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“A Spectacle of Slavery Unwilling to Die”: Curbing Reliance on Racial Stereotyping in Self-Defense Cases*

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* The title for this Article is taken from Justice Douglas’s concurring opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 (1968). Douglas’s concurrence, discussed at length in Part III, addresses the ideological dimensions of racial domination that lingered after the formal abolition of slavery.

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INTRODUCTION

The criminal justice system has long operated as a crucial site of racialization in American society.¹ Materially, the system has disproportionately targeted African Americans and Latinos and has ravaged communities of color.² Ideologically, the system helps to shape commonly held beliefs and stereotypes about the relationship between race, crime, and violence. Such stereotypes in turn have the potential to shape criminal justice outcomes. Nowhere is this dynamic more apparent than in self-defense cases involving highly spectacularized incidents of racialized violence.

Defendants claiming self-defense admit to having committed an act of violence but seek sanction for having done so. They are, in effect, asking the legal system to mark their actions as socially acceptable, if not actually desirable.³ Most

1. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1040–52 (2010); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1250 (2012) (“Over the past thirty-five years, the prison system[’s] . . . growth . . . has largely been driven by the disproportionate criminalization and incarceration of poor people of color, particularly from Black and Latino communities . . . [T]heorists have suggested that prisons have become a mechanism for the regulation of racially and economically marginal populations.” (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 26–35 (2009))).

2. Ocen, *supra* note 1, at 1270, 1271 (discussing a theory that “the dramatic increase in use of the criminal law and incarceration came in response to the gains of the Civil Rights Movement” and noting that “[d]riven by the War on Drugs, approximately 1.5 million people were in prison by the mid-2000s, nearly half of whom were Black”).

3. While self-defense is most frequently thought of as a justification defense, there has been an extended debate as to whether it ought to instead be considered an excuse defense. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 762–67 (1978); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 72–99 (1984); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 390–91 (1996). If self-defense is an excuse, there is a legal conclusion that while there is no moral justification for a defendant’s unlawful actions, it would be inappropriate to hold the defendant responsible for his or her actions. If self-defense is a justification, the legal conclusion is that the defendant’s actions were socially desirable. In the first conceptualization, the law is telling defendants that they should not have done what they did, but their actions were acceptable under the circumstances. In the second, and more common conceptualization, the message to defendants is that their actions represent exactly the kind of behavior society would *like* them to

people would agree that, where defendants have resorted to violence because they were faced with the choice to kill or be killed, their actions *should* be seen as socially acceptable. We generally do not believe that people should be forced to submit passively to unprovoked violence.⁴ The devil is in the details, however, and self-defense inquiries often turn on the question of whether a defendant had a reasonable belief that he or she was faced with a genuine threat.⁵ Because fears of violent crime are so deeply entwined with “common sense” understandings of race and gender in American society, there is a danger that determinations of what counts as “reasonable” fear may be driven, at least partly, by reliance upon racist stereotypes.⁶ This danger is particularly pronounced when claims of self-defense are used to justify acts of violence against members of racialized groups that have been frequently portrayed as violent criminals within popular culture and the mass media.⁷

The danger is not just that individual defendants will be rewarded for their own racism or the racism of various legal actors, including judges, juries, prosecutors, and police officers. Instead, because legal determinations of self-defense are, in effect, reflective of policy determinations about socially acceptable forms of violence, the stakes of any single case touch upon much broader social issues.⁸ The legal system plays a centrally important role in shaping the ideological

engage in. Regardless of which conceptualization underpins the defense, a legal determination about possible grounds for self-defense claims is, in the end, also a policy determination about acceptable motivations for violence.

4. See *State v. Goldberg*, 79 A.2d 702, 709 (N.J. Super. Ct. App. Div. 1951) (“Fundamentally no person has a lawful right to lay hostile and menacing hands on another, without the authority of law to do so. On the other hand, the law does not require anyone to submit meekly to the unlawful infliction of violence upon him.”).

5. The traditional self-defense doctrine allows a person to use force “if he reasonably believes such force is necessary to protect himself from imminent use of unlawful force by the other person . . . [D]eadly force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of *deadly* force by the aggressor.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §1.01[A][1], at 223 (5th ed. 2009) (footnotes omitted).

6. For a discussion of the relationship between “common sense,” hegemony, and race, see Stuart Hall, *Gramsci’s Relevance for the Study of Race and Ethnicity*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 411, 431 (David Morley & Kuan-Hsing Chen eds., 1996), which explains that common sense is

the terrain of conceptions and categories on which the practical consciousness of the masses of the people is actually formed. It is the already formed and ‘taken-for-granted’ terrain, on which more coherent ideologies and philosophies must contend for mastery; the ground which new conceptions of the world must take into account, contest and transform, if they are to shape the conceptions of the world of the masses and in that way become historically effective[.]

7. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–74 (2003) (discussing ways that anti-Black, anti-Latino, and anti-Asian stereotypes play out in self-defense cases).

8. See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 11 (1998) (“A claim of justification . . . generates a new rule of law: ‘[s]hould the same circumstances recur, actors in the future could rely upon the decision, and guide their conduct accordingly.’” (alteration in original))

foundation of the United States. It is, after all, the institution that is most directly entrusted with enforcing and adjudicating the morality of social actors. When legal decision making relies on racist stereotypes, the legal system lends those stereotypes its imprimatur and imbues them with the force of law.⁹ When this happens in the self-defense context, legal determinations can legitimize forms of racial violence. This Article argues for the necessity of actively guarding against such outcomes.¹⁰

Over the past two years, some of the most highly charged public discussions about race and self-defense have revolved around the Trayvon Martin case.¹¹ Martin's death, the initial failure to arrest or prosecute his killer, George Zimmerman, and Zimmerman's eventual acquittal prompted widespread outrage and provided the occasion for protestors, pundits, and politicians alike to condemn (or endorse) racial profiling. As one of the most widely disseminated spectacles involving race and violence in recent years, the case has great potential to influence national processes of racial formation, and to impact commonly held beliefs about race, violence, and the criminal justice system.¹² For that reason, Part I of this Article discusses the case and examines the "stand your ground" laws that are at its heart. While this Article is most directly concerned with criminal trials, an analysis of the Martin case allows for a discussion of legal decision making that happens before trial, or that can prevent cases from coming to trial. There are a number of reasons to think that stand-your-ground laws represent a troubling new development in self-

(quoting George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1304 (1974)).

9. See Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 966 (2006) (addressing ways that "courts use stereotypes and the societal significance of race, class, gender, and other identity variables to perform a 'legal construction' of identity").

10. In arguing that fears based on racial stereotypes ought not be allowed to provide the basis for self-defense claims, this Article may contribute to an ideological project justifying some degree of increased incarceration. The devastation that the "prison industrial complex" has visited upon communities of color, and the generally destructive nature of an increasingly carceral society, make it problematic to argue for any legal reforms that might entail sending more people to prison. However, the costs of a defense strategy that could legitimate racist stereotypes and racialized violence are too high to be ignored. After all, as the history of lynching makes clear, antiracist activists have long struggled to ensure that crimes committed against people of color are not treated with impunity. See W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 193 (1993) (addressing Black anger at the failure of state authorities to suppress mob violence in Georgia at the turn of the twentieth century). If self-defense reforms are therefore necessary, it is nevertheless important to proceed with caution, keeping in mind that such reforms are of limited value at best if they leave the broader issues of institutionalized racism within the criminal justice system intact. For a discussion of the varied kinds of projects necessary to expose and challenge "the deep connections between race, crime, and political economy," see Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 AM. BEHAV. SCIENTIST 625, 639 (2008).

11. *State v. Zimmerman*, No. 12-CF-1083-A, 2013 WL 2729208 (Fla. Cir. Ct. June 5, 2013).

12. "Racial formation" is a term used to describe the "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (2d ed. 1994).

defense doctrine. Chief among them is that the laws increase opportunities for racial stereotypes to cloud the reasonableness component of self-defense determinations.

While stand-your-ground legislation presents new challenges for limiting the institutionalized racism of the criminal justice system, at bottom, this type of legislation merely exacerbates problems that are inherent within the very notion of “reasonable” fear that is central to self-defense doctrine. Part II examines the ways that objective, subjective, and objective-subjective hybrid standards of reasonableness allow for racial stereotypes to shape the nature of self-defense claims and determinations. Part II concludes by calling for a new, normative standard of reasonableness that would instruct legal fact finders that it is unreasonable as a matter of law to rely upon racial stereotypes in order to determine the nature of a violent threat. This standard would be based upon Congressional power under the Thirteenth Amendment to prohibit “badges or incidents of slavery.”¹³

Part III considers additional interventions that might help weed out reliance upon racial stereotypes in self-defense trials. This Part examines the question of *when* interventions are most likely to be necessary, while considering the ways that racial stereotypes are likely to affect defendants, jurors, advocates, and judges. It addresses proposed changes to evidence codes and jury instructions, and concludes that it is necessary to develop methods of actively patrolling for legal actors who rely upon racial stereotypes, consciously or not.

I. TRAYVON MARTIN AND STAND-YOUR-GROUND LEGISLATION: SPECTACLE, IMMUNITY, AND NEW PATHWAYS FOR STEREOTYPING

A. *Death, Protest, and Spectacle*

In the early evening of February 26, 2012, George Zimmerman, a volunteer neighborhood watch captain, noticed a Black¹⁴ teenager walking in a gated community in Sanford, Florida.¹⁵ Seventeen-year-old Trayvon Martin, who was in town to visit his father and had just purchased candy and iced tea at a nearby convenience store, was in the middle of a cell phone conversation when he aroused

13. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

14. Decisions regarding capitalization in the context of discussions of race and ethnicity have long been fraught. Capitalizing “Black” is a method of recognizing a history of resistance to linguistic conventions that have served to denigrate and oppress. There is no similar history associated with the term “white,” so I have chosen not to capitalize that term throughout this Article. For more detailed discussions of this issue see Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 29 n.7 (2006); and Lori L. Tharps, Op-Ed., *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html>.

15. John Rudolph & Trymaine Lee, *Trayvon Martin Case Spotlights Florida Town’s History of ‘Sloppy’ Police Work*, HUFFINGTON POST (Apr. 9, 2012), http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html [<http://perma.cc/2JWA-ESHU>].

Zimmerman's interest.¹⁶ Zimmerman called the Sanford Police Department, relayed his suspicions, said that Martin was running, and was advised not to follow him.¹⁷ This was the fifth time that Zimmerman had called the police to report Black men travelling on foot in the neighborhood in recent days.¹⁸ Within minutes, a neighbor called the police to report hearing screams. Screaming could be heard in the background of the 911 call, followed by the sound of a gunshot.¹⁹

When the paramedics arrived, they pronounced Trayvon Martin dead at the scene.²⁰ Martin was killed by a single gunshot to the chest.²¹ George Zimmerman, who had suffered head injuries at some point before the arrival of the police, told the police that he and Martin had been involved in a physical altercation, and that he shot Martin in self-defense.²² He was taken into custody and released approximately five hours later, without being arrested.²³ The lead homicide investigator in the case recommended charging Zimmerman, but was overruled by the state's attorney general who explained that there was insufficient evidence to convict.²⁴ Martin's father was not informed of the death until 9:20 a.m. the following morning.²⁵

The case lent urgency to a national debate about racial profiling, which was already in the media spotlight because of a series of dramatic protests surrounding

16. For a timeline of the events leading up to Martin's death, see Adam Weinstein, *The Trayvon Martin Killing, Explained*, MOTHER JONES (Mar. 18, 2012, 1:42 PM), <http://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained> [<http://perma.cc/53QE-WC3X>].

17. Zimmerman explained, "This guy looks like he's up to no good or he's on drugs or something . . . These assholes, they always get away." *Id.* When Zimmerman told the 911 dispatcher that he was following him, Zimmerman was told, "Okay, we don't need you to do that." *Id.*

18. David Cook, *George Zimmerman Described Black Males as 'Suspicious' in Phone Calls*, CHRISTIAN SCIENCE MONITOR (June 25, 2013), <http://www.csmonitor.com/USA/USA-Update/2013/0625/George-Zimmerman-described-black-males-as-suspicious-in-phone-calls> [<http://perma.cc/E87G-DUW3>].

19. Weinstein, *supra* note 16.

20. Cook, *supra* note 18.

21. See Sari Horwitz & Stephanie McCrummen, *Trayvon Martin Documents Reveal New Details in Case*, WASH. POST (May 17, 2012), http://www.washingtonpost.com/politics/trayvon-martin-autopsy-report-indicates-struggle/2012/05/17/gIQAxw6HXU_story.html [<http://perma.cc/S2AP-6WSA>].

22. Lizette Alvarez, *Self-Defense, Hard to Topple*, N.Y. TIMES, July 15, 2013, at A1, A9.

23. Mark Strassmann, *What Happened Right After Trayvon Martin's Shooting?*, CBS NEWS (Mar. 27, 2012, 7:57 PM), http://www.cbsnews.com/8301-18563_162-57405476/what-happened-right-after-trayvon-martins-shooting/ [<http://perma.cc/7HHV-GD34>].

24. Julianne Hing, *As Millions Fight for Trayvon Martin, Kill at Will Laws Flourish*, COLORLINES (Mar. 29, 2012, 10:37 AM), http://colorlines.com/archives/2012/03/kill_at_will_laws.html [<http://perma.cc/J9RF-RY7L>]; see also Emily Bazelon, *What if Trayvon Martin Was the One Acting in Self-Defense*, SLATE (Mar. 28, 2013, 2:10 PM), http://www.slate.com/articles/news_and_politics/crime/2012/03/florida_s_stand_your_ground_law_doesn_t_prohibit_that_they_arrest_george_zimmerman_for_killing_trayvon_martin_.html [<http://perma.cc/7XMK-8GSE>] (quoting a letter from the Sanford city manager claiming that "[b]y Florida statute, law enforcement was PROHIBITED from making an arrest based on the facts and circumstances they had at the time").

25. George E. Curry, *Trayvon Martin's Parents Re-Live 'Nightmare'*, CHARLOTTE POST (Mar. 26, 2012, 8:28 AM), <http://www.thecharlottepost.com/index.php?src=news&refno=4505&category=News> [<http://perma.cc/CAN2-EZ3H>].

the New York City Police Department's "stop and frisk" policies.²⁶ Martin was shot while wearing a hooded sweatshirt (a "hoodie"), and after Geraldo Rivera used his platform on Fox News to indict Martin's "thug wear," suggesting that Martin's sartorial choices were responsible for his death, hoodies became a symbol of national protest.²⁷ There were "million hoodie marches" involving thousands of participants throughout the spring of 2012.²⁸ In late March, Democratic Congressman (and former Black Panther) Bobby Rush of Chicago was ejected from the House floor for wearing a hoodie during a floor speech.²⁹ A YouTube video of the ejection received more than 600,000 views.³⁰ Several days later, members of the Black, Latino, and Asian Pacific Islander Caucuses wore hoodies during a session of the California legislature, while protesting the killing and calling on the federal government to intervene in the investigation.³¹

But in the weeks that followed Martin's death, it was not the killing alone, but also the decision not to arrest or prosecute Zimmerman that aroused national outrage and elevated the case to the status of a cause célèbre.³² Media attention to

26. See Matthew Deluca & Jose Martinez, *NYPD's Stop and Frisk Tactics Protested in Harlem; Princeton Prof. Cornel West Among Those Arrested*, N.Y. DAILY NEWS (Oct. 21, 2011, 5:33 PM), <http://www.nydailynews.com/new-york/nypd-stop-frisk-tactics-protested-harlem-princeton-prof-cornel-west-arrested-article-1.965480>; WNYC Newsroom, *Protesters Oppose NYPD's Stop and Frisk Policy*, WNYC (Oct. 13, 2011), <http://www.wnyc.org/blogs/wnyc-news-blog/2011/oct/13/protesters-oppose-nypds-stop-and-frisk-policy/> [<http://perma.cc/TNM3-MX68>].

27. *Geraldo Rivera: Trayvon Martin Surveillance Tape Shows 'He's Dressed in Thug Wear'*, HUFFINGTON POST (May 20, 2012, 10:56 PM), http://www.huffingtonpost.com/2012/05/20/geraldo-rivera-trayvon-martin-thug-wear_n_1530811.html [<http://perma.cc/CF5Q-AHNX>]; see also Katherine Fung, *Geraldo Rivera: Trayvon Martin's 'Hoodie Is as Much Responsible for [His] Death as George Zimmerman'*, HUFFINGTON POST (Mar. 25, 2012, 2:51 AM), http://www.huffingtonpost.com/2012/03/23/geraldo-rivera-trayvon-martin-oodie_n_1375080.html [<http://perma.cc/6HBT-8VP7>].

28. *Trayvon Martin Protest in L.A.: 'Million Hoodie March' Calls for Justice*, HUFFINGTON POST (Apr. 10, 2012, 1:17 PM) http://www.huffingtonpost.com/2012/04/10/trayvon-martin-protest-la_n_1415208.html [<http://perma.cc/JV5L-7JZ5>]; see also Edgar Sandoval & Helen Kennedy, *'Million Hoodie' March Takes Union Square in Protest of Trayvon Martin's Fatal Shooting*, N.Y. DAILY NEWS (Mar. 21, 2012, 8:41 PM), <http://www.nydailynews.com/new-york/million-hoodie-march-takes-union-square-protest-trayvon-martin-murder-article-1.1048522#ixzzZTzpbZE4q>.

29. Gabe Rottman, *Hoodies and Congressional Expression*, ACLU (Mar. 29, 2012, 5:04 PM), <https://www.aclu.org/blog/free-speech-racial-justice/hoodies-and-congressional-expression> [<https://perma.cc/3J8E-4M2S>].

30. *Id.*

31. Michael Mishak, *California Lawmakers Don Hoodies to Protest Trayvon Martin Case*, L.A. TIMES BLOG (Mar. 29, 2012, 1:05 PM), <http://latimesblogs.latimes.com/california-politics/2012/03/california-lawmakers-don-hoodies-to-protest-trayvon-martin-case.html> [<http://perma.cc/LYY6-B4YY>]. Shortly after George Zimmerman was acquitted for the killing of Trayvon Martin, Lonnie Bunch, the director of the Smithsonian National Museum of African American History and Culture, expressed interest in acquiring Martin's hoodie for the museum's collection. Bunch explained that the hoodie "became the symbolic way to talk the Trayvon Martin case. It's rare that you get one artifact that really becomes the symbol Because it's such a symbol, it would allow you to talk about race in the age of Obama." Jamie Wetherbe, *Trayvon Martin's Hoodie to be Displayed at Smithsonian Museum?*, L.A. TIMES (Aug. 1, 2013, 12:53 PM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-trayvon-martin-hoodie-smithsonian-20130801-story.html> [<http://perma.cc/9J77-SEYZ>].

32. Much of the initial public outrage in the case was not only about the killing itself, but also about the apparent indication that the criminal justice system was indifferent to Trayvon Martin's death,

the case prompted Democratic members of the U.S. House of Representatives to hold a forum on racial profiling and hate crime prosecution,³³ while more than 2 million people signed a petition on the website change.org calling for Zimmerman's prosecution.³⁴ The call was eventually answered. On March 20, 2012, the U.S. Department of Justice announced an investigation into the case,³⁵ and on March 22, the Sanford chief of police stepped aside as the Florida Governor appointed a special prosecutor.³⁶ The following day, President Obama responded to a question about the case by discussing the urgent need to "get to the bottom of exactly what happened," and saying "[i]f I had a son, he'd look like Trayvon."³⁷ On April 11,

and was disinclined to try to provide justice. There is an important parallel to the 1991 beating of Rodney King. In that case, the brutality that was captured on George Holiday's amateur video created widespread outrage, but it was not until the LAPD officers who beat Rodney King were acquitted in a criminal trial that the Los Angeles "uprising," "rebellion," or "riots" began. For many people who were concerned with racist police brutality, the only thing that seemed unusual about the beating of Rodney King was that it had been captured on videotape. The acquittal of the officers appeared to send the message that, no matter how stark the evidence, the criminal justice system will not vindicate the rights of African American men victimized by police officers in the most brutal fashion imaginable. For a discussion of the racialized trial dynamics, see Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *READING RODNEY KING: READING URBAN UPRISING 15* (Robert Gooding-Williams ed., 1993).

Another parallel may be drawn to the racist killing of Stephen Lawrence in London in 1993. Writing about the case, Simon Cottle notes that there had been some protest and media coverage after Lawrence was killed by a group of white racists. However, it was not until the Crown Prosecution Service (CPS) decided not to prosecute his killers that the case generated national outrage. Cottle borrows from Victor Turner to argue that the decision created a "breach" in the public trust signaling that the CPS had no regard for Black life. It was this breach that created a major crisis of political legitimacy for the British criminal justice system. Simon Cottle, *Social Drama in a Mediatized World: The Racist Murder of Stephen Lawrence*, in *VICTOR TURNER AND CONTEMPORARY CULTURAL PERFORMANCE* 109, 112–13 (Graham St. John ed., 2008). If the initial decision not to prosecute George Zimmerman created a similar kind of breach, declining protests indicate that the breach was sutured over to some degree by the belated decision to appoint a special prosecutor and file second-degree murder charges. Any reassurance provided by this decision was, however, fleeting, as the protests following Zimmerman's acquittal signaled widespread fury and distress at the state of race and criminal justice.

33. Dennis Parker, *House Holds Forum on Racial Profiling and Hate Crimes in Wake of Trayvon Martin's Killing*, ACLU (Mar. 27, 2012, 1:25 PM), <https://www.aclu.org/blog/racial-justice/house-holds-forum-racial-profiling-and-hate-crimes-wake-trayvon-martins-killing> [<https://perma.cc/H58D-N6UH>].

34. Tracy Martin & Sybrina Fulton, *Prosecute the Killer of Our Son, 17-year-old Trayvon Martin*, CHANGE.ORG, <http://www.change.org/petitions/prosecute-the-killer-of-our-son-17-year-old-trayvon-martin> [<http://perma.cc/YFW8-JDHH>].

35. Lizette Alvarez, *A Florida Law Gets Scrutiny After a Teenager's Killing*, N.Y. TIMES (Mar. 20, 2012), <http://www.nytimes.com/2012/03/21/us/justice-department-opens-inquiry-in-killing-of-trayvon-martin.html>.

36. Susan Jacobson, *Trayvon Martin: Special Prosecutor Appointed in Trayvon Martin Shooting Case*, ORLANDO SENTINEL (Mar. 22, 2012, 9:07 PM), http://articles.orlandosentinel.com/2012-03-22/news/os-trayvon-martin-special-prosecutor-20120322_1_special-prosecutor-task-force-grand-jury [<http://perma.cc/LA9T-WK56>].

37. Sam Stein, *Obama on Trayvon Martin Case: 'If I Had a Son, He'd Look Like Trayvon'*, HUFFINGTON POST (Mar. 23, 2012, 3:39 PM), http://www.huffingtonpost.com/2012/03/23/obama-trayvon-martin_n_1375083.html [<http://perma.cc/4F6S-KCBE>].

2012, George Zimmerman was charged with second-degree murder and turned himself in.³⁸

Zimmerman's trial began on June 24, 2013.³⁹ The case once again attracted national and international attention, placing issues of race and self-defense under the media spotlight throughout the trial's three-week duration. While Zimmerman was initially charged only with second-degree murder, jurors were also given instructions on manslaughter at the trial's conclusion.⁴⁰ Zimmerman was acquitted on July 13, 2013.⁴¹ The acquittal sparked another round of protests around the country. At the height of this new round of protests, President Obama weighed in on the case.⁴² The president took the occasion to discuss racial profiling as a common experience facing African American men, and he reminded the audience that he had said that Trayvon Martin could have been his son.⁴³ President Obama re-emphasized this point by noting that "Trayvon Martin could have been me 35 years ago."⁴⁴ While many commentators welcomed the President's comments, they did not dispel the anger at Zimmerman's acquittal, and prominent pundits and activists called for federal civil rights charges to be brought against Zimmerman.⁴⁵

38. Lizette Alvarez, *Obeying Judge's Order, Zimmerman Turns Himself in and Is Back in a Florida Jail*, N.Y. TIMES (June 3, 2012), <http://www.nytimes.com/2012/06/04/us/zimmerman-returns-to-jail.html>.

39. Lizette Alvarez, *Clash of Styles in Court Opens Trial in Trayvon Martin's Death*, N.Y. TIMES, June 25, 2013, at A11.

40. Patrik Jonsson, *George Zimmerman Trial: Jury Can Consider Lesser Charge of Manslaughter*, CHRISTIAN SCI. MONITOR, July 11, 2013, at 11–12. The manslaughter charge could have resulted in up to thirty years imprisonment. *Id.* Under Florida law, manslaughter is the "killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification" where the killing is not excusable homicide or murder. FLA. STAT. ANN. § 782.07 (West, Westlaw through Ch. 255 of 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23d Leg.). Second degree murder, which may include a life-sentence prison term, is the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." *Id.* § 782.04.

41. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at 1, 20.

42. Mark Landler & Michael D. Shear, *President Offers a Personal Take on Race in U.S.*, N.Y. TIMES, July 20, 2013, at A1.

43. *Id.* at A11.

44. *Id.* at A1.

45. See Eric C. Jacobson, *Why the Justice Department Can (and Must) Criminally Prosecute George Zimmerman*, COUNTERPUNCH (July 29, 2013), <http://www.counterpunch.org/2013/07/29/why-justice-department-can-and-must-criminally-prosecute-george-zimmerman/> [<http://perma.cc/Y9YW-THPM>] (citing *United States v. Pimental*, 979 F.2d 282, 283–84 (2d Cir. 1992), to establish that Zimmerman can be prosecuted for violating Martin's civil rights under 18 U.S.C. § 245(b)(1)(B) (2012), even absent a finding of racial animus); Letter from Laura W. Murphy, Dir., Am. Civil Liberties Union, to Eric Holder, Att'y Gen., U.S. Dep't of Justice (July 18, 2013), https://www.aclu.org/sites/default/files/field_document/aclu_letter_to_ag_holder_re_zimmerman_case.pdf [<https://perma.cc/THQ8-6T68>] ("[T]he ACLU believes the Double Jeopardy Clause of the Constitution protects someone from being prosecuted in another court for charges arising from the same transaction. A jury found Zimmerman not guilty, and that should be the end of the criminal case.").

Zimmerman's acquittal also fueled outrage at the conviction of Marissa Alexander. Alexander, a Black woman in Florida, was tried after she claimed to have fired a warning shot to deter her husband from physically abusing her. In the minutes before Alexander fired the gun, her husband had accused

On February 24, 2015, the Justice Department announced that it would not prosecute Zimmerman, citing “insufficient evidence.”⁴⁶

B. *Stand Your Ground vs. Traditional Self-Defense Doctrine*

The Trayvon Martin case introduced much of the public to a new kind of self-defense statute. Florida’s “Protection of Persons/Use of Force Bill,”⁴⁷ passed into legislation in 2005, was the first of many such laws to be enacted in the past

her of infidelity, broken through a locked bathroom door, and grabbed her by the neck. Alexander’s husband eventually allowed her to leave the bathroom, and she was able to retrieve a gun from a car in the garage. When she returned to the house, her husband saw the gun and “charged her ‘in a rage,’ saying, ‘Bitch, I’ll kill you.’” *Alexander v. State*, 121 So. 3d 1185, 1187 (Fla. Dist. Ct. App. 2013). Alexander claims to have been startled as she raised the gun in the air and fired. *Id.* At trial, Alexander told the jury that this was only the most recent in a series of attacks dating back several years. On previous occasions, Alexander’s husband had attempted to strangle her, and he caused injuries requiring hospitalization. *Id.*

Alexander invoked Florida’s stand-your-ground law in a pretrial motion seeking immunity from prosecution, but the motion was denied, and Alexander was eventually sentenced to twenty years in prison. The Florida Court of Appeal upheld the denial of immunity, but granted Alexander a new trial because of erroneous self-defense jury instructions. *Id.* On November 28, 2013, Alexander was released from jail, pending the new trial. David Bauerlein, *Marissa Alexander Released from Jail*, FLA. TIMES UNION (Nov. 29, 2013, 11:44 AM), <http://jacksonville.com/breaking-news/2013-11-28/story/marissa-alexander-released-jail> [<http://perma.cc/ZBB2-F3SM>]. In November 2014, Alexander pleaded guilty to three charges of aggravated assault with a weapon. Anne Schindler, *Marissa Alexander Agrees to Plea Deal*, FIRST COAST NEWS (Nov. 24, 2014, 8:52 PM), <http://www.firstcoastnews.com/story/news/crime/2014/11/24/marissa-alexander-agrees-to-plea-deal/19483503/> [<http://perma.cc/65XS-T5PR>]. She was finally released on January 27, 2015, after serving three years in prison. Irin Carmon, *Marissa Alexander Released from Prison*, MSNBC (Jan. 27, 2015, 9:17 PM), <http://www.msnbc.com/msnbc/marissa-alexander-may-be-released> [<http://perma.cc/9PZH-ZGXE>]. For many critics of Alexander’s trial, the juxtaposition of Alexander’s conviction and Zimmerman’s acquittal indicated that Florida’s self-defense and stand your ground jurisprudence was riddled with racial and gender bias. Together, the cases appeared to indicate that a white male killer of a young Black man would be given every benefit of the doubt, while a Black woman’s claims of self-defense carried virtually no weight in the eyes of the law.

For a discussion of the movement to free Alexander, see Victoria Law, *Freeing Marissa Alexander*, TRUTHOUT (Oct. 16, 2013, 9:10 AM), <http://truth-out.org/news/item/19447-freeing-marissa-alexander> [<http://perma.cc/9CAK-B8FB>]. See also Andrea Smith, *Racism in the Legal System: Beyond the Quick-Fix Approach*, SOJOURNERS (Aug. 14, 2013), <http://sojo.net/blogs/2013/08/14/racism-legal-system-beyond-quick-fix-approach> [<http://perma.cc/P73G-K5DV>] (“The difference in jury outcomes for the Trayvon Martin vs. Marissa Alexander cases demonstrates that the problem is not just a particular law but the manner in which the law claims to be neutral but is in fact never applied neutrally. If the issue really was Stand Your Ground, then Alexander would not be spending a 20-year sentence for firing warning shots at her abuser. Her claims to self-defense were completely rejected by a Florida jury.”). Smith cautions that it is important to consider “all the unintended consequences” before reforming stand-your-ground or other laws. Most notably, she urges consideration of the impact that imposing a duty to retreat might have upon “sexual/domestic violence survivors asserting self-defense.” *Id.*

46. Zoe Tillman, *Feds Won’t Bring Civil Rights Charges in Death of Trayvon Martin*, LEGAL TIMES, (Feb. 24, 2015, 2:17 PM), <http://www.nationallawjournal.com/legaltimes/id=1202718794783/Feds-Wont-Bring-Civil-Rights-Charges-in-Death-of-Trayvon-Martin> [<http://perma.cc/CP73-N75F>].

47. See FLA. STAT. ANN. §§ 776.012, .013, .031, .032; S. 436, 2005 Sess. (Fl. 2005), <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=15498> (Protection of Persons/Use of Force).

decade.⁴⁸ Popularly known as “stand your ground” laws, this type of legislation had received remarkably little attention in the national press before the Martin killing, despite being adopted by nearly half of the states in the country.⁴⁹ In the wake of Martin’s death, the media was fascinated with stand-your-ground laws, but almost invariably failed to grasp the real nature of the change in self-defense doctrine initiated by this type of legislation.

It is difficult to discuss stand-your-ground legislation in general terms, because state legislative debates led to varying provisions by jurisdiction. The media, however, has been largely inattentive to regional variations. Instead of delving into the nuances of particular bills, most of the media coverage surrounding these laws highlights the one provision that is common to all of them: stand-your-ground legislation is consistently presented as nothing more than an extension of the “castle doctrine.”⁵⁰

The castle doctrine is a centuries-old doctrine from English common law that relaxes the standards for self-defense.⁵¹ Traditionally, use of lethal force in self-defense is permitted only if a defendant is unable to retreat to a place of safety.⁵² The castle doctrine is an exception to this requirement.⁵³ The doctrine removes the

48. Cora Currier, *The 24 States That Have Sweeping Self-Defense Laws Just Like Florida’s*, PROPUBLICA (Mar. 22, 2012, 12:05 PM), <http://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas> [<http://perma.cc/7MUK-GDFC>].

49. There were twenty-four states with some version of a stand-your-ground law in early 2012. *Id.* Because state laws around this issue are in a constant state of flux, and because provisions and names of the laws vary by state, it is difficult to determine exactly how many states have such laws at any given time. Still, the trend toward state adoption of stand-your-ground laws appears to have continued. A report issued by the American Bar Association notes that “[a]s of 2014, 33 states have Stand Your Ground laws.” Tamara F. Lawson, *Preliminary Report and Recommendations*, 2014 ABA NAT’L TASK FORCE ON STAND YOUR GROUND LAWS, at i, 19, <http://www.abajournal.com/files/GunReport.pdf> [<http://perma.cc/H3WE-DAXP>]. Nevertheless, the political momentum behind the laws has diminished somewhat in the wake of Martin’s death, and there have been some efforts to repeal or modify existing laws. *Id.* at 34–36; John Celock, *New Hampshire House Vote to Repeal Stand Your Ground Law*, HUFFINGTON POST (Mar. 27, 2013, 3:52 PM), http://www.huffingtonpost.com/2013/03/27/new-hampshire-stand-your-ground_n_2964309.html [<http://perma.cc/417X-PZHR>].

50. For example, when a reporter from *The Miami Herald* was asked on the National Public Radio program *Talk of the Nation* to explain how Florida’s stand-your-ground law changes existing self-defense law, she responded,

Well, under current law, you have to have made at least a reasonable effort to retreat if someone comes at you with what you believe is deadly force. You have to have at least some sort of—made an attempt to leave. Under this law, under the change in the law, you no longer have that duty to retreat.

Florida’s New Gun Law Loosens Curbs, NPR: TALK OF THE NATION (May 2, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4627356>. More recently, a *New York Times* editorial railed against stand-your-ground laws, noting that they “threaten public safety by eliminating the longstanding legal requirement that someone sensing a threat has a reasonable ‘duty to retreat’ from perceived danger before resorting to deadly force.” Editorial, *Shot to Death in Florida*, N.Y. TIMES, Mar. 22, 2012, at A30.

51. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 656 & n.10 (2003).

52. *Id.* at 656.

53. *Id.*

duty to retreat when someone is attacked in their home and reasonably believes lethal force is necessary for self-defense.⁵⁴

It is true that the stand-your-ground laws extend the castle doctrine, eliminating the duty to retreat no matter where a person is attacked.⁵⁵ On its own, this extension is troubling. From the outset, a number of law enforcement agencies and prosecutors objected to stand-your-ground legislation because they were concerned that it would turn cities into the Wild West. The fear was that without a duty to retreat, nonlethal confrontations would escalate to the point where one party would have a reasonable basis for believing that use of lethal force was necessary.⁵⁶

But this is actually a fairly minor part of the change in Florida's self-defense laws, and was largely irrelevant for the Trayvon Martin case, since no one involved with the case seemed to have ever suggested that the possibility of retreat was at issue.⁵⁷ In fact, even without stand-your-ground laws, it is generally difficult to

54. *Id.*

55. FLA. STAT. ANN. §§ 776.012, .013(3), .031 (West, Westlaw through Ch. 255 of 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23d Leg.). The elimination of the duty to retreat only applies "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." § 776.012(2).

56. Shortly before the killing of Trayvon Martin, former Broward County prosecutor David Frankel referred to the Florida stand-your-ground law as "an abomination," noting that "[t]he ultimate intent might be good, but in practice, people take the opportunity to shoot first and say later they had a justification. It almost gives them a free pass to shoot." Emily Bazelon, *Why Trayvon Martin's Killer Remains Free*, SLATE (Mar. 19, 2012, 5:29 PM), http://www.slate.com/articles/news_and_politics/crime/2012/03/why_george_zimmerman_trayvon_martin_s_killer_hasn_t_been_prosecuted_single.html [<http://perma.cc/AT7R-B7N7>].

57. Florida's version of a stand-your-ground law does not abolish the duty to retreat entirely. The duty still exists for an initial aggressor, or someone who "initially provokes the use or threatened use of force against himself or herself." FLA. STAT. ANN. § 776.041(2). Initial aggressors may not benefit from a self-defense instruction unless they have a reasonable belief that they are in imminent danger of death or great bodily harm and have exhausted all nonlethal methods of escaping such danger or have withdrawn from physical contact with the assailant and indicated their desire "to withdraw and terminate the use of force, but the assailant continues or resumes the use of force." *Id.* § 776.041(2)(b).

During George Zimmerman's trial, the press frequently discussed the idea that Zimmerman may have been an initial aggressor who could not benefit from a self-defense claim. *See, e.g.*, Charles M. Blow, Op-Ed., *The Zimmerman Trial*, N.Y. TIMES, June 29, 2013, at A19; Sunny Hostin, *Let a Jury Decide on Trayvon Martin Case*, CNN (Apr. 11, 2012, 11:39 AM), <http://www.cnn.com/2012/04/11/opinion/hostin-trayvon-martin-jury> [<http://perma.cc/X6F9-FNJZ>]. And several sponsors of Florida's stand-your-ground bill told the press that Zimmerman was the initial aggressor and therefore not entitled to the protection of the law. Jacob Sullum, *Was George Zimmerman the Aggressor?*, REASON (Mar. 22, 2012, 12:19 PM), <http://reason.com/blog/2012/03/22/was-george-zimmerman-the-aggressor> [<http://perma.cc/7ESP-ZKFL>] (quoting Dennis Baxley, the chief House sponsor of Florida's stand your ground law, saying that Zimmerman should be charged and that "there's nothing in this statute that authorizes people to pursue and confront people").

At trial, however, the initial aggressor rule did not enter into jury deliberations. The state asked for an initial aggressor limitation instruction, but the defense objected, arguing that there was no evidence that Zimmerman had initiated the physical confrontation with Martin, and arguing that it would be legal error to provide the instruction. The judge sided with the defense without offering any explanation for deciding not to provide the instruction. Alafair Burke, *What You May Not Know About the Zimmerman Verdict: The Evolution of a Jury Instruction*, HUFFINGTON POST (Sept. 14, 2013, 5:12 AM), http://www.huffingtonpost.com/alafair-burke/george-zimmerman-jury-instructions_b_3596685.html [<http://perma.cc/43A8-53CQ>]. In all likelihood, the initial aggressor instruction would not have

convict someone who fired in self-defense after refusing to retreat, since jurors seem reluctant to impose the duty and frequently find that defendants could not be sure that it was possible to retreat safely.⁵⁸ For this reason, when the Florida law was passed, a number of prominent legal scholars said that it was largely symbolic and would have little practical application.⁵⁹

This assessment overlooked elements of stand your ground laws that go beyond eliminating the duty to retreat, and that instead change the very nature of

made a difference in the outcome of Zimmerman's trial. The jury apparently believed Zimmerman's claim that Martin had repeatedly smashed his head into the concrete and that he was in immediate fear for his life. In this scenario, Zimmerman likely had no option to retreat, and self-defense would have been a viable defense even had the jury concluded that Zimmerman was the initial aggressor. Still, it is possible that an initial aggressor instruction would have encouraged the jury to consider the entire series of events leading up to Martin's death in a different light. The instruction might have focused their attention on a longer time period, rather than on the few seconds of physical struggle. Had the jurors focused more closely on the events before the confrontation, it is possible that their assessment of reasonable fear would have been shaped by consideration of a broader context.

As it was, the decision not to provide an initial aggressor instruction "effectively made everything George Zimmerman did leading up to killing Trayvon Martin, the very source of the outrage over the killing, irrelevant in deciding the case." Shenequa Grey, *The Real Reason for George Zimmerman's Acquittal—Initial Aggressor Jury Instruction Excluded*, FACEBOOK (July 17, 2013, 12:29 PM), <https://www.facebook.com/notes/shenequa-l-grey-esq/the-real-reason-for-zimmermans-acquittal-must-read/10151498182987019> [<https://perma.cc/9ZFX-XCJ8>]; see also Jeffrey A. Fagan, *The Zimmerman Verdict and the Initial Aggressor Exception*, COLUM. L. SCH. MAG., <http://www.law.columbia.edu/magazine/611849> [<http://perma.cc/V3PY-F8LL>]. This position finds some support in the words of one of the jurors. In an interview with CNN's Anderson Cooper, the juror who has been identified only as juror B37 noted that Zimmerman "started the ball rolling. He could have avoided the whole situation by staying in the car." *Not Guilty: The Zimmerman Trial*, ANDERSON COOPER 360° (CNN television broadcast July 17, 2013), <http://www.cnn.com/TRANSCRIPTS/130717/acd.02.html>. These comments suggest that the juror might have seen Zimmerman as the initial aggressor if she had been instructed to consider this possibility. Had she reached this conclusion, it is not clear what impact this might have had on the remainder of her deliberative process.

58. George Fletcher has said that "I don't know of any cases in which a defendant has been convicted because he did not retreat enough or the retreat doctrine actually led to a conviction." *Florida's New Gun Law Loosens Curbs*, *supra* note 50.

59. For example, George Fletcher told the *National Public Radio* audience that "It's largely a symbolic victory for the NRA, but I don't think it's going to make much of a difference in practice." Fletcher elaborated by noting that "changing the language on the duty to retreat doesn't basically change the fundamental requirements of self-defense . . . This is not a new thing . . . I don't think that the statute really changes anything; it's largely symbolic." *Id.* The notion that stand your ground laws changed existing self-defense laws in only minor ways has continued to be forwarded by a number of prominent law professors even in the wake of the Trayvon Martin killing. For example, David Kopel refuted the idea that the stand your ground law "affects the legality of whatever Mr. Zimmerman did," noting that because the retreat rules are not implicated in the case, "Florida's self-defense laws simply would not apply." David Kopel, *Debunking the 'Stand Your Ground' Myth*, WASH. TIMES (Apr. 2, 2012), <http://www.washingtontimes.com/news/2012/apr/2/debunking-the-stand-your-ground-myth/> [<http://perma.cc/TS35-S8K9>]. And, in a January 2013 forum on stand your ground laws in the *New York Times*, Adam Winkler summed up the laws by noting that they "eliminate the longstanding legal requirement that a person threatened outside of his or her own home retreat rather than use force." Adam Winkler, Op-Ed., *What the Florida 'Stand Your Ground' Law Says*, N.Y. TIMES (Jan. 4, 2013, 1:16 PM), <http://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/what-the-florida-stand-your-ground-law-says>.

law enforcement and prosecutorial decision making in violent crimes where self-defense claims are asserted.

Traditionally, self-defense is an affirmative defense.⁶⁰ This is a defense argued at trial, where the burden is usually on the defendant to prove, by a preponderance of the evidence, that he or she acted in self-defense.⁶¹ In order to claim self-defense, the defendant cannot be the initial aggressor.⁶² If the defendant can present credible evidence of an honest and reasonable belief that he or she was threatened with imminent use of unlawful force, and that the defendant's use of force was necessary to repel that threat, then the burden shifts back to the prosecution to disprove the self-defense claim beyond a reasonable doubt.⁶³ This is different from other criminal cases where a conviction is secured if the prosecution can meet its initial burden of establishing the elements of the offense beyond a reasonable doubt. In cases involving affirmative defenses, the defendant can admit to the elements of the offense while nevertheless obtaining an acquittal.

While the specific provisions adopted by different states vary, generally, the most important way that stand your ground laws change self-defense requirements is that they expand the protections given to potential self-defense defendants. Under most stand your ground laws, self-defense is not simply an affirmative defense to be argued at trial, but can instead become a bar to prosecution.⁶⁴ The Florida statute grants immunity from criminal prosecution or civil liability to anyone using deadly force under the law.⁶⁵ This immunity applies even if the person using deadly force

60. See, e.g., MODEL PENAL CODE § 3.01 (2014) (“justification is an affirmative defense”); *id.* § 3.04 (self-defense is a justification defense).

61. *Id.* § 1.12.

62. See *id.* § 3.04. For a typical formulation of the elements of the defense, see *State v. Kelly*, 478 A.2d 364, 374 (N.J. 1984) (“Honesty alone . . . does not suffice. A defendant claiming the privilege of self-defense must also establish that her belief in the necessity to use force was reasonable.”).

63. See, e.g., *People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011). In Colorado, where self-defense is an affirmative defense, “if a defendant charged with [a violent] crime raises credible evidence that he acted in self-defense, or if the prosecution presents evidence raising the issue of self-defense, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, and the trial court must instruct the jury accordingly.” *Id.*

64. *Horn v. State*, 17 So. 3d 836, 839 (Fla. Dist. Ct. App. 2009) (“[O]ur legislature intended to create immunity from prosecution rather than an affirmative defense and, therefore, the preponderance of the evidence standard applies to immunity determinations.”).

65. FLA. STAT. ANN. § 776.032(1) (West 2010 & Supp. 2015) (“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, as defined in section 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.”). However, “[t]he assertion that the law acts more as a bar to prosecution than a defense cannot be fully substantiated . . . because statistics on the number of self-defense claims statewide . . . are not available.” Zachary L. Weaver, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 407 (2008). Nevertheless, while

was the initial aggressor, as long as that person is responding to force that “is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and . . . has exhausted every reasonable means” to escape that danger or has withdrawn from physical contact with the assailant and has indicated a desire to withdraw and terminate the use of force.⁶⁶

The immunity provisions in the Florida statute take effect from the moment that the police become involved in a case. Immunity from prosecution “includes arresting, detaining in custody, and charging or prosecuting the defendant.”⁶⁷ Moreover, the statute specifies that a suspect cannot be arrested unless there is probable cause that the use of force was unlawful.⁶⁸ This is true in any self-defense case, since it is a basic Fourth Amendment requirement that there can be no arrest without probable cause.⁶⁹ But making this explicit in the law, when it is generally not explicit in other criminal statutes, suggests that violent crimes committed in the

it is true that it is impossible to quantify whether the law is used more frequently as a bar to prosecution than as a defense, there is no question that, on its face, the law imposes substantial barriers to prosecution.

The immunity provisions provide no exceptions for injuries to bystanders or for recklessness or negligence, and they include civil immunity, so as long as you had reasonable fear when you shot, you have no obligation to have fired with care or reasonable caution, and a third party who is injured or killed by your gunfire would have no legal recourse or remedy. FLA. STAT. ANN. § 776.032. The civil immunity provisions also obligate a plaintiff to pay attorney’s fees and court costs if the defendant is determined to have acted legally, regardless of whether the victim was actually committing a crime. *Id.* § 776.032(3). One important result is that an important method of fact finding is cut off—without civil suits, there will be less discovery, so anything that is not uncovered in the criminal proceedings will be very unlikely to be uncovered at all.

In the wake of the acquittal of George Zimmerman in the Trayvon Martin case, there has been some speculation that Martin’s family might file a civil suit against Zimmerman. *See e.g.*, Liz Halloran, ‘Stand Your Ground’ Laws Under Scrutiny Post-Zimmerman Verdict, NPR: IT’S ALL POLITICS BLOG (July 15, 2013, 5:45 PM), <http://www.npr.org/blogs/itsallpolitics/2013/07/15/202418599/stand-your-ground-laws-under-scrutiny-post-zimmerman-verdict>. Halloran notes that, while Zimmerman did not ask for an immunity hearing before his criminal trial, he could still request one for a civil hearing. *Id.* Halloran interviewed University of Florida law professor Joseph Little, who argued that a civil suit would provide the Martin family with the opportunity to challenge the immunity provision as a violation of the Florida constitution, because “[t]he Legislature did not prove an overpowering public necessity” for taking power away from the courts. *Id.* It is not clear whether the verdict in the criminal case would automatically establish that Zimmerman is immune from civil suit for the killing, but the defense would certainly be entitled to raise the same self-defense claims at a civil immunity hearing that they raised at trial. Zimmerman’s attorney Mark O’Mara has said, “If someone believes it’s appropriate to sue George Zimmerman, then we will seek and we will get immunity in a civil hearing, and we will see just how many civil lawsuits will be spawned by this fiasco.” Rene Stutzman, *Civil Suit vs. Zimmerman Carries Risks*, ORLANDO SENTINEL, July 17, 2013, at A1.

66. FLA. STAT. ANN. § 776.041(2)(a). This is in contrast to traditional self-defense, which is not available to initial aggressors. *See* DRESSLER, *supra* note 5, at 226 (“An aggressor ‘has no right to a claim of self-defense.’” (citing *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986)). For a fuller discussion of the initial aggressor rule, see the discussion *supra* note 57.

67. FLA. STAT. ANN. § 776.032(1).

68. § 776.032(2).

69. U.S. CONST. amend. IV; *Henry v. United States*, 361 U.S. 98, 100 (1959) (“The requirement of probable cause has roots that are deep in our history.”).

name of self-defense are to be treated differently than other crimes. The exact nature of the difference is, however, open to debate.

The immunity provisions have created confusion among law enforcement agencies and personnel. A spokesman for one Florida State Attorney's Office has said that "[s]ince very little case law exists, all we have to go on is our interpretation of the statute. It's too new for us to use case law effectively It is frustrating for the charging prosecutors."⁷⁰ In 2011, the Eleventh Circuit noted that "[u]nder Florida law, law enforcement officers have a duty to assess the validity of [the stand your ground] defense, but they are provided minimal, if any, guidance on how to make this assessment."⁷¹ Confusion and a lack of guidance from the legislative and judicial branches mean that prosecutors and police officers are left to their own devices to figure out how to implement stand your ground. This kind of unfettered discretion bodes ill for hopes that self-defense cases may be decided without allowing entry for racial bias.

C. *Discretion, Race, and Reasonable Fear*

One consequence of the lack of clarity in stand your ground implementation is that determinations of reasonable fear that would ordinarily be entrusted to the judicial system come into play much earlier in the process, and are left to the devices of law enforcement personnel. Without explicit guidance from above, other determining factors can fill the void. Scholars and activists concerned with racial bias in the criminal justice system have long argued that unfettered discretion may lead police officers to rely upon commonly held stereotypes and forms of both explicit and implicit bias.⁷² In an influential amicus curiae brief filed in the Supreme Court case *Terry v. Ohio*, the NAACP's Legal Defense and Educational Fund noted that "[h]istory, and not in this century alone, has taught that such discretion comes inevitably to be used as an instrument of oppression of the unpopular."⁷³ The Supreme Court has recognized that overly vague criminal laws "may authorize and

70. Henry Pierson Curtis, *Many Arrested Despite Self-Defense Claims*, ORLANDO SENTINEL, Mar. 22, 2012, at A1 (quoting Randy Means, chief investigator and spokesman for the Orange-Osceola State Attorney's Office).

71. *Reagan v. Mallory*, 429 F. App'x 918, 920 (11th Cir. 2011).

72. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998) ("At every step of the criminal process, there is evidence that African Americans are not treated as well as whites—both as victims of crime and as criminal defendants. And because prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound." (citation omitted)); Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 153 (2006) (noting that, in the context of inadequate suspect identifications, officers are given wide discretion leading to "enhanced powers to make arbitrary decisions about whom to stop, and opportunities to act upon or to amplify prejudices").

73. Sinha, *supra* note 72, at 159 (quoting Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 3–4, *Sibron v. New York*, 392 U.S. 40 (1968); and *Terry v. Ohio*, 392 U.S. 1 (1968)).

even encourage arbitrary and discriminatory enforcement.”⁷⁴ Zachary Weaver argues that “too much discretion” in stand your ground investigations “is especially troubling if law enforcement can pick and choose which incidents to investigate more thoroughly than others because it opens the door for personal bias, such as racial or gender animus, to play an improper role in the police’s decisions.”⁷⁵

Of course, racial and gender animus are not entirely *personal* forms of bias. Media stereotyping has led to an association between African American men and crime that is so pervasive and systematic as to have become automatic.⁷⁶ The perceived connections between race and crime are so powerful and ubiquitous that Kathryn Russell has coined the term “criminalblackman” to suggest that crime discourse immediately invokes racialized and gendered imagery and understandings—the categories mesh and blur together ensuring there is no space for reasoned consideration.⁷⁷ Because there is no reason to think that law enforcement personnel are any better isolated from such imagery than is the general public, unfettered law enforcement discretion is likely to be unduly influenced by racist stereotyping.

When prosecutors and police have expressed concern about the immunity

74. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

75. Weaver, *supra* note 65, at 410. Police and district attorneys have expressed concern that stand-your-ground laws remove their discretion to arrest and prosecute. See STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE: IMPLICATIONS FOR POLICY AND PRACTICE, <http://www.ndaa.org/pdf/Castle%20Doctrine.pdf> [<http://perma.cc/VPA6-HLSJ>].

76. See ALEXANDER, *supra* note 1, at 105–09, for an overview of recent literature documenting the prevalence and effects of racialized media stereotyping in the “war on drugs.” Of particular interest is a study suggesting “that the standard crime news ‘script’ is so prevalent and so thoroughly racialized that viewers imagine a black perpetrator even when none exists.” *Id.* at 106 (citing Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000)). Other racialized minorities are also subject to stereotypical depictions of criminality and violence. See LEE, *supra* note 7, at 170 (noting the “Asian-as-Martial-Artist stereotype” has “influenced some individuals to use deadly force against an Asian American they thought knew martial arts”); Suzan Shown Harjo, *American Indians—Redskins, Savages, and Other Indian Enemies: A Historical Overview of American Media Coverage of Native Peoples*, in IMAGES OF COLOR, IMAGES OF CRIME: READINGS 56 (Coramae Richey Mann & Marjorie S. Zatz, eds., 2d ed. 2002) (linking portrayals of Native Americans as “savages” to U.S. Western expansion and conquest); Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1084 (2001) (“Latino adolescent males [are frequently characterized] as violent, inherently dangerous and endangering . . . [T]heir brown bodies, no matter how young or small, are circumscribed as dangerous, prior to any gesture, any raising of the hand.” (citations omitted)). While the bulk of the analysis in this Article addresses the impact of antiBlack stereotypes, the need to root out other kinds of racial stereotypes in self-defense deliberations is apparent from a series of troubling cases. See generally LEE, *supra* note 7, for discussions of some of the best-known self-defense cases involving stereotypes of Latinos and Asian Americans as violent. If people of color are frequently depicted as criminal threats, they are far less likely to be depicted as crime victims. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 76 (2007) (“It is not all victims, but primarily white, suburban, middle-class victims, whose exposure has driven waves of crime legislation.”).

77. KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 3 (1998).

provisions in stand your ground laws, the tendency has been to complain that the laws leave them with too *little* discretion over decisions to prosecute and arrest, rather than too much.⁷⁸ In one sense, this complaint is based upon a fair reading of the statutes since stand your ground laws raise considerable barriers to arrest and prosecution. Discretion is taken away to the extent that there are a greater number of cases where arrests and prosecution are no longer possible.⁷⁹ On the other hand, in the cases where case law and statutory language offer unclear guidance as to whether stand your ground should prevent arrest and prosecution, police and prosecutors have virtually unlimited discretion to decide whether to accept a potential defendant's claims of reasonable fear.⁸⁰ In such cases, there is considerable reason for concern that racial bias will influence determinations of reasonableness.

Arguably, the most important effect of stand your ground laws is that they push the initial reasonableness determination to an earlier moment in the case and then provide additional opportunities for a variety of legal actors to intervene and derail criminal proceedings. Under Florida's stand your ground statute, the immunity determination can be made "at any stage of the proceeding" by "law enforcement officers, prosecutors, judges, and juries."⁸¹ Part of what this means is

78. See JANSEN & NUGENT-BORAKOVE, *supra* note 75, at 6 (stand-your-ground laws "essentially eliminat[e] prosecutorial discretion in evaluating whether the use of deadly force was justified").

79. It is also worth noting that officers may actually be afraid to arrest people who claim self-defense since there have been cases where defendants have sued officers for false arrest under the immunity provision, though those suits have thus far been unsuccessful. See *Reagan v. Mallory*, 429 F. App'x 918, 919 (11th Cir. 2011). In *Reagan*, the case was dismissed because it was not clearly established law that the officer lacked probable cause for arresting the defendant under a stand-your-ground law, and the officer was therefore entitled to qualified immunity. *Id.* Cases like this, however, might go some distance toward establishing that this lack of probable cause is well established, so there is no guarantee that future officers arresting similar suspects will also be entitled to qualified immunity. Indeed, the local police chief in the Trayvon Martin case claimed to be concerned about civil liability should he act too aggressively in the case. *Hing*, *supra* note 24.

80. The most sweeping change to self-defense law introduced by the Florida stand-your-ground bill is not implicated in the Trayvon Martin case. The law expands the castle doctrine to include an irrebuttable presumption of reasonable fear when the defendant shoots someone in the home, or wherever the "castle" extends, including in the defendant's vehicle. FLA. STAT. ANN. § 776.013 (West, Westlaw through Ch. 255 of 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23d Leg.). In ordinary castle doctrine jurisdictions, the defendant is required to prove that he acted out of reasonable fear. Under the Florida statute, the state is not permitted to present evidence rebutting the presumption that the defendant did have reasonable fear. *State v. Heckman*, 993 So. 2d 1004, 1006 (Fla. Dist. Ct. App. 2007) ("The creation of section 776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such."). This issue is not relevant for the Martin case because Martin was not in Zimmerman's home or "castle," but had Zimmerman claimed that Martin attacked him in his car, it is possible that this provision would have kicked in. Interestingly, because this provision removes police and prosecutorial discretion entirely, this is a change in self-defense law that does *not* allow for the intrusion of racial bias into the reasonableness inquiry.

81. *Reagan*, 429 F. App'x at 920; *Velasquez v. State*, 9 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009) ("[T]he legislature did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process."), *abrogated by Cruz v. State*, 54 So. 3d 1067, 1068-69 (Fla. Dist. Ct. App. 2011).

that a case is unlikely to be prosecuted if a police officer decides that a shooter acted with reasonable fear. This would not normally be the case, since standard police investigation procedures do not include determining whether the force that was used was reasonable or whether there was reasonable fear.⁸² Instead, determinations of reasonable fear and reasonable force, involving careful interpretation and fact-finding, would ordinarily be made in court or by a grand jury.⁸³ The problem here is not only that police officers' determinations of reasonable fear may be influenced by racial bias. Instead, because police officers' investigatory responsibilities are so much greater under stand your ground than under traditional self-defense, it is possible that racial bias may play a role in limiting police incentive to take on this burden. Racialized understandings of crime may convince officers to accept a shooter's self-defense claims at face value.⁸⁴ It is possible that this dynamic can explain the initial decision not to charge George Zimmerman for the death of Trayvon Martin.⁸⁵

When police do decide to investigate further, and when prosecutors do decide to prosecute, Florida's stand your ground law provides one final obstacle that may prevent a jury from ever hearing the case: the Florida Supreme Court has determined that a defendant who claims self-defense is entitled to an immunity hearing before a judge prior to trial.⁸⁶ During an immunity hearing, the defendant

82. See JANSEN & NUGENT-BORAKOVE, *supra* note 75, at 9; Patricia Wallace, *Stand Your Ground: New Challenges for Forensic Psychologists*, FORENSIC EXAMINER, Fall 2006, at 37, 39–40 (“The new law obligates Florida’s law enforcement agencies . . . to determine (using their own standard investigation procedures) whether the reasonable fear/deadly force issue will ever reach a court of law. . . . It is unclear whether all law enforcers will use the same model or measure of the reasonableness of the fear that [led] to the use of deadly force. . . . The additional burden of determining reasonableness of deadly force is a tremendous, and possibly unreasonable, responsibility for the law enforcement agency without supplementary training and assessment tools. . . . [The Florida stand your ground statute] means in essence that law enforcement agents, not courts of law, will make determinations of the reasonable fear-reasonable force nexus.”).

83. See Michael J.Z. Mannheimer, *Trayvon Martin and Florida’s “Stand Your Ground” Law*, PRAWFSBLOG (Mar. 22, 2012, 11:28 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/03/trayvon-martin-and-floridas-stand-your-ground-law.html> [<http://perma.cc/Z5KX-WBPE>].

84. JANSEN & NUGENT-BORAKOVE, *supra* note 75, at 9 (“[O]fficers may feel that the person on the receiving end of an encounter in which the Castle Doctrine is invoked ‘deserved’ what he or she received. This is particularly true if the case involves two criminals. As a result, the officers may be less inclined to carry out the more intensive investigative work that is needed in cases involving the Castle expansion.”). Zimmerman’s self-defense claim “may have affected how thoroughly the police interviewed witnesses, preserved the crime scene and screened Mr. Zimmerman.” Alvarez, *supra* note 22; see also Serge F. Kovaleski, *In Martin Case, Police Missteps Add to Challenges to Find Truth*, N.Y. TIMES, May 17, 2012, at A1.

85. See Patricia J. Williams, *States of Exception*, NATION, May 7, 2012, at 10 (“When law enforcement officers accept—*without question*—an admitted killer’s assertion that a homicide was justified because ‘he scared me,’ they license open season.”). In the Martin case, the law enforcement officers in question may have been the police officers at the scene, the police chief, or prosecutors.

86. *State v. Vito*, 100 So. 3d 716, 717 (Fla. Dist. Ct. App. 2012) (“When a defendant invokes the statutory immunity, the trial court must hold a pre-trial evidentiary hearing to determine if the preponderance of the evidence warrants immunity.” (citation omitted)); *Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010) (“In summary, we conclude that the procedure set out by the First District in *Peterson*

must prove by a preponderance of the evidence that his or her violent actions were motivated by reasonable fear.⁸⁷ The case only goes to trial if the defendant cannot meet this burden. And if the defendant cannot satisfy the judge that he acted on the basis of reasonable fear, he can still try to convince the jury of this.⁸⁸ So, the law allows the defendant a second bite at the apple, or two ways to go free.⁸⁹ And, again, this is only if the prosecution decides to press charges in the first place, which is less likely under stand your ground.

D. *The Importance of Stand-Your-Ground Legislation*

It is difficult to gauge the impact of stand your ground laws since there are no clear statistics about the number of self-defense claims that have been made in any of the states where these laws exist. A president of the Florida Association of Criminal Defense Lawyers has said that the real effect of the law in Florida has been to make filing decisions difficult for prosecutors, and that there are many cases where charges are not filed at all or are filed with reduced charges.⁹⁰ The U.S. Commission on Civil Rights has opened an investigation into stand-your-ground laws, and has noted that there was a doubling of justifiable homicides from 2005–2011 in states where stand-your-ground laws were enacted.⁹¹ The Commission has further noted that while white killers of Black victims constitute only 3.1% of all homicides, they account for more than 15% of justifiable homicides, indicating that whites who kill Blacks may be disproportionately likely to be seen as having acted

[requiring a pre-trial evidentiary hearing on claims of statutory immunity] best effectuates the intent of the Legislature”)

87. *Peterson v. State*, 983 So. 2d 27, 28 (Fla. Dist. Ct. App. 2008) (“[A] criminal defendant claiming protection under the [stand your ground] statute must demonstrate by a preponderance of the evidence that he or she is immunized from prosecution.”).

88. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012) (denying an immunity petition during pretrial hearing is “without prejudice to the raising of the Stand Your Ground defense at trial”); *McDaniel v. State*, 24 So. 3d 654, 656 (Fla. Dist. Ct. App. 2009) (“When a defendant’s motion to dismiss on the basis of immunity is denied, the defendant may still assert the issue to the jury as an affirmative defense.”).

89. George Zimmerman waived his right to a pretrial immunity hearing for having killed Trayvon Martin. Lizette Alvarez, *Zimmerman Forgoes Pretrial Hearing, Taking Issue of Immunity to a Jury*, N.Y. TIMES, May 1, 2013, at A12. Apparently, Zimmerman was concerned that going through an immunity hearing (where he would have had the burden of proving, by a preponderance of the evidence that he had acted in self-defense) would provide the prosecution with an early preview of his trial strategy. *Id.* At trial, the burden was on the prosecution, which needed to prove beyond a reasonable doubt that Zimmerman was *not* justified in the use of force. See *George Zimmerman Final Jury Instructions*, L.A. TIMES, July 12, 2013, <http://documents.latimes.com/zimmerman-final-jury-instructions>.

90. Kapree Harrell, *A Closer Look at Florida’s “Stand Your Ground Law,”* DOCKET (Apr. 9, 2012), <http://digital.case.edu/downloads/8336tc86m> [<http://perma.cc/Y9EM-YBWT>] (citation omitted).

91. For a discussion of the Commission’s investigation, see Judd Legum, *U.S. Commission on Civil Rights to Investigate ‘Stand Your Ground’ Laws for Racial Bias*, THINK PROGRESS (June 10, 2012, 10:07 AM), <http://thinkprogress.org/justice/2012/06/10/496949/us-commission-on-civil-rights-to-investigate-stand-your-ground-laws-for-racial-bias/> [<http://perma.cc/GEJ9-TSV4>].

on the basis of reasonable fear.⁹² If true, this bears out a 2007 warning from the National District Attorneys Association that stand-your-ground laws may lead to a “misinterpretation of physical clues that results in the use of deadly force, exacerbating culture, class, and race differences [that will have] a disproportionately negative effect on minorities, persons from lower socioeconomic status, and young adults/juveniles.”⁹³ An analysis of nearly 200 cases by the Tampa Bay Times reinforces this point, as the paper found that 73% of people who killed a Black person faced no punishment, compared to 59% of those who killed a white person.⁹⁴

By allowing a greater variety of legal actors greater discretion to determine that a violent act was based on reasonable fear, stand-your-ground laws offer numerous opportunities for racial bias to infiltrate the earliest stages of self-defense cases, and to determine the outcome of such cases. And it is not just old-fashioned reliance on crude racist stereotypes that is at issue, as stand-your-ground laws may allow implicit forms of racial bias greater reign.⁹⁵ It would be a mistake, however, to see the problem posed by stand-your-ground laws as something qualitatively new. Instead, the central way that stand-your-ground legislation allows for racial bias to influence self-defense cases is in the determination of what counts as reasonable fear. This is a problem inherent in standards of reasonableness that are at the heart of *every* self-defense case.

92. *See id.* This finding is bolstered by a study by the Urban Institute indicating that white shooters who kill Black victims are 350% more likely to be found justified than white shooters who kill white victims. Lawson, *supra* note 49, at 31.

93. Legum, *supra* note 91.

94. Susan Taylor Martin et al., *Race's Complex Role in Florida's 'Stand Your Ground' Law*, TAMPA BAY TIMES (June 2, 2012, 1:00 PM), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152> [<http://perma.cc/2D23-D5GE>]. The article notes that the study might fail to account for some fatal stand-your-ground cases in Florida. The data may not be able to capture the full the range of racial dynamics affected by the law. For example, the paper found “only eight fatalities with a Hispanic victim” which is too small of a sample to make clear how anti-Latino bias plays into stand-your-ground outcomes. Moreover, while “about 7 percent of the cases identified by the *Times* had a Hispanic victim or defendant . . . the true percentage is probably far higher because police and arrest records generally classify people as ‘white’ or ‘black,’ not Hispanic.” *Id.*

95. Psychologist Jennifer Eberhardt has “explained that stand your ground laws give people broad leeway in determining what constitutes a threat, how to act upon those perceived threats, and how that renders blacks vulnerable. She described several studies that explore the association between black and crime and how that association can influence a person’s perception and memory. In one of the studies, simply exposing a person to a black face facilitated that person’s ability to see weapons, regardless of the person’s prejudice level. She described another study that found people were quicker to shoot black men with guns than white men with guns, and if there existed any doubt, would shoot a black person with no gun over a white man with no gun. ‘In the absence of laws that constrain the use of force in the service of defense . . . blacks are more likely to draw out attention and more likely to be perceived as threatening.’” Lawson, *supra* note 49, at 30.

II. RACE AND REASONABLE FEAR

A. *The Reasonableness Inquiry as Point of Entry for Racial Bias*

Ultimately, the Trayvon Martin case aroused national ire because, at crucial moments, key actors within the criminal justice system appeared all too willing to accept that George Zimmerman had reasonable fear coupled with a reasonable belief that it was necessary to use lethal force against an unarmed seventeen-year-old boy. To many observers, there seemed to be three different ways that racial bias had entered into the proceedings. First, Zimmerman's personal fears appeared to have been steeped in racial stereotypes of African American men, rather than based on a reasonable assessment of the situation.⁹⁶ His fear, endorsed by some prominent pundits, seemed not to have been reasonable at all. Nor did his actions, which included pursuing Martin after being advised not to by a 911 dispatcher.⁹⁷ In short, the killing appeared to have been the result of an ill-advised and semivigilante form of racial profiling.⁹⁸ Second, and arguably more importantly, the initial decision not to arrest or prosecute Zimmerman was understood to mean that the legal system was sanctioning his fears and actions, thereby endorsing the very stereotypes that Zimmerman relied upon and sending a message that devalued Black life. Finally, as Zimmerman's defense team worked to convince an almost all-white jury that Zimmerman's actions were borne out of reasonable fear, it relied upon a series of well-worn racial tropes to present a seventeen-year-old boy as a monstrously brutal thug.⁹⁹ The central issues in the case, therefore, were not about stand-your-ground

96. Prior to killing Trayvon Martin, Zimmerman had repeatedly called 911 to report "suspicious" young Black men walking around Sanford. Bazelon, *supra* note 24 (noting that over a period of ten years, Zimmerman placed forty-six 911 calls reporting "black people for hanging out and children for playing in the street"); Matthew DeLuca, *Did Trayvon Shooter Abuse 911?*, DAILY BEAST (Mar. 22, 2012, 7:55 PM), <http://www.thedailybeast.com/articles/2012/03/23/did-trayvon-shooter-abuse-911.html> [<http://perma.cc/5AFE-QKW7>]. The prosecution fought to have these calls entered into evidence. While the judge ultimately granted the prosecution's request, the prosecution did not use this evidence during trial. Lisa Bloom, Op-Ed., *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html>.

97. CNN Library, *Trayvon Martin Shooting Fast Facts*, CNN, <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts> [<http://perma.cc/A8N6-B6DZ>] (last updated Feb. 11, 2015).

98. It would be a mistake to see Zimmerman as a full-fledged vigilante because as a Neighborhood Watch captain, he had a formalized relationship with the police. His actions were, therefore, not entirely personal, and instead involved a degree of state power. See *Crime Prevention*, SANFORD FL., <http://www.sanfordfl.gov/index.aspx?page=340> [<http://perma.cc/8X6Q-Y9WM>] (last updated May 2015) ("Neighborhood Watch is one of the oldest and most effective crime prevention programs in the country, bringing citizens together with law enforcement to deter crime and make communities safer.").

99. For example, shortly before trial, the defense released a series of text messages and photographs taken from Martin's cellphone "showing the Florida teenager discussing guns, fighting and smoking marijuana." Richard Luscombe, *George Zimmerman Lawyers Release Data from Trayvon Martin's Cellphone*, GUARDIAN (May 23, 2013, 4:29 PM), <http://www.theguardian.com/world/2013/may/23/zimmerman-lawyers-trayvon-martin-texts> [<http://perma.cc/2PMW-ZMT6>]. The judge did not allow the defense to present most of this evidence at trial. Richard Luscombe, *Judge Bars Evidence of Trayvon*

legislation itself. Instead, the case raised the questions of what it means to allow a suspect to claim self-defense when his or her fear or actions may have been shaped by racist stereotypes, and of how racial bias may affect the self-defense determinations of a range of legal actors.

This Part argues that both of these questions revolve around standards of reasonableness that guide the self-defense inquiry. In a society in many ways defined by white supremacist ideology, racism has a deeply engrained and immediately recognizable logic.¹⁰⁰ Defendants whose fear and violent actions are based in racist stereotypes cannot, therefore, be easily isolated for their aberrant belief systems. They will not be easily dismissed as deviant “racists,” or identified as irrational. Indeed, their actions are based on systematically formed belief systems that help constitute some of the basic building blocks of American racial ideology and national identity. Existing standards of reasonableness are all too vulnerable to criminal defenses based on exploiting this logic.

B. Subjective Standards

1. Prologue: John White

On the night that he killed Daniel Cicciaro, Jr., John White’s slumber was broken by the terrified voice of his son, Aaron, yelling “Pop, get up. These people are coming to try to kill me.”¹⁰¹ The Whites are African American, while Cicciaro and the group of friends that accompanied him on a late night excursion to the White’s home in the suburban town of Miller Place in Suffolk County, New York were white. According to the 2010 census, whites make up nearly 94% of the population of Miller Place, while 1.7% is African American.¹⁰² Aaron approached

Martin Drug Use from Zimmerman Trial, GUARDIAN (May 28, 2013, 2:05 PM), <http://www.theguardian.com/world/2013/may/28/trayvon-martin-drug-use-barred> [<http://perma.cc/3GDL-ZBPT>].

The defense did, however, make prominent use of a shirtless photograph of Martin in closing arguments. See discussion of this photo *infra* Part III.C. Conservative media outlets added to the defense’s portrait by circulating reports that Martin might have been suspected of stealing jewelry, that he had been suspended from school for having what “was thought to be an empty bag of marijuana,” and, in the case of Breitbart.com, describing Martin as a “thug” and “another black punk who got what he deserved.” Zerlina Maxwell, Opinion, *The Thug-ification of Trayvon Martin: Smear Campaign Distracts from the Case*, GRIO (Mar. 28, 2012, 9:12 AM), <http://thegrio.com/2012/03/28/the-thug-ification-of-trayvon-martin-smear-campaign-distracts-from-the-case/> [<http://perma.cc/9H2F-LSGF>].

100. See Andrea Smith, *Indigeneity, Settler Colonialism, White Supremacy*, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 66, 67 (Daniel Martinez HoSang et al. eds., 2012) (addressing the “separate and distinct, but still interrelated, logics” constituting white supremacy).

101. *People v. White*, 901 N.Y.S.2d 346, 350 (App. Div. 2010).

102. United States Census Bureau, *Table QT-P4, Race, Combination of Two Races, and Not Hispanic or Latino*, AM. FACT FINDER, <http://factfinder2.census.gov> [<http://perma.cc/U3YG-3H6Q>] (follow “Advanced Search” hyperlink; then search “Geography, Place Within State: Miller Place CDP, New York”; follow “Race and Ethnic Groups” hyperlink; then search using “Race & Ethnicity: White, White, Not Hispanic or Latino, Black or African American”; select table QT-P4, “Race, Combination of Two Races, and Not Hispanic or Latino: 2010” from list).

his father's bedside about an hour after leaving a party where Daniel and his friends were guests.

The events of the evening are in dispute, but there is agreement that, at some point during the party, Daniel was told about eight-month-old allegations (later demonstrated to be false) that Aaron had allegedly posted a message on an internet site threatening to sexually assault a white friend's younger sister.¹⁰³ Aaron left the party early, but Daniel called him on his cell phone to confront him about the allegations.¹⁰⁴ It is not entirely clear what was said that caused Daniel to gather two carloads of friends, or what their intentions were as they left the engines and lights on while climbing out of their cars near the White's driveway.¹⁰⁵ The cars' lights may have been pointed into the driveway and into the White's home, or they may have been pointed into the street.¹⁰⁶ Daniel called Aaron twice, and, during the second call, he may or may not have told Aaron that he had come to kill him.¹⁰⁷ Daniel may have littered the second call with racial epithets.¹⁰⁸ Whatever was said was apparently enough to convince the Whites to see the uninvited visitors as a serious threat.¹⁰⁹ Aaron and John quickly gathered two guns that were in their home, and went outside to ward off Daniel and his friends.¹¹⁰ It is not clear what was said during the confrontation, or if John White fired his handgun intentionally.¹¹¹ Before the gun went off, Daniel "slapped," "whacked," or "grabbed" at it.¹¹² Daniel's friends denied that racial epithets were used during the confrontation, though at least one of them can be heard using slurs on a 911 call after Daniel was shot, as he vowed to avenge Daniel's death.¹¹³ The prosecution admitted to the jury that racial epithets had been used during the confrontation.¹¹⁴

103. *White*, 901 N.Y.S.2d at 349; Calvin Trillin, *Letter from Long Island—The Color of Blood: Race, Memory, and a Killing in the Suburbs*, NEW YORKER, Mar. 3, 2008, at 30, 32.

104. *White*, 901 N.Y.S.2d at 348–49.

105. *Id.* at 349.

106. The defense's contention that at least one of the cars was pointed so that its lights shined into the Whites' house was supported by expert analysis of a neighbor's video surveillance tape that had captured images of headlight reflections against a mailbox. Trillin, *supra* note 103, at 35.

107. At trial, Aaron testified that after leaving the party, Daniel called him and told him to return to the party so that Daniel could "kick . . . [his] ass" and that Aaron believed that Daniel was going to kill him. *See White*, 901 N.Y.S.2d at 350. Aaron also testified that Daniel called him again once he had arrived at Aaron's home and demanded that Aaron come out of the house because he "was there to kill him." *Id.* However, the prosecution argued, via the testimony of the four teenagers who accompanied Daniel to Aaron's home that evening, that when Daniel called Aaron a second time, Aaron "had told him to 'come to his house and fight him.'" *Id.* at 348–49.

108. *See id.* at 350.

109. Trillin, *supra* note 103, at 35–36.

110. *White*, 901 N.Y.S.2d at 350–51.

111. At trial, the defense argued that the gun went off as John White turned to avoid Daniel, who had lunged toward the gun that White held in his hand. *Id.* Witnesses for the prosecution testified that White raised the gun and shot Daniel after Daniel had slapped the gun with his right hand. *Id.* at 349.

112. Trillin, *supra* note 103, at 32.

113. *White*, 901 N.Y.S.2d at 349.

114. Trillin, *supra* note 103, at 36. Cicciano's parents hotly disputed claims that Daniel was racist, "noting that [his mother] is of Puerto Rican heritage, and that he had black friends, including Aaron

At trial, John White testified that he had endured incidents of racial discrimination as a child, and that his grandfather told him that the Ku Klux Klan had killed two members of his family in 1924, when lynching rates were at their peak.¹¹⁵ He said that, while he did not intend to shoot Daniel, he perceived the uninvited visitors who had appeared at his house in the dead of night as a “lynch mob” that had come for his son.¹¹⁶ Sonia White, John’s wife, echoed this sentiment, telling the jury that the teenagers had come to her home “posturing” and acting “as if they owned it,” and that they were acting like a “lynch mob.”¹¹⁷ John elaborated by stating that Daniel and his friends appeared to be a lynch mob shouting a variety of epithets and threats, including “We could take that skinny nigger motherfucker.”¹¹⁸ He explained that his understanding of the threat was shaped by his biography and understanding of racial dynamics, noting, “In my family history, that’s how the Klan comes. They pull up to your house, blind you with their lights, burn your house down. That’s how they come.”¹¹⁹

At trial, John White claimed that the shooting was accidental, but he also sought the protection of New York’s version of the castle doctrine, providing that a person “in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.”¹²⁰ This statute does not have the immunity provisions typical of stand-your-ground laws and has been characterized as a “weak” version of the castle doctrine.¹²¹ Nevertheless, it provided John White with a way to, in effect, present a self-defense case, despite being armed while Cicciaro and his friends were not, and despite having left his house to confront them. The question then became: would a jury see John White’s fear as reasonable?

White.” Cory Kilgannon, *Jury Convicts Man Who Shot Teenager During Driveway Confrontation*, N.Y. TIMES, Dec. 23, 2007, at 43.

115. *White*, 901 N.Y.S.2d at 350.

116. *Id.* at 351.

117. *Id.*

118. Trillin, *supra* note 103, at 36.

119. *Id.*

120. N.Y. PENAL LAW § 35.20(3) (McKinney 2009). Other components of the New York castle doctrine are contained in N.Y. Penal Law § 35.15, the section dealing with traditional self-defense. *See id.* § 35.15.

121. Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 523 n.7 (2010) (“New York does recognize a weak form of the common law castle doctrine, but unlike more expansive recent castle law statutes, it still requires proof that the home dweller’s fear of the intruder’s imminent violent behavior was reasonable. *See* N.Y. PENAL LAW § 35.15 (McKinney 2004). Further, it does not presume a threat of imminent violence based on the intrusion alone. *See* § 35.15.”).

2. *The Case for a Subjective Standard*

The reasonableness inquiry has been in a constant state of flux since it was first applied to the self-defense context in the early nineteenth century.¹²² It was not until the early twentieth century that it fully supplanted an “actual danger” approach.¹²³ Reasonableness standards have varied in terms of the kinds of information and context that fact finders are permitted to consider in assessing a defendant’s actions.¹²⁴ Most importantly, courts have debated whether to allow consideration of a defendant’s personal characteristics and experiences.¹²⁵ Regardless of how these debates were resolved, the reasonableness determination has always been a comparative inquiry: the defendant’s beliefs and actions are measured against what an abstract reasonable person would have believed and the actions they would have taken. Until very recently, the “reasonable person” was always a “reasonable man.”¹²⁶

In the early stages of their research on standards of reasonableness in self-defense and provocation cases, Dolores Donovan and Stephanie Wildman planned to argue that the “reasonable man” standard was a gendered construct that could not account for the experiences of women, and that a “reasonable woman” standard was a necessary supplement.¹²⁷ They soon determined, however, that this would not fully address the problem because abstract standards of reasonableness inevitably reflect dominant value systems while marginalizing anyone whose socioeconomic characteristics set “them apart from mainstream middle class America.”¹²⁸

Equally important, Donovan and Wildman argued that the reasonableness inquiry was directly at odds with the “fundamental tenet [sic] of Anglo-American criminal jurisprudence” that legal fact finders are required to examine the actual mental state of the defendant and determine whether he or she had the *mens rea* required for conviction.¹²⁹ Any version of a reasonableness test is “antithetical to the concept of *mens rea*” because it substitutes a jury’s determination of what a

122. Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 443 (1981) (first mention of a requirement that a defendant have a reasonable belief that he was facing “actual danger” appeared in 1803).

123. *Id.* at 444.

124. *Id.* at 444–45.

125. *Id.* at 444 (“Sometimes courts instructed the fact-finder to look at the circumstances surrounding the criminal act, to consider prior threats, or to consider special circumstances of the defendant.”).

126. *Id.* For an early version of a “reasonable woman” standard based on problematic gender beliefs, see *State v. Wanrow*, 559 P.2d 548, 559 (Wash. 1977) (“[C]are must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination.”).

127. Donovan & Wildman, *supra* note 122, at 436.

128. See *id.* at 436–37 (“It is the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person.”).

129. *Id.* at 439.

reasonable person *would* have believed for an assessment of the *actual* belief and mental state of the person who engaged in the legally suspect activity.¹³⁰

Donovan and Wildman ultimately call for the abandonment of any reasonableness inquiry, advocating instead for an individualized determination of the accused's actual state of mind, based on relevant information about the case at hand.¹³¹ To implement this standard, they propose the following jury instruction:

In determining whether or not the accused acted in self-defense, you must consider whether, in light of all the evidence in the case, she honestly and understandably believed that she was in imminent danger of death or great bodily injury. In determining whether her belief was understandable, you must ask yourselves whether she could have been fairly expected to avoid the act of homicide.¹³²

The precise nature of the difference between “reasonably” and “understandably” is not clear. However, whether this particular change is merely semantic or more substantial, the intent behind the instruction is to ensure a fully individualized and subjective assessment of the individual defendant's actions and state of mind.

A subjective determination of whether an individual defendant's actions and beliefs were either “reasonable” or “understandable” has tremendous appeal when considering the case of John White. White's trial strategy revolved around attempting to convince the jury that his biography had shaped his understandings of race and violence in ways that made it reasonable for him to believe that the white teenagers in his driveway posed a deadly threat. Calvin Trillin has argued that, by having John White discuss his familial experiences with lynching, the defense was “making a case for, among other things, the power of race memory.”¹³³ If so, this case is likely to have resonated most strongly with audience members (or jurors) who had a well-developed understanding of lynching's dynamics and mythologies.

For audiences who were aware that lynching had functioned as a form of racial terrorism patrolling public spaces and limiting African American geographic mobility, it might have made sense to think that a Black man living in a virtually all-white enclave could have real reason to fear a late night raid on his home by white males employing racial epithets who had no reason to be there absent violent intent.¹³⁴ Similarly, anyone who understood that lynchings were frequently prompted by baseless allegations of interracial rape involving African American

130. *Id.* at 451 (discussing “a paradox” inherent in the reasonable man standard: “the presence or absence of criminal intent is determined by a standard which ignores the mental state of the individual accused”).

131. *See id.* at 456.

132. *Id.* at 467. Donovan and Wildman note that the pronoun should be appropriate for the gender of the defendant. *Id.* at 467 n.171.

133. Trillin, *supra* note 103, at 36.

134. Trillin reports that during the trial, two of the Black men who had been part of Aaron White's escort began to nod their heads “when the D.A. asked whether a reasonable person would really be guided partly by the memory of a Ku Klux Klan attack that happened years before he was born.” *Id.*

men and white women might have seen reason for heightened fear, given the sexual charges that prompted Daniel Cicciaro's anger.¹³⁵ Because this kind of background information may not have been available to most jurors, it is unlikely to have figured into their reasonableness determinations, even if it did play a role in shaping John White's beliefs and actions that night. A subjective standard of reasonableness might have led to an in-depth examination of White's biography and belief systems that could have brought this kind of information to light.

As it happens, the trial court employed a "hybrid" standard of reasonableness in White's trial.¹³⁶ This is a standard "which has both objective and subjective elements" where "[t]he critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant's background and experiences would conclude."¹³⁷ While this standard does involve a comparison to the abstract "reasonable person" that Donovan and Wildman object to, it appears to incorporate the kind of full assessment of the defendant's actual circumstances that they call for. However, because the standard retains a reasonableness assessment, it stops short of Donovan and Wildman's call for an individualized investigation of the defendant's actual state of mind.

Indeed, the trial court denied White's request to introduce psychiatric evidence "to provide background and cultural evidence' shedding light on how past incidents of racism may have influenced his perception of events on the night of the shooting."¹³⁸ The decision was upheld on appeal, in an opinion that noted not only that there was no indication that the psychiatrist had the requisite expertise "regarding the history of racism in this country and its impact upon African Americans," but also that such matters "are not 'beyond the ken of the typical juror.'"¹³⁹ This seems unlikely. Americans have notoriously low levels of historical awareness, and whites typically have far less exposure to historical knowledge about racism in general, and lynching in particular, than do African Americans.¹⁴⁰

135. See JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY 109 (2004) (lynching provides a "lens" through which various audiences make sense of contemporary instances of racialized violence).

136. *People v. White*, 901 N.Y.S.2d 346, 351 (App. Div. 2010).

137. *Id.* at 352 (internal citation omitted).

138. *Id.* at 356.

139. *Id.* at 357. The court also noted that White had failed to provide the trial court with timely notice of his intent to introduce psychiatric testimony. *Id.* at 356.

140. See Jessica C. Nelson et al., *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCHOL. SCI. 213, 213 (2012) (noting that data collected from surveys of white and Black university students revealed that, as compared to "Black participants, White participants perceived less racism in both isolated incidents and systemic manifestations of racism. They also performed worse on a measure of historical knowledge (i.e., they did not discriminate historical fact from fiction), and this group difference in historical knowledge mediated the differences in perception of racism"); see also Leon F. Litwack, *Hellbonds*, in WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 8, 33–34 (James Allen et al. eds., 2000) (arguing that public displays of lynching photography are necessary to combat "collective amnesia" of "the extent and quality of the violence unleashed on black men and women in the name of enforcing black deference and subordination").

For anyone moved by John White's plight, the case illustrates the value of a subjective standard of reasonableness. While the New York Appellate Division expressed faith in the "typical juror," it is precisely because the reasonableness standard is a measure of typicality that so many critics see it as embodying dominant social norms.¹⁴¹ A fully subjective standard might have given White a better chance of combatting the ready acceptance of such norms by allowing for greater evidence of the impact of what Trillin calls "race memory" to have been introduced at trial.¹⁴² This, in turn, may have helped sway the jury, lending force to White's claims of reasonable fear.¹⁴³

Without such evidence, ten jurors were ready to convict White shortly after deliberations began, while two others resisted the verdict for four days, eventually succumbing to bullying by other jurors who wanted to be released before Christmas.¹⁴⁴ White was convicted of second-degree manslaughter and criminal possession of a weapon, and sentenced to a prison term of twenty months to four years.¹⁴⁵

White was permitted to remain free while the case was appealed.¹⁴⁶ In December 2009, Governor Patterson, the first African American Governor of New York, commuted the sentence.¹⁴⁷ White's lawyer, Frederick Brewington, cautioned the press against reading any kind of racial motivation into the commutation, noting that the governor "reviewed this matter as he reviews any other matter People have to be careful not to fan the flames of racism."¹⁴⁸ Brewington asked, "If the governor happened to be white and he commuted the sentence of a white person, would that be an issue?"¹⁴⁹ White was released after having served five months in prison.¹⁵⁰

141. See discussion of typicality *infra* pp. 915–17.

142. See Trillin, *supra* note 103, at 36.

143. See Donovan & Wildman, *supra* note 122, at 466 (providing a hypothetical scenario in which details of a defendant's social circumstances "including the fact that he is a black living in a white neighborhood who has been victimized by racial harassment as well as by the history of race relations in this country" might lead a jury to better understand why the defendant shot a white police officer breaking into his home).

144. Trillin, *supra* note 103, at 36 (noting that the group of ten jurors ready to convict early in the proceedings included the sole African American juror on the panel).

145. The precise sentence was for "a period of incarceration of one and one-third to four years for the manslaughter conviction, concurrent to a period of incarceration of two years and a post-release supervision period of one and one-half years for the weapons possession conviction." Brief of Respondent at 1, *People v. White*, 901 N.Y.S.2d 346 (App. Div. 2010) (No. 2008-02527), 2009 WL 8531520, at *1.

146. *Id.*

147. Corey Kilgannon, *Patterson Frees Man in Racially Charged Killing*, N.Y. TIMES, Dec. 24, 2010, at A1.

148. *Id.* at A21.

149. *Id.*

150. *Id.*

C. *Bernhard Goetz and the Problem with Subjectivity*

The hybrid reasonableness standard employed by the trial court in the *White* case was most fully developed by the New York Court of Appeals in 1986, when considering the State's appeal in the case of Bernhard Goetz, the (in)famous "subway vigilante."¹⁵¹ The hybrid standard was intended as a corrective to a purely subjective standard employed by the lower courts in determining whether Goetz should stand trial for systematically shooting four Black teenagers who had asked him for money while travelling on a New York City subway train. While the standard is problematic for reasons to be addressed below, the Court of Appeals nevertheless provides a strikingly clear explanation of the perils of adopting the kind of purely subjective self-defense standard that Donovan and Wildman call for, and that seems so appealing when considering the *White* case in isolation.

The *Goetz* case concerned the events of December 22, 1984.¹⁵² On that day, Goetz, a thirty-seven-year-old white man, was riding in a New York City subway car that was also carrying Barry Allen, Troy Canty, James Ramseur, and Darrell Cabey, who were traveling together.¹⁵³ At some point during the ride, Canty approached Goetz and said "give me five dollars."¹⁵⁴ In response, Goetz stood up, pulled out the handgun he was carrying, and quickly fired at all four teens.¹⁵⁵ After taking the time to survey the carnage, Goetz noticed that the bullet that he fired at Cabey had missed.¹⁵⁶ He told Cabey "[y]ou seem to be all right, here's another," and then fired again.¹⁵⁷ He did not miss a second time.¹⁵⁸ Instead, his shot severed Cabey's spinal cord, paralyzing him for life and leaving him with brain damage.¹⁵⁹ In a statement that he later gave to the police, Goetz admitted that he knew that none of the teenagers were armed, but he claimed that his past experiences made him fear that he was about to be "maimed."¹⁶⁰ He told the police that his intent was

151. *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986). While courts use varying terminology in explaining the type of reasonableness standard they employ, currently "a majority of jurisdictions adopt a standard that is *both* objective and subjective (a 'hybrid' standard)." Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 36 (2008).

152. *Goetz*, 497 N.E.2d at 43.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 44.

158. *Id.*

159. *Id.* In 1996, Cabey was awarded forty-three million dollars in a civil suit against Goetz. Because Goetz was only sporadically employed as an electrical engineering consultant, there was never any expectation that he would be able to pay the full amount of the award. Instead, it was expected that he would pay ten percent of his income for the next twenty years. Adam Nossiter, *Putative Damages; the Non-Cash Value of \$43 Million*, N.Y. TIMES, Apr. 28, 1996, at E5; Garry Pierre-Pierre, *The Black and the Red of Goetz's Balance Sheet*, N.Y. TIMES, May 15, 1996, at B3. James Ramseur died in 2011, on the twenty-seventh anniversary of the day he was shot. His death was "investigated as a drug overdose and possible suicide." Bruce Weber, *James Ramseur, Wounded in '84 Subway Shooting, Dies at 45*, N.Y. TIMES (Dec. 23, 2011), <http://www.nytimes.com/2011/12/24/nyregion/james-ramseur-victim-of-bernhard-goetz-subway-shooting-dies-at-45.html>.

160. *Goetz*, 497 N.E.2d at 44.

“to murder the four youths, to hurt them, to make them suffer as much as possible.”¹⁶¹ Goetz fled to New Hampshire, but eventually agreed to waive extradition.¹⁶² He was brought back to New York, where he was arraigned on charges of attempted murder and criminal possession of a weapon.¹⁶³

The case has a complicated procedural history, and the prosecution had some difficulty getting a Grand Jury to indict Goetz for the shootings, but he was eventually charged with a variety of offenses, including four counts of attempted murder.¹⁶⁴ However, Goetz moved to have the attempted murder charges dismissed, and the Appellate Division of the New York Supreme Court granted the motion.¹⁶⁵ The court took issue with a statement that the prosecutor had made to the grand jury indicating that there was an objective component to the reasonableness assessment, as jurors were expected to consider “whether Goetz’s conduct was that of a ‘reasonable man in [Goetz’s] situation.’”¹⁶⁶ The court interpreted the New York statutory test for justifiable self-defense as requiring a “wholly subjective [standard], focusing entirely on the defendant’s state of mind when he used such force. It concluded that dismissal was required for [the erroneous instruction containing an objective component] because the justification issue was at the heart of the case.”¹⁶⁷

The Court of Appeals reversed the Appellate Division, explaining that a completely subjective test was not only contrary to legislative intent, but would also allow anyone’s fear, no matter how idiosyncratic, to become a justification for extreme violence.¹⁶⁸ Judge Wachtler’s opinion noted that

[w]e cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.¹⁶⁹

Fundamentally, the problem with a completely subjective test is that the very instructions that encourage jurors to adopt the perspective and vision of the accused also impose adjudicative blinders obscuring any view of how a defendant’s beliefs and actions *ought* to be seen and understood. Adopting the vision of the accused

161. *Id.* (alteration omitted).

162. *Id.*

163. *Id.*

164. *Id.* at 44–45.

165. *Id.* at 45.

166. *Id.* at 46.

167. *Id.*

168. *Id.* at 50; see also MARKOVITZ, *supra* note 135, at 81.

169. *Goetz*, 497 N.E.2d at 50.

might seem unproblematic if that vision is shaped by a realistic understanding of racist violence. This would probably be true for anyone who is inclined to think that John White should not have been punished for shooting Daniel Cicciaro. However, when the accused's worldview has been forged by reliance upon racist stereotyping, most of us would want jurors to take on a broader vision. This difficulty is not lost upon Donovan and Wildman, who argue that a subjective test can incorporate community standards so long as the test allows for exoneration only where the accused's actions are "understandable," and asks whether the use of lethal force could have been "fairly expected" to be avoided.¹⁷⁰ However, such allowances appear to re-import an objective reasonable component, albeit by another name.

While Wachtler's opinion highlighted the danger of a purely subjective standard, it failed to account for the danger of including a subjective component in a hybrid test. The decision notes that the New York self-defense statute "does contain a subjective element, namely that the defendant believed that deadly force was necessary to avert the imminent use of deadly force or the commission of certain felonies."¹⁷¹ This element requires that

a determination of reasonableness must be based on the 'circumstances' facing a defendant or his 'situation.' Such terms encompass more than the physical movements of the potential assailant. . . . [T]hese terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.¹⁷²

The difficulty with this formulation is that it fails to define or limit "relevant knowledge" or to specify the kinds of "physical attributes" that can be considered. Certainly, there is nothing in the decision suggesting that race is not among those characteristics. In a society in which much of the population's knowledge of the relationship between race and crime is fueled by racist stereotypes and misleading use of statistics, a jury that is encouraged to see shooting victims' physical attributes through the eyes of their assailants is quite likely to be blinded by any socially sanctioned racial bias shaping the defendants' vision.

*D. Objective Standards and "Reasonable Racists"*¹⁷³

While the decisions by the lower courts in the *Goetz* case bring some of the

170. Donovan & Wildman, *supra* note 122, at 467–68.

171. *Goetz*, 497 N.E.2d at 51.

172. *Id.* at 52 (citation omitted).

173. The "Reasonable Racist" is a term coined by Jody Armour. The Reasonable Racist asserts that, even if his belief that blacks are 'prone to violence' stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well. For inasmuch as the criminal justice system operates on the assumption that 'blame is reserved for the

most important problems with subjective self-defense standards into stark relief, this is not to say that objective standards would eliminate the possibility that racial bias might infiltrate the self-defense determination. Judge Wachtler's opinion appears to have been intended to ensure that no one would be given legal sanction for violent actions prompted by belief systems that run so firmly afoul of community sensibilities as to be clearly and consensually understood as unreasonable. The objective component of the test rules out the possibility that raving lunatics or racial extremists could find legal justification for a racist shooting spree by referencing an "aberrational" or "bizarre" set of racial fears. The objective comparison to an abstract "reasonable person," however, does nothing to prevent a defendant from relying on racist fears that are neither aberrational nor bizarre, but are instead widely disseminated and commonly accepted.

This problem is compounded because, in the criminal law context, objective "reasonableness" is frequently equated with "typicality."¹⁷⁴ Cynthia Lee explains that

[t]he reasonable person, when defined by reference to the ordinary or average person, suggests a need to consider how most people would have felt or reacted. If the defendant's beliefs and actions are *typical* of the beliefs and actions of the average American in the mind of the decisionmaker, the defendant will be acquitted on the ground of self-defense.¹⁷⁵

Lee and Jody Armour both take issue with the equation of reasonable and typical, arguing that popularly held beliefs are not reasonable by virtue of being popularly held, and that this is particularly true where popular thought is influenced by racist stereotypes.¹⁷⁶ Normatively, it makes sense to reject the notion that popular beliefs

(statistically) deviant,' an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism.

Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994).

174. See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (citations omitted)).

175. Lee, *supra* note 3, at 495.

176. *Id.* at 495 ("A typical or common belief . . . is not necessarily a reasonable belief. At one time, most Americans believed there was nothing wrong with slavery. The fact that slavery was not only accepted but approved of by most people did not mean that such a belief was reasonable. Reliance on a conception of reasonableness that focuses on what the average American thinks may be problematic in self-defense cases because socially constructed racial images of Blacks and other non-Whites may influence what the average American thinks." (citation omitted)); see also Armour, *supra* note 173, at 789 (discussing "the fallacy of equating reasonableness with typicality" and noting that "[w]ith respect to race, prevailing beliefs and attitudes may fall short of what we can fairly expect of people").

In resisting the equation of reasonable and typical, Lee and Armour are at odds with the work of Joshua Dressler, who writes that the "Reasonable Man . . . is more appropriately described as the Ordinary Man (i.e., a person who possesses ordinary human weaknesses)." Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 753 (1995). Dressler is specifically writing about the concept of the Reasonable Man in provocation cases, but he would likely make the same argument about self-defense doctrine. Dressler argues against "a blanket rejection of the provocation defense in"

are reasonable, since there are an awful lot of widely held but morally repugnant and incorrect ideas. Certainly, a definition of “reasonable” as “[f]air, proper, or moderate under the circumstances,”¹⁷⁷ would support Lee and Armour. However, neither Lee nor Armour account for a definition of “reasonable” that invokes a process of reasoning.¹⁷⁸ Under such a definition, the typicality and popularity of racial stereotypes *can* be said to make reliance upon such stereotypes eminently “reasonable,” since fully systematized and coherent racist logics not only exist, but can be seen as defining the bedrock ideological foundation of many American institutions.

The point is not that the legal system ought to recognize fears based on racial stereotypes as reasonable. Instead, the difficulty lies in the sense that we can rule racism out of the realm of reasonableness merely by demonstrating that racist logic rests upon faulty premises. Thus, Armour challenges defendants’ reliance on racial stereotypes as a basis for reasonable fear by noting that “typical” beliefs are not necessarily “accurate.”¹⁷⁹ Similarly, Lee takes pains to debunk crime statistics that have been invoked to suggest that it is reasonable to fear Black men.¹⁸⁰ This kind of debunking (or “demythication”)¹⁸¹ may be a useful strategy for undermining acceptance of racist stereotypes, but chipping away at the accuracy of racist belief systems is different from establishing that people who rely upon those systems have not developed a fully “reasoned” position. Because racism *does* have coherent logic, it cannot be simply reasoned away, disproven, or easily excised from reasonableness as a definitional matter. Ultimately, Lee’s and Armour’s refutations of racism’s reasonableness would be even more compelling if combined with a sense that what *counts as* reasonable is determined in a process of social struggle. Any attempt to foreclose the possibility that fear motivated by racist stereotypes will be seen as

cases in which apparently heterosexual men kill gay men who have made nonviolent sexual advances. *Id.* at 728. He thinks it is a mistake to challenge the defense on the basis of the argument that “the law is wrong to justify or even or excuse homophobic-based anger” because “[i]t is not necessarily the case that a person who kills [after such an advance] does so as the result of intolerance, bigotry, or homophobia.” *Id.* at 754. Dressler’s claim that such killings can happen absent homophobia or bigotry is unconvincing. However, the argument could be understood as a claim that this type of killing may result from implicit forms of homophobia of which the shooter might be unaware, and that, if this is the case, the law should recognize a lesser degree of culpability. Even this formulation is troubling, however. After all, an alternative to providing a mitigation defense to people who kill because of unacknowledged homophobic or heterosexist belief systems is to deny such a defense, and instead send the message that people are responsible for wrestling with and refusing to act upon beliefs that society as a whole, as reflected in our legal institutions, has decided are unacceptable bases for violence.

177. *Reasonable*, BLACK’S LAW DICTIONARY 1379 (9th ed. 2009).

178. Among the definitions offered by the *Oxford English Dictionary* are “having the faculty of reason, capable of reasoning,” “in accordance with reason, not irrational, absurd, or ridiculous,” and “requiring the use of reason.” *Reasonable*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/159072> [<http://perma.cc/2W44-QPRA>] (last visited Sept. 14, 2015).

179. Armour, *supra* note 173, at 788.

180. Lee, *supra* note 3, at 460–61.

181. Robert Gooding-Williams, “*Look, a Negro!*,” in *READING RODNEY KING: READING URBAN UPRISING*, *supra* note 32, at 157, 168.

reasonable in self-defense jurisprudence must reckon with the notion that reason itself is contested terrain.¹⁸²

III. POINTS OF INTERVENTION

A. *Political Struggle as Threshold Issue*

There is only so far that any changes in official procedures or standards can go in changing the ways that racial bias may infiltrate self-defense investigations, trials, and verdicts. Every set of legal actors interacts with a social world that shapes possible and likely interpretations of evidence, and no opinion or statute has inherent meaning, no matter how perfectly crafted it may be. The possible interventions addressed below are intended to provide methods and tools that can help weed out the influence of racist stereotypes in self-defense determinations, but they will not be adopted without effort. Nor will they have the desired impact if they are not implemented as a component of a larger political struggle against racism within the criminal justice system.

B. *Developing an Antiracist Normative Standard of Reasonableness*

Consideration of the ways that extant reasonableness standards allow for racial bias to infiltrate self-defense deliberations highlights the need for a self-defense doctrine that can weed out reliance on racial stereotypes. While a number of theorists have proposed a variety of intriguing reforms,¹⁸³ Cynthia Lee's call for a

182. See Pierre Bourdieu, *The Social Space and the Genesis of Groups*, 6 THEORY & SOC'Y 723, 729 (1985) (noting that, because the logics and ways that we make sense of the world are shaped by structures of social power, “[k]nowledge of the social world and, more precisely, the categories that make it possible, are the stakes, par excellence, of political struggle, the . . . struggle for the power to conserve or transform the social world by conserving or transforming the categories through which it is perceived”).

183. See discussion *infra* Section C. Not all such reforms are merely theoretical. California, for example, has enacted legislation explicitly intended to prevent jurors from relying upon various forms of bias. CAL. PENAL CODE § 1127h (West 2007 & Supp. 2015) (“[T]he court shall instruct the jury substantially as follows: ‘Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.’”). This provision was enacted as the Gwen Araujo Justice for Victims Act, and was named for the victim of a hate crime murder whose killers employed a “gay panic” defense. See *Gwen Araujo and the Justice for Victims Act*, TRANSGENDER L. CTR., <http://transgenderlawcenter.org/archives/339> [http://perma.cc/T4YP-KCLK] (last visited Sept. 20, 2014).

On September 27, 2014, California's Governor approved Assembly Bill No. 2501, amending the California Penal Code to prevent defendants from relying on “gay panic” or “trans panic” defenses. See CAL. PENAL CODE § 192(f)(1) (“For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.”); § 192(f)(2) (“For purposes of this subdivision, ‘gender’ includes a person's

“normative” standard of reasonableness is the proposal that comes closest to addressing the specific problems that have been laid out in this Article.¹⁸⁴ Lee’s work provides a point of departure for this Article. Lee’s conception of a normative standard is a crucial and groundbreaking intervention into debates surrounding reasonableness and race, but does little to account for the question of how to determine what ought to count as normatively reasonable. In order to address this lacuna, Part 2 of this section argues for a new normative conception of reasonableness based on Thirteenth Amendment jurisprudence.

1. *What Is Normatively Reasonable? Cynthia Lee’s Standard*

Because people who claim self-defense as justification for their violent actions are, in effect, asking for a legal determination that they engaged in socially desirable behavior, Lee suggests that such defendants ought to be held to a higher standard than “objective” reasonableness.¹⁸⁵ Commonly held or average beliefs may be understandable and acceptable in ordinary circumstances, but they do not merit the reward and social embrace that a justification defense ought to represent. For the legal system to declare that someone who chose to use lethal force did exactly what we would *want* someone else to do if the same circumstances were to come up again, “perhaps something more than typicality ought to be required.”¹⁸⁶ The normative standard Lee proposes would require “not only that the defendant’s beliefs and actions were those of the average person, but that the defendant’s beliefs and actions were also normatively justified.”¹⁸⁷

Under a normative standard, a “reasonable” belief is not just typical, commonly held, average, or even based on reason or systematic logical thought. Instead, this standard would ensure that a belief will be defined as reasonable only if it is socially desirable.¹⁸⁸ Lee does not address the kinds of processes or social

gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person’s gender as determined at birth.”); A.B. 2501, 2014 Gen. Assemb., Reg. Sess. (Cal. 2014), http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2501.

184. Lee actually offers “two preliminary suggestions for reform.” Lee, *supra* note 3, at 468. In addition to calling for a jury instruction that will encourage jurors to adopt a normative standard of reasonableness, she calls for “clarification of the act-belief distinction through a revised jury instruction on self-defense that makes explicit the requirement that both the defendant’s beliefs *and acts* must be reasonable, coupled with a new two-tiered framework for assessing criminal liability in recognition of the act-belief distinction.” *Id.* While this would be a useful instruction for *all* self-defense cases, it is not specifically tailored to address self-defense deliberations that rely upon racist stereotyping, and is therefore beyond the scope of this Article.

185. *See id.* at 499.

186. *Id.* at 496.

187. *Id.*

188. Lee notes that normative conceptions of reasonableness may be novel when thinking about self-defense jurisprudence, but have been applied in other areas. Specifically, in the Fourth Amendment context, “to say that D has a “legitimate” or “justifiable” expectation of privacy is to draw a normative conclusion that she has a right to that expectation.’ . . . Use of the terms ‘legitimate’ and ‘justifiable’ to describe the reasonableness of a defendant’s expectation of privacy exemplifies reliance

struggles that are entailed in determining what kinds of belief systems should be promoted as normative. Instead, she admits that

the scope of the normative standard is almost by definition amorphous. It is difficult to define *ex ante* what constitutes reasonableness from a normative perspective. Whether a defendant's actions are normatively reasonable will depend in part on where the crime occurred, who is deciding the question, and the facts of the specific case.¹⁸⁹

While her discussion regarding the issue of “who is deciding the question” indicates that Lee is aware that normative determinations will be made on the basis of definitional contests yet to be waged, she nevertheless suggests that one result of a normative standard would be that a shooter who has relied on racist stereotypes in determining that he was under threat (this might include Bernhard Goetz) would *not* be the beneficiary of a justification defense because “the reasonable person is not supposed to be a racist.”¹⁹⁰ A normative standard of reasonableness is, therefore, a tool to rule out the possibility that racist fears will be given the legal sanction of a successful self-defense claim.

Aside from the question of how what counts as normatively reasonable will be determined, the most important potential limitation to Lee's proposal has to do with implementation. Lee calls for juries to be instructed that “while a defendant's reliance on racial stereotypes may be used to support a finding that the defendant's beliefs were sincere or honest, a defendant's reliance on racial stereotypes is not reasonable as a matter of law. Accordingly, the defendant's actual reliance on racial stereotypes may not be used to support a finding that the defendant's beliefs were reasonable.”¹⁹¹ Lee argues that this instruction will “send a strong normative message that jurors in self-defense cases should not permit racial stereotypes to influence their decisionmaking” and she expresses hope

that the instruction will also minimize the influence of racial stereotypes on jury decisionmaking in self-defense cases by making the inappropriateness of racial stereotyping explicit. Additionally, the instruction may have a socially transformative effect, following the example of changes in rape law which have affected societal attitudes about what constitutes a rape. Before those changes, many people believed that it was not rape if the woman did not immediately complain about the incident to the police or forcibly resist her attacker. . . . [Rape reform legislation has] had a noticeable impact on societal attitudes about rape.¹⁹²

There may be some basis for these hopes, but it is important to note that rape

on a normative conception of reasonableness.” *Id.* at 497 (quoting DRESSLER, *supra* note 5, at 61); *see also* *Oliver v. United States*, 466 U.S. 170, 177 (1984) (noting that, for a Fourth Amendment analysis, reasonable expectation of privacy is defined according to “those ‘expectation[s] that society is prepared to recognize as “reasonable.’” (quoting *Katz v. United States*, 389 U.S. 347, 361(1967)).

189. *Lee*, *supra* note 3, at 499.

190. *Id.* at 472.

191. *Id.* at 473.

192. *Id.* at 468–69.

reform legislation did not occur in a vacuum. Greater attention to the impact of such external forces as the 1970s-era antirape movement might allow for a fuller assessment of the relationship between jury instructions and social attitudes.

Rape reforms only came about because of an organized social movement that spent years working to debunk rape mythology while protesting existing rape jurisprudence as “another form of rape.” The laws changed partly because the antirape movement had already secured some cultural victories, weakening rape mythology. It may be true that rape reform legislation continued to bring about changes in social attitudes about rape, but there is at least a bit of a chicken-or-egg problem here.¹⁹³ This history suggests that it is not clear that legal reforms alone are likely to have an impact on popular understandings of stereotypes, if the reforms are not themselves the product of social struggle and cultural change.

Assuming that meaningful reforms can be brought about, there remains the question of whether Lee’s proposed jury instruction is the kind of reform that would prove useful in helping weed out reliance on racial stereotypes. It is notable that the instruction would not have the legal system completely shun a defendant whose fears were shaped by racist stereotypes. Instead, such defendants can benefit in jurisdictions that recognize the doctrine of “imperfect self-defense.” Under this doctrine, defendants who have an honest but unreasonable belief that factual circumstances justify the use of deadly force may be liable for manslaughter rather than murder.¹⁹⁴ Because Lee’s instruction allows juries to consider racial stereotypes in assessing whether a defendant’s fear was honest,

a racially biased defendant [claiming imperfect self-defense] receives a mitigated conviction for manslaughter, rather than murder In other words, the law partially excuses the racially biased defendant who sincerely but unreasonably believes Blacks, Asian Americans, and/or Latinos are more dangerous than others, but does not let him off the hook completely.¹⁹⁵

Lee appears to favor this form of mitigation because, in a racist society, reliance on racist stereotypes is beyond the control of individuals, and can therefore be thought of as somewhat excusable.

In arguing that an excuse defense is warranted for what might be deemed the “unreasonable racist,” Lee invokes a categorical distinction (which she also questions) between excuse and justification, suggesting that only justification defenses entail normative assessments.¹⁹⁶ However, evaluations about what kinds

193. For an overview of rape reform legislation, see Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 120–29 (1999).

194. DRESSLER, *supra* note 5, at 255.

195. Lee, *supra* note 3, at 473.

196. *Id.* at 390–91 (“[A]n extended discussion on justifications and excuses is beyond the scope of this Article. . . . If one thinks of self-defense as a justification, one should support the view that the law of self-defense should encourage normatively correct behavior. If one thinks of self-defense as an excuse, one might prefer a subjective standard of reasonableness that places emphasis on the actor’s individual blameworthiness.”). Note that an excuse defense is based on the premise that, while the

of behavior we will hold people responsible for and what we will decide is beyond their control are inherently value laden. Lee cites social-psychological research demonstrating that pretty much everyone in the United States is influenced by racism to some degree.¹⁹⁷ But this does not mean that everyone will act on those beliefs, much less that they will act out violently because of those beliefs.¹⁹⁸ The

defendant's conduct was socially harmful, the defendant should not be held responsible for his or her actions. See Joshua Dressler, *Foreword—Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163 (1987) (“Whereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm. Just as we do not punish people for committing harmless acts, we ordinarily do not punish them for blamelessly causing harm.”).

197. Lee, *supra* note 3, at 402–10. For a more recent discussion of social science research addressing the strength of racial stereotyping and fear of Black men, see Phillip Cohen, *Who's Afraid of Young Black Men?*, SOCIOLOGICAL IMAGES (July 15, 2013), <http://thesocietypages.org/socimages/2013/07/15/whos-afraid-of-young-black-men> [http://perma.cc/BZ7E-2H2V] (“[F]or example, one recent controlled experiment using a video game simulation found that white college students were most likely to accidentally fire at an unarmed suspect who was a black male—and most likely to mistakenly hold fire against armed white females. More abstractly, people generally overestimate the risk of criminal victimization they face, but whites are more likely to do so when they live in areas with more black residents.”). For a further discussion, see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1582 (2013) (“Of particular relevance in the self-defense context, several studies have documented the phenomenon of shooter bias in which individuals are quicker to identify weapons and slower to recognize harmless objects, like tools, in the hands of Black persons than in the hands of White persons.”).

198. One category of defendants generally thought to be deserving of an excuse defense is people “whose conduct is caused by a condition over which [they] had no control.” Dressler, *supra* note 196, at 1166. Traditionally, excuse defenses are available to defendants who have some sort of “disability” such as “intoxication, insanity, duress, automatism, and somnambulism” that renders the defendant blameless because the disability can “lead to involuntary acts, inaccurate perceptions of risks and consequences of acts, the inability to know the moral status of certain acts, or the inability to control conduct.” Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1327 (2006) (citations omitted). An attempt to extend this theory of excuse as disability so as to encompass belief in racist stereotypes is an uneasy fit.

There is, of course, a robust debate about whether defendants like George Zimmerman or Bernhard Goetz had inaccurate perceptions of risk or could understand the moral status of their actions. However, if either of these defendants did have problems with risk assessment or moral analysis, and if these problems were due to harboring racist stereotypes, there would still be a logical jump to make before determining that these stereotypes should be thought of as akin to the “disabilities” that have traditionally been required for excuse defenses.

Traditional “disabilities” are thought of as entirely beyond the control of a defendant, whereas people who harbor racist stereotypes may have some opportunity to interrogate and mitigate those stereotypes, even if they may not be able to overcome them entirely. Moreover, even if defendants who harbor unreasonable beliefs about racialized threats have no control over those beliefs at all, they are still unlike the somnambulist in that they may have control over the actions that stem from their “disability.” (They can refuse to use the stereotypes that they believe in to dictate their violent actions, while the somnambulist is incapable of preventing her condition from causing her to fall asleep.) Certainly, in the cases that I have addressed in this Article, there is no indication that racist belief systems led to involuntary acts or the inability to control conduct.

Without such evidence, offering such defendants the opportunity to employ an excuse defense requires a normative assessment that people who act on socially undesirable beliefs are morally blameworthy *neither* for having those beliefs *nor* for the violent actions they’ve committed based on those beliefs. A determination that belief in racist stereotypes *is* a disability sufficient to provide an excuse defense would send a message that people who harbor such beliefs have no obligation to work

decision that a defendant is less culpable for violent actions because those actions were influenced, in part, by ubiquitous racism *is* a normative decision, and one that entails giving some degree of legal sanction to socially undesirable beliefs. Thus, for a normative standard of reasonableness to send an unambiguous message about the inappropriateness of reliance on racist stereotyping in self-defense jurisprudence, the standard must be based on the premise that racially based violence is neither justifiable *nor* excusable.

An additional limitation to Lee's jury instruction proposal has to do with the two-step inquiry that jurors would engage in. First, jurors are instructed to consider whether the defendant had a reasonable belief that she or he was in danger of death or serious bodily harm and needed to use deadly force to prevent that harm.¹⁹⁹ In this part of the inquiry, jurors are instructed that reliance on racial stereotypes is not reasonable as a matter of law.²⁰⁰ Next, they are instructed to consider whether the actions taken by the defendant were reasonable, since any use beyond what was necessary is unreasonable and unlawful.²⁰¹ This step addresses the proportionality requirement that is part of most self-defense statutes. For this part of the inquiry, the model jury instruction contains no mention of racial stereotypes.²⁰² Because reliance on racial stereotypes is explicitly prohibited in the first component but neglected in the second, jurors might conclude that it *is* reasonable to rely on racial stereotypes in determining how much force was required. This is problematic, since racist stereotypes may well inflate people's conceptions of how much force is required to repel a threat. After all, one of the most powerful and enduring stereotypes in American history is that of the "Black brute rapist," which is an image of a threat so severe that it can only be warded off by employing the most extreme forms of force.²⁰³ One way to attempt to counter the possibility that jurors might rely upon such stereotypes in this part of the inquiry would be to instruct jurors that

against those beliefs and that they are likely to face no more than minor consequences if they instead act out on the basis of those beliefs in the most violent possible ways.

199. Lee, *supra* note 3, at 478.

200. *Id.*

201. *Id.* at 478–79.

202. *Id.*

203. See Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 560 (1997) ("An African American man violating a White woman has always been one of White America's worst nightmares. It is the worst manifestation of the 'savage Black brute.' This stereotype is so deeply embedded in our culture that many Whites may not even recognize the prejudice." (citation omitted)). Stereotypes of Black female criminality are also prevalent. See Noliwe M. Rooks, *Renisha McBride and Evolution of Black-Female Stereotype*, TIME (Nov. 14, 2013), <http://ideas.time.com/2013/11/14/renisha-mcbride-and-black-female-stereotype/> [http://perma.cc/AY54-JW5V]. Rooks cites historian Sarah Haley to suggest that one reason that a white man decided to shoot Renisha McBride, a nineteen-year-old Black woman who knocked on his door after her car broke down in the middle of the night in November 2013, rather than to offer her assistance, may be that "we have so often viewed black women as more threatening, more masculine and less in need of help, protection and support than white women." *Id.*

“by law, a reasonable person may not rely upon racial stereotypes in determining whether lethal force is necessary.”²⁰⁴

One reason that Lee’s proposals take the form of jury instructions is that Lee is opposed to legislation that would prevent jurors from considering whether a defendant was reasonably influenced by racial stereotypes.²⁰⁵ Lee is concerned that “legislative preclusion” prevents jurors “from considering whether something is or is not legally adequate provocation” when they “should be encouraged to deliberate explicitly about social norms, stereotypes, and bias.”²⁰⁶ This concern is based on a sense that jury deliberations provide important checks against oppressive state power that can unfairly overwhelm criminal defendants. Juries deliver “commonsense justice” and “serve as a bulwark against overzealous government prosecutors and cynical judges.”²⁰⁷ However, despite their “commonsense” wisdom, jurors are likely to start off predisposed against defendants, who require access to every possible means of persuasion:

Jurors often presume the defendant is guilty, simply by virtue of the fact that he has been charged with a crime Judges often exercise their discretion in ways that favor the prosecution. As if the deck weren’t already stacked against defendants, the Supreme Court has retreated from the long-standing principle that an accused has a due process right to present relevant evidence in his defense. . . .

. . . While I agree that defendants should not profit from arguments that play on [racist, sexist, and homophobic beliefs], the solution, in my opinion, is not to broadly preclude all defendants from claiming provocation or self-defense in certain limited circumstances. The solution is for prosecutors to do a better job of educating jurors about the dangers of such [beliefs].²⁰⁸

Lee’s concern with a criminal justice system that is stacked against defendants is well founded. However, it is not clear that the courtroom is a viable setting for the kind of pedagogy she envisions.

204. Alternatively, Cynthia Lee proposes a “race-switching jury instruction in cases involving a risk that racial stereotyping will influence the jury’s determination of reasonableness.” LEE, *supra* note 7, at 224. The instruction would encourage jurors to imagine that all facts remain the same, except that the defendant and victim switch races. Lee writes that “[e]ncouraging jurors to think about whether they would feel the defendant acted reasonably in self-defense [if the races were switched] would help illuminate the role of race and racial stereotypes.” *Id.* This kind of instruction might be valuable, but recognizing that racial stereotypes are at play is still a step removed from declaring that such stereotypes may not be relied upon in self-defense determinations.

205. *Id.* at 247 (“I find legislative preclusion problematic for several reasons.”). In this passage, Lee is writing about provocation defenses, and is specifically concerned about legislation that would prevent jurors from considering what counts as reasonable provocation. However, the broader section that this excerpt is taken from moves back and forth between discussions of provocation and self-defense, and Lee’s claims about the value of letting a jury debate reasonable provocation are meant to apply equally to reasonable fear in self-defense cases.

206. *Id.*

207. *Id.*

208. *Id.* at 250.

Prosecutors can surely do a better job of bringing in evidence of the nature, extent, and effects of racist stereotyping, but there is little reason to think that most prosecutors have the requisite knowledge to provide lessons about these issues to jurors.²⁰⁹ More important, while it is doubtlessly true that defendants have to frequently contend with unfair bias on the part of jurors and judges, this might not be the case for defendants whose acts of violence were motivated by racist fears. Bernhard Goetz is only one of a long line of white defendants celebrated as folk heroes for the violence they meted out to people of color.²¹⁰ There is an all-too-familiar and lengthy history of juries, judges, and prosecutors refusing to punish or even indict white killers of African American, Latino, Asian American, and Native American victims, despite overwhelming evidence.²¹¹ This history suggests that “commonsense justice” ought to be embraced cautiously, if at all.²¹²

One potential difficulty Lee sees in legislative preclusion is that legislative determinations of what counts as normatively reasonable would entail politicization of self-defense doctrine.²¹³ Lee notes that, while she has her own opinions about what ought to be seen as reasonable, “[w]hen the legislature chooses my view, it denies legitimacy to the opposite view.”²¹⁴ However, rather than seeing this as a problem, it is worth noting that denying the legitimacy of alternative viewpoints is precisely the point of *any* normative determination. After all, the creation of norms also and always entails the creation of categories of deviance.²¹⁵ Whether these

209. Certainly, there is no reason to think that the training that most prosecutors receive would prepare them to provide instruction about the finer points of racist indoctrination. Indeed, it is possible to argue that most prosecutors are, by virtue of their institutional role helming a criminal justice system that disproportionately targets and incarcerates people of color, uniquely likely to be ill equipped for carrying out this pedagogical responsibility.

210. See, e.g., Brian Thornton, *The Murder of Emmett Till: Myth, Memory, and National Magazine Response*, 36 JOURNALISM HIST. 96, 99 (2010) (addressing public support for the murderers of Emmett Till); Seth Mydans, *A Shooter as Vigilante, and Avenging Angel*, N.Y. TIMES, Feb. 12, 1995, at 20 (discussing public support for William Masters, a white man who shot two Latino graffiti artists, killing eighteen-year-old César Arce).

211. See WILLIAM D. CARRIGAN, *THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS 1836–1916*, at 31 (2004) (discussing the “social prestige” bestowed upon “[t]hose who killed Indians” in nineteenth century Texas); LEE, *supra* note 7, at 137–74.

212. The notion of “common sense” plays a central role in racial formation theory. Omi and Winant borrow from Antonio Gramsci, who saw “common sense” as the set of popular ideas and practices that consolidate hegemonic ideology and that lead people to consent to being governed within power structures that do not represent their interests. Racial formation theory is an attempt to extend this idea to an understanding of racial domination. See OMI & WINANT, *supra* note 12, at 67. The understanding that common sense is hegemonically constructed to maintain existing power relationships provides another reason for caution before celebrating “commonsense justice.”

213. LEE, *supra* note 7, at 250.

214. *Id.* at 251.

215. For a classic statement on the creation of categories of deviance, see HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (“[S]ocial groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’ The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.” (emphases omitted) (citation omitted)).

norms are created, debated, and enforced by the legislature or by juries, privileging one viewpoint will entail marginalizing another. With that in mind, it seems a worthy goal to ensure that viewpoints privileging racist belief systems will be on the losing side.

The more powerful objection to legislative preclusion is that, once it is endorsed for certain types of cases, it will be difficult to oppose it for other cases. Conservative legislators could decide to preclude the argument that battering constitutes legally adequate provocation and prevent battered women from arguing that they were provoked into a heat of passion by their abuser's violent actions.²¹⁶

As a strategic matter, it might be risky for antiracist activists to open up the field of self-defense jurisprudence to political gamesmanship. However, this is an argument to tread carefully, not to avoid the battle all together. After all, normative judgments are *always* politicized, if not always explicitly so. Indeed, battered women's defenses are a prime example, since they have only gained traction because of feminist activism directed against sexist assumptions built into traditional self-defense doctrine.²¹⁷

While there may be a theoretical basis for caution about a self-defense jurisprudence that gives strong deference to the jury's ability to wrestle with what ought to be considered reasonable fear, there are also affirmative reasons to think that legislative preclusion is a necessary step in beginning to filter out the influence of racial stereotypes in self-defense determinations. As a purely practical matter, formally encoding normative standards in self-defense statutes may be necessary for implementation because some jurisdictions currently have statutes or clearly established case law mandating objective or hybrid standards.²¹⁸ Unless those statutes and decisions are formally displaced, juries and judges will be bound to existing standards, even if they might prefer to implement a normative standard.

Perhaps more important, part of the reason to reform self-defense doctrine is that reforms may provide opportunities to harness the transformative potential of the legal system for processes of racial formation. When juries acquit defendants whose fear and violence has been shaped by racism, the legal system endorses racist belief systems and devalues the lives of people of color, denying them the full privileges and protections of citizenship. A normative and antiracist self-defense standard can begin to counter this kind of message. For such a standard to have the desired effect, however, it must be implemented as systematically and unambiguously as possible. Because it is unacceptable for any area of the country to have a justice system that denies meaningful protections to people of color, legislation ought to be enacted by Congress rather than by the states. Formalizing a

216. LEE, *supra* note 7, at 251.

217. See Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 575 (1991) (addressing the need to challenge history of sexist stereotypes that presents barriers to battered women's self-defense claims).

218. See Nourse, *supra* note 151, at 36.

normative and antiracist self-defense standard in legislation would send a clear and powerful message about the boundaries of acceptable discourse, and of acceptable violence. It is difficult to see how a similarly impactful message could be sent via piecemeal deliberations by juries that may not always agree that racism *is* either unreasonable or undesirable.

2. *The Thirteenth Amendment and an Antiracist Normative Standard*

One potential set of difficulties with developing a legislative response to reliance upon racial stereotyping in self-defense cases is that it is not immediately clear on what basis Congress might act. In the post-Civil Rights era, the Supreme Court has substantially limited the ways in which the Fourteenth Amendment and the Commerce Clause can be used to challenge civil rights violations.²¹⁹ In response, a growing number of scholars have begun to advocate for reinvigorated interpretations and uses of the Thirteenth Amendment as more viable routes to racial justice.²²⁰ The limited history of Thirteenth Amendment jurisprudence holds

219. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (Commerce Clause cannot be used to support civil rights provision of the Violence Against Women Act because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”). In *Morrison*, the Court indicated that no attempt at “regulating violence” could be supported by the Commerce Clause so long as the violent crime at issue only had substantial national impact when measured in the aggregate. *Id.* at 615. Imposition of a normative self-defense standard would be an attempt to regulate violence. Under *Morrison*, because any isolated case involving racist stereotyping in self-defense cases is unlikely to have a substantial national economic impact, it would likely be an impermissible target for congressional reform using Commerce Clause powers. See *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (“Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that evidence of discriminatory impact in administration of death penalty would not suffice to establish equal protection violation because “a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination” (citation and internal quotation marks omitted)); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (laying out the “basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”); see also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–81 (2011) (noting that the “levels of scrutiny” balancing tests of Fourteenth Amendment jurisprudence “combined with . . . the requirement for proving a discriminatory purpose in order to demonstrate a racial or a gender classification—tremendously limited the ability of the courts to deal with inequalities”).

220. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1118 (1991) (noting that antidiscrimination law would profit from an “amendment shift” or “a shift away from the Fourteenth Amendment’s commitment to equal treatment based on race and toward reliance on the Thirteenth Amendment for a call to an end of second-class status for racial minorities”); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 156 (1992) (noting that because Ku Klux Klan cross burnings can be seen as badges of slavery, it might be permissible to regulate or ban them using Thirteenth Amendment powers); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 19 (2004) (noting that the Thirteenth Amendment provides a stronger basis for combating racial profiling than does the Fourteenth Amendment); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 (1995) (“By linking present racial discrimination to this nation’s history of slavery and apartheid, a Thirteenth Amendment analysis uniquely addresses existing racial and economic injustice as modern relics and badges of slavery.”); Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 341 (1994) (challenging mandatory work for welfare requirements as

significant promise for challenges to discriminatory practices involving often unconscious and unintentional uses of racial stereotypes.

At first blush, it might seem like there is something incommensurate about attempting to enlist the Thirteenth Amendment in an effort to challenge racial stereotypes in self-defense doctrine. The Thirteenth Amendment, after all, was the Constitutional vehicle for striking down slavery, a fully institutionalized system of explicitly racist dehumanization and exploitation that fundamentally defined the nature of American race relations for hundreds of years. It would make sense to think that channeling the power of this Amendment to mitigate the influence of often subtle forms of racism in one little corner of the criminal justice system is akin to using a sledgehammer to kill a fly: the force is too blunt, and the target too elusive. This critique might appear particularly compelling when considering the text of the amendment, which prohibits “slavery” and “involuntary servitude” (except as punishment for crime), while saying nothing about the ideological dimensions of racial domination.²²¹ And yet, precisely because slavery *was* such a powerful and all-encompassing system, prohibiting or dismantling it is, of necessity, a multifaceted endeavor. The two sentences that constitute the Amendment are, therefore, deceptively simple.

Members of the Reconstruction Congress were sharply divided over the meaning of the Thirteenth Amendment, but it was clearly intended to do more than simply strike down the formal framework of legally enforced bondage. Instead, “[b]y the time the Amendment became law in December 1865, a consensus had developed that the Thirteenth Amendment at least protected people’s rights to life, liberty, and property.”²²² The Supreme Court has consistently recognized that the Thirteenth Amendment involved more than merely “nullifying all State laws which establish or uphold slavery.”²²³ The Amendment also has a “reflex character . . . establishing and decreeing universal civil and political freedom throughout the United States.”²²⁴ The Amendment therefore encompasses a fairly broad understanding of slavery as an institution that shaped American civic and political life in addition to raw relations of economic exploitation. For this reason, the Supreme Court determined, in *The Civil Rights Cases*, that section two of the

violation of Thirteenth Amendment’s prohibition of involuntary servitude); Ocen, *supra* note 1, at 1290 (“[T]he Thirteenth Amendment can serve as a vehicle for racial equity in ways that have been foreclosed by the Supreme Court’s Fourteenth Amendment jurisprudence.”); Maria L. Ontiveros, *Immigrant Workers’ Rights in A Post-Hoffman World-Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 675 (2004) (advocating a Thirteenth Amendment framework to authorize labor standards for undocumented workers equivalent to those of documented workers).

221. The full text of the Thirteenth Amendment reads: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII.

222. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 277 (2010).

223. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

224. *Id.*

Amendment (often referred to as the “enforcement clause”)²²⁵ provides Congress with the power to “pass all laws necessary and proper” not only for abolishing slavery itself, but also for abolishing “all badges and incidents of slavery in the United States.”²²⁶

While the discussion of “universal civil and political freedom” in *The Civil Rights Cases* suggests a fairly broad understanding of the scope of the Thirteenth Amendment, the Supreme Court nevertheless applied the Amendment narrowly for nearly the first hundred years of its existence. Thus, even in the very decision that first acknowledged Congressional power to abolish all “badges and incidents” of slavery, the Court held that Congress could not regulate incidents of private discrimination because they have “nothing to do with slavery or involuntary servitude.”²²⁷ The Court remained reluctant to extend the reach of the Thirteenth Amendment in subsequent decades.

Any hope that the Amendment could be used to advocate for a broad understanding of racial justice would have seemed quite dim at the turn of the twentieth century, as the Court’s Constitutional analysis took a starkly literal turn. In *Hodges v. United States*, the Court relied on dictionary definitions to argue that the Thirteenth Amendment’s prohibition against slavery reached only conduct entailing “the state of entire subjection of one person to the will of another.”²²⁸ The Court went on to explain the notion of “badges or incidents” of slavery by way of example, noting that “[i]n slave times in the slave states not infrequently every free negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery.”²²⁹ Because the Court was unwilling to entertain the notion that “incidents or badges of slavery” might extend significantly beyond the bare mechanics of the slave system, it held that the Thirteenth Amendment did not authorize Congress to punish private individuals who used violence and other forms of intimidation to force Black employees to stop working at a lumber mill.²³⁰

If the early history of Thirteenth Amendment jurisprudence worked to constrain the potential of the Amendment, the waning years of the Civil Rights movement, and of the Warren Court, provided some indication of the promise the Amendment held for racial justice initiatives. In *Jones v. Alfred H. Mayer Co.*, the Court held that the Thirteenth Amendment provided Congress the power to enact 42 U.S.C. § 1982, barring “all racial discrimination, private as well as public, in the sale or rental of property.”²³¹ The Court noted that § 1982 was originally part of § 1 of the Civil Rights Act of 1866, and that the section was “cast in sweeping

225. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n.18 (1976).

226. *The Civil Rights Cases*, 109 U.S. at 20.

227. *Id.* at 24.

228. *Hodges v. United States*, 203 U.S. 1, 19 (1906).

229. *Id.* at 17.

230. *Id.* at 20.

231. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

terms.”²³² The Civil Rights Act was concerned not only with the Black Codes and other racially discriminatory statutes, but also with “‘private outrage and atrocity’ . . . ‘daily inflicted on freedmen.’”²³³ The Court found this sweep justified by the legislative history of the Act, whose authors also drafted the Thirteenth Amendment, and who defended the constitutionality of the Act by referencing the Thirteenth Amendment. Most notably, the Court quoted Senator Trumbull, the Chairman of the Judiciary Committee, saying that “I have no doubt that under [section 2 of the Thirteenth Amendment] we may destroy all . . . discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing.”²³⁴ The Court endorsed this sentiment by declaring that “[s]urely, Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”²³⁵

For the issue at hand, the most promising part of the *Jones* decision is that, in determining that Congress acted within its Thirteenth Amendment powers, the Court offered an expansive conception of the badges of slavery. The Court noted that the Black Codes were

substitutes for the slave system . . . [and] the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.²³⁶

The Court concluded that the Act was constitutional because “[t]he end is the maintenance of freedom” and a “man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.”²³⁷

In his concurring opinion, Justice Douglas defined the “badges of slavery” by contemplating the ideological dimensions of racial domination.²³⁸ He agreed with the Court’s finding that “[e]nabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.”²³⁹ More intriguingly, Justice Douglas based his agreement on an analysis of the relationships between racial stereotypes and economic exploitation.²⁴⁰ He declared that

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the *notion that the white man was of superior character, intelligence, and morality*. The blacks were little more than livestock—to be fed and fattened for the

232. *Id.* at 422.

233. *Id.* at 427.

234. *Id.* at 440.

235. *Id.*

236. *Id.* at 442–43.

237. *Id.* at 443–44 (citation omitted).

238. *Id.* at 444–49 (Douglas, J., concurring).

239. *Id.* at 444.

240. *Id.* at 444–49.

economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the *minds and hearts* of many white men.²⁴¹

Justice Douglas went on to list more than a dozen recent cases collectively depicting “a spectacle of slavery unwilling to die” involving such “badges of slavery” as efforts to “thwart Negro voting,” or to exclude Blacks from juries, race-based denial of Black admission to colleges or graduate schools, prosecutions of Blacks for intermarriage, enforced segregation in housing, and exclusion from a variety of public and private spaces.²⁴² For Justice Douglas, the point of this list was not merely to demonstrate the variety of forms that racial discrimination could take, but also to establish that “prejudices, once part and parcel of slavery, still exist.”²⁴³

In highlighting the belief systems that are part and parcel of a system of racial hierarchy and control, Justice Douglas’s concurrence lays a foundation for efforts to enact legislation targeting government policies that rely upon or endorse racist stereotypes. The idea that slavery remains “in the minds and hearts” indicates that these stereotypes can be considered “badges of slavery” prohibited by the Thirteenth Amendment. Even without relying on Justice Douglas’s concurrence, however, the majority opinion’s expansive conception of badges of slavery provides the basis for a framework that can be used to challenge racially based violence.²⁴⁴

Indeed, the Justice Department’s Office of Legal Counsel has recently cited *Jones* in support of the proposition that the racial violence provision of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act is a valid exercise of Congressional power under the Thirteenth Amendment.²⁴⁵ The Office explained

241. *Id.* at 444–45 (emphasis added).

242. *Id.* at 445.

243. *Id.* at 449.

244. In the wake of *Jones*, the Supreme Court continued to discuss Thirteenth Amendment powers in fairly broad terms. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (“[T]he varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude.”). In *Griffin*, the Court held that 42 U.S.C. § 1985(3), or the Ku Klux Klan Act, reaches private conspiracies, and can be used to recover damages against whites who blocked African Americans from travelling on public highways and then beat them with clubs while threatening them with murder. *Id.* at 101. The Court determined that § 1985 was a valid use of Congressional power under the Thirteenth Amendment and the commerce clause. *Id.* at 105–06; *see also* *United States v. Nelson*, 277 F.3d 164, 190 (2d Cir. 2002) (“[R]ace-based private violence both continued beyond the demise of the institution of chattel slavery and was closely connected to the prevention of former slaves’ exercise of their newly obtained civil and other rights (rights that slavery had previously denied them), thereby presenting ‘a spectacle of slavery unwilling to die.’” (quoting *Jones*, 392 U.S. at 445)).

245. Memorandum from Robert Raben, Assistant Att’y Gen., on Constitutionality of the Matthew Shepard Hate Crimes Prevention Act (June 16, 2009), <http://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/shepard-hate-crimes.pdf> [<http://perma.cc/3LP9-ZE2V>] [hereinafter Constitutionality of Hate Crimes Prevention Act]; *see also* Zietlow, *supra* note 222, at 262 (addressing congressional use of Thirteenth Amendment Execution Clause to “legislate against economic barriers

that the provision was “part of a reasonable legislative effort to extinguish the relics, badges and incidents of slavery.”²⁴⁶ In July 2013, the Tenth Circuit upheld the constitutionality of the act, noting that “Congress rationally determined that racially motivated violence is a badge or incident of slavery against which it may legislate through its power to enforce the Thirteenth Amendment.”²⁴⁷ The court went on to note that

[j]ust as master-on-slave violence was intended to enforce the social and racial superiority of the attacker and the relative powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.²⁴⁸

It is precisely because of the communicative aspects of racial violence that the government ought not excuse, justify, or endorse the violent acts of people whose self-defense claims are shaped by racist stereotypes. It is true that there is a clear difference between this type of violence and the “racially motivated violence” contemplated by the Tenth Circuit.²⁴⁹ The Hate Crimes Prevention Act was concerned with violence directly motivated by racial animus, while the primary motivation for at least some race-based self-defense cases may not be animus but genuine fear.²⁵⁰ And yet, when given legal sanction, both types of violence convey similar messages about the racial order.

The stereotypes that provide the basis for believing, for example, that Black men are always and already a criminal threat are, after all, fundamentally of a piece with notions of racial superiority that concerned Justice Douglas and the Tenth Circuit. Throughout slavery, Blacks were portrayed as savage and incapable of “rising above their violent passions, passions that erupted unpredictably and with staggering brutality.”²⁵¹ Belief in the inherently violent nature of Blacks justified ruthless punishment in the antebellum period.²⁵² Similar beliefs characterized the Reconstruction era, as lynching and other forms of antiBlack violence were legitimated by depictions of Blacks as “habitual criminals.”²⁵³ In both periods, racist

and hate crimes confronting racial minorities in the 1968 Fair Housing Act” and to enact the Trafficking Victims Protection Act of 2000).

246. Constitutionality of Hate Crimes Prevention Act, *supra* note 245, at 4.

247. United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013).

248. *Id.* at 1206.

249. The *Hatch* court noted that the racial violence provision of the Hate Crimes Act “rests on the notion that a violent attack on an individual *because* of his or her race is a badge or incident of slavery.” *Hatch*, 722 F.3d at 1195 (emphasis added).

250. *Id.* at 1206 (“Congress could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery.”).

251. BRUNDAGE, *supra* note 10, at 5.

252. *Id.*

253. *Id.* at 53; *see also* Carter, Jr., *supra* note 220, at 24–25 (“[T]he legally enforced stereotype of black criminality has a particularly injurious effect on African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment. The image in the

violence was used to patrol the boundaries of white supremacy, and to send clear messages about the limits to Black power and mobility. The cost of allowing contemporary manifestations of these beliefs to justify continuing violence against African Americans may well be that the government once again signals that the rights and protections of citizenship are circumscribed by race.

It is certainly possible that one message communicated to Black audiences whenever someone is permitted to kill a Black man or woman because of racialized fears, genuine or not, is that, for them, there is no such thing as safe ground. At the very least, Blacks may learn from such cases that they must take precautions that are not required of whites. Black sensitivity to white fears may be thought of as a “racial tax” payable to increase the odds of survival in public spaces.²⁵⁴ Because it would be based on variants of stereotypes and fears central to slavery, Congress could rationally determine that such a tax and the messages giving rise to it are “badges of slavery.” Thirteenth Amendment powers, therefore, would authorize the enactment of legislation preventing the criminal justice system from allowing justification or excuse defenses whose effect would be to lend government authority to these badges of subordination.²⁵⁵

If the Thirteenth Amendment therefore provides the basis for a normative antiracist standard of reasonableness in self-defense jurisprudence, it can also provide additional guidance for the content of the standard. Even when relying on the Thirteenth Amendment, it will remain true that what is normatively reasonable is open to political contest and negotiation. However, a normative standard based upon the Thirteenth Amendment would not treat all racially based beliefs equally. Instead, because the Amendment specifically prohibits “badges of slavery,” the kinds of beliefs that are at issue are those that are, or have historically been, supportive of systems of racial domination.

At one level, every racial belief is linked to systems of racial domination, since the modern conception of race itself is a social construct rooted in slavery and the European conquest of the “new” world.²⁵⁶ On the other hand, racial meanings have

collective white mind of blacks (particularly black men) as congenital criminals is perhaps the most deeply entrenched stereotype pervading the black-white relationship in America.”).

254. “Racial tax” is a term popularized by Randall Kennedy in *RANDALL KENNEDY, RACE, CRIME, AND THE LAW* 159 (1998). Kennedy does not, however, appear to have coined the term. See Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CALIF. L. REV. 1315, 1324 (1997) (“[T]hose who insist on minority status for Asian Americans point out that even the most successful Asian Americans pay a racial tax not borne by Whites.”).

255. One advantage to relying on the Thirteenth, rather than the Fourteenth, Amendment is that the Thirteenth Amendment may be used to strike down racial discrimination on a theory of disparate impact, so it would not matter if a defendant’s reliance upon racial stereotypes was unconscious and unintentional. See *Bailey v. Alabama*, 219 U.S. 219, 244 (1911) (reversing a conviction for debt as violating the Thirteenth Amendment “[w]ithout imputing any actual motive to oppress”); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 506 (1990) (noting that *Bailey* demonstrates that “invidious intent is . . . not a part of the burden a thirteenth amendment challenge to a statute must carry”).

256. OMI & WINANT, *supra* note 12, at 61 (“[T]he emergence of a modern conception of race does not occur until the rise of Europe and the arrival of Europeans in the Americas. . . . It was only

always been hotly contested, and only some racial meanings have been actively mobilized in the service of furthering racial domination. Stereotypes of Black criminality are among the clearest examples of racial beliefs that have been yoked to racially oppressive material practices. As discussed above, these stereotypes are therefore profitably thought of as “badges of slavery.” Other racial beliefs, however, have been used to fight against racial domination and for racial equality or liberation. It would be difficult, for example, to argue that the notion that Black people deserve the same economic opportunities as whites ought to be seen as a “badge of slavery,” even though the belief in racial equality is also a racial belief.

Because not every racial belief is implicated in maintaining relations of racial domination, a normative conception of reasonableness that draws upon Thirteenth Amendment powers would need to distinguish between different types of racially based fears and prohibit only those beliefs that can be fairly considered “badges of slavery” in the determination of whether someone’s violent acts were motivated by “reasonable” fear. Assessing exactly what kinds of racial beliefs are prohibited would be a task of variable difficulty. Fears based on stereotypes of Black criminality or violence are fairly straightforward. Such stereotypes have been used to shore up systems of racial domination for centuries, and were in fact central to slavery itself. They are therefore an emblematic example of racial beliefs as badges of slavery. A normative conception of reasonableness based on Thirteenth Amendment powers would firmly prohibit reliance on them. Under this kind of normative standard, defendants like Bernhard Goetz, whose violent actions may have been motivated by stereotypes of Black men, would be denied the benefit of having their fears treated as providing a reasonable basis for a self-defense claim regardless of whether their beliefs are products of a culture that insists there is good reason for those fears. John White’s fears, on the other hand, present a much more difficult case.

Superficially, John White and Bernhard Goetz might be seen as having acted on similar, but inverse, racialized fears. Goetz appears to have been motivated by fear of young Black men, while White appears to have been motivated by fear of young white men. Both men appear to have seen their targets as more than individuals. The people they shot were symbols of larger threats. The similarities break down, however, when considering the nature of the perceived threat. From the outset, it is worth noting that White’s fear may not have been based on stereotypes at all, but on a realistic understanding of histories of white violence directed at Black men and either endorsed or ignored by the state.

This point is of only limited value when considering that, as a practical matter, it would be difficult to distinguish between Goetz and White on the basis of how strongly their fears resonate with demonstrable patterns of past violence. Courts tasked with determining *whose* fears are statistically justified could quickly devolve into battlegrounds over historical, demographic, and criminological data. These

when European explorers reached the Western Hemisphere . . . that the distinctions and categorizations fundamental to a racialized social structure, and to a discourse of race, began to appear.”).

battles may be worth waging, but it is unlikely that courts will allow judicial resources to be used to hash out these issues. It is important, however, to acknowledge that not every perceived racialized threat is created equally, and that it is possible to believe that one is being targeted for racialized reasons without resort to racial stereotypes. This acknowledgement gets to the reason so many people had sympathy for John White: his fears were based on an understanding of racialized violence that is widely shared among people whose historical sensibilities have been shaped by knowledge of racism and antiracist struggle.

More important, even if White's fears *are* based on racial stereotypes, a belief in white violence is not a stereotype that has historically been used to enforce or maintain a system of racial subordination. This is not the kind of stereotype supporting the beliefs in white superiority of "character, intelligence, and morality" that so concerned Justice Douglas.²⁵⁷ Nor can this stereotype communicate that white men must "*remain* in a subservient position, unworthy of the decency afforded to other races."²⁵⁸ Stereotypes of white violence could not be used to legitimate slavery, and it is therefore difficult to see them as relics, or badges of slavery. It is quite likely, then, that a normative standard of reasonableness shaped by the Thirteenth Amendment would treat White's fears differently than Goetz's. If White's fears are not based on badges of slavery, there is no basis for a Thirteenth Amendment prohibition against allowing them to become a part of the reasonable fear calculus.

This is not to say, however, that a normative reasonableness standard based on the Thirteenth Amendment would only prohibit reliance upon racist stereotypes concerning African Americans. Instead, as Justice Harlan noted in his dissent in *The Civil Rights Cases*, "[t]he terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred."²⁵⁹ During Reconstruction, Congress relied upon Thirteenth Amendment powers to "expressly prohibit[] Native Americans [from] treating other Native Americans as peons and [to] address[] the peonage-like exploitation of young Italian immigrants in urban areas."²⁶⁰ The Amendment's protections extend to every racial or ethnic group, including white ethnicities.²⁶¹ In the self-defense context, however, the protections at issue involve protection from badges of racial inferiority and subordination. The reason that there is no Thirteenth Amendment bar to considering John White's racialized fears is not that the target and source of his fears was white men, but that stereotypes of whites as vigilantes

257. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

258. *United States v. Hatch*, 722 F.3d 1193, 1206 (10th Cir. 2013) (emphasis added).

259. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (Harlan, J., dissenting); *see also* *Slaughter-House Cases*, 83 U.S. 36, 37, 21 (1872) ("While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude . . .").

260. *Zietlow*, *supra* note 222, at 289.

261. *Id.*

have never been used to reinforce systems of racial domination (even as *real-life* white vigilantism *did* support white supremacy). Reliance upon any racial stereotype that *has* been used to reinforce systems of racial domination, including, for example, stereotypes of unthinkingly violent Latino gangbangers, *would* fall under the ambit of a normative standard derived from Thirteenth Amendment prohibitions.²⁶²

Should Congress fail to enact legislation establishing a normative standard of reasonableness in self-defense cases, courts may nevertheless determine that the Thirteenth Amendment directly prohibits reliance upon racial stereotypes in self-defense determinations. The Supreme Court has left unanswered the question of whether the Amendment's prohibition against government endorsement of badges and incidents of slavery is self-executing.²⁶³ However, the logic of the *Civil Rights Cases* suggests that the prohibition is implicitly embodied within the Amendment itself, and does not depend on Congressional action.²⁶⁴ There is no way to understand how the execution clause could grant Congress the ability to pass legislation necessary to eradicate badges of slavery unless they are banned by the Amendment's first section.²⁶⁵

The Supreme Court has expressed concern that judicial action directed against badges and incidents of slavery may inappropriately encroach upon legislative prerogatives.²⁶⁶ However, it was the prospect of judicial supervision of municipal

262. A standard that allows a defendant who kills because of fears of *white* violence to rely upon a claim of reasonable racially based fears while denying such a defense to a defendant who kills because of fears of *Black* violence is likely to be objected to on equal protection grounds. However, such an objection would fail to grasp the nature of racist violence and racist belief systems. The standard I am proposing would prohibit defendants of *any* race from invoking a defense that is based upon racist stereotypes that have been used to uphold systems of domination. All defendants are treated equally under this standard. However, the standard would not allow for a legal fiction of false equivalents suggesting that every type of racial fear and racial stereotype has the same type of history, or has been linked to the same kinds of power and oppression.

It may also be worth mentioning that there is no Sixth Amendment problem here. The standard I am proposing does not prohibit a defendant from providing evidence that he or she acted on the basis of racially based fears. The proposal is thus quite different from the "race shield" proposals discussed *infra*, p. 931.

263. *City of Memphis v. Greene*, 451 U.S. 100, 124–26 (1981) ("Pursuant to the authority created by § 2 of the Thirteenth Amendment, Congress has enacted legislation to abolish both the conditions of involuntary servitude and the 'badges and incidents of slavery.' The exercise of that authority is not inconsistent with the view that the Amendment has self-executing force. . . . In *Jones*, the Court left open the question whether § 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave that question open . . ." (citations omitted)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (declining to determine "[w]hether or not the Amendment *itself* did any more than" abolishing slavery and establishing universal freedom (emphasis added)); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 349 (2004) ("This dictum in *Greene* indicates that, given a justiciable controversy, the judiciary could decide whether a cause of action amounts to a badge or incident of servitude.").

264. See *The Civil Rights Cases*, 109 U.S. at 3.

265. Koppelman, *supra* note 255, at 506 ("If the thirteenth amendment authorizes Congress to eradicate the badges of slavery . . . this can only be because they, too, are among the evils that the amendment forbids.").

266. *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971) (determining that the Thirteenth Amendment prevents a municipality from closing its public swimming pools to avoid integration

services that appears to have prompted this concern.²⁶⁷ There is little reason for concern with usurping the powers of national, state, or local legislative bodies when considering the self-defense context, since defining the parameters of reasonable fear has thus far seldom been a matter of legislative concern. Because courts have always been the final arbiters of what factors can be considered when reaching determinations of reasonable fear, a court's holding that it is impermissible for self-defense determinations to rely upon racial stereotypes would constitute a fairly typical act of judicial interpretation, rather than legislation from the bench. Even so, judicial opinions instituting normative standards of reasonableness would be only a piecemeal solution. Anything less than a Supreme Court decision mandating such a standard would apply only on a jurisdiction-by-jurisdiction basis. Congressional action, then, provides the most direct route to a reasonableness standard disallowing reliance on racial stereotyping throughout the country.

C. *The Need to Actively Patrol for Racial Bias in the Courtroom*

The goal of a normative self-defense standard would be to prevent the jury from sanctioning a defendant's racist fears. This would address only one way that racial bias infiltrates self-defense deliberations, since a normative standard would not prevent jurors from relying upon their *own* racially based fears; nor would it prevent defense attorneys from catering to those fears. Particularly adept lawyers and judges may be able to screen for subtle bias during voir dire, but it may well be impossible to completely weed out jurors whose racial fears would prevent them from engaging in fair adjudication.²⁶⁸ It may, however, be possible to develop better methods for screening for the introduction of racial bias into courtroom proceedings. Two of the cases examined in this Article provide a sense of the potential value in developing a more sophisticated screening process.

While racially based fears undoubtedly played a central role in the public support that Bernhard Goetz received after shooting Darrell Cabey, Barry Allen, Troy Canty, and James Ramseur, and while Goetz's own understandings of racial dynamics seem clearly to have figured into his decision to fire upon the unarmed teens, when the case finally went to the jury, media coverage consistently suggested

"would severely stretch [the Amendment's] short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors").

267. Koppelman, *supra* note 255, at 500 n.87.

268. Voir dire has only limited potential for screening racial bias, partly because "voir dire on racial issues is not always permitted, even when inflammatory factual circumstances are present." Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1769 (1993) (citing *Ristanio v. Ross*, 424 U.S. 589, 598 (1976), as holding that no question on racial prejudice required in trial of a Black man for violent crimes against a white man because no significant likelihood that racial prejudice would affect deliberations); *see also* LEE, *supra* note 7, at 224–25 (proposing a race-switching jury instruction that would heighten awareness of racist stereotypes in deliberations, premised upon the belief that jurors generally do not *want* to rely upon racist stereotypes).

that race had played no role in the trial.²⁶⁹ And it is true that race was never explicitly discussed during the proceedings. However, it is possible to rely upon racial stereotypes without using the language of race, and Goetz's legal team took full advantage of racially charged imagery and code words.

Barry Slotnick, Goetz's attorney, regularly portrayed Goetz's victims in animalistic terms, referring to them as "vultures" and "predators," while suggesting that Goetz had acted in defense not only of self, but also of civilization itself, taking aim not at a group of teenagers, but at the "savages" whose potential for violence needed no explanation.²⁷⁰ More dramatically, Slotnick staged a reenactment of the events leading up to the shooting, and relied on human props to highlight the sense of danger that Goetz claimed to have felt.²⁷¹

Slotnick enlisted the aid of the "Guardian Angels," a volunteer organization dedicated to eliminating street crime by patrolling the streets and making "citizen arrests." In the 1980s, the group was composed mostly of young men, and, like Goetz himself, it had been both praised and condemned for vigilantism.²⁷² Slotnick had "four young black Guardian Angels, fit and muscular, dressed in T-shirts" stand in for Goetz's victims.²⁷³ Ostensibly, the Angels were called in to help demonstrate inferences that could be drawn from bullet trajectories.²⁷⁴ There was, therefore, no evidentiary reason that Slotnick needed to request that the Angels provide Black volunteers for the recreation. George Fletcher notes that the expert witness who testified during the reenactment "was not authorized to speak about the rational inference of danger from being surrounded by four young black toughs. But Slotnick designed the dramatic scene so that the implicit message of menace and fear would be so strong that testimony would not be needed."²⁷⁵ The absence of any open discussion of race may have made Slotnick's theatrical display more effective, since it meant that there was never any debate about the racial underpinnings of the staging. Additionally, it is possible that jurors who may have recoiled at explicit verbal invocations of racist stereotypes were instead quietly swayed by more covert and unacknowledged reliance upon the same types of racist imagery that were ubiquitous outside the courtroom walls, in popular culture and even within daily news coverage of the trial.

Nearly thirty years later, similar dynamics were at play as defense attorney Mark O'Mara presented his closing arguments in the murder trial of George Zimmerman. In an attempt to portray Trayvon Martin as a powerful threat, O'Mara displayed a shirtless photograph of Martin, directing the jury's gaze toward Martin's

269. For a discussion of media coverage of the Goetz case, see MARKOVITZ, *supra* note 135, at 70–80.

270. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 204–06 (1988).

271. *Id.* at 206–07.

272. *Id.* at 207.

273. *Id.*

274. *Id.*

275. *Id.* at 129–30.

physique.²⁷⁶ O'Mara explained that while the jury had already seen Martin's body in autopsy photographs, such photographs are presented to juries for emotional appeal.²⁷⁷ They are

horrific, and they're meant to have negative impact. I did it when I was a prosecutor. Prosecutors do it all the time. A dead person on a slab has an impact on you. . . . The other thing about autopsy photographs is that there's no muscle tone because there's no nerves, there's no movement . . . on that picture that we have of him on the medical examiner's table, yeah, he does look emaciated. But here's him three months before that night. So it's in evidence, take a look at it. Because *this* is the person . . . who George Zimmerman encountered that night. *This* is the person who . . . attacked George Zimmerman, who broke his nose or something close to it, and battered him on something.²⁷⁸

O'Mara then displayed a photograph illustrating how dark it was on the night of Martin's death.²⁷⁹ He told the jury that "it was out of this darkness that Trayvon

276. See David Edwards, *Zimmerman Lawyer Closes by Showing Jury Shirtless Trayvon Photo*, RAW STORY (July 12, 2013, 12:19 PM), <http://www.rawstory.com/rs/2013/07/12/zimmerman-lawyer-closes-by-showing-jury-shirtless-trayvon-photo/> [http://perma.cc/S3U7-7K6L].

277. See *id.*

278. For video of O'Mara's closing argument, see *id.* Of course, if part of the point of showing this photograph to the jury was to provide a clearer sense of the basis for Zimmerman's fear, one important problem is that Zimmerman never saw Martin without a shirt. Zimmerman could not have known what Martin's musculature looked like, so "this" is not the Martin that Zimmerman was confronted with on the night of Martin's death. See Charles Blow, Op-Ed., *The Whole System Failed Trayvon Martin*, N.Y. TIMES (July 16, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html> ("[E]veryone in the courtroom raised racial bias in roundabout ways, but almost never directly—for example, when the defense held up a picture of a shirtless Martin and told the jurors that this was the person Zimmerman encountered the night he shot him. But in fact it was not the way Zimmerman had seen Martin. Consciously or subconsciously, the defense played on an old racial trope: asking the all-female jury—mostly white—to fear the image of the glistening black buck, as Zimmerman had.")

O'Mara would argue, however, that the photograph has probative value in highlighting Martin's physical strength, which would have been apparent to Zimmerman once they were engaged in a struggle. The strongest argument against O'Mara displaying the photograph is not that the photo is without probative value, but that the value is outweighed by the potential to unfairly prejudice the jury. See FED. R. EVID. 403. The idea that Martin was the aggressor in the case, and that Zimmerman was the victim, was central to the entire defense strategy. See Jelani Cobb, *George Zimmerman, Not Guilty: Blood on the Leaves*, NEW YORKER BLOG (July 13, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/07/george-zimmerman-not-guilty-blood-on-the-leaves.html> [http://perma.cc/E8UG-W7RJ] ("During his cross examination of Martin's mother, Sybrina Fulton . . . O'Mara asked if she was avoiding the idea that her son had done something to cause his own death. During closing arguments, the defense informed the jury that Martin was armed because he weaponized a sidewalk and used it to bludgeon Zimmerman.")

While racial bias may have been imported into Zimmerman's trial in fairly subtle ways, there was nothing at all subtle about racist depictions of Trayvon Martin within popular culture. See Ta-Nehisi Coates, *Trayvon Martin and the Irony of American Justice*, ATLANTIC (July 15, 2013, 5:09 AM), <http://www.theatlantic.com/national/archive/2013/07/trayvon-martin-and-the-irony-of-american-justice/277782/> [http://perma.cc/W7R3-N845] (discussing imagery of Trayvon Martin in iPhone games, circulated by e-mail, and as used for target practice by law enforcement).

279. See Edwards, *supra* note 276.

Martin decided to stalk, I guess, plan, pounce, I don't know, all I know is that when George Zimmerman was walking back to his car, out of the darkness, be it bushes or darkness or left or behind or somewhere, Trayvon Martin came towards George Zimmerman. Out of this [O'Mara shakes photo of dark area] and we know what happened. The big picture is what happened."²⁸⁰

Contrasting the shirtless photograph of Martin with the autopsy photographs made it possible for O'Mara to create *two* Trayvon Martins, and to project whatever characteristics he wished up each image. Rather than considering Martin as a single, whole person—a full-fledged human being who had hopes, fears, and a family that he was coming home to in the moments before his death—he gave the jury license to see each photograph as providing evidence of only specific, isolated traits. In creating bifurcated representations of Martin, O'Mara also suggested that it was fair game to discard the parts of Martin's life, or death, that did not fit within Zimmerman's self-defense narrative.²⁸¹

O'Mara acknowledged that the autopsy photographs provided evidence of weakness and vulnerability,²⁸² but he in effect told the jury that use of these photographs was a trick; one of the oldest tricks in the prosecutorial handbook. O'Mara didn't blame the prosecutor for using the trick, but he suggested that the jury should be aware that, were they to give these photographs much attention, they would be falling for empty emotional appeals. Moreover, any juror who lingered on these photographs would be misled, since this was not the *real* Trayvon Martin—the living and breathing Trayvon Martin who encountered George Zimmerman on that fateful evening. The *real* Trayvon Martin was the muscular, apparently physically fit, and very much-alive young man represented in the shirtless photograph. *This* is the Trayvon Martin that jurors were encouraged to think about while considering whether Zimmerman had actual and reasonable fear.

As with the use of the Guardian Angels in the trial of Bernhard Goetz, there is nothing about the use of the shirtless photograph of Trayvon Martin that is explicitly racialized. Certainly, O'Mara said nothing about race as he displayed the photograph. On the other hand, O'Mara's decision to highlight and then cast away images of Martin's vulnerability while lingering on his musculature fits into a long history of racialized narratives and imagery that entail reducing Black men to

280. *Id.*

281. Mario Barnes captures a similar dynamic in his analysis of the ways that African American women are treated by criminal courts. Through a combination of “invisibility” and “hypervisibility” courts can effectively erase or sublimate an individual:

With invisibility, a court's understanding of minority identity or its irrelevance to assisting in decision-making, effectively negates the individual's presence. Essentially, for the purpose of influencing the court's outcome, the defendant is simply rendered not there. With hypervisibility, a court uses identity constructions to erase then reconstitute the individual, but only as a caricature or exemplar of a debilitated identity. The individual, however, is no more present.

Barnes, *supra* note 9, at 979.

282. See Edwards, *supra* note 276.

nothing more than brute physicality.²⁸³ In telling the jury to disregard the autopsy photographs, O'Mara stripped Martin not only of the qualities and frailties that made him most human, but also even of his death itself. After all, directing the jury's gaze away from Martin's death and back toward his vibrant life is, above all else, a powerful moment of resurrection, preventing the ghost of Martin's emaciated, bloodless, and prone body from haunting the jury's deliberations. With this specter out of the picture, O'Mara was free to cater to the most familiar and enduring types of racist impulses. He took full advantage of this opportunity as he employed animalistic imagery, portraying Martin as a creature lying in wait before pouncing out of the darkness or bushes in order to prey upon his victim.²⁸⁴

283. Perhaps the most dramatic illustration of this historical practice can be found in the media coverage of the nomination of Clarence Thomas to be an Associate Justice on the Supreme Court. Toni Morrison notes that the media regularly focused on Thomas's body, addressing his weightlifting, his laugh, and his deliberations about whether to play golf. Morrison is critical of this attention, but unsurprised. She writes that "[w]hat would have been extraordinary would have been to ignore Thomas's body, for in ignoring it, the articles would have had to discuss in some detail that aspect of him more difficult to appraise—his mind." Toni Morrison, *Introduction: Friday on the Potomac*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY*, at vii, xiv (Toni Morrison ed., 1992); see also ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 94–95 (1995) (analyzing lynching as a method of "reclaim[ing] and reassert[ing] the centrality of black male corporeality" at a historical moment where emancipation threatened processes that had reduced African Americans to the status of body and property, and when it was now theoretically possible for Black men to "move toward citizenry and disembodied abstraction").

284. At the same time that the defense was permitted to rely upon unacknowledged racial imagery, the court made a series of decisions preventing the jury from not only considering, but even learning about, any information pointing to possible racial bias or animus on Zimmerman's part. Most importantly, the judge prohibited the prosecution from discussing racial profiling. See Marjorie Cohn, *Key Mistakes Sway Jury in Zimmerman Trial*, TRUTHOUT (July 17, 2013, 9:57 AM), <http://truth-out.org/news/item/17620-zimmerman-vs-martin-racial-profiling-and-self-defense> [<http://perma.cc/LDA4-ZDGB>] ("Only the word 'profiling' could be used, Judge Debra S. Nelson ruled."). Additionally, the jury never learned that Zimmerman's cousin told a Sanford police officer that "I know George. And I know that he does not like black people." *Id.* As Cohn says, "The entire trial from start to finish was sanitized of any mention of race." *Id.* Deciding not to allow any discussion of racial profiling stripped away context that would have aided jurors in their attempt to fairly assess Zimmerman's claim of reasonable fear.

In shifting attention away from Zimmerman's motivations, the judge's refusal to provide an initial aggressor instruction, *supra*, Part I, added to this process of decontextualizing and further obscured the possible racial dimensions to the confrontation between Zimmerman and Martin. The effect of this refusal may have been to encourage jurors to focus so closely on individual blows that they were likely to miss a bigger picture.

The relevance of George Zimmerman's long history of regarding young Black men as suspicious drops away if the legal gaze is focused solely on one small patch of concrete and grass. Similarly, the fear that Trayvon Martin may have felt while being followed and surveilled—if not actually pursued, chased, and assaulted—by Zimmerman, is of little consequence if all that matters is what happened once the physical altercation had already begun.

There are some indications that at least some jurors saw the question of whether Zimmerman had reasonable fear as a close call. See Tim Walker & Heather Saul, *George Zimmerman Trial: Reverend Al Sharpton Calls for Day of Action as Trayvon Martin Juror Reveals Doubts*, INDEPENDENT (July 16, 2013), <http://www.independent.co.uk/news/world/americas/george-zimmerman-trial-reverend-al-sharpton-calls-for-day-of-action-as-trayvon-martin-juror-reveals-doubts-8711329.html> [<http://perma.cc/S788->

This kind of defense strategy hints at how daunting a task it would be to eliminate appeals to racial bias in self-defense trials.²⁸⁵ Several scholars have suggested prohibiting any discussion of race at trial, or developing “race shield” laws, modeled after rape shield laws, that would prohibit reliance on racial imagery, with several exceptions.²⁸⁶ Addressing the merits of each of these proposals is beyond the scope of this Article. However, there are two difficulties worth mentioning that are inherent in attempting to bar the courtroom doors to racial imagery or discussions of race. First, categorically ruling out any discussion of race, or of a defendant’s racially based fears makes sense only with the assumption that juries will share or endorse a racist belief system.²⁸⁷ This assumption forecloses the possibility that juries will find reliance upon racist stereotypes normatively unreasonable, as Lee suggests. Highlighting the role of racist stereotypes might alert jurors to the need to consider whether the victim in a self-defense case was unjustly targeted.²⁸⁸ If racist phobias explain a defendant’s actions, a prosecutor ought to be able to present those phobias to the jury as evidence to better establish culpability, rather than to mitigate it. Second, even if a race shield law is attentive to this issue, and allows exceptions when a defendant is accused of having acted violently because

V6ZY]. There is no way to know whether the call would have been still closer had the jurors been encouraged to consider the mindsets of Zimmerman and Martin before any blows were struck.

Furthermore, it is possible that discouraging one kind of context opened the gateway for another. The refusal to provide an initial aggressor instruction may have shifted focus away from Zimmerman’s motivations and Martin’s fear, while allowing the defense to link Martin to a centuries-old tradition of representing African Americans as inherently violent, or to what Robert Gooding-Williams refers to as a “storehouse of interpreted images of black people that American jurors, lawyers, and media pundits have available to them as elements of the culture they have in common.” Gooding-Williams, *supra* note 181, at 163.

For an analysis of a similar process of decontextualization and recontextualization with regard to the use of video evidence in the state criminal trial of the officers who beat Rodney King, see Butler, *supra* note 32, at 20.

285. The above discussion is not meant as an exhaustive examination of the possible ways that racial bias played out in the Goetz and Zimmerman trials. One additional area that is worthy of extensive scrutiny is the defense treatment of Trayvon Martin’s friend Rachel Jeantel, during Zimmerman’s trial. In an attempt to discredit Jeantel’s testimony, Mark O’Mara asked a series of questions designed to establish whether she was Martin’s girlfriend. While one possible motivation for this questioning was to point to possible bias, it is also conceivable that O’Mara was playing upon stereotypes of Black women’s sexuality. Throughout the questioning, O’Mara may have also been playing upon stereotypes surrounding race, class, gender, and intelligence. For a brief discussion of some of these issues, see Jelani Cobb, *Rachel Jeantel on Trial*, NEW YORKER (June 27, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/06/trayvon-martin-rachel-jeantel-on-trial.html> [<http://perma.cc/4W8Y-7ZRR>].

286. Armour, *supra* note 173; Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1198, 1209, 1214–16 (2003); Johnson, *supra* note 268.

287. Jody Armour argues that “[s]ince assault-induced phobias of blacks may rest on conscious or unconscious racism, admitting evidence of such a phobia, even if the defendant claims it is involuntary, employs an explicit racial classification and gives effect to racial prejudice in violation of the Equal Protection Clause.” Armour, *supra* note 173, at 814.

288. See Lee, *supra* note 197, at 1586–87 (“[W]hen race is made salient at trial, this activates the egalitarian racial attitudes held by White jurors as a normative ideal. . . . When racial issues are highlighted, this reminds White jurors of the need to act without prejudice.”).

of racist fears, courts may have a difficult time determining when racially coded language or imagery has been introduced.²⁸⁹ Sadly, the human capacity for dehumanization is incalculable, and it is difficult to imagine guidelines that could capture the full range of racist appeals.²⁹⁰ This is especially true when considering subtle racist appeals that could be interpreted as having nonracist meanings.²⁹¹ These difficulties are not reason to abandon race shield laws, but they do begin to suggest how difficult such laws would be to develop and implement.

If the prospect of excluding racist appeals or racial imagery from self-defense trials is daunting, it is nevertheless important to develop better methods to actively patrol for racial bias, and to attempt to mitigate its influence. A first step in this process might be to identify the kinds of cases where reliance on racially based fears is most likely to be at issue. Extraordinary vigilance may be warranted, for example, in cases involving interracial violence, especially when those cases have attracted considerable media attention focused around issues of race and crime. Courts should be pressured to do a better job of excluding racial imagery that is more prejudicial than probative in general.²⁹² However, if a system could be established

289. Johnson's race shield proposal does allow for the use of racial imagery where "a racial attitude, including race-based fear, is alleged to have contributed to the defendant's good faith belief that his actions were reasonable *and* his good faith is both relevant and disputed, *and* that attitude is described, questioned or argued in terms that are not unnecessarily inflammatory." Johnson, *supra* note 268, at 1801. Johnson also notes that, as it stands, courts regularly fail to follow evidence rules that should require the exclusion of racial imagery that is more prejudicial than probative. *Id.* at 1771. With this in mind, it is easy to imagine that enforcement of race shield laws would be sporadic and idiosyncratic at best. The shirtless photograph of Trayvon Martin illustrates the problem: as the above analysis suggests, determining that use of this photograph in this particular context involves racial stereotyping is far from immediately clear. It seems unlikely that such imagery would be screened out by most race shield measures.

290. Johnson defines "racial imagery" as any word, metaphor, argument, comment, action, gesture, or intonation that suggests, either explicitly or through commonly understood allusion, that:

- (1) a person's race or ethnicity affects his or her standing as a full, capable, and decent human being; or
- (2) a person's race or ethnicity in any way affects the credibility of that person's assertions; or
- (3) a person's race or ethnicity in any way affects the likelihood that he or she would choose a particular course of conduct whether criminal or noncriminal; or
- (4) a person's race or ethnicity in any way affects the appropriate sanctions for a crime committed by or against him or her; or
- (5) a person's race or ethnicity sets him or her apart from members of the jury, or makes him or her allied with members of the jury or, more generally, that a person's race or ethnicity allies him or her with other persons of the same race or ethnic group or separates him or her from persons of another race or ethnic group.

Id. at 1799.

291. For example, it is common for prosecutors to depict police officers as a "thin blue line" defending civilization from barbarous threats. While a strong argument could be made that this is a racist characterization that taps into cultural imagery of people of color as violent threats, the prosecutors who employ the term would doubtlessly say that it is meant only to invoke generic nonracialized knowledge and understandings about crime that plagues American cities.

292. Because racial stereotypes can be invoked not only through introduction of evidence, but also through narrative and code words, better use of the evidence code can provide, at best, only a partial solution. *See* FED. R. EVID. 403 (allowing courts to exclude evidence if probative value is substantially outweighed by a number of factors, including the danger of unfair prejudice).

to identify self-defense cases that are more likely to involve racially based appeals, those cases could be targeted for more aggressive intervention. Judges and prosecutors who are assigned to these cases might be offered the opportunity to receive specialized training to help recognize subtle appeals to racist belief systems. Courts might appoint monitors who could be trained to identify racial bias and alert judges to the use of racially coded appeals or imagery.²⁹³ These monitors would not need to have any responsibility or authority beyond alerting judges and attorneys to what they have identified as racial appeals. This could be done *in camera*, so a jury would never learn of the monitor's assessment if a judge disagrees with it. If there is disagreement between a judge and an attorney, the attorney would still have the benefit of having heard the monitor's opinion, and might be able to tailor her arguments accordingly. If judges or lawyers agree with the monitor, one response might be to bring in expert witnesses to testify about the nature and prevalence of racial stereotyping, or to allow the monitor to provide that testimony.

These proposals are not intended to be exhaustive, and may not be tenable. Experts in the rules of evidence and trial might have better luck crafting procedures for identifying and defusing appeals to racial bias. And politicians and legislators are better equipped than I am to assess the kinds of resources that might be brought to bear. The point however, is that part of the effort to curtail the influence of racist stereotyping in self-defense determinations must involve providing judges and prosecutors with resources and incentives to take an active role in identifying the problem.

CONCLUSION

Self-defense cases represent only one small area of the law in which determinations of what counts as reasonable fear, suspicion, or force can be shaped by reliance on racist belief systems. The 1992 criminal trial of the LAPD officers who beat Rodney King would have seemed familiar to anyone who had followed the trial of Bernhard Goetz five years earlier.²⁹⁴ Once again, animalistic imagery was invoked in an effort to link a crumpled Black body to foundational myths of African American violence.²⁹⁵ The assumption that police officers *always* have reasonable suspicion of young Black and Latino men provides the unspoken subtext animating stop-and-frisk programs that have recently come under fire in New York, even as they have migrated to other police forces around the country.²⁹⁶ Whenever the legal

293. If this was done in only exceptional circumstances, the burden on the court system would not be terribly high, and any expense could be offset if courts established pools of pro bono expert witnesses.

294. MARKOVITZ, *supra* note 135, at 70–80.

295. FLETCHER, *supra* note 270, at 204–06.

296. The racialized understandings of reasonable suspicion that underlie stop-and-frisk policies were recognized during the 2013 New York City mayoral campaign. In the wake of George Zimmerman's acquittal in the Trayvon Martin case, William C. Thompson, Jr., the sole African American candidate, declared that "[h]ere in New York City, we have institutionalized Mr. Zimmerman's suspicion with a policy that all but requires our police officers to treat young black and

system sanctions the idea that it is reasonable to fear people because of their race, it justifies and reinforces not only racist violence, but also long histories of putting racialized “others” under a surveillant gaze. Self-defense doctrine, like Fourth Amendment jurisprudence, can all too easily become a tool for identifying and regulating racial difference, and for patrolling racial boundaries. When the legal system is willing to sign off on the notion that it is reasonable to fear entire groups of people, and to act out violently because of those fears, the effect is to cast those groups out of the imagined community of the nation,²⁹⁷ and to shatter any illusion of formal equality under the law.

On the other hand, because the criminal justice system plays such a crucial role in shaping public attitudes about race, crime, and violence, antiracist reforms to the system can reverberate in the broader culture. Relatively minor changes in criminal law intended to weed out reliance on racial stereotyping in self-defense determinations can help create an antiracist common sense that can be leveraged for other kinds of social change, within and beyond the legal system. Implementing such changes would therefore be one small step in a much larger struggle.

Latino men with suspicion, to stop them and frisk them because of the color of their skin.” Michael Barbaro & Nate Schweber, *Invoking Zimmerman, Thompson Seizes New York Frisking as Issue*, N.Y. TIMES, July 29, 2013, at A1. Mr. Thompson added that 600,000 Black and Latino men stopped in New York City in 2011 were “profiled as Trayvon was profiled.” *Id.* at A13. Then-candidate Bill de Blasio also became an outspoken critic of New York’s stop-and-frisk policy, and ending the racist use of the practice became a priority of his administration once he was elected. *See* Joseph Goldstein, *Friskings Ebb, But Still Hang Over Brooklyn Lives*, N.Y. TIMES, Sept. 20, 2014, at A1. While the numbers of stops and frisks have declined dramatically in recent months, it is unclear whether other forms of racially biased policing have taken their place. *Id.* at A16. Much of New York City’s stop-and-frisk policy was found unconstitutional in *Floyd v. City of New York*, 283 F.R.D. 153, 167 (S.D.N.Y. 2012) (“[A]ccording to their own explanations for their actions, NYPD officers conducted at least 170,000 unlawful stops between 2004 and 2009.”).

297. *See* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (rev. ed. 2006) (defining the nation as “an imagined political community”).