evaluation that found that from March 2020 through May 3, 2021, "the number of people who . . . died of COVID-19 in the U.S. [was] more than 900,000, a number 57% higher than official figures").

[176] In Des Moines, Iowa, for example, when one customer at a Vision 4 Less store asked another customer to wear his mask over his nose, the unmasked customer followed the masked customer outside the store and assaulted him in the parking lot, jabbing him in the eye and repeatedly kneeing him in the groin. Isabella Grullón Paz, *Iowa Man is Sentenced to 10 Years in Prison After Mask Fight*, N.Y. Times (June 14, 2021), https://www.nytimes.com/2021/06/14/us/iowa-mask-fight-shane-michael.html (https://perma.cc/DNJ5-BVXZ) (reporting that after the unmasked customer had the masked customer on the ground, he spat and coughed on the other man while shouting, "If I have it [COVID-19], you have it!"). In another case, an 80-year-old man was pushed to the ground by a fellow customer a bar in Buffalo, New York after he asked that customer at to wear a mask. Troy Closson, *80-Year-Old Is Killed After Asking Bar Patron to Wear Mask*, N.Y. Times (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/nyregion/face-mask-criminally-negligent-homicide.html (https://perma.cc/9YUZ-DL5N). The 80-year-old man died 5 days later from his injuries. *Id.* Neil MacFarquhar, *Who's Enforcing Mask Rules? Often Retail Workers, and They're Getting Hurt*, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html (https://perma.cc/47LE-C5BK) (reporting numerous incidents in which store employees have been attacked by customers refusing to wear a mask). Jaclyn Peiser, *A Florida Dad Tried to Enter A School Maskless. When a Student Confronted Him, He Assaulted Her, Police Said*, WASH. POST (Aug. 26, 2021), https://www.washingtonpost.com/nation/2021/08/26/florida-man-anti-mask-dan-bauman/ (https://perma.cc/D6C9-YW2G) (reporting numerous incidents in which individuals opposed to masks became violent after being asked to wear a mask).

[177] Gary Detman, *Man accused of pulling gun on father, daughter at Walmart arrested*, CBS12 NEWS (July 23, 2020) (reporting that while inside a Walmart in Palm Beach County, Florida, a man with a concealed carry permit pulled a handgun from his waistband and aimed it at a fellow customer and his daughter after the customer told the unmasked man to put on a mask), https://cbs12.com/news/local/man-who-pulled-gun-on-father-daughter-at-walmart-arrested (https://perma.cc/AD5W-CZUT); Ewan Palmer, *Florida Man Who Pulled Gun on Walmart Shopper in Mask Row Identified*, NEWSWEEK (July 16, 2020) (showing photo of unmasked man brandishing a firearm at Walmart store), https://www.newsweek.com/florida-walmart-mask-gun-1518201 (https://perma.cc/M95A-

ended up pulling out firearms and shooting store employees or customers after being asked to wear a mask or to wear a mask properly.[178]

During the pandemic, the United States also saw an alarming increase in unruly passengers on commercial flights.[179] Many of these unruly passengers resorted to physical violence against flight attendants who asked them to wear a mask or wear their mask properly.[180] At the

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URQW); Tom Batchelor, *Target Shopper Pulls Gun After Being Told to Wear Mask, Police Say*, NEWSWEEK (Dec. 3, 2020) (a man who was asked to put on a mask by two female employees at a Target store in Morgan Hill, California, became agitated and pulled a gun from his pocket), https://www.newsweek.com/target-shopper-gun-wear-face-mask-police-1552134 (https://perma.cc/3XUQ-SP2H); Matthew Ormseth, *Unmasked gunman robs food from kitchen of Roscoe's in Pasadena*, L.A. TIMES (Feb. 3, 2021) (reporting that an unmasked man at a Roscoe's House of Chicken and Waffle in Pasadena, California pulled out a gun and pointed it at a restaurant employee after the employee told him he needed to wear a mask), https://www.latimes.com/california/story/2021-02-03/unmasked-man-enters-roscoes-house-of-chicken-and-waffles-shows-a-gun-and-steals-food (https://perma.cc/D2V4-8C69); Lauren Abbate, *Man allegedly displays gun after being told to wear mask in Maine Dunkin'*, CBS13-WGME (July 29, 2020) (an unmasked man inside a Dunkin' Donuts store in Rockland, Maine, pulled up his shirt to display a handgun on his waist when a fellow customer pointed out that he wasn't wearing a mask as mandated when inside businesses to deter the spread of COVID), https://wgme.com/news/coronavirus/man-allegedly-displays-gun-after-being-told-to-wear-mask-in-maine-dunkin (https://perma.cc/B47A-9JXK).

[178] In one case, a man wearing a mask improperly inside a Decatur, Georgia supermarket while masks were still mandated was asked to pull up his mask by a female cashier. The man refused, walked out of the store without paying for his items, then came back in and shot and killed the cashier who had asked him to mask up. Zack Linly, *Black Female Cashier Fatally Shot in Georgia After Asking Customer to Adjust His Face Mask*, THE ROOT (June 6, 2021), https://www.theroot.com/black-female-cashier-fatally-shot-in-georgia-after-aski-1847114915 (https://perma.cc/XR69-WB3S); Jon Shirek, *Store owner: Customer shoots, kills cashier who asked him to pull up his face mask*, 11ALIVE-WXIA (June 16, 2021), https://www.11alive.com/article/news/crime/store-owner-customer-shoots-kills-cashier-over-mask/85-8f709a03-6e85-4577-b117-2eabc17ecf55 (https://perma.cc/RAA9-CJFX). In another case, a group of men pulled up to a sports bar in Fayetteville, North Carolina, and attempted to enter the bar without face masks. The unmasked men argued with security and a fight between masked patrons and the unmasked men broke out. Both sides pulled out guns. One of the unmasked men shot a security guard who attempted to break up the fight. CBS 17 Digital Desk, *Fayetteville man arrested after shooting over face mask rule critically injures security guard*, CBS 17-WSPA (Apr. 13, 2021), https://www.wspa.com/news/crime/fayetteville-man-arrested-after-shooting-over-face-mask-rule-critically-injures-security-guard/(https://perma.cc/NMH7-G878).

[179] Rich Mendez, *Disputes Over Mask Mandates Comprise 75% of FAA's Unruly-Passenger Complaints on Planes*, CNBC.COM (July 6, 2021), https://www.cnbc.com/2021/07/06/disputes-over-mask-mandates-comprise-75percent-of-faas-unruly-passenger-complaints-on-planes-.html (https://perma.cc/L87U-LGD8) (noting that "[t]he majority of the Federal Aviation Administration's unruly-passenger reports on airplanes stem from passengers who refuse to comply with mask mandates put in place to guard against the spread of Covid-19"); Pete Muntean, *FAA Has Sent Only 37 Unruly Passenger Cases to DOJ*, CNN (Nov. 4, 2021), https://www.cnn.com/2021/11/04/politics/faa-unruly-passengers-doj/index.html (https://perma.cc/GG2C-HXLX) (noting flight crews have reported over 5,000 incidents of violence on commercial flights thus far in 2021, including an incident in which a man claimed he acted in self-defense when he punched an American Airlines flight attendant who was trying to keep him from reaching the lavatory while the seat belt sign was on).

[180] Francesca Street, *Dread at 30,000 Feet: Inside The Increasingly Violent World of US Flight Attendants*, CNN (updated Sept. 6, 2021), https://www.cnn.com/travel/article/flight-attendants-unruly-passengers-covid/index.html (https://perma.cc/L33J-3YAN) (noting that a survey by the Association of Flight Attendants released in July 2021 found that of the 5,000

same time, there was an unprecedented increase in the number of individuals caught attempting to take firearms onto commercial flights, which was and is against the law.[181] In 2021, the Transportation Security Administration intercepted 5,972 firearms at airport security checkpoints.[182] Roughly 80 percent of the guns confiscated by TSA in 2021 were loaded.[183] One can only imagine what might have happened in flight had these loaded firearms not been intercepted.

The United States has one of the highest rates of civilian gun ownership in the world.[184] According to a 2020 Gallup poll, approximately 1 in every 3 adults in the United States own a firearm and 44 percent of all adults live in a household with a gun.[185]

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flight attendants surveyed, 85% reported dealing with unruly passengers in the first half of 2021, with 17% saying they had been the victim of a physical attack and that many of these incidents are linked to mask non-compliance). In a recent Delta flight from Washington, DC to Los Angeles, a maskless passenger assaulted a flight attendant and an Air Marshal after being asked numerous times to wear a mask. Assoc. Press, *Flight to LA Diverted To Oklahoma Due to Unruly Passenger*, ABC NEWS (Dec. 10, 2021), https://abcnews.go.com/US/wireStory/flight-la-diverted-oklahoma-due-unruly-passenger-81671531 (https://perma.cc/J3LF-D4G2) (female passenger on same flight telling ABC News in video clip that Pennington, the passenger who assaulted a flight attendant and an Air Marshal, had refused to wear a mask). This incident was just one of the more than 5,500 reports of unruly passengers on commercial flights in 2021, the highest number the FAA has seen since they began keeping track of such incidents in the mid-1990s. Eric Resendiz, *Delta Flight Diverted After Passenger Assaults Flight Attendant, Air Marshal*, ABC13 EYEWITNESS NEWS (Dec. 10, 2021), https://abc13.com/delta-flight-attendant-assaulted-airlines-passenger-attacked/11319940/ (https://perma.cc/3QEQ-WJA2) (male passenger who was sitting behind the unruly passenger reporting to ABC News that the flight crew kept asking the unruly male passenger to wear a mask for an hour into the flight but the passenger refused to wear a mask).

[181] Kaia Hubbard, *TSA Catching Record Number of Guns at Airport Checkpoints This Year*, U.S. NEWS & WORLD REPORT (Oct 14, 2021), https://www.msn.com/en-us/travel/news/tsa-catching-record-number-of-guns-at-airport-checkpoints-this-year/ar-AAPx4gt (https://perma.cc/K868-5XLB)) (reporting that "Transportation Security Administration officers have detected a record number of firearms at airport security checkpoints so far in 2021, marking a 20-year high well before the year's end").

[182] Joe Davidson, *Airline Passenger Traffic Dropped In The Pandemic. But TSA Seized More Guns Than Ever*, WASH. POST (Mar. 18, 2022), https://www.washingtonpost.com/politics/2022/03/18/tsa-gun-seizures-airport-security/ (https://perma.cc/54GX-U3JD). This was an increase of more than one-third over the 4,432 guns found at airport security checkpoints in 2019, the second highest year for firearms intercepted at airport security checkpoints. *Id.* The number of firearms found at airport security checkpoints has increased more than six-fold since 2008. *Id.*

[183] Kimberlee Speakman, *Record Number of Guns Caught at TSA Checkpoints So Far This Year*, FORBES (Oct. 13, 2021), https://www.forbes.com/sites/kimberleespeakman/2021/10/13/record-number-of-guns-caught-at-tsa-checkpoints-so-far-this-year/?sh=5b40b1aa9717(https://perma.cc/R4KS-374W) (noting that "[r]oughly 80% of the guns confiscated by TSA so far this year were loaded").

[184] German Lopez, *America's love for guns, in one chart*, Vox (June 21, 2018) https://www.vox.com/2018/6/21/17488024/gun-ownership-violence-shootings-us (https://perma.cc/8YMG-NCAU), *citing* Aaron Karp, *Estimating Global Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY 3 (2018).

[185] Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (last updated Nov. 13, 2020), https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx (https://perma.cc/GV6L-5ZNL) (noting that "[t]hirty-two percent of U.S. adults say they personally own a gun, while a larger percentage, 44%, report living in a gun household"); John Shattuck & Mathias Risse, *Reimagining Rights & Responsibilities in the United States:*

Importantly, America's love of guns is not shared by all but is largely marked by political party or ideology, location, gender, and to some extent race.[186] According to a 2020 Gallup poll, "Republicans (50%), rural residents (48%), men (45%), self-identified conservatives (45%) and Southerners (40%) are the most likely subgroups to say they personally own a gun."[187] "Liberals (15%), Democrats (18%), non-White Americans (18%), women (19%) and Eastern residents (21%) are the least likely to report personal gun ownership."[188]

Gun ownership in the United States, however, jumped from 32 percent to 39 percent during the COVID-19 pandemic.[189] Disturbingly, many of those purchasing a firearm were first time gun buyers who were not the typical fans of firearms.[190] According to firearms industry data, "sales jump[ed] 50 percent among Black customers, 47 percent among Hispanics and 43 percent among Asian Americans, though gun ownership remain[ed] proportionately lower among those groups compared with Whites."[191] America's love of—or at least tolerance for—guns and gun ownership appears to be growing.[192]

On top of high private gun ownership, permissive laws allowing gun owners to carry firearms in public are widespread.[193] All fifty states and the District of Columbia allow the concealed carry of firearms in

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Gun Rights and Public Safety, Harvard Kennedy School Faculty Research Working Paper Series 1, 3 (2021) (noting that ". . . 3 in every 10 Americans owns a gun").

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] Marc Fisher, et al., *'Fear on Top of Fear': Why Anti-Gun Americans Joined the Wave of New Gun Owners*, WASH. POST (July 10, 2021), https://www.washingtonpost.com/nation/interactive/2021/anti-gun-gun-owners/ (https://perma.cc/C4G4-49XA). The prevalence of guns may be one of the reasons why there is so much lethal violence in the United States. German Lopez, *America's love for guns, in one chart*, VOX (June 21, 2018) https://www.vox.com/2018/6/21/17488024/gun-ownership-violence-shootings-us (https://perma.cc/8YMG-NCAU) (noting that when a person with a loaded gun gets into an altercation with another person, "it's much more likely that [they] will . . . and be able to . . . kill someone.").

[190] *Id.*

[191] *Id., citing* Jim Curcuruto, *Firearm Ammunition Sales During 1st Half 2020: NSSF Survey Reveals Broad Demographic Appeal For Firearm Purchases During Sales Surge Of 2020*, NSSF (July 21, 2020), https://www.nssf.org/articles/nssf-survey-reveals-broad-demographic-appeal-for-firearm-purchases-during-sales-surge-of-2020/ (https://perma.cc/9SP8-DFM6) (reporting that "approximately 90 percent of retailers reported . . . seeing a 95 percent increase in firearm sales and a 139 percent increase in ammunition sales over the same period in 2019").

[192] Tim Craig, *As Gun Ownership Rises, Georgia Looks to Loosen Restrictions: It's the 'Wild, Wild West,'* WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/nation/2022/03/24/columbus-gun-ownership-violence/ (https://perma.cc/9AKS-8FLU) (noting that "[f]irearm purchases have soared since the beginning of the pandemic, particularly among first-time gun buyers").

[193] Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 1, 9 (2021) ("In the last several decades the law of public carry has evolved to allow more forms of gun carry in shared public spaces with less licensing").

public[194] and forty-seven states allow the open carry of firearms in public.[195]

The U.S. Supreme Court is poised to decide in 2022 whether individuals have a constitutional right under the Second Amendment to "bear" firearms in public.[196] Given the current composition of the Court, the Court is likely to extend its holding in *Heller*, in which the Court held that individuals have a Second Amendment right to possess firearms in the home for self-defense, and find that the Second Amendment also confers a right to "bear" firearms in public for self-defense.[197]

If the Court finds that the Second Amendment encompasses a right to bear a firearm outside the home, this does not mean that anytime an individual uses a firearm in public to harm or kill another individual, they have acted in self-defense and should not be held accountable for their actions. Whether an individual who uses a gun against another person in public has a valid claim of self-defense is an issue separate and apart from the question whether that individual has a Second Amendment right to "bear" a loaded firearm in public.[198]

Eric Ruben has persuasively argued that the law of self-defense can and should inform Second Amendment doctrine.[199] The more

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[194] *State-by-State Concealed Carry Permit Laws*, BRITANNICA PROCON.ORG, https://concealedguns.procon.org/state-by-state-concealed-carry-permit-laws/ (https://perma.cc/4Z6L-3QDP) (last visited Dec. 22, 2021). *See also Guns in Public: Concealed Carry*, GIFFORDS LAW CENTER, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (https://perma.cc/AEH4-K4VL) (last visited Dec. 22, 2021).

[195] *Guns in Public: Open Carry*, GIFFORDS LAW CENTER, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/ (https://perma.cc/PY5Y-JCPU) (last visited Dec. 22, 2021). *See also Open Carry: Map, States & Everything You Need to Know Open Carrying*, AMERICAN ASSOCIATION FOR FIREARMS ADVOCACY, https://gunlawsuits.org/gun-laws/open-carry/ (https://perma.cc/5GEL-MFQT) (last visited Dec. 22, 2021).

[196] Jennifer Mascia, *The Supreme Court's Next Big Gun Case, Explained*, TRACE (May 18, 2021), https://www.thetrace.org/2021/05/supreme-court-gun-rights-concealed-carry-new-york-corlett/ (https://perma.cc/7RM5-EDSG).

[197] Robert Barnes & Ann E. Marimow, *Majority of Supreme Court Appears To Think N.Y. Gun Law Is Too Restrictive*, WASH. POST (Nov. 3, 2021), https://www.washingtonpost.com/politics/courts_law/gun-rights-case-supreme-court/2021/11/03/6b9a75d8-3c13-11ec-a493-51b0252dea0c_story.html (https://perma.cc/N86F-PL6E) ("A majority of Supreme Court Justices indicated Wednesday that they believe Americans generally have a right to carry a handgun outside the home for self-defense and that a New York law requiring special need for such a permit is too restrictive"); Ian Millhiser, *The NRA Had a Very Good Day in The Supreme Court*, VOX (May 18, 2021), https://www.vox.com/2021/11/3/22761240/supreme-court-second-amendment-rifle-bruen-heller-amy-coney-barrett (https://perma.cc/HH8V-6XUU) (noting that at least 5 Justices appear likely to vote to strike down New York's restriction on the carrying of guns in public to those who can show "proper cause").

[198] Blocher, *Pointing Guns*, *supra* note 41, at 122 ("historical legal commentary and custom indicate that the question of whether a particular actual use of a gun constitutes self-defense is a question left to criminal and tort law, about which the Second Amendment is silent") , *citing* Calderone v. City of Chicago, No. 18 C 7866, 2019 WL 4450496, *3 (N.D. Ill. 2019), aff'd 979 F.3d 1156 (7th Cir. 2020).

[199] Ruben, *supra* note 60 (arguing that "the limitations of lawful self-defense can inform Second Amendment doctrine by lending principled requirements and procedures for the right to keep and bear arms").

individuals carry firearms in public, the greater the risk such firearms may be used when individuals in public get into disputes, increasing the likelihood that someone will end up dead or seriously wounded. As Joseph Blocher has observed, a gun owner is more likely to pull a weapon if he thinks the person he is facing is also armed.[200] Indeed, "the mere presence of a firearm can prime people to behave more aggressively—a phenomenon known as the 'weapons effect.' "[201] This is a sobering thought in light of the more than 300 million guns in the hands of private Americans today.[202]

Compounding the prevalence of guns and the relaxing of restrictions on the carrying of guns in public is the fact that racial bias—both implicit and explicit—often influences which persons tend to be seen as threats.[203] Decades of social science research has demonstrated that Black individuals are stereotyped as violent and criminal.[204] Indeed, the mere presence of a Black person can trigger thoughts of violence and crime.[205]

We have all seen how racial stereotyping can lead to violence. In 2020, when Gregory McMichael saw a Black man, Ahmaud Arbery, jogging past his home in Georgia, he immediately assumed Arbery had just burglarized a vacant home under renovation down the street and was fleeing the scene of the crime.[206] It appears that McMichael associated Arbery not only with crime but also with potential violence as he immediately grabbed his gun and shouted for his son, Travis, to grab his shotgun before the two of them proceeded to chase Arbery in their pickup truck.[207] The situation ended tragically when Travis McMichael shot and killed Arbery at close range. Travis claimed he shot Arbery in self-defense, after Arbery grabbed his shotgun and he thought Arbery was going to shoot him with it.[208]

Throughout their state trial, the McMichaels, through their attorneys, denied that race had anything to do with their actions.[209] Yet

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[200] Blocher, *Pointing Guns*, *supra* note 41, at 108.
[201] *Id.* at 109.
[202] *Id.* at 108 n. 40.
[203] Rolnick, *supra* note 39; 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 (2015).
[204] Eberhardt, *supra* note 33.
[205] *Id.*
[206] Devon M. Sayers & Pamela Kirkland, *Detective Testifies That Gregory Mcmichael Told Him He Did Not See Ahmaud Arbery Commit A Crime*, CNN (Nov. 9, 2021), https://www.cnn.com/2021/11/09/us/ahmaud-arbery-killing-trial-day-3/index.html (https://perma.cc/Q65X-T6XE).
[207] *Id.*
[208] Bill Chappell et al, *Travis Mcmichael Says In His Murder Trial That He Felt Threatened By Ahmaud Arbery*, NPR (Nov. 17, 2021), https://www.michiganradio.org/2021-11-17/travis-mcmichael-says-in-his-murder-trial-that-he-felt-threatened-by-ahmaud-arbery (https://perma.cc/Z2S2-SM7H).
[209] Assoc. Press, *Attorneys For Men Charged In Ahmaud Arbery Killing Deny Racial Motive*, USA TODAY (Sept. 12, 2020), https://www.usatoday.com/story/news/nation/2020/09/12/ahmaud-arbery-attorneys-men-charged-killing-deny-racism/5779662002/ (https://perma.cc/4JCB-72BZ).

approximately two months after they were convicted of murder in state court, the McMichaels were ready to admit that they targeted Arbery because of his race in a plea agreement with federal prosecutors that would have allowed them to serve the first 30 years of their state sentences in federal prison rather than state prison.[210] That plea agreement was rejected by the judge after Arbery's family objected strenuously to its terms.[211] The federal hate crimes case proceeded to trial and the McMichaels and their co-defendant, William "Roddie" Bryan, were found guilty of attempted kidnapping and using force and threats of force to intimidate and interfere with Arbery's right to use a public street because of his race.[212]

To reduce the risk of gun violence, I offer two proposals that would reform the law on initial aggressors. Law reform, however, can only go so far to change what is really a deeply rooted cultural phenomenon. Recognizing the limits of law reform, my ultimate hope is that the legal reforms I propose can help gradually change cultural attitudes about guns. If we want to make even a dent in the problem of gun violence, we need to change America's current love of guns by changing the social norms surrounding gun possession and gun use. This is what gun owners and organizations have been doing over the years—just in the opposite direction. As Blocher notes, gun owners have been steadily shifting the social norms surrounding gun possession and gun use, making it not just normal but also desirable to possess firearms and carry them in public.[213]

As outlined in greater detail below, I first propose that individuals who claim self-defense after being charged with a crime should be considered initial aggressors as a prima facie matter if their words or acts created a reasonable apprehension of imminent death or serious physical harm. Unlike many self-defense statutes that use the language of provocation and require an intent to cause physical injury or death before one loses the right to claim self-defense, the proposed definition of the term "initial aggressor" does not require proof that the defendant had an intent to harm the victim for initial aggressor status. It shifts the focus away from the subjective mental state of the defendant and instead utilizes an objective inquiry that applies from the perspective of someone in the victim's shoes. The jury may decide that the defendant was not the initial aggressor if the defendant displayed or

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[210] Annabelle Timsit & Hannah Knowles, *Judge Rejects Plea Deal For Travis Mcmichael And His Father On Federal Hate-Crime Charges In Ahmaud Arbery's Murder*, WASH. POST (Jan. 31, 2022), https://www.washingtonpost.com/nation/2022/01/31/ahmaud-arbery-hate-crime-plea-deal/ (https://perma.cc/EJ2Y-JS59).

[211] *Id.*

[212] David Nakamura & Margaret Coker, *Greg and Travis Mcmichael, William Bryan Guilty of Hate Crimes in Ahmaud Arbery Killing*, WASH. POST (Feb. 22, 2022), https://www.washingtonpost.com/national-security/2022/02/22/arbery-verdict-hate-crimes/ (https://perma.cc/NSH4-LZ8G).

[213] Blocher, *Pointing Guns*, *supra* note 41, at 105 (pointing out that some gun owners openly carry to normalize the open carrying of guns and that "[t]his type of norm entrepreuneuralism by gun owners can, and is designed to, shift social practices so as to permanently shape the law and then cultural perceptions of gun use").

pointed their firearm in response to a credible and imminent threat of death or serious physical injury with the intent of avoiding a physical confrontation.[214] Alternatively, the jury may find that the defendant was the initial aggressor and reject the defendant's claim of self-defense.

It is important to note that I am not proposing that States that currently have only a provocation-with-intent type of aggressor provision replace that provision with an aggressor provision. All I suggest is that those States supplement their provocation provision with an aggressor provision and define the term aggressor as proposed.

Second, I propose that an initial aggressor instruction be mandated whenever an individual brings a firearm outside the home and displays it in a threatening manner or points it at another person, is subsequently charged with a crime arising from their use of the firearm, and claims he was acting in self-defense. Both displaying a firearm in a threatening manner and pointing a firearm at another person are threatening acts that will generally create an apprehension of death or serious bodily harm and therefore should be viewed as prima facie evidence of aggression. If someone comes up to another person and says, "Give me your wallet," while opening up his jacket to reveal a gun, it would be reasonable for the person being asked to give up his wallet to fear death or serious bodily injury from the person displaying his firearm.

Today, however, a judge might not give an initial aggressor instruction if the judge is unaware that the initial aggressor limitation is part of self-defense law and the prosecutor does not ask for such an instruction. The initial aggressor limitation is not always taught in law school classrooms and even when it is taught, it is often mentioned only in passing so many judges and prosecutors may not be aware of it. Moreover, even if a judge is aware of the initial aggressor limitation, the judge may refuse to give an initial aggressor instruction if the incident occurred in a state with a provoke with intent type of initial aggressor rule and the judge thinks there is insufficient evidence that the defendant's intent in pointing or displaying a firearm was to make the victim attack so the defendant could counterattack and then claim self-defense. Even in states with an aggressor type of initial aggressor rule, risk averse trial judges may refuse to give an initial aggressor instruction out of concern that an appellate court will disagree with their decision to give such an instruction and reverse that decision.

As discussed above, also problematic is the fact that judges may wait until just before closing statements to decide whether to give an initial aggressor instruction, making it difficult for the government to present evidence to support their argument that the defendant was an initial aggressor. Just before closing arguments, the government will

[214] I offer this proposal in recognition of the fact that there will be instances when an individual displays or points a firearm in self-defense and should not be considered the initial aggressor in such situations. *See infra* text accompanying note 251 for an elaboration on how one can avoid being considered the initial aggressor.

have long finished presenting its case in chief. If it were clearer that an initial aggressor instruction would be given in these types of cases, both sides would be better able to plan which witnesses to present and how to argue their respective cases.

The ultimate question of whether the defendant was the initial aggressor and thus should lose the right to claim self-defense should be left with the jury, not blocked by a trial court's reluctance to give an initial aggressor instruction. My second proposal thus mandates an initial aggressor instruction whenever an individual points a firearm at another person or displays a firearm in a threatening manner, is charged with a crime arising from these actions, and claims he acted in self-defense.

A. Proposal 1: Clarifying the Definition of "Initial Aggressor"

As discussed above, most self-defense statutes do not define the term "initial aggressor," leaving it up to the courts to decide on a case-by-case basis whether an individual defendant claiming self-defense was the initial aggressor.[215] Without any overarching guidance on what it takes to be considered an initial aggressor, courts across the nation apply different standards, resulting in similarly situated individuals being treated differently. To help provide more clarity and guidance to litigants, I propose a definition of "initial aggressor" that legislatures could incorporate into their self-defense statutes. Alternatively, courts could adopt the proposed definition when deciding cases where the defendant's status as an initial aggressor is an issue.

Under the definition I propose, an "initial aggressor" would be one whose words or acts created a reasonable apprehension of physical harm in another person. One state already defines the term "initial aggressor" in a similar fashion. 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."[216]

Tennessee has adopted a somewhat similar definition, providing that an aggressor is one "who produces fear or apprehension of death or great bodily harm in the mind of his adversary."[217] Tennessee's definition, however, differs from the proposed definition in utilizing a

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[215] *See, e.g.,* State v. Jones, 128 A.3d 431, 452 (Conn. 2015) ("Although the term 'initial aggressor' is not defined by statute, in *State v. Jimenez*, we stated that '[i]t is not the law . . . that the person who first uses physical force is necessarily the initial aggressor . . .'").

[216] State v. Ramos, 801 A.2d 788, 795 (Conn. 2002) (overturned on other grounds); State v. Jones, 128 A.3d at 452 (noting that the initial aggressor is 'the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used [on] that other person. . .'"); State v. Rivera, 204 A.3d 4, 26 (Conn. Ct. App. 2019) ("The 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.").

[217] Gann v. State, 383 S.W.2d 32, 36 (Tenn. 1964) (superseded on other grounds).

subjective rather than an objective standard. Under Tennessee's definition, an individual qualifies as an initial aggressor if the defendant's acts produced a subjective fear or apprehension of death or great bodily injury in the victim, even if those acts would not have had the same effect on the average person in the victim's shoes.

To understand the difference between Tennessee's subjective standard and the objective standard in the proposed definition, we need only look back at the Chipotle parking lot incident. One might say that Takelia Hill, the Black mother who got into a verbal confrontation with Jillian Wuestenberg, leading Wuestenberg to grab a loaded gun and point it at Hill for several minutes, did not seem afraid of Wuestenberg during the entire encounter. Hill continued to argue with Wuestenberg rather than back down even when Wuestenberg had her finger on the trigger of her cocked and loaded gun and pointed that gun at Hill. Under Tennessee's definition of an aggressor, Wuestenberg might not qualify as an initial aggressor if her act of pointing her gun at Hill did not actually "produce fear or apprehension of death or great bodily injury." Under my proposed definition, however, Wuestenberg would be considered the initial aggressor if the average person would have feared physical harm from her actions. Even if Wuestenberg's words or acts did not create a subjective fear in Takelia Hill, those words and acts would likely have created a reasonable apprehension of physical harm in the average person and therefore Wuestenberg would fit within the proposed definition of an initial aggressor.

Unlike provocation provisions that require the defendant to have acted with the intent of causing physical injury or death, the proposed definition does not require proof that the defendant provoked the conflict with a pre-existing intent to harm the victim. Proving that the defendant did what he did with an intent to harm the victim is virtually impossible in cases where the defendant is the only one alive—which will always be the case where the defendant is charged with a homicide—and testifies that he did not have the intent to do whatever the government is trying to prove he had the intent to do. The proposed definition shifts the focus away from the mental state of the defendant and instead asks whether the defendant's words or acts created a reasonable apprehension of imminent bodily harm.

In not requiring proof of a mental state for initial aggressor status, the proposed definition is in line with the way the term "aggressor" is currently understood in jurisdictions that utilize aggressor language as opposed to provocation language to describe their initial aggressor rules.[218] The proposed definition, however, differs from current definitions that require an initial aggressor to have engaged in an unlawful act. For example, the D.C. Circuit's definition of initial aggressor requires "an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal

[218] *See supra* Part I.A.2. and Part I.B.

consequences."[219] The proposed definition does not require "an affirmative unlawful act" before one can qualify as an initial aggressor.

Another way the proposed definition differs from other definitions of "aggressor" is that it allows initial aggressor status to be based on words or acts. Many states that embrace the second category of initial aggressor do not allow mere words to serve as the basis for initial aggressor status.[220] By asking whether the defendant's words or acts created a reasonable apprehension of physical harm, the proposed definition allows a jury to consider whether a defendant's words accompanying the display of a gun should qualify the defendant as an initial aggressor. A defendant with a visibly holstered gun who says to another person, "give me your wallet," should be considered an initial aggressor.

While the proposed definition may be somewhat novel in the initial aggressor context, similar wording has been used to explain when a person is justified in acting in self-defense. For example, courts in the state of Washington have explained that "[o]ne of the elements of self-defense is the person relying on the self-defense claim must have had a *reasonable apprehension of great bodily harm*."[221] Similarly, in Indiana, "Self-defense requires *reasonable apprehension of harm* by the defendant."[222] Similar language can be found in judicial opinions in other states.[223]

One also finds similar language in the definition of the crime of assault. In Arizona, for example, one commits the crime of assault by "[i]ntentionally placing another person in *reasonable apprehension of imminent physical injury*."[224] In Georgia, one commits the crime of assault if one "commits an act which places another in *reasonable apprehension of immediately receiving a violent injury*"[225] and one commits the crime of aggravated assault if one assaults another person or places that person in reasonable apprehension of immediately receiving a violent injury with a deadly weapon.[226]

A similar standard applies in rape cases when the prosecution does not have proof that the defendant used actual force to effectuate the sexual intercourse and is trying to prove the defendant threatened the victim with force to meet the force or threat of force element of

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[219] United States v. Peterson, 483 F.2d 1222, 1233 (D.C. Cir. 1973).
[220] *See* text accompanying note 75.
[221] State v. Walker, 966 P.2d 883, 885 (Wash. 1998) (emphasis added). *See also* State v. Read, 53 P.3d 26, 29 (Wash. 2002) ("[t]o raise a self-defense claim in a murder prosecution, a defendant must produce some evidence to establish the killing occurred in circumstances amounting to defense of life and he or she had a *reasonable apprehension of great bodily harm and imminent danger*") (emphasis added).
[222] Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002) (emphasis added).
[223] State v. Crutcher, 1 N.W.2d 195, 198 (Iowa 1941) ("An actual assault is not always necessary in order to justify a person in using a deadly weapon in self-defense if the circumstances are such as to cause a *reasonable apprehension that an assault is about to be committed*") (emphasis added).
[224] ARIZ. REV. STAT. § 13-1203(A)(2) (emphasis added).
[225] GA. CODE ANN. § 16-5-20(a)(2) (2010) (emphasis added).
[226] GA. CODE ANN. § 16-5-21(a)(2).

rape.[227] For example, in *Hazel v. State*, the Court of Appeals of Maryland, the highest court in Maryland, explained the proof required for rape in a case involving threats of force as follows:

> If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim -- having regard to the circumstances in which she was placed -- *a real apprehension, due to fear, of imminent bodily harm*, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.[228]

Similarly, in *State v. Dill*, a Delaware court explained:

> If the acts and conduct of the person charged with the crime are *sufficient reasonably to create in the mind of the woman*, having regard for the circumstances in which she is placed, *a real apprehension of dangerous consequences, or great bodily harm*, so that her will is, in fact, overcome, such acts and conduct are equivalent to force actually exerted for the same purpose.[229]

It is also common to find such language in statutes explaining what is needed for a protective order based on domestic violence or stalking. In West Virginia, for example, one seeking a protective order based on domestic violence or abuse can prove such violence or abuse by acts by a family or household member "[p]lacing another in reasonable apprehension of physical harm."[230] Similarly, in Oregon, a court may issue a stalking protective order if the court finds by a preponderance of the evidence "[t]he repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household."[231]

The proposed definition merely establishes initial aggressor status as a prima facie matter. The jury may decide that the defendant was not the initial aggressor if the defendant displayed or pointed their firearm in response to a credible and imminent threat of death or serious physical injury with the intent of avoiding a physical confrontation.

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[227] Hazel v. State, 157 A.2d 922, 925 (Md. Ct. App. 1960); State v. Dill, 40 A.2d 443, 444 (Del. Sup. Ct. 1944).
[228] Hazel v. State, 157 A.2d at 925.
[229] State v. Dill, 40 A.2d at 444.
[230] J.C. v. J.M., No. 19-1168, 2021 W. Va. LEXIS 263, at *16-17 (May 20, 2021).
[231] Schiffner v. Banks, 33 P.3d 701, 704 (Or. Ct. App. 2001).

B. Proposal 2: Judges Must Give an Initial Aggressor Instruction Whenever a Defendant Claiming Self-Defense Brought a Firearm Outside the Home and Displayed It in a Threatening Manner or Pointed It at Another Person

My second proposal is to require judges to give an initial aggressor instruction whenever an individual brings a firearm outside the home and displays it in a threatening manner or points it at another person, is charged with a crime, and claims self-defense. Displaying a firearm in a threatening manner and pointing a firearm at another person are threatening acts that would ordinarily create an apprehension of death or serious bodily injury in another person, and thus each should be viewed as prima facie evidence of aggression.[232]

The ultimate question of whether the defendant was the initial aggressor is supposed to be a question for the jury to decide.[233] Too often, however, the jury never gets to decide this question because the judge declines to give an initial aggressor instruction. In cases involving the use of a firearm, judges who favor gun rights may refuse to give an initial aggressor instruction because they won't see that pointing a gun at another person is a threatening act that would cause most people to fear death or serious bodily harm. Even judges who are not Second Amendment enthusiasts may refuse to give an initial aggressor instruction out of fear of being reversed on appeal.

To ensure that the jury will be allowed to decide this question, this proposal lowers the threshold for the giving of an initial aggressor instruction when the defendant brought a firearm outside the home and displayed it in a threatening manner or pointed it at another person.[234] Judges should be required to give an initial aggressor instruction whenever a defendant claiming self-defense brought a firearm outside the home and either displayed that firearm in a threatening manner or pointed it at another person.

Of course, not all individuals who bring a firearm outside the home and display or point that firearm are initial aggressors.[235] There

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[232] My second proposal is limited to firearms and does not apply to other weapons. It would be difficult to administer a rule that applied to all weapons because so many items—even things that are ordinarily considered harmless objects—can be turned into weapons. One need only talk to a prison official to learn about the many ordinary items, including toothbrushes, newspapers and magazines, that have been turned into deadly weapons. *See* J.M. Lincoln, et al., *Inmate-made weapons in prison facilities: assessing the injury risk*, 12 INJURY PREVENTION 195 (2006) (noting "[i]tems that appear innocuous have been converted into weapons that maimed and killed correction officers," including "toothbrushes, disposable razors, metal from ventilators, batteries, and even paper hardened with toothpaste and sharpened").

[233] *See supra* text accompanying note 123.

[234] Other scholars have suggested other ways to hold accountable gun owners who carry a firearm in public and then use it to kill another person. *See, e.g.*, Eric A. Johnson, *When Provocation is No Excuse: Making Gun Owners Bear the Risks of Carrying in Public*, 69 Buff. L. Rev. 943 (2021).

[235] Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence, and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029 (1998) (arguing

are times when an individual may be threatened by another individual or group of individuals and need to display or point a firearm at those individuals to deter them from attacking.[236]

For example, a gay man or transgender woman living in or visiting a neighborhood where other gay men or trans women have been harassed, beaten, or killed by homophobic or transphobic individuals might carry a firearm for protection.[237] In an effort to avoid physical harm, he or she might display or point that firearm if followed or approached by individuals who indicate by their words or acts that they plan to do harm. If one is a member of a racial, ethnic, or religious community that has been repeatedly targeted for harassment and violence, one might carry a firearm for protection and display or point that firearm if followed or approached by individuals who suggest through their words or acts that they pose a threat of physical harm.[238] And one does not have to be a member of a subordinated group in society to believe that carrying a firearm is necessary to protect oneself. Anyone living, working, or traversing in an area racked with violent crime may feel the need to carry a firearm for self-protection, [239] although having a firearm often does not always provide the protection that people think it will provide.[240] The fact that one was carrying a

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against attempts to strengthen self-defense doctrine on the ground that this will work to the disadvantage of law-abiding citizens who wish to use firearms to protect themselves).

[236] Some states explicitly acknowledge that one who displays a firearm with the intent to warn away another person who is threatening serious bodily injury or death has not committed a criminal act. *See, e.g.*, N.H. REV. STAT. ANN. § 627:4 (II-a) (2014).

[237] Amicus Brief by the DC Project Foundation, Operation Blazing Sword—Pink Pistols, and Jews for the Preservation of Firearms Ownership in Support of the Petitioner in New York State Rifle & Pistol Assoc., Inc. v. Bruen (discussing violence against members of the LGBT community creating need to carry guns outside the home for self-protection).

[238] Amicus Brief by Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services et al., in Support of Petitioners, New York State Rifle & Pistol Assoc., Inc. v. Bruen. *See also* Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013) (documenting long tradition of firearms ownership and armed self-defense in the Black community); SpearIt, *Firepower to the People: Gun Rights & The Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 189, 232 (2017) (arguing that Black civilians should arm themselves to protect against police brutality).

[239] Cottrol, *supra* note 235, at 1074.

[240] For example, many female gun owners believe that having a gun makes them safer, when owning a gun actually puts them at greater risk of dying or being seriously injured. Devin Hughes & Evan DeFilippis, *Gun-Rights Advocates Claim Owning a Gun Makes a Woman Safer. The Research Says They're Wrong.*, TRACE (May 2, 2016), https://www.thetrace.org/2016/05/gun-ownership-makes-women-safer-debunked/ (https://perma.cc/D7A9-W28A) (finding that "owning a gun, rather than making women safer, actually puts them at significantly greater risk of violent injury and death"). Contrary to the common belief that a gun in the home increases one's safety and security, a gun in the home is much more likely to be used against the gun owner or a family member than for self-protection. Arlette Saenz, *Which D.C. Neighborhoods are Packing the Most Heat?*, ABC NEWS (Feb. 8, 2011), https://abcnews.go.com/Politics/dc-neighborhoods-packing-heat/story?id=12870238 (https://perma.cc/Z9Y9-66EJ) ("studies have found that a gun in the home is 22 times more likely to be used against the owner or a family member than it is to be used for protection"); Arthur L. Kellerman, et al., *Injuries and Deaths Due to Firearms in The Home*, 45 J. OF TRAUMA: INJURY, INFECTION AND CRITICAL CARE 263, 263 (1998) ("Guns kept in homes are more likely to be involved in a fatal or nonfatal accidental

firearm in public in anticipation of the need for self-protection does not mean one will lose the right to claim self-defense if one ends up needing to display, point, or discharge that firearm to ward off the threat under my proposal.[241] Indeed, if one was obviously acting in self-defense, most likely one will not even be charged with a crime. My proposal is only triggered if an individual is charged criminally and claims they acted in self-defense. Additionally, the mere fact that the judge must give the jury an initial aggressor instruction does not mean that the jury will view one as the initial aggressor and reject one's claim of self-defense. The jury in Kyle Rittenhouse's case, for example, was given an initial aggressor instruction and found Rittenhouse not guilty on all counts.

Unfortunately, it is still true today that certain individuals are more likely to be seen as aggressors than others. As discussed above, racial stereotypes about Black and brown individuals play a huge role in the perception of threat.[242] Such stereotypes have long played a role in self-defense cases with White individuals being able to successfully claim they acted reasonably in self-defense when they shot a Black or brown individual when their claim of self-defense would not likely have succeeded had the tables been turned and a Black or brown individual had done the same thing.[243] If George Zimmerman had been a Black man and if Trayvon Martin had been White, it is unlikely that Zimmerman would have been released rather than arrested after shooting and killing Martin.[244] Similarly, if Kyle Rittenhouse had been a Black man, it is unlikely that he would have been allowed to walk past law enforcement with his AR-15 style rifle hanging across his chest after shooting and killing two people and seriously injuring another amidst individuals yelling at the police, "Hey, the dude right here just shot all of dem down there. That dude just shot them," without being stopped and at least questioned, if not taken into custody.[245] It is also unlikely that he would have been found not guilty on all charges.

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shooting, criminal assault, or suicide attempt than to be used to injure or kill in self-defense.").

[241] Under my proposal, the jury can find that the defendant was not the initial aggressor if the defendant displayed the firearm in response to a credible threat of physical harm, and his or her intent in displaying the firearm was to avoid a physical confrontation. *See supra* text accompanying note 251.

[242] *See supra* text accompanying notes 35-37.

[243] Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

[244] Lee, *Making Race Salient*, *supra* note 151, at 1566 ("When there is a dead victim and police know who killed the victim, they usually arrest the obvious perpetrator of the homicide and then investigate").

[245] Robert Burns, *Every Video of Kyle Rittenhouse (Kenosha Shooting) Including First Shooting* (Aug. 26, 2020) (6:20 - 6:39 minutes), https://thespacecoastrocket.com/every-video-of-kyle-rittenhouse-kenosha-shooting/, also available at https://www.youtube.com/watch?v=7ro8hkfBDVw (perma.cc/7WEE-4J3F).

In our society, even today, Black men—particularly, Black men with guns—are just more likely to be perceived as aggressors than similarly situated White individuals.[246] As David Frum observes:

> . . . the right to carry arms is America's most unequally upheld right. Ohio is an open-carry state. Yet Tamir Rice, a black 12-year-old, was shot dead in Cleveland within seconds of being observed carrying what proved to be a pellet gun. John Crawford was shot dead for moving around an Ohio Walmart with an air rifle he had picked up from a display shelf. Minnesota allows concealed-carry permit-holders to open carry if they wish—yet Minnesotan Philando Castile was killed after merely telling a police officer he had a legal gun in his car.[247]

The tendency to associate Black persons with violence is a serious problem that cannot be fixed overnight.[248] The solution, however, is not to encourage more Black people to arm themselves nor

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[246] Eberhardt, *supra* note 33. *See also* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 7 (Bloomsbury Publishing 2021) (arguing that the Second Amendment "was designed and has consistently been constructed to keep African-Americans powerless and vulnerable"). Explaining the title of her book, Anderson writes, "From colonial times through the twenty-first century, regardless of the laws, regardless of the court decisions, regardless of the changing political environment, the Second has consistently meant this: The second a Black person exercises that right, the second they pick up a gun to protect themselves (or not), their life—as surely as Philando Castile's, as surely as Alton Sterling's, as surely as twelve-year-old Tamir Rice's—could be snatched away in that same fatal second." *Id.* at 8. For commentary on Anderson's book, *see* Dave Davies, *Historian Uncovers the Racist Roots of The 2nd Amendment*, NPR (June 2, 2021), https://www.npr.org/2021/06/02/1002107670/historian-uncovers-the-racist-roots-of-the-2nd-amendment (https://perma.cc/HAT3-5A2Z). *Cf.* Jonathan Turley, *Second Amendment Latest Issue To Be Reframed — Wrongly — As 'Racist'*, Hill (July 28, 2021), https://thehill.com/opinion/judiciary/565177-second-amendment-latest-issue-to-be-reframed-wrongly-as-racist (https://perma.cc/W24J-SRTN) (opining "the suggestion that [racism] was a primary motivation for the Second Amendment is utter nonsense").

[247] David Frum, *The Chilling Effects of Openly Displayed Firearms*, ATLANTIC (Aug. 16, 2017), https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-mean-charlottesville-could-have-been-graver/537087/ (https://perma.cc/4SZ6-FNUT), *citing* David A. Graham, *Do African Americans Have a Right to Bear Arms?*, ATLANTIC (June 21, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-continued-erosion-of-the-african-american-right-to-bear-arms/531093/ (https://perma.cc/MX6C-26LZ). *See also* Avinash Amarth, Michael Thomas, & Christopher Smith, *Second Class*, INQUEST (Nov. 5, 2021), https://inquest.org/nyc-public-defenders-amicus-second-class/ (arguing that Black and brown individuals are treated like second-class citizens when it comes to the Second Amendment (https://perma.cc/LD3Y-RCDR); Sharone Mitchell, Jr., *There's No Second Amendment on the South Side of Chicago: Why Public Defenders Are Standing With The New York State Rifle And Pistol Association In The Supreme Court*, NATION (Nov. 12, 2021), https://www.thenation.com/article/politics/gun-control-supreme-court/ (https://perma.cc/2BFV-XEJY).

[248] While I have engaged in research on implicit racial bias and how we can start trying to overcome implicit bias elsewhere, *see, e.g.*, Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias* in ENHANCING JUSTICE: REDUCING BIAS (Redfield ed. 2017), Lee, *Making Race Salient*, *supra* note 151, figuring out how to get to a world in which racial bias does not influence the way people perceive Black and brown individuals with firearms is beyond the scope of this Article.

to relax laws intended to curb gun violence.[249] Even when Black individuals are *lawfully* carrying guns, they are usually seen as the aggressors.[250]

In recognition of the fact that an individual with a firearm may have displayed or pointed that firearm to try to avoid becoming the victim of physical violence, I also propose that the jury can find that the defendant was not the initial aggressor if: (1) the defendant displayed the firearm in response to a credible threat of physical harm, and (2) his or her intent in displaying the firearm was to avoid a physical confrontation.[251] If the jury finds the defendant was *not* the initial aggressor, it can go on to consider the defendant's claim of self-defense. If the jury finds that the defendant was the initial aggressor, then it would decide the case without considering the defendant's claim of self-defense. And remember that if one's use of a firearm aimed at another person or displayed in a threatening manner was obviously an act of self-defense, the prosecutor will likely choose not to press any criminal charges.[252] My jury instruction proposal only comes into play if an individual who points a firearm at another person or displays a firearm in a threatening manner is charged with a crime and claims they acted in self-defense. If one is not charged in the first instance, a jury instruction would not be necessary.

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[249] Elie Mystal, *Why are Public Defenders Backing a Major Assault on Gun Control?*, THE NATION (July 26, 2021) (critiquing public defender offices supporting petitioners in New York State Pistol and Rifle Association v. Bruen), https://www.thenation.com/article/society/black-gun-owners-court/ (https://perma.cc/UQ5L-TYLM). *See* Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amicus Curiae Supporting Petitioners in New York State Rifle & Pistol Assoc. v. Corlett, Case. No. 20-843, at 5 (arguing that New York's licensing scheme "criminalize[s] gun ownership by racial and ethnic minorities").

[250] David A. Graham, *Do African Americans Have a Right to Bear Arms?*, ATLANTIC (June 21, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-continued-erosion-of-the-african-american-right-to-bear-arms/531093/ (https://perma.cc/MX6C-26LZ). Graham points out that field work by Jennifer Carlson, a sociologist at the University of Arizona, confirms "that law-abiding men of color are . .. more likely to be harassed simply for choosing to carry a gun." *Id., quoting* JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 115 (Oxford Univ. Press 2015). "They must navigate the widespread presumptions that they are criminals and that their guns are illegally possessed or carried." *Id.*

[251] I would support placing the burden of disproving initial aggressor status on the defendant since the defendant is the one claiming to have acted in self-defense, but the decision as to whether to place the burden of proving or disproving initial aggressor status on the prosecution or the defense would be up to each jurisdiction.

[252] Moreover, if the person claiming self-defense is in a state with an immunity provision, she will have a pretrial opportunity to present a prima facie case that she was acting in self-defense and if the government cannot overcome that showing by clear and convincing evidence, the person claiming self-defense will be completely immune from criminal prosecution. *See, e.g.*, FLA. STAT. § 776.032 (1) & (4) (2010) ("In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1)"). For critique of these immunity provisions, *see* Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, ___ S. CAL. L. REV. ___ (forthcoming).

One might object to the proposal on the ground that it improperly assumes that the display of a firearm in a threatening manner or the pointing of a firearm at another person gives rise to a reasonable apprehension of physical harm. There is nothing improper about singling out the display of a firearm in a threatening manner or the pointing of a firearm at another person for an initial aggressor jury instruction. Indeed, in recognition of how dangerous the act of pointing a firearm at another person can be, some states direct the jury to presume recklessness and danger from the act of pointing a firearm—even if unloaded—at another person. In the gun-friendly state of Texas, for example, the deadly conduct statute provides, "A person commits [this] offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury."[253] The statute goes on to provide that "[r]ecklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded."[254] Moreover, the act of displaying a firearm in a threatening manner is a crime in nearly all states.[255]

Former National Rifle Association (NRA) CEO Wayne LaPierre's 2012 statement, "The only thing that stops a bad guy with a gun is a good guy with a gun," has become a rallying cry for gun enthusiasts.[256] The problem with this slogan is that it isn't necessarily true. Too often people can't tell whether a person with a gun is a "good guy with a gun" or a bad guy with a gun. As Mary Anne Franks observes, when Wayne LaPierre and his wife got "swatted" in 2013,[257]

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[253] TEX. PENAL CODE ANN. § 22.05(a) (West 2021).

[254] TEX. PENAL CODE ANN. § 22.05(c) (West 2021). Texas also provides that whenever a jury instruction with a presumption is given to the jury, it must be accompanied by an additional jury instruction that tells the jury, inter alia, that "the presumption applies unless the state proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist." TEX. PENAL CODE ANN. § 2.05(2).

[255] Nearly every state prohibits displaying a gun in an "angry" or "threatening" manner. Chip Brownlee, *What Counts as Brandishing? When Is It Illegal?*, TRACE (July 2, 2020), https://www.thetrace.org/2020/07/armed-st-louis-missouri-couple-threat-brandishing-self-defense/ (https://perma.cc/7GUG-2Q5B) (last visited April 2, 2022). Interestingly, according to the U.S. Concealed Carry Association, only five states (Louisiana, Michigan, Mississippi, Virginia and West Virginia) explicitly prohibit "brandishing," but "[b]randishing a firearm may fall under other state laws, such as aggravated assault, assault with a deadly weapon, improper use of a firearm, menacing, intimidating or disorderly conduct." *Brandishing*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/general-terms/brandishing/ (https://perma.cc/LM76-LTSN) (last visited April 2, 2022).

[256] 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/XAX6-57CB). *See also* Susanna Lee, *How The 'Good Guy With A Gun' Became A Deadly American Fantasy*, PBS NEWSHOUR (June 8, 2019), https://www.pbs.org/newshour/nation/how-the-good-guy-with-a-gun-became-a-deadly-american-fantasy (https://perma.cc/GQ36-9269) (last visited April 2, 2022).

[257] Dakin Andone, *Swatting Is a Dangerous Prank with Potentially Deadly Consequences. Here's What You Need To Know*, CNN (March 30, 2019) (explaining that "swatting is a prank call made to authorities with the express purpose of luring them to a location – usually a home – where they are led to believe a horrific crime has been committed or is in

even they couldn't tell whether the police surrounding their house were good guys with guns or bad guys with guns.[258] And when 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.[259]

Nor would it be wise to carve out an exception to existing or proposed initial aggressor rules for racial minorities or anyone else as this would invite criticism for not carving out exceptions for others. Moreover, carving out exceptions for certain people would likely lead to other carve-outs, with many individuals claiming to fit within the exception. Eventually, the exception or exceptions would end up swallowing the rule.

In cases where an individual displays a firearm in a threatening manner or points it at another person in public and is charged with a crime, the proposal does not require the jury to find that the defendant was the initial aggressor; it simply ensures that the jury gets to determine whether the defendant was the initial aggressor. In this way, it attempts to even the playing field so that all individuals with firearms

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progress" which usually "results in a forceful response from local police or SWAT teams, who have no way [of knowing] the call is a hoax"), https://www.cnn.com/2019/03/30/us/swatting-what-is-explained/index.html (https://perma.cc/8MPJ-6YWJ).

[258] Franks recounts what happened to Wayne LaPierre and his wife Susan in 2013:

> Around 4 a.m. on April 4, 2013, the LaPierres were "swatted." A 911 operator called Susan LaPierre to tell her that police had surrounded their house. They were responding to a call from a person claiming to be Wayne LaPierre, who stated that he had just shot his wife, had barricaded himself inside their home and would come out shooting if police tried to take him. Eventually the operator persuaded Wayne and Susan to emerge from their house, where they were met by a dozen police officers yelling at them to get down. But for some length of time, Susan refused to go outside because she didn't believe that the caller was a real 911 operator. "'Don't go outside,' she told Wayne. 'You don't know who that is. They're going to kill you.'" That night in their expensive, well-secured home, the multimillionaire vice president of the NRA and his wife could not tell if the guys with guns surrounding their house were good or not. Had the couple armed themselves as they emerged, the police would not have been able to tell if they were good guys, either.

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-and-private-security/2021/12/22/1f7b4b22-496b-11ec-b8d9-232f4afe4d9b_story.html (https://perma.cc/JQC7-XSFD) (last visited April 2, 2022).

[259] Police shootings of Black men using their firearms to hold criminal suspects until the police arrive suggest "one of the biggest limits of the conservative argument that 'good guys with guns' are what's needed to prevent gun violence: The police can't always tell a good guy with a gun from a bad guy with a gun, and when the good guy with a gun is black, the police sometimes assume he's a bad guy." 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/DN4C-X4YD) (last visited April 2, 2022); Cynthia Lee, *Jemel Roberson's Avoidable Death: Reform Deadly Force Laws, Require Police To De-Escalate*, USA TODAY (Nov. 15, 2018), https://www.usatoday.com/story/opinion/2018/11/15/jemel-roberson-killed-deadly-force-require-police-de-escalation-column/2002341002/ (https://perma.cc/X99B-TWPA) (last visited April 2, 2022).

are treated the same way as Black and brown individuals with firearms tend to be treated. If one brings a firearm out in public and ends up using it to harm others or create reasonable apprehension of physical harm, it seems eminently fair to increase the scrutiny on that individual's actions.

While it may seem out of the ordinary to mandate the giving of a particular jury instruction, it is common to require certain jury instructions in a criminal case. For example, judges are typically required to give an instruction to the jury on the presumption of innocence and the burden of proof.[260] Another commonly required jury instruction is the instruction that the defendant has a constitutional right not to testify and if the defendant chooses to exercise this right, the jury should not draw any unfavorable inference from the defendant's decision not to testify.[261] When a defendant decides to testify at trial and prior convictions are entered into evidence against him, the judge is typically required to instruct the jury that they should only consider those prior convictions as part of their assessment as to whether the defendant is a credible witness, not as proof that the defendant committed the charged offense.[262] When the government is trying multiple defendants together, the judge typically must give the jury an instruction that the fact that the defendants are on trial together is not evidence that they were associated with one another or that any one of them is guilty.[263]

Judges are also required to give certain jury instructions depending on the type of evidence that has been presented. For example, in cases in which the government presents tracking dog evidence, some states require the judge to issue a cautionary instruction to the jury as follows: "You must consider tracking-dog evidence with great care and remember that it has little value as proof."[264] Some jurisdictions strongly recommend that the judge give an instruction advising the jury that cross-racial identifications are less reliable than same-race identifications in cases where a witness of one race identifies a defendant of another race as the perpetrator of the crime.[265]

It is also common to require the judge to give certain jury instructions when the defendant has proffered some evidence supporting a criminal defense. For example, when a defendant presents some evidence of self-defense, the judge is typically required to give a jury instruction outlining the elements of self-defense.[266] Typically, the judge is required to instruct the jury on which party bears the burden of proving or disproving self-defense and by what standard of evidence.[267]

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[260] 6 WAYNE LAFAVE, ET AL., CRIMINAL PROCEDURE § 24.8(a), § 24.8(c) (4th ed.) (2021).
[261] M CRIM JI 3.3.
[262] M CRIM JI 3.4.
[263] M CRIM JI 2.19; CALCRIM No. 203.
[264] M CRIM JI 4.14.
[265] State v. Henderson, 27 A.3d 872 (N.J. 2011); United States v. Telfaire, 469 F.2d 552, 557 (D.C. Cir. 1972).
[266] M CRIM JI 7.20.
[267] CALCRIM No. 505, *quoting* People v. Breverman 960 P.2d 1094 (Cal.4th 1998).

Some jurisdictions that recognize the defense of imperfect self-defense require the judge to give an instruction on imperfect self-defense whenever the judge instructs the jury on self-defense.[268] Similarly, in cases where the defendant presents evidence of heat of passion, the judge is typically required to give an instruction on voluntary manslaughter.[269]

Requiring jury instructions in the situations described above provides consistency and certainty, both of which are helpful to both litigants and judges. Mandating an initial aggressor instruction in cases involving a criminal defendant who displayed a firearm in a threatening way or pointed it at another person offers a measure of certainty and consistency that is currently lacking and would enable litigants to better prepare their cases at trial. In the Kyle Rittenhouse case, for example, the judge did not rule on whether to give a provocation instruction until just before closing arguments.[270] This hindered the prosecution's ability to lay the groundwork for the argument that Rittenhouse provoked the danger he found himself in by bringing an AR-15 style rifle to Kenosha, Wisconsin on the third night of racial protests—an argument that the prosecution finally made during closing arguments. By closing arguments, however, the jury had already heard all the testimony and likely had formulated strong opinions about Rittenhouse's self-defense claim.

C. Applying the Proposed Reforms

To see how the proposed reforms would work, let's return to our hypothetical McCloskeys. Under Missouri law, as in most states, a person is justified in using physical force in self-defense if they reasonably believe the use of force is necessary to protect against an imminent threat.[271] Missouri also recognizes the initial aggressor limitation on the defense of self-defense.[272]

If our hypothetical McCloskeys had shot and killed a protestor in a state with a provoke-with-intent type of initial aggressor rule, they would not be precluded from arguing to a jury that they acted in self-defense. This is because the McCloskeys could simply take the stand and say it was not their intent to provoke any of the protestors to attack them so they could then fire upon the protestors and claim self-defense. Without an admission that it was their intent to provoke an

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[268] CALCRIM No. 604.
[269] CALCRIM No. 570, *quoting* People v. Breverman 960 P.2d 1094 (Cal.4th 1998).
[270] Kim Bellware, *Jury in Rittenhouse Trial Can Consider Lesser Charges and Whether He Provoked Attack, Judge Says*, WASH. POST (Nov. 14, 2021), https://www.washingtonpost.com/nation/2021/11/14/rittenhouse-jury-instructions/ (https://perma.cc/LCQ4-BRMN).
[271] MO. REV. STAT. § 563.031(1) (2016) ("A person may . . . 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").
[272] MO. REV. STAT. § 563.031.1(1)(a) (West 2016).

attack, it would be difficult, if not impossible, for the government to prove otherwise.

If our hypothetical McCloskeys had shot and killed a protestor in a state that includes an aggressor type of initial aggressor rule, whether they would be allowed to claim self-defense would depend in large part on how that state defines the term "initial aggressor." As discussed above, some jurisdictions require proof that the defendant was engaged in an unlawful act before the defendant can be considered a provocateur or aggressor.[273] A person who carries a gun in public and points it at another person might not qualify as an initial aggressor in a state that freely allows the open carry of firearms.

Under Missouri law, an individual has no right to use physical force in self-defense if he was the initial aggressor unless he withdraws from the encounter and effectively communicates his withdrawal to the other person who nonetheless persists in attacking.[274] Missouri courts have defined an "initial aggressor" as "one who first attacks or threatens to attack another."[275]

If the McCloskeys had fired their weapons upon any of the protestors who were simply walking past their house, there is no question that they would qualify as initial aggressors under current Missouri law since they would have been the first to attack. Let's say, however, that Mark McCloskey had first advanced towards one of the protesters with his firearm pointed at the protester and got so close to the protestor that the protestor tried to push the firearm away to disarm the McCloskey. If our hypothetical Mark McCloskey had then shot and killed the protestor, a prosecutor could argue that by advancing towards the protestor with his firearm pointed at the protestor, hypothetical McCloskey had threatened to attack the protestor and therefore was the initial aggressor. Hypothetical McCloskey, however, might argue—just as real Travis McMichael and real Kyle Rittenhouse argued—that he feared the person he shot was attempting to get his firearm to use it against him and shot him in self-defense. If the judge overseeing our hypothetical case was not too sympathetic with Black Lives Matter protestors,[276] that judge might conclude that the act of pointing an AR-

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[273] U.S. v. Peterson, 483 F.2d 1222, 1233 (D.C. Cir. 1973).

[274] MO. REV. STAT. § 563.031.1(1)(a) (West 2016).

[275] State v. Anthony, 319 S.W.3d 524, 546 (Mo. Ct. App. 2010) ("an initial aggressor, that is, one who first attacks or threatens to attack another, is not justified in using force to protect himself from the counterattack that he provoked."); State v. Morse, 498 S.W.3d 467, 472 (Mo. Ct. App. 2016) ("An initial aggressor is one who first attacks or threatens to attack another"), *quoting* State v. Hughes, 84 S.W.3d 176, 179 (Mo. App. 2002).

[276] For example, Republican Senator Ron Johnson suggested that he wasn't afraid of the pro-Trump MAGA (Make America Great Again) individuals who violently stormed the U.S. Capitol on January 6, 2021, in an effort to prevent Joe Biden but he would have been afraid if the individuals had been Black Lives Matter or Antifa protestors. *See* Ben Leonard, *Ron Johnson Says He Didn't Feel Threatened Jan. 6. If BLM or Antifa Stormed Capitol, He 'Might Have,'* POLITICO (Mar. 13, 2021), https://www.politico.com/news/2021/03/13/ron-johnson-black-lives-matter-antifa-capitol-riot-475727 (https://perma.cc/24M3-KE6S) (reporting that Senator Ron Johnson (R- WI) told a conservative talk show radio host, "Even though those thousands of people that were marching to the Capitol were trying to pressure people like me to vote the way they wanted me to vote, I knew those were people that love

15 style rifle at another person was not an act of aggression. If so, the judge might decline to give the jury an initial aggressor instruction, and the jury would not get to consider whether McCloskey was the initial aggressor. Under my proposal, in contrast, the judge would have to give the jury an initial aggressor instruction and let the jury decide whether hypothetical McCloskey was the initial aggressor.

Recall that the actual McCloskeys also argued they were acting in defense of their home. Like many states,[277] Missouri recognizes the defense of habitation.[278] As a general matter, the defense of habitation gives a resident of a dwelling the right to use deadly force to protect against an imminent unlawful entry into the dwelling.[279]

Until 2007, Missouri's defense of habitation required strict proportionality.[280] A Missouri homeowner (or resident of the dwelling) could only use deadly force against an intruder if she reasonably believed the intruder was threatening imminent death or serious bodily injury.[281] In 2007, the Missouri legislature combined the defenses of self-defense and habitation.[282] In rewriting the defense of habitation statute, the legislature removed the proportionality requirement that used to apply when one was defending one's home.[283] The statute now appears to allow a lawful resident of a dwelling to use deadly force against any person who unlawfully enters, or attempts to unlawfully enter the dwelling, without a corresponding belief that the intruder poses a threat of imminent death or serious bodily injury.[284] Unless the Missouri courts interpret the law as requiring proportionality, a Missouri homeowner who inadvertently leaves her front or back door unlocked can shoot an unarmed individual as he is entering the home through the unlocked door, even if she knows that the individual is her drunk, unarmed next door neighbor mistakenly thinking he is entering his own home.

Additionally, under longstanding pre-2010 Missouri case law, 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

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this country, that truly respect law enforcement, would never do anything to break the law, and so I wasn't concerned," then adding, "Now, had the tables been turned — Joe, this could get me in trouble — had the tables been turned, and President Trump won the election and those were tens of thousands of Black Lives Matter and Antifa protesters, I might have been a little concerned"); Allison Pecorin, *GOP Sen. Ron Johnson Says He Didn't Feel 'Threatened' By Capitol Marchers But May Have if BLM or Antifa Were Involved*, ABCNEWS (Mar. 13, 2021), https://abcnews.go.com/Politics/gop-sen-ron-johnson-feel-threatened-capitol-marchers/story?id=76437425 (https://perma.cc/6CFX-GH26).

[277] Annotation, *Homicide or Assault in Defense of Habitation or Property*, 25 A.L.R. 508 (1923).

[278] MO. REV. STAT. § 563.031.2(2) (West 2016).

[279] 40 AM. JUR.2d Homicide §161.

[280] Sarah A. Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to the Defense of Habitation*, 56 ST. LOUIS U. L.J. 857, 861 (2012).

[281] *Id.*

[282] MO. REV. STAT. § 563.031.2(2) (West 2021). *See also* Pohlman, *supra* note 281, at 875.

[283] Pohlman, *supra* note 281, at 876.

[284] *Id.*

the front yard.[285] In 2010, the Missouri legislature expanded the defense of habitation to apply to any private property.[286] As a result, Missouri's defense of habitation statute now appears to allow a lawful resident of a dwelling to use deadly force against one who unlawfully enters the curtilage, i.e., the area immediately surrounding the home, even if the person does not pose any threat of physical harm to the resident of the dwelling or others.[287]

Given these changes to the defense of habitation in Missouri, if the McCloskeys had shot and killed a protestor and could show that they did so because that protestor unlawfully, i.e., without their permission, had put one foot onto their front lawn, i.e., their private property, or attempted to do so, they could argue that they should not be held criminally liable for the killing. I would argue, however, that when the Missouri legislature combined the defense of self-defense and the defense of habitation in 2007, the initial aggressor limitation on the defense of self-defense became a limitation on the defense of habitation as well.[288] Under my proposal, since the McCloskeys brought their firearms out of the home and pointed them at the unarmed protestors or displayed them in a threatening manner, the judge would have to give an initial aggressor instruction to the jury. The jury would then get to decide whether they were the initial aggressors.

D. Possible Objections

In this Section, I address a few possible objections to my proposal requiring the judge to give an initial aggressor instruction whenever an individual brings a firearm out in public, displays it in a threatening manner or points it at another person, is charged with a crime, and claims self-defense. There are doubtless many other objections that might be raised, but in the interest of time, I have addressed only the most salient objections.

1. Doesn't this proposal impermissibly shift the burden of proving self-defense on the defendant in violation of the defendant's due process rights?

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[285] 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"). *See also* State v. Goodine, 196 S.W.3d 607, 613-14 (Mo. Ct. App. 2006) ("as 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").

[286] Pohlman, *supra* note 281, at 879.

[287] *Id.* at 877-80.

[288] I would also argue that the initial aggressor limitation should apply not only to the defense of self-defense but also to any corollary defenses related to the defense of self-defense, such as the defense of others or defense of habitation at least when the act of killing occurs outside the actual dwelling.

One might first object to mandating an initial aggressor instruction on the ground that this impermissibly shifts the burden of proving self-defense to the defendant in violation of the defendant's due process rights. It does not. If the State places the burden of disproving self-defense on the prosecution, the burden of disproving self-defense stays with the prosecution. My second proposal simply states a triggering condition for an initial aggressor jury instruction.

Moreover, while most states place the burden of disproving self-defense on the State, there is nothing that prohibits them from placing the burden of proving self-defense on the defendant.[289] In *Martin v. Ohio*, the Supreme Court held that States may choose to place the burden of proving an affirmative defense like self-defense on the defendant or the government.[290] If a state may place the burden of proving self-defense on the defendant without violating the Constitution, a state can surely place the lesser burden of disproving initial aggressor status on the defendant as well. My proposal, however, does not require the states to place the burden of disproving initial aggressor status on the defendant. It lets the states decide which party should bear the burden of proving or disproving initial aggressor status.[291]

2. If an individual has a license to carry in public, is it fair to require an initial aggressor instruction?

One might also object to mandating an initial aggressor instruction on the ground that such a mandate would unfairly include individuals who have obtained a license to carry a firearm in public. It is true that my second proposal does not recognize an exception for individuals with a license to carry a firearm in public. Even individuals with a license to carry would be subject to an initial aggressor instruction if they bring their firearm out in public, display it in a threatening manner or point it at another person, are charged with a crime relating to the use of that firearm and claim self-defense. Having the right to carry a firearm in public does not mean one has the right to *use* that firearm in a manner that causes physical harm or creates a

[289] Martin v. Ohio, 480 U.S. 228, 235-36 (1987).
[290] *Id.*
[291] If a state decided to place the burden of disproving initial aggressor status on the defendant, which is what I would recommend, the standard of proof likely would not be very high. Most states would probably require the defendant to prove by only a preponderance of the evidence that she was facing a credible threat of physical harm and displayed or pointed the firearm to try to avoid a physical confrontation, which is the usual standard of proof when the defendant bears the burden of proving an affirmative defense. DRESSLER, *supra* note 49, § 16.01, at 193 (noting that when a legislature allocates to the defendant the burden of persuasion regarding a criminal law defense, the defendant "is usually required to convince the fact finder of his claim by a preponderance of the evidence").

reasonable apprehension of such harm. Given the enormity of the psychological and emotional harms caused by gun violence in addition to the physical harms suffered by the actual victims of gun violence,[292] it is fair to mandate an initial aggressor instruction any time any individual brings a firearm outside the home and then commits a crime with it.

It also makes sense to apply an across-the-board rule without carving out an exception for individuals with a license to carry a firearm in public because the standards for the granting of a license to carry vary from state to state. The vast majority of states today "will issue a concealed carry permit to pretty much any person who applies and meets their minimal requirements."[293] These states are called "shall issue" states.[294] A handful of states, including New York, have licensing schemes that require the applicant to show "proper cause" or "good reason" to carry a firearm in public.[295] These states are called "may issue" states.[296] The showing necessary to satisfy the "proper cause" standard differs in each state so the mere fact that one has a license to carry does not carry the same meaning the same thing in every state.[297]

An individual with a license to carry based on "proper cause" might be able to put forth the granting of that license as some evidence in support of their claim that they were not an initial aggressor, but the granting of such a license alone would not be sufficient proof that they were facing a threat of physical harm at the time that they discharged their firearm. Proof that they were facing a credible threat of physical

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[292] Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 1 (2021) (discussing the harms to those who witness gun violence and the continuing harm to the families and friends of victims of gun violence).

[293] Brittanica, *State-by-State Concealed Carry Permit Laws*, PROCON.ORG (Jan. 11, 2022), https://concealedguns.procon.org/state-by-state-concealed-carry-permit-laws/ (https://perma.cc/DZ29-PW23).

[294] *Id.*

[295] *Id.* (listing California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey and New York as "may issue" states); David G. Savage, *Supreme Court Agrees to Decide Whether Gun Owners Have Right to Carry a Weapon in Public*, L.A. TIMES (Apr. 26, 2021), https://www.latimes.com/politics/story/2021-04-26/supreme-court-agrees-to-decide-whether-gun-owners-have-right-to-carry-a-weapon-in-public (https://perma.cc/GK55-5AXQ).

[296] Brittanica, *supra* note 293.

[297] In Hawaii, for example, a person applying for a concealed carry license must show (1) an exceptional case, and (2) reason to fear injury to his or her person or property. Young v. Hawaii, 992 F.3d 765, 775 (9th Cir. 2021) (en banc), *citing* HAW. REV. STAT. § 134-9(a). As a general rule of substantive criminal law, deadly force is not allowed in defense of personal property. DRESSLER, *supra* note 49, § 20.02[B][3] at 248. A person with a concealed carry license granted on the basis of fear of injury to property has not shown they were facing a credible threat of physical harm to their person and should be required to make that showing if they brought a firearm outside the home, pointed it and shot and killed or injured another person.

harm *at that time* and pointed the firearm to try to avoid a physical confrontation would be needed to escape initial aggressor status.[298]

It should be noted that this objection will likely become moot if the Supreme Court rules that New York's licensing scheme requiring an individual to show "proper cause" violates the Second Amendment. If the Court rules this way, the "proper cause" licensing scheme that currently exists in New York and other states will likely be replaced with the more permissive "shall issue" licensing regime in which the State must issue a license to carry a firearm in public to anyone who applies without requiring any showing of special need. If an individual obtains a license to carry a firearm in a "shall issue" state, the mere fact that she had a license would be meaningless in terms of disproving initial aggressor status because such a license does not require any showing of need to protect oneself in self-defense.

3. Why not limit the proposal to those with semi-automatic or automatic weapons?

Another possible objection to the proposal is that it sweeps too broadly by covering any individual who brings a firearm outside the home and displays or points it at another person. One objecting on this ground might argue that the proposal should be limited to those who bring semi-automatic or automatic weapons outside the home rather than those with "less harmful" firearms.

One problem with limiting initial aggressor status to those with semi-automatic or automatic weapons is that such a limitation would open the door to debate over which weapons should count as automatic or semi-automatic. Defendants with firearms claiming they acted in self-defense would try to argue that the firearm they used was not an automatic or semi-automatic weapon.

This was a problem with the assault weapons ban contained in the U.S. Violent Crime Control and Law Enforcement Act of 1994, which was in effect from 1994 to 2004.[299] The 1994 Act banned certain semi-automatic firearms that were defined as assault weapons[300] but because the Act defined the term "assault weapons" in a very specific way, manufacturers were able to slightly modify the firearms they made

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[298] *See supra* note 251.

[299] 18 U.S.C. § 922(v)(1) (making it "unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon") (expired on September 13, 2004).

[300] "The 1994 act defined the phrase 'semiautomatic assault weapon' to include 19 named firearms and copies of those firearms, as well as certain semi-automatic rifles, pistols, and shotguns with at least two specified characteristics from a list of features." *Assault Weapons* GIFFORDS LAW CENTER, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#footnote_7_5603 (https://perma.cc/FN8F-RTPY) (last visited Dec. 27, 2021).

so they would not fall within the definition.[301] As Adam Winkler notes, one problem with the assault weapons ban contained in the U.S. Violent Crime Control and Law Enforcement Act of 1994, which was in effect from 1994 to 2004 was that it "didn't ban the sale of every gun capable of somewhat rapid fire" but instead "attempted to ban the sale of any semiautomatic rifle that had the menacing military-style appearance of a machine gun."[302]

In proposing a rule that applies to all firearms, I am not precluding defendants from arguing that the firearm they used was less harmful or less lethal than other firearms and therefore would not have created a reasonable apprehension of physical harm. If one is staring down the barrel of a gun, however, I think one would be apprehensive of physical harm whether that gun was a semi-automatic firearm or not, so an argument that one was using just a regular firearm, not a semi-automatic or automatic firearm, would not be that persuasive.

4. If one has a Second Amendment right to bear arms in public, doesn't the proposal infringe upon the exercise of one's constitutional rights?

Another possible objection hinges on the outcome of the *New York Pistol & Rifle Association v. Bruen* case. If the Supreme Court rules that individuals have a Second Amendment right to "bear" arms outside the home, some might argue that the proposals in this Article would impermissibly infringe on the exercise of one's Second Amendment right to keep and bear arms.

The right to keep and bear arms, however, is not an absolute right, as even the *Heller* Court acknowledged.[303] This is true of other constitutional rights as well. For example, even though individuals have a First Amendment right to free speech, this is not an absolute right.[304]

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[301] *Assault Weapons*, GIFFORDS LAW CENTER, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#footnote_7_5603 (https://perma.cc/FN8F-RTPY) (last visited Dec. 27, 2021) (noting that the definition of "semiautomatic assault weapon" in the 1994 Act "created a loophole that allowed manufacturers to successfully circumvent the law by making minor modifications to the weapons they already produced.").

[302] ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 38-39 (2013) (noting that the federal assault weapon ban enacted in 1994 "defined assault weapons largely by their visual characteristics, rather than their lethality").

[303] District of Columbia v. Heller, 554 U.S. 570, ___ (2008) ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

[304] Gitlow v. New York, 268 U.S. 652, 666 (1925) ("It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose . . . ").

One has no right to incite others to imminent lawless action.[305] Similarly, even though the Bill of Rights guarantees individuals a Fourth Amendment right to be free from unreasonable searches and seizures, this is not an absolute right. The Supreme Court has carved out many exceptions to the warrant requirement.[306]

The right to bear a firearm does not include a right to *use* that firearm to threaten others. Regardless of whether one has a statutory or constitutional right to carry a firearm in public, if one uses that firearm in a way that causes physical or psychological harm to another person, the question of whether one acted justifiably in self-defense is a question separate and distinct from the question of whether one had a statutory or constitutional right to bear arms. Whether one acts justifiably in self-defense turns on whether one meets the requirements of self-defense as set forth in the jurisdiction's self-defense statute and case law interpreting that statute.

CONCLUSION

As restrictions on carrying guns in public continue to loosen, the number of individuals bringing firearms out in public is likely to increase. If gun owners choose to resolve minor disputes in public by displaying their firearms in a threatening manner or pointing their firearms at others and end up committing a crime, they should not be able to hide behind a claim of self-defense. The law of self-defense has a mechanism—the initial aggressor limitation—that can help discourage people from pointing guns in public. This mechanism, however, has

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[305] Brandenburg v. Ohio, 395 U.S. 444, ___ (1969) ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").**]**

[306] For example, the Supreme Court has held that the homes of probationers may be searched without a warrant and probable cause. Griffin v. Wisconsin, 483 U.S. 868 (1987) (upholding warrantless search of probationer's home under the special needs doctrine); United States v. Knight, 534 U.S. 112 (2001) (upholding warrantless search of a probationer's home based on probationers' reduced expectations of privacy). The Court has also upheld warrantless, suspicionless searches of parolees. Samson v. California, 547 U.S. 843 (2006) (stating that parolees have even fewer expectations of privacy than probationers because parole is more akin to imprisonment than probation). *See also* Kate Weisburd, *Sentenced to Surveillance*, 98 N.C. L. REV. 717, 728 ("With increasing frequency, judges and prosecutors require defendants to agree to continuous suspicionless searches of their personal electronic devices and electronic data as a condition of supervision"). In one opinion, the late Justice Antonin Scalia decried the number of exceptions to the warrant requirement recognized by the Supreme Court, writing that "one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]. . . ." California v. Acevedo, 500 U.S. 565, ___ (1991) (Scalia, J., concurring).

not yet been utilized to its fullest. The initial aggressor limitation can and should be strengthened in the ways this Article has outlined for the safety of the nation.