SELF-DEFENSE EXCEPTIONALISM AND THE IMMUNIZATION OF PRIVATE VIOLENCE

ERIC RUBEN*

ABSTRACT

After the high-profile trial of Kyle Rittenhouse, the parameters of lawful self-defense are a subject of intense public and scholarly attention. In recent years, most commentary about self-defense has focused on "Stand Your Ground" policies that remove the duty to retreat before using lethal force. But the reaction to Rittenhouse's case reflects a different, more extreme way that the law governing defensive force is changing. In particular, advocates and legislators say that private citizens like Rittenhouse who exercise self-defense should be entitled to immunity—an exemption from prosecution—giving them an extraordinary procedural benefit not attaching to other defenses that are adjudicated at trial. As this Article reveals, this effort to transform self-defense into something exceptional within criminal law began more than a decade ago in the shadows of Stand Your Ground. One-quarter of U.S. states have already enacted laws providing for self-defense immunity.

This Article examines this fundamental yet understudied shift in self-defense law. It shows how the concept of immunizing defensive force is foreign to the Anglo-American legal tradition as well as settled principles of modern criminal law and procedure, including the exceedingly narrow role of immunities. It tells the story of how self-defense immunity arose not as part of the broader criminal justice reform movement, but rather at the behest of the movement to insulate defensive gun use from liability. And it

* Associate Professor, SMU Dedman School of Law; Fellow, Brennan Center for Justice at N.Y.U. School of Law. Many thanks to Hillel Bavli, Joseph Blocher, Jake Charles, Guillermo Jose Garcia Sanchez, Chris Jenks, Cynthia Lee, Pamela Metzger, Darrell A. H. Miller, Adam Sopko, Jenia Iontcheva Turner, and Cynthia Ward, as well as participants in the U.C. Davis Law Review's 2021 symposium, for helpful comments and suggestions. Tiereney Bowman, Robert Larkin, Maggie Gianvecchio, Darby O'Grady, Meredith Palmer, and Nick Salinaro provided excellent research assistance.

demonstrates the costs of treating self-defense as an immunity, such as increasing violence, diminishing the institution of the jury, delegitimizing criminal law outcomes, and undermining judicial economy. After exposing the unreasoned rise and inevitable costs of self-defense immunity, this Article concludes that self-defense should remain an affirmative defense to criminal charges rather than immunize a defendant from being prosecuted at all. Self-defense reform should move in lockstep with other criminal law defenses so as to avoid the societal harms that result from immunizing defensive violence.

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INTRODUCTION

On August 25, 2020, seventeen-year-old Kyle Rittenhouse traveled to Kenosha, Wisconsin, with an illegally obtained AR-15–style rifle in the wake of the shooting of Jacob Blake by a police officer.[1] Rittenhouse said he went heavily armed to provide medical aid and protect property, albeit

1. Kim Bellware, *What to Know About the Contentious Trial of Kyle Rittenhouse*, WASH. POST (Nov. 10, 2021, 8:03 AM), https://www.washingtonpost.com/nation/2021/11/10/rittenhouse-trial-faq [https://perma.cc/ED9L-K3MG].

strangers' property, during racial justice protests and unrest following yet another police shooting of a Black man.[2] Instead, he shot three men during altercations, killing two of them.[3] Rittenhouse was charged with crimes including murder,[4] and in his defense he asserted self-defense: he feared that the men would disarm him and use his own rifle against him unless he shot them first.[5]

Rittenhouse's case was closely watched and controversial, splitting the nation into diametrically opposed camps regarding the appropriateness of his conduct. It also raised difficult factual and legal questions, including whether he provoked the confrontations and thereby negated the lawfulness of his defensive force.[6] At the end of a two-week trial at which dozens of witnesses testified, a jury deliberated for three days and returned a verdict of not guilty.[7] The outcome should have pleased those who supported Rittenhouse's conduct that summer night. Instead, a common reaction was, as former President Donald Trump put it, that Rittenhouse "shouldn't have been prosecuted in the first place."[8]

If that sentiment were simply a feature of modern political rhetoric, it might be undeserving of close scrutiny. Indeed, the politics of self-defense shone brightly after the Rittenhouse trial. U.S. Representative Marjorie Taylor Greene even introduced a bill to award Rittenhouse a civilian's highest congressional tribute, a Congressional Gold Medal, for his "courageous actions."[9] Several Republican politicians invited Rittenhouse to

2. *Id.*

3. *Id.*

4. *See* Crim. Complaint, State v. Rittenhouse, 2020 CF 000983 (Aug. 27, 2020). Wisconsin does not have a crime called "murder"; instead, it proscribes "first-degree intentional homicide" when a person "causes the death of another human being with intent to kill that person." WISC. STAT. § 940.01 (2022).

5. Shaila Dewan, *Can Self-Defense Laws Stand Up to a Country Awash in Guns?*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/us/rittenhouse-arbery-self-defense.html [https://perma.cc/YC5U-XKFD].

6. 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/7C86-Y292] (describing Wisconsin's initial aggressor doctrine in relation to the Rittenhouse case).

7. Julie Bosman, *Kyle Rittenhouse Was Found Not Guilty of Intentional Homicide and Four Other Charges*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial [https://perma.cc/6A5R-6XEW].

8. Fox News, *Trump on Rittenhouse Verdict*, YOUTUBE (Nov. 19, 2021), https://www.youtube.com/watch?v=b0lReIesfZE&t=6s [https://perma.cc/39J9-D7PW]; *see also* Bosman, *supra* note 7 (quoting Republican candidate for Wisconsin governor, Rebecca Kleefisch, as asserting that the prosecution of Rittenhouse was a "complete disgrace").

9. Kyle H. Rittenhouse Congressional Gold Medal Act, H.R. 6070, 117th Cong. (Nov. 23, 2021); Mariana Alfaro, *Rep. Greene Introduces Bill to Award Congress's Highest Honor to Kyle Rittenhouse, Who Fatally Shot Two Men*, WASH. POST (Nov. 24, 2021, 7:35 PM), https://www.washingtonpost.com/politics/greene-rittenhouse-congressional-gold-medal/2021/11/24/c09980d2-4d49-11ec-a1b9-9f12bd39487a_story.html [https://perma.cc/6XEN-XCX7]. Greene voted *not* to grant the same award to the police

intern in their offices.[10] Just days after the verdict, he was welcomed at Trump's Mar-a-Lago Club in Florida.[11]

But this Article shows how the notion that people "should not fear exposure to criminal prosecution when they use firearms to defend themselves and their homes" is more than rhetoric.[12] Rather, it is the foundation for an effort to grant an exemption from prosecution to those who, like Rittenhouse, claim self-defense in defending against criminal charges. After Rittenhouse's acquittal, one advocate penned "Kyle's Law" to cement the exalted status of self-defense.[13] The proposed statute would alter the law in various ways, including effectively immunizing lawful defensive force from prosecution altogether.[14] As it turns out, more than one-fourth of U.S. states have already done just that,[15] and the trend is likely to continue.[16]

In the past decade, legal scholarship has explored "Stand Your Ground," or the removal of the common law duty to retreat before using lethal defensive force in public.[17] That literature shows how Stand Your

officers who defended the Capitol during the riots of January 6, 2021. Annie Grayer & Kristin Wilson, *21 Republicans Vote No on Bill to Award Congressional Gold Medal for January 6 Police Officers*, CNN: POLITICS (June 16, 2021, 12:19 PM), https://www.cnn.com/2021/06/15/politics/congressional-gold-medal-house-vote/index.html [https://perma.cc/82HH-EDCN].

10. Jon Skolnik, *Lauren Boebert Challenges Madison Cawthorn to "Sprint" for Rittenhouse Internship*, SALON (Nov. 24, 2021, 5:25 PM), https://www.salon.com/2021/11/24/lauren-boebert-challenges-madison-cawthorn-is-in-a-wheelchair-to-sprint [https://perma.cc/H96Z-X8JF].

11. Jennifer Hassan, *Donald Trump Meets with Kyle Rittenhouse After Verdict, Calls Him "A Nice Young Man,"* WASH. POST (Nov. 24, 2021, 6:28 AM), https://www.washingtonpost.com/nation/2021/11/24/trump-meets-kyle-rittenhouse [https://perma.cc/MU3U-99SP].

12. Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case, State v. McCloskey, No. 2022-CR01300, at *1 (Cir. Ct. Mo. July 20, 2020).

13. *Kyle's Law: Stopping Politically Motivated Prosecutions of Self-Defense*, LAW OF SELF DEFENSE [hereinafter *Kyle's Law*], https://losd.ubpages.com/kyleslaw/ [https://perma.cc/DV72-N9UN].

14. *See id.* ("Let's make ALL probable cause hearings in self-defense cases into something akin to self-defense immunity hearings—if the prosecution can't disprove self-defense by a preponderance of the evidence at this pre-trial hearing, the matter is dismissed with prejudice . . . ."). The measure also proposes exposing prosecutors to personal liability in self-defense cases. *Id.*

15. *See* ALA. CODE § 13A-3-23(d) (2016); COLO. REV. STAT. § 18-1-704.5(3) (1985); FLA. STAT. § 776.032 (2005); GA. CODE ANN. § 16-3-24.2 (2014); KAN. STAT. ANN. § 21-5231 (2011); KY. REV. STAT. ANN. § 503.085 (West 2006); OKLA. STAT. tit. 21 § 1289.25(F) (2018); S.C. CODE ANN. § 16-11-450 (2006); MICH. COMP. LAWS § 780.961(1) (2006); IDAHO CODE § 19-202A(1) (2018); UTAH CODE ANN. § 76-2-309 (2021); S.D. CODIFIED LAWS § 22-18-4.8 (2021); IOWA CODE § 704.13 (2017); N.C. GEN. STAT. § 14-51.3 (2011).

16. *See, e.g.*, S. 1120, Reg. Sess. 2023–2024 (N.Y. 2023); S. 666, 101st Gen. Assemb., 2d. Reg. Sess. (Mo. 2022); *see also* S. 215, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S. 71, 64th Leg., Budget Sess. (Wyo. 2018).

17. *See, e.g.*, Megan Miller & John Pepper, *Assessing the Effect of Firearms Regulations Using Partial Identification Methods: A Case Study of the Impact of Stand Your Ground Laws on Violent Crime*, 83 LAW & CONTEMP. PROBS. 213 (2020); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIA. L. REV. 827 (2013); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237 (2008). Civic groups, including the American Bar Association, have also evaluated and critiqued Stand Your Ground. *See, e.g.*, AM. BAR ASS'N, NATIONAL

Ground interacts with an expansion of gun rights in a way that can lead to more violence and exacerbate existing patterns of discrimination in the criminal justice system.[18] Articles have likewise explored additional features of the intersection of criminal law, self-defense, and gun rights.[19] And legal scholars are starting to explore whether self-defense law might be bolstered in light of changed circumstances—especially the proliferation of gun carry—to limit the unnecessary loss of life.[20]

Yet the notion that self-defense is exceptional and "deserves" to be immunized, as one legislative witness put it,[21] has evaded close scrutiny. Articles about Stand Your Ground have acknowledged what Cynthia Ward

TASK FORCE ON STAND YOUR GROUND LAWS: FINAL REPORT AND RECOMMENDATIONS (Sept. 2015) [hereinafter ABA TASK FORCE], https://www.americanbar.org/content/dam/aba/administrative/diversity/SYG_Report_Book.pdf [https://perma.cc/SM5C-4BPU]; GIFFORDS LAW CTR., "STAND YOUR GROUND KILLS": HOW THESE NRA-BACKED LAWS PROMOTE RACIST VIOLENCE (May 2021), https://giffords.org/lawcenter/report/stand-your-ground-kills-how-these-nra-backed-laws-promote-racist-violence [https://perma.cc/9YYG-RANF]; RAND CORP., THE EFFECTS OF STAND YOUR GROUND LAWS (Apr. 2020), https://www.rand.org/research/gun-policy/analysis/stand-your-ground.html [https://perma.cc/8JVJ-N384].

18. *See infra* notes 234–38 and accompanying text (discussing literature).

19. In earlier work, I considered how increased gun carry can dilute the ways self-defense law traditionally has operated to steer conflicts away from unnecessary lethal violence. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 100–01 (2020) ("If the Second Amendment protects a broad right to carry handguns virtually everywhere and at all times, and most Americans choose to exercise that right, conflicts would regularly present a threat of lethal violence, and lethal force would regularly be perceived as a reasonably proportional and necessary response. In such a world, necessity and proportionality mean less, no longer moderating between lethal and nonlethal defensive force." (citations omitted)). Others have observed how the criminal law provides "thin and blurry" answers to the question of when brandishing a gun is lawful self-defense or a crime, Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1190 (2021), and how citizen arrest provisions, when combined with gun rights, can lead to deadly outcomes, Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground*, 100 TEX. L. REV. ONLINE 1, 7–12 (2021).

20. Cynthia Lee recently has proposed that policymakers adjust the initial aggressor doctrine to place more of a burden on those who carry guns and then claim self-defense after using them in confrontations. Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1 (2022). Rafi Reznik has argued that self-defense should be conceived as an excuse, not a justification, for otherwise unlawful violence. Rafi Reznik, *Taking a Break from Self-Defense*, 32 S. CAL. INTERDISC. L.J. 19 (2022); *see also infra* notes 207–09 and accompanying text (discussing the justification/excuse distinction and Reznik's argument). Meanwhile, Guha Krishnamurthi and Peter N. Salib explain how the confluence of expansive self-defense laws and firearm possession creates dangers of violence for even well-intentioned, rational actors. *See* Guha Krishnamurthi & Peter N. Salib, *Small Arms Races*, U. CHI. L. REV. ONLINE (June 3, 2022), https://lawreviewblog.uchicago.edu/2022/06/03/krishnamurthi-salib-small-arms-races [https://perma.cc/6TGF-CQXY]. After the Supreme Court established a broad Second Amendment right to carry handguns in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the focus on how self-defense law—as well as the criminal law more generally—might be adjusted to achieve optimal outcomes will only increase. *See generally* Eric Ruben, *Public Carry and Criminal Law After* Bruen, 135 HARV. L. REV. F. 505 (2022) (highlighting intersections between criminal law and public carry beyond licensing that could attract policymaking attention after *Bruen*).

21. *Self-Defense Amendments: Hearing on H.B. 227 Before the H. Judiciary Comm.*, 64th Leg., 2021 Gen. Sess. (Utah 2021), https://le.utah.gov/av/committeeArchive.jsp?timelineID=180423 [https://perma.cc/C63Q-C36R] (statement of Mitch Vilos).

termed the "curious beast" of self-defense immunity as well as the "confusion" it invites.[22] However, self-defense immunity warrants a sustained analysis in terms of how it began as an adjunct to the gun rights movement and how it fits within the criminal justice system today. That, in turn, calls for an examination of a more general topic that similarly has received little attention: the procedural treatment of criminal law defenses and why prosecutorial immunities are so few in number. To exempt a category of defendants from the ordinary criminal process is profound, bestowing "a far greater right than any encompassed by an affirmative defense, which may be asserted during trial but cannot stop a trial altogether."[23] Examining why the criminal law is generally opposed to granting an exemption from prosecution is an important, understudied part of the inquiry.[24]

This Article proceeds in three parts. Part I shows how justifications for otherwise criminal conduct, like self-defense, have traditionally been adjudicated: as affirmative defenses to criminal charges. Some have argued that immunizing self-defense is simply a return to past protections that have been lost in recent times.[25] But those engaging in private violence have always been exposed to criminal prosecution and trial. The argument that self-defense exceptionalism is rooted in tradition is unsupported.

Part I also shows how modern pretrial criminal procedure is consistent with the historical antecedents. The formal process is overwhelmingly structured to bring cases forward to trial, even if few cases get that far.[26]

22. Cynthia V. Ward, *Three Questions About "Stand Your Ground" Laws*, 95 NOTRE DAME L. REV. REFLECTION 119 (2021); *see also* Benjamin M. Boylston, *Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws*, 20 BARRY L. REV. 25 (2014) (discussing vagueness in how states are to implement self-defense immunity); Jennifer Randolph, Comment, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 618 (2014) (observing how self-defense immunity provisions are unclear, which could lead to inconsistent application). In an earlier article, Jonathan Markovitz critiqued how self-defense immunity can "increase opportunities for racial stereotypes to cloud the reasonableness component of the self-defense determination." 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, 877 (2015). Mary Anne Franks, in an article about the asymmetrical distribution of violence between genders, observed how "immunity, by decreasing the likelihood of arrest or prosecution of a person using deadly force, lowers the transaction costs of using such force, which arguably makes the use of violence more appealing." Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 936 (2016). I build on this observation in Section III.A.

23. Bunn v. State, 667 S.E.2d 605, 608 (Ga. 2008).

24. *See infra* notes 94–105 and accompanying text (discussing immunity in the context of criminal law's distinctive function of expressing a community's moral condemnation).

25. *See infra* notes 174–78 and accompanying text (discussing reliance on historical arguments in advocacy for self-defense immunity).

26. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 32–33 (2021) (noting that guilty plea rates have been above 90% since the 1990s).

Pretrial screening is largely geared toward questioning the basis for the charged offense, not adjudicating potential defenses.[27] The criminal law makes exceptions for a narrow set of pretrial matters—narrower than in the civil context. The scant prosecutorial immunities and their narrow justifications can be linked to the criminal law's aims and distinctive character, which are especially protective of public prosecutions. The exceptions that receive prosecutorial immunity tend to be fundamentally different than self-defense in both their scope and purpose. In particular, other criminal law immunities benefit narrow classes of defendants and *must* be addressed ahead of trial to protect distinctive public interests like maintaining foreign relations or preserving the balance of powers.[28] Self-defense, in contrast, can be invoked by any defendant and, like a multitude of other defenses,[29] can be adjudicated at trial without undermining its role as justifying otherwise unlawful conduct. Moreover, interests served by self-defense law—like maintaining the legitimacy of the legal order—are actually *undermined* by immunity.

Part II then turns to the next logical question: Why are states now diverging from American legal tradition and standard practices to treat self-defense as something exceptional? The Article traces self-defense immunity from a barely debated and misunderstood change to Colorado law in the 1980s to a primary ambition of gun rights advocates in the 2000s. The resulting legal changes are often characterized as "Stand Your Ground laws," but that understates the transformation that is afoot. Stand Your Ground relates to just one of many ways that legislators are remaking the law governing defensive force. Indeed, one possible reason why self-defense immunity has escaped close scrutiny is that the typical focus is on the substantive elements establishing *what* lawful self-defense is, and especially the duty to retreat, while glossing over changes to *how* self-defense is adjudicated.[30]

Yet while Stand Your Ground has garnered the most attention, advocates—and especially gun rights advocates—have pursued a deeper goal: insulating defensive gun use from legal oversight to the greatest extent possible. It is hard to overstate the degree to which the quick rise of self-defense immunity is due to lobbying by advocates for one deadly weapon

27. *See infra* Section I.B (discussing pretrial screening mechanisms).

28. *See infra* Section I.C (discussing immunities and other pretrial matters).

29. "Current law recognizes a surprising variety of . . . possible bars to conviction, from amnesia to withdrawal." Paul H. Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199, 203 (1982). Paul Robinson identifies fifty-four such bars to conviction. *Id.* at 203 n.7.

30. *Cf.* Ward, *supra* note 22, at 138 ("Clarifying the issues is a necessary step toward a rational conversation not only about Stand Your Ground, but also about other controversial elements of self-defense.").

(the gun) that is used in a minuscule percentage of self-defense confrontations.[31] The loudest voices advocating for immunizing self-defense tend not to be those seeking criminal justice reform generally but rather those seeking to expand gun rights. A National Rifle Association ("NRA") lobbyist, for example, drafted and led the campaign to institute self-defense immunity in Florida, which then became a model for states across the nation.[32] The playbook for transforming self-defense into an immunity mirrors the one used to expand gun rights.[33] The overlap between gun rights and self-defense rights advocacy begs the question of whether any principle other than bestowing a benefit on gun users is guiding self-defense's transformation from an affirmative defense into an immunity. Part II raises several possibilities, but it finds each too thin to justify such an immense procedural departure.

Part III then explores functional and institutional costs of immunizing private violence. Self-defense immunity sends a signal that people can judge for themselves when to deploy violence in the name of self-protection without exposure to prosecution, thereby encouraging unnecessary violence.[34] Meanwhile, by preventing the community, through the jury, from evaluating the lawfulness of defensive force, immunity jettisons the institution best suited for adjudicating self-defense.[35] In addition, immunizing self-defense creates an inefficient process by which courts consider the same witnesses and arguments that will be presented at trial during a separate pretrial hearing, setting up the sort of mini-trial that criminal procedure generally disfavors.[36]

Trials like Rittenhouse's spark intense disagreement and debate. But such trials are a feature—not a bug—of the American justice system. The Article concludes that policymakers should keep self-defense in its traditional place as an ordinary affirmative defense to criminal charges. Criminal justice reform is desperately needed, but treating private violence as privileged at the behest of gun rights advocates is a perilous path.

31. *See* Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 202 (2021) ("According to the [National Crime Victimization Survey], fewer than 1 percent of crime victims report using a gun in self-defense . . . ." (citing David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTATIVE MED. 22, 22 (2015))).

32. *See infra* notes 162–64 and accompanying text (discussing the involvement of the National Rifle Association in the spread of self-defense immunity laws).

33. *See infra* notes 149–54 and accompanying text (describing similarities in arguments raised for gun rights and self-defense immunity).

34. *See infra* Section III.A.

35. *See infra* Section III.B.

36. *See infra* Section III.C.

I. SELF-DEFENSE AND PRETRIAL CRIMINAL PROCEDURE

As Carl Sagan famously put it: "You have to know the past to understand the present."[37] That maxim applies equally well for modern criminal law. This Part thus explores how self-defense was historically implemented in criminal procedure. It shows how the criminal justice system that the United States adopted from England was "*trial-centered*, in the sense that the legal system sought to resolve most criminal business at trial,"[38] including claims of self-defense. This Part then shows how that treatment continued in modern times until the recent effort to grant pretrial prosecutorial immunity for self-defense. The effort to recharacterize self-defense as an immunity invites a question about how immunities fit within the criminal justice system. This Part closes by addressing that question, showing how and why prosecutorial immunities are few in number and narrowly construed, and how and why their typical rationale does not apply to self-defense.

A. HISTORICAL PROCEDURE

In 1841, in *People v. McLeod*, a New York court considered a habeas corpus petition for a defendant charged with murder.[39] The defendant sought his "unqualified discharge" on the basis of pretrial evidence that, among other things, he acted in lawful self-defense.[40] The court emphatically rejected the "extraordinary" request,[41] noting the "absurdity of such a proposition in practice, and its consequent repudiation by the English criminal courts" whose law and procedure the United States inherited.[42] Among other things, granting the defendant's request "would be to trench on the office of the jury."[43] As the court explained, "[a]n innocent man may be, and sometimes unfortunately is[,] imprisoned. Yet his imprisonment is no less lawful than if he were guilty. He must await his trial before a jury."[44] That early American understanding of the appropriate time—and the appropriate entity—to adjudicate self-defense was firmly rooted in the English common law tradition.

During the seventeenth and eighteenth centuries in England, after a felony was charged, judges lacked authority to discharge defendants

37. CARL SAGAN, COSMOS 41 (1980).
38. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 7 (2003).
39. People v. McLeod, 1 Hill 377 (N.Y. Sup. Ct. 1841).
40. *Id.* at 392–93.
41. *Id.* at 406.
42. *Id.* at 404.
43. *Id.* at 397.
44. *Id.* at 404.

"without further trial."[45] This was true regardless of whether the defendant was believed to be justified in engaging in the alleged offense conduct.[46] In the 1700s, judges began conducting a "pretrial inquiry" that "increasingly took on the trappings of a public hearing, which would ultimately come to be known as the preliminary hearing."[47] At such hearings, however, the defense attorney was limited to challenging the prosecution's case and was *not* entitled to present the defense's case.[48]

Classic common law treatises demonstrate how self-defense was just like other defenses in that it was a trial issue, not a pretrial issue. For example, Michael Foster, a judge on the King's Bench and the author of a widely read treatise published in 1762, observed that the defendant raising self-defense "standeth upon just the same foot that every other Defendant doth: the Matters tending to Justify, Excuse, or Alleviate, must appear in Evidence before He can avail himself of them."[49] And the opportunity to introduce that evidence was not until trial: "*[W]hether the Facts alledged by way of Justification, Excuse, or Alleviation are True*, is the proper and only Province of the Jury."[50]

Several years after Foster's publication, William Blackstone completed "the preeminent authority on English law for the founding generation,"[51] in

45. MICHAEL DALTON, THE COUNTRY JUSTICE 407 (1618) ("[I]t is not fit that a [m]an once arrested and charged with Felony (or suspicion thereof) should be delivered upon any [m]an's discretion, without [further] [t]rial."). Justices of the peace played the central role in administering the criminal law. *See generally* Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 Q.J. LIBR. CONG. 315 (1977) (discussing the power and reach of justices of the peace in criminal matters); *see also* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11 (2017) (discussing justice of the peace manuals used by English and American officials between 1688 and 1835).

46. *See* RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 207 (1756) ("If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty, yet the justice shall not discharge him, but he must either be bailed or committed; for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without further trial."); *see also* LANGBEIN, *supra* note 38, at 46–47 ("[T]he JPs had no power to dismiss felony charges for insufficiency of the evidence."); *id.* at 47 ("What passed for truth in English criminal procedure would have to emerge at trial, from the altercation of citizen accusers and citizen accused."). Some justices of the peace pressured prosecutors to discharge cases, while recognizing their own limited ability to discharge cases before trial. *Id.* at 47 n.184.

47. LANGBEIN, *supra* note 38, at 274.

48. *Id.* at 274–75; *see also id.* ("As late as 1787 an experienced Old Bailey barrister serving as defense counsel remarked in response to a question from the bench that '[t]he Magistrates at Bow Street never receive evidence for prisoners, only for prosecutors.' " (citing Darcy Wentworth & Mary Wilkerson, Old Bailey Sessions Papers ("OBSP") 15, 19 (Dec. 1787, #8) (quoting Newman Knowlys))).

49. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES 255 (1762).

50. *Id.*; *see also id.* ("In every Charge of Murder, *the Fact of Killing being first proved*, all the Circumstances of Accident, Necessity, or Infirmity are to be satisfactorily proved by the Prisoner.").

51. Alden v. Maine, 527 U.S. 706, 715 (1999); *see also* District of Columbia v. Heller, 554 U.S.

which he explained that "it is incumbent upon the prisoner to make out, to the satisfaction of the criminal court and jury," any "circumstances of justification, excuse, or alleviation."[52] The jury, Blackstone wrote, is "to decide whether the circumstances alleged [regarding self-defense or other affirmative defenses] be proved to have actually existed"; the judge then decides "how far [the proved circumstances] extend to take away or mitigate the guilt."[53]

Edward Hyde East, in his influential 1803 treatise, built on Blackstone's and Foster's accounts and elaborated on the lack of a pretrial process for asserting self-defense.[54] He wrote that "the jury alone [is] to decide" on "the truth" of the defendant's allegations of "justification, excuse, or alleviation," though the judge could consider such defenses when deciding on bail.[55] The *McLeod* case demonstrates that this current continued in the United States into the nineteenth century.[56] In his 1872 *Commentaries on the Law of Criminal Procedure*, Joel Prentiss Bishop described how a defendant entering a plea of not guilty at arraignment formally "puts himself upon the country," or submits to a trial by jury.[57] The jury therefore remained the primary entity to decide disputed fact issues in criminal cases, including regarding self-defense.[58]

Pretrial processes, like the preliminary hearing and the grand jury, generally did not provide a defendant an opportunity to introduce evidence of any particular defense.[59] As the 1918 edition of Francis Wharton's treatise

570, 593–94 (2008).

52. *See* 4 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND *201 (1769).

53. *Id.*

54. 1 EDWARD HYDE EAST, TREATISE OF THE PLEAS OF THE CROWN 340 (1803).

55. *Id.*; *see also id.* ("And where a party is committed upon such a charge [of homicide], he may be brought up by habeas corpus before the court of [the King's Bench], and if a clear case be laid before the court, whereby the homicide appears to be either justifiable or excusable, they will upon view of the depositions and commitment admit the party accused to bail, as in Mrs. Barney's case . . . where the charge clearly appeared to be groundless.").

56. *See supra* notes 39–44 and accompanying text.

57. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 487 (2d ed. 1872); *see also Going to the Country*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act of requesting a jury trial. A defendant was said to be 'going to the country' by concluding a pleading with the phrase 'and of this he puts himself upon the country.' "); *see also* FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 530 (1874) ("In all cases of felony the prisoner shall be arraigned, and where any person on being so arraigned shall plead not guilty, every such person shall be deemed and taken to put himself upon the inquest or country for trial . . . ." (quoting criminal procedure rules in Pennsylvania)).

58. JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 735 (1868) (discussing how "inquiries concerning facts . . . must be passed upon by the jury"); WHARTON, *supra* note 57, § 488 (describing how in a self-defense case, "[t]he jury must judge whether the danger was apparent").

59. *See* JAMES MANFORD KERR & FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE § 112 (10th ed. 1918) ("[N]or has the practice of taking the prisoner's examination [at the preliminary magistrate's review] been generally adopted."); *id.* § 1288 ("The question before the grand jury being

on criminal procedure observed, "the better opinion is that on a preliminary hearing the magistrate is to hold the defendant for trial" when "there is made out a probable case of guilt."[60] Similarly, in a proceeding before the grand jury, "it is not the usage to introduce, in matters of confession and avoidance, witnesses for the defense, unless their testimony becomes incidentally necessary to the prosecution."[61]

The notion that self-defense could be adjudicated by a judge before trial thus has no basis in the common law tradition imported from England and implemented in America. The next Section shows how that basic understanding carried forward to modern times.

B. MODERN PROCEDURE

In 1971, Indiana passed a statute providing that "[n]o person . . . shall be placed in legal jeopardy of any kind whatsoever" after exercising lawful self-defense.[62] Armed with that broad statutory language, one defendant sought a pretrial determination of the lawfulness of his claimed self-defense.[63] In *Loza v. State*, Indiana's highest court recognized the novelty of the proposition before reacting much like the New York court did more than a century earlier in *McLeod*.[64] In particular, in order "to prevent absurdity," the court held that the new law "neither creates a new remedy nor does it alter our procedure in any respect."[65] In other words, self-defense remained a trial issue. The *Loza* court's understanding was consistent with modern

whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution."). Kerr and Wharton recognize limited exceptions "to avoid circuity and oppression," such as if "the defendant, in a liquor prosecution, tenders a license." *Id.* § 113.

60. *Id.* § 114.

61. *Id.* § 1288; *see also id.* § 1290 ("[A] grand jury has no authority by law to ignore a bill for murder on the ground of insanity, though it appear plainly from the testimony of witnesses, as examined by them on the part of the prosecution, that the accused was in fact insane . . . ."); *see also Confession and Avoidance*, BLACK'S LAW DICTIONARY, *supra* note 57 (defining "confession and avoidance" to be "[a] plea in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect"); Brooks v. Haslam, 4 P. 399, 399 (1884) (noting that self-defense "amounts simply to a plea in confession and avoidance"); Jordan v. State, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) ("Self-defense is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct.").

62. Loza v. State, 325 N.E.2d 173, 176 (Ind. 1975) (quoting and discussing IND. CODE § 35-13-10-1 (repealed 1976)).

63. *Id.*

64. *See id.* ("This statute has not been previously interpreted by our courts, and our research discloses no interpretation of any similar statute by any sister state."); *supra* notes 39–44 and accompanying text (discussing People v. McLeod, 1 Hill 377 (N.Y. Sup. Ct. 1841)).

65. *Loza*, 325 N.E.2d at 176; *see also* Myers v. State, 137 N.E. 547, 548 (Ind. 1922) (noting that alleged facts surrounding claims of self-defense are "proper matters for the jury alone to consider and weigh"); Landreth v. State, 171 N.E. 192, 194 (Ind. 1930), *overruled in part on other grounds by* Burris v. State, 34 N.E.2d 928 (Ind. 1941) ("[T]he defense of self-defense is an ultimate fact solely for the determination of the jury from the evidence.").

pretrial procedure.

Modern criminal procedure is heavily constitutional,[66] and an overview of the minimalist pretrial constitutional requirements for defenses (like self-defense) is therefore instructive. Under the Fourth Amendment, police officers must have probable cause before making an arrest,[67] and an impartial magistrate must review whether probable cause exists if the arrestee is to remain in custody.[68] The Supreme Court has described probable cause as "a fluid concept" that "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[69] Admittedly, probable cause is "not a high bar."[70]

Importantly, moreover, probable cause does not require robust consideration of self-defense, if it requires any at all. The Third Circuit has held that "affirmative legal defenses"—like self-defense—"are not a relevant consideration in [a police] officer's determination of probable cause."[71] In contrast, the Second Circuit has held that "a police officer's awareness of the facts supporting a defense can eliminate probable cause."[72] That said, such evidence must be "conclusive" or first-hand,[73] and once an officer has probable cause to make an arrest, the officer does not constitutionally have "to investigate exculpatory defenses offered by the person being arrested or to assess the credibility of unverified claims of justification."[74] Self-defense is not singled out for special treatment, but rather is treated like any other defense.[75]

66. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7 (1996) ("Only in criminal procedure does constitutional law dominate the field.").

67. *See generally* Terry v. Ohio, 392 U.S. 1 (1968) (discussing when the probable cause requirement applies in police-citizen interactions). The probable cause standard is expressly referenced in the Fourth Amendment. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, *but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)).

68. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("[W]e hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.").

69. Illinois v. Gates, 462 U.S. 213, 232, 243–44 n.13 (1983).

70. Kaley v. United States, 571 U.S. 320, 338 (2014).

71. Holman v. City of York, 564 F.3d 225, 229 (3d Cir. 2009).

72. Jocks v. Tavernier, 316 F.3d 128, 135 (2d Cir. 2003).

73. *See* Ryan P. Sullivan, *Revitalizing Fourth Amendment Protections: A True Totality of the Circumstances Test in § 1983 Probable Cause Determinations*, 105 IOWA L. REV. 687, 708–09 (2020) (discussing *Jocks*, 316 F.3d 128, and other relevant case law).

74. *Jocks*, 316 F.3d at 135–36; *see also* Baker v. McCollan, 443 U.S. 137, 145–46 (1979) (observing that police officers do not have "to investigate independently every claim of innocence"); District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018) ("[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts.").

75. *Jocks*, 316 F.3d at 135.

Subsequently, once a prosecutor makes a charging decision, there is "no federal constitutional right to any review" of that decision before trial "apart from the grand jury clause of the Fifth Amendment."[76] The grand jury, meanwhile, is also guided by the standard of whether there is "probable cause necessary to initiate a prosecution for a serious crime."[77] In *United States v. Williams*,[78] the Supreme Court held that, notwithstanding the constitutional obligation to disclose material exculpatory evidence to a defendant before trial,[79] the Constitution does *not* require prosecutors to disclose substantial exculpatory evidence to the grand jury, including regarding a potential claim of self-defense.[80] Looking back to the common law history, the Court explained that the grand jury is "an accusatory [body]," not "an adjudicatory body," and its task is "to assess whether there is adequate basis for bringing a criminal charge."[81] Historically, "it has always been thought sufficient for the grand jury to hear only the prosecutor's side."[82]

In some jurisdictions, by either law or internal policy, prosecutors are held to a higher standard than the federal constitutional baseline with respect to grand juries.[83] However, most such departures only require presenting "evidence that is clearly exculpatory" or "that would exonerate the accused or lead the grand jury to refuse to indict."[84] Given the low bar for indictment—again, probable cause[85]—even these jurisdictions stop far short of adjudicating self-defense before trial.

76. RONALD JAY ALLEN, JOSEPH L. HOFFMANN, ANDREW D. LEIPOLD, DEBRA LIVINGSTON & WILLIAM J. STUNTZ, CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1037 (2011) (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975)).

77. Kaley v. United States, 571 U.S. 320, 328 (2014).

78. United States v. Williams, 504 U.S. 36, 51 (1992).

79. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.").

80. *Williams*, 504 U.S. at 51.

81. *Id.*

82. *Id.* at 37.

83. SARA SUN BEALE, WILLIAM C. BRYSON, JAMES E. FELMAN & KATHERINE EARLE YANES, *Prosecutor's Duty to Present Exculpatory Evidence*, *in* GRAND JURY LAW AND PRACTICE § 4:17 (2d ed. 2021) ("In approximately a quarter of the states, there are statutes or judicial decisions that require prosecutors to inform the grand jury of exculpatory evidence in some circumstances.").

84. *Id.* The United States Justice Manual, for example, provides that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U.S. DEP'T OF JUST., *Presentation of Exculpatory Evidence*, *in* DEPARTMENT OF JUSTICE MANUAL § 9-11.233 (2021). That is a hard standard for a defendant to satisfy. BEALE ET AL., *supra* note 83, § 4:17 (characterizing this "test" as "very difficult . . . to satisfy"). The Manual provides that "failure to follow the Department's policy should not result in dismissal of an indictment," but that "appellate courts may refer violations of the policy to the Office of Professional Responsibility for review." U.S. DEP'T OF JUST., *supra*.

85. Kaley v. United States, 571 U.S. 320, 328 (2014).

The *Federal Rules of Criminal Procedure*, which "almost always reflect the basic position adopted in a substantial number of states,"[86] provide other pretrial procedural steps apart from the grand jury, most notably a preliminary hearing.[87] Yet the preliminary hearing—consistent with historical practices[88]—focuses on the prosecution's evidence for the charged offense, and not evidence of self-defense or any other affirmative defense. Again, the standard is probable cause: the prosecutor need only show "probable cause to believe an offense has been committed and the defendant committed it."[89] Moreover, the prosecutor gets to decide whether to have a preliminary hearing at all: if the prosecutor secures an indictment before a grand jury, then the defendant has no right to demand a pretrial hearing.[90]

It thus has remained true under conventional criminal procedure that "[i]f a defendant claims innocence or has a defense," including self-defense, "the proper body to decide the issue is the petit jury."[91] Recent reform efforts, however, characterize self-defense not as a "defense" but as an "immunity," calling to mind exceptions to the general rule—a category of traditional immunities and other matters that *are* adjudicated pretrial. The next Section addresses such pretrial issues in relation to self-defense.

C. IMMUNITIES FROM PROSECUTION

Recent legislation declaring that self-defense is an immunity from prosecution has led judges and commentators to treat self-defense as a "true immunity" comparable to others.[92] This classification invites questions about how other prosecutorial immunities operate, why they exist, and whether they share anything in common with self-defense.[93]

86. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 4 (2004).

87. FED. R. CRIM. P. 5.1(e).

88. *See supra* notes 47, 58–60 and accompanying text (discussing the historical focus on prosecution evidence at preliminary hearings).

89. FED. R. CRIM. P. 5.1(e).

90. The same is true in "most states and for most charges." MARC L. MILLER, RONALD F. WRIGHT, JENIA I. TURNER & KAY L. LEVINE, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 188 (6th ed. 2019) (discussing preliminary hearings).

91. BEALE ET AL., *supra* note 83.

92. Rogers v. Commonwealth, 285 S.W.3d 740, 753 (Ky. 2009) ("[T]he General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges.").

93. In considering these questions, I build on Cynthia Ward's observation that self-defense immunity "seems quite different" from traditional immunities. *See* Ward, *supra* note 22, at 134–35 ("Traditionally, immunity from prosecution is offered to certain government officials, or to citizens performing important roles in the legal process (such as witness in a criminal case), where it might reasonably be argued that society's interests in protecting such roles and functions outweighs its interest in prosecuting the individual. That seems quite different from the immunity procedure outlined in Florida's self-defense law." (citation omitted)).

Common immunities from prosecution include diplomatic immunity, judicial immunity, legislative immunity, executive immunity, immunity after compelled testimony, and immunity bestowed on the basis of a plea agreement.[94] These are "defenses" in the sense that they are asserted by a defendant as a way to avoid a conviction. But their essence goes beyond ordinary defenses because immunities operate to *exempt* a person from the mandate of the criminal law, not to justify otherwise criminal conduct because of the circumstances surrounding that conduct.[95] *Black's Law Dictionary* cross-references "impunity" in its definition of "immunity," which similarly denotes an "[e]xemption from punishment."[96] The example that *Black's* uses to describe impunity relates to diplomatic immunity: "because she was a foreign diplomat, she was able to park illegally with impunity."[97] Immunity gets asserted early in the criminal process to head off the prosecution of someone possessing such an exemption.

As such, prosecutorial immunities are a remarkable departure from the ordinary criminal process described above; moreover, they are in tension with a basic, distinctive function of criminal law. Criminal law is traditionally viewed as a means to declare "a formal and solemn pronouncement of the moral condemnation of the community."[98] The community's role in implementing the criminal law—through a public prosecution and jury trial—is intertwined with that function. It is no coincidence that the prosecutor in a criminal case is called "The People" in many jurisdictions.[99]

Prosecutorial immunity dilutes the formal power of the public in

94. Since my focus is on immunities from criminal prosecution, I do not address the operation of immunities geared toward *civil* suits and liability such as sovereign and qualified immunity. *See, e.g.*, State v. Velky, 821 A.2d 752, 759 (Conn. 2003) ("Sovereign immunity is not applicable in criminal cases, because, at least ordinarily, the charges are not brought 'in effect' against the government."); Kipps v. Caillier, 197 F.3d 765, 768 (5th Cir. 1999) ("Public officials acting within the scope of their official duties are shielded from *civil* liability by the qualified immunity doctrine." (emphasis added)); Temich v. Cossette, No. 11CV958, 2015 U.S. Dist. LEXIS 76064, at *6 (D. Conn. June 12, 2015) ("The defense of qualified immunity is not germane to a criminal proceeding.").

95. *Immunity*, BLACK'S LAW DICTIONARY *supra* note 57 ("Any exemption from a duty, liability, or service of process; esp., such an exemption granted to a public official or governmental unit. Cf. IMPUNITY.").

96. *Impunity*, BLACK'S LAW DICTIONARY, *supra* note 57.

97. *Id.*

98. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (describing distinctions between criminal and civil wrongs); *see also* PAUL ROBINSON, CRIMINAL LAW 21 (1997) (discussing the criminal law's role in "creating and maintaining the social consensus on morality necessary to sustain norms").

99. *See, e.g.*, LAW REPORTING BUREAU OF THE STATE OF N.Y., NEW YORK LAW REPORTS STYLE MANUAL § 8.1(a) (2012), http://www.courts.state.ny.us/reporter/new_styman.htm [perma.cc/62GF-KVATJ] ("In criminal actions, the prosecuting authority is usually described as 'The People of the State of New York.' ").

assessing an alleged crime, and it thus raises special concerns in criminal law that might exist only to a lesser extent in the civil context, where immunity is sometimes granted, for example, primarily to avoid costs.[100] In the criminal context, immunities tend to be justified by a narrower, more compelling rationale. As a general matter, only when avoiding the criminal justice process is a defense's entire raison d'être is it exempted from prosecution as an "immunity." Put differently, the public policies underlying the above-mentioned criminal law immunities *necessarily* require the avoidance of prosecution and trial.

Consider diplomatic immunity. A key reason why we immunize conduct by foreign diplomats in the United States is to protect American diplomats outside the United States from exposure to foreign court systems.[101] There is no way to satisfy that goal through an affirmative defense at trial. Consistent with the purpose of diplomatic immunity, it also does not protect diplomats from sanction upon return to their home countries.[102] Judicial, legislative, and executive immunities are similarly geared to specific policy rationales necessitating avoidance of a trial. Each protects "governmental officials from personal liability arising from their official duties" because of the strong interest in facilitating their ability to serve the public.[103] The Supreme Court has explained how legislative immunity enables "representatives to execute the functions of their office without fear of prosecutions."[104] An added component of legislative and judicial immunity is to preserve the balance of power between the three

100. *See generally* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009) (describing a growing conferral of tort immunity without accompanying compensatory schemes); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (describing and critiquing widespread tort reform); *see also* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (codified at 15 U.S.C. § 7901 et seq. (2005)) (shielding federally licensed firearm manufacturers, dealers, and sellers from civil, but not criminal, actions "resulting from the criminal or unlawful misuse" of firearms).

101. *See* U.S. DEP'T OF STATE OFF. OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 5 (2018) [hereinafter DIPLOMATIC AND CONSULAR IMMUNITY] ("On a practical level, a failure of the authorities of the United States to fully respect the immunities of foreign diplomatic and consular personnel may complicate diplomatic relations between the United States and the other country concerned. It may also lead to harsher treatment of U.S. personnel abroad, since the principle of reciprocity has, from the most ancient times, been integral to diplomatic and consular relations."); William F. Marmon, Jr., Note, *The Diplomatic Relations Act of 1978 and Its Consequences*, 19 VA. J. INT'L L. 131, 134, 142 n.64 (1978) ("[I]t is to our advantage not to expose our personnel to [foreign] court systems." (quoting the testimony of Hampton Davis during a Senate Foreign Relations Hearing)).

102. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, at art. 31(4) ("The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.").

103. Robinson, *supra* note 29, at 231.

104. Tenney v. Brandhove, 341 U.S. 367, 374 (1951).

branches of government by insulating legislative and judicial officers from prosecutions by the executive branch.[105] Again, interests that these governmental immunities serve cannot be furthered—and indeed would be undermined—if they were treated as defenses to be proved at trial. The remarkable benefit of immunity is thus granted because of strong public policy arguments that inherently entail a bar to prosecution.

How does self-defense relate to immunities? Self-defense is not about trial avoidance but exculpation.[106] Like other justification defenses and unlike immunities, it *can* be adjudicated in the traditional way—through trial—without undermining its rationale.[107] Moreover, unlike typical immunities, self-defense furthers interests that are in fact *undermined* by short-circuiting a prosecution and trial.

T. Markus Funk has identified seven values served by self-defense law: protecting the state's monopoly on force, protecting the individual attacker's right to life, maintaining the equal standing between people, protecting the defender's autonomy, ensuring the primacy of the legal process, maintaining the legitimacy of the legal order, and deterring attackers.[108] Immunity arguably advances the interests in protecting a defender's autonomy or deterring attackers. But it runs roughshod over other values, especially self-defense law's dual roles of ensuring the primacy of the legal process and maintaining the legitimacy of the legal order. Both roles underlie the idea that "the authority to punish and condemn" remain with "the liberal state," not with individual citizens.[109] In his discussion of ensuring the primacy of the legal process, Funk notes that "[t]o the extent possible, . . . the justice system must promote the resolution of disputes in the courts."[110] Immunity, however, dilutes the state's oversight of defensive violence and, perhaps worse still, undermines the community's role through the jury to assess the lawfulness of violence—a point addressed in greater depth in Part III. In other words, in contrast to typical immunities, whose purposes are overall advanced by providing an exemption from prosecution, key values underlying self-defense law are undercut by providing such an exemption.

105. James Walton McPhillips, Note, *"Saturday Night's Alright for Fighting": Congressman William Jefferson, the Saturday Night Raid, and the Speech or Debate Clause*, 42 GA. L. REV. 1085, 1093 (2008) (observing how legislative immunity insulates legislators from an "unfriendly executive").

106. Robinson, *supra* note 29, at 220 (observing that justification defenses exculpate because "by the infliction of the intermediate harm or evil, a greater societal harm is avoided or benefit gained").

107. *Id.* at 220. "The societal benefit underlying [immunities] arises not from [the defendant's] conduct, but from foregoing his conviction." *Id.* at 232.

108. T. MARKUS FUNK, RETHINKING SELF-DEFENCE: THE 'ANCIENT RIGHT'S' RATIONALE DISENTANGLED 18 (2021).

109. *Id.* at 44.

110. *Id.* at 43.

Immunities, of course, are not the only matters that receive pretrial resolution. Some defenses—like those based on statutes of limitations, double jeopardy, and speedy trial requirements—are also adjudicated in advance of trial. Other issues, like competency to stand trial, also receive pretrial determination. In the effort to implement self-defense immunity, some have analogized self-defense to those other pretrial issues even though they are not technically "immunities."[111] Yet these issues, like traditional immunities, protect interests that necessarily call for avoiding trial and thus are dissimilar to self-defense. Statutes of limitations affirm the belief that "[a]fter a period of time, a person ought to be allowed to live without fear of prosecution."[112] Double jeopardy protections are "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[113] Speedy trial guarantees mandate "the Government [to] move with the dispatch that is appropriate to assure [the defendant] an early and proper disposition of the charges against him."[114] And resolving competency questions must also happen before a trial since the entire point is to determine the defendant's "ability to participate meaningfully in the trial."[115]

In connection with competency hearings, one exception to the general rule of limiting pretrial criminal matters to those that inherently require pretrial determination involves the insanity defense. Courts tend to draw a clear line between the question of competency to stand trial, which is adjudicated in advance of trial, and insanity at the time of the offense, which is a trial issue.[116] As a general matter, therefore, an insanity defense is submitted to the fact finder at trial and is not decided at a pretrial hearing.[117]

111. *See, e.g.*, People v. Guenther, 740 P.2d 971, 977 (Colo. 1987) (en banc) (analogizing self-defense immunity to prosecutorial bars based on the statute of limitations, double jeopardy, and speedy trial requirements); Rogers v. Commonwealth, 285 S.W.3d 740, 755 (Ky. 2009) (comparing self-defense immunity hearings to competency hearings).

112. MODEL PENAL CODE § 1.07, cmt. at 16–17 (Tentative Draft No. 5, 1956); *see also* Toussie v. United States, 397 U.S. 112, 114–15 (1970) (observing that a limitations period "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past").

113. Green v. United States, 355 U.S. 184, 187 (1957).

114. United States v. Marion, 404 U.S. 307, 313 (1971).

115. *Rogers*, 285 S.W.3d at 755.

116. *See, e.g.*, Bishop v. Superior Court *ex rel.* County of Pima, 724 P.2d 23, 25–26 (Ariz. 1986) (en banc) (stating that competency and the insanity defense "are distinctly different inquiries, one leading to a determination of whether the trial can proceed at all, and the other to the trial defense of insanity"); Ricks v. State, 242 S.E.2d 604, 606 (Ga. 1978) ("The issue of the accused's insanity at the time of the alleged crime is a question for the trial jury. The issue of the accused's competency to stand trial is a question for a special jury upon a special plea of insanity.").

117. *See, e.g.*, TENN. CODE. ANN. § 39-11-501 (2014) (providing the defense of insanity is "a matter for the trier of fact alone"); WIS. STAT. § 971.165 (2008) (requiring a continuous, bifurcated trial for the insanity defense); State v. Fichera, 903 A.2d 1030, 1035 (N.H. 2006) ("[S]anity is a question of fact to

However, such bifurcation is not universally followed. Pennsylvania law, for example, grants a judge the discretion to "hear evidence on whether the person was criminally responsible for the commission of the crime charged" so long as the judge is already conducting a competency hearing.[118]

In that context, judicial economy might weigh in favor of considering evidence of both competency and insanity at a pretrial hearing. At least one other state—North Carolina—gives courts discretion to hold a pretrial insanity hearing so long as the state consents.[119] That exception is highly limited in that courts and prosecutors can override a defendant's request for a hearing, making it quite different from self-defense immunity.[120] And in Washington, a defendant may request a pretrial insanity determination, but the statute notes that any acquittal under the statute cannot be used to contest mental health detention—a possibility that distinguishes insanity and self-defense.[121]

This Section has set out the limited nature of criminal law immunities and other pretrial matters and offered a normative explanation, rooted in the criminal law's distinctive role, for that narrow scope. Below, the Article considers additional arguments for and against expanding immunities to include self-defense.[122] First, however, the Article turns to the story of how self-defense immunity arose in the first place.

be determined by the jury . . . ." (quoting State v. Hall, 808 A.2d 55 (N.H. 2002))); State *ex rel.* Smith v. Scott, 280 S.E.2d 811, 814 (W. Va. 1981) ("Consequently, we hold that a trial court judge is not under any duty to hold a hearing on the issue of criminal responsibility in advance of trial regardless of how compelling the pretrial reports may be. Criminal responsibility is a jury question . . . unless both prosecutor and judge concur that the outcome of the proceedings would be a foregone conclusion."); Bonner v. State, 520 S.W.2d 901, 906 n.2 (Tex. Crim. App. 1975) ("The issue of insanity at the time of the commission of an offense is a defensive one, and therefore is properly raised during the course of the trial on the merits."); People v. Ford, 235 N.E.2d 576, 578 (Ill. 1968) ("The defense of insanity at the time of the crime, like any other defense, must be raised at the time of trial and submitted to the jury who are hearing the case, and no special jury is called or pretrial hearing conducted to determine this question.").

118. 50 PA. CONS. STAT. § 7404(a) (2014); *see also* Commonwealth v. Scott, 578 A.2d 933, 936–37 (Pa. Super. Ct. 1990) (describing procedure).

119. N.C. GEN. STAT. § 15A-959 (1973) ("Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense.").

120. *See infra* Part II.

121. WASH. REV. CODE § 10.77.080 (1998) ("The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged."); *see also* Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985) (discussing "not guilty but mentally ill" verdicts, by which a defendant is still incarcerated for treatment despite being found not guilty by reason of insanity).

122. *See infra* Section II.C, Part III.

II. THE PUSH TO MAKE SELF-DEFENSE EXCEPTIONAL

In light of the American criminal law tradition of adjudicating self-defense at trial, how did self-defense immunity arise? This Part shows how self-defense immunity emerged out of Colorado in 1986, laid dormant for almost two decades, and then became a central component of gun rights advocacy in the 2000s. The Part then analyzes the thin rationales put forward for treating self-defense as deserving of exceptional treatment through prosecutorial immunity.

A. INAUSPICIOUS BEGINNING IN COLORADO

Accounts of recent self-defense reforms tend to begin with Florida's 2005 Stand Your Ground legislation.[123] Indeed, Florida's law served as a model that influenced legal changes across the country.[124] But the first example of a self-defense immunity statute was not Florida's but rather a last-minute compromise bill from Colorado twenty years earlier.[125]

The Colorado law did not, at first, provide for prosecutorial immunity. Rather, the bill initially added a legal presumption to self-defense law to enhance the scope of lawful self-defense against home intruders.[126] To be sure, homeowners already had an expanded right to self-defense through the "Castle Doctrine," which generally removed a person's duty to retreat before using lethal defensive force in the home.[127] However, Colorado policymakers wanted to do more, so they borrowed from a California statute that a person confronting a home intruder is legally "presumed" to fear for

123. *See, e.g.*, Elizabeth Chuck, *Florida Had First Stand Your Ground Law, Other States Followed in "Rapid Succession,"* NBC NEWS (July 18, 2013, 7:03 AM), https://www.nbcnews.com/news/us-news/forida-had-first-stand-your-ground-law-other-states-followed-flna6c10672364 [perma.cc/QX22-DB36].

124. *See infra* notes 162–69 and accompanying text (describing the influence of Florida's self-defense reform).

125. *See* COLO. REV. STAT. § 18-1-704.5 (1986); Dirk Johnson, *"Make My Day": More Than a Threat*, N.Y. TIMES (June 1, 1990) (noting that "[n]o other state [was] believed to have such a law" providing immunity from criminal prosecution for lawful self-defense).

126. WILLIAM WILBANKS, THE MAKE MY DAY LAW: COLORADO'S EXPERIMENT IN HOME PROTECTION 31 (1990).

127. *See* BLACKSTONE, *supra* note 52, at *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity."); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 486 (1680) (writing that when a man is assailed in his own house he "need not fl[y] as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, for that would be to give up the protection of his house to his adversary by flight"). All American jurisdictions accept some version of the Castle Doctrine. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 924 (2017); *see also* People v. Tomlins, 107 N.E 496 (N.Y. 1914) ("It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack.").

their life.[128] That presumption would satisfy one requirement of lethal defensive force—that the defender reasonably perceives a threat of death or serious bodily injury[129]—thereby relieving the defendant of the need to produce evidence of such heightened fear.

Prosecutors objected because they "believed that it would be very difficult, if not impossible, to rebut the presumption in favor of the homeowner."[130] There was little public debate regarding the subsequent compromise that became the nation's first law providing immunity from prosecution for self-defense.[131] Yet the law appears to have imported a *civil* immunity provision enacted in Colorado in 1982 into the criminal law.[132]

By way of background, in 1981, a Colorado jury awarded a plaintiff more than $300,000 in damages from a defendant for gunshot injuries incurred while the plaintiff was burglarizing the defendant's shop.[133] The public outcry was swift and the shop owner's lawyer helped to draft a bill immunizing people like his client from civil damages.[134] The resulting law barred payouts for personal injuries "sustained during the commission of or during immediate flight from" a felony if the person inflicting the injury reasonably believed that physical force was "reasonable and appropriate" to prevent *both* injury *and* the commission of the felony.[135] The wisdom of such civil immunity is beyond the scope of this Article; more important for present purposes is that it did not address immunity from *criminal* liability. As discussed above, criminal liability is geared toward vindicating public harms in a way that civil liability is not.[136] Nonetheless, the criminal immunity bill

128. *See* CAL. PENAL CODE § 198.5 (1984) ("Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.").

129. *See* COLO. REV. STAT. § 18-1-704(2)(a) ("Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and . . . [t]he actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury.").

130. WILBANKS, *supra* note 126, at 42. The presumption would result in a helpful jury instruction for the defendant and could help a defendant avoid taking the stand to demonstrate a fear of death or great bodily injury. The presumption would not shift the burden of proof, however, since the prosecution already had to disprove self-defense beyond a reasonable doubt. *See* Martin v. Ohio, 480 U.S. 228, 236 (1987) ("[A]ll but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant.").

131. WILBANKS, *supra* note 126, at 38 (noting the compromise negotiations were "held behind closed doors" and "were unannounced . . . and lacked formality").

132. *See infra* notes 133–35 and accompanying text (describing Colorado's civil immunity law).

133. WILBANKS, *supra* note 126, at 21–23.

134. *Id.* at 23.

135. *Id.* at 24.

136. *See supra* notes 92–98 and accompanying text. The Colorado shop owner case demonstrates

that later passed in Colorado in 1986 mirrored the earlier civil immunity law. The law provided that a person "shall be immune from *criminal* prosecution" if the person used defensive force and four conditions were met relating to an unlawful home intrusion.[137]

The 1986 law's legislative sponsors and the negotiating prosecutors appeared to have different beliefs about what the new law actually accomplished. The sponsors appreciated that they had achieved "greater protection [for defendants] than a presumption for the homeowner as part of an affirmative defense at trial."[138] The negotiating prosecutors, in contrast, believed that they gave up nothing. Denver's district attorney, for example, publicly commented that the "compromise is just a clarification of existing law."[139]

In that vein, some prosecutors tried to argue in subsequent litigation that the new provision could not possibly grant true immunity for self-defense.[140] Among other things, they pointed out that the provision appears alongside other affirmative defenses in Colorado's criminal code.[141] When the issue reached the Colorado Supreme Court, however, the justices rejected the prosecutors' interpretation that self-defense remained an ordinary defense to be proved at trial, noting that "[i]t must be presumed that the legislature has knowledge of the legal import of the words it uses."[142] The plain meaning of "shall be immune from criminal prosecution" in the statute, they concluded,

another distinction between civil and criminal cases in that the prosecutor declined to prosecute. WILBANKS, *supra* note 126, at 22. In criminal cases, a prosecutor with legal experience weighs the viability of a case before pressing charges and then must prove the case beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). In contrast, civil plaintiffs are frequently not lawyers (even if they have representation by one) and face a lesser burden of proof: they have to prove their case by a preponderance of the evidence, not beyond a reasonable doubt. *See* Addington v. Texas, 441 U.S. 418, 423–24 (1979) (observing that in "the typical civil case involving a monetary dispute between private parties[, s]ince society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence," whereas "[i]n a criminal case, on the other hand, the interests of the defendant are of such magnitude that . . . the state [must] prove the guilt of an accused beyond a reasonable doubt"). This presents a risk of over-litigation in the civil context that is generally absent from the criminal context.

137. COLO. REV. CODE § 18-1-704.5(3) (1986) (emphasis added). The four conditions were that (1) the defendant was an "occupant of a dwelling"; (2) another person "made an unlawful entry into the dwelling"; (3) "the occupant ha[d] a reasonable belief that such other person . . . committed a crime in the dwelling in addition to the uninvited entry, or [wa]s committing or intend[ed] to commit a crime against a person or property in addition to the uninvited entry"; and (4) "the occupant reasonably believe[d] that such other person might use any physical force, no matter how slight, against any occupant." *Id.*

138. WILBANKS, *supra* note 126, at 46.

139. *Id.* at 45 (quoting Norman Early).

140. People v. Guenther, 740 P.2d 971, 975 (Colo. 1987).

141. *Id.*

142. *Id.* at 976.

was "to bar criminal proceedings against a person for the use of force under the circumstances set forth" in the law.[143] In the course of reaching that holding, the justices acknowledged what went unsaid during the legislative hearings: that "the immunity created by [the law] is an extraordinary protection which, so far as we know, has no analogue in Colorado statutory or decisional law."[144] In fact, immunity for self-defense in criminal cases does not appear to have existed anywhere else in the country.[145]

Perhaps because of its unusualness, or because it was an eleventh-hour deal seemingly unrooted in any principle other than compromise, Colorado's self-defense immunity law was not immediately enacted elsewhere. In 1987, for example, Oklahoma's governor vetoed legislation similar to Colorado's, which subsequently passed after the immunity provision was removed.[146] Nonetheless, Colorado's immunity provision was on the books, providing a template for future efforts.

B. AUSPICIOUS EFFORT BY GUN RIGHTS ADVOCATES

The Colorado self-defense immunity law was not instituted at the behest of gun rights advocates or other lobbyists, but rather, it arose as a compromise with prosecutors after a locally elected leader perceived a need for expanding self-defense protections against home intruders.[147] In more recent times, however, gun rights advocates and the NRA in particular have led a campaign to expand not only the right to have and carry guns but also to brandish and shoot them when gun owners feel threatened.[148] Most public attention to this campaign has centered around Stand Your Ground, but looking closely at testimony and commentary reveals a deeper ambition: immunizing defensive gun use from prosecution.

The parallels between the NRA's lobbying for gun rights and its lobbying for self-defense immunity is striking. Gun rights advocates frequently claim that the right to keep and bear arms is being disrespected in the courts and therefore that the Second Amendment needs more

143. *Id.* at 975.
144. *Id.* at 980.
145. *See* Johnson, *supra* note 125 ("No other state is believed to have such a law.").
146. WILBANKS, *supra* note 126, at 50–51.
147. *Id.* at 31 ("Rep. Armstrong says that the idea and initiative for the original bill was her own as she did not contact any lobbyists (the Colorado District Attorneys Council, the National Rifle Association, homeowners associations) to seek help in drafting the initial bill.").
148. For accounts of the NRA's recent focus on self-defense law, and especially Stand Your Ground, see MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 85 (2019) and CAROLINE E. LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE 161–62 (2017).

protection.[149] The claim with self-defense is similar: as one gun rights advocate put it, self-defenders are "victimized . . . in court."[150] The executive director of the NRA's Institute for Legislative Action lamented that "people who defend themselves are more likely to be charged with crimes and, as the old sayings go, be forced to 'tell it to the judge' and 'let the jury sort it out.' "[151] That creates a problem, he explained, because "a murder trial puts the defendant at risk of a long prison sentence—or worse."[152] The NRA lobbyist most directly involved with Florida's landmark Stand Your Ground bill in 2005 was likewise moved by this notion.[153] A basic problem, in her view, was that people were "being arrested" and "prosecuted . . . for exercising self-defense that was lawful."[154]

An answer to that feeling of disregard for self-defense was to transform it from an affirmative defense to an immunity. The NRA devised a self-defense immunity law[155] and found legislative sponsors in Florida who agreed with the complaint that, as one put it, "law-abiding citizens" who "protect themselves [are] in a posture that they have to defend themselves from their own government."[156] The measure passed in 2005 and went even further than Colorado's, extending prosecutorial immunity to *all* self-defense—not just self-defense in the context of home invasions.[157] In particular, the law provided that someone using lawful self-defense is "immune from criminal prosecution," with "criminal prosecution" defined to "include[] arresting, detaining in custody, and charging or prosecuting the

149. Joseph Blocher and I explore that rhetorical move in Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613, 613 (2022); *see also* Joseph Blocher & Eric Ruben, *No, Courts Don't Treat the Second Amendment as a 'Second-Class Right*,*'* WASH. POST (Nov. 17, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/11/17/no-courts-dont-treat-second-amendment-second-class-right [https://perma.cc/S9QU-UHDD] (discussing "allegations of widespread mistreatment" of the right to keep and bear arms).

150. Self-Defense Amendments: Hearing on H.B. 227 Before the Senate Natural Resources, Agriculture, and Environment Comm., 2021 Gen. Sess., at 35:30 (Utah 2021), https://le.utah.gov/av/committeeArchive.jsp?timelineID=182900 [https://perma.cc/8K2K-MH86] (statement of Clark Aposhian).

151. Chris W. Cox, *"Castle Doctrine" Legislation: Protecting Your Right to Protect Yourself*, NRA-ILA (Apr. 1, 2012), https://www.nraila.org/articles/20120401/castle-doctrine-legislation-protecting-your-right-to-protect-yourself [https://perma.cc/7M2Q-PW9V].

152. *Id.*

153. Mike Spies, *The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies*, NEW YORKER (Feb. 23, 2018), https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies [https://perma.cc/ND4Z-RRE2] (describing Marion Hammer's role in the enactment of Florida's 2005 law and subsequent amendments).

154. *Id.* (quoting Marion Hammer).

155. *Id.*

156. Talk of the Nation, Opinion, *Why I Wrote "Stand Your Ground" Law*, NPR (Mar. 26, 2012, 1:00 PM), https://www.npr.org/2012/03/26/149404276/op-ed-why-i-wrote-stand-your-ground-law [https://perma.cc/AKP6-KD45] (interview of State Rep. Dennis Baxley (R-Fla.)).

157. *See id.*

defendant."[158]

After some Florida judges placed the burden on the defendant to prove self-defense at a pretrial hearing, legislators stepped in to strengthen the immunity provision by clarifying that the burden of proof is on the prosecutor to disprove self-defense before trial by clear and convincing evidence.[159] That standard is much higher than the probable cause standard that prosecutors must satisfy to indict, which, as discussed above, is the primary focus of traditional and modern pretrial screening.[160] And there have been efforts to increase the burden even more, such as by requiring the prosecutor to disprove self-defense beyond a reasonable doubt—the same burden borne by the prosecutor at trial.[161]

Unlike Colorado's law, which failed to attract buy-in elsewhere, Florida's law was aggressively promoted by the NRA and the conservative American Legislative Exchange Council ("ALEC"),[162] which described the

158. *See* FLA. STAT. § 776.032 (2005). The self-defense immunity provision adopted in Florida in 2005 is as follows:

> Immunity from criminal prosecution and civil action for justifiable use of force.—
> (1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

Id. The law, formally called, "An act relating to the protection of persons and property," 2005 FLA. LAWS 199, also enacted Stand Your Ground, 2005 FLA. LAWS 202, and two presumptions making it easier to defend deadly defensive force in a person's home and cars, *see id.* (creating FLA. STAT. § 776.013(1), (4)).

159. *See* Love v. State, 286 So. 3d 177, 180 (Fla. 2019) (recounting the history of the burden shift for self-defense immunity in Florida).

160. *See supra* Section I.B (discussing pretrial screening and the probable cause standard).

161. *See* Lizette Alvarez, *Florida Poised to Strengthen 'Stand Your Ground' Defense*, N.Y. TIMES (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/us/stand-your-ground-florida.html [https://perma.cc/HF98-Z8EM] (describing effort to increase the burden for disproving self-defense at immunity hearings to the beyond-a-reasonable-doubt standard).

162. *See NRA Presents ALEC Model Legislation in Grapevine, Texas*, NRA INST. LEGIS. ACTION (Aug. 12, 2005), https://www.prwatch.org/files/NRA_2005.png [https://perma.cc/MK8P-8AAY] ("At the recent Annual Meeting of the American Legislative Exchange Council (ALEC) in Grapevine, TX, Marion Hammer presented the ALEC Criminal Justice Task Force with proposed model legislation based on Florida's landmark "Castle Doctrine" law, that passed in Florida earlier this year."); Press Release, *ALEC Statement on "Stand Your Ground" Legislation* (Mar. 26, 2012), https://www.alec.org/press-release/alec-statement-on-stand-your-ground-legislation-32612 [https://perma.cc/T8Q2-8X58] ("Florida's 'Stand Your Ground' law was the basis for the American Legislative Exchange Council's

need to "[p]rotect[] citizens from prosecution or liability if they use a firearm in self defense [sic] inside or outside their homes."[163] Similar laws were introduced in states across the country,[164] and the NRA-promoted sentiment that civilians asserting self-defense should have a path to immunity was frequently invoked. When legislators debated Iowa's self-defense law, one objected that a person must "spend eternity in prison trying to defend themselves" after being put "in that untenable situation where they have to make that snap decision and defend themselves or another from an aggressor."[165] In Ohio, a legislative witness inveighed that "[t]he mere fact of acting justly in self-defense should not result in dragging folks who used defensive force in accordance with Ohio law through the mud, costing them valuable time and resources."[166] In South Carolina, a self-defense bill's sponsor argued that "the State should have to prove you did something wrong before they can send you to jail" to await trial in homicide cases.[167] And in Utah, an advocate complained that people should not have to "go through the crucible of a self-defense trial."[168] Ultimately, after the passage of Florida's law, more than twenty other states passed some sort of self-defense reform, such as Stand Your Ground,[169] with at least thirteen enacting self-defense immunity.[170]

model legislation, not the other way around.")

163. *See, e.g.*, ALEC, 2007 LEGISLATIVE SCORECARD, http://www.alec.org/am/pdf/2007alecscorecard.pdf [https://web.archive.org/web/20081106044025/http://www.alec.org/am/pdf/2007alecscorecard.pdf].

164. *Id.* (tracking where ALEC model legislation had been successfully introduced or enacted); *see also* Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, MOTHER JONES (June 7, 2012), https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground [https://perma.cc/34DP-N7NG].

165. *Iowa House of Representatives Floor Debate on HF 517 During the 87th General Assembly*, IOWA LEGISLATURE, at 1:15:45 PM (Mar. 7, 2017), https://www.legis.iowa.gov/perma/093020194217 [https://web.archive.org/web/20230421065522/https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170307124009459&dt=2017-03-07&offset=1793&bill=HF%20517] (statement of Rep. Matt Windschitl); *see also id.* at 1:52:00 PM ("We want to make absolutely certain that, if someone ever does find themselves in that situation where they've used Stand Your Ground or not retreated, that we provide to them the protections from criminal and civil actions against them.").

166. Memorandum of Support for Senate Bill 215 from Ohio Gun Owners to the Ohio Senate Veterans and Public Safety Committee (Oct. 5, 2021) (statement of Rob Knisley, Ohio Gun Owners).

167. WCBD News 2, *Stand Your Ground in South Carolina*, YOUTUBE (May 19, 2016), https://www.youtube.com/watch?v=RptJ8dKVWJg [https://perma.cc/HQ7R-2MCQ] (interviewing House Rep. Greg Delleney, Jr., regarding H. 4703).

168. *Self-Defense Amendments: Hearing on H.B. 227 Before the Senate Natural Resources, Agriculture, and Environment Comm.*, 2021 Gen. Sess. (Utah 2021) [hereinafter *Hearing on H.B. 227*], https://le.utah.gov/av/committeeArchive.jsp?timelineID=182900 [https://perma.cc/8K2K-MH86] (statement of Mitch Vilos).

169. *See The Effects of Stand Your Ground Laws*, RAND CORP. (Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/stand-your-ground.html#fn3 [https://perma.cc/TA4X-5R64] (counting twenty-four states that passed self-defense reform in the decade after Florida's 2005 enactment).

170. *See* ALA. CODE § 13A-3-23(d) (2016), COLO. REV. STAT. § 18-1-704.5(3) (1985), FLA. STAT.

But the fact that people who lawfully defend themselves are sometimes prosecuted and forced to argue self-defense is unexceptional. It is a truism that self-defense sometimes exculpates—that is precisely why it is an available defense to criminal charges. Singling out self-defense for special treatment as an immunity should have a compelling rationale similar to the ones that justify other prosecutorial immunities. The next Section searches for such a rationale in the legislative debates and commentary.

C. SEARCHING FOR A RATIONALE

A common assertion among advocates for self-defense immunity is that awaiting trial is "not giving the right to self-defense the consideration it deserves."[171] But why not? After all, awaiting trial is the traditional process and the one afforded other defenses. In his systematic analysis, Paul Robinson identifies dozens of other affirmative defenses that bar conviction.[172] What is the basis for treating self-defense differently than these other defenses? Though legislative debates offer no consistent rationale, four can be teased out: restoring procedural protections for self-defense lost to history, stopping politically motivated prosecutions of self-defenders, vindicating the notion that self-defense is a "natural right," and reducing defense costs for gun owners. None of these is as strong as the rationale for traditional immunities—an inherent need for pretrial adjudication.[173] Moreover, each is unpersuasive on its own terms.

Some advocates argue that prosecutorial immunity restores self-defense to an exalted place from a bygone era. In Florida, for example, a witness testified that making the prosecutor disprove self-defense before trial "recover[s] a right that we as citizens lost to defend ourselves from criminals."[174] In Utah, a witness testified that "Utah used to have a robust preliminary hearing procedure" as it relates to self-defense, and that immunity "restores some much-needed balance."[175]

§ 776.032 (2005), GA. CODE ANN. § 16-3-24.2 (2014), KAN. STAT. ANN. § 21-5231 (2011), KY. REV. STAT. ANN. § 503.085 (West 2006), OKLA. STAT. tit. 21 § 1289.25(F) (2018), S.C. CODE ANN. § 16-11-450 (2006), MICH. COMP. LAWS § 780.961(1) (2006), IDAHO CODE § 19-202A(1) (2018); UTAH CODE ANN. § 76-2-309 (2021), S.D. CODIFIED LAWS § 22-18-4.8 (2021), IOWA CODE § 704.13 (2017), N.C. GEN. STAT. § 14-51.3 (2011).

171. *Hearing on H.B. 227*, *supra* note 168, at 8:40 (statement of Mitch Vilos).

172. Robinson, *supra* note 29, at 203 n.7.

173. *See supra* Section I.C (discussing traditional prosecutorial immunities).

174. Mark Obbie, *The Politician Who Brought America 'Stand Your Ground' Is Pushing to Make Self-Defense Claims More Bulletproof*, TRACE (Sept. 27, 2015), https://www.thetrace.org/2015/09/stand-your-ground-florida-bill-baxley [https://perma.cc/2HEH-HTVM] (quoting testimony of Eric Friday).

175. *Self-Defense Amendments: Hearing on H.B. 227 Before the Senate Natural Resources, Agriculture, and Environment Comm.*, 2021 Gen. Sess., at 2:37 (Utah 2021) (testimony of Mark Moffatt), https://le.utah.gov/av/committeeArchive.jsp?timelineID=182900 [https://perma.cc/8K2K-MH86].

A related move has been to couple self-defense immunity with Stand Your Ground and then defend both on the basis of Stand Your Ground history. For example, the NRA has said that Stand Your Ground laws, such as Florida's (which includes an immunity provision), "focus on the narrow issue of whether and to what extent a person who would otherwise have a right to self-defense forfeits that right by not first attempting to flee the confrontation."[176] With omnibus bills like Florida's so purportedly reduced, the NRA then asserted that removing the duty to retreat has "a pedigree in American law dating back over 150 years."[177] Other advocates have similarly ignored everything in recent self-defense legislation other than Stand Your Ground and then defended the entirety on the basis of Stand Your Ground history.[178]

Nostalgia is a staple of gun rights advocacy,[179] so it is unsurprising to see appeals to history when it comes to self-defense immunity. Yet, as shown in Section I.A, there is no basis in Anglo-American legal tradition for immunizing private defensive violence. Treating self-defense as exceptional through immunity is a thoroughly modern innovation.

An alternative rationale is that people exercising lawful self-defense are targeted for "political" prosecutions.[180] Prosecutors have vigorously rejected that narrative, and advocates for immunizing self-defense have failed to offer convincing evidence of political prosecutions, let alone the sort of systemic abuses that would justify a radical change to self-defense law. Advocates for

176. *Stand Your Ground*, NRA INST. LEGIS. ACTION (Feb. 1, 2014), https://www.nraila.org/articles/20140201/stand-your-ground [https://perma.cc/WKE5-VCKB].

177. *Id.*

178. A legal scholar with the Cato Institute, which also supports Florida-style self-defense laws, similarly downplayed their ambition. As he put it, "[Stand Your Ground] laws are a tremendously misunderstood aspect of the debate over firearms regulation and criminal-justice reform" because "[a]ll they do is allow people to assert their right to self-defense in certain circumstances without having a so-called 'duty to retreat.' " Ilya Shapiro, TESTIMONY BEFORE THE U.S. SENATE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS: HEARING ON "'STAND YOUR GROUND' LAWS: CIVIL RIGHTS AND PUBLIC SAFETY IMPLICATIONS OF THE EXPANDED USE OF DEADLY FORCE" 1 (Oct. 29, 2013), https://www.cato.org/sites/cato.org/files/pubs/pdf/syg_senate_testimony_-_shapiro_with_attachments.pdf [https://perma.cc/NVT7-T2Y7]; *see also id.* (arguing that "there's nothing particularly novel" about Stand Your Ground laws). The misdirection might be unwittingly assisted by opponents of immunity legislation who adopt a similar Stand Your Ground framing. *See, e.g.*, ABA TASK FORCE, *supra* note 17.

179. *See* Ruben & Blocher, *supra* note 149, at 632 (describing rhetorical appeals to an imagined past in gun rights advocacy).

180. *See, e.g.*, Tucker Carlson, *Kyle Rittenhouse's Trial Is the Most Bizarre Court Proceeding Ever Caught on Camera*, FOX NEWS (Nov. 10, 2021), https://www.foxnews.com/opinion/tucker-carlson-kyle-rittenhouse-trial [https://perma.cc/9N8K-GCRX] (saying Kyle Rittenhouse's prosecutor "didn't want to know what happened that night" and was "under enormous political pressure" to "declare Kyle Rittenhouse a murderer"). Indeed, it has become an article of faith on the political right that people exercising self-defense with firearms are targeted for political prosecutions. *See, e.g.*, *Kyle's Law*, *supra* note 13 ("Too often, rogue prosecutors bring felony criminal charges against people who were clearly doing nothing more than defending themselves, their families, or others from violent criminal attack.").

both of the first immunity statutes—in Colorado (1986) and Florida (2005)—could not point to a single example of an improper prosecution.[181] Rather, the chief NRA lobbyist for the Florida law ultimately contended that whether bad prosecutions have been brought is "not relevant."[182]

In subsequent efforts to immunize self-defense, advocates have invoked the prosecutions of George Zimmerman for the shooting death of Trayvon Martin and Rittenhouse for the Kenosha incident as exemplars of political prosecutions justifying self-defense immunity.[183] Looking to Zimmerman's prosecution is somewhat ironic given that it took place in Florida *after* Florida adopted its 2005 immunity provision and Zimmerman opted not to have a pretrial immunity hearing.[184] Furthermore, in both cases the juries reached verdicts only after extensive deliberation. The lead homicide investigator in the Zimmerman case recommended charges but was initially overruled.[185] Many perceived the declination of charges as reflecting racial bias, as Martin was an unarmed Black teenager.[186] A special prosecutor ultimately brought charges and a trial was held.[187] The law considered by Zimmerman's jury did not include how initial aggressors have a limited right to self-defense, since the judge declined to instruct the jury on the initial aggressor doctrine;[188] perhaps that would have made a difference in the verdict. Others have argued that prosecutors in both cases made strategic

181. *See* WILBANKS, *supra* note 126, at 54 ("[T]he sponsors of the bill were not able to point to any case in the past where they viewed the prosecutor to have incorrectly (in their view of the homeowner's right of self-defense) charged a homeowner."); Spies, *supra* note 153 ("Hammer and the Republican sponsors of Stand Your Ground could not point to a single instance in which a person had been wrongfully charged, tried, or convicted after invoking Florida's traditional self-defense law.").

182. Spies, *supra* note 153; *see also* Daniella Rivera, '*It's Not Working': KSL Investigates Unintended Consequences of New Utah Self-Defense Law*, KSL.COM (Nov. 16, 2021, 12:17 PM), https://www.ksl.com/article/50284891/its-not-working-ksl-investigates-unintended-consequences-of-new-utah-self-defense-law [https://perma.cc/R34W-ZCRG] ("Lisonbee said the [Utah immunity] law was intended to address politically motivated prosecutions but could not provide examples of that happening in Utah.").

183. *See, e.g.*, *Kyle's Law*, *supra* note 13 (naming the Zimmerman and Rittenhouse prosecutions as evidence of political prosecutions that rationalize the adoption of self-defense immunity).

184. *See* 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/LWH5-H78G] (noting that the shooting occurred on February 26, 2012, and the trial took place in 2013).

185. Matt Gutman, *Trayvon Martin Investigator Wanted Manslaughter Charge*, ABC NEWS (Mar. 27, 2012, 8:18 AM), https://abcnews.go.com/US/trayvon-martin-investigator-wanted-charge-george-zimmerman-manslaughter/story?id=16011674 [https://perma.cc/8TGG-8BQJ].

186. *See* Markovitz, *supra* note 22, at 879–80 n.32 (recounting how many thought "the criminal justice system was indifferent to Trayvon Martin's death, and was disinclined to try to provide justice").

187. *See* Alvarez & Buckley, *supra* note 184.

188. *See* 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/BDD9-7TGS].

errors that may have affected the outcomes.[189] In the Zimmerman trial, half of the jurors reportedly wanted to convict but changed their minds.[190] Deliberations in both cases extended over multiple days before the jurors returned not guilty verdicts.[191]

Of course, in an ideal world, prosecutors would have perfect clarity into guilt and innocence, and prosecutions that result in acquittals after trial would never be brought. That, of course, is not realistic and is the reason why affirmative defenses and trials exist.[192] Moreover, in light of the radical nature of the change wrought by singling out self-defense for immunity, if political prosecutions are the justification, then advocates should put forth more and better examples.

Another rationale that advocates raise is that self-defense is philosophically or morally distinct as a natural or human right.[193] The Republican Party platform refers to the right of self-defense as "God-given."[194] And the argument that self-defense is a justification and not an excuse is often explained by referencing moral philosophy.[195] But these understandings of self-defense as a natural, divine, or human right have long existed in harmony with adjudication at trial. Blackstone, for example, referred to self-defense as a natural right,[196] but he believed, as described

189. Some legal scholars have asserted that the Zimmerman prosecution made a tactical error by pursuing a murder theory rather than solely a manslaughter theory. David G. Savage & Michael Muskal, *Zimmerman Verdict: Legal Experts Say Prosecutors Overreached*, L.A. TIMES (July 14, 2013, 12:00 AM), https://www.latimes.com/nation/la-xpm-2013-jul-14-la-na-zimmerman-legal-20130715-story.html [https://perma.cc/8BM3-XDAN]. That, of course, is different than saying Zimmerman should not have been prosecuted at all. Various commentators have also critiqued the strategy and tactics deployed in the Rittenhouse prosecution. *See, e.g.*, Ashley Collman, *Did Prosecutors Bungle the Kyle Rittenhouse Case? Legal Experts' Reviews Are Mixed*, INSIDER (Nov. 16, 2021, 12:29 PM), https://www.insider.com/legal-experts-say-kyle-rittenhouse-prosecution-made-some-mistakes-2021-11 [https://perma.cc/T6T7-97DW].

190. Richard Luscombe, *George Zimmerman: Half of Jurors 'Initially Favored Conviction,'* GUARDIAN (July 16, 2013, 7:22), https://www.theguardian.com/world/2013/jul/16/george-zimmerman-jurors-trayvon-martin [https://perma.cc/S4E7-4GY3].

191. *Id.*; *see* Bosman, *supra* note 7 (noting that the Rittenhouse jury deliberated for three days before reaching its verdict).

192. *Cf.* Ward, *supra* note 22, at 136 ("The adjudication process itself is a recognition of human imperfection—because we can never have perfect knowledge, we subject our suspicions to the test of a criminal trial (or at least the prospect of a criminal trial) before punishing someone suspected of a crime.").

193. *See, e.g.*, *Self-Defense Amendments: Hearing on H.B. 227 Before the H. Judiciary Comm.*, 64th Leg., 2021 Gen. Sess. (Utah 2021), https://le.utah.gov/av/committeeArchive.jsp?timelineID=180423 [https://perma.cc/XB2Y-GLUD] (testimony of Clark Aposhian, Utah Shooting Sports Council, noting "[s]elf-defense is a basic human right").

194. *See* REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2016, at 12 (2016), https://prod-cdn-static.gop.com/static/home/data/platform.pdf [https://perma.cc/S4TQ-NA62].

195. *See* Reznik, *supra* note 20, at 26–27.

196. 1 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND *139–40 (1765).

above, that self-defense is squarely a jury question.[197] Saying that self-defense is a natural right does not rationalize treating it as an immunity any more than it rationalizes erasing the common law elements of necessity and proportionality that have long guided self-defense decision-making.[198]

That leaves the fourth explanation, which perhaps arises most often: that gun owners should not have to pay typical criminal defense costs if they have a claim of self-defense. The NRA's former executive director noted that "the legal fees . . . can easily top $50,000."[199] A representative of a gun rights advocacy group in Wyoming expressed a similar view: "We don't want to have a gun owner bankrupted by the criminal process just because he had to use a firearm in self-defense."[200] And in Utah, an advocate said, "I have people calling me all the time [and saying] I'm afraid it will ruin me if I have to defend myself."[201] The legislative sponsor of the Utah bill recounted how a person leaving a gun carry class remarked, "I would rather die than financially ruin my family" by using a gun in self-defense.[202]

The cost of criminal defense is a concern for *all* defendants, not just those asserting that violent conduct was justified as self-defense, and cost typically is not a sufficient rationale for prosecutorial—as opposed to civil—immunity.[203] If self-defense, alone among affirmative criminal law defenses, is to be immunized, it warrants a much stronger rationale than cost saving for gun owners. This is especially true in light of the costs incurred as a result of self-defense immunity that are discussed in the next Part.

III. THE COSTS OF IMMUNIZING PRIVATE VIOLENCE

The previous Section showed how the usual arguments put forth to

197. *See supra* notes 52–53 and accompanying text (discussing Blackstone's account of the process for raising affirmative defenses).

198. *See, e.g.*, Isaacs v. State, 25 Tex. 174, 177 (1860) (stating that the right to self-defense "is founded on the . . . law of nature" but that the common law requirement of "necessity of the case, and that only . . . justifies a killing").

199. Cox, *supra* note 151.

200. Arno Rosenfeld, *Senate Removes Immunity from 'Stand Your Ground' Law*, CODY ENTER. (Feb. 28, 2018), https://www.codyenterprise.com/news/local/article_d303bdba-1cc8-11e8-8673-776a19213ae2.html [https://perma.cc/6TPX-XS8P] (quoting Aaron Dorr of Wyoming Gun Owners discussing Senate File 71).

201. *Self-Defense Amendments: Hearing on H.B. 227 Before the H. Judiciary Comm.*, 64th Leg., 2021 Gen. Sess. (Utah 2021), https://le.utah.gov/av/committeeArchive.jsp?timelineID=180423 [https://perma.cc/EGF2-RRLM] (statement of Mitch Vilos).

202. *House of Representatives Floor Debate on H.B. 227 During the 2021 General Session*, UTAH STATE LEGISLATURE, at 1:00:11 (Feb. 22, 2021), https://le.utah.gov/av/floorArchive.jsp?markerID=114533 [https://perma.cc/YF2H-3WSJ] (statement of State Rep. Karianne Lisonbee).

203. *See supra* notes 100–01 and accompanying text (comparing rationales for civil and prosecutorial immunities); *cf.* Ward, *supra* note 22, at 135–36 (questioning the trial hardship rationale for self-defense immunity procedures).

support self-defense immunity are thin. It also is important to consider whether immunizing private violence has costs that further undercut exceptional treatment of defensive force. This Part contends that it does: immunizing self-defense can lead to more unlawful violence with less legal oversight; diminish the jury, thereby inviting less accurate and less legitimate outcomes; and introduce inefficiency into the criminal justice process.

A. MORE UNLAWFUL VIOLENCE (AND INCREASED IMPUNITY)

The message that self-defense immunity sends is troubling: that people can engage in defensive violence that *they believe* is lawful with less legal oversight. Both logic and data suggest that this message could bring about more assaults and homicides because of the impunity it signals—and in fact provides. Frederick Schauer has observed that "[q]uite often, officials who are immune for one reason or another from formal legal sanctions violate the law with some frequency."[204] One can expect the same result from self-defense immunity, except for a much larger swath of the population; relatively few people receive official immunity, but everyone is entitled to assert self-defense when defending against criminal charges.[205]

Rafi Reznik has recently argued that the modern understanding of self-defense as a justification, not an excuse, can signal societal acceptance of the alleged offense conduct in a way that promotes more violence;[206] immunity sends an even more powerful signal. As Reznik describes, in the dominant view, a *justification* indicates that "the wrongfulness of the act is negated."[207] *Excuses*, on the other hand, do not negate the wrongfulness of the conduct but "negate the blameworthiness of the actor."[208] The upshot is that "[j]ustifying self-defense," as opposed to excusing it, "can . . . amount to an encouragement and it can even amount to an imperative."[209] Reznik argues that self-defense should be considered an excuse, which it was under English common law.[210] On the ground, however, the trend is going in the opposite

204. FREDERICK F. SCHAUER, THE FORCE OF LAW 90 (2015).

205. Moreover, officials often are constrained by other forms of oversight that could compensate for the negative effects of granting immunity. *See id.* at 86 (discussing internal punishment that can play a role "in ensuring official obedience to law").

206. *See* Reznik, *supra* note 20, at 68 ("[W]e should not want to tell self-defenders that they have done the right thing, nor provide them with the powers that justification confers, vindicate the values that justificatory self-defense stands for, or accept the socio-political conditions that self-defense laws create or perpetuate.").

207. *Id.* at 26.

208. *Id.* at 27.

209. *Id.* at 33; *see also* Markovitz, *supra* note 22, at 875–76 (observing how "legal determinations of self-defense are, in effect, reflective of policy determinations about socially acceptable forms of violence").

210. *See* Reznik, *supra* note 20, at 65; *see also* Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 87–95 (2017) (tracing the intellectual history of self-

direction: jurisdictions are granting immunity to self-defenders, which goes even further down the path toward encouraging the use of violence than considering self-defense a justification.[211]

This trend is especially problematic because people are often wrong about the lawfulness of defensive force. One study found, for example, that a majority of self-reported defensive gun uses are likely illegal.[212] People "view [a] hostile encounter from their own perspective; in any mutual combat both participants may believe that the other side is the aggressor and that they themselves are acting in self-defense."[213] A particular incident from the summer of the Rittenhouse shooting is exemplary.

Two months before the Rittenhouse shooting, Mark and Patricia McCloskey stood outside their St. Louis, Missouri, mansion as racial justice protesters marched nearby.[214] Both were captured on video screaming angrily and wielding firearms: Mr. McCloskey, an AR-15–style rifle, and Ms. McCloskey, a handgun that she pointed at one protester after another.[215] In Missouri, it is a crime to "exhibit[], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner."[216] A local prosecutor charged the couple with violating that statute.[217] In their defense, the couple asserted that their conduct was justified to protect themselves and their property.[218]

Speaking at the 2020 Republican National Convention (the McCloskeys, like Rittenhouse, became celebrities on the political right for their gun use),[219] Mr. McCloskey, a lawyer, expressed outrage that the

defense from an excuse to a justification).

211. *Cf.* SCHAUER, *supra* note 204, at 7 (noting that "[s]ometimes the law" creates positive incentives "by granting immunity from otherwise applicable and legally enforced obligations").

212. David Hemenway, Debra Azrael & Matthew Miller, *Gun Use in the United States: Results From Two National Surveys*, 6 INJ. PREVENTION 263, 266 (2000).

213. *Id.*

214. Tom Jackman, *St. Louis Couple Who Aimed Guns at Protesters Charged with Felony Weapons Count*, WASH. POST (July 20, 2020, 8:33 PM), https://www.washingtonpost.com/nation/2020/07/20/st-louis-couple-who-aimed-guns-protesters-charged-with-felony-weapons-count [https://perma.cc/5PW7-6PG3]. The protestors do not appear to have entered the McCloskeys' property, though they marched on the sidewalk in a gated community in which the McCloskeys lived. *See* Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went on in St Louis that Day?*, BBC (Aug. 25, 2020), https://www.bbc.com/news/election-us-2020-53891184 [https://perma.cc/C53B-FGL2] (reporting that, while protestors walked into the private neighborhood, video from the event "does not show the protestors cross[ed] onto the McCloskeys' property, remaining instead on the sidewalks and in the roadway").

215. *See* Jackman, *supra* note 214; *see also* KMOV St. Louis, *Charges Filed Against Mark and Patricia McCloskey*, YOUTUBE (Jul. 20, 2020), https://www.youtube.com/watch?v=sUMfKFLGDcE [https://perma.cc/QP6H-CH8Q].

216. MO. REV. STAT. § 571.030 (2022).

217. *See* Jackman, *supra* note 214.

218. *Id*.

219. Caitlin O'Kane, *St. Louis Couple Who Pointed Guns at Black Lives Matter Protesters to Speak*

prosecutor "actually charged [them] with felonies for daring to protect [their] home."[220] Then, in a remarkable move, Missouri's attorney general urged dismissal of the local charges on the basis of the sentiment underlying immunity: "Missourians should not fear exposure to criminal prosecution when they use firearms to defend themselves and their homes from threatening intruders."[221] In the end, however, the couple effectively conceded that they were not lawfully defending themselves when they pled guilty to the crimes of assault and harassment, thereby waiving any claim for self-defense.[222] In other words, despite their confident assertions that they were legally justified in their actions, they ultimately admitted that they had no legal justification for their conduct.[223]

Unlawful defensive force imposes an especially troubling risk to Black men and women, like many of those marching in front of the McCloskey house, who are mistaken as threats all too frequently. Data has consistently shown that Black people are more likely to be misperceived as a threat than white people.[224] According to L. Song Richardson and Phillip Atiba Goff,

at Republican National Convention, CBS NEWS (Aug. 18, 2020, 2:06 PM), https://www.cbsnews.com/news/republican-national-convention-mark-patricia-mccloskey-to-speak [https://perma.cc/ATS7-DQH7]. Mr. McCloskey subsequently announced his candidacy for a U.S. Senate seat, prominently displaying on his campaign website a photograph of himself and Ms. McCloskey holding their guns during the racial justice protest. MCCLOSKEY FOR SENATE, https://www.mccloskeyforsenate.com [https://web.archive.org/web/20211106143557/https://www.mccloskeyforsenate.com].

220. CNBC, *Couple Who Pointed Guns at BLM Protesters Speaks at RNC*, YOUTUBE (Aug. 24, 2020), https://www.youtube.com/watch?v=gK8P0vUQ4lg [https://perma.cc/AU64-926A].

221. Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case, State v. McCloskey, No. 2022-CR01300, at *1 (Cir. Ct. Mo. Jul. 20, 2020).

222. Meryl Kornfield, *St. Louis Couple Who Pointed Guns at Protesters Plead Guilty, Will Give Up Firearms*, WASH. POST (June 17, 2021, 7:07 PM), https://www.washingtonpost.com/nation/2021/06/17/st-louis-couple-guns [https://perma.cc/EFL6-859X]; *see* Hagan v. State, 836 S.W.2d 459, 461 (Mo.1992), *overruled on other grounds by* State v. Heslop, 842 S.W.2d 72 (Mo. 1992) ("The general rule in Missouri is that a plea of guilty voluntarily and understandably made waives all non-jurisdictional defects and defenses." (citation and quotation marks omitted)). Mr. McCloskey nonetheless showed no remorse, saying of the criminal conduct, "I did it, and I'd do it again." Joel Currier, *St. Louis Gun-Waving Couple Plead Guilty to Misdemeanor Charges*, ST. LOUIS POST-DISPATCH (June 17, 2021), https://www.stltoday.com/news/local/crime-and-courts/st-louis-gun-waving-couple-plead-guilty-to-misdemeanor-charges/article_5b02e25b-0034-58a3-8181-f0a724ffa323.html [https://perma.cc/J5NN-A3MY]. The Supreme Court of Missouri suspended both Mark and Patricia McCloskeys' law licenses because of their convictions for offenses involving moral turpitude. *See In re* Mark T. McCloskey, Order, No. SC99301 (Mo. Feb. 8, 2022); *In re* Patricia McCloskey, Order, No. SC99302 (Mo. Feb. 8, 2022).

223. The case did not end there. The Missouri governor, who asserted that the prosecution was "political" and "out of control," pardoned the couple. Meryl Kornfield, *Missouri Governor Pardons Mark and Patricia McCloskey, Who Pointed Guns at Protestors*, WASH. POST (Aug. 3, 2021, 10:25 PM) https://www.washingtonpost.com/nation/2021/08/03/mccloskey-pardon [https://perma.cc/UP68-AY2Q]; Marc Cox Show, *Interview of Governor Mike Parson*, FACEBOOK (July 17, 2020), https://www.facebook.com/watch/?v=273414383946013 [https://perma.cc/L63N-AUWR].

224. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 307–14 (2012) (discussing data).

this is in part because Black people "serve as our mental prototype (i.e., stereotype) for the violent street criminal."[225] A prosecution and trial can separate out biased and unreasonable threat perceptions from unbiased and reasonable ones better than any individual can in the moment.[226] And getting it right is important for ensuring a fair and just implementation of criminal law.

Well-intentioned people can have flawed perceptions of lawfulness, but encouraging restraint for defensive violence through the threat of prosecution and punishment is even more important for those who are ill-intentioned. For some people, "genuine and sanction-independent obedience [to the law] is rare."[227] In that circumstance, "coercion through the threat of sanctions emerges as the principal mechanism for securing the obedience that turns out to be so often necessary."[228] Immunity lessens the law's constraining force and risks that someone prone to violence will construe immunity as a license to commit violence.[229]

In this regard, it is notable that a study of the effects of Colorado's 1986 immunity law found that those invoking immunity "used force (sometimes deadly force) as much out of anger as self-defense."[230] Moreover, the legal change primarily benefited defendants other than the intended beneficiaries—homeowners confronting stranger intruders.[231] In the years immediately following the enactment, the only "strangers" who intruded into homes and faced defensive force triggering immunity were police officers.[232]

Unfortunately, more recent empirical studies on the impact of changes to self-defense law do not distinguish between the effect of various simultaneous changes, such as Stand Your Ground, presumptions, and immunity. Several such studies have shown that self-defense reforms that include an immunity provision correlate with more violent crime.[233] One

225. *Id.* at 310.

226. To be sure, I am not saying that juries are never biased. The point, rather, is that a jury with representation from a cross-section of the community as required by law should reflect more diverse voices than a lone defendant (or judge), which would make it better suited to discern biased and unreasonable threat assessments. I discuss virtues of the jury in greater detail below. *See infra* Section III.B.

227. SCHAUER, *supra* note 204, at 75; *see id.* at 59 (noting how law serves to "constrain[] moral outliers").

228. *Id.* at 75.

229. *See generally* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (discussing the criminal law's ability to shape norms and behavior).

230. WILBANKS, *supra* note 126, at 322.

231. *Id.*

232. *Id.* at 321.

233. *See, e.g.*, Alexa R. Yakubovich, Michelle Degli Esposti, Brittany C. L. Lange, G. J. Melendez-Torres, Alpa Parmar, Douglas J. Wiebe & David K. Humphreys, *Effects of Laws Expanding Civilian*

study found that in the decade following Florida's 2005 legislation, "monthly rates of homicide increased by 24.4% and monthly rates of homicide by firearm by 31.6%."[234] Another found that the law was associated with a 44.6% increase in adolescent firearm homicides.[235] In February 2020, the U.S. Commission on Civil Rights released a report finding no evidence of crime deterrence and an increase in homicide rates in states that adopted such laws.[236] A commissioner recommended rejecting self-defense immunity because it "remove[s] incentives to mitigate or reduce the use of deadly force by protecting the claimant regardless of the collateral consequences."[237] Yet, as noted, the power of these studies as regards the impact of self-defense immunity is limited and, hopefully, future empirical studies will seek to isolate the effect of self-defense immunity.

A corollary to the signals sent by self-defense immunity is that sometimes immunity can in fact hinder or prevent a conviction of someone who engages in unlawful violence. The analysis of cases soon after Colorado passed its self-defense immunity law in 1986 found that the statute likely led to an acquittal in one case that would otherwise have been a probable conviction, as well as decisions not to prosecute in others.[238] The district attorney for a single county in Kansas has reported "declin[ing] to file charges against thirty-three people based on self-defense immunity," thirty of which were deemed homicides by the coroner.[239] Three additional cases were charged by the district attorney but dismissed on self-defense immunity grounds by a judge.[240]

Those arguing in support of self-defense immunity do not contest, and implicitly concede, much of this analysis. They acknowledge that the risk of having to defend against a prosecution causes gun owners to hesitate before deploying lethal force, and they seek to reduce such hesitation.[241] However,

Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review, AM. J. PUB. HEALTH (Mar. 10, 2021) (reviewing the literature).

234. David K. Humphreys, Antonio Gasparrini & Douglas J. Wiebe, *Evaluating the Impact of Florida's "Stand Your Ground" Self-Defense Law on Homicide and Suicide by Firearm: An Interrupted Time Series Study*, 177 JAMA INTERNAL MED. 44, 49 (2017).

235. Michelle Degli Esposti, Douglas J. Wiebe, Jason Gravel & David K. Humphreys, *Increasing Adolescent Firearm Homicides and Racial Disparities Following Florida's 'Stand Your Ground' Self-Defence Law*, 26 INJ. PREVENTION 187 (2020).

236. U.S. COMM'N ON C.R., EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES 6 (2020).

237. *Id.* at 26 (statement of Michael Yaki).

238. WILBANKS, *supra* note 126, at 321–24.

239. REPORT OF DISTRICT ATTORNEY MARC BENNETT 18TH JUDICIAL DISTRICT OF KANSAS 43 (Jan. 18, 2022), https://www.sedgwickcounty.org/media/60604/final-c-lofton-january-18-2022.pdf [https://perma.cc/6N6Y-5KC2].

240. *Id.* at 45.

241. *See, e.g.*, *supra* notes 202–03 and accompanying text (expressing gun owner concerns about

a cost of immunizing self-defense is to transform the signals sent by conventional self-defense law in a way that likely leads to more unlawful, and at times discriminatory, violence. Furthermore, immunizing self-defense erects an obstacle to achieving a basic goal of the criminal justice system: punishing those who commit crimes of violence.

B. FEWER JURIES IN MATTERS OF COMMUNITY IMPORTANCE

Another consequence of granting a defendant immunity is to disempower a jury from deciding facts surrounding a properly charged crime. The institution of the jury has long played a central role in self-defense cases. The jury is well-equipped to resolve disputes about the lawfulness of violence. Moreover, and importantly in the context of self-defense, the community's involvement through the jury legitimates the law and promotes acceptance of outcomes as well as community healing.

Today, the jury is most often discussed solely in the context of defendants' rights,[242] but the jury's importance to society is actually far deeper. At the nation's founding, Anti-Federalists were adamant about protecting the institution of the jury because, even more than protecting the defendant, the jury integrated "the people in the administration of government."[243] As Laura I. Appleman has put it, "the right of the jury trial" is about "the participation of the citizenry in [the] rule of law."[244] This feature of the jury—as a key means of community involvement in the law's implementation—is reflected in the fact that a defendant has no federal constitutional right to *waive* a jury trial, even if a defendant can demand one.[245] Prosecutors and courts generally can demand jury trials even over the

the cost of defending against a prosecution).

242. *See* U.S. CONST. amend. VI (granting defendants the right to "an impartial jury"); Duncan v. Louisiana, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

243. HERBERT J. STORING, *What the Anti-Federalists Were For*, *in* 1 THE COMPLETE ANTIFEDERALIST 19 (Herbert J. Storing ed. 1981).

244. *See* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 413 (2009); *see also id.* (noting that juries play an invaluable role for "the local community and to the people at large"); *accord* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373 (2012); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 882 (2014); George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804 (1995).

245. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); Singer v. United States, 380 U.S. 24, 34 (1965) ("[T]here is no federally recognized right to a criminal trial before a judge sitting alone."). Some states do grant defendants a right to demand a bench trial as a matter of state law. *See, e.g.*, MD. CODE ANN., CRIM. § 4-246 (West 2023) ("A defendant may waive the right to a trial by jury at any time before the commencement of trial . . . .").

defendant's objection.[246] Today, as in the past, there is a "strong preference for jury trials on *all* elements of a criminal case."[247]

Accuracy is one important interest served by this longstanding commitment to juries, because "[j]uries . . . are considered the best deciders of fact."[248] This is in no small part because juries "are more representative of their communities than judges . . . . They better represent various races, socio-economic classes, various levels of formal education, differing religions, and a broader spectrum of political engagement than do judges."[249] This is especially true when the task is assessing "matters reflecting their communities' values,"[250] like self-defense.

Self-defense is inherently fact-based, calling for answering difficult questions about the reasonableness of a defendant's perception of—and violent response to—a threat. Evaluating the lawfulness of self-defense calls for an assessment of whether defensive force was reasonably necessary and proportionate to a reasonably perceived threat.[251] Criminal law scholars

246. *See, e.g.*, *Singer*, 380 U.S. at 24–26 (upholding Rule 23(a) of the Federal Rules of Criminal Procedure, which requires the government to consent to and the court to approve a defendant's waiver of a jury trial); FLA. R. CRIM. P. 3.260 ("A defendant may in writing waive a jury trial with the consent of the state."); KY. R. CRIM. P. 9.26 ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth."); State v. Greenwood, 297 P.3d 556, 558–59 (Utah 2012) (holding that a trial court erred when granting a defendant's request for a bench trial over the prosecution's objection); State v. Burks, 674 N.W.2d 640, 647 (Wis. Ct. App. 2003) (permitting the trial judge to insist on a jury trial even when both the defense and prosecution prefer a non-jury trial).

247. Rodgers v. Commonwealth, 285 S.W.3d 740, 755 (Ky. 2009) (emphasis added).

248. *See* Ryan, *supra* note 244, at 872; *see also* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker*: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 905 (2005) ("As our system has implicitly recognized for centuries, juries are simply the best actors to decide fact questions."); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 339–343 (2003) (discussing the virtues of the jury as a deliberative democratic body); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 745 (1993) ("The Founders considered the jury to be superior to a single judge in finding facts because it embodied the common sense of twelve individuals with a variety of experiences and knowledge.").

249. Ryan, *supra* note 244, at 878; *see also* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 (1995) ("[T]he modern jury is the most diverse of our democratic bodies.").

250. Ryan, *supra* note 244, at 878. *See generally* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS (2012) (discussing the value of juries and jury duty in the American democracy).

251. *See* Ruben, *supra* note 19, at 81–89 (discussing elements of necessity and proportionality in self-defense law); United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (" '[T]he law of self-defense is a law of necessity'; the right of self-defense arises only when the necessity begins, and equally ends with the necessity . . . ."). A counterargument to the claim that a jury is best placed to decide on self-defense reasonableness might be that judges already decide questions of reasonableness for other purposes, especially determining the lawfulness of searches and seizures under the Fourth Amendment, so why not do so for self-defense, too? However, judicial determination of reasonableness in the Fourth Amendment context is itself heavily criticized, not least because "judges are not representative of the societal standards upon which [such] questions are based, thus likely skewing judges' conclusions." Ryan, *supra* note 244, at 874; *see also id.* at 877 n.177 (collecting scholarship critical of judicial determinations of reasonableness in the Fourth Amendment context).

devise complex classifications in an attempt to capture the permutations of defensive confrontations and how they intersect with the law of self-defense,[252] but it is impossible to resolve self-defense claims through any sort of rote analysis. It is necessary to apply community values and experiences to assess reasonableness, and judges, unlike juries, are often removed from both.[253] Simply because a jury is comprised of a cross-section of the community, the jury will incorporate perspectives and experiences that lead to a fair resolution of disputed facts more so than a single judge who is likely insulated from the circumstances that gave rise to the violence.

Moreover, importantly, community resolution of the difficult factual questions that go into self-defense can legitimate the law and promote acceptance of outcomes.[254] Precisely because "juries have the power to incorporate societal norms and values into their decisions . . . citizens can view these determinations as legitimate and as not influenced by the political leanings of government-employed judges."[255] That sense of legitimacy, in turn, can help a community accept a case's outcome and move past the trauma of community violence.

For example, after the killing of Trayvon Martin, the quick decision not to prosecute George Zimmerman led to mass protests across the country.[256] Many thought that the declination of charges suggested that "the criminal justice system was indifferent to Trayvon Martin's death and was disinclined to try to provide justice."[257] The fact that Martin was a Black teenager triggered speculation that race was part of the reason for not immediately prosecuting Zimmerman.[258] When a special prosecutor subsequently

252. *See, e.g.*, Larry Alexander, *Recipe for a Theory of Self-Defense: The Ingredients, and Some Cooking Suggestions*, *in* THE ETHICS OF SELF-DEFENSE 20, at 21–28 (Christian Coons & Michael Weber eds., 2016) (categorizing those who might be involved in self-defense situations and affect the application of law to facts as the victim, a nonthreatened third party, a culpable aggressor, a culpable person, a culpable faker, an innocent aggressor, an anticipated innocent aggressor, and an innocent bystander).

253. *See* Ryan, *supra* note 244, at 874 (noting that judges "are not representative of society, nor are they usually representative of the individual communities that they serve"); *id.* at 874–77 (surveying literature on judicial diversity).

254. *See* FUNK, *supra* note 108, at 49 ("[W]idely rejected self-defence decisions can adversely impact the broader public's view of the legitimacy of the legal order."); *id.* ("Self-defence outcomes that are broadly rejected as immoral threaten to incrementally erode the justice system's moral credibility, undermine compliance with the law, and reduce cooperation with legal authorities.").

255. Ryan, *supra* note 244, at 881.

256. Patrik Jonsson, *George Zimmerman Charged in Trayvon Martin Case: Why Now, and What Next?*, CHRISTIAN SCI. MONITOR (Apr. 11, 2012), https://www.csmonitor.com/USA/Justice/2012/0411/George-Zimmerman-charged-in-Trayvon-Martin-case-Why-now-and-what-next [https://perma.cc/VZ8T-7P28] (describing protests).

257. Markovitz, *supra* note 22, at 879–80 n.32.

258. *Id.* This speculation is consistent with data: as one researcher found, "[w]ith respect to race, controlling for all other case attributes, the odds a white-on-black homicide is found justified is 281 percent greater than the odds a white-on-white homicide is found justified." JOHN K. ROMAN, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY

charged Zimmerman, the move brought great relief. Martin's mother commented that "[w]e simply wanted arrest, nothing more, nothing less, and we got it."[259] Although many people who wanted a prosecution may have been disappointed by the jury verdict of not guilty, that the process was followed, and that the decision was rendered by a jury certainly lowered the temperature of the earlier protests.

Conversely, a prosecution's dismissal because of immunity sends a very different signal to the community. Victims and family members can never know how a jury of their peers would decide on the legality of defensive force. Indeed, a homicide case in Utah elicited the opposite reaction after the defendant was discharged because of self-defense immunity.[260] A family member of the victim of the alleged homicide exclaimed in court: "We all feel the justice system has no doubt failed us."[261] Another said: "This has forever changed my outlook on the system and the faith that I once had that justice would prevail."[262] Similarly, in Kansas, after a prosecutor declined to bring homicide charges against juvenile detention officers citing a self-defense immunity law, the victim's family viewed the decision as "yet another instance of an unarmed Black teenager killed by law enforcement with impunity" and without "even an ounce of accountability."[263] Likewise, a community partnership expressed "outrage[]" at the declination of charges, viewing it as a "blatant disregard for the life" of the victim.[264]

The denouncements above demonstrate that self-defense immunity can not only prevent a community from healing, but can also undermine the rule of law and faith in the judiciary. In this regard, it is notable that the criticism in such cases is not at the legislature for passing a self-defense immunity bill, or at the governor for signing it, but rather at the "justice system" that "no doubt failed."[265] Moreover, under the law of self-defense, the harm caused

HOMICIDE REPORT DATA 9 (2013). If the homicide occurred in a state with a Stand Your Ground law, like Florida, that "increases the odds of a justifiable finding by 65 percent." *Id.* at 9–10; *see also* Nicole Ackermann, Melody S. Goodman, Keon Gilbert, Cassandra Arroyo-Johnson & Marcello Pagano, *Race, Law, and Health: Examination of "Stand Your Ground" and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194 (2015) (finding a defendant was two times as likely to be convicted for killing a white victim as a non-white victim under Florida's 2005 self-defense law).

259. Jonsson, *supra* note 256 (quoting Trayvon's mother, Sybrina Fulton).

260. *See* Rivera, *supra* note 182 (describing the discharge of Troy James Pexton).

261. *Id.* (quoting from court audio recordings).

262. *Id.*

263. Ryan Newton, Laura McMillan & Stephanie Nutt, *Sedgwick County Prosecutor: No Charges in Cedric Lofton's Death*, KSN.COM (Jan. 18, 2022), https://www.ksn.com/news/local/watch-live-da-holds-news-conference-unknown-subject [https://perma.cc/LP62-X55D] (quoting statement from Cedric Lofton's family).

264. *Id.* (quoting statement by the Progeny youth/adult partnership).

265. Rivera, *supra* note 182.

by defensive violence is supposed to "remain[] a legally recognized harm which is to be avoided whenever possible,"[266] and the conduct underlying self-defense is supposed to "remain[] generally condemned and prohibited."[267] Immunity dilutes the force of such legal values and erodes trust that the judicial system will enforce them.

C. INEFFICIENT MINI-TRIALS

One counterargument to concerns about self-defense immunity is that it will only weed out rare, egregious prosecutions. In some places where self-defense immunity is already enacted, the defendant has the burden of proving self-defense at an immunity hearing,[268] or, in the alternative, the prosecutor must only show probable cause that self-defense did not justify the defendant's violence.[269] In those places, most self-defense cases might still proceed to trial. This, however, raises a question about judicial economy.

To be sure, the likely trajectory for self-defense immunity is for legislators to strengthen it, similar to how Florida recently placed the burden on prosecutors to disprove self-defense by clear and convincing evidence at a pretrial hearing.[270] Since Florida has led the way for NRA-backed initiatives to be subsequently passed elsewhere,[271] it is no surprise that when Utah passed its self-defense immunity law in spring 2021, a legislative sponsor said the law "basically copie[d] and paste[d]" the clear and convincing evidence standard "from Florida['s] statute."[272] Furthermore, even in jurisdictions with lesser prosecutorial immunity standards currently, immunity still sends troubling signals that could increase violence.[273]

Setting aside these concerns and focusing narrowly on the argument that immunity will have little impact on prosecutions outside of rare cases, a question arises: Why undertake an expensive immunity hearing that will mirror the eventual trial at all? Two goals of the rules governing criminal procedure are to "secure simplicity of procedure" and "to eliminate

266. Robinson, *supra* note 29, at 213.

267. *Id.* at 220.

268. *See, e.g.*, People v. Guenther, 740 P.2d 971, 977 (Colo. 1987) (en banc).

269. *See, e.g.*, Rodgers v. Commonwealth, 285 S.W.3d 740, 754 (Ky. 2009); State v. Hardy, 390 P.3d 30, 39 (Kan. 2017).

270. *See supra* notes 159–61 and accompanying text.

271. *See* DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 105 (2016) ("Florida has generally been the NRA's starting line for legislative gun rights campaigns . . . .").

272. Rivera, *supra* note 182 (quoting Rep. Karianne Lisonbee, R-Clearfield, on the floor of Utah's House of Representatives); UTAH CODE ANN. § 76-2-309 (West 2021) (setting out clear and convincing evidence standard).

273. *See supra* Section III.A.

unjustifiable expense."[274] Self-defense immunity runs counter to those goals.

In this regard, it is helpful to contrast self-defense with other pretrial issues discussed above,[275] which generally implicate evidence that is both clear-cut and distinct from proof of guilt or innocence. Whether too much time has passed between criminal conduct and a prosecution so as to violate a statute of limitations, for example, may call only for simple arithmetic unrelated to the alleged offense conduct.[276] The same could be said for speedy trial issues.[277] Determining whether a pending prosecution is substantially the same as an earlier one, thereby violating double jeopardy protections, calls for a comparison of the two prosecutions.[278] And determining whether diplomatic immunity attaches often only requires inquiring into the defendant's status as a diplomat and whether the sending state has waived the immunity.[279]

Yet proving or disproving whether self-defense exculpates requires consideration of the same witnesses and evidence that will be introduced at trial to prove the charged crime. Indeed, this is implicit in affirmative defenses (like self-defense), which contend that something happening at the time of the alleged offense justified or excused the underlying conduct. Resolving the lawfulness of self-defense ahead of trial would call for delving into the circumstances surrounding the charged offense and receiving testimony from the same witnesses of the alleged crime who will testify at trial. Self-defense immunity hearings, when they do not result in a dismissal, involve "mini-trials of the evidence in advance of the actual trial" that criminal procedure typically seeks to avoid.[280]

274. FED. R. CRIM. P. 2.

275. *See supra* Section I.C.

276. *See* Toussie v. United States, 397 U.S. 112, 114–15 (1970) ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.").

277. *See* United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("[T]he Sixth Amendment's guarantee of a speedy trial 'is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.' " (quoting United States v. Ewell, 383 U.S. 116, 120 (1966))).

278. *See* Brown v. Ohio, 432 U.S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.").

279. *See, e.g.*, United States v. Khobragade, 15 F. Supp. 3d 383, 385 (S.D.N.Y. 2014) ("With several exceptions not applicable here, diplomatic officers may not be arrested, detained, prosecuted or sued unless their immunity is waived by the sending state."); *see also* DIPLOMATIC AND CONSULAR IMMUNITY, *supra* note 101, at 7–8 ("Diplomatic agents . . . enjoy complete immunity from the criminal jurisdiction of the host country's courts and thus cannot be prosecuted no matter how serious the offense unless their immunity is waived by the sending state . . . .").

280. *See, e.g.*, United States v. Bazezew, 783 F. Supp. 2d 160, 166 (D.D.C. 2011) (discussing preference to avoid mini-trials in the context of evidentiary disputes).

To be sure, adding costs and inefficiencies is not always inappropriate. Many scholars agree that grand juries are ineffective at eliminating bad prosecutions[281] and that the plea bargain system that is used to resolve the vast majority of criminal prosecutions creates injustices.[282] Some scholars and advocates have thus suggested reforms that would be costly, like enhancing internal prosecutorial screening[283] or devising something akin to summary judgment for criminal procedure.[284] But self-defense immunity is extrinsic to that broader conversation, which is about how to improve the pretrial process for *all* issues bearing on guilt and innocence, and for all defendants. Self-defense immunity grants a benefit for one defense championed by powerful lobbyists. That may explain why self-defense immunity is passing in legislatures, but it hardly rationalizes the costs.

CONCLUSION

A central goal of this Article is to show that the exceptionalism reflected in self-defense immunity laws is not rooted in history, tradition, or longstanding priorities of criminal law and procedure. Self-defense has always been an affirmative defense, embedded in a system of defenses and vindicated through the same criminal justice process as other defenses. Those pursuing self-defense immunity have thus far failed to put forward a compelling rationale for a radical departure from legal tradition. Self-defense should remain unexceptional within the system of criminal law defenses to avoid the unwarranted harms that can come from immunizing private violence.

281. *See, e.g.*, Roger A. Fairfax Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 341–45 (2010) (summarizing critiques); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 265–69 (1995). The classic cliché is that a grand jury would "indict a ham sandwich." *See In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. 1989), *aff'd as modified*, 548 N.Y.S.2d 679 (App. Div. 1989) ("[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.' ").

282. *See* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 974 (2021) ("Today, over ninety-five percent of convictions at the state and federal levels are the product of guilty pleas."); Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 80–88 (Erik Luna ed., 2017) (reviewing critiques of plea bargaining).

283. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30–35 (2002) ("By prosecutorial screening we mean a far more structured and reasoned charge selection process than is typical in most prosecutors' offices in this country."); *see also* ALLEN ET AL., *supra* note 76, at 1039 ("In a system that resolves a huge majority of cases without trials, the choice of how best to screen prosecutors' charging decisions is critically important to the quality of justice the system delivers.").

284. Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 666, 685 n.105 (2011).