

## DEFENDING WHITE SPACE

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*“What I knew then, what black people have been required to know, is that there are few things more dangerous than the perception that one is a danger.”*

—Jelani Cobb, *Between the World and Ferguson*<sup>1</sup>

*Police violence against minorities has generated a great deal of scholarly and public attention. Proposed solutions—ranging from body cameras to greater federal oversight to anti-bias training for police—likewise focus on violence as a problem of policing. Amid this national conversation, however, insufficient attention has been paid to private violence. This Article examines the relationship between race, self-defense laws, and modern residential segregation. The goal is to sketch the contours of an important but undertheorized relationship between residential segregation, private violence, and state criminal law. By describing the interplay between residential segregation and modern self-defense law, this Article reveals how criminal law reinforces racial subordination in areas where it is nominally prohibited by law.*

*While the laws governing stranger self-defense are facially race-neutral, self-defense is assessed only according to whether the defendant’s fear is reasonable to the reviewing prosecutor, judge, or jury. Research on unconscious bias and cultural myths about criminality demonstrate that fear is racially contingent. One factor that*

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<sup>1</sup> Jelani Cobb, *Between the World and Ferguson*, NEW YORKER (Aug. 26, 2014), <http://www.newyorker.com/news/news-desk/world-ferguson> [<https://perma.cc/Q4AG-6RSN>].

*can support both subjective and objective assessments of threat is whether a person looks “out of place,” making a Black person in a White neighborhood even more likely to be the object of fear. This relationship between race, fear, place, and legal violence sets a framework that shapes a continuum of neighborhood interactions, from surveillance to calling 9-1-1 to engaging in lethal violence.*

*History elucidates this relationship. Self-defense evolved to protect the right of White men to defend their bodies, homes, families, and honor. Against this tilted backdrop, state legislatures strengthened and expanded the private right of self-defense by adding presumptions that relax its basic substantive requirements and alter the common law procedural approach to insulate more cases from judicial scrutiny. In the neighborhood context, modern self-defense laws signal to private actors that they are free, if they legitimately feel threatened, to use violence to police their own realms. But they do not send a uniform signal to all actors. For Black people in White neighborhoods, self-defense laws are a reminder that the law condones, and even encourages, fear-based violence against them. For White people living in White spaces, a robust right of self-defense suggests that it is desirable—a right and a duty—to protect one’s home and neighborhood from intruders. By underscoring White ownership, and increasing Black vulnerability, self-defense laws further inscribe already-segregated neighborhoods as White spaces in an era when property laws no longer do so explicitly.*

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## INTRODUCTION

In the spring of 2012, a resident of a majority-White neighborhood of gated and planned subdivisions shot and killed an unarmed Black teenager. The killer suspected the teenager was trying to break into his house and shot him through the back door. The killer claimed self-defense. His claim was never evaluated by a jury, though, because police and prosecutors saw the claim of self-defense as strong enough to not warrant a charge.

The teenager’s name was DeMarcus Carter. He lived in Las Vegas, Nevada, and he died in a suburban neighborhood called Summerlin.<sup>2</sup>

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<sup>2</sup> Jackie Valley, *Las Vegas Teen Identified as Intruder Killed in Summerlin*, LAS VEGAS SUN (Mar. 21, 2012, 2:45 PM), <https://lasvegassun.com/news/2012/mar/21/police-identify-intruder-shot-summerlin> [<https://perma.cc/7RYM-88RJ>]. Located on the western edge of Las Vegas, Summerlin is a collection of planned villages that began development in 1990. HOWARD HUGHES CORP., SUMMERLIN (2017), <http://summerlin.com/uploads/files/Summerlin-Overview-101-update.pdf> [<https://perma.cc/9MAX-UABN>]. Summerlin South, where Carter was killed, is sixty-eight percent White. It has seventeen percent more White residents and five percent more Asian residents than Las Vegas; it has four percent fewer Black residents and seventeen percent fewer Hispanic residents than Las Vegas. See *Race and Ethnicity in Summerlin South, Nevada*, STATISTICAL ATLAS, <https://statisticalatlas.com/place/Nevada/Summerlin-South/Race-and-Ethnicity#figure/place-in-united-states> [<https://perma.cc/99NB-HPXN>] (last updated Sept. 10, 2018). Summerlin North is sixty-three percent White. It has seventeen percent more White residents and six percent more Asian residents than Las Vegas; it has four percent fewer Black residents and nineteen percent fewer Hispanic residents than Las Vegas. Among Las Vegas neighborhoods, it has one of the smallest non-White populations. See *Race and Ethnicity in Summerlin North, Las Vegas, Nevada*, STATISTICAL ATLAS, <https://statisticalatlas.com/neighborhood/Nevada/Las-Vegas/Summerlin-North/Race-and-Ethnicity> [<https://perma.cc/8T64-DZ4Q>] (last updated Sept. 14, 2018). Data on the site is taken from the 2010 Census and the 2012–2016 American Community Survey. See *About*, STATISTICAL ATLAS,

His killer told police that he saw Carter outside his back door and believed Carter was trying to break into his home. Unlike the death of Trayvon Martin in Florida only a month earlier,<sup>3</sup> Carter's death received very little media coverage, and none of the coverage raised questions about the validity of the killer's self-defense claim.<sup>4</sup> The local newspaper and police department, which in 2012 collected and publicized detailed information about the circumstances and legal outcome of every police killing,<sup>5</sup> did not similarly track private self-defense killings.

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<https://statisticalatlas.com/about#data> [<https://perma.cc/FR2S-TFPR>] (last updated Aug. 28, 2018).

<sup>3</sup> See Dan Barry, Serge Kovalski, Campbell Robertson & Lizette Alvarez, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES (Apr. 1, 2012), <https://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html> [<https://perma.cc/8RNS-CXR7>]. Martin was killed on February 26th by George Zimmerman, a neighborhood watch captain in a majority White and Hispanic gated community called The Retreat at Twin Lakes. See, e.g., Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1171–72 (2016) (describing the neighborhood's history and demographics). He happened upon Martin, a Black teenager, while driving through the neighborhood and thought Martin looked and acted suspicious. A confrontation ensued that ended in Martin's death. *Id.* at 1114. Florida had recently enacted a package of expansions to its self-defense laws. See Zachary L. Weaver, Note, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395 (2008); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 832–33 (2013); Jessica Travis & Jeffrey James, *Know the Ground You're Standing On: Analyzing Stand Your Ground and Self-Defense in Florida's Legal System*, 20 BARRY L. REV. 91 (2014). Martin's death and Zimmerman's subsequent acquittal consequently became focal points for criticism of expanded self-defense laws. The case became a catalyst for protests against the everyday threat of violence at the hands of police and civilians experienced by African Americans. The Black Lives Matter movement in many ways grew out of the Zimmerman acquittal, although it crystallized in response to the deaths of Michael Brown and Eric Garner at the hands of police officers who similarly claimed self-defense.

<sup>4</sup> See, e.g., Mike Blasky, *Man Slain in Summerlin Yard Had Lengthy Record*, LAS VEGAS REV.-J. (Mar. 22, 2012, 12:13 PM), <https://www.reviewjournal.com/crime/courts/man-slain-in-summerlin-yard-had-lengthy-record> [<https://perma.cc/7NA5-JWG7>] (describing arrest history of Demarcus Carter).

<sup>5</sup> Following a controversial 2011 police killing, the *Las Vegas Review-Journal* published an in-depth investigation of police use of force and began maintaining an interactive database with details for each incident of police use of force. See *Deadly Force: When Las Vegas Police Shoot, and Kill*, LAS VEGAS REV.-J. (Nov. 5, 2011, 6:19 PM), <https://www.reviewjournal.com/crime/courts/deadly-force-when-las-vegas-police-shoot-and-kill> [<https://perma.cc/KQH4-4X9Y>]. The Las Vegas Metropolitan Police Department updated its use of force policies in 2012, see Ricardo Torres-Cortez, *Metro Demonstrates Progress and Revamped Use-of-force Policies*, LAS VEGAS SUN (May 1, 2017, 2:00 AM), <https://lasvegassun.com/news/2017/may/01/metro-demonstrates->

Nevada is not a Southern state known for a deep history of state-sponsored segregation. Las Vegas, like other Sun Belt cities, is often touted as a model of integration,<sup>6</sup> and the exponential population growth that made it a major urban center came well after the end of legal segregation.<sup>7</sup> Summerlin itself was undeveloped desert until the 1990s.<sup>8</sup> Unlike Florida, which adopted a high-profile package of amendments to expand its law of self-defense shortly before Martin was killed,<sup>9</sup> Nevada had recently rejected some of the most far-reaching proposals for amendments to expand its self-defense law.<sup>10</sup> Nevada has long had a stand your ground rule, which eliminates the duty to retreat

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progress-and-revamped-use-of-fo [https://perma.cc/FKA4-KTWC], and now shares detailed information with the public regarding all police killings. Jaweed Kaleem & David Montero, *A Police Officer Kills an Unarmed Black Man, and, in Las Vegas, There Are No Protests*, L.A. TIMES (May 19, 2017, 3:50 PM), <http://www.latimes.com/nation/la-na-vegas-police-chokehold-20170519-story.html> [https://perma.cc/L3ZB-T564].

<sup>6</sup> See, e.g., Haya El Nasser, *Living Las Vegas: Sun Belt Cities Offer New Take on Race*, AL JAZEERA AM. (Mar. 19, 2014, 7:00 AM), <http://america.aljazeera.com/articles/2014/3/19/sun-belt-cities-offernewtakeonrace.html> [https://perma.cc/8FR4-3C69] (citing research showing that Las Vegas has one of the lowest levels of residential segregation and opining that “[t]he most striking reason for the lower rate of segregation is that most of these newer places have few remnants of a pre-civil-rights society and fewer established racial enclaves.”).

<sup>7</sup> EUGENE P. MOEHRING, *RESORT CITY IN THE SUNBELT: LAS VEGAS, 1930–2000* 39, 106, 261 (2d ed. 2000) (describing a post-war influx in the 1940s, a population that “ballooned from 40,000 to 240,000” during the 1950s and 1960s and then “exploded from 270,000 . . . to 1.3 million” after 1970). From the mid-1980s and throughout the 1990s, Las Vegas was America’s fastest-growing metropolitan area. *Id.* at 261.

<sup>8</sup> Amanda Finnegan, *Summerlin: Past and Present*, LAS VEGAS SUN (Aug. 18, 2008, 3:54 PM), <https://lasvegassun.com/news/2008/aug/18/summerlin-past-and-present> [http://perma.cc/4TMA-BNNT].

<sup>9</sup> Such laws are often referred to as “stand your ground” laws, but the term can be misleading. As described *infra* in Section I.C, a stand your ground law eliminates the common law requirement of necessity by permitting a person to respond with deadly force even if safe retreat was available. In other words, these laws allow a person to “stand his ground” instead of backing down from a confrontation. Florida law, and the law of many other states, has other provisions that make self-defense easier to claim and make it available in more circumstances.

<sup>10</sup> In 2011, the Nevada legislature rejected a proposed amendment to expand habitation law to include vehicles and workplaces and add a presumption of reasonable fear in certain cases. See, e.g., A.B. 381, 76th Leg. (Nev. 2011) (proposing to expand defense of habitation rule to include workplaces and vehicles). It passed substantially the same provisions in 2015, see S.B. 175, 78th Leg. (Nev. 2015), but rejected a version of the proposed law that would have extended the right to unoccupied vehicles. See *id.*, amended by S. Amendment 136 (2015), <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1548/Text#> [https://perma.cc/4WKY-P9TF].

before using deadly force,<sup>11</sup> but Carter's killing was legal under an even older rule: Nevada's defense of habitation law, which authorizes the resident of a home to use deadly force to defend against a person anywhere outside the home if that person appears to be planning to break into the home.<sup>12</sup> If Martin's death represented the failure of the justice system—despite a national outcry—to punish the killer of an innocent “teenage boy with his packet of candy and sweet tea,”<sup>13</sup> Carter's death was an example of the unexceptional cases in which the legal system and the public accepted a neighborhood killing as inevitable and legal.

In the years since Martin and Carter were killed, scores of unarmed Black and brown<sup>14</sup> people have died at the hands of people claiming self-

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<sup>11</sup> The state's stand your ground rule was first set forth in an 1872 case. See *State v. Kennedy*, 7 Nev. 374, 376–77 (1872); see also *Culverson v. State*, 797 P.2d 238 (Nev. 1990) (confirming, more recently, the judicial rule that a non-aggressor has no duty to retreat). It was first codified in 2011 as NEV. REV. STAT. § 200.120(2) (West 2019). See A.B. 321, 76th Leg. (Nev. 2011); see also Lawrence Mower, *Nevada's Stand Your Ground Law Goes Back 140 Years*, LAS VEGAS REV.-J. (Apr. 4, 2012, 1:02 AM), <https://www.reviewjournal.com/crime/courts/nevadas-stand-your-ground-law-goes-back-140-years> [<https://perma.cc/TY37-Z2FT>].

<sup>12</sup> NEV. REV. STAT. § 200.120(1) (defining justifiable homicide to include killing “in defense of habitation . . . against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein”).

<sup>13</sup> Patricia J. Williams, *The Monsterization of Trayvon Martin*, NATION (July 31, 2013), <https://www.thenation.com/article/monsterization-trayvon-martin> [<http://perma.cc/KW9C-VK2R>].

<sup>14</sup> Blackness, or more specifically fear of Blackness, is central to this analysis. In this country, the historical association of Blacks with criminality is tied to efforts to maintain Black subordination in the post-Reconstruction era. As described *infra* in Section II.C, psychological studies demonstrate that this association persists today. It is not, however, an exhaustive account of non-White vulnerability to fear-based violence. For example, recent accounts show that Native Americans, see *The Navajo Nation Human Rights Commission Responds to the Shooting of Kriston Charles Belinte Chee*, NATIVE NEWS ONLINE (Mar. 05, 2014), <http://nativenewsonline.net/currents/navajo-nation-human-rights-commission-responds-shooting-kriston-charles-belinte-chee> [<http://perma.cc/ZSY9-KQZU>], Latinx people, see Carlos Saucedo, *High-Speed Chase Ends With Officers Killing Woman*, ABC10 (May 19, 2017, 3:50 PM), <https://www.abc10.com/article/news/local/citrus-heights/high-speed-chase-ends-with-officers-killing-woman/277655580> [<http://perma.cc/Y74L-VBK6>], and South Asians, see *Alabama Police Officer Testifies Against Colleague Who Beat Indian Man*, GUARDIAN (Sept. 2, 2015, 3:57 PM), <http://www.theguardian.com/us-news/2015/sep/02/alabama-police-officer-testifies-indian-man> [<http://perma.cc/RET8-LWJG>], may also be perceived as threatening, and Native people experience the highest per capita rates of police violence. Mike Males, *Who Are Police Killing?*

defense. Many of the names are familiar: Michael Brown, Eric Garner, Jordan Davis, Tamir Rice, Sean Bell, Walter Scott, Terence Crutcher, Philando Castile, Jordan Edwards, Charleena Lyles, Loreal Tsingine, Alton Sterling, Keith Lamont Scott, Botham Jean, Stephon Clark, Lacquan McDonald. Others may not be: Kriston Charles Belinte Chee, John Williams, Renisha McBride, Romain Brisbon, Cesar Arce, Jessica Hernandez, Charley Leundeu “Africa” Keunang, D’Andre Berghardt, Jr., Gabriella Nevarez, John Crawford III, Jonathan Mitchell.

Many died at the hands of police officers who claimed that their actions were reasonable—and therefore legal—responses to real or perceived threats posed by the victims. In most of the resolved cases, the officer was either not charged or was acquitted in the homicide.<sup>15</sup> In

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CTR. ON JUV. & CRIM. JUST. (2014), <http://www.cjcj.org/news/8113> [<http://perma.cc/VWS7-J9BX>]; see also Stephanie Woodard, *The Police Killings No One is Talking About*, IN THESE TIMES (Oct. 17, 2016), [http://inthesetimes.com/features/native\\_american\\_police\\_killings\\_native\\_lives\\_matter.html](http://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html) [<https://perma.cc/98Q6-TRUX>]. While other non-White groups may be perceived as threatening and out of place, I save analysis of the precise dynamics affecting different minority groups for future articles.

<sup>15</sup> See, e.g., Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown’s Death*, NPR (Nov. 24, 2014), <https://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case> [<https://perma.cc/8L56-KRLX>]; *The Eric Garner Case’s Sickening Outcome*, WASH. POST (Dec. 3, 2014), [https://www.washingtonpost.com/opinions/eugene-robinson-the-eric-garner-cases-sickening-outcome/2014/12/03/283c0e02-7b5c-11e4-b821-503cc7efed9e\\_story.html?noredirect=on&utm\\_term=.16b5ba53481e](https://www.washingtonpost.com/opinions/eugene-robinson-the-eric-garner-cases-sickening-outcome/2014/12/03/283c0e02-7b5c-11e4-b821-503cc7efed9e_story.html?noredirect=on&utm_term=.16b5ba53481e) [<https://perma.cc/4Q7T-7PNV>] (grand jury declined to indict); Richard Luscombe, *Michael Dunn Sentenced to Life Without Parole for Killing of Florida Teenager*, GUARDIAN (Oct. 17, 2014), <https://www.theguardian.com/us-news/2014/oct/17/michael-dunn-sentenced-life-without-parole-florida> [<https://perma.cc/596T-HLNL>] (killer of Jordan Davis sentenced to life without parole); Ashely Fantz, Steve Almasy & Catherine E. Shoichet, *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015, 7:22 PM), <https://www.cnn.com/2015/12/28/us/tamir-rice-shooting/index.html> [<https://perma.cc/CX66-3EPC>]; *Officers Acquitted in Sean Bell Case*, NPR (Apr. 25, 2008, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=89938081> [<https://perma.cc/TY87-MXX7>]; Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html> [<https://perma.cc/9MBW-HP6E>]; Bill Chappell, *Tulsa Police Officer Is Found Not Guilty in Death of Terence Crutcher*, NPR (May 18, 2017), <https://www.npr.org/sections/thetwo-way/2017/05/18/528915380/tulsa-police-officer-is-found-not-guilty-in-death-of-terence-crutcher> [<https://perma.cc/4QTZ-DFZQ>]; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/PQP2-9N4W>]; Faith Karimi & Emanuella Grinberg, *Texas Ex-Officer is Sentenced to 15 Years for Killing an Unarmed Teen*, CNN (Aug. 30, 2018), <https://www.cnn.com/2018/08/29/us/texas-jordan->

response to these cases, the topic of police violence against minorities has generated a great deal of scholarly and public attention.<sup>16</sup> Proposed solutions—ranging from body cameras to greater federal oversight to anti-bias training for police—likewise focus on violence as a problem of policing.

Amid this national conversation about policing and criminal justice, however, insufficient attention has been paid to private violence. Martin, Carter, Chee, Arce, Mitchell, Davis, McBride, and many other unnamed victims were killed by private citizens. Like the police officers involved in other cases, many of their killers were not charged or were eventually acquitted.<sup>17</sup> The legal claim involved in these cases is similar in many respects to the claims of police officers: in each case the killer

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edwards-death-sentencing-phase/index.html [https://perma.cc/EQ7E-QARL] (discussing Jordan Edwards); Lynsi Burton, *SPD: Charleena Lyles Shooting Consistent with Policy, Training*, SEATTLE PI (Dec. 11, 2017), <https://www.seattlepi.com/local/seattlenews/article/SPD-Charleena-Lyles-shooting-consistent-with-12422144.php>. Several of the killings in which officers who were acquitted or not charged criminally nevertheless resulted in civil judgments against the officers, suggesting that there was some evidence that the police acted illegally.

<sup>16</sup> See, e.g., L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961 (2015); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 *OHIO ST. J. CRIM. L.* 115 (2014); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Violent Communities*, 12 *OHIO ST. J. CRIM. L.* 57 (2014); Devon Carbado, *From Stopping Black People to Killing Black People: Fourth Amendment Pathways to Police Violence*, 105 *CALIF. L. REV.* 125 (2017).

<sup>17</sup> See *supra* note 15. Only McBride's and Davis' killers were punished. Theodore Wafer shot McBride when she knocked on his door seeking help one night. Wafer thought McBride was an intruder and feared for his life. Wafer was convicted of second-degree murder. See Mary M. Chapman, *Theodore Wafer Sentenced to 17 Years in Michigan Shooting of Renisha McBride*, N.Y. TIMES (Sept. 3, 2014), <https://www.nytimes.com/2014/09/04/us/theodore-wafer-sentenced-in-killing-of-renisha-mcbride.html> [https://perma.cc/VEC2-J6YE]. The state supreme court rejected Wafer's request for a new trial. See Oralandar Brand-Williams, *State Supreme Court Denies New Trial in Porch Shooting*, DETROIT NEWS (Mar. 9, 2018, 2:46 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2018/03/09/theodore-wafer-denied-new-trial-porch-shooting/32778751> [https://perma.cc/HAN6-846B]. Michael Dunn, who shot into Davis's car after an argument about the volume of the music in Davis's car, was convicted of first degree murder during a retrial and his appeal was denied. See Tarik Minor, *Michael Dunn Attorney Files Appeal Brief in Tallahassee*, NEWS 4 JAX (Mar. 17, 2016), <https://www.news4jax.com/news/local/jacksonville/michael-dunn-attorneys-file-appeal-in-tallahassee> [https://perma.cc/KJ85-T4TX]. George Zimmerman was tried and acquitted for killing Martin. See Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [https://perma.cc/C47T-6JUJ]. The killers of Carter, Chee, Arce, and Mitchell were never charged.



claimed he<sup>18</sup> feared the victim, and that this fear was reasonable under the circumstances. None of the reforms proposed to address police violence would have any effect on the private neighbor-on-neighbor violence that led to their deaths.

Instead, these killings force us to examine the traditional doctrine of self-defense, the extent to which racial fear is embedded in the law, and the significance of the trend among state legislatures to expand the right of self-defense even as more evidence emerges of its disproportionate impact on minorities. These cases shift the focus from police accountability to the role of private parties in enforcing racial exclusion and hierarchy. They also complicate the picture of the relationship between private violence and state law.

While policing and incarceration are the most visible institutions through which the government regulates and authorizes violence, which critics argue is often deployed in service of maintaining racial subordination, this Article reveals that substantive criminal law is another such institution. State criminal laws determine to a large extent what violence will be punished and what will be permitted. By expanding the categories of permissible violence, state legislatures can authorize private parties to carry out violence while appearing to reign in state-sponsored violence. This public-private distinction is significant when considering racial violence because state-sponsored race discrimination of any kind is prohibited by federal law,<sup>19</sup> while private race discrimination, particularly violence, is illegal under federal law only in its most extreme and blatant forms.

This Article considers the role of self-defense doctrine in maintaining White residential spaces. Common law self-defense doctrine evolved in large part to secure the right of White men to protect their homes, families, and honor.<sup>20</sup> The “reasonable fear”

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<sup>18</sup> All were killed by men, although the need for protection of White women figures prominently in the story of neighborhood self-defense. See Angela Onwuachi-Willig, *From Emmett Till to Trayvon Martin: The Persistence of White Womanhood and the Preservation of White Manhood*, DU BOIS REV. (forthcoming 2019) (manuscript at 21–33) (on file with author).

<sup>19</sup> But see Carbado, *supra* note 16 (describing instances in which the Fourth Amendment permits police to engage in race discrimination).

<sup>20</sup> See Jeanne Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 243–48 (2008) (“The true man’s role, to protect the home and family, functioned as a model for the broader self-defense right of the true man.”); CAROLINE LIGHT, STAND YOUR

component of modern self-defense laws continues to reify our well-documented unconscious racial bias and reinforce cultural myths about Black criminality, even when we intend for the law to be race-neutral.<sup>21</sup> Building on feminist and critical race theory critiques of self-defense law, this Article argues that the core doctrine of self-defense has been strengthened and expanded to further insulate private violence in defense of home and family from legal scrutiny.<sup>22</sup>

Modern state self-defense laws extend to a broad range of circumstances and physical spaces, especially in residential neighborhoods.<sup>23</sup> These laws signal to private actors that they are free, if

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GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE 28, 57–62 (2017); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 125–74 (2007); see also Mary Ann Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1108–14 (2014) (arguing that the castle doctrine and stand your ground laws invoke the idea of women as victims in need of male protection but do not fully protect women's right to defend themselves).

Some scholars have suggested that the constitutional right to bear arms also has roots in the desire to protect White property interests against Black and Indian uprisings and people. See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1694–96 (2012); SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA, 39–40 (2006).

<sup>21</sup> Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 103 (2014); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1584–85 (2013); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 318 (2012).

<sup>22</sup> By contrast, victims of domestic violence who kill their abusers face a very real doctrinal hurdle in trying to claim self-defense because, while the doctrine easily protects a man defending his home against a stranger in a direct confrontation, it does not always clearly protect a woman when she kills someone with whom she shares a home and knows well, especially if she does so during a quiet moment instead of during a fight. See generally Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 409–20 (1991) (describing how courts' interpretation of the imminence, proportionality, and retreat rules can exclude or disadvantage a claim of self-defense by a battered woman); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW (1990). This is an area where amendments to the law might be needed to adequately protect women, yet even efforts to reinterpret existing doctrine have encountered resistance. See Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 970–76 (2000). And the modern trend of state law expansions does nothing to make it easier for battered women to claim self-defense. See discussion *infra* Section I.C (describing the ways that self-defense doctrine has been expanded).

<sup>23</sup> See discussion *infra* Section I.C (describing expansions).

they legitimately feel threatened, to use violence to police their own realms. But these laws do not send a uniform signal to all actors. For White people living in White spaces—who can expect not to be feared by others in the course of everyday life and who appear to belong in White spaces—a robust right of self-defense suggests that it is desirable to protect one’s home and neighborhood from intruders.<sup>24</sup> For Black people in White spaces, whose bodies carry the weight of cultural myths about danger and criminality and who may at any time be viewed as suspicious, threatening,<sup>25</sup> or out of place<sup>26</sup> by their neighbors, self-defense laws are a reminder that the law condones, and even encourages, fear-based violence against them. The laws create a framework that legitimates White fear of a stranger who looks racially out-of-place and condones violence based on that fear. This framework in turn helps normalize neighbor-on-neighbor surveillance.

The cycle of fear, surveillance, and violence is also one that can be abused. Even if a person is not actually threatened or afraid, she can invoke the framework of fear based on racial out-of-placeness and can expect that police or a jury will be sympathetic. By underscoring Black vulnerability and White ownership, self-defense laws further inscribe the racialized character of White neighborhoods in an era when property laws no longer do so explicitly.<sup>27</sup>

Part I of this Article considers the relationship between race and self-defense law. First, it argues that stranger self-defense cases are

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<sup>24</sup> Several scholars have documented the way that Whites have employed private violence against their Black neighbors to preserve White neighborhoods. See Onwuachi-Willig, *supra* note 3, at 1171 (citing JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 54 (2013)); RICHARD ROTHSTEIN, *THE COLOR OF LAW* 139–51 (2017). Although they acknowledge police indifference to and encouragement of this violence, these scholars do not focus on self-defense law as an important source of legal absolution.

<sup>25</sup> See discussion *infra* Section I.B (describing how Blackness is viewed as threatening).

<sup>26</sup> See Onwuachi-Willig, *supra* note 3, at 1180 (describing how Trayvon Martin was viewed as “stepping out of place” by being Black in a White neighborhood); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 65–66 (describing the role of “racial incongruity” in police decisions to stop, question, and search people); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 226–27 (1983) (same).

<sup>27</sup> Like the concept of Whiteness itself, White spaces are built on both “exclusion and subordination,” see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737 (1993), and both are accomplished when White residents surveille Black residents under a looming threat of violence. See Onwuachi-Willig, *supra* note 3, at 1180–82.

always “about race” in the sense that they are about individual and shared fear and are therefore uniformly vulnerable to widely-shared racial biases. Second, it argues that laws that expand the right of self-defense, from longstanding defense of habitation laws to more recently adopted stand your ground and immunity laws, operate together to make self-defense available in more situations and easier to claim than the core doctrine might suggest. The expansion is also literal, especially in the residential neighborhood context, in that these laws enlarge the physical space one can legally protect using lethal force.

Part II explains how self-defense law can transform private fear into state-sanctioned violence. First, the Article situates this claim in the larger context of residential segregation, which has always been enforced through cooperation between state and private actors, such that distinction between *de jure* and *de facto* segregation is mostly imaginary. Second, it considers the problem of new White spaces. These neighborhoods cannot easily be linked to past state-sponsored discrimination in property law or housing policy (e.g., legal segregation, redlining, or racially restrictive covenants) because they post-date the worst of those policies. To the extent that segregation is acknowledged, it is attributed only to private preferences. Yet, these private preferences are expressed in and enforced by neighbor-on-neighbor harassment, profiling, and violence, with law as a primary tool of harassment. Third, it argues that, by preemptively legalizing private home defense and loudly signaling that legality with each new enactment, self-defense laws sanction the most severe instances of private violence and offer a framework that legitimates fear-based violence and encourages the profiling and reporting that precedes that violence.

The purpose of this Article is to sketch the contours of an important but undertheorized relationship between residential segregation, private violence, and state criminal law. I hope it will draw renewed attention to the importance of state substantive criminal law as a site of racial subordination and a potential area for reform. More specifically, I aim to highlight the central role of self-defense doctrine in shielding, legalizing, and encouraging private racial violence. The Article does not offer proposals for reform because determining which reforms will be effective will require that states collect and make available data on self-defense claims, and that legislatures carefully weigh the harms and benefits of each change to self-defense law, including harms that might weigh differently on different people. By

explaining one such potential harm, I hope this Article invites a deeper examination of the racial contingency of self-defense laws.

## I. THE LEGALITY OF PRIVATE VIOLENCE

When two strangers encounter one another in a backyard or on a neighborhood street, and one of them purposefully kills the other, self-defense laws provide the standard for determining whether the killing amounts to murder or manslaughter, or whether it is legally justified. The basic principles of self-defense say that killing is only legally justified if it is necessary to defend oneself against the threat of death or serious injury.<sup>28</sup> In general, this means that the killer must have acted out of reasonable fear, whether or not the fear turns out to be correct.<sup>29</sup> But these basic principles have been relaxed over time by laws that expand the doctrine of justifiable homicide.<sup>30</sup> Several criminal law scholars have pointed out that stand your ground laws have dubious public safety benefits and a concerning potential for racial bias.<sup>31</sup> As this Article explains, stand your ground laws are only one piece of a much longer story about states strengthening the right of self-defense, particularly in situations involving actual or suspected home intruders.<sup>32</sup>

Defense of habitation laws, which permit the use of deadly force against an intruder in the home—even absent clear evidence that the intruder intends to harm anyone—and castle doctrine laws, which provide that a person does not have to retreat before using deadly force against a home intruder, are the law in nearly every state.<sup>33</sup> At least half the states also have stand your ground laws that authorize the use of

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<sup>28</sup> See discussion *infra* Section I.A (describing the basic principles of self-defense).

<sup>29</sup> 2 WHARTON'S CRIMINAL LAW § 127 (15th ed. 2018). See, e.g., *Culverson v. State*, 797 P.2d 238, 239 (Nev. 1990); *People v. Davis*, 63 Cal. Rptr. 801 (1965).

<sup>30</sup> See *infra* Section I.C.

<sup>31</sup> See, e.g., Mario L. Barnes, *Taking A Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179, 3180 (2015); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 850–57 (2013).

<sup>32</sup> See discussion *infra* Section I.C (describing how the core doctrine of self-defense has been expanded over time).

<sup>33</sup> See *infra* notes 149–55, 164–67, 183–85 and accompanying text (discussing defense of habitation laws); 175–78 and accompanying text (discussing castle laws).

deadly force against an aggressor in any place, such as a neighborhood sidewalk, even when retreat is possible.<sup>34</sup> In recent years, many states have passed laws that further expand the right of self-defense by making it available in more situations and making it easier to claim and prove. These include extending home defense rules to vehicles and workplaces, establishing a presumption of justification every time a killer raises a claim of self-defense, and providing immunity in civil suits arising out of self-defense killings.<sup>35</sup> Often advanced in state legislatures as a package, these laws permit an individual to use deadly force in defense of a larger and larger swath of space—from his person, to his home, his yard, and even to the streets of his neighborhood<sup>36</sup>—and require less and less evidence to substantiate the claimed fear. As an expressive matter, expanded self-defense laws seem to validate and encourage private violence in defense of body, home, and neighborhood.

Self-defense killings are a small subset of homicides overall, but statistics suggest they are an important category and that they operate in a particular way. According to the only nationally available data source on homicide trends<sup>37</sup> collected by the U.S. Department of Justice's Bureau of Justice Statistics, there were several hundred self-defense killings by private actors each year between 1980 and 2008.<sup>38</sup> Self-

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<sup>34</sup> See *infra* notes 138–42, 181–82 and accompanying text (discussing stand your ground laws).

<sup>35</sup> See Elizabeth Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allows Criminals to Get Away with Murder*, 34 AM. J. TRIAL ADVOC. 105 (2010) (describing immunity laws).

<sup>36</sup> See Onwuachi-Willig, *supra* note 18 (manuscript at 5, 26).

<sup>37</sup> The federal government maintains two datasets that can be used to track justifiable homicides. Fatal injury reports, collected by the Centers for Disease Control and Prevention, would include all deaths, regardless of the killer's claim or the legal outcome. Homicide data, collected from state and local law enforcement by the Federal Bureau of Investigation (FBI), distinguishes between culpable killings (murder/manslaughter) and justifiable homicides. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *THE NATION'S TWO MEASURES OF HOMICIDE* (July 2014), <https://www.bjs.gov/content/pub/pdf/ntmh.pdf> [<http://perma.cc/V7UM-WAND>]. The FBI, whose Uniform Crime Reports (UCR) and Supplemental Homicide Reports are the basis for most studies of self-defense disparities, defines justifiable homicide to include a narrow category of killings that occur during a listed felony that has been separately reported. *UCR Offense Definitions*, UNIFORM CRIME REPORTING STATS., <https://www.ucrdatatool.gov/offenses.cfm> [<https://perma.cc/J6JG-FYGE>] (last updated Jan. 26, 2017).

<sup>38</sup> ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *NCJ-236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008* 32 (2011), <https://www.bjs.gov/content/pub/pdf/hctus802008.pdf>.

defense killings by private actors increased between 2000 and 2008.<sup>39</sup> Despite this increase, the number of justifiable homicides by private citizens was still much lower in 2008 than it was in 1980.<sup>40</sup>

Most civilian self-defense killings (55%) involved a person interrupting a crime in progress,<sup>41</sup> and a substantial minority (41%) involved someone responding to an attack.<sup>42</sup> The vast majority of justifiable homicides are committed with firearms.<sup>43</sup>

Federal data does not capture the full scope of self-defense killings.<sup>44</sup> It is based on voluntary reporting of crimes known to law enforcement by state and local law enforcement agencies.<sup>45</sup> Reports do not present justifiable homicides as a percentage of homicides in which

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[www.bjs.gov/content/pub/pdf/htus8008.pdf](http://www.bjs.gov/content/pub/pdf/htus8008.pdf) [<http://perma.cc/K75V-36ZC>]. National homicide data comes from the FBI's Uniform Crime Reports. *Id.* at 34.

<sup>39</sup> COOPER & SMITH, *supra* note 38, at 32.

<sup>40</sup> *Id.* The number of justifiable homicides by police, on the other hand, has decreased only slightly since 1980. *Id.*

<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Id.*

<sup>43</sup> *Expanded Homicide Data Table 15: Justifiable Homicide by Weapon, Private Citizen, 2011–2015*, FED. BUREAU INVESTIGATION, [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded\\_homicide\\_data\\_table\\_15\\_justifiable\\_homicide\\_by\\_weapon\\_private\\_citizen\\_2011-2015.xls](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_15_justifiable_homicide_by_weapon_private_citizen_2011-2015.xls) [<https://perma.cc/RCM4-KYYF>] (last visited Mar. 21, 2019); see also VIOLENCE POLICY CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE 4 (2017) <http://www.vpc.org/studies/justifiable17.pdf> [<https://perma.cc/6ZZ6-VY6X>] (firearms were used in over 80% of justifiable homicides in 2014).

<sup>44</sup> Researchers have raised various questions about the utility of the UCR and Supplementary Homicide Reports as a measure of self-defense killings. See, e.g., Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites are Far More Likely to be Ruled “Justifiable”*, MARSHALL PROJECT (Aug. 14, 2017, 5:30 AM), <https://www.themarshallproject.org/2017/08/14/killings-of-black-men-by-whites-are-far-more-likely-to-be-ruled-justifiable> [<https://perma.cc/54XU-9PK6>] (describing how UCR data may not include determinations made by prosecutors, who are not required to report their data); P.H. BLACKMAN & R.E. GARDINER, *FLAWS IN THE FBI UNIFORM CRIME REPORTS REGARDING HOMICIDE AND WEAPONS USE* (1984) (suggesting that the UCR may under-report justifiable homicides); accord Howard E. Williams, Scott W. Bowman & Jordan Taylor Jung, *The Limitations of Government Databases for Analyzing Fatal Officer-Involved Shootings in the United States*, 30 CRIM. JUST. POL’Y REV. 201 (2016) (outlining similar shortcomings with UCR data collection for officer-involved shootings).

<sup>45</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-247060, *THE NATION’S TWO MEASURES OF HOMICIDE 2* (2014). The data reflects the initial determination made by law enforcement, not subsequent decisions of prosecutors, courts, or coroners. *Id.* Whether a self-defense killing will be included in homicide data, as opposed to just fatal injury data, and whether the its classification will correspond with the legal outcome, depends in large part on how state and local agencies collect and report their data.

self-defense was claimed, or include updates if the determination changes later in the legal process. The data thus does not tell us how often self-defense claims are successful. It also does not include location information.

A congressional review of the limited federal homicide data from 2001–2010 revealed that killings of Black people by White people were ruled justified 35% of the time.<sup>46</sup> Killings of White people by Black people were ruled justifiable in only 3% of cases.<sup>47</sup> Further analysis confirms that White on Black homicides are most likely to be ruled justified, while Black on White homicides are least likely to be ruled justified.<sup>48</sup> In cases involving two male strangers and a firearm, the overall rate of justified homicides is higher, and the racial disparity is also greater.<sup>49</sup> A study by the Marshall Project found that killings of

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<sup>46</sup> Memorandum from William J. Krouse & Matt Deaton, Cong. Research Serv., to Senate Comm. on the Judiciary, on Supplementary Homicide Report Data on Black and White Inter-Racial Justifiable Homicides in Comparison (2001–2010) (Sept. 16, 2013), <https://www.scribd.com/document/179956006/Inter-Racial-Justifiable-Homicides-Memo-9-16-2013-pdf>.

<sup>47</sup> *Id.* These numbers reflect only stranger-on-stranger homicides by involving firearms. FBI data was not collected from all states in all years. *Id.* at 2.

<sup>48</sup> JOHN K. ROMAN, URBAN INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 6 (2013); AM. BAR ASS'N, NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, A REVIEW OF THE PRELIMINARY REPORT AND RECOMMENDATIONS 20 (2014) (citing ROMAN, *supra*). *But see Some Notes on John Roman's "Race, Unjustifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data," Urban Institute, CRIME PREVENTION RES. CTR.* (Nov. 4, 2013), <https://crimeresearch.org/2013/11/some-notes-on-john-romans-race-justifiable-homicide-and-stand-your-ground-laws-analysis-of-fbi-supplementary-homicide-report-data-urban-institute> [<https://perma.cc/YE6B-WCTH>] (critiquing some aspects of Roman's methodology).

<sup>49</sup> ROMAN, *supra* note 48, at 9 (finding the overall rate of justifiable homicides is “almost six times higher” in cases involving two male strangers and a gun and that, among such cases, White-on-Black homicides “have justifiable findings 33 percentage points more often” than Black-on-White homicides). In male stranger cases, controlling for other variables, Roman found that

[T]he odds a white-on-black homicide is found justified is 281 percent greater than the odds a white-on-white homicide is found justified. By contrast, a black-on-white homicide has barely half the odds of being ruled justifiable relative to white-on-white homicides. Statistically, black-on-black homicides have the same odds of being ruled justifiable as white-on-white homicides.

*Id.*



Black men by White people (including private and police killings) were eight times more likely to be found justifiable than any other combination.<sup>50</sup>

Between 1980 and 2008, a majority of the people killed by private actors (59%) were non-White. To compare, a majority of the people killed by police in self-defense (60%) were White.<sup>51</sup> (This number, of course, says nothing about whether the rates at which Whites and non-Whites are victims of police killing are proportional to population). While questions about “justifiable” police killings of Black people abound in the public discourse, these statistics suggest the law of private self-defense may also be responsible for legitimating Black deaths.<sup>52</sup> While the numbers tell us little about the circumstances that led to each individual killing, they should at least raise questions about the role of racial bias in private self-defense law.

Trayvon Martin’s death by George Zimmerman’s bullet did raise these questions for some, leading to critiques of the expanded self-defense law that had been enacted by the Florida legislature a few years before Martin was killed, and of similar laws enacted by other states.<sup>53</sup> Emphasis on relatively recent reforms implies that, without them, self-defense law would be race neutral. However, even without expansion laws, the focus on reasonable fear embedded in the law of self-defense means that it is inherently vulnerable to racial bias. Some of the most

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<sup>50</sup> See Lathrop & Flagg, *supra* note 44.

<sup>51</sup> COOPER & SMITH, *supra* note 38, at 33 tbl.14.

<sup>52</sup> For a thorough analysis of the limited data available on the racial effects of expanded self-defense laws and a discussion of the need for more and better data, see Barnes, *supra* note 31, at 3192–98.

<sup>53</sup> See, e.g., Jamiles Lartey, *Why the Days of ‘Stand Your Ground’ Self-Defense Laws May be Numbered*, GUARDIAN (Aug. 8, 2018), <https://www.theguardian.com/us-news/2018/aug/07/why-the-days-of-stand-your-ground-self-defense-laws-may-be-numbered> [https://perma.cc/BWH9-7SVG]; David A. Love, *‘Stand Your Ground’ Laws Encourage Racially Charged Violence*, CNN (Aug. 3, 2018, 10:01 PM), <https://www.cnn.com/2018/08/03/opinions/stand-your-ground-law-racial-violence-opinion-love/index.html> [https://perma.cc/STE7-9MFA]; John Bacon, *‘People Emboldened’: Stand Your Ground Laws Face New Scrutiny; George Zimmerman’s Lawyer Isn’t a Fan*, USA TODAY (July 26, 2018, 4:43 PM), <https://www.usatoday.com/story/news/nation/2018/07/26/stand-your-ground-laws-renewed-scrutiny-florida-shooting/840272002> [https://perma.cc/9U2B-W83U]; Mike Spies, *Black Politicians are Fighting a Stand Your Ground Resurgence*, HUFFPOST (Apr. 4, 2017, 9:36 AM), [https://www.huffingtonpost.com/entry/black-politicians-are-fighting-a-stand-your-ground\\_us\\_58fd8be1e4b0f420ad99c9e4](https://www.huffingtonpost.com/entry/black-politicians-are-fighting-a-stand-your-ground_us_58fd8be1e4b0f420ad99c9e4) [https://perma.cc/YNL6-JYQV]; see also sources cited *supra* note 48.

significant doctrines that strengthen the right to self-defense, thereby legalizing more deaths, are not recent at all. The legality of DeMarcus Carter's killing, for example, likely hinged on Nevada's century-old self-defense and defense of habitation statutes.<sup>54</sup> Recent expansions might worsen the problem, but they did not create it, so repealing expansion laws will not solve it.

Rather, the potential for racial bias is built into the core doctrine of self-defense. This is because the question of whether private violence is justifiable, and therefore legal, centers on whether the killer feared the victim and whether that fear was reasonable.<sup>55</sup> While many Americans expressly disavow racial bias, our psychological processes and cultural myths reveal an association between Blackness and threat.<sup>56</sup> Mapped onto bodies, this tendency means that individuals may be more likely to fear Black strangers, and police, prosecutors, judges, and juries may be more likely to understand that fear as reasonable. Instead of arguing over whether race played a role in Martin's death and Zimmerman's trial,<sup>57</sup> we might instead begin from the presumption that all stranger self-defense cases are at least in part "about race."

The law of self-defense has broadened over time, with common law and statutory developments rendering violence justifiable in more circumstances, insulating more killings from review, particularly those that occur in the context of home defense.<sup>58</sup> Rules that expand the right of self-defense in and around the home are premised on long held

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<sup>54</sup> See NEV. REV. STAT. § 200.120(1) (West 2019). The statute was enacted in 1911 and was amended in 1983 to add the word "surreptitious." See *Runion v. State*, 13 P.3d 52, 56 n.2 (Nev. 2000) (finding that "Nevada's self-defense statutory framework has existed for over seventy years" and noting 1983 amendment).

<sup>55</sup> See *infra* Section I.A.

<sup>56</sup> See *infra* Section I.B.

<sup>57</sup> See Frederick M. Lawrence, *To What Extent Did Race Play a Role in the Death of Trayvon Martin*, HUFFPOST (July 29, 2013, 6:18 PM), [http://www.huffingtonpost.com/frederick-m-lawrence/to-what-extent-did-race-p\\_b\\_3659014.html](http://www.huffingtonpost.com/frederick-m-lawrence/to-what-extent-did-race-p_b_3659014.html) [http://perma.cc/LHF6-2FPK] (describing the role of race as a "key question" that persisted for many people in the wake of the trial). Attorneys involved in the case similarly asserted that the case was not about race. See Lisa Bloom, *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?mcubz=2> [http://perma.cc/7NLS-W6LF] (describing how the prosecutor in closing arguments insisted that the case was "not about race" and noted that this language "mirrored" public statements by Martin's family's attorney, Benjamin Crump, that the case "shouldn't be about race").

<sup>58</sup> See *infra* Section I.C.

beliefs about the right and duty of White men to protect the sanctity of their houses and the safety of their families.<sup>59</sup> The same themes resonate today as a desire to protect suburban neighborhood from the possibility of encroaching crime, with special concern for women home alone. As a result, state criminal laws legalize private violence in a variety of circumstances and covering a broad swath of space in and around residential neighborhoods.<sup>60</sup> Some expansions represent thoughtful responses to the perceived narrowness of core self-defense doctrine, while others seem to do little more than signal to fearful residents that they are entitled to use lethal violence to protect their homes, cars, boats, unoccupied houses, and neighborhoods against intruders.<sup>61</sup>

To elucidate the relationship between racial fear, place, and self-defense doctrine, I first describe what I refer to as “core” self-defense doctrine: the idea that force is only justifiable if the user reasonably believes that he faces an imminent threat, that the force is proportional to the harm threatened, and that force is necessary to avoid the threatened harm. Relying on psychological research on implicit bias, as well as sociological scholarship on the cultural meaning of Blackness, I then argue that stranger self-defense cases are always “about race” to some degree, and that this fact should be acknowledged. Third, I analyze laws that expand the right of self-defense, including longstanding rules like defense of habitation and more recent innovations like criminal and civil immunity. I focus on the way that each rule relaxes one or more of the basic common law requirements for self-defense to underscore that all these laws are simply different variations on the same theme.<sup>62</sup> While data on the application and outcome of state self-defense laws is quite

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<sup>59</sup> See *infra* Section I.C.

<sup>60</sup> See *infra* Section II.C.

<sup>61</sup> See *infra* Section I.C.4.

<sup>62</sup> The criminal law doctrines governing defensive use of force are sometimes taught as a collection of different rules, such as defense of self, defense of others, defense of property, defense of habitation, and stand your ground. The better approach, in my view, is to focus on the basic elements required for justifiable defensive use of force and how each discrete rule expresses or modifies these basic elements. See PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 97–98 (1997) (“[S]elf-defence, defence of others, and defence of property are often defined separately. But this need not be the case. Their shared function and underlying principle means that one could formulate a single defensive force provision . . .”).

limited, it raises significant questions about whether expanded self-defense laws worsen the built-in racial bias.

A. *The Basic Principles of Self-Defense*

Killing another human being is illegal under most circumstances. In every state today, and under English common law, intentional killing is punishable by the most severe consequences, including death or life in prison.<sup>63</sup> The legal principles that permit the use of deadly force in self-defense present a very limited exception to the rule that killing is illegal. These principles dictate that, if deadly force is necessary to preserve one's own life or the life of another person, the killing is justifiable.<sup>64</sup> In other words, it is not a crime at all. The fact that self-defense is a justification, as opposed to an excuse, is significant. When an act is considered legally justifiable, the message is that the defendant's actions were not merely understandable but also desirable under the circumstances.<sup>65</sup> In the case of justifiable homicide in self-defense, the law expresses the idea that the death of the original aggressor is preferred over the death of the person being attacked.<sup>66</sup> A justifiable homicide is a killing that any person would have—perhaps should have—committed under the same circumstances.

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<sup>63</sup> See Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1247 (2011).

<sup>64</sup> FIONA LEVERICK, *KILLING IN SELF-DEFENCE* 2 (2006); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 132–38 (1998); George P. Fletcher, *The Nature of Justification*, in *FLETCHER'S ESSAYS ON CRIMINAL LAW* 174 (Russell L. Christopher ed., 2013); ROBINSON, *supra* note 62, at 96.

<sup>65</sup> LEVERICK, *supra* note 64, at 13, 17–19; H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 13 (2d ed. 2008) (justifiable conduct is “something which the law does not condemn, or even welcomes”); BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* 18 (2006) (explaining the views of Robinson and Fletcher regarding the morality and social desirability of a justified act).

<sup>66</sup> See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 640 (1996) (contrasting the criminal law's treatment of killings of aggressors with that of killings of innocent bystanders). *But see* George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 562 (1996) (focusing on the motivation of the killer, rather than the lack of social harm wrought by the killing, and pointing out that self-defense is available even against an excused attacker).

A person is justified in using force only if he honestly and reasonably believes that he is in imminent danger and force is necessary to avoid the danger.<sup>67</sup> Even then, the force used must be proportional to the threat.<sup>68</sup> These four elements—imminence of threat, necessity, proportionality, and reasonableness—form the legal bounds of traditional self-defense doctrine.<sup>69</sup> Imminence means that the defendant must have been in fear of immediate harm.<sup>70</sup> Necessity means that force must be the only option left.<sup>71</sup> If safe retreat or de-escalation is available, force may not be used.<sup>72</sup> Proportionality means that deadly force may only be used to defend against a deadly or similarly grave threat.<sup>73</sup>

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<sup>67</sup> I use the masculine pronoun because traditional self-defense doctrine references the behavior of a reasonable *man*. But see LEE, *supra* note 20, at 204–12 (describing the evolution from reasonable *man* to reasonable person). See also Suk, *supra* note 20, at 243–46 (describing the role of masculinity in the evolution of home defense and no retreat rules); Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1110–11 (2014) (explaining how the castle doctrine and no retreat rules carve out defensive violence as “a privilege primarily reserved for men”).

<sup>68</sup> See WHARTON'S CRIMINAL LAW, *supra* note 29, § 127 (a person may kill in self-defense if “he reasonably believes that he is in imminent danger of losing his life or suffering great bodily harm.”); *State v. Comisford*, 168 P. 287 (Nev. 1917) (the law “confers upon [the defendant] the right to exercise his judgment as a reasonable man in determining, at the time, whether, from all the attendant circumstances and conditions, it was necessary to strike the fatal blow for the protection of his own life.”).

<sup>69</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221–22 (6th ed. 2012) (describing common law requirements); see LEE, *supra* note 20, at 127–32. Robinson describes the requirements for defensive use of force as “triggering conditions” (imminent unlawful threat), plus two limits on the scope of the response (necessity and proportionality). ROBINSON, *supra* note 62, at 99. Lee lists one additional requirement: the defendant may not be the “initial aggressor.” LEE, *supra* note 20, at 127–32. This limitation is certainly part of the network of common law rules governing self-defense, but I characterize it here as an application of the necessity principle in the sense that an aggressor is required to take the alternative option of not starting the fight in the first place. See *infra* notes 172–82 and accompanying text.

<sup>70</sup> See ROBINSON, *supra* note 62, at 99.

<sup>71</sup> *Id.* at 99 (“The *necessity requirement* demands that the defendant act only when and to the extent necessary to protect or further the interest at stake . . . [and use] only the degree of force that is necessary for self-protection.”).

<sup>72</sup> *Id.*

<sup>73</sup> GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 135–36 (1998) (describing proportionality requirement as requiring that “the harm done in disabling the aggressor must not be excessive or disproportionate relative to the harm threatened and likely to result from the attack” so deadly force might be used to ward off rape, but not a lesser intrusion into bodily autonomy or a petty theft); see also ROBINSON, *supra* note 62, at 99. A strict application of the

A person may be legally justified in using deadly force even if he is mistaken about the threat.<sup>74</sup> The defendant's fear, and his assessment of the threat's imminence and the necessity of force, must be based on an honest and reasonable belief that he is in danger.<sup>75</sup> If the fear is not genuine, or not reasonable, the defendant may be convicted of murder. The reasonableness requirement, traceable at least to the early 1800s, extends the justification to circumstances where the victim did not actually pose a threat, as long as a hypothetical reasonable man would have made the same assessment of threat.<sup>76</sup> Although modern courts are more likely to articulate it as a reasonable person standard, the roots of

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proportionality requirement would deny the defendant the privilege of using deadly force to protect property, even as a result the defendant is forced to surrender property to a thief. "But such commitment to proportionality—as in the valuation of human life over property alone, even the life of a law-breaker—is the mark of a civilized society." *Id.* at 100; *see also* SANGERO, *supra* note 65, at 181 ("There is absolutely no room in a civilised society to justify the rescue of property at the price of human life, not even at the price of the aggressor's life.") In the strictest sense, deadly force can only be used to defend against a person who is threatening death. However, English and American laws have long permitted the use of deadly force as a defense against some potential harms that are considered quite serious, but fall short of a threat of death, such as to defend against an attack on the home, or to stop a violent felony in progress. I describe these rules, even the longstanding ones, as expansions to the core idea of self-defense in order to focus on how they relax or eliminate the core requirements. *See* discussion *infra* Section I.C.

<sup>74</sup> *See, e.g.,* Pineda v. State, 88 P.3d 827, 833 (2004) ("[A] reasonably perceived apparent danger as well as actual danger entitles a defendant to an instruction on self-defense."); WHARTON'S CRIMINAL LAW, *supra* note 29, § 127; ROBINSON, *supra* note 62, at 100–02 (explaining that the dominant "reasons" theory of self-defense focuses only on the defendant's reason for acting, which turns on what the defendant believes at the time, without regard to the correctness of the belief, but advocating instead for a "deeds" approach, which would focus on "whether or not the conduct was something that we are content to have others perform under the justifying circumstances and to have others perform under similar circumstances in the future," so the defendant's reasons for acting are irrelevant and a mistaken belief would result, at most, in an excuse defense).

<sup>75</sup> WHARTON'S CRIMINAL LAW, *supra* note 29, § 127. The Model Penal Code's (MPC) self-defense provision requires only a genuine perception of immediate danger, eliminating the reasonableness requirement. MODEL PENAL CODE § 3.04(1) (1962).

<sup>76</sup> Stephanie M. Wildman & Delores A. Donovan, *Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 443–44 (1981) (citing H.A. Snelling, *Killing in Self-Defence*, 34 AUST. L.J. 130, 134 (1960)). Prior to the widespread adoption of the reasonableness requirement, the right of self-defense was even broader because most states allowed even an unreasonable mistaken belief in the need for force to provide a justification. Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 479–86 (1987).

reasonableness in self-defense, as in other areas of criminal law, are gender and race specific.<sup>77</sup> Some states incorporate a rule of “imperfect self-defense,” under which a defendant who makes an honest, but unreasonable, mistake about the need for deadly force has a defense to murder but not to manslaughter.<sup>78</sup>

Because self-defense is an affirmative defense, states may require the defendant to produce evidence to support a claim of self-defense and to persuade a jury of the claim’s validity.<sup>79</sup> In a prosecution for intentional killing, the state must prove the elements of murder beyond a reasonable doubt.<sup>80</sup> The state need not, however, prove the absence of justification. Instead, in order to get a jury instruction on self-defense, the defendant must present evidence sufficient to establish the defendant’s reasonable belief as to the existence of the core elements of the defense. At common law, the defendant also had to convince a jury by a preponderance of the evidence of the validity of his self-defense claim.<sup>81</sup> States today may require the prosecution to disprove self-defense beyond a reasonable doubt once the defense is raised,<sup>82</sup> but a

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<sup>77</sup> See Wildman & Donovan, *supra* note 76, at 436–37; LEE, *supra* note 20, at 203–04.

<sup>78</sup> See, e.g., FLA. STAT. ANN. § 782.11 (West 2019); *People v. Koontz*, 46 P.3d 335 (Cal. 2002) (applying imperfect self-defense rule in California). Under the MPC, a defendant who makes a reckless or negligent mistake, however, may still be convicted of manslaughter. The net effect under both approaches is the same: a reasonable (non-negligent) mistake still results in a complete defense. MODEL PENAL CODE § 3.09 (1962); UTAH CODE ANN. § 76-5-203(4) (2009). Nevada courts have not adopted this approach. See *Hill v. State*, 647 P.2d 370 (Nev. 1982).

<sup>79</sup> See *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (upholding Ohio law that placed the burden of production and persuasion on the defendant claiming self-defense). *But see* H.B. 228, 132nd Gen. Assemb. § 2901.05(B)(1) (Ohio 2019) (passed over Governor’s veto, Dec. 27, 2018) (placing the burden of proof in alleged self-defense cases on the government if “evidence [is] presented that tends to support” self-defense).

<sup>80</sup> See *In re Winship*, 397 U.S. 358, 364 (1970) (constitution requires that the prosecution prove all elements of a crime beyond a reasonable doubt).

<sup>81</sup> See *Martin*, 480 U.S. at 235.

<sup>82</sup> See *id.* at 236. Nevada statutory law provides that

[T]he burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified, or excused in committing the homicide.

NEV. REV. STAT. § 200.170 (West 2019). Nevada courts, however, disallow jury instructions based on this provision in murder trials because such instructions “may cause the jury to conclude that the prosecution does not have the burden of persuasion throughout the trial to

defendant must still present some evidence to establish self-defense, and the claim will usually go a jury.<sup>83</sup>

The traditional substantive and procedural requirements for self-defense provided a dual layer of protection against false or disingenuous self-defense claims. First, requiring the defendant to support a self-defense claim in court (even if only by producing evidence) helps to weed out fabricated claims. Second, the substantive requirement of reasonableness helps to guard against claims of justification that do not accord with what society (as embodied in the jury) believes to be justifiable. Unreasonable self-defense claims would include those not really based on fear, as well as those based on genuine, but socially aberrational, fear.

Through self-defense doctrine, criminal laws condone death, expressing a societal preference for the death of the assailant over the death of the victim. The core substantive requirements, along with the procedural rules governing defense of justification, help to keep this exception narrow. Together they establish that a killing is justifiable

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prove every element of the crime beyond a reasonable doubt[,] i.e., to believe incorrectly that, on the issue of self-defense, the burden of persuasion shifts to the defendant.” *Robertson v. State*, 625 P.2d 565, 565–56 (Nev. 1981). It is not immediately clear what effect, if any, the Supreme Court’s subsequent decision in *Martin v. Ohio* had on Nevada law in this area. Eugene Volokh argued that nearly all states today require the prosecution to prove the absence of justification beyond a reasonable doubt once the defendant introduces any evidence of self-defense, although he acknowledges that “[t]he English common law rule at the time of the Framing was that the defense must prove self-defense by a preponderance of the evidence.” Eugene Volokh, *Burden and Quantum of Proof as to Self-Defense*, VOLOKH CONSPIRACY (July 14, 2013), <http://volokh.com/2013/07/14/burden-and-quantum-of-proof-on-self-defense> [<http://perma.cc/F9SP-B7KW>] (claiming that Florida’s 2005 provision was in line with the practice of most states, contrary to what other commentators had claimed). See also GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* 197 (1988) (describing the prosecution’s burden to disprove self-defense beyond a reasonable doubt and highlighting the importance of this in the criminal trial of Bernard Goetz).

<sup>83</sup> 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 132 (2018). See, e.g., *Greedy v. State*, 64 N.E.3d 1263, 2016 WL 5394460 (Ind. Ct. App. Sept. 27, 2016) (unpublished disposition) (describing Nebraska’s rule that the defendant bears the burden of production for self-defense and contrasting it with the rules for mitigation defenses, which require only that the defendant raise the issue). Of course, prosecutorial discretion would permit a decision not to file homicide charges in a case where the self-defense evidence is particularly strong. See Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806–07 (explaining that the prosecutor’s role is to assess the strength of a possible self-defense claim and decide whether to bring charges and asserting that implicit racial bias may color that assessment).



only when a person has no other option besides dying or being seriously injured at the hands of an assailant. Yet, in most states, the law of self-defense is actually much broader. The doctrines that expand these core principles are described in Section I.C. First, however, it is important to examine the relationship between race and fear that permeates even the basic rules.

### B. *Blackness and Fear*

Self-defense law legalizes violence perpetrated in response to a perceived threat, as long as the perception is reasonable (that is, it would be shared by others). In encounters between strangers, this means relying on easy to ascertain cues, such as what the person looks like, what he is wearing, where he is, what he appears to be doing, and whether he seems like he might be holding or reaching for a weapon, as well as one's sense of unease or danger. Doctrinally, it is difficult to eliminate this reliance on subjective threat assessment.<sup>84</sup> We want to allow people to defend themselves against people who might otherwise kill them.<sup>85</sup> Forcing every defendant to wait until the threat of death is

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<sup>84</sup> Several scholars have suggested doctrinal modifications or theoretical approaches that would more carefully limit self-defense to situations in which the defendant is certain and correct regarding the nature of the threat. Fletcher argues that a defendant facing a real threat to life may be justified in killing the aggressor, whereas a defendant who kills out of a mistaken belief that he faces a threat is not justified but might be excused. George P. Fletcher, *The Psychotic Aggressor: A Generation Later*, in FLETCHER'S ESSAYS ON CRIMINAL LAW 202 (Russell L. Christopher ed., 2013) ("The jury should first find and declare to the public that a defendant like Bernhard Goetz . . . acted unjustifiably and wrongly in using force against someone who was not actually engaged in attacking them as required by the law of self-defense. Then, as a second stage of the proceedings, the jury should be able to declare the defendant[] excused on the grounds of reasonable misperception of danger."); Richardson & Goff, *supra* note 21, propose a doctrinal regime in which killing in response to a correct assessment of threat would be justified and would be a complete defense, but killing in response to a mistaken belief that was premised on racial fear would have only a partial defense (i.e., a charge of murder would become voluntary manslaughter).

<sup>85</sup> LEVERICK, *supra* note 62, at 66 ("[K]illing in self-defence is permissible because all human beings possess a right to life and an aggressor threatens to violate this right . . . . The reason the victim is permitted to kill the aggressor, but the aggressor is not permitted to kill the victim, is that the aggressor, by virtue of her conduct in becoming an unjust and immediate threat to the life of the victim that cannot be avoided by any less harmful means, forfeits her right to life"); ROBINSON, *supra* note 62, at 97 ("Society's interest in maintaining the right to

crystal clear would likely result in more innocent people dying at the hands of aggressors before they are able to fully determine whether the threat is real, and thus, their act justifiable. In many situations, self-defense requires a split-second assessment of danger, and therefore the law tolerates a risk of mistakes. The potential for mistakes and varied judgment, however, does not unfold on a neutral stage.

Because our collective sense of threat is racially contingent, the potential for racial bias is built into self-defense law.<sup>86</sup> Black people, and others whose physical characteristics are associated with danger (tall people, muscular people, men), are more vulnerable to being assessed as threatening.<sup>87</sup> This is a statement of fact, not a criticism. Race neutral rules can perpetuate racial inequality because historical and social biases, and existing inequality, are built into them.<sup>88</sup> Acknowledging

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bodily integrity, when combined with the physical harm threatened, outweighs the harm inflicted to stop the aggression.”); SANGERO, *supra* note 65, at 44 (“[T]he aggressor, by his guilty act, loses his right to life, or, at least, the right to claim this right.”)

<sup>86</sup> See, e.g., LEE, *supra* note 20, at 103; Richardson & Goff, *supra* note 21.

<sup>87</sup> Masculine characteristics may also signal a threat, see, e.g., E. Ashby Plant, Joanna Goplen & Jonathan W. Kunstman, *Selective Responses to Threat: The Role of Race and Gender in Decisions to Shoot*, 37 PERSONALITY & SOC. PSYCH. BULL. 1274 (2011) (finding that all participants in simulation showed bias in favor of shooting White men and away from shooting White women, and that White participants showed bias in favor of shooting Black men and away from shooting Black women), and there is some evidence that the intersection of gender and racial stereotypes make Black men especially vulnerable to being seen as physically threatening. John Wilson, Kurt Hugenberg & Nicholas Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCHOL. 59 (2017) The problem of racialized perception of danger, however, is not just a male problem. There is evidence that Black women and girls are more likely than their White counterparts to be perceived as older and less innocent. Compare REBECCA EPSTEIN, JAMILIA L. BLAKE & THALIA GONZALEZ, *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD* (2017), with Wilson, Hugenberg & Rule, *supra*, at 59 (finding that people tend to perceive Black men, especially darker-skinned Black men, as larger and more threatening than similarly sized White men); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014). This perception affects their involvement in the criminal justice system, especially whether they are treated as victims or criminals. Priscilla Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015).

<sup>88</sup> For detailed accounts of how neutral rules perpetuate structural inequality, see generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (5th ed. 2018); DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014); Ian

that a neutral rule might affect a Black victim differently from a White victim allows us to better ground theoretical assessments of criminal law and the reality of how it is applied.

### 1. Psychological Anti-Blackness

Decades of social science research on unconscious bias has established that anti-Blackness is pervasive in American society, including a negative association with Blackness,<sup>89</sup> a preference for White over Black,<sup>90</sup> and an association between Blackness and criminality.<sup>91</sup> Blackness in this context is what Jerry Kang calls a “racial schema,” or “a set of [socially created] racial categories into which we map an individual . . . according to prevailing rules of racial mapping,” triggering “implicit and explicit racial meanings associated with that

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Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012). See also Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017) (credit); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000) (law school admissions).

<sup>89</sup> See, e.g., Adam L. Alter, Chadly Stern, Yael Granot & Emily Balcetis, *The “Bad Is Black” Effect: Why People Believe Evildoers have Darker Skin than Do-Gooders*, 42 PERSONALITY & SOC. PSYCH. BULL. 1653 (2015).

<sup>90</sup> See, e.g., Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 105–06 (2002) (reviewing data from web-based administration of the Implicit Association Test and finding implicit preference for White over Black, strongly among White subjects and more weakly among Black subjects).

<sup>91</sup> See, e.g., Andrew R. Todd, Kelsey Thiem & Rebecca Neal, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCHOL. SCI. 384 (2016) (finding that White participants had less difficulty identifying threatening stimuli and more difficulty identifying non-threatening stimuli after seeing Black faces and that the association between Blackness and criminality occurred even if the faces shown were young Black children); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881, 883, 887–88 (2004) (finding that Black faces increased subjects’ likelihood of seeing crime-relevant objects, subjects primed to think about crime paid more attention to Black faces, and finding the same results among police officers as among undergraduates). Researchers have also identified a persistent association between Black people and apes, echoing historical stereotypes used to dehumanize Black people, and shown that this association can influence criminal sentencing determinations and encourage violence against Black people. Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304–05 (2008).

category.”<sup>92</sup> This mapping is often based on the visual cues we typically associate with race, such as skin color, but it may also be based on performative traits<sup>93</sup> or non-visual cues.<sup>94</sup>

Social psychologists have documented negative implicit associations attached to Blackness using the Implicit Association Test (IAT).<sup>95</sup> The IAT tests the degree to which people associate two concepts. The subject is shown one of two types of images (e.g., flowers/insects and positive/negative) and asked to hit a key to categorize the image.<sup>96</sup> When the available categories are consistent with widely-held stereotypes (e.g., “flower or positive word” versus “insect or negative word”), the test subjects react quickly.<sup>97</sup> When the categories

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<sup>92</sup> Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005). The meanings triggered by racial schemas may include cognitive responses (stereotypes) and affective responses (prejudices). *Id.* at 1500. As Kang explains, schematic thinking operates automatically and is a necessary part of cognition:

Our senses are constantly bombarded by environmental stimuli, which must be processed, then encoded into memories (short- and/or long-term) in some internal representation. Based on that representation of reality, we must respond. But we drown in information. Perforce we simplify the datastream at every stage of information processing through the use of schemas. Different schema types exist for different types of entities, such as objects, other people, the self, roles, and events. To be clear, this most basic process operates not only on inanimate objects, such as chairs or bananas, but also on human beings. When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role.

*Id.* at 1499 (internal citations omitted).

<sup>93</sup> See DEVON CARBADO AND MITU GULATI, ACTING WHITE: RETHINKING RACE IN A “POST-RACIAL AMERICA” (2013) (explaining how performative characteristics such as clothing, accent, or hairstyle can determine whether a person is seen as Black and also “how Black” she is perceived to be).

<sup>94</sup> See OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 55 (2014); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–1002 (2004).

<sup>95</sup> Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1473–76 (1998), [http://faculty.fortlewis.edu/burke\\_b/Senior/BLINK%20replication/IAT.pdf](http://faculty.fortlewis.edu/burke_b/Senior/BLINK%20replication/IAT.pdf) [<https://perma.cc/WBS5-WF2T>].

<sup>96</sup> *Id.* at 1465–66; Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265–92 (J. A. Bargh ed., 2007).

<sup>97</sup> Nosek, Greenwald & Banaji, *supra* note 96, at 267.

are schema-inconsistent (e.g., “flower or negative word” versus “insect or positive word,” the subjects react slowly. As the test’s creators explain, “[t]he logic of the IAT is that this sorting task should be easier when the two concepts that share a response are strongly associated than when they are weakly associated.”<sup>98</sup> Blackness, for many people, is more strongly associated with negative words and ideas.

## 2. Bias and Behavior

Life is not a lab experiment. In any real-life encounter between two strangers, a person’s assessment of threat and determination of how to react to that threat are likely to be based on more than just racial bias. But the overwhelming weight of current evidence reveals a shared tendency to associate Blackness with threat. Self-defense cases involve a split-second assessment of whether a stranger poses a deadly threat. To make such a determination, a person can rely only on limited easy-to-see cues, such as skin color, apparent gender, style of dress, location, and environment. Race is an irrevocable part of this mix of cues. Perceptions about race can also influence a person’s assessment of seemingly neutral factors, such as whether the person appears to have a weapon and whether that person seems to be engaged in criminal or dangerous behavior at the moment.

Social scientists have also demonstrated that unconscious biases translate into behavior. In several studies, research subjects were shown a photo of a person and then asked to make a snap judgment about the identity of an object. Participants in the study were more likely to mistakenly think the object was a gun if they had been shown an image of a Black face.<sup>99</sup> In so-called “shooter bias” studies, participants are asked to quickly determine whether a person in an image is holding a gun or a wallet, and to make a simulated decision about whether to shoot the person in a video game-like setting. Participants in these studies are more likely to mistake a wallet for a gun and to shoot the

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<sup>98</sup> *Id.*; see Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

<sup>99</sup> See Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 152–60 (2016) (reviewing nearly two decades of shooter bias studies).

image when the face in the image is Black.<sup>100</sup> Because these biases are unconscious, they cannot be reduced or eliminated simply through a conscious attempt not to be racist.<sup>101</sup>

These biases may be worse in cross-racial encounters because people also tend to respond more negatively to anyone who is in an out-group.<sup>102</sup> They are not, however, limited to cross-racial encounters.<sup>103</sup> Black people are at greater risk of being perceived as a threat, regardless of who is making the assessment.<sup>104</sup> In terms of self-defense law, this

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<sup>100</sup> See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); B. Keith Payne, *Weapons Bias: Split Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287 (2006). But see Lois James, Bryan Vila & Kenn Daratha, *Results from Experimental Trials Testing Participant Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9. J. EXPERIMENTAL CRIMINOLOGY 189, 196 (2013); Lois James, David Klinger & Bryan Vila, *Racial and Ethnic Bias in Decisions to Shoot Seen Through a Stronger Lens: Experimental Results from High-Fidelity Laboratory Simulations*, 10 J. EXPERIMENTAL CRIMINOLOGY 323, 334 (2014); Lois James, Stephen M. James & Bryan Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black than White Suspects?*, 15 CRIMINOLOGY & PUB. POL'Y 457, 458 (2016).

<sup>101</sup> See, e.g., Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 171 (2008).

<sup>102</sup> See Richardson & Goff, *supra* note 21, at 305; Saul L. Miller, Kate Zielaskowski & E. Ashby Plant, *The Basis of Shooter Bias: Beyond Cultural Stereotypes*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1358 (2012).

<sup>103</sup> See L. Song Richardson & Devon W. Carbado, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1992 n.33–37 (2018) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)) (collecting sources documenting anti-Black unconscious biases among Black people).

<sup>104</sup> Analyses of self-defense killings that focus on the race of the killer miss this point. For example, some raised questions about whether racism could possibly be relevant to the Martin killing because George Zimmerman is Hispanic. See *Race Plays Confusing Role in Trayvon Martin Case*, CBS NEWS (July 10, 2013, 4:46 PM), <http://www.cbsnews.com/news/race-plays-confusing-role-in-trayvon-martin-case> [https://perma.cc/RWJ9-D4KN] (“[P]ossible racial motives on Zimmerman’s part became tough to pin down. His background and associations cut across racial lines, and his racial identity didn’t fit neatly into a box.”) Similarly, some commentators have framed the issue in police killing cases as one about the privilege of White officers, pointing to the indictment of Jeronimo Yanez and the conviction of Peter Liang as evidence that non-White officers do not benefit in the same way. See, e.g., Filiberto Nolasco Gomez, *The Rare Indictment and Trial of Jeronimo Yanez ‘Proves White Privilege Exists and Protects White Cops’*, DAILY PLANET (Jan. 5, 2017), <https://www.tcdailyplanet.net/the-rare-indictment-of-jeronimo-yanez-proves-white-privilege-exists-and-protects-white-cops> [http://perma.cc/3428-A94Q]; see also Eric Dang, *Why the Asian Community Is Upset about the Peter Liang Verdict*, ODYSSEY (Feb. 29, 2016), <https://www.theodysseyonline.com/controversy-behind-peter-liang> [http://perma.cc/WX6F-7FAW] (“[I]t is very clear that between Peter Liang

means that a person's ability to assess the threat of a target is affected by the race of the target. Legal scholars L. Song Richardson and Cynthia Lee have carefully examined the connection between implicit racial bias and self-defense. Richardson, writing with psychologist Phillip Atiba Goff, explains, "Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal" and "[w]hen the person being judged fits a criminal stereotype, the suspicion heuristic can cause the actor more easily to believe honestly—but mistakenly—that the person poses a threat and that deadly force is necessary."<sup>105</sup> According to Lee,

If most individuals would be more likely to "see" a weapon in the hands of an unarmed Black person than in the hands of an unarmed White person and are thus more likely to shoot an unarmed Black person when they would not shoot a similarly situated White person, then jurors in self-defense cases may also be more likely to find that an individual who says he shot an unarmed Black person in self-defense because he believed the victim was about to kill or seriously injure him acted reasonably, even if he was mistaken.<sup>106</sup>

It would be reasonable to expect, then, that self-defense doctrine is more likely to exonerate people who kill Black victims.<sup>107</sup> The limited data

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and Daniel Holtzclaw . . . certain officers are not offered the same police union support as others."). While it may be true that non-White police officers, and perhaps non-White civilians, who kill Black people are more likely to be punished, these cases demonstrate anti-Black bias and the role of Blackness in the larger structure of White supremacy is not simply the province of individual White people.

<sup>105</sup> Richardson & Goff, *supra* note 21, at 310, 314. Richardson and Goff propose that killings in which unconscious racial bias played a role be treated as presumptively unreasonable. *Id.* at 321–26.

<sup>106</sup> Lee, *Making Race Salient*, *supra* note 21, at 1584–85. Lee suggests that explicitly discussing racial bias during self-defense trials may help disentangle biased fear from reasonable fear. *Id.* at 1590–1601; *see also* Richardson & Goff, *The Suspicion Heuristic*, *supra* note 21, at 326 (adopting Lee's proposal that judges use "race-switching" jury instructions).

<sup>107</sup> We might also expect it to be more difficult to recognize Black claims of self-defense against non-Black victims, a possibility that is also supported by available data. KROUSE & DEATON, *supra* note 46, at 3 & tbl.1. This dynamic is complicated by the reality that there is a winner and a loser in any homicide involving a claim of self-defense. Where the non-Black person is the one killed, the Black person may not be able to claim he was acting in self-defense if the conduct of the other person is understood to arise from his initial fear of the Black person. The Black person would then become the initial aggressor, the victim's behavior would be legally justifiable, and the killer would have no self-defense claim. Where the Black person is the one killed, any preceding self-defense claim of the victim is erased. *See infra* notes 268–74

available suggest that that this is so.<sup>108</sup> Finally, researchers have shown that implicit racial bias can infect various stages of the criminal justice system, including public defender triage,<sup>109</sup> prosecutorial discretion in charging,<sup>110</sup> jury determinations,<sup>111</sup> and sentencing.<sup>112</sup> Just as the shooter bias studies have raised concerns about how widely held biases might lead to more Black deaths, these studies should raise concerns about whether the substantive laws and procedural mechanisms of the criminal justice system may worsen, rather than remedy, pervasive bias.<sup>113</sup>

### 3. Cultural Anti-Blackness

Research demonstrating that subjective threat assessment is affected by unconscious racial bias has received well-deserved attention from criminal law scholars, but explicit bias matters too. For many Americans, Blackness is a proxy for dangerousness in their conscious minds as well. Selective news coverage of local crime reinforces this cultural myth.<sup>114</sup> It is hardly surprising, then, that our culture tends to

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and accompanying text for further discussion of a case showing how this might play out in neighborhoods.

<sup>108</sup> See *supra* notes 37–53 (discussing federal homicide statistics).

<sup>109</sup> See, e.g., L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

<sup>110</sup> See generally Smith & Levinson, *supra* note 83.

<sup>111</sup> See generally Casey Reynolds, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 LAW & PSYCHOL. REV. 229 (2013).

<sup>112</sup> See generally Kimberly Papillon, *The Court's Brain: Neuroscience and Judicial Decision Making in Criminal Sentencing*, 49 CT. REV. 48 (2013).

<sup>113</sup> See CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 23–25 (2014) (summarizing sources cited *supra* notes 109–12 and other recent work on implicit bias in the criminal justice system).

<sup>114</sup> See, e.g., Eileen E.S. Bjornstrom, Robert L. Kaufman, Ruth D. Peterson & Michael Slater, *Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage*, 57 SOC. PROBS. 269, 272 (2010); Richard J. Lundman, *The Newsworthiness and Selection Bias in News About Murder: Comparative and Relative Effects of Novelty and Race and Gender Typifications on Newspaper Coverage of Homicide*, 18 SOC. F. 357, 358–59 (2003). Accord NAZGOL GANDNOOSH, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 13–14, 18–19, 22–23 (2014) (summarizing research showing that people over-estimate Black and Hispanic crime rates and linking this over-estimation to disparate media representation and support for punitive policies). See also



“view crime as a predominantly Black phenomenon.”<sup>115</sup> Khalil Gibran Muhammad has documented how the relationship between Blackness and criminality, and the certainty of the Black criminal, evolved out of a combination of history, racist policies, sociological studies of immigrant crimes, and the advent of federal crime statistics.<sup>116</sup>

Olivia Bertalan, one of George Zimmerman’s neighbors, articulated the explicit fear of Black intruders shared by many of her White neighbors when she described her experience weeks earlier when two men broke into her home. She told the jury how she hid in a bedroom with her infant son while two Black men went through her home and stole electronics.<sup>117</sup> The only connection between the burglary and Trayvon Martin’s death was that they occurred in the same neighborhood, Zimmerman was aware of the previous break-in, and Martin was also Black. Bertalan’s story, though, echoed a commonly held fear of Black intruders as threats to White women and children.<sup>118</sup> In her story, she looks out of the peephole of her door to see “two young African American guys” ringing her doorbell, at which point she panics, calls her mother, calls the police, and hides out in her son’s room.<sup>119</sup> Although her story ends with a break-in, she seems to have assumed this ending the moment she saw the men on her porch.<sup>120</sup> The narrative of

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Calvin John Smiley, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 353–55 (2016) (finding that unarmed Black male victims are also disproportionately portrayed as criminal).

<sup>115</sup> See Thelma L. Harmon, *Codification of Fear: SYG Laws*, 5 RALPH BUNCHE J. PUB. AFF. 1, 6 (2016).

<sup>116</sup> See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

<sup>117</sup> See Bloom, *supra* note 57.

<sup>118</sup> See Onwuachi-Willig, *supra* note 18 (manuscript at 26–29).

<sup>119</sup> Bloom, *supra* note 57.

<sup>120</sup> This same narrative was invoked by Theodore Wafer, who shot and killed Renisha McBride through his screen door when he saw her standing on his porch. Wafer, who claimed self-defense but was denied a self-defense jury instruction, was convicted and sentenced to prison, but the judge who handed down his sentence expressed sympathy for his story. See Alana Semuels, *Detroit-Area Man Gets 17 to 32 Years for Shooting Visitor on Porch*, L.A. TIMES (Sept. 3, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-porch-killer-sentenced-20140903-story.html> [<http://perma.cc/HZQ7-SMSE>] (quoting Judge Dana Hathaway as saying to Wafer, “I do not believe that you are a coldblooded murderer or that this case had anything to do with race . . . I do believe that you acted out of fear . . .”); see also Jenna Amatulli, *Black Teen Nearly Shot after Knocking on Door Asking for Directions to School*, HUFFPOST (Apr. 13,

the Black intruder, particularly when juxtaposed against a White female victim, holds power regardless of its truth or the ultimate outcome.<sup>121</sup>

Fear of Black crime as a cultural phenomenon matters because, while it is not necessarily correlated with actual risk of crime,<sup>122</sup> fear of crime can drive individual responses as well as collective responses in the form of enactment of new criminal laws.<sup>123</sup> While psychological research on unconscious bias has been the subject of sustained attention in criminal law, the racial bias that shapes fear of crime on an individual and societal level is often expressly stated.

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2018, 1:56 PM), [https://www.huffingtonpost.com/entry/black-teen-nearly-shot-asking-for-directions\\_us\\_5ad0d38be4b077c89ce82acc](https://www.huffingtonpost.com/entry/black-teen-nearly-shot-asking-for-directions_us_5ad0d38be4b077c89ce82acc) [https://perma.cc/FTG5-GKD4] (recounting how Brennan Walker knocked on a door to ask for directions after missing his school bus and was greeted by a gun and a woman shouting, “Why are you trying to break into my house?”). This narrative of presumptive Black criminality may also be at play when people share footage from security cameras or smart doorbells with police or on social media. See *infra* notes 278, 299 and accompanying text (describing this phenomenon). Those instances sometimes involve footage of Black people in yards, on porches, at front doors, or even ringing doorbells that someone has deemed “suspicious.” See, e.g., David Debolt, *Black Firefighter Doing His Job Questioned by Suspicious Neighbors*, EAST BAY TIMES (June 25, 2018, 9:57 AM), <https://www.eastbaytimes.com/2018/06/25/report-resident-called-police-on-black-oakland-firefighter-during-routine-inspection> [https://perma.cc/6VJX-4YLH] (describing an incident in which a woman “contacted the neighborhood’s community resource officer after finding [a] firefighter . . . on her property,” included surveillance video footage, and said she “was concerned the person may be posing” as a firefighter); Pendarvis Harshaw, *Nextdoor, the Social Network for Neighbors, is Becoming a Home for Racial Profiling*, SPLINTER (Mar. 24, 2015, 10:02 AM), <https://splinternews.com/nextdoor-the-social-network-for-neighbors-is-becoming-1793846596> [https://perma.cc/Y3AS-RWSN] (describing an incident in which an Oakland woman posted a warning and description of two Black men, who turned out to be friends of a neighbor, ringing her doorbell).

<sup>121</sup> See generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1995) (critiquing the way defense attorneys in self-defense trials exploit cultural fears of Blackness to make the defendant’s fear seem reasonable).

<sup>122</sup> See Lynn Newhart Smith & Gary Hill, *Perceptions of Crime Seriousness and Fear of Crime*, 24 SOC. FOCUS 315 (1991).

<sup>123</sup> See, e.g., Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 3, 12–13 (2013) (describing the role of fear and its exploitation by lawmakers in the tough on crime policies of the 1980s and 1990s); Kate Hynes, *The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom*, 2 PENN. STATE J.L. & INT’L AFF., 351, 377–78 (2013) (critiquing sex offenders laws in two and asserting that the restrictive regimes are the result of fear, particularly in the wake of high-profile crimes).

#### 4. Reasonableness and Colorblindness

In cases involving strangers, the killer's assessment of threat must be made quickly and based on easy-to-ascertain cues, including race and gender. This is important in light of the psychological evidence described in Section I.B.1, which demonstrated a widespread unconscious tendency to associate Blackness with criminality, and to fear Black people. These implicit biases, coupled with the cultural myths described in Section I.B.3, mean that racial bias is embedded in all stranger self-defense cases because the question of who we fear and how much we fear them nearly always implicates race.

Two additional dynamics operate to further exacerbate the problem of racial bias in the law of self-defense. First, the requirement of objective reasonableness,<sup>124</sup> which is supposed to operate as a check on individual biases, may instead operate to rubber stamp individual bias if the decision-maker shares the same psychological and cultural fears. Second, courts' tendencies to adopt a colorblind approach to adjudicating cases that do not involve direct and explicit race discrimination prevent the judicial process from acknowledging the role that bias may play.

Reasonableness is an objective standard, but an objective standard tolerates bias as long as the bias is shared by the people who apply it. A prosecutor or jury's after-the-fact assessment of whether the fear was reasonable is, at its core, a question of whether the members of the jury would have assessed the threat similarly. It is a question of shared fear. Because the biases are widespread among perpetrators, judges, and potential jurors, the reasonableness requirement that should provide a check against racist vigilantism may offer only illusory protection against racial violence under color of self-defense law.<sup>125</sup> Bias may influence both a defendant's perception of danger and a police officer,

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<sup>124</sup> See *supra* notes 74–78 (doctrine requires that fear be reasonable, but not necessarily correct).

<sup>125</sup> See, e.g., Richardson & Goff, *supra* note 21, at 318–19; Lee, (*E*)*Racing Trayvon Martin*, *supra* note 21, at 103.

prosecutor, judge, or jury's conclusion as to whether that fear was reasonable.<sup>126</sup>

Furthermore, the reasonableness test may only accommodate some versions of shared fear. The hypothetical reasonable person is likely to be a reasonable White man.<sup>127</sup> When measured against this standard, the fears of women and non-White people may not register, obscuring those people's potential self-defense claims and opening the door for others to claim self-defense when responding violently to them.

Despite the core significance of race and the possibility for racial bias in stranger self-defense cases, the legal principle of colorblindness dominates:<sup>128</sup> as long as the law at issue is facially race-neutral and no express declaration of racial bias is present in the facts, race is not addressed.<sup>129</sup> Despite the deep association between race and fear, self-defense doctrine—like most of criminal law—does not force courts to engage the possibility of racial bias. Absent evidence of explicit, intentional racist behavior on the part of the killer, express non-engagement with racial issues is more common. For example, the judge in the Zimmerman trial famously barred the prosecutor from using the term “racial profiling” to describe Zimmerman's activities on the night

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<sup>126</sup> Richardson & Goff, *supra* note 21 (arguing that self-defense law should be altered to account for predictable racial biases and, specifically, that in light of these biases, the duty to retreat should be a requirement of all self-defense laws); see also Lee, *Making Race Salient*, *supra* note 21, at 1584–85 (describing the role of racial stereotypes about Blacks, Latinxs, and Asian Americans in the assessment of reasonable fear in self-defense cases).

<sup>127</sup> See Andrea Headley & Mohamad G. Alkadry, *The Fight or Flight Response: A Look at Stand Your Ground*, 5 RALPH BUNCHE J. PUB. AFFAIRS 1 (2016) (describing the evolution of the American “true man” rule as race and gender-specific); LEE, *supra* note 20, at 204, 212–17. The case law on self-defense, particularly the no-retreat rule, is replete with gender-specific references. See, e.g., *Erwin v. State*, 29 Ohio St. 186, 199 (1876) (“[A] true man, who is without fault, is not obliged to fly from an assailant.”).

<sup>128</sup> See Haney-López, *supra* note 88, at 1876 (“We live today under a Fourteenth Amendment jurisprudence geared toward excluding evidence of the evolving mistreatment of non-Whites. Colorblindness disregards the reparative motives that animate affirmative action and renders immaterial the larger context of continuing discrimination in a society otherwise struggling to get past racism. Meanwhile, when evaluating disproportionate harm to non-Whites, malicious intent dismisses historical and sociological evidence of racial stratification—ostensibly because it cannot prove the animus of named culprits.”).

<sup>129</sup> Accord Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 247–52 (2010) (describing Fourth Amendment jurisprudence as “a series of race cases in which race is rarely mentioned”).

of the shooting.<sup>130</sup> This refusal to discuss or address race in criminal cases may even worsen bias.<sup>131</sup>

To summarize, even in its most basic form, self-defense doctrine is vulnerable to racial bias and, coupled with courts' presumption of colorblindness, poorly suited to guard against it. Self-defense laws also provide ready cover to those acting with conscious racial animus.<sup>132</sup> A vigilante acting on overt racism may successfully claim self-defense as long as his victim is someone a reasonable jury would fear. Self-defense law enshrines shared fear into law, and often does so without mentioning race at all or acknowledging its impact.

### C. *Expanding the Self-Defense Exception*

Given the potential for bias to infect split-second decisions about the use of deadly force and the high cost of mistaken self-defense claims, it would be reasonable to expect that self-defense would be tightly circumscribed by legal rules that limit the situations in which it can be invoked to only the most unavoidable scenarios and that subject most claims of justifiable homicide to legal scrutiny. Yet, the opposite is true. Most states have adopted a constellation of additional rules that relax the basic requirements. These rules make self-defense easier to claim, including removing many cases from legal review, and they make it

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<sup>130</sup> See Lee, *Making Race Salient*, *supra* note 21, at 102–03; see also GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE AND THE LAW: BERNHARD GOETZ AND THE LAW ON TRIAL 206–09 (1988) (describing how the court in *People v. Goetz* did not mention the fact that Goetz was White and his victims were Black teenagers, setting the stage for the defense attorneys to use race covertly, including a staged reenactment using Black Guardian Angels as stand-ins for the teenaged victims, without any express reckoning).

<sup>131</sup> Lee, *(E)Racing Trayvon Martin*, *supra* note 21, at 94, 107, 113 (noting “ignoring racial difference can actually exacerbate the effects of implicit racial bias” and highlighting research suggesting that “ignoring race leads jurors to assess black defendants more harshly”).

<sup>132</sup> For example, Michael Dunn, whose self-defense claim was rejected after he shot Jordan Davis, a Black teenager, in a confrontation over Davis's music, wrote letters to his daughter from jail in which he admitted to mounting prejudice against Black “thugs” and expressed his belief that “if more people would arm themselves and kill these (expletive) idiots when they're threatening you, eventually they may take the hint and change their behavior.” Jamelle Bouie, *A Killer's Racist Rants*, DAILY BEAST (Feb. 6, 2014, 1:00 PM), <http://www.thedailybeast.com/a-killers-racist-rants> [<http://perma.cc/9Q4N-FGPK>]. Dunn's letters reveal a racism that is neither unconscious nor hidden but is instead an idea he believes deserves greater support. *Id.*

facially available in more situations. Some of these rules have deep roots in common law and are intended to address gaps left by strict application of the core principles. Others, however, are relatively new. Most strikingly, many of the newer laws do not appear to address a clear gap in existing law: their primary effects are symbolic (they reinforce the desirability of self-defense) and procedural (they insulate a person who kills in self-defense from review by a jury).

Today, expansions to self-defense law are often presented as part of a package of reforms designed to make the defense easier to claim. Florida's 2005 law, which included a no-retreat rule, presumption of threat rules, and procedural changes, is a prime example.<sup>133</sup> In other states, advocacy groups have proposed reform packages modeled after Florida's law,<sup>134</sup> often hand in hand with proposals to loosen restrictions on private gun ownership and use.<sup>135</sup> The conservative American Legislative Exchange Council (ALEC) made these reforms a priority, crafting and circulating model legislation that was eventually introduced in Florida and across the country.<sup>136</sup> While state legislatures can and do

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<sup>133</sup> See Headley & Alkadry, *supra* note 127; Lave, *supra* note 3, at 833–34; Weaver, *supra* note 3, at 399–401; John F. Timoney, *Florida's Disastrous Self-Defense Law*, N.Y. TIMES (Mar. 23, 2012), <https://www.nytimes.com/2012/03/24/opinion/floridas-disastrous-self-defense-law.html> [<https://perma.cc/EKM5-32PE>]. The National Rifle Association was instrumental in ensuring passage of Florida's law. See Lave, *supra* note 3, at 836–38; Weaver, *supra* note 3, at 396. Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 286–88 (2012) (describing the Florida law's immunity provision); Jennifer Randolph, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation*, 44 SETON HALL L. REV. 599, 608–16 (2014) (analyzing civil and criminal immunity laws adopted by Florida, Alabama, Kansas, Kentucky, and Oklahoma, and noting that Florida's 2005 law also established a presumption of reasonableness when force was used against an intruder in an occupied home or vehicle).

<sup>134</sup> See Lave, *supra* note 3, at 839; Weaver, *supra* note 3, at 397; Heath Druzin, *Gun Rights Groups Pressure Legislators to Expand Stand Your Ground Rules*, IDEASTREAM (Dec. 5, 2018), <https://wclv.ideastream.org/news/gun-rights-groups-pressure-legislators-to-expand-stand-your-ground-rules> [<https://perma.cc/N4PC-2BHY>].

<sup>135</sup> Press Release, Ctr for Media & Democracy, ALEC's Legislative Agenda on Guns, [https://www.alecexposed.org/w/images/b/b8/Header\\_ALEC\\_on\\_Guns\\_Final\\_PDF.pdf](https://www.alecexposed.org/w/images/b/b8/Header_ALEC_on_Guns_Final_PDF.pdf) [<https://perma.cc/7XQ9-MALZ>].

<sup>136</sup> See John Nichols, *How ALEC Took Florida's 'License to Kill' Law National*, NATION (Mar. 22, 2012), <https://www.thenation.com/article/how-alec-took-floridas-license-kill-law-national> [<https://perma.cc/VWR6-URPN>]. The group has since eliminated public safety as a key issue area. Tom Hamburger, *Legislative Committee Moves Away from 'Stand Your Ground' Laws*,

pick and choose among the proposed reforms,<sup>137</sup> it is significant that they are typically advanced as a package. This suggests that the goal is not so much to address any flaw in a state's current approach, but to broaden the right of self-defense generally.

Most commentators have focused on laws that eliminate the common law duty to retreat,<sup>138</sup> but that focus is too narrow. The widespread attention to no-retreat laws has engendered confusion and counterarguments focused on whether Zimmerman actually benefitted from the no-retreat provision of Florida's law,<sup>139</sup> whether he benefitted from the 2005 law at all,<sup>140</sup> and whether eliminating the duty to retreat is actually a recent or rare innovation in the law of self-defense.<sup>141</sup>

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WASH. POST (Apr. 17, 2012), [https://www.washingtonpost.com/politics/legislative-committee-moves-away-from-stand-your-ground-laws/2012/04/17/gIqAN1ytOT\\_story.html?utm\\_term=.839a31f6927c](https://www.washingtonpost.com/politics/legislative-committee-moves-away-from-stand-your-ground-laws/2012/04/17/gIqAN1ytOT_story.html?utm_term=.839a31f6927c) [<https://perma.cc/Y7NU-N9J7>].

<sup>137</sup> For example, the Nevada legislature in 2011 codified its no-retreat rule but rejected several other expansions, including a presumption of reasonable fear and a provision extending defense of habitation rules to vehicles and workplaces, that were originally proposed as part of a single bill. See A.B. 381, 76th Leg. (Nev. 2011) (including all proposed amendments); A.B. 321, 76th Leg. (Nev. 2011) (including only no-retreat provisions); Andy Chow, *Ohio Legislature Passes Self-Defense Gun Bill Over Kasich's Objections*, WOSU (Dec. 27, 2018), <http://radio.wosu.org/post/ohio-legislature-passes-self-defense-gun-bill-over-kasichs-objections#stream/0> [<https://perma.cc/B8P6-H2D2>] (describing how Ohio lawmakers stripped the no-retreat provision, but passed a bill shifting the burden of proof in self-defense cases and restricting local gun control laws).

<sup>138</sup> See, e.g., Lave, *supra* note 3, at 832–34; Anthony Hall, *A Stand for Justice—Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 S. REGION BLACK L. STUDENTS ASS'N L.J. 95, 97–98 (2013); Barnes, *supra* note 31, at 3180.

<sup>139</sup> See, e.g., Dan Abrams, *No, Florida's Stand Your Ground Did Not Determine Either Zimmerman or Dunn Cases*, ABC NEWS (Feb. 17, 2014), <http://abcnews.go.com/US/floridas-stand-ground-law-determine-zimmerman-dunn-cases/story?id=22543929> [<http://perma.cc/3T4F-5SFQ>]; Jacob Sullum, *Sorry, the Zimmerman Case Still Has Nothing to Do with 'Stand Your Ground'*, REASON: HIT & RUN BLOG (July 14, 2013, 11:12 AM), <http://reason.com/blog/2013/07/14/sorry-the-zimmerman-case-still-has-nothing> [<http://perma.cc/GGN7-EW2Y>].

<sup>140</sup> See, e.g., Ta-Nehisi Coates, *How Stand Your Ground Relates to George Zimmerman*, ATLANTIC (July 16, 2013), <https://www.theatlantic.com/national/archive/2013/07/how-stand-your-ground-relates-to-george-zimmerman/277829> [<http://perma.cc/8CFE-DZV5>] (responding to Jacob Sullum by pointing out that the immunity provision of Florida's law likely made a difference in how the prosecution proceeded, but still referring to the law as “stand your ground”); Nicole Flatow, *Zimmerman Juror Says Panel Considered Stand Your Ground In Deliberations: 'He Had a Right to Defend Himself'*, THINK PROGRESS (July 16, 2013, 2:46 AM), <https://thinkprogress.org/zimmerman-juror-says-panel-considered-stand-your-ground-in-deliberations-he-had-a-right-to-defend-10e55e0750bf> [<http://perma.cc/7QT7-Q6GD>].

In fact, Florida and many other states have enacted or considered a range of statutory amendments in the past two decades that broaden the scope of self-defense. Eliminating the duty to retreat is neither the only nor necessarily the most sweeping change wrought by these laws. They all make self-defense easier to claim, but they do so in different ways, including codifying presumptions, eliminating requirements, and shifting procedural burdens. Use of the term “stand your ground” as shorthand for laws that expand the right of self-defense is confusing because it lumps together several distinct legal rules under an umbrella term that refers to one specific rule. The focus on reforms adopted in the past decade also obscure the role of other doctrines that expand the right of self-defense but have deeper roots in the common law, such as defense of habitation and the castle doctrine.

In this Section, I describe various types of state laws that expand on the core principles of self-defense by relaxing one of the traditional substantive requirements—imminence, proportionality, necessity, or reasonableness—or by removing more claims from the courts. Conceptualizing this constellation of laws in terms of how they relax the core requirements helps illustrate just how broad the self-defense exception can be. My goal here is to demonstrate that all the various rules, new and old, related to defensive use of force are really expressions of, or shortcuts around, one of these basic requirements. Viewed this way, modern self-defense law appears to be a collection of ways that states have chosen to permit the use of deadly force in more scenarios and make it easier for defendants to claim it.

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(interview with juror who vaguely invoked “stand your ground” as one reason the jury reached its verdict).

<sup>141</sup> Andrew F. Branca, *‘Stand Your Ground’ Continues to Gain Ground*, NAT’L REV. (Apr. 18, 2017, 8:00 AM), <https://www.nationalreview.com/2017/04/stand-your-ground-iowa-35-states-florida-trayvon-martin-black-lives-matter> [http://perma.cc/39VB-QRTY] (“Stand-your-ground is not a legal aberration. At the time of the Zimmerman trial, only 18 states did not adhere to the ‘stand your ground’ doctrine. The other 32 imposed no legal duty on victims of unlawful attacks to retreat before they could use deadly force in self-defense.”); see also Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEMPHIS L. REV. 383, 389 n.29 (2015) (citing statutes to show that a majority of states had a no-retreat rule before Florida enacted its law).



### 1. Imminence

In the most basic form of self-defense, a defendant must demonstrate that the threatened harm to which he is reacting is imminent.<sup>142</sup> The laws described in this Section relax or shortcut this requirement by permitting a person to presume that an assailant is about to use deadly force in situations where no fight has started and no weapon is visible.

The imminence requirement has received a great deal of scholarly attention for the barriers it poses to people who use deadly force to fight back against abusive partners.<sup>143</sup> In such cases, an abusive partner may pose a deadly threat over the long term or in the future, but if a person kills her abusive partner in a moment of calm, such as when the attacker is asleep, she may be denied a self-defense instruction because the threat was not imminent at that moment.<sup>144</sup> A minority of jurisdictions have instead adopted a slightly looser temporal requirement of immediate threat.<sup>145</sup> Attorneys may also rely on evidence about the cycle of abusive relationships in individual cases to explain to a jury why the threat may appear imminent to a person in the defendant's position.<sup>146</sup> Yet, the problems posed by imminence in domestic violence cases have not

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<sup>142</sup> ROBINSON, *supra* note 62, at 99; Maguigan, *supra* note 22, at 414 (describing how imminence requirement limits the availability of self-defense in cases where women kill their abusive partners); AYA GRUBER, *THE DUTY TO RETREAT IN SELF-DEFENSE LAW AND VIOLENCE AGAINST WOMEN* 4, 7–10 (2017), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-5?print=pdf> (describing traditional imminence requirement and distinguishing between that and the minority approach of requiring only and “immediate” threat in the context of abuser killings).

<sup>143</sup> LEVERICK, *supra* note 62, at 92–93.

<sup>144</sup> *Id.* at 92 n.29 (citing cases).

<sup>145</sup> *Id.* at 97 (describing the MPC's “immediately necessary” formulation and citing state laws); GRUBER, *supra* note 142, at 4.

<sup>146</sup> See Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 55–63; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 37 (1991). But see GRUBER, *supra* note 142, at 7 (explaining that such testimony may help surmount the necessity requirement, but does not necessarily explain why an abused partner would believe a sleeping person posed an imminent threat, leading many scholars to pursue changes in self-defense doctrine).

resulted in a widespread effort by state legislatures to modify the imminence requirement by statute.<sup>147</sup>

On the other hand, statutory and common law incorporates some rules that do modify the imminence requirement by allowing a defendant to presume the existence of an imminent threat even where the evidence may not support it. A primary example of this is a defense of habitation law. In every state, it is legal to kill a person who is breaking into your home, even if there is no evidence of an imminent deadly threat.<sup>148</sup> This rule, called “defense of habitation” or “defense of dwelling,” was part of the English common law and incorporated in American jurisdictions.<sup>149</sup> State statutes differ in their precise requirements, but many laws allow a person to presume the existence of an imminent deadly threat when a person breaks into, or is about to break into, an occupied dwelling.<sup>150</sup>

One rationale offered for home defense laws is the prediction that home invasions might lead to inter-personal violence because most intruders are present for criminal purposes and might therefore react with violence if confronted by the residents.<sup>151</sup> According to this view, it is impractical to require a person to wait for evidence that the intruder intends to do harm to someone in the home before force may be used.

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<sup>147</sup> See Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(B) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 33 n.81, 33–39 (2015) (discussing a proposal to amend the MPC to better deal with its imminence problem). *But see* Fletcher, *supra* note 66, at 218–19 (arguing in favor of retaining a strict, objective imminence requirement and stating that “the underlying relationship of dominance and subordination should not bear on the analysis of self-defense”); Joshua Dressler, *Reply: Battered Women, Sleeping Abusers, and Political Moral Theory*, in FLETCHER’S ESSAYS ON CRIMINAL LAW 225, 227 (Russell L. Christopher ed., 2013) (“To claim that a reasonable person might think that a sleeping man represents an *imminent* threat is virtually to defend the oxymoron of a ‘reasonable irrational person.’”).

<sup>148</sup> Annotation, *Homicide or Assault in Defense of Habitation or Property*, 25 A.L.R. 508 (1923).

<sup>149</sup> SANGERO, *supra* note 65, at 266–67; LEVERICK, *supra* note 62, at 137–39.

<sup>150</sup> Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9–18 (describing and classifying types of defense of habitation laws). Some of these statutes include language specifically permitting a person to presume the existence of a deadly threat when an intruder enters or is about to enter the home, a framing that highlights the way these laws shortcut the imminence requirement. *Id.* at 28.

<sup>151</sup> SANGERO, *supra* note 65, at 267.

Defense of home laws can thus be understood to modify the imminence requirement by establishing a presumption of imminent harm if a person breaks into an occupied dwelling. At common law, deadly force could be used only against an intruder who intended to commit a violent felony,<sup>152</sup> an approach that supports the idea that defense of habitation laws offer a shortcut around the imminence requirement for people who encounter intruders at home.<sup>153</sup> Statutes differ according to how close the intruder must be to entering the premises,<sup>154</sup> a difference that can have significant consequences in the context described in Part II.

Other provisions extend the idea of home defense to more places, creating a presumption of imminent threat when an intruder tries to break into an unoccupied building, a car, or a boat. A 2015 Nevada law, for example, allows a person to presume that a deadly threat exists in any case involving suspected home invasion or grand larceny of a vehicle.<sup>155</sup>

## 2. Proportionality

If defensive force must be proportional to the threatened harm, then deadly force would never be permitted in response to anything short of a deadly threat and killing someone in defense of property would never be justifiable. Yet, self-defense laws in most states relax this proportionality requirement slightly, in that they permit the use of deadly force in response to a threat of death or certain other violent crimes, most commonly robbery, rape, and kidnapping.<sup>156</sup>

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<sup>152</sup> Sarah A. Pohlman, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 ST. LOUIS L.J. 857, 859 (2012).

<sup>153</sup> See *id.* at 864 (describing defense of habitation under Missouri common law as differing from self-defense in that it allowed defensive force to be undertaken earlier). Because it is only available against an unlawful intruder, see, e.g., *State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017), the defense of habitation presumption cannot be used by defendants who kill a spouse or other cohabitant, leaving the imminence problem described above unresolved.

<sup>154</sup> See Green, *supra* note 150, at 17–18.

<sup>155</sup> NEV. REV. STAT. § 41.095 (West 2019).

<sup>156</sup> TEX. PENAL CODE ANN. § 9.32 (West 2019); N.Y. PENAL LAW § 35.15(2)(b) (McKinney 2019). Cf. NEV. REV. STAT. § 200.200 (West 2019) (permitting deadly force “in order to save the person’s own life, or to prevent the person from receiving great bodily harm”). See also

The New York statute at issue when Bernhard Goetz shot Darrell Cabey, Barry Allen, Troy Canty, and James Ramseur on a subway car was one such law.<sup>157</sup> Goetz did not claim that he feared his victims were about to kill him.<sup>158</sup> He did not need to do so because New York's law permitted the use of deadly force when a person "reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery."<sup>159</sup> Because he felt surrounded by his victims and because they asked him for money, Goetz convinced a jury that he reasonably feared either a robbery or deadly physical force.<sup>160</sup> This slight modification of the proportionality rule meant that Goetz was not required to present evidence suggesting that any of the five teenagers appeared to be holding a deadly weapon.<sup>161</sup> Robbery is a taking involving violence or threat,<sup>162</sup> but it need not involve a deadly threat. Yet, under New York's statute, Goetz could shoot or kill to defend himself against any threatened force at all if it occurred in the context of a robbery.

Notwithstanding the discussion of imminence above, defense of habitation is most commonly conceptualized as an exception to the proportionality requirement.<sup>163</sup> The home, it is argued, is a special place, the value of which lies somewhere between property and human life.<sup>164</sup> If this is the underlying rationale, home defense laws modify the proportionality requirement by providing that deadly force is legal in

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SANGERO, *supra* note 65, at 168 ("A striking example of this flexibility of the proportionality requirement is the accepted assumption that the exercise of lethal force is justified even when the danger to the attacked person is not one of death, but rather one of severe bodily harm.").

<sup>157</sup> FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 130, at 25 (noting that New York law permitted deadly force in response to a threat of deadly physical force or an attempted robbery and characterizing the attempted robbery provision as "a peculiarity of New York law").

<sup>158</sup> *Id.* at 11, 118–20 (describing how Goetz, in a taped confession, talked about fear of a potential robbery or of being beaten up, but noting that he also denied seeing their words and gestures as a threat and denied being afraid of a robbery).

<sup>159</sup> N.Y. PENAL LAW § 35.15(2)(b); see *People v. Goetz*, 68 N.Y.2d 96, 106 (1986).

<sup>160</sup> FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 130, at 197.

<sup>161</sup> In fact, he testified that he was certain none of them had a gun. *Goetz*, 68 N.Y.2d at 101. Some were carrying screwdrivers, but there is no evidence that Goetz knew about them. FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 130, at 26.

<sup>162</sup> FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 130, at 25.

<sup>163</sup> See Green, *supra* note 150, at 32–37.

<sup>164</sup> LEVERICK, *supra* note 62, at 142; SANGERO, *supra* note 65, at 266–67.

response to the threat of a home invasion (though that threat must still be imminent and the use of force necessary).<sup>165</sup> This rationale seems particularly applicable to many modern defense of habitation statutes, which apply to any trespasser, not just one who plans to commit a violent or forcible felony.<sup>166</sup> The stated rationale of some state legislatures for expanding these laws is to make it easier for people to defend their homes against the assumed risk of burglaries.<sup>167</sup> If this rationale is extended to other forms of property, such as cars or boats, such laws can also be viewed as modifying the proportionality rule by permitting deadly force in response to threats to special categories of property.<sup>168</sup>

A more controversial expansion of self-defense involves statutes that allow a private citizen to shoot to stop a fleeing felon.<sup>169</sup> Texas law, for example, permits a private citizen to use lethal force against “the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime.”<sup>170</sup> The same statute alters the traditional proportionality requirement in another significant

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<sup>165</sup> LEVERICK, *supra* note 62, at 138; Green, *supra* note 150, at 32. The right to defend one’s home may also be protected by state constitutions. See Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 409–10 (2007).

<sup>166</sup> See Green, *supra* note 150, at 11–16.

<sup>167</sup> See, e.g., Derek E. Empire, *Crimes and Offenses: Defense to Criminal Prosecution: Change Provisions Relating to the Use of Force in the Defense of Habitations or Residences; Provide for Related Matters*, 18 GA. ST. U. L. REV. 25, 25–27 (2001) (describing the history of Georgia’s expanded home defense law).

<sup>168</sup> Green, *supra* note 150, at 3–4, 12–13.

<sup>169</sup> Police, of course, may use deadly force to stop a fleeing felon provided the force is reasonable under the circumstances. See *Tennessee v. Garner*, 471 U.S. 1 (1985) (officer’s decision to shoot a Black teenager fleeing an unoccupied house that was the site of a likely burglary was reasonable in light of circumstances, including the officer’s belief that Garner posed a threat).

<sup>170</sup> TEX. PENAL CODE § 9.42(2)(B) (West 2019). But see F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens’ Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 637 (2014) (arguing that the need to stop a fleeing felon, without more, is not sufficient to satisfy the standard for use of deadly force); see also Nicholas A. Serrano, *Vigilante Justice at the Home Depot: The Civilian Use of Deadly Force under Michigan’s Common Law Fleeing-Felon Rule*, 11 CHARLESTON L. REV. 159 (2017) (discussion of more recent applications of fleeing felon laws in other states).

way by allowing private citizens to use deadly force in defense of property.<sup>171</sup>

### 3. Necessity

Because the use of deadly force in self-defense must be necessary, the core doctrine requires that the person who is attacked must use alternative measures to avoid the threatened harm if they are available. The most important manifestation of the necessity principle is the general rule that deadly force cannot be used if safe retreat is available.<sup>172</sup> Besides retreat, the necessity principle also requires that a defendant opt to de-escalate a conflict if possible, or to use less-than-lethal force if that is all that is necessary to stop the threat.<sup>173</sup> Most jurisdictions do not allow an initial aggressor to use deadly force in response to a confrontation he initiated;<sup>174</sup> in other words, if a deadly confrontation could have been avoided by not starting the fight, then defensive force is not strictly necessary and is therefore illegal.

The “castle doctrine” provides that a person who is attacked in his or her own home need not retreat to safety, even if retreat is an option, before using deadly force.<sup>175</sup> This rule partially eliminates the necessity requirement by permitting a person involved in a conflict to choose deadly force even when deadly force is not strictly necessary because retreat is possible. Castle doctrine rules have long been in place in most states, but they have traditionally been limited to situations where a person is attacked in the home.<sup>176</sup> Together with defense of habitation

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<sup>171</sup> TEX. PENAL CODE § 9.42(2). *See generally* George Wilfred Stumberg, *Defense of Person and Property under Texas Criminal Law*, 21 TEX. L. REV. 17 (1942) (summarizing Texas common law).

<sup>172</sup> At English common law, retreat was also required, if safe retreat was available, before defensive force could be used. Leverick, *supra* note 62, at 70–74; SANGERO, *supra* note 65, at 198–99. The American rule eliminated the retreat requirement for defensive use of non-deadly force, but many American jurisdictions still required retreat before deadly force would be authorized anywhere outside the home. *Id.* at 200–01.

<sup>173</sup> ROBINSON, *supra* note 62, at 99.

<sup>174</sup> LEE, *supra* note 20, at 131; SANGERO, *supra* note 65, at 314.

<sup>175</sup> *See* GRUBER, *supra* note 142, at 4–5.

<sup>176</sup> *See* NAT’L URBAN LEAGUE, SHOOT FIRST: STAND YOUR GROUND LAWS AND THEIR EFFECT ON VIOLENT CRIME AND THE CRIMINAL JUSTICE SYSTEM 3 (2013), <https://everytown>

laws, castle doctrine laws relax the typical requirements for self-defense in home invasion cases, signifying the deeply rooted idea that people have special rights to protect their homes.<sup>177</sup> As Jeanne Suk explains,

Within the home and nowhere else, the common law recognized the right of the home resident—archetypally a man defending his family—to use deadly force to repel the intruder, without obligation to retreat. An intruder who invaded the house of another man, and thereby threatened his home and family, crossed the boundary of the lawful, and thus moved beyond the protection of the law, into a realm that suspended the restrictions on violence.<sup>178</sup>

Some state laws expand the castle doctrine even further by extending it to places outside the home. Although the castle doctrine has roots in English and American common law, no-retreat rules that cover other places are of more recent vintage. For example, some states permit people to use deadly force without retreating if they are attacked in their office<sup>179</sup> or in their vehicle.<sup>180</sup> “Stand your ground” laws extend the no retreat rule everywhere, allowing a person to kill without retreating from a conflict, even if he could have escaped danger by walking away.<sup>181</sup> Like the castle doctrine, the stand your ground rule is not new. Although English common law requires retreat, more than half the

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research.org/documents/2015/04/shoot-first.pdf [https://perma.cc/D49N-FHAM] (stating that castle doctrine “holds that a person has no duty to retreat before using deadly force if the conflict takes place in his or her own home—the ‘castle.’”).

<sup>177</sup> See SANGERO, *supra* note 65, at 268–70.

<sup>178</sup> Suk, *supra* note 20, at 239.

<sup>179</sup> See, e.g., ALA. CODE § 13A-3-23 (2019); ARIZ. REV. STAT. § 13-411 (2019); LA. STAT. ANN. § 14:20(3) (2019); see also SANGERO, *supra* note 65, at 274.

<sup>180</sup> ALA. CODE § 13A-3-23; IND. CODE ANN. § 35-41-3-2(d), (e), (i) (2019); LA. STAT. ANN. § 14:20(3).

<sup>181</sup> Ahmad Abuznaid et al., “Stand Your Ground” Laws: International Human Rights Implications, 68 U. MIAMI L. REV. 1129, 1132–34 (2014) (describing state statutory and common law rules permitting deadly force without retreat). Most stand your ground laws apply only to the non-aggressor. If a person starts a fight, he is still required to retreat before using deadly force. However, many contain an exception providing that the aggressor may become the non-aggressor, and therefore may stand his ground—as long as he withdraws from the fight and the other person starts it again.

American states have modified the English approach in favor of what is often called the “true man” rule.<sup>182</sup>

#### 4. Reasonableness and Procedural Changes

Some states have considered proposals to eliminate the “reasonableness” requirement entirely, which would make a killing justifiable if based on an honest fear, even if the fear is unreasonable and incorrect.<sup>183</sup> Some have adopted laws that presume the existence of reasonable fear in specific circumstances, including home defense.<sup>184</sup> Some have adopted immunity laws, which shift the burden of proof in self-defense cases by prohibiting a prosecutor from bringing charges at all unless sufficient evidence exists to disprove the self-defense case.<sup>185</sup>

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<sup>182</sup> AM. BAR ASS’N, *supra* note 48, at 17 (stating that thirty-three states now have no-retreat rules).

<sup>183</sup> Addie Rolnick, *Expert Perspective: Race and Self-Defense Killings*, UNLV (Apr. 13, 2015), <https://www.unlv.edu/news/article/lecture-preview-race-and-self-defense-killings> [https://perma.cc/N3Z7-3RWK]. See, e.g., Karoun Demerjian, *Trayvon Martin Case Has Some Looking at Nevada’s New Self-Defense Law*, LAS VEGAS SUN (Apr. 1, 2012, 2:00 AM), <https://lasvegas.sun.com/news/2012/apr/01/trayvon-martin-case-has-some-looking-nevada-new-se> [https://perma.cc/3DQP-56KN] (stating that “bare fear” laws have been introduced in three different Nevada legislative sessions). The MPC’s self-defense provision also eliminates the reasonableness requirements, but a killing carried out under a reckless or negligent belief that it is justified is punishable as either manslaughter or negligent homicide, and states that follow the Code’s approach incorporate a similar provision about reckless or negligent mistakes. MODEL PENAL CODE §§ 3.04(1), 3.02(2) (1964); see also HAW. REV. STAT. §§ 703-304, 703-302(c)(2) (2017) (adopting MPC approach); Caroline Forell, *What’s Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1404 (2010).

<sup>184</sup> E.g., NEV. REV. STAT. § 200.130(2) (West 2019) (establishing a rebuttable presumption “that the circumstances were sufficient to excite the fears of a reasonable person” in cases of forceful and unlawful entry into an occupied home or vehicle and where the victim is committing or attempting a crime of violence); FLA. STAT. § 776.013(2) (West 2019) (presumption of reasonable fear and imminent threat when the victim unlawfully and forcefully enters an occupied home or vehicle); S.C. CODE ANN. § 16-11-440(A) (2018) (same). See *supra* note 10 (describing how the Nevada provision was considered and rejected in 2011, but adopted in 2015).

<sup>185</sup> See, e.g., Robert Christian Rutledge, *Vigilant or Vigilante? Procedure and Rationale for Immunity in Defense of Habitation and Defense of Property under the Official Code of Georgia Annotated* §§ 16-3-23, -24, -24.1, and -24.2, 59 MERCER L. REV. 629, 630–38 (2008) (discussing Georgia’s immunity provisions); Megale, *supra* note 35, at 119–28 (describing immunity laws in Florida and elsewhere).



These laws discourage review of self-defense claims by keeping more of them out of courts and away from juries. Some states also provide civil immunity against wrongful death suits for any person who is not criminally convicted, further insulating the killer from any legal accountability.<sup>186</sup>

Expanded self-defense laws clarify that defensive lethal violence is a desirable outcome in specific situations that might otherwise fall into a grey area. Some of these changes, such as defense of habitation laws, ensure that self-defense law will cover situations where it might be needed but where the traditional requirements, such as imminent deadly threat, might be too narrow to cover them. Others are nothing more than signals because they cover situations that would likely have led to successful claims under the traditional, narrow approach. For example, Nevada recently passed a law that establishes a presumption of imminent harm in cases of carjacking. There was no evidence presented that Nevada's existing self-defense laws were somehow inadequate to cover self-defense killings in response to carjackings. The new law was part of a bill containing several other expansions to Nevada's self-defense laws. Its importance was largely symbolic.

The home has long occupied a special place in the common law of self-defense, and the earliest doctrines relaxing the basic requirements of self-defense were centered there. Although the proportionality requirement means that lethal force can be used to protect life, not property, defense of habitation laws provide that lethal force is justifiable if used to protect one's home.<sup>187</sup> The castle doctrine alters the necessity requirement by providing that a person attacked in his home is not required to retreat before responding with deadly force, even if safe retreat is available. As Jeanne Suk described, the importance of home

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<sup>186</sup> See, e.g., NEV. REV. STAT. § 41.095; TEX. PENAL CODE § 83.001 (West 2019).

<sup>187</sup> To permit a resident to use deadly force against a home intruder, defense of habitation laws may permit the resident to presume the existence of an imminent threat to the occupants the moment someone enters a home, or they may authorize deadly force in response to a threatened home intrusion. Some states, including Nevada, have statutes that incorporate both approaches. See NEV. REV. STAT. § 200.120 (deadly force authorized against someone who enters a home); NEV. REV. STAT. § 200.130(2)(a) (presumption of deadly threat when an intruder enters the home). The relationship of these two approaches to the core requirements of proportionality and imminence is discussed *supra* in Section I.C.1–2.

defense was linked to the idea that masculinity included a special duty to protect one's home and family from outsiders.

The "true man" had a certain relationship and attitude toward his home and family. A "true man" did whatever was necessary to provide economically for his wife and children, who were dependent on him. He was the source of strong moral guidance for his vulnerable or needy wife or children. . . . The chivalry which makes the strong sex the natural protector of the weak runs in every true man's blood. To be a "true man" was to be a man who supported and protected a woman. . . . And similarly, a "true man" was protective of children. . . . The "true man" rhetoric thus importantly valorized the man's role as protector of his home and family.<sup>188</sup>

Presumption of threat laws accord more and more spaces homelike status, allowing people to protect them in accordance with the same principles described by Suk. Stand your ground and immunity laws, which apply anywhere, effectively allow home defense to take place anywhere. A resident who sees a suspicious person in the neighborhood can follow and confront that person. If violence results, stand your ground laws and immunity laws make it more likely the suspicion-based violence will be legal.

One study compared states that enacted expanded self-defense laws with states that had not. The study found that the new laws did not deter burglary, robbery, or aggravated assault, but that they did lead to an *increase* in criminal homicides (a category that excludes those that were ruled justifiable).<sup>189</sup> The increase is consistent with the purpose and function of these laws. As the authors explained, "[g]iven that the laws reduce the expected costs associated with using violence, economic

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<sup>188</sup> Suk, *supra* note 20 at 244–45.

<sup>189</sup> See generally Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 822 (2012). Based on additional analysis, the authors found it "unlikely, albeit not impossible" that the increase in criminal homicides was entirely due to homicides that could have been, but were not, ruled justified. *Id.* at 824. See also Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries*, 52 J. HUM. RESOURCES 621, 646–51 (2017) (finding that stand your ground laws are associated with an increase in homicides and hospitalizations due to gun injuries).

theory would predict that there would be more of it.”<sup>190</sup> As might be expected, the enactment of laws expanding the right of self-defense also seems to increase the odds that a homicide will be ruled justified.<sup>191</sup>

Empirical assessments of expanded self-defense laws are limited.<sup>192</sup> In addition to increasing the number of killings and the likelihood that a killing will be ruled justified, there is evidence that these laws might worsen racial disparities in justifiable homicides.<sup>193</sup> As an American Bar Association Task Force noted in a report that urged states to limit expanded self-defense laws,

although racial disparities in the likelihood of being found to be justified exist, in stand your ground states, the rate is significantly higher, such that a white shooter that kills a black victim is 350% more likely to be found to be justified than if the same shooter killed a white victim.<sup>194</sup>

In conclusion, the potential for racial bias is baked into every stranger self-defense case, especially those involving cross-racial encounters. And mechanisms intended to guard against the possibility of bias, such as the reasonableness requirement and review by a jury, provide only a minimal check and in some cases might operate to enshrine biases into law. Rather than circumscribing self-defense in the face of this reality, states have moved to expand the right of self-defense by making it easier to claim and by insulating more claims from judicial review. (However, states have not made similar statutory changes to expand the right of self-defense in cases of women who kill abusive partners, where scholars have provided the most documentation of the need for an expansion).

Moreover, even the traditional common law approach to justifiable homicide is more broad than is often assumed: each of the core requirements of imminence, proportionality, and necessity can be

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<sup>190</sup> *Id.* at 836.

<sup>191</sup> ROMAN, *supra* note 48, at 10 (being in a “stand your ground state” increased the odds that a homicide would be ruled justified by 65%).

<sup>192</sup> For a thorough account of existing assessments, their limitations, and the conflicting conclusions drawn by various researchers about the deterrent and racial effects of expanded self-defense laws, see Barnes, *supra* note 31 at 3190–96.

<sup>193</sup> *See id.* at 3193.

<sup>194</sup> AM. BAR ASS’N, *supra* note 48, at 20 (citing ROMAN, *supra* note 48).

shortcut in specific scenarios. Stand your ground laws, immunity provisions, and laws that extend the presumption of imminent threat to non-home situations are some of the most far-reaching reforms, but even less controversial state self-defense laws can insulate killers from trial and punishment, particularly when defense of home or neighborhood is at issue. When DeMarcus Carter died, Nevada had not adopted the kind of expansions scrutinized in Florida. Its century-old self-defense and defense of habitation laws were more than enough to shield Carter's killer from scrutiny. Because those laws require only a reasonable assessment of fear, they allow a resident to presume a deadly threat in the case of a suspected home intruder, and allow a person to defend against a suspected break-in. And because prosecutors will often decide not to charge someone who has a strong self-defense claim, Nevada's basic self-defense laws can easily immunize anyone who shoots an unfamiliar figure through the door. Whether the victim is armed, and whether he really intends to do harm, is irrelevant.

## II. FEAR, SURVEILLANCE, AND KILLING IN THE NEIGHBORHOOD

Having carefully examined the interplay between race and self-defense law, this Article now considers how the doctrinal framework of self-defense can function in residential neighborhoods. A self-defense claim is premised on a recitation of fear and an assertion of that fear to a decision-maker, who will either confirm the asserted fear as reasonable, thus legalizing the killing, or reject it, transforming the killing into a murder. Taken as a whole, the framework described in Part I communicates the idea that violence is acceptable as long as it is enacted out of a snap judgment about fear. The collection of rules described in the previous Part confirm that such violence is even more likely to be permissible when it happens in the context of home defense and when it conforms to the narrative of men as protectors of women in homes. The trend toward adding new shortcuts and immunities serves as a reminder that this brand of violence is permitted, and perhaps even encourages civilians to use it.

While actual killings in self-defense are rare, a legal framework that condones violence in service of fear has important expressive and material consequences once it is acknowledged that fear is racialized. In the context of modern residential segregation, expanded self-defense

laws affirm White ownership of White-identified neighborhoods and reinforce the outsider status of Black residents. They carve out the possibility for legalized lethal violence against people who appear “out of place” and also create space for White residents to enact lesser forms of violence on their Black neighbors under cover of the same fear. While Black people are no longer formally excluded from White spaces, and while openly racist private violence is now illegal, the law of justifiable homicide communicates the idea that private violence is permitted and desirable when enacted in the name of home defense and against people who are believed to be threatening or out-of-place.

Spaces—neighborhoods, cities, and counties—have been and continue to be racially segregated, and racially identifiable, in the United States. The idea that certain geographical spaces have a racially identifiable character is not new,<sup>195</sup> and neither is the role of law in creating and maintaining those spaces. Yet, as the typical legal tools of segregation (from public housing plans to racially restrictive covenants) have been repealed or rejected, modern segregation has come to be viewed as a social or economic problem rather than a legal one.<sup>196</sup> Segregation is still reinforced by law, but one may need to look more deeply to see the relationship.<sup>197</sup> Self-defense law, which is unavoidably linked to racial fear and which states have consistently expanded despite its potential for bias, is one legal tool that reinforces modern segregation

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<sup>195</sup> See John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233, 1235 (1995) (“[R]acialization of space” is “the process by which residential location and community are carried and placed on racial identity.”).

<sup>196</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1–2 (1993) (“If residential segregation persist, [most Americans] reason, it is only because civil rights laws passed during the 1960s have not had time to work or because many blacks still prefer to live in black neighborhoods. The residential segregation of blacks is viewed charitably as a ‘natural’ outcome of impersonal social and economic forces . . .”). Scholars also highlight social and economic factors as drivers of segregation. See, e.g., David R. Harris, “Property Values Drop When Blacks Move in, Because . . .”: *Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 476 (1999) (“The conclusion that people generally avoid black neighbors for reasons that are related to social class bodes well for stable integration. When black residents and their neighbors have similar socioeconomic statuses, increasing levels of integration should have little effect on property values, and white flight should not ensue.”).

<sup>197</sup> See ROTHSTEIN, *supra* note 24, at xiii (describing legal and popular “willful blindness” to the governmental role in segregation).

by offering government approval and encouragement to private neighborhood violence in service of racial fears.

State legislatures, by enacting far-reaching expansions to the already-broad law of self-defense, absolve private citizens of legal responsibility for violence and encourage them to take over the work of crime control. In neighborhood protection scenarios, these laws legitimize collective fear of Black intruders and give people greater license to act on that fear through violence, absent any demonstration that people in their homes face any increased risk of crime. State-sanctioned private violence is an old story when it comes to racial control and segregation. But it is also a new story. Demands for greater police accountability should not distract us from scrutinizing the kinds of private violence that go unpunished by state criminal laws; private violence is also an integral part of the machinery of White supremacy, and state legislatures quietly encourage it when they enact and expand criminal laws that legalize it.

This Part explores the relationship between segregated neighborhoods, fear, private violence, and self-defense law. Sections II.A and II.B rebut the colorblind argument that there is no such thing as a White-identified neighborhood today and that, to the extent majority-White neighborhoods exist, they are an accident of social interaction. Section II.A shows how official and private discrimination have always worked hand-in-hand to enforce residential segregation in service of racial hierarchy, so that an effort to isolate one law, policy or decision and ask whether that decision is state or private action provides an incomplete picture.<sup>198</sup> Section II.B looks specifically at newly

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<sup>198</sup> This point is descriptive. The distinction between state and private action has been a recurring theme in civil rights law, and many scholars have demonstrated the way it has been used to shield ongoing discrimination from the reach of the constitution. *See, e.g.,* Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 635–44, 649 (2011) (“[T]he Supreme Court’s remedial school desegregation jurisprudence places the problem of school segregation caused by residential segregation outside the purview of the federal courts’ remedial powers. The underlying rationale behind the Court’s reasoning appears to be that residential segregation is a matter of private choice rather than intentional state action.”); *see generally* Reva B. Seigel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (describing how several key distinctions—public/private, social rights/civil rights, and intentionally discriminatory/race neutral—have helped insulate discrimination from constitutional scrutiny). I do not seek here to revisit the

constructed suburban neighborhoods to identify the way that laws help to create and sustain White spaces, even in the absence of a direct history of *de jure* segregation.<sup>199</sup> Sections II.C and II.D locate the dynamics of home defense in these new White spaces. Section II.C describes how state laws invite private violence in the name of home protection and increasingly insulate that violence from review. By doing so, self-defense laws reinforce White ownership of White spaces while increasing Black vulnerability to state-sanctioned killing in those same spaces. Section II.D links the legal framework of self-defense to acts of precursor violence, such as posting photos of people who appear suspicious, following people, and calling the police. While lethal defensive violence in these neighborhoods is rare, self-defense doctrine offers a script of fear that White residents can invoke when carrying out these lesser—but much more common—acts of violence.

#### A. *Segregation and Private Violence*

Physical separation has been an essential tool of racial hierarchy since European settlement of North America.<sup>200</sup> Spatial boundaries have

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state action doctrine or to argue that a constitutional remedy is necessary for private neighborhood violence. As Erwin Chemerinsky has noted, the common law and state statutory law protect individuals from each other, a function served here by state criminal law. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 511 (1985). Constitutional intervention has been necessary where states, through their application of statutory and common law, failed to protect the rights of non-White people. In this Article, I take the preliminary step of asking states to do a better job of protecting Black people by rethinking self-defense law. I encourage careful attention to state substantive criminal law and, for the reasons described in the conclusion, I believe that pressure on state legislatures is the most likely avenue to generate reform.

<sup>199</sup> Writing about the government's role in twentieth century residential segregation, Richard Rothstein explains that private discrimination "played a role, but it would have been considerably less effective had it not been embraced and reinforced by the government." ROTHSTEIN, *supra* note 24, at xii.

<sup>200</sup> In addition to the role of physical separation in maintaining the White/Black racial hierarchy, federal Indian policy through the late 1800s was dedicated to finding a way to designate separate areas for indigenous peoples while accommodating increasing White desire for land. See Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 373–74 (2013) (describing removal, reservation and allotment policies). Location was therefore one way federal officials differentiated between White and Indian people. See William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415,

worked in tandem with legal and social ones. When racial status differences have been starkly defined in law and social interaction, geographic integration does not present a threat to White dominance.<sup>201</sup> As legal rules about race and status have become more fluid, residential segregation has become starker.<sup>202</sup> This use of residential segregation to underscore White supremacy has always been a public-private partnership. Laws and legal institutions have reflected and shaped social reality; private racism and violence have inspired and enforced legal rules.<sup>203</sup> In order to place the relationship between private violence, self-defense law, and modern segregation in historical context, this Section considers the different ways that public and private discrimination have relied on and reinforced each other to produce residential segregation.

### 1. State-Sponsored Segregation Enforced by Private Violence

The most obvious relationship between law and segregation occurs when laws expressly designate racial neighborhood boundaries and courts enforce those boundaries. Residential segregation laws, the local laws that explicitly designated certain areas as White and other areas as non-White, hardened the spatial boundary between White and Black people who lived in the same cities once the definitional line of slavery disappeared and African Americans began to migrate to cities in large

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466 n.203 (2016) (describing how federal officials determined who counted as Indian based on whether or not the person maintained a “tribal relation,” including asking whether a person lived in a tribal community or “mingled with the white population” in cities).

<sup>201</sup> JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 11–12 (2013) (explaining that Black and White people lived in close proximity during slavery and in the North before the Civil War).

<sup>202</sup> Onwuachi-Willig, *supra* note 3, at 1121, 1153–57; BELL, *supra* note 201, at 12–15 (explaining that Black and White people continued to live in the same neighborhoods immediately after the Civil War in both Northern and Southern cities but “by the 1890s the springtime of race relations had begun to subside into a cold, harsh winter . . . [and] once-blurry [geographic] racial lines began to solidify”).

<sup>203</sup> As Ian Haney-López explained in his analysis of racial category rules, “the law serves not only to reflect but to solidify social prejudice.” Ian Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994).



numbers.<sup>204</sup> This was also the era of “sundown towns,” which were separate towns and suburbs established as all-White communities across the North, Midwest, and West between 1890 and the 1930s and named for the signs that were often posted at the incorporated limit warning Black people (and sometimes Chinese, Mexican, or Indian people) not to be caught in town after sundown.<sup>205</sup> Some towns did this by requiring all housing developments to include racially restrictive covenants; others passed ordinances that barred Black people from local businesses; some simply posted signs at the edge of town or relied on custom and reputation.<sup>206</sup> The Supreme Court outlawed local segregation ordinances in 1917 in *Buchanan v. Warley*,<sup>207</sup> but it did so largely on the theory that they interfered with the property rights of White homeowners who wished to sell their houses to Black buyers.<sup>208</sup> Some states blatantly ignored the Court’s holding, passing and enforcing racial zoning ordinances well into the late twentieth century.<sup>209</sup>

The intertwined nature of state law enforcement and private racial violence contributed to the urgent need for federal intervention via early civil rights statutes. State law enforcement and courts were “either unwilling or unable” to stop the Ku Klux Klan’s organized campaign of racial violence.<sup>210</sup> Private violence, and local government acquiescence

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<sup>204</sup> See Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J. S. HIST. 179 (1968); George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914–1917*, 78 REG. KY. HIST. SOC’Y 39 (1980). State and local governments claimed these laws “promote[d] peace by preventing race conflicts.” *Buchanan v. Warley*, 245 U.S. 60, 73 (1917); see Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENV’T L. 89 (1998) (describing the role of explicitly racial zoning ordinances in maintaining neighborhood segregation).

<sup>205</sup> See generally JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005). According to Loewen, the phenomenon of all-White towns came first, followed by all-White suburbs beginning in about 1890; these policies persisted through the 1960s. *Id.* at 4.

<sup>206</sup> *Id.* at 4.

<sup>207</sup> *Buchanan*, 245 U.S. at 82.

<sup>208</sup> *Id.* at 81. The Court contrasted such an infringement on property rights with laws requiring segregation in transportation and education, which at the time were legal. *Id.* at 79–81.

<sup>209</sup> ROTHSTEIN, *supra* note 24, at vii–viii.

<sup>210</sup> Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 881 (1987) (identifying the Klan’s racial violence, and

or encouragement, was similarly essential in enforcing the municipal ordinance or policies excluding Black people from sundown towns. For example, James Loewen recounts how Black exclusion was accomplished in Vienna, Illinois during the summer of 1954 when White residents were “deputized” to find two Black men accused in a killing and attempted rape.<sup>211</sup> The White residents “sacked the entire [B]lack community,” burned houses, and forced the town’s Black residents out, leaving the town all-White.<sup>212</sup> Private violence was also used to keep out Black residents who tried to move in to White towns or neighborhoods. A partnership between public and private racism also greeted Harvey Clark, who tried to move into an apartment in Cicero, Illinois, a White suburb of Chicago. Local police tried to stop Clark by saying he needed a permit and referring to an ordinance he was allegedly violating. When a court ordered the police to stop interfering with his move, local residents gathered to shout at Clark, and later to burn his building and destroy his furniture while the police watched.<sup>213</sup>

## 2. “Neutral” State Action in Service of Private Racism

Explicit, openly segregationist laws and policies were replaced in the second half of the twentieth century by facially neutral governments policies and programs that were employed with the goal of maintaining residential segregation.<sup>214</sup> Laws were intentionally and sometimes blatantly employed to create and support residential segregation because government officials understood that the White population that was the target of housing and home ownership initiatives did not “care to associate with” Black families, a sentiment likely shared by those

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states’ failure to stop it, as the primary reason southern Blacks turned to the federal government to vindicate their rights). See also Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. § 1985(3)*, 64 TEX. L. REV. 527, 535–37 (1985).

<sup>211</sup> LOEWEN, *supra* note 205, at 10.

<sup>212</sup> *Id.* at 10.

<sup>213</sup> *Id.* at 10–11.

<sup>214</sup> See Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 84 (1995) (describing how racial segregation resulted from “intentional, direct housing policies of the federal, state and local governments”).

officials.<sup>215</sup> These rules and programs lent the force of law to the private preferences of White homeowners.

The federal programs that created post-war suburbs, including funding for mortgages, highways, and utilities, were administered in a way that ensured the new suburbs would be White spaces.<sup>216</sup> The Home Owners' Loan Corporation (HOLC) and Federal Housing Administration, both created to facilitate middle-class homeownership, adopted policies that made assistance dependent on racial segregation. The HOLC assessed the relative risk of borrower neighborhoods using a color-coded system in which green (indicating the least risk) was assigned to middle-class White neighborhoods and red (indicating the most risk) was assigned to Black neighborhoods.<sup>217</sup> Rothstein explains that, through the production and dissemination of these maps, the federal government approved and encouraged racial discrimination by

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<sup>215</sup> ROTHSTEIN, *supra* note 24, at 60–61.

<sup>216</sup> James A. Kushner, *Apartheid in America: A Historical and Legal Analysis of Contemporary Racial Segregation in the United States*, 22 HOW. L.J. 547, 565–70 (1979); MASSEY & DENTON, *supra* note 196, at 52–54. Most famously, the Federal Housing Administration issued loans to the developers of Levittown on the condition that the deed to the houses in the new suburb would all contain racially restrictive covenants. ROTHSTEIN, *supra* note 24, at 70–71.

<sup>217</sup> See BRUCE MITCHELL & JUAN FRANCO, HOLC “REDLINING” MAPS: THE PERSISTENCE STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 18 (2018), [https://ncrc.org/wp-content/uploads/dlm\\_uploads/2018/02/NCRC-Research-HOLC-10.pdf](https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf) [<https://perma.cc/N5FQ-47UC>] (concluding that federally-created risk maps correspond to present-day patterns segregation and economic inequality patterns, especially in the South and West). Mitchell and Franco describe how

HOLC examiners consulted with local bank loan officers, city officials, appraisers, and realtors to create ‘Residential Security’ maps of cities. More than 150 of these maps still exist. The examiners systematically graded neighborhoods based on criteria related to the age and condition of housing, transportation access, closeness to amenities such as parks or disamenities like polluting industries, the economic class and employment status of residents, and their ethnic and racial composition. Neighborhoods were color-coded on maps: green for the “Best,” blue for “Still Desirable,” yellow for “Definitely Declining,” and red for “Hazardous.”

*Id.* at 5. Redlining “put the federal government on record as judging that African Americans, simply because of their race, were poor risks.” ROTHSTEIN, *supra* note 24, at 64. The practice of assessing loan risk based on the racial character of a neighborhood persists today in the practices of private mortgage and credit lenders. Freeman, *supra* note 88, at 1097–98.

lenders.<sup>218</sup> Federal community development funding was used to redevelop urban neighborhoods, displacing minority residents when White homeowners and business owners moved in.<sup>219</sup>

Local governments were also important architects of segregation. Some towns replaced racial zoning ordinances with economic zoning rules crafted to enforce racial boundaries but also to pass muster under *Buchanan*.<sup>220</sup> Some zoning rules created exclusive, high-income neighborhoods, then made it impossible for poor people, many of whom were Black, to move into those neighborhoods.<sup>221</sup> Other rules protected White neighborhoods against undesirable uses, such as toxic industries and waste disposal, steering those dangerous polluters into unprotected lower income, largely Black neighborhoods.<sup>222</sup> Together, zoning rules kept Black people out of White spaces, increased the desirability of those spaces, and created unsafe and unhealthy conditions in Black neighborhoods.<sup>223</sup>

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<sup>218</sup> ROTHSTEIN, *supra* note 24, at 63–64. *But see* Amy E. Hiller, *Redlining and the Homeowner's Loan Corporation*, 29 J. URB. HIST. 394, 396–420, 412 (2003) (arguing that the HLOC maps, while demonstrating racism on the part of the federal government, did not directly cause redlining because lenders were already engaging in it and relied on other sources).

<sup>219</sup> Kushner, *supra* note 216, at 559–60.

<sup>220</sup> Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 25 (June Manning Thomas & Marsha Ritzdorf eds., 1997) (explaining that, after *Buchanan*, “cities hired prominent planning professionals to fashion legally defensible racial zoning plans”).

<sup>221</sup> ROTHSTEIN, *supra* note 24, at 56–57.

<sup>222</sup> *Id.* at 57.

<sup>223</sup> Silver, *supra* note 220, at 38 (describing how “race-based planning” continued the process of creating and maintaining racially segregated cities into the middle of the twentieth century); ROTHSTEIN, *supra* note 24, at 55 (describing zoning rules that concentrated industrial and toxic land uses to Black neighborhoods and kept them out of White neighborhoods); Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 POVERTY & RACE 1, 1–2 (2012) (explaining how site choice and screening requirements ensured that the most desirable public housing developments were majority-White and located in White neighborhoods, while those accessible to Black families were located in Black neighborhoods); Seitles, *supra* note 204, at 92–97 (describing the deliberate creation of racialized urban ghettos).

### 3. State-Sanctioned Private Racism

While it outlawed explicitly racist segregation laws, *Buchanan* left private discrimination untouched.<sup>224</sup> It would be another fifty years before the force of law was employed to decry private discrimination. In 1968, the Court in *Jones v. Alfred H. Mayer Co.* held that Section 1982 of the Civil Rights Act of 1866 prohibited private discrimination.<sup>225</sup> Congress also passed the Fair Housing Act.<sup>226</sup> That law sought to ensure that anyone, regardless of race, has the right to own or rent a home in any neighborhood.<sup>227</sup> The temporal gap between *Buchanan*, which outlawed official residential segregation laws, and *Jones*, which confirmed that Congress had the power to forbid private discrimination, suggests the importance of private actors in maintaining segregation and the degree to which courts and lawmakers have been willing to support private segregationist efforts.

Even without local laws explicitly designating racial boundaries, neighborhood segregation was maintained by private White homeowners' individual and collective preferences.<sup>228</sup> The legal system

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<sup>224</sup> *Buchanan v. Warley*, 245 U.S. 80, 82 (1917) (holding that an ordinance prohibiting a White property owner from selling his home to a Black buyer violated the Fourteenth Amendment's prohibition against "state interference with property rights"); *Corrigan v. Buckley*, 271 U.S. 323, 330–31 (1926) (holding that the neither the constitution nor Section 1982 "in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property").

<sup>225</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

<sup>226</sup> Pub. L. No. 90-284, 82 Stat. 83 (1968) (codified as amended at 42 U.S.C. § 3604 (2018)).

<sup>227</sup> 42 U.S.C. § 3604(a), (b) (outlawing discrimination in sale, rental, conditions, and advertising "because of race, color, religion, sex, familial status, or national origin"); Civil Rights Act of 1866, 42 U.S.C. §§ 1981–82 (2018) ("[A]ll persons born in the United States and not subject to any foreign power, . . . of every race and color" have "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens."); *Jones*, 392 U.S. at 424–37, 443 (holding that Congress intended to outlaw private discrimination in Section 1982 and that the Thirteenth Amendment empowered it to do so).

<sup>228</sup> ROTHSTEIN, *supra* note 24, at 78 (noting that private deed restrictions prohibiting resale to blacks and other disfavored groups "spread throughout the country in the 1920s as the preferred means to evade" *Buchanan*). Individual deeds between seller and buyer were not always enforceable by others in the neighborhood, so "increasingly in the twentieth century, racial covenants took the form of a contract among all owners in the neighborhood." *Id.* at 79. Subdivision developers also created all-White community associations before putting homes up for sale and made membership in the association a condition of buying a home. *Id.* The all-

enshrined these private racial preferences in a variety of ways, most famously through judicial enforcement of racially restrictive covenants.<sup>229</sup> Although the Court ruled in 1948 that judicial enforcement of private housing discrimination constituted state action,<sup>230</sup> racially restrictive covenants still appear in the deeds attached to homes across the country.<sup>231</sup> In generational terms, many people living and working today either lived through this type of express residential segregation as children or have parents who did so.

Today, most laws are at least neutral as to race, and private discrimination in property and housing is illegal. Everyone is also equally entitled to defend their home, including the right to keep and use a firearm to protect their home and family.<sup>232</sup> Moreover, a person who makes the decision to exclude someone from a neighborhood or to threaten or hurt someone because of that person's race can face criminal and civil sanctions.<sup>233</sup> Yet, laws that are race-neutral in language and

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White character of these communities, then, was an important component in their planning. In neighborhoods where sales were made subject to these covenants, sale and leasing to Blacks was never permitted, but other groups (e.g., individuals of Jewish, Chinese, Indian, and Mexican descent) were sometimes targeted for exclusion as well. *Shelley v. Kramer*, 334 U.S. 1, 21 n.26 (1948); Michael Jones-Correa, *The Origins and Diffusion of Racially Restrictive Covenants*, 115 POL. SCI. Q. 541, 544 (2001). The particular groups excluded varied from place to place, so that the covenants provided a snapshot of each location's particular racial hierarchy.

<sup>229</sup> ROTHSTEIN, *supra* note 24, at 81–83 (describing federal court enforcement of covenants, local government promotion of them, and federal actors' assurance that such covenants were legal as private agreements).

<sup>230</sup> *Shelley*, 334 U.S. at 19–21; see Thomas B. MacAfee, *Shelley v. Kramer: Herald of Social Progress and of the Coming Debate Over the Limits of Constitutional Change*, 34 ST. LOUIS B.J. 1, 18–19 (1987).

<sup>231</sup> See, e.g., Motoko Rich, *Restrictive Racial Covenants Slow to Disappear*, CHI. TRIBUNE (May 1, 2005), <https://www.chicagotribune.com/news/ct-xpm-2005-05-01-0505010501-story.html> [<http://perma.cc/CGQ9-5DYM>] (describing how the covenants, though unenforceable, continue to appear in deeds, sometimes causing individual sellers to discriminate because of what they believe is a legal obligation).

<sup>232</sup> For a description of race neutral home defense laws, see *supra* Sections I.C.1 & I.C.2; U.S. CONST. amend. II.

<sup>233</sup> See, e.g., 42 U.S.C. § 3631 (2018) (making it a federal crime to interfere with housing rights on the basis of race); 18 U.S.C. § 245 (2018) (making it a crime to violate a person's civil rights); 18 U.S.C. § 241(2018) (making it a crime to conspire to violate a person's civil rights); see Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. ON LEGIS. 247, 250–51 (2016) (describing enforcement provisions in the Fair Housing Act).

intent may nonetheless reinforce or reflect private prejudices or historical inequality. They calcify a segregated status quo.

Whether this is viewed as a within the reach of legal remedy turns on the idea of state versus private action. Institutional actors may not give effect to the overt racism of private citizens. In the property law context, courts may not enforce private agreements between homeowners to racially discriminate.<sup>234</sup> In the criminal law context, private violence between neighbors that is explicitly motivated by race is a crime. On the other hand, courts treat neutral laws that reflect but do not actively enforce private racism as beyond the reach of legal remedy.<sup>235</sup>

Despite the demonstrated intent of White homeowners to exclude non-Whites from White communities, and the central role played by federal and state policy in facilitating this exclusion, residential segregation is treated by modern courts as a matter of personal choice, unbounded from historical forces and unreachable by legal remedy. For example, the Supreme Court has refused to permit inter-district remedies to counter school segregation, holding that the importance of local control over schools meant that courts could not require the redistribution of students or resources between districts.<sup>236</sup> Justice Stewart's concurring option in *Milliken v. Bradley* elaborated further on the view that *de facto* residential segregation is not necessarily connected to *de jure* segregation and is therefore beyond the reach of legal remedy. According to Justice Stewart, the fact that Detroit's school system was majority Black, while suburban schools were majority White, was "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears" and therefore could not serve as the basis for a race conscious legal remedy.<sup>237</sup> Two decades later, Justice Thomas, concurring in *Missouri v. Jenkins*, similarly argued that "[t]he continuing 'racial isolation' of schools after *de jure* segregation has

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<sup>234</sup> See *Shelley*, 334 U.S. at 11.

<sup>235</sup> ROTHSTEIN, *supra* note 24, at xii–xiv (tracing the evolution of the Supreme Court's view that racially segregated neighborhoods are a matter of societal discrimination but that this sort of segregation and its effects, such as segregated schools, was a matter of private choice and not illegal unless caused or directly enabled by state action).

<sup>236</sup> See *Milliken v. Bradley*, 418 U.S. 717, 748–53 (1974).

<sup>237</sup> *Id.* at 753 n.2 (Stewart, J., concurring).

ended may well reflect voluntary housing choices or other private decisions” that are beyond the reach of law.<sup>238</sup>

The Court’s colorblind and ahistorical approach to questions of race discrimination (at least as a matter of equal protection) obscured the link between residential segregation as a historical practice (clearly understood to be a function of racism, nearly complete, and often enforced by violence) and residential segregation today (understood to be a function of social preferences, not complete, and not linked to violence). Although cities and neighborhoods continue to be racially identifiable as a social matter,<sup>239</sup> courts and individuals often adopt a colorblind approach, denying that spaces are segregated if they are not governed by rigid exclusionary rules. One consequence of this is that, in the absence of clear evidence of intentional discrimination, courts’ constitutional analyses about discrimination—and consequent legal remedy—do not address the relationship between race and spatial exclusion, instead “read[ing] racial geography out of the equal protection framework”<sup>240</sup> But this is a mistake. Although it is less direct than in the past, law still plays an important role in maintaining residential segregation.

### B. *New White Spaces*

“[T]he white space,” a “perceptual category” understood by Blacks to include “overwhelmingly white neighborhoods . . . that reinforce[] a normative sensibility in settings in which [B]lack people are typically

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<sup>238</sup> *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (Thomas, J., concurring).

<sup>239</sup> See Sherene Razack, *When Place Becomes Race*, in *RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY* 7–10 (Sherene Razack ed., 2002).

<sup>240</sup> Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. Rev. 401, 421 (2010). Professor Boddie provides a compelling example of the effect of spatial colorblindness with the story of the Gretna Bridge in the immediate aftermath of Hurricane Katrina. Black residents of New Orleans, a majority Black city, were blocked by police when they tried to cross the bridge to shelter in neighboring Gretna, a majority White suburb. She describes how the failure of law to recognize the existence of racialized spaces in law meant that Blacks who were blocked from crossing the bridge could not make out a claim for racial discrimination absent evidence of individual racist intent on the part of specific police officers. Boddie argues that the racial character of geographic spaces should inform constitutional claims of “racial territoriality,” defined as the exclusion of people of color from (or their marginalization within) White-identified spaces. *Id.* at 445–47.



absent, not expected, or marginalized when present,”<sup>241</sup> exists in every city. White spaces are not limited to the South or to Black Rust Belt cities, where White residents are simply using new tools to carry forward a legacy of *de jure* segregation. White spaces and fear of Blackness are so embedded in the popular psyche that this dynamic of private violence in defense of White space occurs even where it is not predated by official segregation. While White neighborhoods today may not be all White and are not racially exclusive by law, they remain racially identifiable. These White spaces have been shaped by law, and law—though less visibly—continues to help maintain them. This observation is particularly important in newer urban and suburban neighborhoods, including those in Sun Belt cities, some of which post-date officially-sponsored segregation.<sup>242</sup>

Segregation today is not necessarily absolute, but cities and neighborhoods may still be regarded as Black or White spaces, and the racial character of these neighborhoods is neither accidental nor divorced from law and history.<sup>243</sup> For example, although Las Vegas,

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<sup>241</sup> Elijah Anderson, *The White Space*, 1 SOC. RACE & ETHNICITY 10 (2015).

<sup>242</sup> See John Iceland et al., *Sun Belt Rising: Regional Population Change and the Decline in Black Residential Segregation, 1970–2009*, 50 DEMOGRAPHY 97, 98 (2013) (“growing Sun Belt cities—such as Austin, Phoenix, and Las Vegas—have less of an entrenched history of black-white conflict to contend with and more ethnically diverse populations that render black white divisions less important”); *id.* at 100 (“Many high-growth areas in the South and West may have less of a history of racial animosity and fewer entrenched neighborhoods than relatively stratified and stagnant areas in the Northeast and Midwest.”); Patricia A. Bell & Wade Smith, *Racial Residential Segregation in the Sun Belt*, 16 SOC. INDICATORS RES. 181, 192 (1985) (in contrast to northern frost belt cities, “sun belt cities are often developing around one industry; especially one which experiences growth in spite of, perhaps because of, a national recession; and one which is often oriented toward advanced technology. (The plans to develop Phoenix and Albuquerque as silicon metropolises are offered as examples.) These fast growing areas offer little possibility of transferring skills in the dominant growth industries to other productive sectors. The results suggest that population growth in the *sun belt* is accompanied by in-migration and that this in-migration is a considerable factor in attenuating racial residential segregation.”). See also Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 32–38 (1994) (age of city, age of housing stock, industry specialization, and region all affect the level of segregation in modern cities).

<sup>243</sup> Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1850–51 (1994); Richard Thompson Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER J. 117, 127 (1992).

where Carter was killed, did not have laws mandating residential segregation, “the years between 1931 and the 1960s marked a legacy of segregated public accommodations (e.g., restaurants, shows, and casinos), discriminatory employment practices, and racially segregated housing and schools, earning Las Vegas the nickname ‘Mississippi of the West.’”<sup>244</sup> As African Americans moved to Las Vegas from Southern cities during this period, they settled in West Las Vegas, partly in response to White efforts to keep them out of downtown neighborhoods and partly because newcomers gravitated toward the vibrant Black community.<sup>245</sup> Residential segregation was persistent enough that Las Vegas’ largely segregated elementary school system was the subject of a 1968 lawsuit, and the school board eventually adopted a mandatory busing plan to desegregate schools.<sup>246</sup>

As Las Vegas’ Latinx population grew between 1980 and 1990, the Westside became a mixed Black and Latinx neighborhood.<sup>247</sup> While Blacks and Latinxs live in all areas of the city today, the Westside is still regarded as a Black space. At the other end of the spectrum are the newer suburban communities at the edges of town, including Summerlin. Compared to the rest of Las Vegas, Summerlin’s population is more White and Asian, and less Black and Latinx.<sup>248</sup> This is not to say that Black and Latinx families do not live in Summerlin, but Summerlin’s neighborhoods are predominantly White spaces.<sup>249</sup> When the influx of Black and Latinx residents reaches a tipping point, however, White residents work harder to police the boundaries and preserve the Whiteness of the neighborhood.<sup>250</sup>

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<sup>244</sup> Sonya D. Horsford, Carrie Sampson & Felicia Forletta, *School Resegregation in the Mississippi of the West: Community Counternarratives on the Return to Neighborhood Schools in Las Vegas, 1968–1994*, 115 TCHRS. C. REC. 1, 7 (2013).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 4.

<sup>247</sup> *Id.* at 8.

<sup>248</sup> See *supra* note 2.

<sup>249</sup> *Id.* For an example of popular understandings of Summerlin as a racialized space, see *Summerlin Reviews*, NICHE, <https://www.niche.com/places-to-live/n/summerlin-las-vegas-nv/reviews> [<https://perma.cc/AN36-ZVQJ>] (including reviews that describe Summerlin as “safe, secure,” “upscale,” and “a very white area”) (last visited Mar. 11, 2018).

<sup>250</sup> Scholars describe a kind of racial tipping point in which “the fraction of same-race neighbors determines Whites’ attachment to neighborhood identities based on racial homogeneity.” Robert DeFina & Lance Hannon, *Diversity, Racial Threat, and Metropolitan*

The physical layout and architectural features of suburban neighborhoods help do that. In Western and Sun Belt suburbs, clusters of carefully planned neighborhoods are built around cul-de-sacs, marked by a single entrance, and often enclosed by a wall or gate.<sup>251</sup> These features minimize the likelihood that a stranger might pass through the neighborhood for an innocent reason, giving residents a further basis for believing that an unfamiliar person is out of place or up to no good. Access may be restricted by guards and identification requirements. Many of these communities were built long after legal segregation ended, giving them a sort of post-racial status, but many are still “white spaces” where Black residents and visitors risk being seen as “out of place.”

Continued residential segregation may be attributable in part to private beliefs and actions, but various legal tools provide the mechanisms through which private preferences are enforced. To understand the way that law supports segregation in new White spaces, it is important to look beyond public housing policy and zoning. Although the decision to sell or rent property can no longer be based on race, housing can legally be denied based on a host of other factors that may correlate with race, such as receipt of government housing assistance, violation of neighborhood-imposed rules of aesthetics and decorum, and even personal dislike. Homeowners’ Associations (HOAs) govern planned communities and impose hundreds of pages of Covenants, Conditions, and Restrictions on the properties included in

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*Housing Segregation*, 88 SOC. FORCES 373, 374 (2009); see Michelle Wilde Anderson & Victoria C. Plaut, *Property Law, Implicit Bias, and the Resilience of Spatial Colorlines*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 25, 28–29 (Justin D. Levinson & Robert D. Smith eds., 2012) (White level of comfort with a neighborhood varies depending on the proportion of non-White neighbors). See, e.g., Onwuachi-Willig, *supra* note 3, at 1153, 1168–75; see also Megan Messerly, *Study Reveals Where White Nevadans Rank for Racial Bias*, LAS VEGAS SUN (Nov. 9, 2015, 12:46 PM), <https://lasvegassun.com/news/2015/nov/09/study-reveals-where-white-nevadans-rank-for-racial> [http://perma.cc/XR3V-W597] (describing study showing that implicit bias among Nevada Whites increased when Whites perceive greater competition from Blacks).

<sup>251</sup> See Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1958 (2015) (analyzing how urban architecture facilitates racial segregation, including highways that separate cities from suburbs and the “walls, gates and guardhouses” of gated communities that “serve to keep out those who are not expressly allowed in”).

the neighborhood.<sup>252</sup> While race per se is no longer enforceable as a reason to exclude, occupants can be penalized or evicted for violation of myriad HOA rules.<sup>253</sup>

Exclusion of individuals and families from housing based on any of these factors can perpetuate racial segregation in three ways. First, any of these factors can easily supply a pretext for exclusion of people of color where the desire to keep them out is, at base, motivated by racial animosity or racial stereotypes. Second, even if the decision-maker's motivation is not consciously affected by race, exclusion of groups like poor people, large families, or neighbors that are perceived as loud, unclean, or unlikable will often disproportionately result in the exclusion of people of color from spaces controlled by Whites because White people may associate negative traits with non-White people, and vice versa.<sup>254</sup> Third, unconscious bias may color decisions to exclude that the decision-maker genuinely believes are based on a non-racial factor.

Once granted access to White neighborhoods, people of color may be subject to scrutiny by their neighbors, and the law provides a range of mechanisms that residents can use to police and even remove an unwanted neighbor. For example, the strict rules associated with Section 8 housing, and the requirement that recipients of assistance remain subject to searches and interviews by the housing authority to determine whether they are in compliance with these rules, have been used by White residents to exclude poor Black women who receive Section 8

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<sup>252</sup> See Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 20 (1995) ("Under the aegis of the declaration and CC&Rs, these HOAs operate as powerful private 'mini-governments.'").

<sup>253</sup> See, e.g., Lorraine Longhi, 'No, You Can't,' *Condo Owner Says to HOA after Alleged Age and Race Discrimination*, AZ CENTRAL (Aug. 27, 2018), <https://www.azcentral.com/story/money/business/consumers/2018/08/27/phoenix-hoa-sunrise-village-condominiums-association-accused-age-race-discrimination/838620002> [<https://perma.cc/6DA7-5G5H>].

<sup>254</sup> For example, homeowners in affluent White suburbs may choose not to accept Section 8 vouchers, effectively prohibiting low income voucher recipients, many of whom are Black women, from moving into the neighborhoods. Laura Sullivan, *Section 8 Vouchers Help the Poor—But Only if Housing Is Available*, NPR (May 10, 2017, 4:35 PM), <http://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> [<https://perma.cc/WU2M-5B55>] (quoting a resident of McKinney, Texas as saying she opposes efforts to open local housing to Section 8 recipients because "[t]he lifestyle that goes with Section 8 is usually working, single moms or people who are struggling to keep their heads above water. . . . It's just not people who are the same class as us.").

assistance from their neighborhoods.<sup>255</sup> In a similar manner, HOAs regularly survey houses in their communities to identify any failure to comply with HOA rules. A resident can be cited for any violation, no matter how minor, and may be subject to fees and even exclusion for repeated or unaddressed violations.<sup>256</sup>

Private violence, too, remains a powerful tool of residential segregation.<sup>257</sup> Jeannine Bell has documented how Black families still experience “move in violence” when they arrive in White spaces.<sup>258</sup> As Bell explains, neighborhood violence today tends to be individual, rather than collective violence imposed by groups like the Klan in an earlier era.<sup>259</sup> The incidents of targeted violence described by Bell are almost certainly illegal, even if the law is not always enforced.<sup>260</sup>

However, neighbor-on-neighbor violence justified by fear of a person who looks unfamiliar and out of place may be legal under the law of self-defense described in the previous Part. This is likely to be the case if a defendant can convince a factfinder that she was genuinely afraid that the victim planned to harm her or break into her house, especially if the defendant did not know or recognize the victim, meaning the victim would have been unfamiliar and out-of-place in an area in which people expect to feel safe. The law of fear and reasonableness may also legalize killings that are driven by overt racism or malice, so long as they appear to be based on fear.

The risk of private fear-based violence may be greater when private citizens patrol their neighborhoods, either individually or as part of a

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<sup>255</sup> Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1543–45 (2012).

<sup>256</sup> See, e.g., Paula A. Franzese & Steven Siegel, *The Twin Rivers Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J.L. & PUB. POL’Y 729 (2008) (discussing the *Twin Rivers* case and the broad powers of Homeowners Associations); see also Daniel Goldmintz, Note, *Lien Priorities: The Defects of Limiting the “Super Priority” for Common Interest Communities*, 33 CARDOZO L. REV. 267, 278 n.73 (2011).

<sup>257</sup> Rothstein documented the role of private violence and official disregard in enforcing segregation during the 1960s. White residents, individually and in mobs, visited violence and intimidation on Black residents who moved into white neighborhoods, yet local police and prosecutors “stood by as rocks were thrown and crosses were burned,” refusing to stop the violence or punish the offenders. ROTHSTEIN, *supra* note 24, at 142–51.

<sup>258</sup> See generally BELL, *supra* note 201.

<sup>259</sup> See *id.* at 86–87.

<sup>260</sup> *Id.* at 86–106.

neighborhood watch group, with the goal of identifying and confronting criminals or suspicious people. George Zimmerman proudly identified himself as a neighborhood watch captain, and his encounter with Trayvon Martin occurred when he was patrolling his neighborhood in the wake of stories about Black male teenagers breaking into houses.<sup>261</sup> Even if neighborhood watch members are unarmed, as Zimmerman was, their very structure and goals invite confrontation, potentially increasing the risk of violence. In White spaces, the rules of justifiable homicide affect White people and Black people very differently, making White people the vindicated protectors and Black people vulnerable to violence.

### C. *Ownership and Vulnerability*

In a column written in response to Trayvon Martin's death, journalist Charles Blow explained the vulnerability experienced by Black families who know that suspicion, even if misplaced, can be the basis for legalized killing:

This is the fear that seizes me whenever my boys are out in the world: that a man with a gun and an itchy finger will find them "suspicious." That passions may run hot and blood run cold. That it might all end with a hole in their chest and hole in my heart. That the law might prove insufficient to salve my loss.<sup>262</sup>

Black people in White spaces bear the double burden of being racially suspicious and racially salient. Blackness increases the likelihood that people will see innocent actions as threatening. Being non-White in a White space means one will always look out of place.

This combination of perceived threat and looking out of place can be enough to legalize a killing because whether a homicide is justifiable turns on whether the killer's perception of threat was reasonable, not whether it was true. Expanded self-defense laws have relaxed or eliminated many of the core limitations on the use of force, especially in

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<sup>261</sup> See Onwuachi-Willig, *supra* note 3, at 1161–64.

<sup>262</sup> Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), [https://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html?\\_r=1&ref=charlesmblow](https://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html?_r=1&ref=charlesmblow) [http://perma.cc/Y7Q6-UJ66].

or around the home, so a person patrolling the neighborhood for suspected burglars would likely be justified in shooting someone as long as the police, prosecutor, or jury were convinced that the fear of crime was real and that the victim really did look threatening and out of place. Fear of crime, of course, does not need to be related to a risk of actual crime.<sup>263</sup> Self-defense laws function in part to remind Black people in White spaces that the law permits their neighbors to follow them and kill them simply because they look suspicious and out of place.

Ownership of, and thus the need to protect, property may be expansively interpreted, as when the law protects the rights of renters to police homes they do not own and the right of homeowners to police property they do not occupy. In 2014, Wayne Burgarello killed Cody Devine and wounded Janai Wilson when he found the two squatting in an abandoned duplex that he owned. Burgarello claimed self-defense and was acquitted by a jury.<sup>264</sup> He did not invoke Nevada's defense of habitation law, but instead said he thought Devine had a gun (which turned out to be a flashlight) and relied on Nevada's stand your ground law to explain why he chose to respond to the trespasser with violence instead of fleeing.<sup>265</sup> Moreover, individuals are not confined to protecting their own homes. When Joe Horn shot and killed Miguel Antonio DeJesus and Diego Ortiz after he saw them breaking into a neighbor's home, a grand jury refused to indict him.<sup>266</sup> Horn emphasized that the men crossed into his yard, but he also predicated

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<sup>263</sup> Cf. Dennis P. Rosenbaum, *The Theory and Research Behind Neighborhood Watch: Is it a Sound Fear and Crime Reduction Strategy*, 33 CRIME & DELINQUENCY 103 (1987) (studying the effects of neighborhood watch in reducing fear amongst neighbors and concluding that "[f]ear reduction may not be possible or even desirable given the objective of increasing citizen crime prevention behaviors"); James C. Wo, John R. Hipp & Adam Boessen, *Voluntary Organizations and Neighborhood Crime: A Dynamic Perspective*, 54 CRIMINOLOGY 212 (2016) (same).

<sup>264</sup> See, e.g., Marcella Corona, *Burgarello Not Guilty in Fatal Sparks Shooting*, RENO GAZETTE J. (May 29, 2015), <https://www.rgj.com/story/news/crime/2015/05/29/jury-decides-burgarello-verdict-murder-trial/28189467> [<https://perma.cc/FV22-8AJU>].

<sup>265</sup> *Id.*; see Assoc. Press & Scott Sonner, 'Stand Your Ground' in Nevada: Killing of Unarmed Trespasser was Self-defense, Lawyer Says, MERCURY NEWS (Aug. 19, 2004, 1:58 PM), <http://www.mercurynews.com/2014/08/19/stand-your-ground-in-nevada-killing-of-unarmed-trespasser-was-self-defense-lawyer-says> [<http://perma.cc/RV64-FVZK>].

<sup>266</sup> See Chris Bury & Howard L. Rosenberg, *Man Cleared for Killing Neighbor's Burglars*, ABC NEWS (2008), <https://abcnews.go.com/TheLaw/story?id=5278638&page=1> [<https://perma.cc/5HQY-PMQM>]. I thank Adrian Hernandez for suggesting that I discuss the Horn acquittal.

his defense on a Texas statute that permits deadly force in defense of tangible property.<sup>267</sup> In the Horn case, his visual assessment that the men stole his neighbor's property, coupled with their presence in his yard, was enough to support a claim of self-defense strong enough to avoid an indictment. In each of these cases, the defendants relied on multiple doctrines, including defense of property, no-retreat rules, and defense of home. The cases demonstrate how discrete rules operate together to significantly expand—both spatially and conceptually—on the common law ideas about defense of home.

As Onwuachi-Willig and Bell have explained, using violence to protect one's home and neighborhood is a racially-charged endeavor: Whites have long used violence to keep Black people out of White spaces.<sup>268</sup> Writing about Martin's death, Onwuachi-Willig explained that Martin was vulnerable to being profiled by Zimmerman precisely because residents understood the neighborhood to be a "white space" and considered unknown Blacks to be "intruders."<sup>269</sup> These scholars document the significance of White spaces in "preserving the material benefits and the psychological wages of Whiteness"<sup>270</sup> and explore how and why residents use violence to police and protect them.<sup>271</sup> This dynamic of ownership and violence depends on and reproduces "the same racist principles" more explicitly expressed half a century ago in the same cities.<sup>272</sup> While Bell characterizes this violence as contrary to law,<sup>273</sup> this Article argues that state self-defense laws actually permit and even encourage this type of private violence.<sup>274</sup> For White residents of White spaces, expanded self-defense laws are a reminder that the law

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<sup>267</sup> See TEX. PENAL CODE §§ 9.41, 9.42, 9.43 (West 2019).

<sup>268</sup> See Onwuachi-Willig, *supra* note 3, at 1170–72; see also BELL, *supra* note 201.

<sup>269</sup> See Onwuachi-Willig, *supra* note 3, at 1121, 1182.

<sup>270</sup> *Id.* at 1119.

<sup>271</sup> *Id.* at 1151–85; BELL, *supra* note 201, at 43–47.

<sup>272</sup> See Onwuachi-Willig, *supra* note 3, at 1119.

<sup>273</sup> See BELL, *supra* note 201, at 6; accord Onwuachi-Willig, *supra* note 3, at 1167 (describing Zimmerman's acquittal as the result of poor prosecutorial effort); *id.* at 1175 (describing how police discouraged the neighborhood watch group from "being a vigilante police force" and told them not to carry guns).

<sup>274</sup> Onwuachi-Willig also points out that the law sometimes condones violence. See Onwuachi-Willig, *supra* note 3, at 1164–65.



permits them to use violence, even lethal violence, to defend themselves, their families, and their homes from intruders.

For example, the necessity principle requires that one retreat before using deadly force. One of the earliest modifications of this principle, the castle doctrine, is premised on the idea that a man need not retreat in his home because he has a special relationship—one of ownership and a corollary duty to protect—to his house. In other places, a person was required to retreat before using deadly force, but in the home one was permitted, even encouraged, not to back down.

Home defense laws express a similar idea about the importance of the home and a person's right and duty to protect that space. They allow for a person to use deadly force as soon as an intruder has met some triggering condition related to breaching the security of the home. Usually, this condition is that the intruder has entered the home.<sup>275</sup> Some laws permit deadly force as soon as an intruder has entered a yard or porch, expanding the boundaries of defensible space to include the area around one's home.<sup>276</sup> In Nevada, the triggering condition is that a person feared that the potential intruder was about to enter the home. This kind of law does not have a precise spatial boundary, so a person outside the home may be the target of justifiable homicide as long as he is close enough to give rise to a belief by the resident that he plans to break in.

If a yard is demarcated by a wall or bounded by a gate, presence in the yard alone could be enough to justify deadly force under a broadly-worded defense of habitation law.<sup>277</sup> Walls establish such a clear boundary that seeing an unfamiliar person inside the walled perimeter

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<sup>275</sup> California's defense of habitation law is an example of this type. CAL. PENAL CODE § 198.5 (West 2019) (permitting a person to presume an imminent threat of deadly force when "another person, not a member of the family or household, . . . unlawfully and forcibly enters or has unlawfully and forcibly entered the residence"). This leads to questions about what constitutes the threshold of a home. See *People v. Brown*, 8 Cal. Rptr. 2d 513 (Cal. Ct. App. 1992) (holding that entry onto an attached but uncovered porch does not constitute entry into the home).

<sup>276</sup> E.g., FLA. STAT. ANN. § 776.013(5) (West 2019) (porch included in definition of dwelling); *State v. Kuhns*, 817 S.E.2d 828, 832 (N.C. Ct. App. 2018) (yard included in definition of home); see also *Green*, *supra* note 150, at 17 (defense of habitation sometimes available against intruders who break into outbuildings).

<sup>277</sup> See *supra* Section I.C.2.

may, without more, be sufficient to establish reasonable fear.<sup>278</sup> As a homicide detective said when explaining (before the prosecutor determined whether or not charges would be filed) that Demarcus Carter was “likely trying to gain entry” to the home, “[t]here was no reason for anybody to be back there, especially someone he didn’t know . . . . There was a tall block wall and a padlocked gate. No easy access.”<sup>279</sup> Locked gates and guardhouses add an additional layer of security to a neighborhood or community, further underscoring the assumption (already available in Nevada law) that anyone who looks out of place near a home is probably trying to break in. When coupled with walls and locked gates, unfamiliarity may be enough to support a claim of self-defense, as in the case of Carter’s death.

Together, the castle doctrine and the defense of habitation rule send a powerful message that a home is a special kind of space that the resident is entitled to defend. They underscore that it is one’s right to defend one’s home (perhaps including the yard or porch). Perhaps they even signal that defending one’s home is a duty, not just a right. When these two rules (defense of habitation and no-retreat) are expanded outside the home, they encourage people to see the space outside their homes as their rightful territory, a place where they have a right to be and are not required to back down. The first line of expansion includes home-like spaces, such as campers, workplaces, cars, boats, and campsites. When state laws permit a presumption of threat and/or eliminate the retreat requirement in these spaces, the rationale of home defense travels to those spaces too. They expand the idea of defensible space from a home to several specific spaces outside the home.

Stand your ground laws eliminate the retreat requirement completely, providing that a person faced with a deadly threat may

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<sup>278</sup> The significance of walls and closed doors in establishing what will count as reasonable fear is underscored by the proliferation of smart doorbells and some residents’ claim that anyone photographed outside the door must be engaging in suspicious behavior. See Bea Bischoff, *Amazon’s Smart Doorbell is Creepy as Hell*, MEDIUM: ONE ZERO (Nov. 8, 2018), <https://onezero.medium.com/amazons-smart-doorbell-is-creepy-as-hell-faaac4a9d6c3> [<https://perma.cc/P6SB-TN8C>] (describing incidents of racial profiling on social media sites and linking it to the danger or profiling via smart doorbells).

<sup>279</sup> Mike Blasky, *Man Slain in Summerlin Yard Had Lengthy Record*, LAS VEGAS REV.-J. (Mar. 22, 2012), <http://www.reviewjournal.com/news/crime/courts/man-slain-summerlin-yard-had-lengthy-record> [<http://perma.cc/9N7L-XLTE>].

respond with deadly force anywhere. If the rationale for the castle doctrine centers on a man's ownership of his home, and his corresponding duty to defend it, stand your ground laws invite people to exercise the same ownership right over any square of space. In the context of a neighborhood, they also function to expand the idea of defensible space even further in that they permit a person to protect and patrol one's neighborhood with the knowledge that, if a confrontation with a suspected intruder does ensue, one need not retreat and can instead use deadly force if the conflict escalates. This story of patrolling and protecting the neighborhood provided the foundation for George Zimmerman's choice to follow and confront Trayvon Martin.<sup>280</sup> On the other hand, a Black resident of a White neighborhood may be entitled to use force without retreating if a person breaks into his house, but he will not have the same right, as a practical matter, to search his yard, his sidewalk, and his neighborhood for an intruder.

The death of Jonathan Mitchell in Albuquerque's Ventana Ranch subdivision illustrates the way that self-defense law may not protect Black residents of White spaces. If they wield guns to protect their homes and neighborhoods, their neighbors may be more likely to see their actions as a threat, rather than as self-defense. Mitchell, a twenty-three-year-old African American veteran, was standing in a driveway in his neighborhood with a gun.<sup>281</sup> The neighborhood, Ventana Ranch, is a far Northwest Albuquerque subdivision of gated and walled communities with amenities that include a tennis court and a pool. The

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<sup>280</sup> As Angela Onwuachi-Willig explains, Zimmerman and some of his neighbors had become increasingly concerned about an alleged "rash" of break-ins in which the suspects were described as Black men. His claim that Martin matched the description of a suspect was based only on this vague sense that the homes in the neighborhood needed to be protected from Black male teenagers. Onwuachi-Willig, *supra* note 3, at 1174–80. Indeed, hearkening back to the origins of the castle doctrine and the true man rule, Zimmerman seemed especially concerned about protecting women who were home alone in his neighborhood. Onwuachi-Willig, *supra* note 18, at 23, 27.

<sup>281</sup> See Nicole Perez, *NAACP Seeks Action in ABQ Veteran's Shooting*, ALBUQUERQUE J. (Oct. 7, 2013), <https://www.abqjournal.com/276880/action-sought-in-vets-shooting.html> [<https://perma.cc/WAE2-BSZ4>]. A neighbor said Mitchell "brandished" his gun, though the preceding factual context is not documented in news accounts. Aurelio Sanchez, *No 'Probable Cause' in Death*, ALBUQUERQUE J. (Mar. 23, 2013), <https://www.abqjournal.com/181536/no-probable-cause-in-death.html> [<http://perma.cc/S6D4-MYCS>]. I thank the faculty at the University of New Mexico School of Law for suggesting that I discuss the Mitchell killing.

neighborhood is Whiter and less Latinx than the rest of the city.<sup>282</sup> Mitchell's neighbor called a third neighbor, Donnie Pearson.<sup>283</sup> Pearson left his own house and circled the block to investigate, bringing his young son along.<sup>284</sup> Others contend Mitchell felt threatened by Pearson circling the block, triggering Mitchell to fire his gun.<sup>285</sup> Pearson fired back, killing Mitchell. He claimed self-defense and was not charged. Many facts in the Albuquerque case are disputed, but Mitchell's family describe him as acting in self-defense and maintain that the police believed Pearson's version of events because they "treated [Mitchell] like he was a prowler that didn't belong in the neighborhood."<sup>286</sup> As New Mexico's self-defense law includes an initial aggressor bar to a claim of self-defense,<sup>287</sup> the legality of Pearson's actions depended on the perception that Mitchell had acted illegally, which in turn depended on whether authorities believed he was reasonably defending himself against Pearson.

Expanded self-defense laws communicate ownership over, and a duty to protect, larger and larger swaths of space. They encourage residents to police their homes and neighborhoods by signaling that the use of force against someone who is unfamiliar or seems dangerous will not be punished. Because spaces, especially neighborhoods, are so strongly racialized, this right of ownership and duty of protection only

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<sup>282</sup> See *Ventana Ranch, Albuquerque, NM Demographics*, AREAVIBES, <https://www.area.vibes.com/albuquerque-nm/ventana+ranch/demographics> [<https://perma.cc/5NYK-E446>] (last visited Feb. 10, 2019). The Black population of Ventana Ranch is lesser than the Black population of Albuquerque, and Blacks make up less than five percent of the population in Albuquerque and in Ventana Ranch. All other minorities are under-represented in Ventana Ranch. *Id.*

<sup>283</sup> Cf. sources cited *supra* note 281.

<sup>284</sup> Earlier stories described Pearson as going directly to the house in question. See Sanchez, *supra* note 281. Mitchell's family said Pearson was circling the block, and police helicopter footage confirmed that he circled at least once. See Perez, *supra* note 281; Xena, *Justice for Jonathan Mitchell*, BLACKBUTTERFLY7 BLOG (Mar. 17, 2013), <https://blackbutterfly7.wordpress.com/2014/03/17/justice-for-jonathan-mitchell> [<https://perma.cc/S3F6-N9W9>].

<sup>285</sup> See Perez, *supra* note 281.

<sup>286</sup> Barron Jones, *Mitchell Shooting Investigation Continues*, ALIBI, <http://alibi.com/news/44536/Neighborhood-Watch.html> [<http://perma.cc/KT8T-HHHZ>] (last visited Nov. 23, 2018).

<sup>287</sup> See *State v. Lucero*, 972 P.2d 1143, 1145 (N.M. 1998).

extends to people who, in a racial sense, already own the neighborhood.<sup>288</sup>

D. *Precursor Violence: Surveillance and 9-1-1 Calls*

Self-defense killing is rare, but the surveillance that provides the foundation for suspicion and confrontation is not. Neighborhood watch groups and online communities provide a structure through which residents can band together to look for the potential or evidence of crime, and perhaps even address it directly. The law does not constrain private surveillance in the way that it does government-sponsored surveillance. Racial profiling by police may be illegal in some circumstances,<sup>289</sup> but racial profiling by private citizens is perfectly legal.<sup>290</sup>

Residents of Mountain's Edge, a planned community on the southwestern outskirts of Las Vegas, created a community Facebook page to monitor suspicious activity and guard against a perceived spate of crimes. White residents posted photos of activity they deemed suspicious, including photos of Black children waiting for their parents to get home. These same residents sometimes followed their Black neighbors in order to take photos, and sometimes called security to report them.<sup>291</sup> In response to complaints about racial profiling, the site organizer noted that the posts may "offend," but underscored the

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<sup>288</sup> See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1731 (1993) (the right to exclude is essential to maintaining Whiteness as a property right); Onwuachi-Willig, *supra* note 3, at 1168 (explaining how Trayvon Martin's death unfolded against a backdrop of residents seeking to preserve White ownership of, and exclude Blacks from, the Retreat at Twin Lakes).

<sup>289</sup> But see Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

<sup>290</sup> See Mark NeJame, *Trayvon Martin Shooting Wasn't a Case of Racial Profiling*, CNN (May 30, 2012, 9:09 AM), <http://www.cnn.com/2012/05/30/opinion/nejame-zimmerman-racial-profiling/index.html> [<http://perma.cc/6V82-7AAK>] (column by attorney explaining that it was "not illegal" for Zimmerman to follow Martin because of his race).

<sup>291</sup> See Michael Burton, *Local Facebook Group Details Crimes at Mountain's Edge*, KTNV, <http://www.ktnv.com/news/local-facebook-group-details-crimes-at-mountains-edge> [<https://web.archive.org/web/20151011160833/http://www.ktnv.com/news/local-facebook-group-details-crimes-at-mountains-edge>] (last visited Mar. 23, 2019).

central goal of preventing crime.<sup>292</sup> This pattern has been repeated across the country as residents use online neighborhood-based community groups to racially profile their neighbors.<sup>293</sup>

Figurative walls can also delineate White spaces, such as the boundaries created through gentrification of portions of historically Black neighborhoods. In Oakland, Black residents of a majority White enclave described feeling scrutinized by their neighbors.<sup>294</sup> While such feelings are frequently dismissed, the residents of this neighborhood also created an online community where they posted and shared photos of suspicious-looking people they saw in the neighborhood, including their Black neighbors.<sup>295</sup> When profiling their Black neighbors as suspicious, these White residents invoke the same cultural narrative of the Black intruder that animated Olivia Bertalan's testimony in the Zimmerman trial.<sup>296</sup>

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<sup>292</sup> *Id.* She admitted that she had no evidence that the group had prevented any crime, but expressed hope that it might. *Id.*

<sup>293</sup> See, e.g., Harshaw, *supra* note 120 (describing incidents of racial profiling on Nextdoor); Nextdoor has since added automatic pop-up messages to crime posts that warn the poster of the danger of racial profiling and require the poster to use descriptors that go beyond race and gender. Aarti Shahani, *Social Network Nextdoor Moves to Block Racial Profiling Online*, NPR (Aug. 23, 2016, 4:38 AM), <https://www.npr.org/sections/alltechconsidered/2016/08/23/490950267/social-network-nextdoor-moves-to-block-racial-profiling-online> [<https://perma.cc/P8RD-RHK7>] (describing how the company responded to pressure from an Oakland community group concerned about the widespread use of Nextdoor to racially profile). Yet problems persist. Caroline O'Donovan, *Racial Profiling is Still a Problem on Nextdoor*, BUZZFEED NEWS (May 18, 2017, 5:15 AM), <https://www.buzzfeednews.com/article/carolineodonovan/racial-profiling-is-still-a-problem-on-nextdoor> [<https://perma.cc/3BFM-ZW3A>] (describing incidents of racial profiling).

<sup>294</sup> See Sam Levin, *Racial Profiling Via Nextdoor.com*, EAST BAY EXPRESS (Oct. 7, 2015), <http://www.eastbayexpress.com/oakland/racial-profiling-via-nextdoorcom/Content?oid=4526919> [<http://perma.cc/5JGF-LZTC>]. Unlike the new Sun Belt suburbs described elsewhere in this Article, this Oakland neighborhood used to be a Black space until it underwent gentrification, bringing in more White homeowners and slowly pricing out Black residents. *Id.*

<sup>295</sup> See *id.*

<sup>296</sup> See *supra* note 121 (discussing this narrative and how it figures into Bertalan's testimony, Theodore Wafer's self-defense claim, and neighborhood racial profiling). Compare the fear and violence leveled at suspected Black intruders to the generosity and care shown to students in college towns who drunkenly stumble into a strangers' house. See Russell Frank, *What to Do When an Inebriated Stranger Stumbles into Your Home?*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/education/edlife/binge-drinking-students-penn-state.html>.

Surveillance intersects directly with violence when people call the police on their neighbors for complaints ranging from loud parties to suspected crimes. These callers employ state violence in order to regulate and punish their neighbors.<sup>297</sup> In 2018, news outlets published a number of stories documenting the phenomenon of White people calling, or threatening to call, the police on Black people engaged in mundane activities in their own neighborhoods. These stories include a White woman who threatened to call the police on young Black girls selling water in her neighborhood, a White woman who called the police to report a Black family picnicking in a local park, and neighbor who called the police when she saw three Black women leaving a vacation rental and assumed they were committing a robbery.<sup>298</sup> In some cases, the police refuse to respond, and many readers ridiculed the choice to call the police. Yet, sometimes the police do respond<sup>299</sup> and the

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<sup>297</sup> See generally I. Bennett Capers, *supra* note 26 (discussing how racialized policing practices preserve the racial character of places); see Anthony Paul Farley, *The Poetics of Colorlined Space*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 97, 110–11 (Francisco Valdes et al. eds., 2002). It is important to recognize how both self-policing in the form of surveillance and self-defense killings work in tandem with the act of calling the police for minor infractions—an act which can result in anything from fear to death. For example, George Zimmerman called 9-1-1 over forty times in the years preceding Trayvon Martin’s death to report suspicious activity in the neighborhood. See Lizette Alvarez, *A Florida Law Gets Scrutiny after a Teenager’s Killing*, N.Y. TIMES (Mar. 20, 2012), <https://www.nytimes.com/2012/03/21/us/justice-department-opens-inquiry-in-killing-of-trayvon-martin.html> [http://perma.cc/3GV2-ECLJ].

<sup>298</sup> Sam Levin, *California Woman Threatens to Call Police on Eight-Year-Old Black Girl for Selling Water*, GUARDIAN (June 25, 2018, 3:56 PM), <https://www.theguardian.com/us-news/2018/jun/25/permit-patty-eight-year-old-selling-water-san-francisco-video> [https://perma.cc/T9Q8-TNH3] (discussing such instances); Jamiles Lartey, *Oppression in America: ‘To Root This Out We Need a Movement Against Racist Policies’*, GUARDIAN (June 6, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/jun/06/everyday-racism-in-america-how-to-fix-it> [https://perma.cc/V636-VH6S] (same).

<sup>299</sup> Indeed, early efforts are underway to enable communication between police and residents’ smart doorbell footage. Sarah Emerson, *A Smart Doorbell Company is Working with Cops to Report “Suspicious” People and Activities*, MOTHERBOARD (May 8, 2018, 8:51 PM), [https://motherboard.vice.com/en\\_us/article/evkgpw/smart-doorbell-company-ring-is-working-with-cops-to-report-suspicious-people-and-activities](https://motherboard.vice.com/en_us/article/evkgpw/smart-doorbell-company-ring-is-working-with-cops-to-report-suspicious-people-and-activities) [https://perma.cc/2DST-6D3M] (Ring); Tanvi Misra, *Who’s Afraid of Amazon’s Video Doorbell?*, CITYLAB (Dec. 26, 2018), <https://www.citylab.com/equity/2018/12/amazon-facial-recognition-ring-smart-doorbell-camera-privacy/578485> [https://perma.cc/84U2-NZH5] (describing Amazon’s patent application for more advanced facial recognition capabilities to ring doorbells in order to “allow users to receive detailed information about who is approaching the house in real time, ‘enabling users to

threat of violence is realized. In 2015, in McKinney, Texas, a Dallas suburb profiled for its reluctance to accept Section 8 vouchers, Officer Eric Casebolt wrestled a fourteen-year-old Black girl to the ground<sup>300</sup> after he responded to a call by residents of a subdivision who were complaining about a teenager's pool party, which took place at the subdivision's gated and locked pool.<sup>301</sup>

This sense of ownership and entitlement to protection<sup>302</sup> is apparent in two of the most well-publicized incidents of White people calling the police on Black people they believe do not belong in a particular space. When Alison Ettel (a.k.a. "Permit Patty") called the police to report that her eight-year-old neighbor was selling water without a permit, she claimed only that the girl and her cousin were breaking permit rules, not that they posed a threat of any kind.<sup>303</sup> When Dr. Jennifer Schulte (a.k.a. "Barbeque Becky") called the police to report a Black family in a park, she claimed in the first call that the family was

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make more educated decisions on whether the person is suspicious or dangerous, and also whether or not to identify law enforcement, family members, neighbors of the like."").

<sup>300</sup> See Dorothy A. Brown, *McKinney Pool Party Incident Has Everything to Do with Race*, CNN, <https://www.cnn.com/2015/06/09/opinions/brown-mckinney-pool-party/index.html> [http://perma.cc/ED9V-XLXJ] (last updated June 9, 2015).

<sup>301</sup> Besides reporting allegedly disruptive behavior to the police, the caller could have invoked the neighborhood's HOA rules to discipline the party hosts. See Sundance, *The Full Story of the McKinney Texas, Pool Mob—Inside the "Craig Ranch" Subdivision*, CONSERVATIVE TREEHOUSE (June 8, 2015), <https://theconservativetreehouse.com/2015/06/08/the-full-story-of-the-mckinney-texas-pool-mob-inside-the-craig-ranch-subdivision> [http://perma.cc/HDL6-87MD] (detailing the ways the pool party, hosted by a Black resident of the subdivision, violated the HOA's standards for pool use); *Demographic and Income Profile*, ENCORE ENT. (Jan. 14, 2016), <https://images3.loopnet.com/d2/AS7orPVJNAGtTleFGIWmAjryfGAnQMS0gosC-2mifiA/document.pdf> [https://perma.cc/4UTM-8DZB] (Craig Ranch's residents are 73% White, making it less White than other McKinney neighborhoods but more White than most neighborhoods in the greater Dallas area); see also Olga Khazan, *After the Police Brutality Video Goes Viral*, ATLANTIC (July 23, 2018), <https://www.theatlantic.com/politics/archive/2018/07/after-the-police-brutality-video-goes-viral/564863> [https://perma.cc/ZHZ5-35EA] (describing how Craig Ranch is known as the "new" side, the "good" side, and sometimes the "white" side" of McKinney, and describing how the teenaged party-goers said neighbors told them to "go back to your Section 8 housing" and how some in the neighborhood later emphasized that the party violated HOA rules).

<sup>302</sup> As Cheryl Harris has explained, this "settled expectation" of privilege is a defining characteristic of Whiteness as a property right. Harris, *supra* note 288, at 1714.

<sup>303</sup> See Levin, *California Women*, *supra* note 298.



being disruptive.<sup>304</sup> When the police did not arrive promptly, she called back to demand that they attend to her complaint. In the second call, she implied that she was afraid they would hurt her, saying, “I’m really scared! You gotta come quick!”<sup>305</sup> Both women were using the police to discipline Black people in neighborhood spaces. In making the second call, Schulte invoked the script of White female fear and Black bodies out of place that underlies some home defense claims. Her recitation of fear and demand for police response is evidence that she views the police as required to respond to her, and that she knows the correct words to ensure that it happens; it does not seem to matter whether the words are recited convincingly.

White residents’ actions may elicit sympathy if they seem to be driven by a fear of crime<sup>306</sup> or a desire to protect women at home alone,<sup>307</sup> but it is important to recognize that this fear and protectiveness is both racially charged and not necessarily grounded in actual risk of crime.<sup>308</sup> New White spaces like Summerlin may be some of the safest neighborhoods in terms of comparative crime statistics, but residents may nevertheless prioritize crime control and protection via formation of neighborhood watch groups, investment in security technology, and maintenance of online communities where neighbors can report suspicious activity or potential criminals. These activities are unregulated, often hidden, and probably entirely legal. Should they create the conditions for a killing, the killer’s actions may be legal as well if taken in alleged self-defense.

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<sup>304</sup> Christina Zhao, ‘BBQ Becky,’ *White Woman Who Called Cops on Black BBQ, 911 Audio Released: “I’m Really Scared! Come Quick”*, NEWSWEEK (Sept. 4, 2018, 5:42 AM), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057> [<https://perma.cc/F55X-K47X>].

<sup>305</sup> *Id.*

<sup>306</sup> Randy Alcorn, *Trayvon Martin Case—Racism or Reality?*, NOOZHAWK (July 21, 2013), [https://www.noozhawk.com/article/randy\\_alcorn\\_trayvon\\_martin\\_case\\_racism\\_or\\_reality](https://www.noozhawk.com/article/randy_alcorn_trayvon_martin_case_racism_or_reality) [<http://perma.cc/9BDZ-G8P9>] (profiling by citizens justified by fear of crime).

<sup>307</sup> *Cf. Race, Law and the Zimmerman Verdict*, NATION (July 17, 2013), <https://www.the-nation.com/article/race-law-and-zimmerman-verdict> [<http://perma.cc/D2B3-CJTU>].

<sup>308</sup> See *supra* notes 122, 263 and accompanying text (describing the way fear of crime is often unrelated to risk of crime).

## CONCLUSION

State self-defense laws provide a legal mechanism through which residents of a neighborhood can surveille, intimidate, punish, and even remove their neighbors. These laws have demarcated progressively wider spaces that a person is legally permitted to protect with deadly force, effectively allowing residents of White neighborhoods to police people who stand out in those neighborhoods because of their race and ensuring that those racially-salient people never fully belong there. These laws imbue split-second assessments of threat—demonstrated to be racially contingent, even if unconsciously so—with the force of law. They also provide cover for private citizens acting out of more malicious intent. When states expand the right of self-defense, removing more situations from review and adding shortcuts to ensure that it applies to more scenarios, those states invite private individuals to help law enforcement by policing their own domains, even authorizing the use of lethal private violence to do so. In White spaces, these laws remind White residents of their authority and Black residents of their vulnerability.

Acknowledging the race-specific meaning of self- and home-defense laws does not necessarily determine whether any particular self-defense law is desirable. For example, some legislators might choose to support a law with potentially discriminatory effects if the law is invoked rarely, has a significant deterrent effect, and if the data shows that the racial effects are minimal in practice. To make such an assessment, though, a legislator must consider the race-specific meanings of self-defense laws in the neighborhood context. This might lead to requests for quantitative and qualitative data, including stories from Black residents of White spaces, about how these laws are used and what they mean to people. While I suspect that many expansion laws serve no useful purpose and should therefore be rejected because of the racialized signaling described here, a full assessment of desirability of specific laws, or further proposals for doctrinal reform, is beyond the scope of this Article.

State legislators confronted with proposed laws to expand self-defense should be aware of the way these laws can and do function in White neighborhoods. At a minimum, lawmakers should consider what expanded laws would signal to White and Black residents of White

spaces, as well as the potential for racially biased effects. While race will not be their only consideration, they should weigh these questions when determining the costs and benefits of any proposed change to the criminal law. As a corollary, states should better track how their self-defense laws are used. Lawmakers must have data that tells them how often these laws are used, who claims their benefit, and what kind of killings are legalized (including those found justified by a jury as well as those not charged), where they occur, who is killing, and who is dying. Members of the public should pay careful attention to any proposed amendment to state criminal law that would legalize more private killings, especially when there is no clear demonstration that existing law has been applied too narrowly. In the case of expansions that do not address a gap in existing law, the expressive effect described here is especially important to consider.

The Trump Administration in 2017 signaled clearly that crime control and support for law enforcement would be federal policy priorities for at least the next four years. The administration envisions the federal role as one of supporting, rather than monitoring and restraining, state and local criminal justice systems. It also envisions private citizens as important partners to local police. The policy statement on the White House website highlights the relationship between official and private violence by linking support for law enforcement with private exercise of Second Amendment rights and underscoring the role of this public-private partnership in protecting parents, children, and senior citizens against immigrants, gangs, and “the rioter, the looter, or the violent disrupter.”<sup>309</sup>

This kind of public-private law enforcement partnership, and the racially-coded description of its targets, recall the Reconstruction and Jim Crow eras, when private violence worked hand-in-hand with local law enforcement to enforce racial hierarchies and the Department of Justice arose out of a need for federal intervention. Unlike its predecessor, however, the current Department of Justice is likely to serve as a facilitator, rather than a disruptor, in this relationship. One

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<sup>309</sup> Matt Zapotosky, *Trump White House Vows It Won't Coddle 'the Rioter, the Looter, or the Violent Disruptor'*, WASH. POST (Jan. 20, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/01/20/trump-white-house-vows-to-take-on-the-rioter-the-looter-or-the-violent-disrupter/?utm\\_term=.30f11ced4e1b](https://www.washingtonpost.com/news/post-nation/wp/2017/01/20/trump-white-house-vows-to-take-on-the-rioter-the-looter-or-the-violent-disrupter/?utm_term=.30f11ced4e1b) [https://perma.cc/6CA3-SFJB].

manifestation of this new federal-local-private collaboration will be the use of state criminal laws, including self-defense laws, to sanction more private violence, and a parallel lack of federal civil rights enforcement. Because they reflect local norms and long-held prejudices, state criminal laws have often been used in the past to target people of color<sup>310</sup> and to enforce racial hierarchies, and we can expect that they may be used this way in the future.

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<sup>310</sup> As another example of the way criminal law can be used to target disfavored groups, the North Dakota legislature considered a bill in the wake of the #NoDAPL protests that would have altered the burdens and presumptions applicable when a motorist kills or injures a protestor on a roadway, effectively insulating those killings from judicial review and sanctions by presuming that they are non-negligent. The law eventually did not pass. H.J. 487, 65th Legis. Assemb., at 487 (2017), <https://www.legis.nd.gov/assembly/65-2017/journals/hr-dailyjnl-28.pdf#Page487> [<https://perma.cc/AAH7-K6QP>] (“HB 1203: A BILL for an Act . . . relating to the liability exemption of a motor vehicle driver; and . . . relating to pedestrians on roadways . . . failed.”).