

THE VALUE OF LIFE: CONSTITUTIONAL LIMITS ON CITIZENS' USE OF DEADLY FORCE

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INTRODUCTION

The shooting of Trayvon Martin by George Zimmerman has focused attention on governmental authorizations of citizens' use of deadly force.¹ This attention is long overdue because many "lawful" killings by citizens occur in situations where the victim posed no threat to the shooter or other persons.² For example, Gregory Duncan "lawfully" shot Christopher Spicer on Duncan's porch largely because Spicer was rude and unmannerly.³ In another case, Thomas Cooney and James Hall, two white men, staked out a wooded area where some copper tubing stolen from their business had been hidden.⁴ When Carlton Williams, an African American, arrived and went straight to the copper, they arrested him at gunpoint. When Williams ran away, Cooney "lawfully" shot and killed Williams with a pistol loaded with hollow-point bullets.⁵

This Article addresses the constitutionality of private citizens' "lawful" uses of such deadly violence in terms of three situations: (1) implementing a citizen's arrest and preventing crime; (2) protecting intrusions into one's metaphorical "castle"; and (3) preventing crime and "standing one's ground" in a confrontation with an attacker. Underlying all three situations is the issue of whether a particular use of deadly force (i.e., force sufficient to kill or seriously injure a person) is "legitimate." Because a

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¹ See, e.g., John Cloud, *The Law Heard Round the World*, TIME, Apr. 9, 2012, at 36. For further discussion of this shooting, see *infra* notes 189–196 and accompanying text.

² See, e.g., Jack Healy, *Unarmed and Gunned Down by Homeowner in His "Castle,"* N.Y. TIMES (Oct. 23, 2012), http://www.nytimes.com/2012/10/24/us/castle-law-at-issue-after-fatal-montana-shooting.html?pagewanted=all&_r=0.

³ See *infra* notes 125–133 and accompanying text.

⁴ *Cooney*, 463 S.E.2d at 598.

⁵ *Id.* Cooney and Hall testified that they left after the shooting because they thought Williams had not been shot. However, Cooney returned the next morning, found Williams's dead body, and subsequently informed the police. *Id.* For further discussion of *Cooney*, see *infra* notes 81–90 and accompanying text.

state has a “monopoly of the legitimate use” of deadly force,⁶ the use of such force is only legitimate if the state has authorized that use. In the American constitutional system of legitimacy, there are limits on the state’s power to authorize the use of deadly force. Because the use of such force can deny a victim’s fundamental constitutional right to life, these limits require that authorizations of deadly force be narrowly tailored to serve a compelling state interest.

As a result, a state is prohibited from overbroad authorizations of the use of deadly force by governmental officials like police. However, some courts have ruled that these limits do not apply to authorizations of private citizens’ use of deadly force.⁷ This Article argues that, because of the unique nature of the state’s monopoly on deadly force, these cases are wrong. This Article also argues that most states have adopted similar unconstitutionally overbroad authorizations of citizens’ use of deadly force.

Part I of this Article develops the point that life is especially valuable in terms of: (1) the state’s monopoly on deadly force, (2) the two categories of deadly force—prohibited and authorized—and (3) the constitutional concern for the fundamental right to life. Part II addresses the constitutionality of state authorizations of citizens’ use of deadly force to prevent crime and to arrest a fleeing felon. Part III addresses the constitutionality of recent statutory expansions of authorizations of the use of deadly force to protect a citizen’s “castle.” Part IV addresses the right to “stand your ground,” rather than retreat when it is safe to do so, in the face of a deadly threat. Part V considers issues concerning the application of the constitutional limits on the authorization of deadly force. Part VI contains a short concluding summary.

I. THE VALUE OF LIFE

A. *The State’s Monopoly on Deadly Force*

Because life is “the necessary condition for the enjoyment of all other goods[,] . . . every person by and large tends to value his life preeminently, and any society must place a high value on preserving it.”⁸ Given this importance and human vulnerability to bodily attack, the most important legal prohibitions “are those that restrict the use of violence in killing or inflicting bodily harm.”⁹ Without such restrictions, “what point could there

⁶ MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds. & trans., 1946) (emphasis omitted).

⁷ See *infra* Part II.A.

⁸ Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 871 (1976).

⁹ H. L. A. HART, *THE CONCEPT OF LAW* 194 (2d ed. 1994).

be . . . in having rules of any other kind?"¹⁰ An analysis of these legal prohibitions, as well as the corresponding legal authorizations of deadly violence, involves two dimensions: factual and normative.

From a factual perspective, "a [nation] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."¹¹ Because the government is "the one entity that retains a monopoly over legitimate violence,"¹² "the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it . . . [and] [t]he state is considered the sole source of the 'right' to use violence."¹³ Thus, "[o]ne of the most common [attributes of a failing state] is the loss of physical control of its territory or monopoly on the legitimate use of force."¹⁴ On the other hand, in a successful state, the state certifies all deaths and investigates all homicides. In addition, the monopoly is so total that you cannot lawfully consent to your own killing¹⁵ or, in a few states, commit suicide.¹⁶

The normative dimension involves the legitimacy of the state's authorization of physical coercion.¹⁷ Legitimacy "is particularly powerful where,

¹⁰ *Id.* (emphasis omitted).

¹¹ WEBER, *supra* note 6, at 78. Weber's characterization of the state in terms of its "monopoly of the legitimate use" of physical—and, by extension, deadly—force is widely used today. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 23 (1974) ("A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly."); JOHN RAWLS, POLITICAL LIBERALISM 136 (1993) ("[P]olitical power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force in upholding its laws."). From an anthropological perspective:

The concentration of all physical force in the hands of the central authority is the primary function of the state and is its decisive characteristic. In order to make this clear, consider what may not be done under the state form of rule: no one in the society governed by the state may take another's life, do him physical harm, touch his property, or damage his reputation, save by permission of the state. The offices of the state have powers to take life, inflict corporal punishment, seize property as fine or by expropriation, and affect the standing and reputation of a member of the society.

LAWRENCE KRADER, FORMATION OF THE STATE 21 (Marshall D. Sahlins ed., 1968).

¹² LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2, at 1306 (2d ed. 1988).

¹³ WEBER, *supra* note 6, at 78. This same point is also developed below at note 30 and accompanying text (discussing the lack of a category of deadly force that is neither permitted nor prohibited).

¹⁴ Blake Hounshell, *2009 Failed States Index - FAQ & Methodology*, FOREIGN POL'Y (June 22, 2009), http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_faq_methodology.

¹⁵ *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that there is no fundamental right to assisted suicide and that a state's ban on assisted suicides was rationally related to legitimate state interests); WAYNE R. LAFAVE, CRIMINAL LAW § 7.8, at 700 (3d ed. 2000) (stating that one who kills a person at that person's request is guilty of murder).

¹⁶ *See, e.g.*, LAFAVE, *supra* note 15, § 7.8, at 699 (noting that attempted suicide is a crime in some states).

¹⁷ MAX WEBER, *Political Communities*, in MAX WEBER ON LAW IN ECONOMY AND SOCIETY 338, 341 (Max Rheinstein ed., 1954) [hereinafter WEBER, *Political Communities*]; WEBER, *supra* note 6, at 78–79.

and in so far as, communal action comprises physical coercion, including the power to dispose over life and death.”¹⁸

The belief in the specific legitimacy of political action can, and under modern conditions actually does, increase to a point where only certain political communities, viz., the “states,” are considered to be capable of “legitimizing,” by virtue of mandate or permission, the exercise of physical coercion by any other community. For the purpose of threatening and exercising such coercion, the fully matured political community has developed a system of casuistic rules to which that particular “legitimacy” is imputed. This system of rules constitutes the “legal order,” and the political community is regarded as its sole normal creator, since that community has, in modern times, normally usurped the monopoly of the power to compel by physical coercion respect for those rules.¹⁹

In American culture, legitimacy is often viewed in terms of “social contract” analysis. For example, Hobbes argued that accepting a social contract that grants the sovereign the monopoly on deadly violence is rational because the state provides the best means to protect that which is “dearest” to a person: “his own life, & limbs.”²⁰ Moreover, argued Hobbes, in order to be effective in protecting “life and limbs,” this delegation of power must be total because “when a man hath in either manner abandoned, or granted away his Right [to freedom]; then is he said to be Obliged, or Bound, not to hinder those, to whom such Right is granted.”²¹ Such an absolute delegation may be a rational choice in comparison to living in the Hobbesian state of nature, which he characterized as a state “where every man is Enemy to every man,” and where there is “continuall feare, and danger of violent death,” and where “the life of man . . . [is] solitary, poore, nasty, brutish, and short.”²²

However, from a more optimistic Lockean view of the state of nature, a limited state may be a more rational approach to protecting life.²³ Locke argued that even though the state of nature has some degree of order the enjoyment of freedom in that state “is very uncertain . . . [and] full of fears

¹⁸ WEBER, *Political Communities*, *supra* note 17, at 341.

¹⁹ *Id.*

²⁰ THOMAS HOBBS, *LEVIATHAN* 383 (C. B. Macpherson ed., 1968) (1651).

²¹ *Id.* at 191.

²² *Id.* at 186.

²³ John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 424, 424-25 (Edwin A. Burt ed., Random House 1994). The essay is often referred to as a treatise and is the second of Locke’s two treatises of government published in 1690. *Id.* at 424 n.1. Locke characterizes the state of nature as follows:

But though this be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.

Id. at 426.

and continual dangers.”²⁴ Consequently, it is rational “to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property.”²⁵ Implicit in the argument that it is rational to join in such a Lockean agreement is the view that government could not “possibly be absolutely arbitrary over the lives and fortunes of the people.”²⁶ Though Locke may be overly optimistic about the possibility of absolutism, he clearly recognizes that, without limits on the state, there is a risk that deadly force is “legitimate” only in the ipse dixit sense that the violence is proper simply because the state authorities have said so.

Locke had an enormous impact on colonial culture in the United States.²⁷ For example, the Declaration of Colonial Rights, adopted in 1774 by the First Continental Congress, claims that persons have a natural right to “life, liberty, & property.”²⁸ Similarly, the Declaration of Independence declares the “self-evident” truth “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²⁹ This rights-oriented view also underlies the Bill of Rights—for example, the Fifth Amendment’s prohibition of any denial of “life, liberty, or property” without due process of law.

B. *Categories of Deadly Force*

Given the successful modern state’s monopoly on deadly force, there are only two categories of deadly force: (1) permitted, or legitimate, and thus excused or justified; and (2) prohibited, and thus either a criminal homicide or assault and also, perhaps, a tort. There is no third category of

²⁴ *Id.* at 476.

²⁵ *Id.*

²⁶ *Id.* at 480.

²⁷ See, e.g., CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 26–29 (1922) (discussing the influence of natural rights philosophy on American colonies); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 365, 383 (1929) (same).

²⁸ 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 67 (Worthington Chauncey Ford ed., 1904). This right rests on “the immutable laws of nature, the principles of the English constitution, and the several charters or compacts.” *Id.*

²⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Similar language is found in the Virginia Bill of Rights, adopted on June 12, 1776, VA. CONST. art. I, § 1, and in the Massachusetts Bill of Rights, adopted in 1780, MASS. CONST. pt. 1, art. I. The Virginia Bill of Rights, which was drafted by George Mason, provides:

[A]ll men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

VA. CONST. art. I, § 1.

“private” deadly violence that the legal system has not determined to be permitted or prohibited or, alternatively, has no concern for addressing. Such a third category would violate the “social contract” to grant the state a monopoly on deadly force based on our desire to protect ourselves from non-legitimate “private” deadly force.

This denial of the existence of a third category does not necessarily involve a claim of an enforceable, positive right concerning the details of otherwise constitutional prohibitions or authorizations of the use of deadly force. Within broad constitutional limits, states may categorize violent actions differently.³⁰ Nor does it involve an assertion of a judicially enforceable positive right to a particular level of preventive or deterrent measures to enforce a prohibition. Instead, the following two claims are made: First, no successful modern state can simultaneously claim a monopoly on all deadly violence while also saying it neither prohibits nor allows a particular use of deadly force. Second, this lack of a third category substantially affects constitutional analysis of authorizations of deadly force.

C. *Constitutional Limitations: The Fundamental Right to Life*

The Constitution, particularly the Bill of Rights, is a central part of the American approach to implementing a Lockean “contract” with meaningful limits on the legitimate use of the government’s monopoly on deadly force.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *One’s right to life*, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other *fundamental rights* may not be submitted to vote; they depend on the outcome of no elections.³¹

In a sense, the right to life is the most fundamental constitutional right of all. When one is dead, liberty, property, and First Amendment rights are meaningless.

In terms of the constitutional scheme of protecting our lives by explicit limits on the government’s authorization or prohibition of deadly force, cases involving the application of several constitutional provisions or rights are especially important. Those rights and provisions are (1) the Second Amendment right of citizens to bear arms for self-defense; (2) the Fourth Amendment’s prohibitions of “unreasonable . . . seizures;” (3) the Fifth, Sixth, and Fourteenth Amendments’ guarantees of due process; (4) the Eighth Amendment’s prohibition of cruel and unusual punishment in the context of capital punishment; and (5) the constitutional right of privacy’s

³⁰ See *infra* notes 119–121 and accompanying text.

³¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

limitations on state prohibitions of abortions. Though varying in important details,³² cases in all five areas indicate that life is a fundamental right and that therefore citizens' use of deadly force must be limited to narrowly drawn authorizations where a compelling state interest outweighs the fundamental right to life.³³

1. Second Amendment

The Second Amendment "right of the people to keep and bear Arms"³⁴ protects "the inherent right of self-defense."³⁵ *District of Columbia v. Heller*³⁶ held that a District of Columbia ordinance, which totally banned handguns in the home and required lawful guns to be bound by a trigger lock or be disassembled at all times, was an unconstitutional denial of this inherent right because the ordinance made it "impossible for citizens to use [firearms] for the core lawful purpose of self defense."³⁷ *McDonald v. City of Chicago*³⁸ held that the Second Amendment right to self-defense applied to the states as a result of the Fourteenth Amendment and that the handgun bans at issue were unconstitutional.³⁹ *McDonald* summarized *Heller* as follows: "Explaining that 'the need for defense of self, family, and property is most acute' in the home, we found that this right applies to handguns because they are 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family.'"⁴⁰

Heller and *McDonald* do not develop the details concerning self-defense, but *McDonald* notes that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day."⁴¹ Though the basic right to use deadly force to defend one's self or other persons has deep historical roots, the details of the defense have varied. Generally, the traditional requirements in the United States can be summarized in terms of three elements: First, the defendant was *without fault* in bringing

³² For example, there are differences among these areas because the second, third, and fourth categories limit the state's substantive power to use or authorize deadly force while the first category and, to some extent, the fifth category place limits on the state's right to prohibit the use of deadly force by citizens.

³³ See *infra* notes 104–105 and accompanying text.

³⁴ U.S. CONST. amend. II.

³⁵ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) ("Self-defense is a basic right . . ."). For a discussion of this inherent right in social contract terms, see Kadish, *supra* note 8, at 884–85.

³⁶ 554 U.S. 570 (2008).

³⁷ *Id.* at 630.

³⁸ 130 S. Ct. 3020 (2010).

³⁹ *Id.* at 3050.

⁴⁰ *Id.* at 3036 (citations omitted) (quoting *Heller*, 554 U.S. at 628–29).

⁴¹ *Id.*

on the difficulty.⁴² Second, the defendant must have both an *actual and reasonable belief* that the use of that deadly force is *necessary* to prevent an *imminent threat* of serious harm (i.e., a threat of death, serious bodily harm, kidnapping, or serious sexual assault).⁴³ Third, the amount of force used must be *proportional* to the threat involved; a person is only authorized to use deadly force to respond to threats of serious harm.⁴⁴

The states have often disagreed over the details. For example, despite agreement that the threat must be imminent, the states disagree about the imminence requirement's application in "battered spouse" situations.⁴⁵ Considerable disagreement also exists over the necessity requirement. Where a person can, without threat to himself, avoid the use of deadly force, some states view the use of such force as not necessary and require that he retreat from the situation, unless he is in his home (or, in some jurisdictions, at an equivalent of "home," such as his place of work).⁴⁶ Other states do not require retreat.⁴⁷

Finally, there is disagreement about several specific details concerning the defense of others. First, some jurisdictions require a specific type of relationship between the defender and the person being defended.⁴⁸ Second, where a defender makes a reasonable mistake about whether the person being threatened would have a right to self-defense, jurisdictions disagree about whether the defender's use of deadly force is justified.⁴⁹ Third, there may be difficulty in jurisdictions requiring retreat for self-defense because of the need to determine whether and how the rule applies to the defender and to the person defended.⁵⁰

Regardless of the details of self-defense, *Heller* and *McDonald* affirm both the unique value of life and the Lockean natural right of each individual to protect one's self and family from the threat of death or serious harm by wrongdoers, particularly within the home. The affirmation of the fundamental value of life for both the defender *and the attacker* is echoed in the traditional common law requirements of imminence, necessity, and proportionality.

⁴² MODEL PENAL CODE § 3.04(2)(b)(i) (Proposed Official Draft 1962); LAFAVE, *supra* note 15, § 5.7, at 497.

⁴³ MODEL PENAL CODE § 3.04(2)(b); LAFAVE, *supra* note 15, § 5.7(b), at 492–93.

⁴⁴ MODEL PENAL CODE § 3.04(2)(b); LAFAVE, *supra* note 15, § 5.7(b), at 492–93.

⁴⁵ LAFAVE, *supra* note 15, § 5.7(d), at 496–97.

⁴⁶ MODEL PENAL CODE § 3.04(2)(b)(ii)(1); LAFAVE, *supra* note 15, § 5.7(f), at 497–99.

⁴⁷ LAFAVE, *supra* note 15, § 5.7(f), at 498–99.

⁴⁸ *Id.* § 5.8(a), at 501.

⁴⁹ *Id.* § 5.8(b), at 502–03.

⁵⁰ *Id.* § 5.8(c), at 503.

2. Fourth Amendment

*Tennessee v. Garner*⁵¹ involved the shooting of an unarmed suspect fleeing from a burglary of an unoccupied house.⁵² The Court held that implementing an arrest by the use of deadly force is a “seizure” subject to the Fourth Amendment’s reasonableness requirement.⁵³ The Court noted that there are

many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure “[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”⁵⁴

In terms of this balancing test, the Court noted:

The intrusiveness of a seizure by means of deadly force is unmatched. The *suspect’s fundamental interest in his own life* need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. . . .

Without in any way disparaging the importance of these [law enforcement] goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects.⁵⁵

Given this balancing, the Court held that deadly force may not be used “[w]here the suspect poses no immediate threat to the officer and no threat to others.”⁵⁶ Because of the wide range of felonies in contemporary criminal law and because not all felonies are now punishable by death, the fact that a suspect is a fleeing felon does not by itself satisfy this standard of threat of harm.⁵⁷ The Court also noted that burglary is not a crime that by itself indicates a threat of serious harm.⁵⁸ Consequently, the Tennessee statute authorizing deadly force to arrest a fleeing felon was unconstitutional except where “the suspect poses a threat of serious physical harm, either to the officer or to others.”⁵⁹

⁵¹ 471 U.S. 1 (1985).

⁵² *Id.* at 3–4.

⁵³ *Id.* at 7.

⁵⁴ *Id.* at 7–8 (alteration in original) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

⁵⁵ *Id.* at 9–10 (emphasis added).

⁵⁶ *Id.* at 11.

⁵⁷ *Garner*, 471 U.S. at 11.

⁵⁸ *Id.* at 21–22.

⁵⁹ *Id.* at 11.

3. Fifth Amendment, Sixth Amendment, and Fourteenth Amendment

The Fifth Amendment explicitly provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law”⁶⁰ The Fourteenth Amendment has a similar guarantee. *Johnson v. Zerbst*⁶¹ noted that the right to “the Assistance of Counsel”

is one of the safeguards of the Sixth Amendment deemed necessary to insure *fundamental human rights of life and liberty*. . . . [P]rovisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights.⁶²

4. Eighth Amendment

A clear recognition of the fundamental value of life underlies the Supreme Court’s approach to capital punishment. Beginning with *Furman v. Georgia*⁶³ and *Gregg v. Georgia*,⁶⁴ the Court has required that states provide sufficient procedural safeguards to provide a meaningful basis for identifying persons to be executed.⁶⁵ In addition, because of the impact of the death penalty on the “fundamental right to life,”⁶⁶ the Court has imposed a number of substantive limits. For example, the death penalty can only be imposed for egregious murders where “aggravating circumstances,” like torture, exist.⁶⁷ Given this limit, it cannot be imposed for rape.⁶⁸ In addition, the death penalty cannot be imposed on persons who are insane⁶⁹ or on persons who were under the age of eighteen⁷⁰ or mentally retarded⁷¹ when they committed the murders.

⁶⁰ U.S. CONST. amend. V.

⁶¹ 304 U.S. 458 (1938).

⁶² *Id.* at 462 (emphasis added) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁶³ 408 U.S. 238, 239-40 (1972) (per curiam) (striking down a scheme lacking sufficient procedural safeguards).

⁶⁴ 428 U.S. 153, 195 (1976) (plurality opinion) (upholding scheme with sufficient procedural safeguards).

⁶⁵ See, e.g., F. Patrick Hubbard, “Reasonable Levels of Arbitrariness” in *Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1114-21 (1985).

⁶⁶ *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

⁶⁷ See, e.g., *Gregg*, 428 U.S. at 165 n.9 (plurality opinion) (quoting GA. CODE ANN. § 27-2534.1(b) (Supp. 1975)) (internal quotation marks omitted).

⁶⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁶⁹ See *Ford*, 477 U.S. at 410-11 (plurality opinion) (requiring full and fair hearing on issue of insanity); see also *Panetti v. Quarterman*, 551 U.S. 930, 934-35 (2007) (applying *Ford*).

⁷⁰ *Roper v. Simmons*, 543 U.S. 551, 555-56 (2005).

5. Right of Privacy/Abortions

In addressing the limits on the state's right to prohibit abortions resulting from the constitutional right of privacy, *Roe v. Wade*⁷² held that, even though a fetus is not a person, the state has a "compelling" interest "in protecting the potentiality of human life" after the first trimester.⁷³ *Roe* also held that, after the third trimester, the state "may, if it chooses, regulate, and even proscribe, abortion *except* where it is necessary . . . for the preservation of the life or health of the mother."⁷⁴

Thus, *Roe* establishes two points for the period after the first trimester. First, both the interest in the potential life of the fetus and the interest of the life of the mother are compelling.⁷⁵ Second, where these interests conflict, the fundamental value of an existing life outweighs the compelling interest in a potential life.⁷⁶

II. CITIZEN'S ARREST AND CRIME PREVENTION

A. *Current Law*

As indicated above,⁷⁷ *Tennessee v. Garner* held that an arrest by the use of deadly force was a "seizure" and that deadly force could only be used where the suspect poses a threat of harm to the arresting officer or to others.⁷⁸ Though one state appellate court has held that *Garner* applies to citizens,⁷⁹ two state supreme courts have held that *Garner* does not apply to lawful arrests by citizens and that, therefore, a state may authorize the use of deadly force by a citizen in a situation where an officer could not use such force.⁸⁰

⁷¹ *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002).

⁷² 410 U.S. 113 (1973).

⁷³ *Id.* at 162-63.

⁷⁴ *Id.* at 164-65 (emphasis added).

⁷⁵ *Id.* at 162-63.

⁷⁶ *Id.*

⁷⁷ *See supra* Part I.C.2.

⁷⁸ 471 U.S. 1, 11-12 (1985).

⁷⁹ *State v. Pecora*, 622 N.E.2d 1142, 1144 (Ohio Ct. App. 1993).

⁸⁰ *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990); *State v. Cooney*, 463 S.E.2d 597, 599 (S.C. 1995); *see, e.g., State v. Clothier*, 753 P.2d 1267, 1270 (Kan. 1988) (holding that *Garner* did not apply in a criminal case to the use of deadly force to protect property or a dwelling and that citizens could use deadly force to protect either even if there was no personal threat to the citizen using the deadly force); *State v. Johnson*, 954 P.2d 79, 86 (N.M. Ct. App. 1997) (agreeing with *Cooney* but following the *Garner* approach in interpreting a state statute on the basis of "the public policy informing the reasoning of the Supreme Court in *Garner*"); LAFAVE, *supra* note 15, § 3.9(b), at 505-06; *see gen-*

In *State v. Cooney*,⁸¹ the South Carolina Supreme Court reversed Cooney's murder conviction for fatally shooting Carlton Williams, who had fled from Cooney's citizen's arrest for allegedly stealing some copper tubing.⁸² Cooney admitted shooting at the decedent with a pistol loaded with hollow-point bullets but "claimed to have been shooting at the ground and not aiming to kill him."⁸³ On appeal, Cooney argued that the trial court erred in refusing to charge the jury that, under the common law, a citizen like Cooney could use "reasonable means to effect" a lawful arrest.⁸⁴

The trial judge had denied the charge on the grounds that *Garner* applied and thus barred the use of deadly force on these facts.⁸⁵ The judge also held that shooting under the circumstances was per se unreasonable.⁸⁶ The South Carolina Supreme Court held that *Garner* did not apply and that there was a jury issue as to "reasonableness" under the South Carolina rule authorizing citizens to use deadly force to apprehend a fleeing felon.⁸⁷ The conviction, therefore, was reversed,⁸⁸ and the state chose not to pursue further prosecution of Cooney.⁸⁹

The result of this reversal is that, in a future case, a jury could find the force used to apprehend a fleeing felon by a person in Cooney's situation to be "reasonable," and thus legitimate, regardless of whether it believed the shooter was aiming to kill or was shooting with a reckless disregard of human life and safety. (It is hard to believe that intentionally shooting in the direction of a person is not at least reckless.) But for the authorization of force in the context of a common law citizen's arrest, either shooting to kill or shooting recklessly would be criminal homicide.⁹⁰

erally Thomas J. Griffin, Annotation, *Private Person's Authority, in Making Arrest for Felony, to Shoot or Kill Alleged Felon*, 32 A.L.R. 3d 1078 (1970).

⁸¹ 463 S.E.2d 597 (S.C. 1995). For additional facts in *Cooney*, see *supra* notes 4–5 and accompanying text.

⁸² *Id.* at 598.

⁸³ *Id.*

⁸⁴ *Id.* at 598–99.

⁸⁵ *Id.* at 598.

⁸⁶ *Id.*

⁸⁷ *Cooney*, 463 S.E.2d at 599.

⁸⁸ *Id.* at 600.

⁸⁹ E-mail from David I. Bruck, Clinical Professor of Law, Washington & Lee Univ. Sch. of Law, to Author (Feb. 19, 2013, 1:07 PM) (on file with author) (e-mail from Cooney's attorney on appeal noting that the case "was not re-prosecuted after the convictions were reversed" and that the defendant "served a few months in the [South Carolina Department of Corrections] before being released on appeal bond"). Cooney spent about half a year in prison between his conviction and release on bond during appeal. E-mail from Jannita Gaston, Div. Dir., S.C. Dep't of Corr., to Candle M. Wester, Assistant Dir. for Faculty Servs., Univ. of S.C. Sch. of Law (Feb. 26, 2013, 11:34 AM) (on file with author).

⁹⁰ Under South Carolina law, if Cooney had been aiming to kill he would be guilty of murder if the common law of citizen's arrest did not apply. See WILLIAM SHEPARD MCANINCH ET AL., *THE CRIMINAL LAW OF SOUTH CAROLINA* 93–94, 97–103 (5th ed. 2007). If Cooney had been extremely reckless in shooting at the ground in the direction of the victim, he would have been guilty of murder.

The defendant in *People v. Couch*,⁹¹ a Michigan Supreme Court citizen's arrest case, heard the sound of his car alarm and went to investigate.⁹² A man near the parking lot driveway yelled something and then ran away.⁹³ When Couch reached his car, he observed Alphonso Tucker bending forward on the front seat of the car.⁹⁴ It appeared that the car stereo had been dismantled. Couch drew his revolver and demanded that Tucker exit the car so that the police could be called.⁹⁵ When Tucker exited, Couch said, "Get out of the car and go with me so I can call the police."⁹⁶ Tucker then lunged at Couch and proceeded to run away. When Tucker was about twenty to thirty feet away, Couch fatally shot him.⁹⁷

Couch held that *Garner* did not apply to deadly force used in a citizen's arrest. The court also held that it would not use its common law power to change the current common law citizen's arrest rule, which permitted the use of deadly force to apprehend a fleeing felon.⁹⁸ Given the facts of the case, it appears that Couch, like Cooney, would not be punished for the intentional shooting of a non-dangerous fleeing thief.

B. *Constitutionality*

The courts gave two grounds for the holdings in *Cooney* and *Couch*. First, the decisions took the position that a private use of deadly force is like a private search, which is not subject to the Fourth Amendment exclusionary rule and, therefore, there is no state action or involvement in the context of citizen's arrests to trigger the application of the Fourth Amendment.⁹⁹ Second, the decisions noted that *Garner* was a Section 1983 civil suit and took the view that *Garner* did not, and could not, hold that a state must criminalize a particular use of deadly force.¹⁰⁰ These grounds do not support the constitutionality of the killings involved for three reasons.

First, the grant of power to a citizen to arrest necessarily involves the state in that arrest. The point of any arrest (and of the use of force to effect the arrest) is to seize the suspect and take him to governmental authorities. A citizen acting pursuant to this authority is acting as an agent of the state

Id. at 94–95. If he had been merely reckless, he would have been guilty of involuntary manslaughter. *Id.* at 195–201.

⁹¹ 461 N.W.2d 683 (Mich. 1990).

⁹² *Id.* at 689 (Archer, J., concurring in part and dissenting in part).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (internal quotation marks omitted).

⁹⁷ *Couch*, 461 N.W.2d at 689 (Archer, J., concurring in part and dissenting in part).

⁹⁸ *Id.* at 684–86 (majority opinion).

⁹⁹ *See id.* at 684; *State v. Cooney*, 463 S.E.2d 597, 599 (S.C. 1995).

¹⁰⁰ *See Couch*, 461 N.W.2d at 684; *Cooney*, 463 S.E.2d at 599 n.2.

because: (1) having authorized the arrest and use of force, the state clearly knows of and acquiesces in the arrest and use of force; and (2) the person making the arrest intends to act as an agent of the state in seizing the suspect and delivering the suspect to authorities. Where searches are involved, these two factors would show that the citizen was acting as an agent of the government.¹⁰¹ Thus, the citizen making the arrest is also acting as an agent of the state. Therefore, the Fourth Amendment governs the arrest, and *Garner* applies to the use of deadly force to implement the arrest.

Second, the courts' reasoning ignores the state's monopoly on deadly force. Because of this monopoly, where the state does not prohibit use of deadly force, it has necessarily authorized such use.¹⁰² The Supreme Court clearly has authority to prohibit state authorizations of the use of deadly force which are unconstitutional. For example, even in the context of extremely lengthy and careful due process, states cannot authorize the use of capital punishment to punish a rape or to punish a juvenile or a mentally retarded person for murder.¹⁰³ Consequently, the Supreme Court clearly has the power to declare that the authorization to shoot a non-dangerous felon is unconstitutional.

Third, because of this power, even if the Fourth Amendment does not apply to a citizen's arrest, the citizen's use of deadly force is subject to the requirements of equal protection and due process. The right to equal protection is relevant because the authorization of the use of deadly force results in two classes of non-dangerous suspects: (1) those arrested by police, who, as a result of *Garner*, cannot be authorized to use deadly force; and (2) those arrested by citizens, who are authorized to use deadly force. Where a fundamental right like the right to life is involved, the right to substantive due process is also involved.

The analysis of this differential treatment of a fundamental right under equal protection and substantive due process is basically the same: infringements by the government are subject to strict scrutiny.¹⁰⁴ Under this approach, the government must show: (1) the right is justified by a compelling state interest, and (2) the law at issue has been narrowly drawn to protect that interest.¹⁰⁵

¹⁰¹ See, e.g., *United States v. Hardin*, 539 F.3d 404, 418 (6th Cir. 2008) (using a two-factor test for determining whether a private citizen was acting as an agent of the state in conducting a search: (1) the government's knowledge or acquiescence in the search; and (2) the intent of the private person conducting the search).

¹⁰² See *supra* Part I.A.

¹⁰³ See *supra* notes 67–71 and accompanying text.

¹⁰⁴ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 554 (4th ed. 2011).

¹⁰⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”); CHEMERINSKY, *supra* note 104, at 554.

An authorization of the use of deadly force to implement an arrest is overbroad, and thus not narrowly tailored, if it includes the use of deadly force to seize suspects who pose no threat to the person making the arrest or to others. *Garner* determined that the “governmental interest in effective law enforcement” did not justify authorizing police to shoot non-dangerous suspects.¹⁰⁶ Though *Garner* applied the Fourth Amendment’s reasonableness standard, the balancing test used in *Garner* is basically the same as the strict balancing test applicable to a fundamental right under equal protection and due process. Thus, the result of the balancing test should be the same where citizens use deadly force. If anything, trained professional police should have more, not less, authority to shoot fleeing suspects.¹⁰⁷

Preventing crime is also an important governmental interest, and many states authorize citizens to use force—including, in some states, deadly force—to prevent crime.¹⁰⁸ There is no reason the approach in *Garner* should not apply to authorizations of deadly force to prevent crime, including the prevention of felonies and burglaries. *Garner* held that, because the terms felony and burglary include so many types of unlawful conduct, committing a felony or a burglary did not, by itself, justify using deadly force to *apprehend* a felon or a burglar.¹⁰⁹ Given this holding, *prevention of* such broad criminal categories should not by itself provide a compelling state interest sufficient to justify using deadly force.

¹⁰⁶ See *supra* Part I.C.2.

¹⁰⁷ See, e.g., *State v. Weddell*, 43 P.3d 987, 988 (Nev. 2002) (en banc) (finding that post-*Garner* state legislation repealing the fleeing-felon rule and limiting the use of deadly force by police officers indicated legislative intent to abrogate the common-law fleeing-felon rule in the context of citizen arrests); *State v. Pecora*, 622 N.E.2d 1142, 1144 (Ohio Ct. App. 1993) (applying *Garner* to a citizen’s arrest).

¹⁰⁸ See, e.g., ALA. CODE § 13A-3-23(a)(3) (LexisNexis Supp. 2013) (“burglary in any degree”); FLA. STAT. ANN. §§ 776.012(1), 776.013(3), 776.08 (West 2010) (authorizing the use of deadly force in limited circumstances and defining “forcible felony”); GA. CODE ANN. § 16-3-21 (West, Westlaw through 2013) (“forcible felony”); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008) (“felony involving the use of force”); MONT. CODE ANN. § 45-3-102 (2013) (forcible felony); N.H. REV. STAT. ANN. § 627:4.II(b) (LexisNexis 2007) (deadly force permitted against a person using “any unlawful force against a person present while committing or attempting to commit a burglary”); N.M. STAT. ANN. § 30-2-7.A (West 2003) (“Homicide is justifiable . . . when committed . . . in necessarily defending against any unlawful action directed against himself . . . or family.”); N.Y. PENAL LAW §§ 35.15(2)(c), 140.20 (McKinney 2009) (permitting the use of deadly force when a person “reasonably believes that such other person is committing or attempting to commit a burglary,” and defining “burglary in the third degree”). For a discussion of crime prevention in the context of defense of one’s “castle,” see *infra* notes 113-114 and accompanying text.

¹⁰⁹ See *supra* notes 57–58 and accompanying text.

III. DEFENSE OF HOME, “SANCTUARY,” OR “CASTLE”

Because a home provides a “sanctuary” or “castle” where one is free from both governmental and private intrusions, “our law has long recognized that the home provides a kind of special sanctuary in modern life.”¹¹⁰ As a result, the legal system has traditionally granted people a greater right to use deadly force where unlawful home intrusions are involved. For example, jurisdictions requiring that a person retreat, rather than use deadly force, in the case of a deadly attack where retreat is a safe option generally do not require a retreat from one’s home.¹¹¹ Many states go beyond this narrow expansion of the right to use deadly force to respond to a deadly threat without retreating. In addition, these states authorize the use of deadly force to prevent a felony or burglary, to protect property, or to implement a person’s right to exclude people from a dwelling or vehicle.¹¹²

State schemes authorizing a citizen’s use of deadly force in protecting home and property must comply with the constitutional rights to equal protection and due process. Because the fundamental right to life is involved, strict scrutiny is appropriate for the consideration of the interests to be protected by the authorization of the use of deadly force. However, the extreme diversity among the states concerning situations where deadly force is authorized complicates the application of the strict scrutiny test. Given this diversity, the weight of the interest protected by the authorization of the use of deadly force varies enormously.

Consequently, this Article does not analyze all the schemes that states use. Instead, the Article focuses on recent statutory schemes that expand the defense by broadening the concept of castle and of threats justifying the use of deadly force. Section A discusses these statutes; Section B provides a constitutional analysis of these statutes; and Section C comments on similar approaches used by other states.

A. *Recent Statutory Expansions of Defense*

Recently, a number of states have adopted statutes designed to provide both greater legal certainty and greater protection for a citizen’s “castle” by granting: (1) a presumption that the use of deadly force to resist “forcible” intrusions to a person’s “castle” is reasonable and, therefore, lawful; and (2)

¹¹⁰ McDonald v. City of Chicago, 130 S. Ct. 3020, 3105 (2010) (Stevens, J., dissenting).

¹¹¹ See *supra* note 46 and accompanying text.

¹¹² LAFAVE, *supra* note 15, § 5.9(b), at 505–06; see, e.g., State v. Clothier, 753 P.2d 1267, 1270 (Kan. 1988) (holding that *Garner* did not apply to the use of deadly force to protect property or a dwelling and that a citizen could use deadly force to protect either even if there was no personal threat to the citizen using the deadly force); see also *supra* note 108 and accompanying text; *infra* notes 166–168 and accompanying text.

an immunity from both criminal and civil prosecution.¹¹³ For example, Section 776.013 of the Florida statute, which many states have followed,¹¹⁴ provides in part:

- (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
- (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
- (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.¹¹⁵

The statute further provides:

- (4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.¹¹⁶

¹¹³ See, e.g., ALA. CODE § 13A-3-23; COLO. REV. STAT. §§ 18-1-704 to -704.5 (2012); FLA. STAT. ANN. §§ 776.013, 776.032; GA. CODE ANN. §§ 16-3-21 to -24.2 (2011); KAN. STAT. ANN. §§ 21-5224, 21-5231 (2012); KY. REV. STAT. ANN. §§ 503.055 to .085 (LexisNexis 2011); N.D. CENT. CODE § 12.1-05-07.1 (2012); OHIO REV. CODE ANN. § 2901.05 (LexisNexis Supp. 2013); OKLA. STAT. tit. 21, § 1289.25 (2011); S.C. CODE ANN. §§ 16-11-410 to -450 (2012). For similar statutes, see, e.g., LA. REV. STAT. ANN. § 14:20(A)(4)(a), (B) (2007); MO. REV. STAT. § 563.031.2(2), (3) (2013); 18 PA. CONS. STAT. ANN. § 505 (West Supp. 2013); TEXAS PENAL CODE ANN. § 9.32 (West 2011); WIS. STAT. §§ 895.62, 939.48 (2012). Some states have a common-law right to use deadly force to prevent a forcible entry into a dwelling. See, e.g., *State v. McCuiston*, 514 N.W.2d 802, 806 (Minn. Ct. App. 1994).

¹¹⁴ See *supra* note 113 and accompanying text; see also Lydia Zbrzezny, Comment, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 266-73 (2012) (describing Florida as a "trendsetter in national gun policy"). For background on some of these statutes, see generally Jason W. Bobo, Comment, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 339-40 (2008); Denise M. Drake, Comment, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573 (2008) (discussing Texas statute); Wyatt Holliday, Comment, *"The Answer to Criminal Aggression Is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407 (2012) (discussing Florida, Ohio, and Wisconsin statutes); Joshua G. Light, Comment, *The Castle Doctrine - The Lobby Is My Dwelling*, 22 WIDENER L.J. 219 (2012) (discussing Pennsylvania statute); Daniel J. Merrett, Comment, *Crimes and Offenses*, 23 GA. ST. U. L. REV. 27 (2006) (discussing Georgia statute); J.P. Neyland, Comment, *A Man's Car Is His Castle: The Expansion of Texas' "Castle Doctrine" Eliminating the Duty to Retreat in Areas Outside the Home*, 60 BAYLOR L. REV. 719 (2008) (discussing Texas statute); Sarah A. Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 ST. LOUIS U. L.J. 857 (2012) (discussing Missouri statute); Annie Wells, Note, *Home on the Gun Range: Discussing Whether Kansas's New Stand Your Ground Statute Will Protect Gun Owners Who Use Disproportionate Force in Self-Defense*, 56 U. KAN. L. REV. 983 (2008) (discussing Kansas statute).

¹¹⁵ FLA. STAT. ANN. § 776.013(1).

Section 776.032 of the statute provides the following immunity:

(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.¹¹⁷

Determining the meaning of the term “presumption” is the first step in interpreting and applying statutes like Florida’s. The presumption could be treated as a *rebuttable* presumption (i.e., a burden-shifting device that requires the state to show that the immunity does not apply by presenting evidence that will rebut the presumption).¹¹⁸ Such a burden-shifting presumption does not raise constitutional problems. The victim’s fundamental right to life is not violated if the traditional rules governing self-defense are used,¹¹⁹ including “imperfect” self-defense, which some jurisdictions use to lessen the punishment where, for example, the defendant had an honest but unreasonable belief in the necessity of resorting to deadly force to defend against death or serious harm.¹²⁰ Moreover, it is virtually certain that a presumption in favor of the defense would not violate the defendant’s rights because the states possess wide latitude in defining the elements of crimes and apportioning the burden of proof.¹²¹

However, some jurisdictions, including Florida, have interpreted the term to mean a *conclusive* presumption in the sense that if, for example, the

¹¹⁶ *Id.* § 776.013(4).

¹¹⁷ *Id.* § 776.032(1). Section 776.012 addresses defense of persons, and Section 776.031 addresses protection of real property. Section 776.012 authorizes the use of deadly force in situations involving imminent death or serious bodily harm where permitted in Section 776.013. Section 776.031 authorizes such force where “necessary to prevent the imminent commission of a forcible felony.”

Section 776.032 also provides:

(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. § 776.032(2)-(3).

¹¹⁸ *See, e.g.*, N.D. CENT. CODE § 12.1-05-07.1 (2012) (stating that the presumption “may be rebutted by proof beyond a reasonable doubt”); OHIO REV. CODE ANN. § 2901.05(B)(3) (LexisNexis Supp. 2013) (stating that the presumption “may be rebutted by a preponderance of the evidence”).

¹¹⁹ *See supra* notes 43–50 and accompanying text for a discussion of traditional rules of self-defense.

¹²⁰ *See, e.g.*, LAFAVE, *supra* note 15, § 5.7(i), at 500-01.

¹²¹ *See, e.g.*, *Martin v. Ohio*, 480 U.S. 228, 232-33 (1987); *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

person using the deadly force demonstrates by a preponderance of the evidence that Subsections (1)(a) and (1)(b) of Section 776.013 were applicable, the state may not try to rebut the presumption.¹²² In such a case, Section 776.032's immunity automatically applies. As a result, the presumption is, in effect, a "rule" providing immunity from prosecution or civil liability where the person who used deadly force proves that the statutory presumption applicable to "forcible" intrusions applies.¹²³

This "rule" effectively eliminates the traditional requirement that the use of force in self-defense be proportional to the threat (i.e., that deadly force only be used to resist an imminent threat of death or serious harm).¹²⁴ The impact of this rejection of proportionality is illustrated by *State v. Duncan*,¹²⁵ which held: (1) that, in enacting South Carolina's version of the Florida statute,¹²⁶ the legislature meant to provide a *pretrial* forum to address the immunity; (2) that an order granting the immunity is immediately appealable; and (3) that Duncan was entitled to the immunity.¹²⁷ More generally, *Duncan* held that if, at the pretrial hearing, the defendant shows by a preponderance of the evidence that forcible entry was involved, the immunity applies.¹²⁸ The court viewed the presumptive immunity as conclusive and held that the immunity applied, and thus barred prosecution, in Duncan's case because the facts "showed by a preponderance of the evidence that the victim [Spicer] was in the process of unlawfully and forcefully entering . . . [the] home in accordance with" the requirements of the statute.¹²⁹

However, the evidence also indicated that the presumption of "reasonable fear of imminent death or great bodily harm" could have been easily

¹²² See *supra* notes 114–121 and accompanying text for further discussion of this conclusive presumption.

¹²³ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989) (plurality opinion) (noting that a conclusive presumption is actually a substantive rule and that some conclusive presumptions have been stricken down on substantive due process grounds).

¹²⁴ See *supra* notes 42–44 and accompanying text.

¹²⁵ 709 S.E.2d 662 (S.C. 2011). The Supreme Court of South Carolina subsequently held that a denial of a request for immunity is not immediately appealable. *State v. Isaac*, 747 S.E.2d 677, 681 (S.C. 2013). For a critique of this holding, see F. Patrick Hubbard, *A Messy Menace: Immunity Under the South Carolina "Protection of Persons and Property Act,"* SCLAWBLOG (Sept. 17, 2013), <http://www.sclawreview.org/blog/2013/09/17/messy-menace-immunity-south-carolina-protection-persons-property-act/>.

¹²⁶ The South Carolina statute is virtually identical to the Florida statute. See S.C. CODE ANN. §§ 16-11-410 to -450 (2012).

¹²⁷ *Duncan*, 709 S.E.2d at 663.

¹²⁸ *Id.* at 665.

¹²⁹ *Id.* See *infra* notes 161–162 and accompanying text for further discussion of reasons for this interpretation. The standard of review on appeal is not clear. At one point, the court states that "there is evidence to support the circuit court's finding that respondent was entitled to immunity." *Duncan*, 709 S.E.2d at 665. This language suggests a limited form of appellate review. However, the court also states: "We find respondent showed by a preponderance of the evidence that [he was entitled to the immunity]." *Id.* For further discussion of the *procedural* problems with the Act, see Hubbard, *supra* note 125.

rebutted. Prior to the killing, Duncan and Spicer, along with their girlfriends, were in Duncan's home.¹³⁰ At one point, Duncan became angry with Spicer for making inappropriate comments concerning a photograph of Duncan's daughter in a cheerleading outfit and asked Spicer to leave.¹³¹ According to the trial testimony of Duncan's girlfriend (Templeton):

[Spicer] left but returned a few minutes later. [He] was opening the screened porch door when [Duncan] exited the front door of the house onto the porch with the gun. At one point, [Spicer] began advancing across the porch and Templeton was "between [them]" and was "trying to get [Spicer] off the steps and leave." [Spicer] continued to force his way onto the porch.¹³²

At this point, Duncan shot and killed Spicer even though there was no evidence that Templeton or Duncan was threatened by serious harm. Under the statute, Duncan only had to show unlawful forcible entry in order to be immune from prosecution.¹³³

The Florida Court of Appeals reached a similar result under the Florida statute in *Hair v. State*.¹³⁴ In this case, the victim had forcefully entered the defendant's car.¹³⁵ The court held that the conclusive presumption meant that it was irrelevant that the victim may have been in the process of being pulled from the car at the time of the fatal shooting.¹³⁶ According to the conclusive presumption, the only important points were that the victim "had unlawfully and forcefully entered" the vehicle and "was still inside the vehicle when he was shot."¹³⁷

The net effect of conclusive presumption statutes like these is that citizens are authorized to use deadly force in homes where, as in *Duncan*, a guest has egregiously bad manners¹³⁸ and in vehicles, as in *Hair*, so long as

¹³⁰ *Duncan*, 709 S.E.2d at 663.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 17 So. 3d 804 (Fla. Dist. Ct. App. 2009) (per curiam). *Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010), held that the approach in *Peterson v. State*, 983 So. 2d 27 (Fla. Dist. Ct. App. 2008), "best effectuates the intent of the Legislature" in adopting the immunity. *Peterson* held that the presumption was intended to be applied in a pretrial proceeding. *Peterson* also noted that the legislature "intended to establish a true immunity and not merely an affirmative defense." *Peterson*, 983 So. 2d at 29. As evidence of this intent, *Peterson* noted that the preamble to the legislation stated: "[T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." *Id.* (alteration in original) (quoting Protection of Persons/Justifiable Use of Force, ch. 2005-27, 2005 Fla. Laws 199, 200) (internal quotation marks omitted). See *infra* notes 161–162 and accompanying text for a discussion of this interpretation.

¹³⁵ *Hair*, 17 So. 3d at 805.

¹³⁶ *Id.*

¹³⁷ *Id.* at 805–06.

¹³⁸ See *supra* notes 130–132 and accompanying text.

the victim has entered, or has attempted to enter, “forcefully.” Regardless of the factual details, the defendant is immune from prosecution simply because it is conclusively “presumed” that the defendant was threatened with imminent death or serious harm.

B. *Constitutionality*

The effect of the use of a conclusive presumption in cases like *Duncan* and *Hair* is that all “forcible” interferences (or attempted “forcible” interferences) with the right to exclude (or to require departure) from a dwelling, residence, or occupied vehicle result in an authorization to use deadly force so long as the person using the force knows or has reason to know of the forcible interference. Given the fundamental right to life, the constitutionality of this authorization of deadly force depends upon whether the government can show both a compelling state interest and a narrow focus on protecting that interest.¹³⁹ The weight of the interests protected by the authorization of deadly force depends upon the weight given to the definition of “home” and the weight given to the value of excluding persons from one’s “home,” which clearly has a special character. As *Heller* and *McDonald* indicate “the need for defense of self, family, and property is most acute in the home.”¹⁴⁰ However, these Supreme Court cases do not elaborate on the circumstances where deadly defense is appropriate. Nor do they define “home” or elaborate on the values underlying the importance of a home.

In defining the terms for applying the statutory presumption, the Florida and South Carolina schemes extend the concept of home to include “dwelling, residence, or occupied vehicle.”¹⁴¹ These terms are defined as follows:

- (a) “Dwelling” means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
- (b) “Residence” means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
- (c) “Vehicle” means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.¹⁴²

Definitions (a) and (b) include things that are too broad to fit within the traditional concept of home. As defined in (c), vehicles, particularly those

¹³⁹ See *supra* notes 104–105 and accompanying text.

¹⁴⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

¹⁴¹ FLA. STAT. ANN. § 776.013(1)(a) (West 2010); accord S.C. CODE ANN. § 16-11-430(1) (2006).

¹⁴² FLA. STAT. ANN. § 776.013(5); accord S.C. CODE ANN. § 16-11-430(1), (3)-(4).

without motors, are an even broader view of home. Moreover, limiting the presumption to “occupied” vehicles, while not limiting it to occupied dwellings or residences, suggests that a person could use deadly force from outside the dwelling or residence if that person “knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.”¹⁴³

In order to address the breadth of these definitions, this Article focuses initially on situations where a person is inside a traditional permanent home. If the interest in the right to exclude from (or the right to remain in) one’s “sanctuary” within that home is not constitutionally sufficient to justify killing in all cases of forcible entry or ejection, then the interests that broader definitions of home protect will also be insufficient.

The home as sanctuary protects a cluster of overlapping interests.¹⁴⁴ Privacy, both in terms of intrusion into the private sphere by the government¹⁴⁵ and by private persons¹⁴⁶ and in terms of conduct within that sphere,¹⁴⁷ is the most obvious interest involved in the home. In addition, a person usually has a property interest in the home, and this interest is unique in many ways. First, it reinforces the privacy interest by providing a right to exclude, which is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁴⁸ Second, *private* property, whether real or personal, is intimately connected with human personhood.¹⁴⁹

¹⁴³ See FLA. STAT. ANN. § 776.013(1)(b); accord S.C. CODE ANN. § 16-11-440(A)(2).

¹⁴⁴ See, e.g., Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 5-7 (identifying and critiquing interests and analyzing the conflict of values involved in authorizations of deadly force to protect the home).

¹⁴⁵ See, e.g., U.S. CONST. amend. III (establishing limits on involuntary quartering of soldiers); *Id.* amend. IV (prohibiting unreasonable searches). Justice Breyer, dissenting in *Hudson v. Michigan*, 547 U.S. 586 (2006), referred to *Boyd v. United States*, 116 U.S. 616 (1886), as a “seminal Fourth Amendment case, decided 120 years ago,” and noted that the *Boyd* “Court wrote, in frequently quoted language, that the Fourth Amendment’s provisions apply ‘to all invasions on the part of the government and its employ[ees] of the sanctity of a man’s home and the privacies of life.’” 547 U.S. at 606 (Breyer, J., dissenting) (quoting *Boyd*, 116 U.S. at 630) (emphasis added).

¹⁴⁶ See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 632-33 (1951) (upholding ordinance restricting door-to-door solicitation at homes); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (upholding statute permitting addressee to stop delivery of sexually explicit materials to addressee’s residence); RESTATEMENT (SECOND) OF TORTS § 652B (1977) (imposing liability for intentional, highly offensive intrusions “upon the solitude or seclusion of another, or his private affairs or concerns”).

¹⁴⁷ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (right to possess gun in home for self-defense); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (right to engage in intimate sexual relations within the home); *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (right to read or watch items within the home).

¹⁴⁸ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

¹⁴⁹ See, e.g., ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 18-21, 244-54 (2007) (noting the way inmates claim an exclusive personal interest in things and space); O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) (noting the instinctual manner in which property “you have enjoyed and used as your own for a

These interests are very important. However, they are already protected by a virtually universal right to “stand your ground” in the home in using deadly force to prevent death or serious harm.¹⁵⁰ Moreover, a state is permitted to require the prosecution to prove beyond a reasonable doubt that a person did not have this right at the time of using deadly force.¹⁵¹ This can be an extremely difficult burden for the state to satisfy, particularly where the defendant had to make sudden, immediate decisions about using force under conditions of stress and uncertainty.¹⁵² Such conditions exist, for example, where one hears someone coming up the stairs to the landing outside his bedroom at 3 a.m. and realizes it is not his wife or children, who are the only other people who are supposed to be in the locked house.¹⁵³

Statutes like those in Florida and South Carolina go beyond these procedural protections and substantively authorize deadly force in *all* cases of “unlawful and forcible” acts. Such overbroad authorizations of the right to use deadly force devalue the intruder’s fundamental right to life by totally abandoning the concern for proportionality between the threat and the response to the threat.

Underlying this devaluation of the intruder’s life is an extreme version of two now-defunct views.¹⁵⁴ One is the view that deadly force is always allowed to prevent a felony or burglary. The other is the view that, by committing a “serious” crime, a criminal has forfeited his rights vis-à-vis “law-abiding” people.

The Supreme Court in *Garner* clearly rejected the first view by determining that the categories of felony and burglary are too broad, by themselves, to justify the use of deadly force to prevent a crime.¹⁵⁵ The second view assumes that all persons who have committed or may commit a “serious” crime are no longer entitled to the right to life. Such an expansive approach to loss of a fundamental right is simply a broader view of the first and is therefore similarly inadequate under *Garner* and under the Eighth Amendment death penalty cases.

long time . . . takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself”); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982); *supra* notes 23-25 and accompanying text (referring to Locke’s concern for property rights in “estates” and “possessions”).

¹⁵⁰ See *supra* note 46 and accompanying text.

¹⁵¹ See *supra* note 121 and accompanying text.

¹⁵² See, e.g., N.J. STAT. ANN. § 2C:3-4(c)(1)-(2) (West 2005) (defining the right to use deadly force by reference to whether such force is “immediately necessary” and the encounter with the intruder was “sudden and unexpected”).

¹⁵³ The Author had this experience. Luckily, the intruder left quickly when he heard the Author indicate to his wife that he was going (even though unarmed) to see what was going on outside their bedroom door.

¹⁵⁴ See, e.g., Green, *supra* note 144, at 28–30, 36–39; Kadish, *supra* note 8, at 883–85.

¹⁵⁵ See *supra* notes 57–58 and accompanying text.

The forfeiture theory underlies the choice of the Florida and South Carolina legislatures to authorize “law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution.”¹⁵⁶ In effect, the legislature has divided the world into two categories: (1) “law-abiding people” and (2) “intruders and attackers.” As a result of this division, “intruders and attackers” forfeit their right to life, and therefore “law-abiding people” may kill them. Thus, Duncan was free to shoot Spicer because Duncan was “law-abiding” and Spicer, as a forcible intruder, had forfeited his fundamental right to life.

Such a forfeiture scheme is flawed in many ways.¹⁵⁷ First, the attackers have certainly not agreed to the forfeiture. Second, if the forfeiture occurs during the attack, why does the attacker regain his right to life if the attacker stops and withdraws?¹⁵⁸ Third, the forfeiture scheme relies on a simplistic division of people into two categories, law abiding and law breaking, even though all of us are in both categories. None of us abides by all the laws all the time. Who has not done at least one of the following: speeding, not reporting taxable income, illegal copying of music or video, or jaywalking? Similarly, no one disobeys all the laws all the time.

Fourth, forfeiture diverts attention from the central focus of *Heller* and *McDonald*: “the inherent right of self-defense.”¹⁵⁹ Analysis of this right requires recognition that both the defender and the attacker have a fundamental right to life. Therefore, the defender has a right to defend his life against a person threatening death or serious harm but does not have a right to use deadly force against a “law breaker” who threatens less serious harm.¹⁶⁰ More specifically, the right of self-defense does not empower a defendant to use force that is so out of proportion to the threat that the attacker’s fundamental right to life becomes so devalued that it is worth virtually nothing.

In terms of the specifics of the statutes involved, however, it is not necessary to balance the fundamental right to life against the sanctuary of the home because these statutory extensions were *not* adopted in order to protect the sanctuary of the home. Instead, the purpose of conclusively immunizing deadly force in all cases of “forcible” intrusion is to protect defendants from the cost, unpleasantness, and inconvenience of criminal or civil proceedings.

¹⁵⁶ See *infra* note 161 and accompanying text.

¹⁵⁷ See Kadish, *supra* note 8, at 883–85.

¹⁵⁸ See, e.g., FLA. STAT. ANN. § 776.041(2)(b) (West 2010) (providing that an initial aggressor’s right to use deadly force revives where the initial aggressor withdraws); *State v. Bryant*, 520 S.E.2d 319, 322 (S.C. 1999) (same); MODEL PENAL CODE § 3.04(2)(b)(i) (Proposed Official Draft 1962); Ferdinand S. Tinio, Annotation, *Comment Note: Withdrawal, After Provocation of Conflict, as Reviving Right of Self-Defense*, 55 A.L.R. 3d 1000, 1003-04 (1974).

¹⁵⁹ See *supra* notes 35–38 and accompanying text.

¹⁶⁰ See Kadish, *supra* note 8, at 886–87.

The focus on this concern is clear from the legislative statements of purpose: “[T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.”¹⁶¹ Both the Florida and South Carolina courts relied on this language in finding that the immunity was a “true immunity, and not simply an affirmative defense” and that therefore the presumption was conclusive.¹⁶²

These statutes grant “law-abiding” citizens the discretionary power to choose, with no due process, whether to respond to a nonserious threat involving a “forcible” intrusion either by killing or by using non-deadly measures. The justification for the authorization of this discretionary power to kill is a concern that “law-abiding people” not have a “fear of prosecution” for killing.¹⁶³ Such prosecution, however, will be subject to the requirements of due process, including a right to an attorney and burdens phrased in terms of “innocent until proven guilty” and “proof of guilt beyond a reasonable doubt,” on the issue of whether the killing was necessary to prevent death or serious harm. This interest in protecting persons who use deadly force from fear of prosecution is not sufficiently compelling or essential to justify abandoning the concern for proportionality recognized in *Garner* and authorizing deadly force in all cases of unlawful forcible entry.

The constitutional flaws in authorizing deadly force in all cases of forcible intrusion into a traditional home are even more obvious in the use of broader definitions of “residence” in the statutes. Because the interests protected by the right to exclude from a “vehicle,” particularly a vehicle as defined in the statutes, are no greater than those involved in exclusion from the home,¹⁶⁴ the conclusive presumption approach of these statutes in the context of vehicles and “carjackings” is also unconstitutional.¹⁶⁵

¹⁶¹ *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (alteration in original) (quoting Protection of Persons/Justifiable Use of Force, ch. 2005-27, 2005 Fla. Laws 199, 200) (internal quotation marks omitted); accord S.C. CODE ANN. § 16-11-420(B) (2006) (containing language virtually identical to the preamble to the Florida legislation).

¹⁶² *State v. Duncan*, 709 S.E.2d 662, 665 (S.C. 2011); see *id.* at 663-65 (quoting S.C. CODE ANN. § 16-11-420(B), which is virtually identical to the Florida preamble quoted *supra* at text accompanying note 161, and emphasizing “without fear of prosecution”); see also *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010) (adopting the reasoning of *Peterson*, discussed *supra* at notes 134 and 161, and noting that the immunity provision “establishes entitlement . . . not [to] be subjected to trial”).

¹⁶³ See *supra* note 161 and accompanying text.

¹⁶⁴ *Cf., e.g., California v. Carney*, 471 U.S. 386, 394 (1985) (granting less protection to a vehicle, because of its mobility, than to a house).

¹⁶⁵ The same analysis would apply to statutes that only address carjacking. For an example of such statutes, see ALASKA STAT. ANN. § 11.81.350(e) (West Supp. 2013).

C. *Other Schemes*

Many states authorize the use of deadly force against an intruder who is committing a burglary, felony, or unlawful trespass.¹⁶⁶ However, as *Garner* noted, both felony and burglary have such broad definitions that neither, by itself, can justify the use of deadly force.¹⁶⁷ Consequently, schemes authorizing deadly force in all cases of invasion involving a felony or burglary are, like the overbroad “forcible entry” approach of the Florida and South Carolina statutory schemes, unconstitutional. Statutes authorizing deadly force for the protection of property are similarly overbroad.¹⁶⁸

IV. SELF DEFENSE: RETREAT VERSUS “STAND YOUR GROUND”

As indicated above, traditional approaches to self-defense have differed over whether a person faced with a threat of death or serious bodily harm has a duty to retreat if such retreat can be done safely.¹⁶⁹ Some states have not required retreat; other states, on the theory that deadly force in

¹⁶⁶ See, e.g., ALA. CODE § 13A-3-23 (2006) (use of physical force against occupant of dwelling in connection with burglary); ARIZ. REV. STAT. ANN. § 13-407 (2012) (criminal trespass of dwelling, whether occupied or not); CONN. GEN. STAT. § 53a-20 (1989) (unlawful forcible entry of dwelling, whether occupied or not); DEL. CODE ANN. tit. 11, § 469 (2007) (possible infliction of personal injury; refusal to surrender); FLA. STAT. ANN. § 776.031 (West 2010) (“forcible felony”); GA. CODE ANN. § 16-3-23 (2011) (“habitation” where assault or “offer of personal violence,” “unlawful and forcible entry,” or felony); *id.* § 16-3-24 (property where “the person using such force reasonably believes that it is necessary to prevent the commission of a forcible felony”); 720 ILL. COMP. STAT. ANN. 5/7-1(a) (2002) (“forcible felony”); *id.* at 5/7-2 (“assault,” “offer of personal violence,” or “felony”); IND. CODE § 35-41-3-2 (2004) (“forcible felony” or “unlawful entry . . . or attack”); KAN. STAT. ANN. § 21-5223(a) (West 2012) (“unlawful entry into or attack upon [the] person’s dwelling, place of work or occupied vehicle”); LA. REV. STAT. ANN. § 14:20(3) (2006) (burglary); MINN. STAT. ANN. § 609.065 (West 2009) (felony); MO. REV. STAT. § 563.031 (Westlaw through 2010) (forcible felony, unlawful entry); MONT. CODE ANN. § 45-3-103 (West 2009) (forcible felony, assault); N.H. REV. STAT. ANN. § 627:4.II(d) (LexisNexis 2007) (any unlawful force or felony in dwelling or curtilage). Many of these statutes use the term “forcible felony.” However, the definitions of forcible felony are often overbroad. See, e.g., FLA. STAT. ANN. § 776.08 (including burglary and “any other felony which involves the use or threat of physical force or violence against any individual”); MO. REV. STAT. § 563.011(3) (including burglary); N.Y. PENAL LAW § 35.20(3) (McKinney 2009) (including burglary); *id.* § 140.20 (defining burglary in the third degree).

¹⁶⁷ *Tennessee v. Garner*, 471 U.S. 1, 21–22 (1985). For further discussions of such overbreadth, see, e.g., Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 629 (2012); Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL’Y 231, 248–50 (2006); Green, *supra* note 144, at 25–30; Sarah A. Pohlman, *supra* note 114, at 859–60.

¹⁶⁸ See, e.g., N.M. STAT. ANN. § 30-2-7 (West 2003) (“Homicide is justifiable when . . . committed in the necessary defense of . . . property. . .”).

¹⁶⁹ See *supra* notes 46–47 and accompanying text.

self-defense is not necessary in such a situation, have required it.¹⁷⁰ In a state requiring retreat, a person does not have a duty to retreat in his home or, in most states, his office.¹⁷¹ In addition, some states explicitly require that the defendant know that retreat with complete personal safety is possible.¹⁷²

Recently, state legislatures in states with a duty to retreat have adopted statutes eliminating any duty to retreat.¹⁷³ For example, Section 776.012 of the Florida scheme discussed in Part III above provides:

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

- (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
- (2) Under those circumstances permitted pursuant to s. 776.013.¹⁷⁴

As indicated above, because Section 776.013 (the second subsection's set of situations where there is no duty to retreat) authorizes the use of deadly force in all forcible intrusions, the section is an unconstitutionally overbroad denial of the fundamental right to life.¹⁷⁵ The authorization in Subsection 776.012(1) of deadly force to prevent the commission of a "forcible felony" has the same flaw because the category of forcible felony is too broad.¹⁷⁶

The authorization in the first part of Subsection 776.012(1) of deadly force to prevent imminent death or great bodily harm is not subject to the same overbreadth shortcomings that characterize Section 776.013 or the authorization in the second part of Subsection 776.012(1) to use deadly force to prevent a forcible felony. *Garner* indicates that tailored authorizations of deadly force like that in the first part of Subsection 776.012(1) are constitutional.¹⁷⁷

¹⁷⁰ See *supra* notes 43, 46 and accompanying text.

¹⁷¹ See, e.g., *supra* note 46 and accompanying text.

¹⁷² See, e.g., ALASKA STAT. ANN. § 11.81.335(b) (West Supp. 2013); ARK. CODE ANN. § 5-2-607(b) (2011); CONN. GEN. STAT. § 53a-19(b) (1989); DEL. CODE ANN. tit. 11, § 464(e)(2) (2007); NEB. REV. STAT. ANN. § 28-1409(4) (West 2009); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 2005); MODEL PENAL CODE § 3.04(2)(b)(ii) (Proposed Official Draft 1962).

¹⁷³ See, e.g., *supra* note 113 and accompanying text.

¹⁷⁴ FLA. STAT. ANN. § 776.012 (West 2010).

¹⁷⁵ See *supra* note 154 and accompanying text.

¹⁷⁶ See *supra* notes 57, 155, 166 and accompanying text. As indicated *supra* in note 166, "forcible felony" includes burglary and any felony involving the threat or use of force or violence.

¹⁷⁷ See *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding that deadly force may be used where the "suspect threatens the officer with a weapon" or "committed a crime involving . . . serious physical harm").

Subsection 776.012 also authorizes a person to “stand his ground” rather than retreat even where the person is outside his sanctuary and it is not *necessary* to prevent death or serious harm. Does *Garner*’s concern for proportionality apply by analogy to the necessity requirement? If so, is this approach narrowly tailored to protect a compelling state interest?

Answering these questions requires recognition of the no-duty-to-retreat approach’s long history in the United States. As a part of this history, it appears that the U.S. Supreme Court has sided with those states that have traditionally used the no-duty-to-retreat approach. More specifically, in exercising its common law powers, the Court recognized a right to use deadly force without retreating when a person was on his own land in *Beard v. United States*¹⁷⁸ and his place of business in *Brown v. United States*.¹⁷⁹ *Beard* went further and noted in dicta:

[A] true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm.¹⁸⁰

. . . Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.¹⁸¹

Here, the Court said,

[t]he defendant was *where he had the right to be*, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground¹⁸²

The language in the last quotation from *Beard* was quoted and relied upon in *Rowe v. United States*,¹⁸³ which held that there was no duty to retreat where the killing occurred in a hotel office area open to the public.¹⁸⁴

Today, references to obligations in terms of a “true man” connote negative stereotypes, like sexist and macho, which arguably suggest excessive testosterone rather than reasoned values. Though the “true man” perspective

¹⁷⁸ 158 U.S. 550, 564 (1895) (finding no duty to retreat where the defendant was “on his premises, outside of his dwelling-house”).

¹⁷⁹ 256 U.S. 335, 344 (1921) (discussing jury instructions in a case where the defendant’s use of force occurred in “a place where he was called to be, in the discharge of his duty”).

¹⁸⁰ *Beard*, 158 U.S. at 561 (quoting *Erwin v. State*, 29 Ohio St. 186, 199–200 (1876)) (internal quotation marks omitted).

¹⁸¹ *Id.* at 561–62 (quoting *Runyan v. State*, 57 Ind. 80, 84 (1877)).

¹⁸² *Id.* at 564 (emphasis added).

¹⁸³ 164 U.S. 546 (1896).

¹⁸⁴ *Id.* at 557.

might, therefore, appear to be a relic of an outmoded frontier, the values involved in “the tendency of the American mind” can easily be rephrased in more familiar terms like personhood, autonomy, and liberty. These concepts fit well with the concept of home as a sanctuary central to privacy and personhood.¹⁸⁵ People retreat from the problems of life by going home, not leaving it. Similarly, one’s job enables her to pay for her home and other necessities of life. For many people, the job also helps define one’s personhood. Thus, the Supreme Court’s recognition of a right to stand your ground at one’s home or place of work is grounded in values of liberty and autonomy. If deadly force is used to resist an unprovoked threat of death or serious harm, the proportionality concerns of *Garner* are addressed. In addition, the importance of the home or office as a sanctuary provides a compelling, narrowly focused reason for allowing a defender to use deadly force even though a safe retreat from the sanctuary would have been feasible.

The right to stand your ground in a public area, with no duty to retreat, cannot rely on the interest in sanctuary. Is the interest in freedom to move about freely without yielding to an unprovoked, unlawful threat of deadly force sufficiently compelling to justify taking an attacker’s life, rather than retreating where it is clearly safe to do so?¹⁸⁶ The long history of the use of the no-retreat approach in the United States is relevant to the answer to this question in two ways.

First, the history shows an ongoing commitment by some states to the right to stand one’s ground. Arguably, such a history should not matter because *Garner* held that, even though the authority to shoot all fleeing felons had a long history, deadly force had to be limited to fleeing suspects who posed serious danger if not apprehended. However, *Garner* stressed that the definitions of felony and burglary had changed and that felons are not automatically subject to the death penalty anymore.¹⁸⁷ No such changes apply in terms of the issue of retreat.

Second, the history indicates that stand your ground may not lead to a substantial increase in successful claims of self-defense. In all the debate on the issue, there do not seem to be any studies showing a significant difference between retreat jurisdictions and no-retreat jurisdictions in the occurrence of homicides justified by self-defense.

Given these two points concerning the no-duty-to-retreat approach, it may be that the issue of retreat in a public place is a matter for which the

¹⁸⁵ See *supra* notes 144–149 and accompanying text.

¹⁸⁶ This interest could be particularly important if one repeatedly had to give up freedom of movement by retreating frequently in the face of repeated deadly threats by the same person. On the one hand, such an extreme situation would itself constitute a crime, see, e.g., S.C. CODE ANN. § 16-3-700 (Supp. 2013), and should arguably be addressed by requesting police assistance rather than using deadly force. See, e.g., MODEL PENAL CODE AND COMMENTARIES § 3.04 (1985). On the other hand, a continuing pattern would arguably indicate a failure on the part of the government to provide sufficient protection to uphold its part of the social contract. Such a failure arguably supports the right to stand your ground.

¹⁸⁷ *Tennessee v. Garner*, 471 U.S. 1, 14 (1985).

balancing of values should legitimately be left to legislative discretion. Such deference to the legislature is bolstered by the requirement that a person claiming self-defense be without fault in provoking the confrontation.¹⁸⁸ For example, even though Florida is a no-duty-to-retreat jurisdiction,¹⁸⁹ Section 776.041(2)(a) of the Florida Code provides:

The justification described in the preceding sections of this chapter is not available to a person who . . . [i]nitially provokes the use of force against himself or herself, unless . . . [s]uch force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she *has exhausted every reasonable means to escape* such danger other than the use of force which is likely to cause death or great bodily harm to the assailant¹⁹⁰

The application of this provision, as well as the other requirements of self-defense, could be complicated by Florida's right to a pretrial hearing on whether there is immunity from prosecution.¹⁹¹ In August 2012, George Zimmerman's attorney indicated a desire to have such a pretrial hearing.¹⁹² The judge appeared to press for conducting the hearing in April 2013.¹⁹³ At this point, Zimmerman's attorney indicated an interest in combining the hearing and the trial.¹⁹⁴ However, Zimmerman eventually waived his right to a pretrial hearing.¹⁹⁵

It is understandable why any defendant, not just Zimmerman, might be hesitant to assert the right to a separate pretrial hearing on immunity. If the defendant loses the motion, the purpose of such a hearing—eliminating

¹⁸⁸ See *supra* note 42 and accompanying text.

¹⁸⁹ See FLA. STAT. ANN. § 776.013(3) (West 2010) (“right to stand his or her ground”).

¹⁹⁰ *Id.* § 776.041(2)(a) (emphasis added).

¹⁹¹ See *supra* notes 122–123, 126–129, 130, 161–162 and accompanying text.

¹⁹² See Rene Stutzman, *Can Zimmerman Win ‘Stand Your Ground’ Hearing?*, ORLANDO SENTINEL (Aug. 9, 2012), http://articles.orlandosentinel.com/2012-08-09/news/os-george-zimmerman-stand-your-ground-20120809_1_george-zimmerman-trayvon-martin-mark-o-mara.

¹⁹³ Rene Stutzman, *Judge Denies George Zimmerman’s Request to Delay ‘Stand Your Ground’ Hearing*, ORLANDO SENTINEL (Feb. 14, 2013), http://articles.orlandosentinel.com/2013-02-14/news/os-george-zimmerman-scheduling-conference-20130214_1_george-zimmerman-trayvon-martin-judge-rules.

¹⁹⁴ Jeff Weiner, *George Zimmerman Defense Ponders Request to Combine ‘Stand Your Ground’ Hearing with Trial*, ORLANDO SENTINEL (Feb. 17, 2013), http://articles.orlandosentinel.com/2013-02-17/news/os-george-zimmerman-stand-your-ground-trial-20130217_1_george-zimmerman-trayvon-martin-mark-o-mara. A combined hearing would make no sense for two reasons. First, the purpose of the immunity is to enable the potential defendant to avoid the costs of a criminal trial. Second, a defendant is entitled to move for a directed verdict of acquittal. FLA. R. CRIM. P. 3.380(a). Zimmerman may have been more likely to prevail on this motion, based on a burden on the prosecution to prove guilt beyond a reasonable doubt, than on his motion, based on his burden to show a right to the immunity based on the preponderance of the evidence.

¹⁹⁵ Rene Stutzman & Jeff Weiner, *George Zimmerman Won’t Have Pretrial ‘Stand Your Ground’ Hearing*, ORLANDO SENTINEL (Apr. 30, 2013), <http://www.orlandosentinel.com/news/local/george-zimmerman-trial/os-george-zimmerman-stand-your-ground-right-20130430,0,340410.story>.

expense and fear of prosecution¹⁹⁶—would be largely defeated, particularly if a judge's decision to deny the immunity for failure to satisfy the preponderance-of-the-evidence standard is not appealable.¹⁹⁷ Moreover, a hearing before trial could provide the prosecution with an opportunity to learn details about the defense. If the defendant testifies, the prosecution will get a chance to cross-examine in detail under oath. In addition, the defendant might also have to consider whether to strengthen his immunity case by waiving any possible claims of the Fifth Amendment right to refuse to answer questions that could incriminate him. Given these possibilities, if a defendant does not succeed at the pretrial hearing in achieving the immunity from prosecution, the hearing could conceivably provide considerable advantages to the prosecution.

V. APPLICATION ISSUES

The argument herein is that some legal authorizations of deadly force fail to satisfy the constitutional requirement of proportionality between the level of the threat and the amount of force used. Obviously, despite broad statutory language that does not satisfy the standard of proportionality, many instances of defensive deadly force will be proportional to the threat. In other words, the schemes may not be facially unconstitutional, and as-applied constitutional challenges may be required.

However, a declaration of constitutionality on an as-applied basis could involve the unfairness of punishing a person for acting “lawfully” pursuant to an unconstitutional authorization of deadly force. Perhaps the best approach in this situation is to allow the defense and make the ruling of unconstitutionality prospective only.¹⁹⁸ Prospective application in the criminal context would not necessarily remove incentives for prosecutors to challenge the constitutionality of the authorization. As repeat players in the criminal justice system, prosecutors have a stake in future cases, as well as the one involved in the challenge.

A prospective ruling might also be appropriate in a civil case because it is arguably unfair to impose civil liability retrospectively. *Garner*, in effect, followed this approach because the police officer involved had acted in good faith reliance on the statutes and thus had qualified immunity.¹⁹⁹ However, a weakness of this approach is that plaintiffs (and their contingency-fee paid attorneys) may have less incentive to bring the case. *Garner* was able to satisfy this concern for incentivizing plaintiffs' attorneys by a Court

¹⁹⁶ See *supra* notes 161–162 and accompanying text.

¹⁹⁷ See, e.g., *State v. Isaac*, 747 S.E.2d 677, 679 (S.C. 2013) (holding denial of request for immunity not immediately appealable). For a critique of *Isaac*, see *supra* note 125.

¹⁹⁸ See, e.g., LAFAVE, *supra* note 15, § 2.4.

¹⁹⁹ See *Tennessee v. Garner*, 471 U.S. 1, 5, 22 (1985).

of Appeals determination that the police department could be held liable for damages.²⁰⁰ State courts have reached a similar result by allowing the plaintiff in a rule-changing case to recover under the new rule while treating all other claims on the basis of a prospective overruling.²⁰¹

VI. SUMMARY AND CONCLUSION

This Article has argued that most states have authorizations of citizen's use of deadly force which are unconstitutionally overbroad insofar as they include situations where the state interest involved is not sufficiently compelling to justify a denial of the fundamental right to life. This argument can be summarized in terms of eight assertions.

First, life is so fundamentally important that all successful nation states claim and exercise a meaningful monopoly of the legitimate use of deadly force.

Second, because of this monopoly, the only categories of deadly force are: (1) authorized, and (2) prohibited.

Third, the Constitution places limits on the government's exercise of the monopoly on deadly force.

Fourth, authorizations of deadly force in the context of a citizen's arrest are unconstitutionally overbroad if they authorize the use of deadly force to implement the arrest where such force is not necessary to prevent death or serious harm.

Fifth, authorizations of deadly force in the context of a forcible intrusion into one's home are unconstitutionally overbroad if they authorize the use of deadly force where such force is not necessary to prevent death or serious harm.

Sixth, authorizations of deadly force in the context of preventing any burglary, any felony, or a threat to property are unconstitutionally overbroad if they authorize the use of deadly force where such force is not necessary to prevent death or serious harm.

Seventh, authorizations of deadly force in the context of confronting an unprovoked deadly threat in a public place may be unconstitutionally overbroad if they authorize the use of deadly force where such force is not necessary because retreat is a clearly safe option.

Eighth, because of the unfairness of applying a constitutional limit in the context where a citizen has acted in accordance with an overbroad au-

²⁰⁰ See *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993).

²⁰¹ See, e.g., *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 520 S.E.2d 142, 156 (S.C. 1999); *Marcum v. Bowden*, 643 S.E.2d 85, 90–91 (S.C. 2007) (Toal, C.J., concurring in part, dissenting in part) (arguing that change in rule concerning tort liability should not be prospective for claimant bringing successful challenge); ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 39–53 (1969).

thorization of deadly force, a prospective declaration of unconstitutionality may be appropriate.

Though much has been written about the widespread ownership and violent use of guns in the United States, no one has made the arguments contained in this Article. Accepting these arguments and limiting overbroad authorizations may not have a major impact on gun violence. However, it will be an important step in protecting our fundamental right to life and will also, hopefully, save some lives that might otherwise be taken by “lawful” violence.