

# Justifiable Self-defense in the People's Republic of China and in the United States

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Legal principles regarding justifiable self-defense in the People's Republic of China and in the United States paint very different legal landscapes. In China, there is a single, over-arching, national set of self-defense principles largely identically applied and interpreted in all provinces. Evolution of self-defense in China is, as a result, much easier to design and impose with one set of decision-makers monolithically setting the contours of Chinese self-defense from border to border. In the United States, the federalist criminal justice system is characterized by a federal sovereign, 50 states, and the District of Columbia. Each of those jurisdictions marches to its own drummer, thereby giving life to individual, local, and provincial problems and preferences within the broad contours compelled by the United States Constitution. The United States self-defense tapestry is described herein as a crazy quilt. This article summarizes legal self-defense principles in each country and derives from those disparate approaches several key lessons from which decision-makers in both countries and elsewhere could benefit.

*Keywords:* self-defense, comparative law, imperfect self-defense

## Introduction

In an effort to help both countries critically assess their approaches to self-defense and facilitate cross-cultural sharing of related insights and concerns, the authors offer this assessment of the respective self-defense laws and legal principles in the People's Republic of China and in the United States of America.

We begin by presenting and discussing the justifiable (self-) defense laws and principles in the People's Republic of China, then present self-defense laws and principles across the United States, then draw from those different systems several overarching self-defense principles and lessons generally applicable to all justifiable self-defense frameworks. The authors deem it an honor to share our respective systems and our joint and individual recommendations for consideration in both countries.

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## Justifiable Self-defense in the People's Republic of China

### Justifiable Defense Legislation and Institutional Changes in the People's Republic of China

Justifiable (self-) defense has become an indispensable part of modern criminal law in China. Article 17 of China's first Criminal Law, promulgated in 1979, provides:

If an act of self-defense is taken in order to protect the public interest, the personal and other rights of himself or others from ongoing unlawful infringement, he shall not bear criminal responsibility.

If justifiable defense exceeds the necessary limit and causes undue harm, criminal responsibility shall be borne, but the punishment shall be mitigated or exempted as appropriate.<sup>1</sup>

Unfortunately, influenced by the thinking of "strike hard" later, the application of this system tends to be conservative in judicial practice, and judicial authorities have exerted strict control over the justifiable defense standard. A typical case involved defendant Sun Mingliang, who along with his friend, Jiang Xiaoping, went to the movies.<sup>2</sup> When the two noticed that Guo Pengxiang, Guo Xiaoping, and Ma Zhongquan were following and pestering two girls, they came forward to stop the three who were harassing the two girls. Later, Guo Pengxiang and his friends called some other people to accompany them and intercept Sun Mingliang and Jiang Xiaoping to beat them in revenge. Among them, Guo Xiaoping wielded bricks and Guo Pengxiang punched Jiang Xiaoping in the face. After being beaten, Jiang Xiaoping retreated with Sun Mingliang. Guo Pengxiang continued to beat the two. Sun Mingliang then took out his spring knife and stabbed Guo Pengxiang to death. In November 1984, the first-instance court<sup>3</sup> convicted Sun Mingliang and sentenced him to serve 15 years in prison for intentional injury. The defendant did not appeal, but the procuratorate<sup>4</sup> deemed the conviction inaccurate and the sentence too light. Finally, the high court<sup>5</sup> reheard the case, the defendant Sun Mingliang's behavior was deemed to be excessive defense, the punishment was reduced below the prescribed punishment, and Sun Mingliang was sentenced to fixed-term imprisonment of two years with a suspended sentence of three years for the crime of intentional injury.<sup>6</sup> This case was published in the *Bulletin of the Supreme People's Court* to play a critical role in guiding judiciary authorities to accurately identify mutual affray, justifiable defense, and excessive defense under the framework of criminal law at that time. Today, many experts and scholars have recognized that Sun Mingliang's behavior could also be considered justifiable defense if the current provisions of criminal law and judicial philosophy are considered (Shen, 2017; Chen, 2019).

After promulgation of the criminal law in 1979, there were great deviations in the legislative intent, understanding, and application of justifiable defense by the judiciary. When China revised the criminal law in

<sup>1</sup> Criminal Law of the People's Republic of China (1979), Art. 17, available at <https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china>.

<sup>2</sup> A case summary may be found at Pingliang Branch of the People's Procuratorate of Gansu Province v. Sun Mingliang, available at <http://www.lawinfochina.com/display.aspx?lib=case&id=744>.

<sup>3</sup> Constitution of the People's Republic of China (2018), § 8, Art. 128 ("The people's courts of the People's Republic of China are the adjudicatory organs of the state").

<sup>4</sup> Constitution of the People's Republic of China (2018), § 8, Art. 134 ("The people's procuratorates of the People's Republic of China are the legal oversight organs of the state").

<sup>5</sup> Constitution of the People's Republic of China (2018), § 8, Art. 132 ("The Supreme People's Court supervises the judicial work of the local people's courts at various levels and the special people's courts, and the people's courts at higher levels supervise the judicial work of the people's courts at lower levels").

<sup>6</sup> *Bulletin of the Supreme People's Court*, 1985(2).

1997, the limits of justifiable defense were relaxed and the “special defense”<sup>7</sup> was added to strengthen citizens’ right to self-defense. Article 20 of the Criminal Law of the People’s Republic of China in 1997 stipulates:

Any act taken to stop the unlawful infringement in order to protect the interests of the state and the public, or the personal, property and other rights of himself or others from the ongoing unlawful infringement, which causes damage to the unlawful infringer, belongs to justifiable defense and shall not bear criminal responsibility.

If justifiable defense obviously exceeds the necessary limit and causes major damage, criminal responsibility shall be borne, but it shall be mitigated or eliminated.

If an act of defence is taken against an on-going physical assault, murder, robbery, rape, kidnap or any other violent crime that seriously endangers personal safety, resulting in injury or death of the unlawful infringer, it is not excessive defense and shall not bear criminal responsibility.<sup>8</sup>

Compared with the criminal law of 1979, this revision improved the system of justifiable defense in three ways: (1) it clearly defined the nature of justifiable defense as “stopping acts of unlawful infringement”, which includes “causing damage to the unlawful infringer”; (2) only when defense “obviously exceeds the necessary limit and causes major damage” can it constitute excessive defense (the word “obviously” was added, and excessive defense “should be mitigated or exempted from punishment”, rather than considered “as appropriate”); and (3) relevant provisions were added regarding “special defense”. When taking defensive actions “against ongoing physical assault, murder, robbery, rape, kidnap and other violent crimes that seriously endanger personal safety”, there is no excessive defense. The legislature hoped to solve the practical problem of deviation in the identification of justifiable defense in judicial practice through legislation. This change in the criminal law reflected the difficult choice between the protection of citizen’s right of defense and the avoidance of its abuse, and the tension between legislative rationality and judicial logic (Chen, 2017a, p. 263). However, even though the criminal law strengthened citizens’ rights to justifiable defense in 1997, judicial personnel were still too strict in identifying and adjudicating justifiable defenses, and some scholars criticize that the “special defense” provision is in a “dormant” state to some extent, becoming a “zombie” provision and failing to play its due role (Liang, 2019; Chen, 2017b).

### **The Basic Elements and Judgment Criteria of the Justifiable Defense in the People’s Republic of China**

In Chinese criminal law theory, three different viewpoints about the basic elements of justifiable defense predominate: “four elements”, “five elements”, and “six elements”. According to the early viewpoint of “four elements”, justifiable defense should have four basic elements at the same time: (1) there must be unlawful infringement; (2) the unlawful infringement must be ongoing; (3) the defense must be against the unlawful infringer himself; and (4) defensive behavior should not exceed the necessary limit and cause undue damage (Gao, 1982, pp. 164-166). Scholars who advocate “five elements theory” add a subjective element, that is, that the party claiming justifiable defense must have intended to act in defense. Those supporting five elements theory maintains that the behavior of people in the sense of criminal law must exhibit subjective knowledge and will (intent) factors. Therefore, justifiable defense should naturally be the unity of subjective and objective. If the subjective elements of justifiable defense are denied, it is inevitable that justifiable defense will be regarded as a conditioned reflex and instinctive activity, and thus the social, political, moral, and legal significance of justifiable

<sup>7</sup> Some scholars also call it “no undue defense” or “boundless defense”.

<sup>8</sup> Criminal Law of the People’s Republic of China (1997), Art. 20.

defense would be erased (Chen, 2017a, pp. 35-38). The “five elements theory” is now the mainstream view. On the foundation of “five elements”, “six elements theory” adds another injurious condition, that is, that the defensive act must have injured the unlawful infringer. Supporters believe that causing damage to the unlawful infringer is the meaning of justifiable defense. They argue that if the act of defense does not injure the unlawful infringer, it is legal (it is simply non-criminal) and should not be included in the research category of justifiable defense (Wang, 2000, pp. 147-148). However, this view seems to take the characteristics and results of justifiable defense as a condition, which is not appropriate. According to the provisions of China’s current criminal law, the academic and judicial circles generally hold that the establishment of general justifiable defense should meet five conditions at the same time: cause condition, time condition, subjective condition, object condition, and limit condition. However, in the case of special defense, there is no requirement for limit conditions, which is an exception.

**Cause conditions: There must be unlawful infringement.** First, unlawful infringement includes not only the infringement of the right to life or health, but also the infringement of the right to personal freedom, public or private property, etc.; including not only the unlawful infringement against the person himself, but also the infringement against the state or public interest or others, such as robbing a bus driver’s steering wheel to hamper safe driving or endanger public security. Second, unlawful infringement includes criminal acts and other general illegal acts. The reason why the term “unlawful infringement” is used instead of “crime” in Article 20 of the criminal law is that when the unlawful infringement occurs, it is often difficult for citizens to determine whether the unlawful infringement is a “crime” or a “general illegal act”. If they have to wait until the unlawful infringement reaches the degree of “crime”, the infringement result has appeared, then the meaning of self-defense is lost. Third, not all illegal and criminal acts can be self-defense; only those unlawful infringements that cause damage or danger with urgency can be self-defense. For example, bribery does not have urgency. Such unlawful infringement can be reported and charged, but self-defense cannot serve as a valid defense. Finally, unlawful infringement does not have to be an act of violence, it can be an intentional or negligent act or omission. For example, for illegal restrictions on the personal freedom of others, illegal intrusion into the residence of others, and other unlawful infringement, the unlawful infringer can be required to lift the restrictions or withdraw from the residence as a duty, but must pay attention to the limit of defense, and not obviously exceed the necessary limits or cause major damage.

The People’s Court of Changli County in Hebei Province once judged a typical case of justifiable defense against illegal trespassing upon a residence.<sup>9</sup> Defendant Wang Tianyou and Wang are neighbors. The two sides had a dispute arising from Wang’s house construction, which had been settled through mediation. At about 8:00 p.m. on August 6, 2017, Wang’s son-in-law Yan drove with Zhao and Yang to the north gate of Wang Tianyou’s house, ready to question Wang Tianyou. After getting out of their vehicle, Yan and Zhao knocked on the north door of Wang Tianyou’s house. Because he did not know Yan and Zhao, Wang Tianyou asked what the two people were up to, but Yan did not show his identity, so Wang Tianyou refused to open the door. Yan and Zhao kicked open the screen door into the entry of Wang Tianyou’s house. Wang Tianyou was hit in the face by the

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<sup>9</sup> The Supreme People’s Court, the Supreme People’s Procuratorate, and the Ministry of Public Security jointly issued on September 3, 2020. *Seven typical cases involved justifiable defense*. Available at <https://www.court.gov.cn/zixun-xiangqing-251621.html>.

screen door when the two intruders threw it open. Wang Tianyou picked up an iron motorcycle shock absorber from the cabinet in the entry and fought with Yan and Zhao. Wang Tianyou successively injured Yan and Zhao by striking both in the head with the motorcycle shock absorbers, thereby causing minor injuries to Zhao and slight injuries to Yan. Meanwhile, Wang Tianyou's wife called the police. The court held that the infringers illegally trespassed into another person's house without permission. The court noted that Wang Tianyou acted in self-defense when he injured the infringers and did not bear criminal responsibility.<sup>10</sup>

**Time conditions: The unlawful infringement must be ongoing.** The unlawful infringement must be ongoing meaning the infringement has begun and is not yet finished. First, there are three theoretical views on the beginning time of unlawful infringement in Chinese criminal law. The "initiation theory" holds that when an unlawful infringer starts to commit an unlawful infringement, justifiable defense can be started (Zhou & Liu, 1988, p. 53). "Direct danger theory" holds that when the legitimate rights and interests are directly confronted with the danger of unlawful infringement, it should be deemed that the unlawful infringement has begun, including the urgent situation that the unlawful infringement is being suffered or will be suffered (Jiang, 1988, p. 70). "Synthesis theory" synthesizes the first two views and holds that generally, the starting time is the start of the unlawful infringement. However, under special circumstances, if the actual threat of the unlawful infringement is very urgent, such as when the opportunity for defense will be lost if it is not defended in time and the damage results cannot be mitigated or avoided, it should also be recognized that the unlawful infringement has begun even earlier (Zhao, 1997, p. 253). In current judicial practice, if the unlawful infringement has formed a realistic and urgent danger, it is recognized that the unlawful infringement has begun.<sup>11</sup> Second, there are five main theories about the ending time of unlawful infringement in criminal law. The theory of "completion of act" holds that the termination time of unlawful infringement is the end time. However, according to this view, when the thief runs away after stealing, self-defense cannot be implemented. "Leaving the scene theory" holds that as long as the offender leaves the scene of the crime, the unlawful infringement will cease. But this view obviously does not take into account that the crime scene may be transferred, let alone that the infringer may stop infringing even if he does not leave the crime scene. "The continuation of the facts theory" argues that the infringement ends only when the continuation state of the damages caused by the infringement ends. This theory well explains why self-defense can be implemented for the continuous crime of illegal detention as long as the illegal factual state continues, but it cannot explain why the illegal state continues after the thief safely transfers the stolen goods, but self-defense cannot be implemented. The "result formation theory" holds that the end time should be the time when the harmful result of the unlawful infringement has actually formed (Gao, 1985, p. 29). But the problem is that for those crimes that do not take the formation of results as the constitutive condition, how should the formation time of harmful results be determined? The "eliminating danger theory" advocates that the elimination of danger is the sign of the termination of unlawful infringement. The danger here refers to the actual danger caused by unlawful infringement on the state, public interests, personal, or property, and other rights of oneself or others. In judicial practice, considering the complexity of unlawful infringement, there is no mechanical

<sup>10</sup> Criminal Judgment of Changli County People's Court of Hebei Province (2018) Ji 0322 Xing Chu No. 239.

<sup>11</sup> On September 3, 2020, *The Guiding Opinions on Applying the Law Regarding Self-defense* jointly issued by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of public security summarized and confirmed these applicable rules.

standard for the judgment of the ongoing time of unlawful infringement, but courts instead reach a comprehensive judgment according to the behavior type of unlawful infringement and the specific situation of defense.

A typical case happened in Tongzhou city, Jiangsu Province (Liu, 2001). A young man surnamed Han heard someone shouting "stop thief" at noon one day, so he chased the thief with the villagers and called the police. The two thieves were chased everywhere and finally jumped into a river in the village. One of them swam across the river and ran away. The other, unable to swim, had to stand in the water up to his neck for a long time. The banks of the river were lined with villagers. Someone threw stones around the thief to force him to come to the shore. One of the bricks Han threw hit the thief in the eye, and the thief turned and slid one or two meters north before disappearing under the water. The thief's body was fished out of the river later. The autopsy report showed that the thief died of drowning, and that drowning was related to eye injuries which reduced self-rescue ability. In this case, although the unlawful infringer has stolen the property, if the property can be recovered through chasing, blocking, and other measures, it can still be regarded as a continuing unlawful infringement. If the unlawful infringement is only temporarily suspended or stopped, but the unlawful infringer still has the realistic possibility to continue the infringement, it shall be deemed that the unlawful infringement is continuing. However, if the unlawful infringer has really lost the ability to infringe or has really given up the infringement, the unlawful infringement shall be deemed to have come to an end. The court believed that the thief was surrounded by many villagers in the water, and has lost the ability to infringe, and the urgent danger of infringement has been eliminated, so it was not appropriate to throw bricks at the infringer in purported self-defense. In the end, Han, who had thrown the brick, was sentenced to one year in prison and suspended for two years for the crime of causing death through negligence (Liu, 2001).

**Subjective conditions: The defender must have the defense intention.** Defense intention refers to the psychological attitude that the defender should have towards his defense behavior and the result of his defense behavior, including defense cognition and defense will. The defense cognition refers to whether the defender recognizes that the unlawful infringement is going on, which is the premise and key factor of the defense intention. Defense will mean the defender is determined to stop the unlawful infringement and protect lawful rights and interests by using defensive acts. Special attention should be paid to distinguishing defensive provocations and mutual assault from justifiable defense. Defense provocation is the act of deliberately provoking the other party to commit unlawful infringement, and then harming the wrongful infringer under the excuse of justifiable self-defense. Defense provocations have the illusion of justifiable defense. On the surface, defense provocation meets the objective conditions of justifiable defense, but it does not belong to justifiable defense due to its subjective lack of defense intention. Mutual assault is an act of mutual aggression that occurs when both parties have the intention of illegally harming each other (Chen, Zhang, & Hu, 2013, p. 33). Both parties in a mutual assault have the intention to injure the other party, so they do not have the intention to defend themselves. Even the party who strikes later cannot be regarded as having acted in justifiable defense. From the external appearance, both defense and mutual assault are shown as mutual attack, so the correct distinction between defense and mutual assault often becomes the key issue in the identification of justifiable defense. Ancient Chinese law once equated self-defense with mutual assault and punished both parties as criminals. This legal principle that attached importance to the maintenance of social order and neglects the protection of personal rights, is the characteristic of the social-standard legal concept. Some scholars believe that the reason why Chinese judicial authorities often confuse

defense with mutual assault is, to some extent, the legacy of the concept that self-defense was strictly prohibited in Chinese history (Chen, 2019). The essential difference between mutual assault and justifiable defense lies in whether there is defensive intention. If both sides have premeditated or temporary agreement to fight each other, it is mutual assault. In the absence of premeditation and temporary agreement, the party who starts first is an unlawful infringer, and the party who starts later acts defensively.

In the famous “Yu Haiming Self-defense Case” in 2018<sup>12</sup>, Yu Haiming was riding his bicycle on the street in Kunshan city, Jiangsu Province, when the driver, surnamed Liu, drove his car to the right and forced his way into the non-motorized lane while intoxicated, almost colliding with Yu. One of Liu’s fellow passengers got off and argued with Yu Haiming. When they were persuaded to return, Liu suddenly got off and pushed and kicked Yu Haiming. Although after persuasion, Liu still continued to chase and take out a machete (control knives) from the car, Liu hit Yu Haiming’s neck, waist, and legs continuously with the machete surface. In the process of hitting, Liu dropped the machete, then Yu Haiming grabbed the machete. Liu came forward to fight for the machete with Yu Haiming, and during the fight, Yu Haiming stabbed Liu’s abdomen and buttocks, and cut his right chest, left shoulder, and left elbow. Liu was injured and as Liu was running to his car, Yu Haiming continued to chase Liu and cut Liu two more (without hitting). Liu fled and collapsed in a nearby green isolation belt. He died after being sent to a hospital. The scene surveillance video showed that Liu first picked a fight and chased Yu Haiming with a machete and in the fight, Liu dropped the machete. On the video, Yu Haiming could be seen grabbing the machete, and continuously stabbing and cutting Liu five times in seven seconds. It is obvious that the two parties did not fight each other in premeditation and temporary agreement, so Yu Haiming’s immediate counterattack on Liu’s unlawful infringement cannot be identified as mutual assault. Although Liu ran to the car after being injured, it is not easy to assume that he had given up the attack. He may also have run to the car to find another weapon and continue to infringe, so this urgent real danger was not eliminated when Liu ran to the car. Thus, Yu Haiming continuing to chase and attack Liu with the machete was still justifiable defense. Finally, Kunshan Public Security Bureau determined that Yu Haiming’s behavior was justifiable defense and withdrew the case according to law. In this case, although the infringer was eventually killed by the defender, the identification process of justifiable defense was not as tortuous as previous similar cases, with no repeated appeal or protest, which shows that the judicial concept had changed. The Public security organs accurately judged the subjective intentions and behaviors of the two parties and accurately distinguished defensive behavior from mutual assault by comprehensively considering the cause of the incident, whether there is fault in the escalation of the conflict, whether to use or prepare to use weapons, whether to use violence that is obviously not equal to others, and whether to gather others to fight. This case was also published by the Supreme People’s Procuratorate as a guiding case.<sup>13</sup> Immediately fighting back when beaten by others, self-defense is completely in line with human nature. China’s justifiable defense system has never demanded that the defender must fight back as a last resort. When the defender is infringed upon illegally, he can take a tool at hand or seize the other party’s tool to fight back, or he may prepare self-defense tools in advance. It cannot be simply identified as mutual assault only because the defender has prepared self-defense tools in advance. Moreover, we cannot request the defender to

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<sup>12</sup> Yu Haiming’s Self-defense Case (Prosecution No. 47) issued by the Supreme People’s Procuratorate on December 19, 2018.

<sup>13</sup> Yu Haiming’s Self-defense Case (Prosecution No. 47) issued by the Supreme People’s Procuratorate on December 19, 2018.

stop the infringement within one round, as long as the two sides continue to fight or even the infringer is killed by the defender, then it would be deemed mutual assault. This defensive nature should not be altered by result.

**Object conditions: The defense must be carried out against the unlawful infringer himself.** The object of justifiable defense can only be the unlawful infringer himself, which is determined by the essential attribute of justifiable defense. The object of justifiable defense can be divided into two types: (1) to carry out defensive behaviors against the unlawful infringer, which may only bind his body or injure the unlawful infringer; and (2) to defend against the property of the unlawful infringer. If the unlawful infringer uses his property as a criminal tool or means, the defender can defend himself by destroying the property to protect his legitimate rights and interests (Zhang, 2011, p. 199). For example, if an unlawful infringer intentionally uses his animals as tools to harm others, then the infringement of the animals can be regarded as the act of its owner, and the animals can also become the object of justifiable defense. Justifiable defense is not allowed to be carried out by means of causing damage to a third party (including the family members and children of the offender). However, justifiable defense may be exercised against those who jointly commit unlawful infringement at the scene. One often-discussed question is whether self-defense can be carried out against persons who are incapable of responsibility. The academic consensus is that if the offender is not known to be a minor who has not reached the legal age of criminal responsibility or a mental patient with no capacity for responsibility, of course justifiable defense can be carried out. However, scholars differ in their opinions when they knew the other person was incapable of responsibility. “Affirmative theory” holds that the defense object is not necessary to be responsible; as long as the act objectively causes serious damage to legitimate interests, it belongs to unlawful infringement. The act of the infringer without responsibility is also harmful to the society, which needs to be stopped immediately, so that justifiable defense can be carried out against him. “Negation theory” holds that the unlawful infringement must be an act of subjective and objective unity. The behavior of a person without capacity for responsibility is a behavior without subjective fault, so it cannot be subjected in justifiable defense. When it has to, emergency risk aversion can be used as a last resort. The “compromise theory” holds that if one knows that the infringer is incapable of responsibility, he should try his best to avoid him and not hurt him. Only when he has to, he can use justifiable defense, but he should control the intensity of defense. This is out of humanitarian consideration and is the mainstream view adopted by Chinese judicial authorities. Among the 12th tranche of guiding cases published by the Supreme People’s Procuratorate in 2018, there is such a case.<sup>14</sup> A middle school student surnamed Chen (a minor) was beaten by nine minors near the school for trifles. Some of them hit Chen in the chest with their knees, some hit Chen in the arm with a rock, some hit Chen in the back with a steel pipe, and others strangled Chen or punched and kicked him. Chen took out a folding fruit knife he was carrying and ran away. Some of the assailants continued to chase and throw stones from behind, hitting Chen’s back and legs. Chen fled into the school, and the assailants who had continued chasing Chen were stopped by the school security guard. Chen stabbed three people in the process of counterattack, causing serious injuries. Chen had multiple soft tissue injuries. The procuratorate believes that Chen was surrounded and beaten by nine minors, and there is a great difference in strength between the two sides. Chen enhanced his defense ability with the help of a fruit knife

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<sup>14</sup> The Self-defense Case of Chen (Procuratorate Case No. 45) issued by the Supreme People’s Procuratorate on December 19, 2018.



and escaped after waving and stabbing indiscriminately, which was deemed reasonable in means and intensity. Overall, although Chen's defense behavior has the objective consequences of causing serious injuries to many people, the defense measures did not obviously exceed the necessary limit, which is justifiable defense, and the procuratorate did not approve the arrest. At the same time, the procuratorate also pointed out that all parties in this case are minors. When adults intervene, they should give priority to dissuading and stopping; if the persuasion is ineffective, attention should be paid to the moderation of means and behavior intensity when isolating, controlling, or subduing the infringers.<sup>15</sup>

**Limit conditions: It must not obviously exceed the necessary limit and cause major damage.** Article 20 of the Criminal Law of the People's Republic of China distinguishes two cases concerning the limits of justifiable defense. Under normal circumstances, justifiable defense shall not obviously exceed the limits of necessity and cause major damage; otherwise, it shall constitute excessive defense and criminal responsibility shall be borne, but punishment shall be mitigated or exempted. This is the case in general defense. As for the judgment standard of "necessary limit" of justifiable defense, there are mainly three doctrines in China's criminal law theory: (1) The "basic adaptation theory" holds that defense behavior and unlawful infringement must be basically equivalent and should be determined according to the nature, means, and intensity of unlawful infringement, as well as defense interests (Guo, 2010, pp. 106-107); (2) the "objective need theory" holds that justifiable defense is limited by the objective actual need to effectively stop unlawful infringement—the intensity of defense may be greater, less, or equal to the intensity of the offense (Zeng, Jiang, & Zhu, 1988, p. 133); and (3) "the unified theory of basic adaptation and objective needs" holds that whether a defensive act exceeds the necessary limit is generally determined by whether it is necessary to effectively stop the unlawful infringement. However, when determining whether it is necessary or not, the nature, means, and intensity of the unlawful infringement and defense interests should be investigated and analyzed (C. Yang & D. Yang, 1994, p. 121).

In 2016, a case in China's Shandong Province drew nationwide attention.<sup>16</sup> The defendant, Yu Huan, whose mother is the head of a company, had borrowed money at high interest rates but was unable to repay the debt when it was due. Therefore, the creditor gathered Du and other 11 people to the company to demand the debt, illegally restricting Yu Huan and his mother's personal freedom for six hours, mixed with verbal abuse, insults, and beating, and took away their mobile phones. The police received a report from the company staff, came to the scene, heard that these people were demanding debts, the police said, "It is ok to demand debt, but do not hit" and then left the reception room to find the company staff.<sup>17</sup> Yu Huan and his mother want to leave with the police, but were blocked by Du and others, who stuck Yu Huan's neck and pushed and pulled him to the southeast corner of the reception room. Yu Huan picked up the fruit knife on the table and warned Du and others not to approach. Du spoke provocatively and approached Yu Huan. Yu Huan stabbed Du in the abdomen and then stabbed the people around him, resulting in Du's death, two serious injuries, and one minor injury. The first-

<sup>15</sup> Please refer to the 12th batch of guiding cases issued by the Supreme People's Procuratorate (December 19, 2018). Available at [https://www.spp.gov.cn/xwfbh/wsfbt/201812/t20181219\\_402919.shtml#2](https://www.spp.gov.cn/xwfbh/wsfbt/201812/t20181219_402919.shtml#2).

<sup>16</sup> Lu 15 Xing Chu No. 33 criminal incidental civil judgment of Liaocheng intermediate people's Court of Shandong Province (2016).

<sup>17</sup> The police who responded to the incident were punished for failing to effectively control the scene and failing to separate the two sides of the scene.

instance court held that Yu Huan stabbed the victim without the premise of unlawful infringement in the sense of self-defense, and sentenced Yu Huan to life imprisonment for the crime of intentional injury.<sup>18</sup> The court of second instance held that Du and others illegally detained Yu Huan and his mother, and insulted, pushed, slapped, and choked Yu Huan, then blocked them from leaving. The infringement was ongoing. Yu Huan stabbed only when his personal safety was under real threat, and his stabbing targets were all those who surrounded him after his warning, so his behavior was to stop unlawful infringement. However, Yu Huan's defensive behavior obviously exceeded the necessary limit and caused major damage, which was excessive defense. First, the unlawful infringer did not carry or use any equipment. Second, the unlawful infringement is only manifested as unlawful detention, insult, cheek slapping, hair pulling, and other acts. Third, the police did not leave when Yu Huan was defending and the infringers only surrounded Yu Huan without any strong attack. Fourth, Guo Yangang, one of the infringers, was stabbed in the back. Fifth, Yu Huan caused one death, two serious injuries, and one minor injury, which were serious consequences. The court of second instance sentenced Yu Huan to five years in prison for intentional injury.<sup>19</sup> Chen Xingliang, a criminal law professor at Peking University, said that while the ruling was an improvement, there was still room for discussion, in his opinion, to judge whether the defensive behavior obviously exceeded the necessary limit. Chen Xingliang argued it should be analyzed from the perspective of the whole case, rather than analyzing each segment of the incident in isolation. The court emphasized the unlawful infringer did not use any equipment and caused no harmful consequences, but neglected to consider the large number of unlawful infringers (at least 11 infringers). In addition, Du also exposed his lower body to Yu Huan's mother in front of Yu Huan, and this serious insult must be combined with the detention of up to six hours (with verbal abuse, insults, and beatings) to consider the necessary limits. It is regrettable that the court came to the conclusion that the unlawful infringement was not urgent or serious only based on the degree of violence at the moment when Yu Huan struck back (Chen, 2017a, pp. 353-354). Professor Liang Genlin of Peking University has also argued in an article that excessive defense must meet two conditions at the same time: excessive behavior ("obviously exceeding the limit of necessity") and excessive results ("causing major damage")<sup>20</sup> (Lao, 2015; Chen, 2013, p. 149). Yu Huan's behavior was a necessary counterattack permitted by social ethics to stop unlawful infringement under the specific circumstances of the crime. Although the result was excessive, the behavior was not excessive. He pointed out that there are four kinds of wrong judgment, logic, or habitual thinking in the judgment of justifiable defense cases, which must be completely abandoned. One is the "sage standard theory", which demands that the defender must make an objective, calm, rational, and accurate response to the sudden unlawful infringement, especially the violent attack. Otherwise, it will deny the defensive nature of his behavior, or at least constitute excessive defense. The second is the "hindsight judgment theory", which is accustomed to being the judge after the fact, based on all the objective facts found out afterwards, especially the damage results caused by the act of defense, to make a hindsight judgment on whether the act of

<sup>18</sup> Lu 15 Xing Chu No. 33 criminal incidental civil judgment of Liaocheng intermediate people's Court of Shandong Province (2016).

<sup>19</sup> Shandong Higher People's Court (2017) Lu Xing Zhong No. 151 criminal incidental civil judgment.

<sup>20</sup> Lao Dongyan professor of Tsinghua University, Chen Xingliang professor of Beijing university also holds a similar view. Refer to Lao Dongyan (2015). The identification of excessive defense and the inadequacy of the theory of Erfolgsunrecht (result-oriented wrongdoing). *Chinese and Foreign Studies Law*, 38(5), 1328; Chen Xingliang. (2013). *Normative Criminal Law* (3rd ed.). Beijing: China Renmin University Press, at p. 149.

defense is justified. It does not consider the urgent and critical situation faced by the defender at that time, and deduces whether the defense behavior is excessive purely on the basis of the actual damage result caused by the defense behavior, and replaces the judgment of the defense behavior with the judgment of the defense result. The third is the “equal armed theory”, which ignores the nature, severity, and urgency of the unlawful infringement, ignores the strength comparison between the defender and the unlawful infringer, and unilaterally emphasizes that the defender can only attack the unarmed assailant with his bare hands, and can only choose the armed counterattack method that is equal to the attacking force and striking effect of the other party's instruments. For example, in the case of Yu Huan, the court emphasized that the assailant was not armed, so it was obviously excessive for Yu Huan to stab and cause serious consequences. The fourth is “results-only theory”, holding that as long as the act of defense causes serious injury or death of the unlawful infringer, it will be deemed as excessive defense. The correct logical way to judge the excessive defense should be from the behavior to the result. It should judge whether the defense behavior is excessive first, and then whether the defense result is excessive (Liang, 2019). If the behavior is not excessive, there is no need to consider whether the result is excessive, even if the serious consequence is death, it is not excessive defense. These scholars' opinions were later taken seriously and adopted by judicial authorities.<sup>21</sup> In 2018, when the Supreme People's Procuratorate announced the aforementioned self-defense case of a minor surnamed Chen as a guiding case, it also clearly pointed out that:

The limit condition stipulated in the criminal law is that it obviously exceeds the necessary limit and causes major damage, specifically, although the actor's defense measures obviously exceed the necessary limit, but the defense result objectively is not major damage, or although the defense result is objectively major damage, but the defense measures do not obviously exceed the necessary limit, it cannot be regarded as excessive defense.<sup>22</sup>

On July 30, 2018, a case similar to Yu Huan's happened in Hangzhou, Zhejiang Province.<sup>23</sup> Guo, a MLM agent, tricked Sheng Chunping to Tonglu County, Hangzhou, in the name of falling in love. According to the MLM organization arrangement, after Guo and others picked up the station, they lured Sheng Chunping to the MLM dens. Sheng Chunping entered the room and rested in the living room first. Guo, Tang, Cheng, and other MLM personnel tried to deceive her into the bedroom for many times, intending to force her to join the MLM organization by taking measures such as “brainwashing”, intimidation, physical punishment, and beating. Sheng Chunping found that the situation was abnormal and refused. After many requests to leave were rejected, she took out her fruit knife to give a warning when she was approached by Tang and others, and offered to pay her money to leave, but she was still refused. Later, another three MLM personnel who hid in advance came to the living room. Cheng and others approached Sheng Chunping one after another, and Sheng Chunping was forced to retreat. When Cheng came forward to grab the knife, Sheng Chunping stabbed Cheng with the knife, cutting his right wrist and left neck, and stabbed Cheng in the left chest, causing heart rupture. Sheng then abandoned her carry-on luggage and fled the scene. Cheng was discharged from the hospital after medical treatment and did

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<sup>21</sup> On September 3, 2020, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security of the People's Republic of China jointly issued *The Guiding Opinions on Applying the Law Regarding Self-defense*, drawing on the above opinions.

<sup>22</sup> The Case of Self-defense of Chen (Procuratorate Case No. 45) issued by the Supreme People's Procuratorate on December 19, 2018.

<sup>23</sup> The seven typical self-defense cases jointly issued by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security on September 3, 2020. Available at <https://www.court.gov.cn/zixun-xiangqing-251621.html>.

not follow the doctor's advice of continuing rehabilitation treatment, eventually causing cardiac tamponade and death. The People's Procuratorate in Hangzhou, Zhejiang province, decided not to prosecute Sheng Chunping after concluding that her actions constituted justifiable defense. Later, the Supreme People's court, the Supreme People's Procuratorate, and the Ministry of Public Security jointly issued this case as one of the seven typical cases involving justifiable defense, and pointed out that whether the defense "obviously exceeds the necessary limit" should be based on the nature, means, intensity, and degree of harm of the unlawful infringement, as well as the timing, means, intensity, and damage consequences of the defense, considering the balance of power between the two sides and the situation of the defender's defense, and make a judgment in combination with the general cognition of the public. When judging the harm degree of unlawful infringement, we should consider not only the damage already caused, but also the urgent danger and realistic possibility of further damage. It should not demand that the defender adopt a counterattack mode and intensity basically equivalent to the unlawful infringement.<sup>24</sup>

In addition to the "general defense" mentioned above, there is an exceptional situation without limit conditions, which is "special defense". Some scholars also call it "no undue defense" or "boundless defense". In other words, under special circumstances, if an act of defense is taken against an ongoing crime of physical assault, murder, robbery, rape, kidnap, or other crimes of violence that seriously endanger personal safety, thus causing injury or death to the unlawful infringer, it is not excessive defense and shall not bear criminal responsibility. Whether the right of defense should be restricted is itself a controversial issue. The modern justifiable defense is developed on the basis of the "innate human rights theory" of western Enlightenment thinkers. This rights-based justifiable defense theory considers that justifiable defense is an innate human right, and the idea of unlimited right of defense also originates from this theory. After the 20th century, the socialization of law emphasizes the protection of social interests, advocates to clarify the nature of justifiable defense with social interests as the starting point, and the right of justifiable defense should be limited to not harming social interests. The theory of social-based justifiable defense requires that excessive defense should bear criminal responsibility. When China revised its criminal law in 1997, it added a new provision of "special defense" to highlight the concept of order that "law cannot give way to lawlessness". It no longer requires the defenders to worry about excessive defense when they face violent crimes that seriously threaten their personal safety. At the same time, it was also considered that the judiciary authorities were often based on the above four wrong judgment logic or inertial thinking above, leading to the improper expansion of the application of excessive defense. However, some scholars pointed out that the deviation of judicial determination is not the responsibility of legislation. Legislation should not and cannot replace judicial judgment. Legislation can only make general provisions, and specific judgments should be completed at the discretion of judiciary authorities (Chen, 2017a, p. 318).

According to paragraph 3 of Article 20 of China's Criminal Law,<sup>25</sup> special defense can only be carried out against "violent crimes seriously endangering personal safety", and other legal rights such as property rights and

<sup>24</sup> *The Guiding Opinions on Applying the Law Regarding Self-defense*, jointly issued by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security of the People's Republic of China.

<sup>25</sup> Criminal Law of the People's Republic of China (1997), Art. 20, available at <https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm#:~:text=Article%2020.,harm%20to%20the%20unlawful%20infringer.>

democratic rights are not included in the provisions. The murder, robbery, rape, and kidnap listed in this clause should be understood in a broad sense, which not only refers to the four specific crimes, but also includes crimes committed by means of such violence against others, such as, robbing guns, ammunition, or explosives by violent means or abducting and trafficking in women or children by means of kidnapping. However, the unlawful infringement should reach a certain degree of severity, that is, it may cause serious injury or death of others. As for whether the unlawful infringement has caused actual harm, it does not necessarily affect the establishment of special defense. Special defense may also be exercised if serious danger is caused to the personal safety of others.<sup>26</sup>

It should be noted that “physical assault” is also mentioned in this article, which is not a separate charge in the criminal law, nor is it strictly a legal term. Some scholars criticize that the use of the word “physical assault” is inappropriate, easy to produce ambiguity, and “physical assault” can be completely covered by “other violent crimes seriously endangering personal safety” (Tian, 2004, p. 257). This is a valid concern. Some scholars understand that “physical assault” is a kind of violent crime with unclear subjective intent between harm and murder (Zhang, 2011, p. 205). Some scholars have reached a broader understanding, believing that the assault has the ambiguity of subjective intent and criminal behavior. For example, the act of breaking into a person’s house late at night with the intention of committing a crime is difficult to charge until further offenses have been committed thus clarifying the severity level of the crime that should be charged (Liu, 2001, p. 591). Some scholars emphasize that “physical assault” refers to violent assault with weapons, that is, violent attack on the victim, seriously endangering the victim’s personal safety. If it is just punching and kicking, it does not constitute “physical assault”; however, the use of a weapon does not necessarily mean “physical assault”, which has to reach the extent of a serious threat to personal safety (Chen, 2008, p. 149). In 2018, when the Supreme People’s Procuratorate announced the aforementioned Yu Haiming self-defense case as a guiding case, it identified two points that should be considered when determining whether a “physical assault” had occurred: (1) it must be a violent crime, and non-violent crimes or general violent acts cannot be identified as physical assault; and (2) it must seriously endanger personal safety, that is, pose serious danger to people’s life and health. In specific cases, the subjective intention of some violent acts has not been clearly expressed through objective acts, or the infringer himself carries out the acts with generalized intention. Although the intentional content of such acts is uncertain, it has shown a variety of intentional possibilities. As long as there is a real possibility of causing serious injury or death to others, it should be recognized as “physical assault”.<sup>27</sup> In 2020, the Supreme People’s Court, the Supreme People’s Procuratorate, and the Ministry of Public Security jointly issued the *Guiding Opinions on Applying the Law Regarding Self-defense*,<sup>28</sup> which stipulated that the following acts shall be identified as “physical assault”: (1) using lethal weapons to seriously endanger the personal safety of others; and (2) without the use of weapons or without the use of lethal weapons, but according to the number of infringers, the location

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<sup>26</sup> The Case of Self-defense of Hou Qiuyu (Procuratorate Case No. 48) issued by the Supreme People’s Procuratorate on December 19, 2018.

<sup>27</sup> The Case of Self-defense of Yu Haiming (Procuratorate Case No. 47) issued by the Supreme People’s Procuratorate on December 19, 2018.

<sup>28</sup> Notice by the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security of Guiding Opinions on Applying the System of Justifiable Self-defense (Aug. 28, 2020). Available at <http://www.lawinfochina.com/display.aspx?id=33882&lib=law>.

of the attack, and the force of the attack, it has seriously endangered the personal safety of others. An act that has caused serious and imminent danger to personal safety even though no actual damage has been caused may also be identified as a “physical assault”.

### The Reconstruction of the Judicial Concept of Justifiable Defense in the People’s Republic of China

The trial of justifiable defense cases is not only related to the fairness of justice, but also affects the people’s recognition of justice. Emotion, reason, and law are intertwined and often become the focus of social attention.

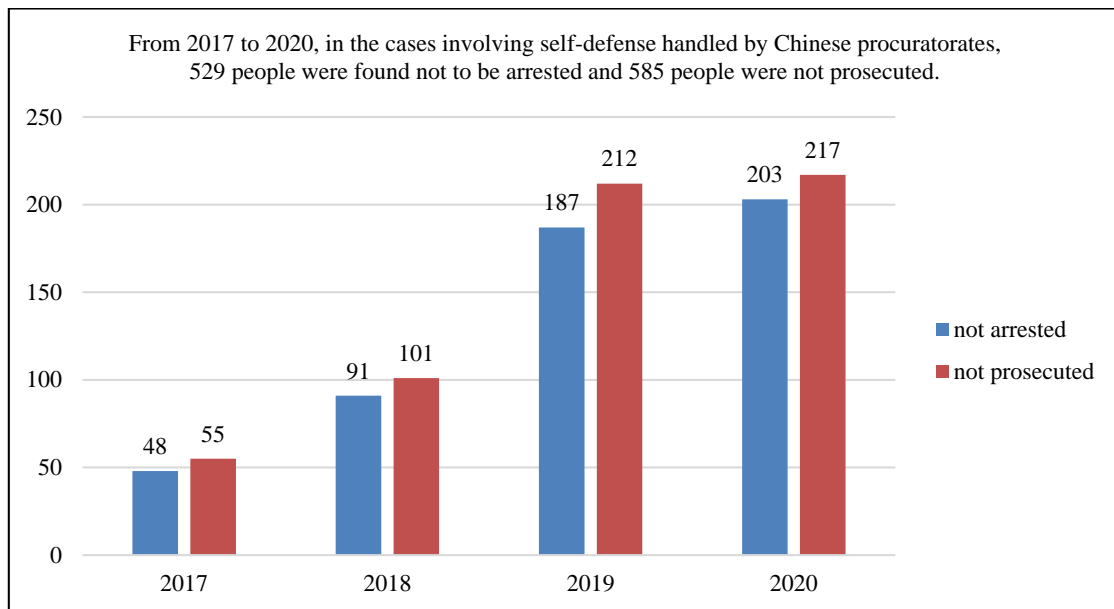


Figure 1. Non-prosecution decisions in self-defense cases.

From 2017 to 2020, in the cases involving self-defense handled by Chinese procuratorates, 529 people were found not to be arrested and 585 people were not prosecuted. Among them, 48 people were not arrested and 55 people were not prosecuted in 2017. In 2018, 91 people were not arrested and 101 people were not prosecuted, with a year-on-year increase of 89.6% and 83.6%. In 2019, 187 people were not arrested and 212 people were not prosecuted, with a year-on-year increase of 105.5% and 109.9%. In 2020, 203 people were not arrested and 217 people were not prosecuted.<sup>29</sup> Procuratorates have the courage to assume judicial responsibility, uphold social justice, and “justify” and “support” defenders by not approving arrests and not prosecuting those acting in justifiable self-defense. Courts, procuratorates, and public security organs have carefully reviewed their experience in handling justifiable defense-related cases, systematically sorted out the adjudication rules and values of justifiable defense-related cases, and unified standards for the application of law by issuing guiding and reference cases to safeguard social fairness and justice. The issue of these typical cases will help judicial personnel update their judicial concepts, improve their judicial capabilities, strengthen their judicial responsibilities, apply the system of justifiable defense more accurately, and realize the organic unity of law, reason, and emotion. On September 3, 2020, the Supreme People’s Court, the Supreme People’s Procuratorate,

<sup>29</sup> Data from the Supreme People’s Procuratorate of the People’s Republic of China website. Available at [https://www.spp.gov.cn/spp/zdgz/202103/t20210302\\_510264.shtml](https://www.spp.gov.cn/spp/zdgz/202103/t20210302_510264.shtml), the release time 2021-03-02.

and the Ministry of Public Security jointly issued the *Guiding Opinions on Applying the Law Regarding Self-defense*, which has made a comprehensive system of rules to accurately apply in accordance with the justifiable defense system from the general requirements and specific applications. The guideline calls for an accurate understanding of the legal provisions and legislative spirit of justifiable defense, effectively preventing the wrong practices of “who can make trouble is justified” and “who is killed or injured is justified”, and resolutely safeguarding the spirit of the rule of law that “law cannot give way to lawlessness”. It is necessary to accurately grasp the time, limit, and other conditions of defense according to law, based on the specific situation of the defense, taking into account the overall course of the case and the possible reactions of ordinary people in similar situations. Full consideration should be given to the urgency and nervousness of the defender in the face of unlawful infringement, so as to prevent the defender from being judged afterwards by calm, rational, objective, and accurate standards under normal circumstances, ensure that the handling of cases is legal-based, reasonable, and compatible, in line with the people’s concept of fairness and justice, and to realize the organic unity of legal effect and social effect. The guidelines give positive responses and guidance to many perplexities and difficulties in the specific application of justifiable defense, excessive defense, and special defense, actively adopt reasonable opinions and suggestions of scholars, and establish specific rules for the application of laws in justifiable defense cases from 10 aspects, which are more instructive and operable. The specific rules of these 10 aspects include: accurately grasp the cause, time, object, and intention conditions of justifiable defense, accurately distinguish between defense behavior and mutual assault, accurately distinguish between abuse of defense power and justifiable defense, accurately grasp the identification conditions of excessive defense, accurately grasp the penalty discretion of excessive defense, accurately grasp the identification conditions of special defense, and accurately grasp the relationship between general defense and special defense.

Although the legislation of China’s justifiable defense system started relatively late, and there have, in the past, been some deviations in the judicial recognition, in recent years, the judicial authorities have made remarkable progress in reshaping the judicial concept of justifiable defense in China, unifying the judicial rules of justifiable defense, and improving the trial capacity of justifiable defense cases. It is a great honor for us to have this opportunity to introduce China’s self-defense system to you. We do not want to simply evaluate the merits and demerits of any system. We only hope to open a window, understand the world with a broader mind, listen to different voices, and look forward to exchanging and learning with legal researchers from all over the world for common development and progress.

### **Lessons From the Chinese Justifiable Defense System**

It is always a difficult problem in criminal law theory and judicial practice to correctly distinguish justifiable defense from crime and to grasp the boundary between justifiable defense and excessive defense. Influenced by the traditional judicial concepts of ancient China, although the limits conditions of justifiable defense were relaxed and “special defense” was added to strengthen citizens’ right of justifiable defense when Chinese Criminal Law was revised in 1997, judicial personnel were still too conservative in the application of justifiable defense for a long time, and there were certain deviations and disconnection between legislative provisions and judicial application. Legislative provisions are always very abstract, requiring the judiciary to exercise discretion according to the specific circumstances of the case. To this end, the Supreme People’s Procuratorate and the

Supreme People's Court, Ministry of Public Security issued guidance cases and the *Guiding Opinions on Applying the Law Regarding Self-defense*. The Guiding Opinions summarize the rules for the identification of self-defense, which has played a positive role in clarifying and unifying the applicable standards for self-defense, correctly handling cases of self-defense, and encouraging and guiding citizens to correctly exercise their right to defense. China has established a case guidance system, which provides a more detailed and operable reference for judicial adjudication and provides guidance that cannot be replaced by other normative legislation or judicial documents for the handling of a series of difficult and complicated cases.

Justifiable defense is a basic right granted to citizens by law, rather than the last private remedy to stop unlawful infringement (Gao, 2020). No matter the essence of justifiable defense is expounded on the basis of individual rights or social interests, "justice against injustice" is the essential attribute of justifiable defense. So justifiable defense should be encouraged and supported. Of course, there is also a limit to any just acts; otherwise, justice would turn into injustice. In the adjudication of justifiable defense cases, the boundary of justifiable defense should be correctly and reasonably grasped from the basic value orientation of priority of defense right, so as to protect the legitimate rights and interests of defenders and prevent the abuse of defense right. This is also the basic requirement of humanism of criminal law. It is necessary to give priority to the environment and position of the defender by putting himself in his position, not demanding that the defender remain absolutely rational and calm in an emergency situation. We should resolutely abandon the wrong judgment logic of "sage standard theory", "hindsight judgement theory", "equal armed theory", "results-only theory". In judging whether the defense is excessive, we need to examine whether the behavior is excessive and whether the result is excessive, and follow the logical path from the behavior to the result, first examine whether the defense behavior "obviously exceeds the necessary limit", and then judge whether the defense result is "significant damage result". Special attention should be paid to prevent the reverse inference of whether the defense act is excessive based purely on the result of the damage caused by the defense act, and the judgment of the defense result replaces the judgment of the defense act.

Justice must not deviate from human nature and common sense. It is necessary to integrate the professional judgment of law with the simple cognition of the public, show the judicial rationality with rigorous jurisprudence, show the judicial conscience with accepted reason, and take into account the principles of nature, national law and human feelings.<sup>30</sup>

Justifiable defense is legitimate in both legal and moral terms. It can not only counter the real unlawful infringer in time, but also have a deterrent effect on the potential unlawful infringer, carries forward the positive social energy, and has significant social benefits. If a defense case is handled in a way that appears to be legally valid, but the result is not socially acceptable, one important reason lies in the fact that judicial personnel do not fully consider common sense, leading to the deviation between the understanding and application of legal provisions and people's general cognition of fairness and justice. "Criminal trials should not be indifferent to public opinion and engage in mechanical justice, nor should they be controlled by public opinion, and engage in public opinion trials."<sup>31</sup> We must adhere to the unity of law, reason, and feeling, find out the cause and effect, distinguish right

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<sup>30</sup> Speech by Zhou Qiang (2019, Oct. 17), President of the Supreme People's Court, at the Seventh National Conference on Criminal Trial Work.

<sup>31</sup> Speech by Zhou Qiang (2019, Oct. 17), President of the Supreme People's Court, at the Seventh National Conference on Criminal Trial Work.



from wrong, and truly realize the organic unity of legal effect and social effect. The establishment of social justice order depends on legal authority, and the establishment of legal authority is inevitably based on the foundation of social justice.

We turn now to describe the many different approaches to self-defense across the United States today.

### **Justifiable Self-defense in the United States of America**

#### **Criminal Defenses, Generally, in the United States**

Of course, criminal defendants in the United States can avoid criminal culpability by arguing the defendant did not commit the crime, the defendant could not have committed the crime (e.g., alibi), or the prosecutor failed to prove one or more essential elements of the crime beyond a reasonable doubt. Other categorical and affirmative defenses to criminal culpability also exist, and when proved, can form a complete defense to criminal conviction and punishment. These criminal defenses are often and classically bifurcated into excuse defenses and justification defenses. Excuse defenses typically acknowledge the criminal act was committed, but argue that criminal culpability should be excused, because the defendant's characteristics rendered them not criminally responsible (e.g., insanity). Justification defenses also acknowledge the criminal act was committed, but argue that the criminal act is justified because of the circumstances under which the act was committed (e.g., necessity). Self-defense is generally deemed a justification defense; that is, the criminal act was deemed justified because of the circumstances under which the actor committed the act.

Self-defense in the United States is frequently conceived of as having three variants: defense of self, defense of others, and defense of property. Although historically, one could not use lethal force in defense of property, modern self-defense laws in some states have started to conflate defense of self/others and defense of property into a single, largely monolithic self-defense formulation focused on standing one's ground. Thus, all three self-defense variants are discussed in the United States sections of this comparative article although the predominant focus is on self-defense of oneself.

#### **Self-defense in the United States**

As a country founded on federalist principles with largely separate and independent criminal justice systems federally and for each of the over fifty constituent states, districts, and territories, and in stark contrast to the single universal approach in China, the United States exhibits a wide array—some would label it a “crazy quilt”—of differing approaches to self-defense. Each United States jurisdiction is largely free to develop its own approach to self-defense (so long as each is consistent with the United States Constitution). Designed after UCLA Professor Eugene Volokh's parsing scheme (Volokh, 2020), the five main self-defense formulations across the United States may be categorized as “stand your ground” states by legislative enactment (30 states)<sup>32</sup>, “stand your ground”

<sup>32</sup> The 30 states that have adopted the “stand your ground” formulation by statutory enactment include Alabama (Ala. Code § 13A-3-23(b)), Alaska (Alaska Stat. Ann. § 11.81.335), Arizona (Ariz. Rev. Stat. Ann. §§ 13-411, 13.418), Arkansas (Ark. Code Ann. §§ 5-2-606, 5-2-607), Florida (Fla. Stat. Ann. §§ 776.001, 776.012, 776.013(3), 776.031), Georgia (Ga. Code Ann. § 16-3-23.1), Idaho (Ida. Code Ann. § 18-4009(1)(b)), Indiana (Ind. Code Ann. § 35-41-3-2), Iowa (Ia. Code Ann. § 704.1), Kansas (Kan. Stat. Ann. § 21-5222), Kentucky (Ky. Rev. Stat. Ann. §§ 503.050(4), 503.055(3)), Louisiana (La. Stat. Ann. § 14:20(C)), Michigan (Mich. Comp. Laws §§ 768.21c, 780.972(2)), Mississippi (Miss. Ann. Code § 97-3-15(4)), Missouri (Mo. Stat. Ann. § 563.031), Montana (Mont. Code Ann. §§ 45-3-103, 45-3-110), Nevada (Nev. Rev. Stat. Ann. § 200.120(2)), New Hampshire (N.H. Rev. Stat. Ann. § 627:4(III)), North Carolina (N.C. Gen. Stat. Ann. § 14-51.3), North Dakota (N.D. Cent. Code § 12.1-05-07), Ohio (Ohio Rev. Code Ann. § 133

states by judicial decision or jury instruction (eight states)<sup>33</sup>, classic castle doctrine (requiring retreat except in one's home) (seven states)<sup>34</sup>; castle doctrine modified states (requiring retreat except in one's home or workplace) (two states)<sup>35</sup>; and castle doctrine expanded states (requiring retreat except in one's home, workplace, or vehicle) (four states)<sup>36</sup>. All jurisdictions (the federal government<sup>37</sup>, all states, and the District of Columbia) in the United States<sup>38</sup> (1) recognize general self-defense: one not engaged in criminal activity, who did not start the affray, and where retreat is not feasible, may—free from criminal culpability—respond to a threat of imminent death or great bodily harm to self with commensurate force they reasonably believed was necessary; and (2) carve out an exception to the retreat requirement for persons acting in self-defense within their own residence. But as will be illustrated below, beyond that common core and in stark contrast to the singular national approach to legal self-defense principles in the People's Republic of China, there is tremendous variation in statutory language and judicial application of self-defense in United States jurisdictions and even within each of these formulation categories there is substantial variation (note also that American Samoa and the U.S. Virgin Islands have no fixed rule).

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SB 175), Oklahoma (Okla. Stat. Ann. tit. 21 § 1289.25(D)), Pennsylvania (18 Pa. Cons. Stat. § 505(b)(2.3)), South Carolina (S.C. Ann. Code § 16-11-440(C)), South Dakota (S.D. Laws § 22-18-4), Tennessee (Tenn. Ann. Code § 39-11-611(b)), Texas (Tex. Penal Code § 9.32(C)), Utah (Utah Code Ann. § 76-2-402(3)—first stand your ground statute in the Nation), West Virginia (W. Va. Code § 55-7-22), and Wyoming (Wyo. Stat. § 6-2-602(e)).

<sup>33</sup> The eight states that have adopted a “stand your ground” approach to self-defense by judicial decision, jury instruction, or judicial decision augmented by statute are California (*People v. Humphrey*, 13 Cal. 4th 1073 (1996); CalCrim 505 (“He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant ...”)); Colorado (Colo. Rev. Stat. § 18-1-704; *People v. Rau*, 2022 CO 3 (Colo. 2022)); Illinois (720 Ill. Comp. Stat. 5/7-3(a), 5/19-1, 5/2-8; *People v. McGraw*, 13 Ill. 2d 249 (1958); *Hammond v. People*, 199 Ill. 173, 182 (1902)); New Mexico (*State v. Anderson*, 364 P.3d 306 (N.M. 2015); *State v. Horton*, 57 N.M. 257 (1953); N.M.R.A. 14-5190 (self-defense jury instruction: “he may stand his ground and defend himself”)); Oregon (*State v. Sandoval*, 342 Ore. 506 (2007); *State v. Lang*, 215 Ore. App. 15 (2007)), Vermont (*State v. Hatcher*, 167 Vt. 338 (1997)); Virginia (*Footte v. Commonwealth*, 11 Va. App. 61 (1990) (citing *McCoy v. Commonwealth*, 125 Va. 771 (1919)); and Washington State (*State v. Redmond*, 150 Wn. 2d 489 (2003); *State v. Allery*, 101 Wn. 2d 591 (1984); *State v. Hiatt*, 187 Wash. 226 (1936)); Washington (Pattern Jury Instruction 16.08).

<sup>34</sup> The seven states that have adopted the classic castle doctrine approach to self-defense (requiring retreat except within one's home) are Maine (Me. Stat. 17-A 108(2)(C)(3)(a)); Maryland (*Burch v. State*, 346 Md. 253 (1997)); Massachusetts (*Commonwealth v. Pring-Wilson*, 448 Mass. 718 (2007); *Commonwealth v. Lapointe*, 402 Mass. 321 (1988)); Minnesota (Minn. Stat. § 609.065; *State v. Zumberge*, 888 N.W.2d 688 (Minn. 2017); *State v. Glowacki*, 630 N.W.2d 392 (Minn. Ct. App. 2001)); New Jersey (N.J. Stat. Ann. § 2C:3-4(b)(2)); New York (N.Y. Penal Law § 35.15); and Rhode Island (*State v. Guerrero*, 206 A.3d 108 (R.I. 2019); *State v. Garrett*, 91 A.3d 793 (R.I. 2014)).

<sup>35</sup> The two states that have adopted a modified version of the castle doctrine approach to self-defense (requiring retreat except within one's home or workplace) are Washington DC (*Dawkins v. United States*, 189 A.3d 223 (D.C. 2018); *Broadie v. United States*, 925 A.2d 605 (D.C. 2007); *Gillis v. United States*, 400 A.2d 311 (D.C. 1979)); and Wisconsin (Wisc. Stat. § 939.48).

<sup>36</sup> The four states that have adopted an expanded castle doctrine approach to self-defense are Connecticut (Conn. Gen. Stat. Ann. § 53a-20); Delaware (11 Del. Code §§ 4-464); Hawai'i (Hawai'i Rev. Stat. Ann. § 703-304(5)(b)(i)); and Nebraska (Neb. Rev. St. § 28-1409(4)(b)).

<sup>37</sup> In the federal criminal court system, self-defense principles are derived from common law, not statute.

<sup>38</sup> Note that Model Penal Code § 3.04 provides that force is “justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion... The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if ... the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take, except that the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.”

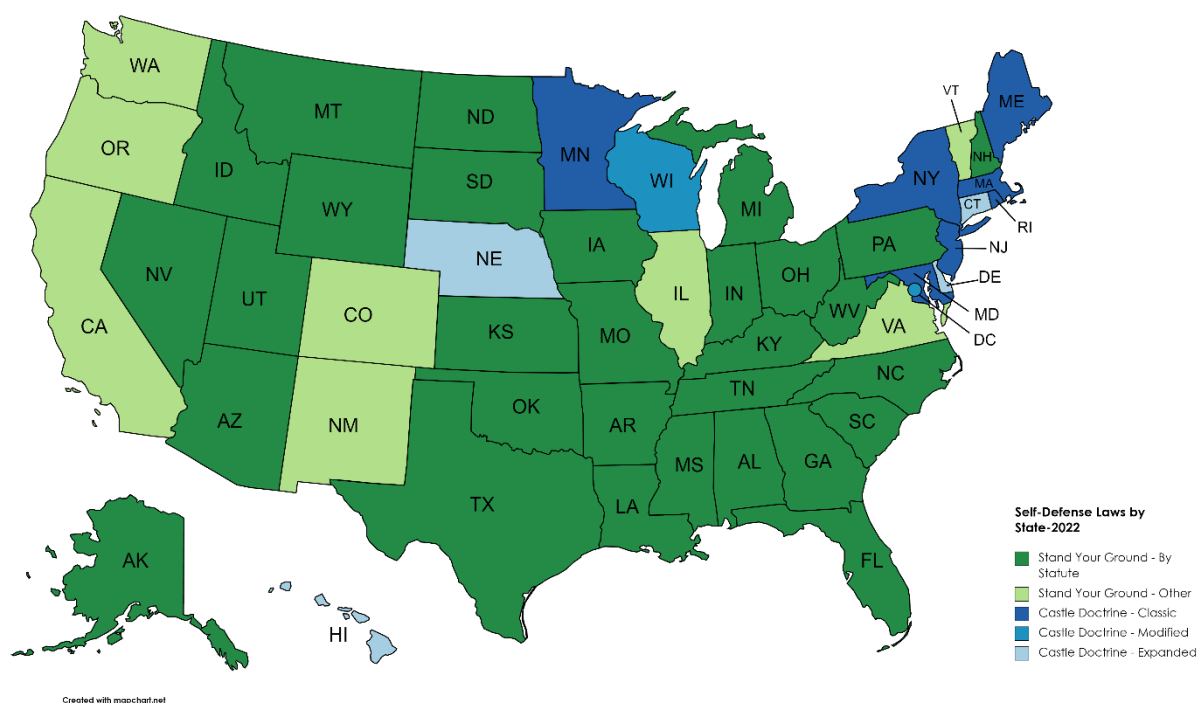


Figure 2. Self-defense category followed in each state.

“Stand your ground” and “castle doctrine” self-defense formulations are addressed, in turn, below, with samples from one typical state adhering to each formulation.

**“Stand your ground” self-defense in the United States (38 states).** The first statutory “stand your ground” jurisdiction in the United States was the State of Utah in 1994.<sup>39</sup> And in just the five years between 2004 and 2009, 17 more states enacted “stand your ground” legislation—12 states did so in 2006 alone. “Stand your ground” is the fastest growing self-defense formulation in the United States and is now the law in more than two-thirds of all states.<sup>40</sup>

<sup>39</sup> Utah (Utah Code Ann. § 76-2-402(3)).

<sup>40</sup> The 38 states with “stand your ground” self-defense formulations are Alabama (Ala. Code § 13A-3-23(b)); Alaska (Alaska Stat. Ann. § 11.81.335); Arizona (Ariz. Rev. Stat. Ann. §§ 13-411, 13.418); Arkansas (Ark. Code Ann. §§ 5-2-606, 5-2-607); California (*People v. Humphrey*, 13 Cal. 4th 1073 (1996); CalCrim 505 (“He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant ...”)); Colorado (Colo. Rev. Stat. § 18-1-704; *People v. Rau*, 2022 CO 3 (Colo. 2022)); Florida (Fla. Stat. Ann. §§ 776.001, 776.012, 776.013(3), 776.031); Georgia (Ga. Code Ann. § 16-3-23.1); Idaho (Ida. Code Ann. § 18-4009(1)(b)); Illinois (720 Ill. Comp. Stat. 5/7-3(a), 5/19-1, 5/2-8; *People v. McGraw*, 13 Ill. 2d 249 (1958); *Hammond v. People*, 199 Ill. 173, 182 (1902)); Indiana (Ind. Code Ann. § 35-41-3-2); Iowa (Ia. Code Ann. § 704.1); Kansas (Kan. Stat. Ann. § 21-5222); Kentucky (Ky. Rev. Stat. Ann. §§ 503.050(4), 503.055(3)); Louisiana (La. Stat. Ann. § 14:20(C)); Michigan (Mich. Comp. Laws §§ 768.21c, 780.972(2)); Mississippi (Miss. Ann. Code § 97-3-15(4)); Missouri (Mo. Stat. Ann. § 563.031); Montana (Mont. Code Ann. §§ 45-3-103, 45-3-110); Nevada (Nev. Rev. Stat. Ann. § 200.120(2)); New Hampshire (N.H. Rev. Stat. Ann. § 627:4(III)); New Mexico (*State v. Anderson*, 364 P.3d 306 (N.M. 2015); *State v. Horton*, 57 N.M. 257 (1953); N.M.R.A. 14-5190 (self-defense jury instruction: “he may stand his ground and defend himself”)); North Carolina (N.C. Gen. Stat. Ann. § 14-51.3); North Dakota (N.D. Cent. Code § 12.1-05-07); Ohio (Ohio Rev. Code Ann. § 133 SB 175); Oklahoma (Okla. Stat. Ann. tit. 21 § 1289.25(D)); Oregon (*State v. Sandoval*, 342 Ore. 506 (2007); *State v. Lang*, 215 Ore. App. 15 (2007)); Pennsylvania (18 Pa. Cons. Stat. § 505(b)(2.3)); South Carolina (S.C. Ann. Code § 16-11-440(C)); South Dakota (S.D. Laws § 22-18-4); Tennessee (Tenn. Ann. Code § 39-11-611(b)); Texas (Tex. Penal Code § 9.32(C)); Utah (Utah Code Ann. § 76-2-402(3)); Vermont (*State v. Hatcher*, 167 Vt. 338 (1997)); Virginia (*Foot v. Commonwealth*, 11 Va. App. 61 (1990) (citing *McCoy v. Commonwealth*, 125 Va. 771 (1919)); Washington State (*State v. Redmond*, 150 Wn. 2d 489 (2003); *State v. Allery*, 101 Wn. 2d 591 (1984); *State v. Hiatt*, 187 Wash. 226 (1936); Washington Pattern Jury Instruction 16.08); West Virginia (W. Va. Code § 55-7-22); and Wyoming (Wyo. Stat. § 6-2-602(e)).

In the main, “stand your ground” self-defense laws do not require the person acting in self-defense to retreat (even if that can be accomplished with no risk to the retreator) before using deadly force in self-defense so long as they were not the initial aggressor. Most “stand your ground” states allow persons to “stand their ground” in their home or in public when confronted with deadly force or an imminent forcible felony, and many “stand your ground” states permit self-defense without retreat in an occupied vehicle. In virtually every “stand your ground” state, equivalent rules apply to defense of others as for defense of self.<sup>41</sup> Note also, that in Florida, a person immune from criminal prosecution due to “stand your ground” self-defense, is also immune from civil liability for the acts committed.

Florida’s statute is representative of these “stand your ground” formulations:

(1) A person is justified in using or threatening to use 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. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and *has the right to stand his or her ground* if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.<sup>42</sup>

The Florida “stand your ground” statutory scheme also applies to home protection:

A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and *has the right to stand his or her ground* and use or threaten to use:

(a) Nondeadly 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; or

(b) Deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.<sup>43</sup>

The Florida “stand your ground” statutory scheme also applies to defense of property:

(1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate the other’s trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession ... A person who uses or threatens to use force in accordance with this subsection *does not have a duty to retreat* before using or threatening to use such force...

(2) A person is justified in using or threatening to use deadly force only if he or she reasonably believes that such conduct is necessary to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and *has the right to stand his or her ground*...<sup>44</sup>

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<sup>41</sup> e.g., Fla. Stat. § 776.012(2) (2021) (emphasis added) (“A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to ... another or to prevent the imminent commission of a forcible felony [and] does not have a duty to retreat and has the right to stand his or her ground”).

<sup>42</sup> Fla. Stat. § 776.012(1)-(2) (2021) (emphasis added).

<sup>43</sup> Fla. Stat. § 776.013(1) (2021) (emphasis added).

<sup>44</sup> Fla. Stat. § 776.031(1)-(2) (2021) (emphasis added).

Under the Florida “stand your ground” statutory scheme, one immune from criminal prosecution for “stand your ground” acts in defense of self, others, home, or property, are likewise statutorily immune from civil suit for those acts:

A person who uses or threatens to use force as permitted in [sections 776.012, 776.013, or 776.031] is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforcement officer.<sup>45</sup>

The Florida criminal jury instruction on point helps by converting the statutory prose of Florida’s section 776.012(2) [deadly force “stand your ground”] into an enumerated checklist:

The use of deadly force is justifiable if defendant reasonably believed that the force was necessary to prevent imminent death or great bodily harm to [himself] [herself] while resisting:

- another’s attempt to murder [him] [her], or
- any attempt to commit (applicable felony) upon [him] [her], or
- any attempt to commit (applicable felony) upon or in any dwelling house in which [he] [she] was present.

If defendant was not otherwise engaged in criminal activity and was in a place [he] [she] had a right to be, then [he] [she] had no duty to retreat and had the right to stand [his] [her] ground.<sup>46</sup>

Perhaps the most famous (read, infamous) application of Florida’s “stand your ground” regime involved George Zimmerman’s acquittal in his second-degree murder and manslaughter trial for the killing of seventeen-year-old Trayvon Martin (Herald, 2012). On February 26, 2012, in Seminole County, Florida, the following occurred according to a sworn statement from two investigators with the State Attorney Office for the Fourth Judicial Circuit:

Trayvon Martin was temporarily living at the Retreat at Twin Lakes, a gated community in Sanford, Seminole County, Florida. That evening Martin walked to a nearby 7-11 store where he purchased a can of iced tea and a bag of skittles. Martin then walked back to and entered the gated community and was on his way back to the townhouse where he was living when he was profiled by George Zimmerman [an unofficial Neighborhood Watch officer]. Martin was unarmed and was not committing a crime.

Zimmerman, who also lived in the gated community, and was driving his vehicle, observed Martin [a young Black male wearing a hooded sweatshirt] and assumed Martin was a criminal. Zimmerman felt Martin did not belong in the gated community and called the police. Zimmerman spoke to the dispatcher and asked for an officer to respond because Zimmerman perceived that Martin was acting suspicious. The police dispatcher informed Zimmerman that an officer was on the way and to wait for the officer.

During the recorded call Zimmerman made reference to people he felt had committed and gotten away with break-ins in his neighborhood. Later while talking about Martin, Zimmerman stated “these assholes, they always get away” and also said “these fucking punks”.

During this time, Martin was on the phone with a friend and described to her what was happening. The witness advised that Martin was scared because he was being followed through the complex by an unknown male and didn’t know why. Martin attempted to run home but was followed by Zimmerman who didn’t want the person he falsely assumed was going to commit a crime to get away before the police arrived. Zimmerman got out of his vehicle and followed Martin. When the police dispatcher realized Zimmerman was pursuing Martin, he instructed Zimmerman not to do that and that the responding officer would meet him. Zimmerman disregarded the police dispatcher and continued to follow Martin who was trying to return to his home.

<sup>45</sup> Fla. Stat. §776.032(1) (2021) (emphasis added).

<sup>46</sup> Fla Std. J. Instr. (Crim.) 3.6(f) (emphasis added).

Zimmerman confronted Martin and a struggle ensued. Witnesses heard people arguing and that sounded like a struggle. During this time period witnesses heard numerous calls for help and some of these were recorded in 911 calls to police. Trayvon Martin's mother has reviewed the 911 calls and identified the voice crying for help as Trayvon Martin's voice.

Zimmerman shot Martin in the chest. When police arrived Zimmerman admitted shooting Martin. Officers recovered a gun from a holster inside Zimmerman's waistband. A fired casing that was recovered at the scene was determined to have been fired from the firearm. Martin died from the gunshot wound (Osteen & Gilbreath, 2012).

Zimmerman was charged with Second Degree Murder. Zimmerman did not testify. At the conclusion of the trial (before an all-female, six-person jury), the judge instructed the jury on Second Degree Murder and on the lesser-included crime of Manslaughter and read to the jury the following "stand your ground" instruction (Zimmerman had waived a pretrial hearing to interpose a "stand your ground" defense, thus leaving the defense for trial):

An issue in this case is whether George Zimmerman acted in self-defense. It is a defense to the crime of Second Degree Murder, and the lesser included offense of Manslaughter, if the death of Trayvon Martin resulted from the justifiable use of deadly force.

"Deadly force" means force likely to cause death or great bodily harm.

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

In deciding whether George Zimmerman was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing George Zimmerman need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, George Zimmerman must have actually believed that the danger was real.

If George Zimmerman was not engaged in an unlawful activity and was attacked in anyplace where he had a right to be, *he had no duty to retreat and had the right to stand his ground* and meet force with force, including deadly force if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.<sup>47</sup>

On July 13, 2013, the jury unanimously found Zimmerman not guilty. Several jurors later explained they acquitted, because although the one juror of color insisted "in our hearts, we felt he was guilty" (Newcomb, 2013), the jury also felt Zimmerman had acted in self-defense: "All I go back to is the law" (Holub, 2017).

Controversy has surrounded the Zimmerman verdict since it was returned; meanwhile, an increasing number of states are adopting "stand your ground" formulations to self-defense despite recent research revealing that "stand your ground" increases gun crimes, suicides, and homicides rather than deterring them<sup>48</sup> (Degli Esposti, Wiebe, Gasparrini, & Humphreys, 2022; Rand Corporation, 2020; Yakubovich et al., 2021).

The castle doctrine, in many ways a precursor to "stand your ground" formulations, may be thought of as "stand your ground" but applicable only inside your own home; the castle doctrine is addressed in the next section.

<sup>47</sup> *State of Florida v. George Zimmerman*, No. 2012 CF 1083 AXXX. Instructions read to the jury by The Honorable Debra S. Nelson, Circuit Judge (2013, July 12); Judge Nelson Gives "Stand Your Ground" Instructions to Zimmerman Jury (2013, July 12), available at <https://youtu.be/wPmFPzioniU>.

<sup>48</sup> Degli Esposti, M., Wiebe, D. J., Gasparrini, A., & Humphreys, D. K. (2022, February 21). Analysis of "stand your ground" self-defense laws and statewide rates of homicides and firearm homicides. *JAMA Network Open*, 5(2), e220077. doi:10.1001/jamanetworkopen.2022.0077. See also Rand Corporation (2020, April 22). Effects of stand-your-ground laws on violent crime. Retrieved from <https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime.html> (a meta-study finding moderate evidence that "stand your ground" laws increase homicides). See also Yakubovich, A. R., Degli Esposti, M., Lange, B. C. L., Melendez-Torres, G. J., Parmar, A., Wiebe, D. J., & Humphreys, D. K. (2021). Effects of laws expanding civilian rights to use deadly force in self-defense on violence and crime: A systematic review. *American Journal of Public Health*, 111, e1-e14 (a metastudy finding that expanding people's self-defense rights by adopting "stand your ground" legislation has not decreased crime, has increased the frequency of homicides, and has increased race bias in application of self-defense protections).

**Castle doctrine self-defense in the United States (13 states).** The castle doctrine<sup>49</sup> and its direct variants, in effect in 13 states (Chen, 2017a)<sup>50</sup>, eliminate the duty to retreat before acting in self-defense in one's home (and in modified and expanded castle doctrine states, in one's workplace and/or motor vehicle), but the duty to retreat remains in other situations where the party claiming self-defense could have retreated to a place of safety without additional risk.

The castle doctrine arose from medieval English law that distinguished between protecting oneself generally and protecting oneself in one's home ("defense of habitation") (Catalfamo, 2007). And the term "Castle Doctrine" is generally attributed to Sir Edward Coke, who served as England's Attorney General in the early 1600s:

That *the house of everyone is to him as his castle and fortress*, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law so that, although a man kills another in his defence, or kills one [by misfortune] without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels for the great regard which the law has to a man's life, but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house it is not felony, and he shall lose nothing.<sup>51</sup>

Thus, castle doctrine roots are deep and have remained the general rule in most United States courts since colonial times.<sup>52</sup> As the United States Supreme Court has noted in two older cases on point:

The 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 ground*, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.<sup>53</sup>

[Justice Oliver Wendell Holmes:] Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.<sup>54</sup>

Wisconsin's self-defense approach most closely resembles the classic castle doctrine, requiring retreat when feasible only outside of the home, place of business, or motor vehicle:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm

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<sup>49</sup> Some use the "castle doctrine" label to include "stand your ground" formulations (e.g., Wallace, L. N. (2014). Castle doctrine legislation: Unintended effects for gun ownership? *Justice Policy Journal*, 11(2), 1-17). In this article, castle doctrine jurisdictions exclude "stand your ground" jurisdictions and include only those jurisdictions still requiring retreat (a) outside the home, (b) outside the home and workplace, or (c) outside the home, workplace, and motor vehicle.

<sup>50</sup> See Notes 24-25, above, and accompanying discussion.

<sup>51</sup> *Semayne's Case*, All ER Rep. 62, 5 Co. Rep. 91 a, Cro Eliz 908, Moore KB 668, Yelv 29, 77 ER 194 (Michaelmas Term, 1604) (Sir Edward Coke) (emphasis added).

<sup>52</sup> See *Beard v. United States*, 158 U.S. 500 (1895); *Brown v. United States*, 256 U.S. 335 (1921); Wallace (2014), *supra* note 34, at 4.

<sup>53</sup> *Beard v. United States*, 158 U.S. 550, 564 (1895) (emphasis added).

<sup>54</sup> *United States v. Brown*, 256 U.S. 335, 343 (1921) (J. Holmes).

unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.<sup>55</sup>

If an actor intentionally used force that was intended or likely to cause death or great bodily harm, *the court may not consider whether the actor had an opportunity to flee or retreat* before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and *either of the following applies*:

1. *The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business*, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

2. *The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it*, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.<sup>56</sup>

Two Wisconsin examples will set the context for that state's approach to the state's castle doctrine statute, which "generally provides that use of force is presumably justified when a person is defending himself or herself against an unlawful and forcible intruder in that person's home."<sup>57</sup> First, in *State v. Mouth*,<sup>58</sup> Mouth had attempted to purchase a vehicle repair shop using a land contract for deed. Mouth failed to make the payments; then, after the redemption period had passed, the husband of the landowner and another male came to the property to reclaim it. They were met at the property by Mouth—it was the middle of the day. There were only those three witnesses to the incident. As the two men approached Mouth on the property, he pulled out a handgun and shot both men at close range, killing one and injuring the other. The trial court declined to give the jury the castle doctrine instruction (which would have freed Mouth from having to show he had retreated or had been unable to retreat in safety), because the landowner had a right to enter to retake the land on which Mouth had failed to redeem (thus, there was no unlawful or forcible entry onto the land). The facts also betrayed that Mouth was angry rather than in fear of imminent death or great bodily harm. The Wisconsin Court of Appeals affirmed the trial court's decision to refuse the castle doctrine instruction.

Another Wisconsin case arose in the context of street demonstrations after Jacob Blake, a Black man, was shot and left paralyzed from the waist down by a White Kenosha (Wisconsin) police officer on August 23, 2020. The Criminal Complaint filed in Kenosha Circuit (Trial) Court on August 27, 2020, summarizes the key facts:

On August 25, 2020 an 8:00 pm curfew had been imposed east of I-94 in Kenosha County due to civil unrest. On August 25th at approximately 11:45 pm a shooting occurred at Car Source ... in Kenosha... The man who was shot at this location was identified as Joseph Rosenbaum. Rosenbaum was transported to a local hospital where a doctor declared him to be deceased... Kyle H. Rittenhouse, [was] running southwest across the eastern portion of the Car Source parking lot. The defendant is a resident of Antioch, [Illinois]. The defendant can clearly be seen holding a long gun, which was later recovered by law enforcement and identified as a Smith & Wesson AR-15 style .223 rifle. The recovered magazine for this rifle holds 30 rounds of ammunition. Following the defendant is Rosenbaum and trailing behind the defendant and Rosenbaum is a male who was later identified as Richard McGinnis, a reporter. The video shows that as they cross the parking lot, Rosenbaum appears to throw an object at the defendant. The object does not hit the defendant and a second video shows, based on where the object landed, that it was a plastic bag. Rosenbaum appears to be unarmed... [T]he defendant and Rosenbaum continue[d] to move across the parking lot and approach[ed] the front of a black car parked in

<sup>55</sup> Wis. Stat. §939.48(1).

<sup>56</sup> Wis. Stat. §939.48(1m)(ar); see also *State v. Wenger*, 225 Wis. 2d 495 (1999).

<sup>57</sup> *State v. Chew*, 358 Wis. 2d 368, 370-371 (2014).

<sup>58</sup> No. 2018AP1153-CR, 388 Wis. 2d 257, 2019 WL 2621157 (Wis. Ct. App. June 27, 2019).



the lot. A loud bang is heard on the video, then a male shouts, "Fuck you!", then Rosenbaum appears to continue to approach the defendant and gets in near proximity to the defendant when 4 more loud bangs are heard. Rosenbaum then falls to the ground. The defendant then circles behind the black car and approaches Rosenbaum. Rosenbaum remains on the ground. McGinnis also approaches, removes his shirt, and attempts to render aid to Rosenbaum. The defendant appears to get on his cell phone and place a call. Another male approaches, and the defendant turns and begins to run away from the scene. As the defendant is running away, he can be heard saying on the phone, "I just killed somebody." \* \* \* The defendant told McGinnis that he was a trained medic. \* \* \* [A witness reported that during the incident,] the defendant had the gun in a low ready position. Meaning that he had the gun raised but pointed downward. The butt of the gun would have been at an angle downwards from the shoulder. [That witness] stated that the defendant brought the gun up ... [and that witness] thinks the defendant fired 3 rounds in rapid succession..., the first round went into the ground and when the second shot went off, the defendant actually had the gun aimed at Rosenbaum. [That Witness] stated he did not hear the two exchange any words [and] the unarmed guy (Rosenbaum) was trying to get the defendant's gun ... [Rosenbaum] definitely made a motion that he was trying to grab the barrel of [Rittenhouse's] gun... [After] the defendant shot he ran back towards the hospital towards the middle of the road. [That witness] stayed and turned his attention to Rosenbaum [, then] heard other shots really soon after. [On a video from another angle, a] person can be heard yelling what sounds like, "Beat him up!" Another person can be heard yelling what sounds like, "Hey, he shot him!" [A] fourth video ... showed a different angle of the defendant running northbound. In this video a person can be heard yelling, "Get him! Get that dude!" Then a male in a light-colored top runs towards the defendant and appears to swing at the defendant with his right arm. This swing makes contact with the defendant, knocking his hat off. The defendant continues to run northbound. On the video a male can be heard saying something to the effect of, "What'd he do?" Another male can be heard responding something to the effect of, "Just shot someone." Then a male can be heard yelling, "Get his ass!" The defendant then trips and falls to the ground. As the defendant is on the ground, an unidentified male wearing a dark-colored top and lightcolored pants jumps at and over the defendant. Based on the sounds of gunshots on the video and the positioning of the defendant's gun, it appears that he fires two shots in quick succession at this person. It appears that that person was not hit as he then runs away from the defendant. A second person who was later identified as Anthony Huber approaches the defendant who is still on the ground, on his back. Huber has a skateboard in his right hand. When Huber reaches the defendant it appears that he is reaching for the defendant's gun with his left hand as the skateboard makes contact with the defendant's left shoulder. Huber appears to be trying to pull the gun away from the defendant. The defendant rolls towards his left side and as Huber appears to be trying to grab the gun the gun is pointed at Huber's body. The defendant then fires one round which can be heard on the video. Huber staggers away, taking several steps, then collapses to the ground. Huber subsequently died from this gunshot wound. After shooting Huber, the defendant moves to a seated position and points his gun at a third male, later identified as Gaige Grosskreutz, who had begun to approach the defendant. When the defendant shot Huber, Grosskreutz freezes and ducks and takes a step back. Grosskreutz puts his hands in the air. Grosskreutz then moves towards the defendant who aims his gun at Grosskreutz and shoots him, firing 1 shot. Grosskreutz was shot in the right arm. Grosskreutz appears to be holding a handgun in his right hand when he was shot. Grosskreutz then runs southbound away from the defendant screaming for a medic and the defendant gets up and starts walking northbound. The defendant turns around facing southbound while walking backwards northbound with his firearm in a ready position, pointed towards the people in the roadway.<sup>59</sup>

Thus, Kyle Rittenhouse, presumably responding to calls on social media for vigilantes to descend on Kenosha (Outlay & Snow, 2020), brought his semi-automatic AR-15 style rifle to Kenosha then confronted demonstrators with that rifle. During the demonstrations, Rittenhouse shot and killed two men and shot and wounded a third. When asked why he, as a seventeen-year-old, had brought his rifle across state lines to Kenosha, Rittenhouse simply noted, "I have my rifle—because I can protect myself, obviously" (Fung, 2020). "I did what I had to do" (Chan, 2021). Apparently, what he "had to do" was shoot to death one man who had kicked him and another who had held up a skateboard in defense.

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<sup>59</sup> *State of Wisconsin v. Kyle H. Rittenhouse*, No. 2020CF000983, Criminal Complaint (2020, August 27). Available at <https://www.wpr.org/sites/default/files/rittenhouse.pdf>.

Rittenhouse was charged (as an adult) with Reckless Homicide (regarding one of the deceased), Intentional Homicide (regarding the other deceased), Attempted Intentional Homicide (regarding the injured man), and several lesser counts.<sup>60</sup> He pleaded not guilty. A jury trial was conducted in November 2021 following which Rittenhouse was acquitted on all counts by a unanimous jury (Bosman, 2021). The jury had accepted the notion that Rittenhouse had acted in self-defense—not in his home (that was in Illinois), not to protect his property (that was also in Illinois), not to protect others (they were not at risk), but to protect himself when those three victims, who were protecting themselves, allegedly caused Rittenhouse to fear for his own life. He did not bring a gun to a knife fight.<sup>61</sup> He brought an AR-15 to a peaceful demonstration then used it to extinguish a threat that existed—if it existed at all—solely because he had brought that rifle from Illinois. Garden-variety self-defense exists even outside the home and even outside of “stand your ground” jurisdictions so long as a reasonable person would have deemed the self-defensive act reasonable and necessary.

### **Repairing Self-defense Principles in the United States**

With the exception of required adherence to the Supreme Law of the Land, the United States Constitution<sup>62</sup>, the federalist and disaggregated nature of criminal justice in the United States lends itself to very few solutions that apply to all jurisdictions. Rather, each of the 50-plus jurisdictions faces its own circumstances, traditions, interest groups, civilian preferences, and existing statutory and case law. Nonetheless, in this section the authors offer several suggestions that apply rather well across all jurisdictions.

**Address civilian firearm proliferation.** The Second Amendment, frontier roots, focuses on personal and home protection, and perhaps individualism have contributed to the United States having more firearms in civilian hands than any other nation and often muddy the self-defense and firearm politics and debates (Schaeffer, 2021). The United States has more firearms in civilian hands per capita than any other nation (World Population Review, 2022a). Indeed, there are more firearms in civilian hands than there are civilians in the United States. And the rate of civilian gun ownership varies sharply from state to state, ranging from a high of 66% of civilian homes with firearms in Montana to a low of 14.7% in Massachusetts (World Population Review, 2022b). Note that the 14 states with the highest civilian gun ownership rates are all “stand your ground” by statute states<sup>63</sup> (National Archives, 2020); the six states with the lowest civilian gun ownership rates are all “castle doctrine” states<sup>64</sup> (National Archives, 2020). These state-by-state decisions, preferences, and resulting statistics result from peculiar issues, traditions, and predilections specific to each state. Perhaps reducing gun ownership is a path toward rationalizing and reducing the lethality of self-defense in the United States.

**Slowing or reversing the “stand your ground” revolution.** Recent research has revealed that “stand your ground” law, touted as the path toward reducing crime and gun violence, instead does not reduce crime,

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<sup>60</sup> Ibid.

<sup>61</sup> *The Man With the Iron Fists* (Arcade Pictures 2012).

<sup>62</sup> U.S. Const. Art. VI (the Supremacy Clause).

<sup>63</sup> In order to start with the highest per capita rate, the top 14 states are: Montana, Wyoming, Alaska, Idaho, West Virginia, Arkansas, Mississippi, Alabama, South Dakota, North Dakota, Oklahoma, Kentucky, Louisiana, and Tennessee. Donald Trump carried all 14 of these states in the 2020 presidential election.

<sup>64</sup> Those six states with the lowest firearm ownership rates, all honoring the castle doctrine are: Connecticut, New York, Hawai’i, Rhode Island, New Jersey, and Massachusetts. Joe Biden carried all six of these states in the 2020 presidential election.

sometimes increases crime, and increases gun suicide and gun homicides rather than deterring them<sup>65</sup> (Degli Esposti, Wiebe, Gasparini, & Humphreys, 2022; Rand Corporation, 2020; Yakubovich et al., 2021).

**Address other gun control (i.e., gun safety) options.** Pew Research (Schaeffer, 2021, p. 80) revealed based on United States adults surveyed (the ranges capture the variety of responses from Republican (and lean Republican) gun owners on one end to Democrat non-gun owners (and lean Democrat) on the other):

- 86%-91% favor precluding mentally ill persons from purchasing guns;
- 65%-94% favor background check at gun shows and private sales;
- 30%-88% favor creating a federal gun sale tracking database;
- 23%-87% favor banning assault-style weapons;
- 26%-86% favor banning high-capacity (ten or more rounds) magazines.

The huge ranges depicted as to most of these gun safety proposals betray deep political polarization regarding gun control. And those polar extremes make gun laws difficult to revise, particularly with the Supreme Court, empowered by the current Court majority, that is using the Second Amendment to ratchet the United States toward increased and increasingly visible civilian gun proliferation to the detriment of cities and states that would otherwise wish to adopt their own gun control measures as part of their police power<sup>66</sup> as is addressed in the next section.

**Address the Second Amendment and Supreme Court interpretation of it.** The right to bear arms guaranteed by the Second Amendment to the United States Constitution<sup>67</sup> has contributed to the United States having more firearms in civilian hands than any other nation and often muddies the self-defense debate. Indeed, the United States Supreme Court's own approach to the Second Amendment has undergone some major shifts toward eliminating most restrictions on civilian firearm possession. In 1939, the Supreme Court held the Second Amendment was grounded on ensuring a viable militia: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces, the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."<sup>68</sup> But by 2008, supported by a far more conservative lineup of justices on the Supreme Court, the majority had cemented a very different original intent/original meaning approach to the Second Amendment virtually abandoning its militia predicate: "we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."<sup>69</sup> The *Heller* majority dismissed *Miller* as dictum and charted a new Second Amendment interpretation that unwisely

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<sup>65</sup> Degli Esposti, M., Wiebe, D. J., Gasparini, A., & Humphreys, D. K. (2022, February 21). Analysis of "stand your ground" self-defense laws and statewide rates of homicides and firearm homicides. *JAMA Network Open*, 5(2), e220077. doi:10.1001/jamanetworkopen.2022.0077. See also Rand Corporation. (2020, April 22). Effects of stand-your-ground laws on violent crime. Available at <https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime.html> (a meta-study finding moderate evidence that "stand your ground" laws increase homicides). See also Yakubovich, A. R., Degli Esposti, M., Lange, B. C. L., Melendez-Torres, G. J., Parmar, A., Wiebe, D. J., & Humphreys, D. K. (2021). Effects of laws expanding civilian rights to use deadly force in self-defense on violence and crime: A systematic review. *American Journal of Public Health*, 111, e1-e14 (a metastudy finding that expanding people's self-defense rights by adopting "stand your ground" legislation has not decreased crime, has increased the frequency of homicides, and has increased race bias in application of self-defense protections).

<sup>66</sup> U.S. Const. Amend. X.

<sup>67</sup> U.S. Const. Amend. II.

<sup>68</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>69</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

exacerbates gun proliferation, gun accidents, gun suicides, gun violence, and brings U.S. self-defense laws to the forefront.

Furthermore, *Heller* diminishes to the vanishing point state and local gun control efforts by treating them as superseded by the Second Amendment and the Supreme Court's Court firearm "jurisprudence". But that gives short shrift to states' constitutional rights, through the Tenth Amendment, to exercise police powers to safeguard public safety, health, and morals. After all, the federal government is one of limited and enumerated powers, but the states (and the People, respectively) retain all other powers, including police powers. Nonetheless, and without so much as a nod toward strong public sentiment in many states supporting enhanced gun control, the Court declined to read the Second Amendment and the Tenth amendment *in pari materia*. One does not supersede the other; they must be construed together as a piece. We need a new federal firearm jurisprudence—or perhaps a new majority on the Court—that will refrain from grounding today's firearm decisions on cases and pronouncements from the era of flintlocks and powder horns. The United States Supreme Court should honor states' rights and allow the states to serve as laboratories of democracy on gun safety—as Supreme Court Justice Louis Brandeis so eloquently noted in dissent:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a *laboratory*; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment... But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.<sup>70</sup>

**Focus on the words “necessary” and “reasonable” in self-defense statutes.** Most U.S. jurisdictions' self-defense formulations require that the act committed in self-defense was both “reasonable” and “necessary”. But too often courts almost interpret those words out of the formulation. An example may be found in one of Minnesota's self-defense statutes:

[R]easonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist ... when used by any person in resisting or aiding another to resist an offense against the person.<sup>71</sup>

The intentional taking of the life of another is not authorized by section 609.06, except when *necessary* in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor's place of abode.<sup>72</sup>

Thus, this self-defense statute provides that the force used must be “reasonable”, the person purporting to act in self-defense must “reasonably” believe the imminent threat is occurring or is about to occur, and the self-defensive acts taken must be “necessary” to resist or prevent the imminent threat.<sup>73</sup> The reasonableness and necessary elements are mirrored in the Minnesota Jury Instruction for Justifiable Taking of Life (in defense of self), which provides:

The defendant asserts the defense of the justifiable taking of a life.

<sup>70</sup> *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>71</sup> Minn. Stat. § 609.06, Subd. 1 (2021) (Authorized Use of Force).

<sup>72</sup> Minn. Stat. § 609.065 (2021) (Justifiable Taking of Life).

<sup>73</sup> 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(b) (2nd ed. 2003).

No crime is committed when a person takes the life of another, even intentionally, if the person's action was taken in resisting or preventing an offense the person *reasonably* believed exposed (him) (her) (or another) to death or great bodily harm.

In order for the taking of a life to be justified for this reason, four conditions must be met. First, the defendant's act must have been done in the belief that it was *necessary* to avert death or great bodily harm. Second, the judgment of the defendant as to the gravity of the peril to which (he) (she) (or another) was exposed must have been *reasonable* under the circumstances. Third, the defendant's election to defend must have been such as a *reasonable* person would have made in light of the danger perceived and the existence of any alternative way of avoiding the peril. Fourth, there was no *reasonable* possibility of retreat to avoid the danger. All four conditions must be met.

The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.<sup>74</sup>

But consider the following constructions of the self-defense applications of “necessary” and “reasonable”; recall that the prosecution must *disprove* reasonableness and *disprove* necessity beyond a reasonable doubt. A person noticing what he believed was a firearm in his brother's visitor's pocket while the brother was acting nervous about the visitor was sufficient “necessity” to justify the man firing a dozen rounds into the visitor, who never took the gun from his pocket; the Court precluded the shooter's retrial.<sup>75</sup> Where a civilian inside his residence shot entering officers, who had kicked and knocked on the door and yelled “we are the police with a search warrant”, that was sufficient reasonable doubt as to *reasonableness* to overturn the conviction.<sup>76</sup> Self-defense principles do not always protect only those acting in good faith, reasonable, necessary, and commensurate self-defense.

**Preclude self-defense where party claiming it prompted the imminent threat.** Finally, in many circumstances such as involving Kyle Rittenhouse in Wisconsin in 2020, it appears that open carry, concealed carry, lax self-defense applications, and broad appeals to gun rights expansions have rendered self-defense in the United States to resemble the Wild Wild West—kill or be killed—I would rather be judged by twelve than carried by six. And some lionize those who parade about with weapons in 7-Eleven and WalMart stores. Those open carriers are asking for trouble and too often find it—we would argue they too often foment that trouble they encounter. There was no reason for Kyle Rittenhouse to bring his AR-15 assault-style weapon from Illinois to Wisconsin except to heed the call for armed vigilantes to patrol the streets. When his arrogance, youth, hubris, and weaponry scare people and lead them to take self-protective steps to save themselves from Rittenhouse, they are the ones acting in self-defense, not Rittenhouse. Rittenhouse went to the trouble. Those people in Kenosha would be alive today had Rittenhouse not traveled to Kenosha with his weapon. No one else was shot that day and no one else shot anyone. It was a peaceful demonstration—protected by the First Amendment—interrupted by a vigilante who created the threat to which he then claimed a right of self-defense. This confluence of guns, vigilantism, polarization, race tensions, and a conservative Supreme Court bent on open carry has created these risks and self-defense ought not to add fuel to that confluence.

The simplest fix—again, no fixes are simple in American criminal justice because each fix must be adopted separately and independently in over 50 jurisdictions—is to preclude those who go to or create the threat from then claiming self-defense. That would be an important start.

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<sup>74</sup> Minn. Practice. Jury Instruction Guides-Criminal (CrimJIG) 7.05 (6th ed. 2017).

<sup>75</sup> *State v. Harvey*, 277 N.W.2d 344 (Minn. 1979).

<sup>76</sup> *State v. Housley*, 322 N.W.2d 746 (Minn. 1982).

### Lessons From This Comparative Review

The two nations pose, in a sense, polar extremes regarding the historical development and promulgation of justifiable self-defense principles. The People's Republic of China has used local and regional courts as a laboratory to develop self-defense principles over time then, through the combined efforts of the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security, announced Guiding Principles intended to coalesce a single grand self-defense formulation to be applied across the nation. In the United States, as each state and the federal government exercise largely independent authority over criminal law, the states have served as laboratories of democracy,<sup>77</sup> but there is no central authority (other than the United States Constitution, where applicable) to review these laboratories' results and announce a single formulation applicable in all U.S. jurisdictions. There are, of course, advantages and disadvantages to both systems' approaches, with lessons to be drawn from both. The authors encourage commentators and policy makers to review the system summaries presented in this article and reach their own conclusions.

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<sup>77</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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