FIREPOWER TO THE PEOPLE! GUN RIGHTS & THE LAW OF SELF-DEFENSE TO CURB POLICE MISCONDUCT

SPEARIT[1]

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INTRODUCTION TO AN ONGOING CRISIS IN CRIMINAL JUSTICE

I shot the sheriff
But I swear it was in self-defense
I say I shot the sheriff - Oh, Lord!
And they say it is a capital offense[2]

> But today's blanket condemnation of resistance toward officers cloaks a more complicated national history, one that celebrates—selectively—individual rights to refuse compliance with state agents . . . When viewed alongside the common law right to resist unlawful arrest once widely recognized in the United States, and alongside the recently resurgent Second Amendment right to bear arms, the Fourth Amendment's treatment of resistance as a license for officers to use force seems less self-evident, and perhaps, less defensible.[3]

This Article represents a polemic against the most harmful aspects of the policing status quo. At its core, the work asserts the right of civilians to defend against unlawful deadly police conduct. It argues that existing gun and self-defense laws provide a practical and principled basis for curbing police misconduct. It also examines legislative trends in gun laws to show that much of most recent liberalizing of gun rights is a direct response to self-defense concerns sparked by mass public shootings. The expansion of gun rights and self-defense comes at a time when ongoing police killings of Black civilians menace public opinion of the police and killings that result from ambush-style execution of a warrant.

This Article posits that expanded gun rights and self-defense law can lead to greater police accountability such that civilians are empowered in the streets, in their homes, and in courts, with knowledge of their rights against police. The central thrust of the work is that expanded lawful gun possession by educated carriers increases the potential for legal gun possessors and carriers to intervene—not only to prevent mass killings, but also to counter

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2. THE WAILERS, I Shot the Sheriff, on BURNIN' (Island Records 1973).
3. Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1190 (2017).

unlawful bodily harm by police. Hence, this Article contemplates how existing law can be used to achieve more just outcomes, underscores that gun rights are at the core a self-defense issue, and maintains that sometimes police are the trigger for the use of self-defense.

As the above lyrics suggest, the problem of police misconduct is nothing new. Neither is the biological instinct to self-defend. The words articulate a base presumption that a legitimate self-defense claim offered a legal shield for resisting unlawful and injurious conduct by police. Hence, when Marley claims he shot the sheriff, he is relying on a self-defense claim against the unlawful, deadly police force of Sheriff John Brown. This Article fathoms how the expansion of gun rights and expansion of education in self-defense can chill police misconduct and lead to better outcomes in policing. In Marley's time, the likelihood of an individual owning a gun was slight. But, in today's America, it is estimated that there are more guns than people in the country,[4] with an increasing number being carried in public.[5] The positive aspect perhaps is that more people "packing" potentially means more opportunities for public intervention to help stop not just the Columbines and Sandy Hooks of the world, but also the Sheriff Browns.

Of course, considering recent and shocking attacks against Dallas, Texas police forces that left at least five officers dead, such an exposé may seem untimely.[6] Not to mention an ambush two weeks later on police in Baton Rouge, Louisiana, which left three more officers dead.[7] To be certain, illogical, cold-blooded killing is not the subject of this Article. Those cases were indiscriminate ambushes on police that left innocent officers dead. This Article, by contrast, is about the fundamentals of rational conduct. It is not about visiting terror upon police, but genuine instances where police conduct calls for a response in self-defense—it is about the police aggression that sparked the

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4. Christopher Ingraham, *There Are Now More Guns Than People in the United States*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.fbf8174f5a77.

5. *See* Nicholas Moeller, The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller, 2014 U. ILL. L. REV. 1401 (2014).

6. Joel Achenbach, William Wan, Mark Berman, & Mariah Balingit, *Five Dallas Police Officers Were Killed by a Lone Attacker,* WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/like-a-little-war-snipers-shoot-11-police-officers-during-dallas-protest-march-killing-five/?utm_term=.03c592e82a95.

7. Steve Visser, *Baton Rouge Shooting: 3 Officers Dead; Shooter was Missouri Man, Sources Say*, CNN (July 18, 2016), http://www.cnn.com/2016/07/17/us/baton-route-police-shooting/index.html.

Dallas protest in the first place. As this Article will highlight, many national headline cases give instances in which civilians may have been justified in using force against police. Simultaneously, as one researcher notes, "those who believe allowing private citizens to carry concealed weapons will endanger the lives of law enforcement officials do not even have anecdotal evidence to support them . . . we have no examples of law-abiding citizens with concealed weapons assaulting police officers."[8]

Many critical questions drive this work. First is the obvious: what are the social implications of laws that expand gun rights? Although studies have tried to measure gun violence levels after the enactment of gun legislation, few efforts have focused on the impacts on police. Moreover, what does this will to armament imply for the post-Trayvon era, where police and police-want-to-be alike can apparently kill Blacks at will?[9] Beyond, can gun rights be consciously combined with self-defense principles to stem police abuses? Such questions are of heightened importance in jurisdictions that allow open-carry and those that allow carrying on school campuses.

This Article points to some of the interests at stake in the answers. For example, public discourse typically frames the will to arms in terms of public safety and the Second Amendment right to bear arms. More civilians arming themselves for defense purposes has converged, in some ways, with civil-rights campaigns and organizations like Black Lives Matter and Color of Change. These movements have been sparked by the ongoing police killings of Black civilians. Arming for self-defense was a central Black Panther practice, which was developed as a means of protecting against excessive police force. As such, these groups' interests converge with interests of the National Rifle Association [NRA] and other gun enthusiasts who push for expanded gun rights and less government regulation. Whether these groups accept this strange bed fellowship is uncertain, but the convergence in interests is clear.

The argument unfolds in several steps. First, it begins with Exercising Self-Defense: Under Law of Color, which focuses on how racial bias is evident throughout the criminal justice system. Second, the argument examines two self-defense cases that show the stark racial disparity in the use of self-defense against police. Next, Gun

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8. David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & ECON. 635, 654 (2001).

9. Jeremy I. Levitt, *Embrace Gun Laws to Stand Ground Against Violent Racism*, LEVITT (Aug. 8, 2013), http://drjeremylevitt.com/articles/embrace-gun-laws-to-stand-ground-against-violent-racism.

Rights Logic explores the most recent wave of gun-carrying legislation as a reaction to mass public shooting. As the legislative histories suggest, self-defense was a central concern of the law making. The final section provides a backdrop of the legal principles of self-defense law. Police as Trigger, the Very Tyranny the Second Amendment Meant to Check holds that there are indeed times when police wrongdoing calls for a response in self-defense. In these instances, citizens are often held to a higher standard than police, which seems backward in a democratic society. Today's legal landscape is not the common law of kings, but a place where citizens have the right to repel state tyranny. When a civilian defends against police, a jury's decision can mean the difference between a life or death sentence, or freedom. These realities point to the importance of citizen education in gun and self-defense law. Education for Self-preservation & Maximizing Rights advocates street law programs as a potential means of educating civilians and police on a grassroots platform. This section also examines some of the obstacles to the feasibility of successfully defending against police. Finally, Toward a Future of Hope and Despair offers some concluding remarks on the viability of defending against police. It looks forward to prospects for reducing violence and to leaving the reader aware of how the need for protection from the police is real, and all too often, lacking.

Robust gun rights combined in praxis with self-defense may be a natural deterrent to police abuses that increases accountability. As one scholar has argued, police brutality is an organizational problem that must be remedied with systemic solutions as opposed to resorting to "rogue" or "rotten apple" narratives about police conduct:

First, it is factually inaccurate to focus on individual [police] deeds, and ignore the organization, in analyzing the causes of police conduct. Law enforcement organizations have cultures—commonly held norms, social practices, expectations, and assumptions—that encourage or discourage certain values, goals, and behaviors. Police agencies are culpable if they tolerate cultures that promote conduct that is morally or legally objectionable.[10]

The expansion of public education in self-defense law promises a means of reducing police misconduct nationwide.[11] In addition, there

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10. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493 (2004).

11. *But see* Cheng Cheng & Mark Hoekstra, *Does Strengthening Self Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 821, 849 (2013) (arguing that legislation passed creating castle and stand your ground laws do not deter burglary, robbery, or aggravated assault, but instead lead to increases in criminal homicides).

is the promise of putting more power into the hands of the people in jury boxes across the country, where indictments and acquittals take place. It also promises more civilian ownership of policing efforts—including the policing of police. Understanding the difference between criminal violence against police and a civilian's lawful right to self-defend will be critical moving forward in today's new law-and-order climate. Whether such a movement can manifest may depend on whether the public is willing to hold police as equally, if not more, accountable than civilians. After all, the police are hailed as professionals, not civilians; and above all, the law should afford leniency to the people. The law today has this equation reversed. The current law allows the state countless fatal errors with hardly any recourse for civilians, while a civilian's mistake in turn is usually met with the full brunt of the criminal justice system and its killing machine.

I. EXERCISING SELF-DEFENSE UNDER LAW OF COLOR

This section establishes a double-standard that exists in criminal justice generally, and more specifically when it comes to self-defense claims. When it comes to contending with the criminal justice system, the beneficiaries of law are mostly white, while minorities are burdened at practically every stage with heavy policing, more arrests, more convictions, and longer sentences. The difference in how Whites and others are treated in the justice system is explored, which illustrates in dramatic fashion how nearly identical instances of self-defense can have such drastically different outcomes. This section highlights these disparities, which, in turn, underscore the urgency of this thesis.

A. Race Matters to Everyone

The actors that churn the criminal justice system show racial biases at practically every phase of the process. When considering the procedures of police, players in courts, and jurors, studies have shown that race shapes the views of criminal suspects and defendants. Whether one scopes the conduct of police, prosecutors, judges, or juries, the outcome tends to be the same—disparate treatment for ethnic minorities.

Despite Fourth Amendment constraints, police procedure and street conduct offer a number of key insights to life on the ground.

Statistics show that police are more likely to question,[12] seize,[13] search,[14] and conduct SWAT raids against minorities.[15] African Americans, for example, are more likely to be subject to police force,[16] more likely to experience lethal force by police,[17] and more likely to be killed by police than any other demographic group in the country.[18] The legalization of racial profiling is not a peripheral or sideline feature of Fourth Amendment law:

> It is embedded in the analytical structure of the doctrine in ways that enable police officers to force engagements with African Americans with little or no basis. The frequency of these engagements exposes African Americans not only to the violence of ongoing police

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12. Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 847 (2016) ("New York City's stop-and-frisk policy, which a federal court found to have disproportionately targeted and impacted minorities, is perhaps the most well-known example of this.").

13. *Id.*; *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (finding NYC's stop-and-frisk policy unconstitutional, and noting that the people subjected to stops were "overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention.").

14. Moran, *supra* note 12, at 847 n. 49 ("'Jump-out' is the colloquial term many Washington, D.C. residents use to describe unmarked police cars whose occupants conduct surprise stops and frisks of unsuspecting residents. According to [Nicole] Flatow, jump-outs are 'for many black residents the mark of policing problems in the nation's capital: militaristic, seemingly arbitrary, and reeking of racial disparity.'") (quoting Nicole Flatow, If You Thought Stop-and-Frisk Was Bad, You Should Know About Jump-Outs, THINK PROGRESS (Dec. 10, 2014, 5:49 PM), http://thinkprogress.org/justice/2014/12/10/3468340/jump-outs).

15. Moran, *supra* note 12, at 847–48; *see also* U.S. DEP'T. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 2, 10, 16 (2014), https://perma.cc/PE2D-2LBG?type=pdf ("The [Newark Police Department] stops black individuals at a greater rate than whites.").

16. U.S. COMM'N ON CIVIL RIGHTS, REVISITING WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS at vii (2000), https://permanent.access.gpo.gov/lps13614/www.usccr.gov/pubs/guard/main.htm. A report by the U.S. Commission on Civil Rights backs up this claim, noting that poor people and minorities have consistently borne the brunt of police brutality, harassment, and misconduct. *Id.* The report concluded, "in their eagerness to achieve important goals such as lowering crime, some police officers overstep their authority, trample on individuals' civil rights, and may cause entire communities to fear the same people they hired and trusted to protect them." *Id.* Violence directed toward poor minorities has been a common characteristic of police abuse in America for decades.

17. *The Science of Justice: Race, Arrests, and Police Use of Force*, CTR. FOR POLICING EQUITY 12–14 (July 2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

18. Wesley Lowery, *More Whites Killed by Police, But Blacks 2.5 Times More Likely to be Killed*, CHI. TRIB. (July 11, 2016), http://www.chicagotribune.com/news/nationworld/ct-police-shootings-race-20160711-story.html.

surveillance, contact, and social control but also to the violence of serious bodily injury and death. Which is to say, Fourth Amendment law facilitates the space between stopping black people and killing black people.[19]

Indeed, so long as a legal basis can be articulated, many court opinions provide harbors for racial discrimination. One Court opinion has held that as long as an officer has a legal pretext to stop a person in a car, whatever other underlying motivations there may be, it does not make the stop unconstitutional.[20] This would seemingly allow an individual to implement a personal system of racial profiling, as long as this rule is scrupulously followed. Court rulings have also whittled down the power of the exclusionary rule by broadening the number of exceptions that apply to wrongful police conduct.[21] This development results practically in a greater number of convictions overall than would occur with a firmer exclusionary rule in place.

Like police, prosecutors have myriad ways to express racial animus under law. For example, prosecutorial discretion allows prosecutors the ultimate decision of whether to pursue a case, which has produced a justice system with African Americans being tried and convicted per capita more than any other racial group.[22] Moreover,

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19. Devon Carbado, *From Stopping Black People to Killing Black People*, 105 CAL. L. REV. 125, 125 (2017) (focusing on police contacts in Ferguson, Missouri and how "front end" contacts result in "back end" violence); *see also,* Ristroph, *supra* note 3, at 1185–86 (describing patterns in recent high-profile cases: "The encounter begins with a seemingly minor police intervention: a traffic stop, an order by the officer to stop walking in the street, an arrest for a petty offense such as selling loose cigarettes. The suspect is insufficiently cooperative, or perhaps only apparently non-cooperative. The officer asserts greater authority, the seizure quickly escalates, and the officer concludes that he is in danger. He kills the suspect.").

20. Whren v. United States, 517 U.S. 806, 813 (1996).

21. *See* Wong Sun v. United States, 371 U.S. 471, 481, 488 (1963). The question for the Court was whether the information on which the officers acted could have supported the issuance of an arrest warrant. *Id.* The exclusionary rule covers not only evidence seized directly but also evidence discovered later, the "fruit of the poisonous tree." Hudson v. Michigan, 547 U.S. 586, 607, 619 (2006). The several exceptions to the exclusionary rule include evidence revealed by an independent source, evidence that inevitably would have been discovered, and evidence found when the connection between the illegal police action and the discovery is remote or interrupted so that the suppression would not help to protect the Fourth Amendment right to be free of illegal searches and seizures. *Id.*

22. Over 65% of people sentenced in federal court every year are black or Hispanic. Glenn R. Schmitt & Elizabeth Jones, Overview of Federal Criminal Cases Fiscal Year 2016, U.S. SENTENCING COMM'N 3 (May 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_ Federal_Criminal_Cases.pdf.

prosecutors seek longer sentences for racial minorities[23] and are more likely to seek the death penalty for African Americans than any other race.[24] There are other mechanisms in place that allow prosecutors and defense counsel the opportunity to strike jurors on account of race. For example, in voir dire proceedings, it is much like the situation on the street for police; a prosecutor can strike a juror if the prosecutor can give a plausible reason for doing so, and the issue of race never surfaces, despite that race itself may be the predicate for striking in the first place.[25]

Judges likewise contribute to the disparate outcomes. Judges give longer sentences[26] and larger fines to minorities[27] and are less likely

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23. Harold J. Krent, *Post-Trial Plea Bargaining and Predictive Analytics in Public Law*, 73 WASH. & LEE L. REV. ONLINE 595, 606 (2017) ("Indeed, ProPublica recently released a study of risk assessment for recidivism assigned to 7,000 people arrested in Broward County, Florida, in 2013–14. The data revealed that race played a substantial factor in the recidivism projection, which then led to longer sentences for African Americans who committed similar offenses to whites.").

24. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 192 n. 101 (2001). As a result, defendants tried by all-white juries are more likely to be found guilty than those tried before more diverse juries. *Id.* at 182, 208. For black defendants in capital cases, all-white juries correspond with more likely imposition of the death penalty. *Id.* at 193 n. 104.

25. Joshua C. Polster, *From Proving Pretext to Proving Discrimination: The Real Lesson of Miller-El and Snyder*, 81 MISS. L.J. 491, 531 (2012).

26. Eric S. Fish, *Criminal Law Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 575–76 (2015) ("There is also some empirical evidence that judges sentence members of minority groups more harshly than white defendants. If judges are free to sentence for their own subjective reasons, it is difficult to see how they can be prevented from sentencing for bad reasons."); *see also* Ojmarrh Mitchell & Doris L. MacKenzie, *The Relationship Between Race, Ethnicity, and Sentencing Outcomes: A Meta-Analysis of Sentencing Research*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 2 (Dec. 2004), https://www.ncjrs.gov/pdffiles1/nij/grants/208129.pdf (summarizing eighty-five empirical studies of sentencing disparity, concluding that African-Americans and Latinos were generally sentenced more harshly than whites, and that "there was some evidence to suggest that structured sentencing mechanisms, such as sentencing guidelines, were associated with smaller unwarranted sentencing disparities.").

27, Alexes Harris, *Municipal Policing and Courts: A Search for Justice or a Quest for Revenue*, ALEXES HARRIS: BLOG (Mar. 22, 2016), https://www.alexesharris.com/single-post/2016/03/22/Municipal-Policing-and-Courts-A-Search-for-Justice-or-a-Quest-for-Revenue-Briefing-to-the-US-Commission-on-Civil-Rights ("While one in 100 American adults eighteen years of age or older lives behind bars, there are dramatic differences by race: one in eighty-seven White men, one in thirty-six Latino men, and one in twelve Black men live behind bars in the United States.").

to give them probation.[28] They often give higher bail amounts[29] and are less likely to grant bail.[30] Moreover, the judiciary has in place several holdings that grant police nearly every conceivable mistake in the execution of a warrant, whereas for civilian error, there is typically a severe price to pay.[31]

Juries are powerful legal institutions that can shelter bias in decisions about who gets indicted and convicted.[32] The members of a grand jury are responsible for deciding whether to indict an individual, and over all, minorities are more likely to be indicted.[33] At the trial level, petit jurors are responsible for deciding guilt as well as the sentencing.[34] Both types of juries allow for unfettered racial discrimination. These differences also bear out when it comes to who is afforded the privileges of self-defense law, since grand jurors have the power to indict or to believe a claim of self-defense, and a trial jury has the power to find guilt or whether to accept the same claim.

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28. John Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265, 269 (2014).

29. Harris, *supra* note 27 ("African Americans, Native Americans, and Latinos are disproportionately convicted and incarcerated. Monetary sanctions, solely because racialized communities are the disproportionate focus of the criminal justice system, are imposed in a disparate way on people of color and thus are implicated in perpetuating racial and ethnic inequality.").

30. Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1950, 1957 (2005) ("Judges detain a small minority without bail because they are deemed a flight risk or a danger to the community, and no other means may adequately ensure their presence at trial. But the vast majority of detainees languish in detention primarily because they are guilty of being too poor to meet bail."); *see* Gerard Rainville & Brian A. Reaves, *Felony Defendants in Large Urban Counties*, 2000, U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS 16 (Dec. 2003), https://www.bjs.gov/content/pub/pdf/fdluc00.pdf (Thirty-eight percent of state felony defendants in the seventy-five largest counties were denied bail or could not meet bail in 2000.).

31. United States v. Leon, 468 U.S. 897, 925 (1984) ([R]ecognizing that Officer Rombach had acted in good faith, the court rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good-faith reliance on a search warrant.).

32. *See generally* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843 (2015).

33. Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts.").

34. *Types of Juries*, U.S. COURTS, http://www.uscourts.gov/services-forms/jury-service/types-juries (last visited Nov. 28, 2017).

Taken as a whole, race matters at all procedural levels of the criminal justice system. As this section shows, when the discrete aspects of criminal justice work in tandem, a portrait of minorities bearing the brunt emerges, even when it comes to defending against police. The next section endeavors to illustrate just how disparate the treatment can be when individuals defend against police in their own home in the same state.

B. A Logical Absurdity

The cases of Henry Magee and Marvin Guy offer a lesson in how prosecutors and grand jurors can dole out protections for one person and withhold them from another.[35] Although these individuals were involved in similar events that were within a mere 100 miles of each other in the state of Texas, the legal outcomes were a million miles apart. However, these cases do more than illustrate the instability of self-defense law, they also show the unfair application of laws that treat nearly identical scenarios in radically different color-coded fashion. The unfortunate fact that white defendants get off, while Black defendants do not illustrates the possibilities of racial animus embedded in criminal justice.

Magee's case offers a powerful example of grand jurors recognizing a situation that warranted the valid use of self-defense.[36] In 2014, a Texas grand jury refused to indict Henry Magee for killing one police officer and wounding 5 others during the execution of a "no-knock" warrant on Magee's home.[37] The search was supposed to turn up weapons and marijuana cultivation, but instead, only turned up some seedlings and plants, and less than one ounce of dry marijuana.[38] The raid came in the early hours while Magee and his pregnant girlfriend were asleep.[39] Magee claimed he thought the intruders sought to cause them harm, and began firing a gun at the intruders.[40] The prosecutor of the case brought the facts as well as the law of self-defense to the grand jurors who ultimately returned a no bill on the murder charge, but indicted him for possession of "more than four

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35. *See* Radley Balko, *Some Justice in Texas: The Raid on Henry Magee*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/news/opinions/wp/2014/02/10/some-justice-in-texas-the-raid-on-henry-magee/?utm_term=.b7ed71ee8b09.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

ounces, but less than five pounds," of marijuana while in possession of a deadly weapon—a third degree felony that can carry a penalty of 2-10 years imprisonment.[41] As far as police killings go, Magee's case stands as a remarkable instance of a civilian using deadly force against the police and actually never having to go to trial for it.

A few months later, in a nearby town, one Marvin Louis Guy awoke to a similar intrusion.[42] Like Magee, he and his wife were in bed asleep when a SWAT team raided their place in the early morning hours under a no-knock warrant.[43] Guy similarly reacted to the intruders who forced their way into his residence, shooting one officer dead and wounding three others.[44] However, unlike the grand jury that refused to indict Magee, Guy was indicted and ultimately charged with capital murder and three attempted murders.[45] At the time of this writing, Guy sits behind bars awaiting potential execution.[46]

These two individuals highlight that the line between self-defense and capital offense is sometimes skin-thin. More befuddling is that at Magee's residence, there were at least some marijuana plants growing for his personal use. In Guy's case, there was neither money nor drugs found, which were the items specified in the warrant.[47] The difference results in Magee being spared the grind of a capital charge, while Guy must grapple with the system. The situation for Guy has worsened since a change in lawyers has forced him to ask for a delay in the trial date so that new attorneys can prepare his defense.[48] As Guy is being held on a four and a half million-dollar bond, he will likely spend the entire pretrial and trial period locked behind bars.[49] Thus, even if he mounts a successful defense that the jury uses to acquit, it speaks

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41. *Id.*; *see also* Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

42. Shane Bauer, *Two SWAT Raids. Two Officers Dead. One Defendant Is Black, One White. Guess What Happened,* MOTHER JONES (Oct. 21, 2014, 5:25 PM), http://www.motherjones.com/politics/2014/10/texas-no-knock-swat-raid.

43. *Id.*

44. *Id.*

45. Chris McGuinness, *Attorneys Ask Judge to Delay Trial of Accused Cop Killer*, KILLEEN DAILY HERALD, (Mar. 24, 2015), http://kdhnews.com/news/crime/attorneys-ask-judge-to-delay-trial-of-accused-cop-killer/article_fdb5306c-d260-11e4-8398-a7d305bd61af.html.

46. *Id.*

47. Bauer, *supra* note 42.

48. McGuinness, *supra* note 45.

49. Josh Sullivan, *Marvin Guy Case Gets National Attention*, KILLEEN DAILY HERALD (Mar. 21, 2017), http://kdhnews.com/news/crime/marvin-guy-case-gets-national-attention/article_cd61ed8e-0de5-11e7-b29e-8f901d3c8115.html.

nothing of the years he has already paid with his life to defend himself in court, after having to defend himself physically against police.

When examined side-by-side, the individual outcomes could not look any more different, and they suggest that race is paramount. Despite what race enthusiasts might attempt to postulate in today's age, be it post-racial, colorblind, or some other moniker, race remains a central theme in social, political, and legal consciousness.

II. GUN RIGHTS LOGIC

This part of the Article posits that the most recent proliferation of American gun carry laws is in large part a reaction to mass public shootings. The claim is substantiated by legislative trends of the last several decades that highlight the dominant rationales at play in the lawmaking.[50] As the discussions, commentaries, and formally published remarks reveal, self-defense is at the root of this legislative push. This part also includes a legal frame for self-defense law, which offers a snapshot of the legal status quo. Together, this work supports the thesis by showing that the lawmaking was the result of deep preoccupations about self-defense and defending others. Indeed, it is these types of tragedies that inspired the lawmaking to the present, where 6.53% of the U.S. adult population has a gun permit.[51]

A. Legislative Responses to Mass Shootings

A number of empirical metrics support that mass shootings trigger legislation that enhances both gun rights and self-defense protections. Scholars note a positive relationship between mass shootings and legislative trends, with one group of researchers finding that more than 20,400 pieces of gun-related legislation were produced after mass shootings in the last quarter century, with more than 3,000 becoming law.[52] According to the same study, a "single mass shooting leads to an approximately 15% increase in the number of firearm bills

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50. *See, e.g.*, Jeff Golimowski, Note, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post-*Heller *World*, 49 AM. CRIM. L. REV. 1599 (2012) (discussing the impact the Virginia Tech Shooting had on debates to expand gun carry laws).

51. John R. Lott, Jr., *New Study: Over 16.3 Million Concealed Handgun Permits, Last Year Saw the Largest Increase Ever in Number of Permits*, CRIME PREVENTION RES. CTR. (July 19, 2017), https://crimeresearch.org/2017/07/new-study-16-3-million-concealed-handgun-permits-last-year-saw-largest-increase-ever-number-permits/.

52. Michael Luca, Deepak Malhotra, & Christopher Poliquin, *The Impact of Mass Shootings on Gun Policy* 22 (Harvard Bus. Sch., Working Paper No. 16-126, 2016), http://www.hbs.edu/faculty/Publication%20Files/16-126_23dbdd9e-2135-4a5c-9979-cebc6b6492e4.pdf.

introduced within a state in the year after the mass shooting. This effect is largest after shootings with the most fatalities—and holds for both Republican-controlled and Democrat-controlled legislatures."[53] Across states, bills legislating firearms increase by two and one-half more in the year following a mass shooting.[54]

Whether, as a factual matter, expanded gun rights result in more or less crime seems to suggest the latter.[55] Earlier scholarship supported that expanded rights to carry laws result in substantial reductions in violent crime – with studies showing that murder rates and other violent crimes were reduced after the passing of concealed gun laws[56] and that "the presence of concealed handguns should reduce both the number of public shootings and the amount of harm caused by any one event."[57] Others have challenged the notion, while conceding that increased gun carrying has not had the unintended consequence of increasing violent crime.[58] Moreover, one report claims that concealed handgun permit holders are extremely law abiding, with holders in Texas and Florida being convicted of misdemeanors and felonies at one-sixth of the rate at which police officers are convicted.[59]

Mass shootings have greater effects on policy, per fatality, than ordinary gun homicides.[60] The last fifteen years bear an unmistakable surge in laws to expand gun rights in America. One might dub this the "post-Columbine" era, which is characterized by a considerable number of states passing concealed and open carry laws. These new laws have led to an increasing number of Americans carrying in a country whose citizenry is already among the most armed in the world.[61] Although the attacks of 9/11 contributed to the zeal for new

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53. *Id.* at 3.

54. *Id.* at 10.

55. Tomislav V. Kovandzic & Thomas B. Marvell, *Right-To-Carry Concealed Handguns and Violent Crime: Crime Control Through Gun Decontrol?* 2 CRIM. & PUB. POL'Y 363 (2003).

56. *See* John R. Lott, Jr. & William M. Landes, *Multiple Victim Public Shootings, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement* 44 (Univ. of Chi. Law Sch. John M. Olin Law & Economics, Working Paper No. 73, 1999); *see also* Florenz Plassmann, & John Whitley, *Confirming More Guns, Less Crime*, 55 STAN. L. REV. 1313 (2003) (reviewing empirical scholarship on the benefits of right-to-carry laws on crime rates).

57. Lott & Landes, *supra* note 56, at 17.

58. Kovandzic & Marvell, *supra* note 55, at 36.

59. Lott, *supra* note 51.

60. Luca, Malhotra, & Poliquin,, *supra* note 52, at 14.

61. Stephen Dinan, *Obama Gun Control Push Backfires as Industry Sees Unprecedented Surge*, WASH. TIMES, (Apr. 8, 2015), http://www.washingtontimes.com/news/2015/apr/8/obama-gun-control-push-backfires-as-us-firearms-in.

gun legislation, as did Second Amendment enthusiasm in the post *Heller-McDonald* decisions that individualized the right to bear arms,[62] the persistency of mass shootings has been a steady legislative force. Mass shootings continue to resonate with lawmakers. Most recently, the mass shooting in Las Vegas, Nevada, which killed fifty-eight people attending a country music festival, is recorded as the deadliest mass shooting in modern American history.[63] The threat of mass shootings remain a salient topic that preoccupies the public and its desire for protection.[64]

Discussions of bills and those leading to the passing of gun-related legislation are telling. For lawmakers, the threats posed by mass shootings drive debate on both sides of the issue. Whether one believes carnage could have been avoided if no automatic gun was used at the scene of a crime or believes that there remains a need for greater regulations of weaponry that can cause such carnage in the first place, both of these hypotheses are grounded in legislative reaction to horrific mass shootings.

As shown here, expansions of self-defense law often follow mass shooting events. One of the predominant notions in the debate is that lawful gun carrying can combat unlawful violence.[65] Although

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62. Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1451 (2012).

63. Lynh Bui, Mart Zapotosky, Devlin Barrett, & Mark Berman, *At Least 59 Killed in Las Vegas Shooting Rampage, More Than 500 Others Injured*, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting/?utm_term=.6db10b5ade45.

64. *See* Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (noting that in the early 1990s this theme had already been present in gun carry legislation).

65. *See e.g.*, S. 29-174, 2d Sess., at 6 (Alaska 2016) (describing situations in which concealed carriers help counter violence, but that these instances may not get reported. "Since 1958 all but two public mass shootings have been in areas where concealed carry was not allowed."); S. 82-4530, Reg. Sess., at 13 (Mich. 1999) ("allowing more honest citizens to carry guns benefits not only those citizens who are armed but also serves to protect those who choose not to carry a gun."); S. 98-164, Reg. Sess., at 26 (Ill. 2013) ("this lovely young woman watched her parents and 27 other people slaughtered because she didn't have her gun. . . . Gun-free zones are killing fields for crackpots."); S. 83-972, Reg. Sess., at 5 (Tex. 2013) ("People need to be able to protect themselves in public because government authorities are not always able to do so. While authorities claim they are able to respond quickly to shooters, too often people have died waiting for official response to arrive. If civilians were able to defend themselves, they could stop a shooter and save lives. . . . Current laws, by preventing civilians from bringing firearms onto a campus, make colleges and universities notoriously vulnerable targets."); S. 81-1893, Reg. Sess., at 5 (Tex. 2009) (on amending Penal Code § 46.03 (2009) to create an exception to the prohibition against carrying a weapon at a public or private university for concealed license holders: "In the Luby's

numbers are uncertain, the estimates of gun usage in self-defense is between tens of thousands to as high as two million a year.[66] The next section situates the discussion within a general overview of self-defense law as a means of better understanding how gun-related self-defense fits within the law.

B. Protecting the Person: Model Penal Code & Majority Views

This review of self-defense aims to be more than the typical academic rehearsal. Beyond laying a general frame of the black letter law, it endeavors to highlight how knowledge of self-defense law is critical at various stages of the criminal process. Ultimately, civilians, whether by grand jury or jury trial, decide whether a self-defense claim succeeds or fails. At trial, for example, if a defendant can prove to a jury that he acted in self-defense, it will prevent a criminal conviction. Long before such a trial, grand-jurors may consider self-defense when deciding whether to indict. At this stage, self-defense law in theory would also constrain a prosecutor's decision to file formal charges or seek indictment in the first place. Hence, this section serves as a reference for the critical role civilians play in the judging of self-defense claims, and points to a different type of firepower that civilians hold in court.

Today, defenses are primarily statutory, largely codified from the common law.[67] Self-defense is by far the most common trial defense,[68] which cuts across several doctrinal lines, including general self-defense, defense of another, and defense of property.[69] "[U]se of deadly force in self-defense apparently constituted an excuse, rather than a justification in early English legal history."[70] At Common Law, one

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Cafeteria massacre, the Columbine High School massacre, and the Virginia Tech massacre, the assailants moved slowly and methodically, shooting their victims from a very close range. A person does not have to be a deadeye shot to defend himself or herself against an assailant standing only a few feet away.").

66. Clayton E. Cramer & David Burnett, *Tough Targets: When Criminals Face Armed Resistance from Citizens*, CATO INST. (Feb. 2, 2012), http://www.cato.org/sites/cato.org/files/pubs/pdf/WP-Tough-Targets.pdf.

67. DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES 285 (2d ed. 2010).

68. Neil P. Cohen, Michael G. Johnson, & Tracy B. Henley, *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 981 (1993).

69. Paul H. Robinson, *United States*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 563, 581 (2010).

70. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 232 (7th ed. 2015); *see also* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 7 (2008) ("Self-defense doctrine can be rationalized along either of these lines. The doctrine can be characterized as a 'justification,' for example . . . one

prominent criminal law professor notes, self-defenses were categorized as "justification" as opposed to an "excuse."[71] The difference, according to another, was that a justified act is one that "the law does not condemn, or even welcomes."[72] The point is clear when considered in a situation where mass lives are at stake: the use of self-defense by any third party would be welcomed by potential victims, not simply condoned. Justified conduct conveyed a different moral message since the conduct was not wrongful, but perhaps affirmatively desirable.[73] "[A]lthough a person satisfies the elements of an offense, his or her offense is tolerated or even encouraged because it does not cause a net societal harm."[74] Excused crime exculpates a defendant under a different theory, namely that the defendant "has admittedly acted improperly—has caused a net social harm or evil—but the defendant is excused because he or she cannot properly be held responsible for his or her offense conduct."[75] An excuse defense meant only forgiveness for the conduct.

Why law and society value self-defense is obvious, but worth reiterating. First is the basic legal ability to ward off unlawful violence and threats of violence. This point is so simple that one could hardly imagine what forbidding self-defense would look like and the upper hand it would give criminals in their exploits, while at the same time handcuffing victims of crime with the inability to fight back against unlawful aggression. In fact, the law of self-defense has been characterized in American jurisprudence as a "natural law," which predates the Constitution and is so engrained in the American consciousness that it goes without saying.[76] This is a strong argument for understanding self-defense as a justification—the conduct is not

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can also see self-defense as an 'excuse.' On this account, the 'primal impulse' of self-preservation triggered by the prospect of an impending deadly attack is said to destroy one's capacity to control the urge to resort to protective violence and to disrupt reasoned contemplation of alternatives.").

71. DRESSLER, *supra* note 70, at 207 (describing procedural differences at common law, "the excused wrongdoer was not on the same footing as the justified actor, since the former party was subject to incarceration while petitioning for a pardon and for restitution of his property. The justified actor was free of all legal impediments.").

72. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 13 (2d ed. 2008).

73. DRESSLER, *supra* note 70, at 208.

74. Robinson, *supra* note 69.

75. *Id.*

76. *See* David Kopel, *The Natural Right of Self-Defense: Heller's Lesson For the World*, 59 SYRACUSE L. REV. 235, 238–40 n.18 (outlining case law where the court recognizes self-defense as a natural right).

merely tolerated by society, but is a public good.[77] As another commentator has suggested, the "urge to preserve or defend oneself is so embedded in human nature that the legal system likely could not prevent it even if there was some reason to do so."[78]

i. Self Defense: Reasonable Belief, Necessity, Unlawful Force, Proportionality

Self-defense is ultimately an act of self-preservation, and it is sometimes described as "nature's eldest law."[79] Every state in the United States and the federal government recognizes some sort of self-defense claim.[80] This right allows a non-aggressor to counteract force or violence through a corresponding appropriate level of force.[81] In other words, conduct that would otherwise be criminal is viewed as justified conduct. Although some states provide broader protections than others, all states grant the individual right to self-defend in the face of unlawful physical aggression.[82]

Traditional self-defense doctrine includes a set of distinct elements that a defendant must show to avoid punishment. An innocent victim is justified in using proportionate force against another if that victim believes it is necessary to avoid the imminent danger of unlawful bodily harm.[83] Under the Modern Penal Code ("MPC") § 3.04, the law delineates a similar rule: "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting

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77. ENCYCLOPEDIA ON CRIME AND JUSTICE 899 (Joshua Dressler ed., 2d. ed. 2002).

78. CRUMP ET AL., *supra* note 67, at 372; *see also* DRESSLER, *supra* note 70, at 223 (noting if a law abolished self-defense, it could be struck down as unconstitutional according to District of Columbia v. Heller, 554 U.S. 570 (2008) which held that the Second Amendment provides an individual right to possess a firearm and to use it for lawful purposes, including self-defense).

79. JOHN C. COLLINS, THE SATIRES OF DRYDEN 17 (1909); *see also* JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 131–32 ("Self-defense is a part of the law of nature; nor can it be denied the community, even against the king himself.").

80. DRESSLER, *supra* note 70, at 49.

81. Joshua D. Brooks, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J. L. & PUB. POL'Y 533, 537 (2015) (noting that aggressors also have a limited claim to self-defense in instances where the provocation results in a disproportionate application of force); *see also* 2 WHARTON'S CRIMINAL LAW § 135 (14th ed. 1978) ("A defendant who provokes an encounter as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot claim that he acted in self-defense.").

82. DRESSLER, *supra* note 70, at 223.

83. *Id.*

himself against the use of unlawful force by such other person on the present occasion."[84] For defendants, a sufficient showing of these elements entitles the defendant to a jury instruction on self-defense, and specifically, that it may consider self-defense in its deliberations.[85]

On its face, these principles seem simple enough, but practical application yields perpetual issues. For example, how much force is appropriate for defending oneself? How does an individual's height, weight, and reputation factor in, and what about objects used in self-defense? Does a slingshot count as a deadly weapon? What if the victim provoked the attack? What if someone is genuinely frightened of attack, but that fear falls below what is reasonable?

Given that both Magee and Guy faced prosecution in the State of Texas, one might start with that state's main defense statute. The Texas Penal Code § 9.31 offers a relatively robust set of rules for would-be defenders:

> [A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary . . . is reasonable if the actor:
> (1) knew or had reason to believe that the person against whom the force was used:
> (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
> (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
> (C) was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery;
> (2) did not provoke the person against whom the force was used; and

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84. State v. King, 235 P.3d 240, 242–43 (Ariz. 2010) ("[C]omments to the MPC highlight the omission of the 'sole motivation' requirement and explain that the MPC provision 'does not demand that [the defendant's fear] be the sole motive [for the defendant's] action.'").

85. *See id.* at 243 (authorizing the use of a self-defense jury instruction when all essential elements are shown).

(3) was not otherwise engaged in criminal activity . . . .[86]

A plain reading of the text shows no exception for police, which means that they may also meet the elements that trigger a response in self-defense. The statute implements a proportionality standard that would make it permissible for unlawful deadly force to be met with the force of a firearm. In the Magee and Guy cases, neither was technically a response to "unlawful" force since in both situations, the police were executing lawful warrants.[87] The grand jury in each case saw things differently, however. In Magee's case, the jury may have focused on the reasonable belief aspect of self-defense law and found that self-defense was reasonable.[88] In Guy's case, the jury may not have even considered whether the belief was reasonable, but simply excluded the possibility because the claim did not meet the "unlawful" element.[89]

As the Texas statute indicates, self-defense has several essential elements to use force to repel unlawful force.[90] In addition to meeting the basic elements, other conditions may be required. For example, as the above section makes clear, only non-instigators can claim self-defense and they must have not been involved in criminal activity, which has historically been dubbed the "clean hands" rule.[91] Moreover, a successful self-defense claim will often depend on whether the force used in self-defense was proportionate to the unlawful force. There may also be retreat rules that require withdrawal in certain situations before employing force.

The reasonable belief in the need for self-defense, described as the necessity element, is rooted in the concept of "imminency."[92] This factor determines the genuineness of one's need for force, which is based on an immediate threat that is capable of achievement. Imminence is a temporal component that limits the use of force to situations in which defenders face an existential harm, in real time.[93] Relatedly, the just measure is an emergency that must be used only

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86. TEX. PENAL CODE ANN. § 9.31 (West 2016).
87. *See* Bauer, *supra* note 42.
88. Balko, *supra* note 35.
89. Bauer, *supra* note 42.
90. *Id.*
91. Paul H. Robinson et al., *The American Criminal Code: General Defenses* 7 J. LEGAL ANALYSIS 37, 53 (2015), (noting that thirty-six jurisdictions provide that an aggressor who withdraws and effectively communicates his withdrawal may claim self-defense if the other party continues to attack).
92. *Id.* at 51.
93. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 77, at 902.

to repel, but not pursue.[94] When a defender is put on the offensive, and force is used after the threat ceases, the protection of self-defense is forfeited.[95] In situations that lack imminency, the conduct will not be protected and is more likely to viewed as retributive or retaliatory versus defensive.[96] The Model Penal Code (MPC) formulation veers from statutory constructions by using the phrase "immediately necessary."[97] This terminology effectively broadens the temporal scope of when self-defense would be lawful by allowing a would-be defender to act sooner rather than what common law statutes would allow.[98] This element may take into consideration the use of verbal threats, which may help to trigger an individual's right to self-defend.

Most self-defense statutes keep the common-law formulation that an individual is justified in repelling "unlawful force" only.[99] But what constitutes unlawful force that triggers the right to self-defend?

It appears that there is a general agreement on this point but few explicit statutory definitions codifying this shared understanding. "Force that is objectively justified is not 'unlawful force', but force that is only excused . . . is 'unlawful force' and will trigger a right of defense even though the attacker may be excused for the attack."[100]

The MPC defines unlawful force as "force including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offence or tort except for a defense . . . not amounting to a privilege to use the force."[101] This requirement means that the force being repelled must have no legal authorization. So, repelling a burglar who breaks into a home to murder is lawful, but repelling against police serving a warrant in the same manner is not.

The MPC adopts this element in its formulation.[102] Unfortunately, there is potential for confusion since threats like the ones faced by Magee and Guy were lawful but they nonetheless warranted self-defense as a response. The MPC provision, and by extension others

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94. *Id.*
95. *Id.*
96. *Id.*
97. Robinson et al., *supra* note 91, at 52.
98. DRESSLER, *supra* note 70, at 250.
99. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 77, at 902.
100. Robinson et al., *supra* note 91, at 52.
101. MODEL PENAL CODE § 3.11 (1985).
102. *Id.* at § 3.04(1) ("Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

that follow its formulation, have been criticized for being too narrow.[103] As will be described below, this problem has important complications in the context of "no-knock" warrants where lawful force is used to raid unsuspecting parties in their home, who despite fear of illegal intrusion, will not be granted self-defense because the force being repelled is treated as lawful.

Use of self-defense against police is possible in certain circumstances. A majority of jurisdictions and the MPC disallow the use of force to resist an arrest by a peace officer, even if the arrest is unlawful.[104] The rule applies with one exception, which is recognized in over thirty jurisdictions, that an arrestee may use defensive force if the officer uses excessive force—this is regardless of whether the arrest is lawful.[105]

Finally, the amount of force that can be used in self-defense is often governed by adherence to principles of proportionality. A majority of jurisdictions require that an actor use only the force "that he reasonably believes is necessary."[106] The proportionality requirement is a limiting force that ensures self-defense is not excessive in comparison to the threatened harm. Proportionality is a relational concept that considers the force of the threatened harm, and then permits a range of responses based on the severity of that threat.[107] To cite an extreme example, a frail elderly person threatening with a potato peeler would not warrant the use of deadly force as a means of self-defense. Deadly force, according to a majority of jurisdictions, is permitted force against threats of death, serious bodily injury, rape, and kidnapping.[108] The ideal sense of proportionality would be for non-deadly force to repel a non-deadly or deadly attack. However, sometimes unlawful force can be repelled only by deadly force, which likewise fits within the proportionality principle.

ii. Defense of Another

As the previous section outlined self-defense law as it applies to the individual, this section looks at defending innocent victims from

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103. Robinson et al., *supra* note 91, at 50–51.

104. *Id.* at 55 ("A minority of fifteen jurisdictions, however, differs from the majority by denying the right to self-defense against lawful arrests, but allowing it against unlawful arrests.").

105. *Id.* at 56.

106. *Id.* at 52.

107. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 77, at 901.

108. Robinson et al., *supra* note 91, at 49, 52.

unlawful force. Every jurisdiction embraces a justification for defense of third persons.[109] Most jurisdictions lay out a common principle for defending others: A person is justified in using force to protect a victim from unlawful force by an aggressor to the extent the victim is lawfully entitled.[110] In such cases, the would-be defender's right to use force parallels the victim's right to repel the attack. By extension, if the victim were at the end of unlawful deadly force, the victim would be lawfully entitled to use deadly force in turn, as would any third party who intervened to protect the victim. Deadly force is thus justified if there is a reasonable belief that it is necessary to use force to protect another against imminent harms.[111]

MPC § 3.05 outlines rules for the use of force to protect other persons.[112] According to this provision, use of force to protect a third person is permissible when:

> (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
> (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
> (c) the actor believes that his intervention is necessary for the protection of such other person.[113]

The construction of this provision does away with the common law "alter ego" rule.[114] Under that rule, an intervener could use force to protect a person, but, if the intervener was mistaken in the belief that the person had the right to self-defense, there would be no legal protection.[115] The alter ego rule meant that *D,* the intervener, was placed in the shoes of *X*, the person being defended, and acted at her peril. . . . [I]f *X* had no right of self-defense, even though a reasonable person would have believed that *X* did, this rule provided that *D* was not justified in using force to protect *X*.[116]

Still, there was the possibility of sentence mitigation through an

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109. *Id.*
110. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 77, at 903.
111. *See* Robinson et al., *supra* note 91, at 49–50.
112. MODEL PENAL CODE § 3.05 (1985).
113. *Id.*
114. Marco F. Bendinelli and James T. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 REGENT U. L. REV. 153, 153 (1995).
115. *Id.*
116. DRESSLER, *supra* note 70, at 255.

imperfect or mistaken self-defense claim.

Because of the MPC's influence, the majority of jurisdictions today hold that an intervener may use force to the extent that such force reasonably appears to the intervener to be justified.[117] This construction means that the use of force is based on the subjective belief of the intervener, even if that belief is mistaken. However, it does not mean that an intervener has free reign to a purely subjective understanding in all instances. Because the code, in addition to retreat requirements, also provides that if the intervener was negligent or reckless in that belief, the intervener can be convicted for a criminal homicide based on either mental state.[118] Hence if there were a negligent or reckless killing in defense of another, the intervener could be liable for either type of homicide.[119]

iii. Duty to Retreat, Castle Doctrines, Stand Your Ground

The mapping of self-defense elements is more complex since some states have retreat requirements, while others have passed laws that reject the notion. On the ground, some states maintain retreat or "retreat to the wall" limitations on the use of self-defense.[120] American jurisdictions diverge on this issue, with the majority of states applying no duty to retreat.[121] A majority of thirty-three jurisdictions have no duty to retreat, even if one could do so in complete safety.[122] However, eighteen jurisdictions and the MPC recognize a duty to retreat at least before using deadly force.[123]

The general principle of retreat at common law was that before employing force, especially deadly force, one must first consider and use options that would prevent the use of force at all.[124] Retreat

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117. *Id.* at 256.

118. ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 77, at 900.

119. *Intervener Held Liable for Assault Despite Reasonable Belief That His Conduct Protected Another from Unlawful Harm*, 63 COLUM. L. REV. 160, 162–63 (1963); *see also*, People v. Webster 34 N.E. 730 (N.Y. 1893) ("[The charge of the court was] not in accordance with the law [upon the subject of self-defense] . . . the defendant should act upon the reasonable appearances, and if, from those appearances, he reasonably believed his life to be in danger, although no danger in fact existed, he was still justified in defending himself, even to the extent of taking life.").

120. Michelle Jaffe, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 159, 160 (2005).

121. DRESSLER, *supra* note 70, at 229.

122. Robinson et al., *supra* note 91, at 56.

123. *Id.*

124. *See* Regina v. Smith, 173 Eng. Rep. 441, 443 (1837) (holding that deadly force to defend oneself was only justified if the defender "retreated as far as he could.").

jurisdictions typically require that if one can escape or avoid having to harm another person in self-defense, that choice must be employed.[125] The current statutory state has historical roots: "Americans rejected such English cowardice just as they rejected English rule; thus, a majority of Americans gained the right to stand their ground and defend themselves as their fledgling country gained its independence from England."[126]

The United States Supreme Court has rejected a general duty to retreat. In *Brown v. United States*, the Court declared that, "if a man reasonably believes that he is in immediate danger of death or grievous bodily harm he may stand his ground . . . ."[127] In the Court's opinion, imposing a duty to retreat on an individual in a moment of terror was not realistic since:

> [d]etached reflection cannot be demanded in the presence of an uplifted knife . . . it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.[128]

The MPC illustrates how these rules intersect with general self-defense principles. For example, as a general measure, § 3.04 2(b)(i) disallows use of deadly force by one who provoked the use of force against himself in the same encounter."[129] The code is also adamant that even if one is not the provoker, one may not use deadly force against an aggressor if he knowingly "can avoid the necessity of using such force with complete safety by retreating."[130]

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125. Jaffe, *supra* note 120, at 160.

126. *Id.* at 123, at 156 n.12.

127. Brown v. United States, 256 U.S. 335, 343 (1921) ("The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense.").

128. *Id.*

129. MODEL PENAL CODE § 3.04(2)(b)(i) (1985) ("The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if . . . the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter.").

130. *Id.* § 3.04(2)(b)(ii) ("[T]he actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing

Many laws have put limits on traditional retreat rules. Popularly known as "Castle Laws," "Make My Day Laws," and "Stand Your Ground Laws," most states have statutes that offer specified protections in the use of self-defense that dispense with the need to retreat.[131] For example, from 2000 to 2010, more than twenty states passed this type of legislation.[132] Like the expansion of gun rights, this area of self-defense law has seen a remarkable expansion, particularly in the number of Castle and Stand Your Ground laws.

The Castle doctrine was a common law limitation that qualified the traditional expression of self-defense law.[133] The word "castle" was deliberate in the age of kings, and meant what it said: when it came to one's home, the rules of retreat did not apply.[134] Whereas traditional self-defense requires proportionality in force to repel, Castle doctrine creates "a presumption that lethal force is authorized against an unlawful intruder in one's home . . . ."[135] As one prominent legal scholar describes, "[t]his doctrine provides that a non-aggressor is not ordinarily required to retreat from his dwelling, even though he knows he could do so in complete safety, before using deadly force in self-defense."[136] States with strong Castle legislation have several key features. These states do not require homeowners to attempt to retreat prior to employing force to protect themselves.[137] This view upholds the homeowner's rights on a pedestal, as a sacred zone in which one's right to defend is absolute. States with enhanced Castle laws extend these rights and allow civilians to use force in cars or at the workplace to repel unlawful force.[138]

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to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take . . . .").

131. Jaffe, *supra* note 120, at 169.

132. Cheng & Hoekstra, *supra* note 11, at 825–27.

133. SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 184, (William C. Jones ed., 1915); *see also*, RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 6, ("The Castle Doctrine was probably first formally invoked in common law in Semayne's Case in 1572; it has been a right recognized and protected by British law ever since.").

134. Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of Bearing Arms for Self-Defense*, 61 AM. U. L. REV. 585, 594 (2012).

135. *Id.*

136. DRESSLER, *supra* note 70, at 230–31.

137. *Id.*

138. *See, e.g.,* Kelley Beaucar Vlahos, *Floridians' Self-Defense Rights Expanded*, FOX NEWS (May 03, 2005), http://www.foxnews.com/story/2005/05/03/floridians-self-defense-rights-expanded.html; Tyler Younts, *North Carolina's New Castle Doctrine, Stand Your Ground, and Other Firesms Laws Changes*, 5 CHARLOTTE L. REV. 267, 281–82 (2014).

Not all Castle doctrine laws are equal, and indeed, some states provide stronger rights in this area than others, which leads to some confusion, particularly when jurisdictions split about whether the doctrine applies to cohabitants and guests.[139] As the Texas statute indicated, a defender may use lethal force if necessary when an intruder has unlawfully entered or is attempting to enter by force or while committing certain crimes, yet no attempt to retreat is required before one is justified in using self-defense to repel an attack.[140] In Florida, the dwelling being protected need not even have a roof; it can be mobile or immobile, and can even be as temporary as a tent.[141]

One state, Indiana, recently made headlines for passing legislation that specifically identifies "public servants" as potential threats that could trigger self-defense.[142] In enacting this legislation, the Indiana general assembly stressed the "unique character of a citizen's home," and that a citizen should feel "secure in his or her own home against unlawful intrusion by another individual or a public servant . . . people have a right to defend themselves and third parties from physical harm and crime."[143] The legislation states:

> (i) A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
> (1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
> (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
> (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose

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139. Jaffe, *supra* note 120, at 168.

140. TEX. PENAL CODE ANN. § 9.31 (West 2016).

141. Vlahos, *supra* note 138 ("Residents of Florida's castles – whether mobile homes or stately mansions – got extra protection last week when Florida Gov. Jeb Bush signed into law a bill that allows would-be victims of life-threatening assaults to use deadly force on their assailants without fear of prosecution or civil litigation.").

142. IND. CODE ANN. § 35-41-3-2 (LexisNexis 2016) (Discussing legislative findings, noting that, "the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public servant").

143. *Id.*

property the person has authority to protect.[144]

Although the Indiana General Assembly saw this statute as simply embodying already existing principles,[145] it was the first type of legislation of the sort in the United States that leaves no doubt that lawful police conduct may still trigger a lawful response in self-defense. More critically, the language apparently leaves a path open for self-defenders in the home to defend against police executing a no-knock warrant. As the statute states, a home-defender must have a reasonable belief that the force is unlawful.[146] Such wording might presume to help plug a legal hole caused by these types of warrants, which are technically "lawful," but which also trigger a reasonable belief that someone is breaking into the castle to cause harm. Under such a statute, perhaps of all the cases examined above, Magee, and Guy, would presumptively be justified in using lethal force. Even though the police force was lawful, the method used to execute the warrant cannot trump a person's right to defend if that is really what the defender reasonably thought was necessary.

Other states grant narrower rights for would-be defenders. In California, citizens may protect their homes with deadly force to repel physical danger, but it does not extend to theft, protecting cars, or the workplace.[147] New York law forbids deadly force if one knows with certainty that one can retreat to avoid using that force; deadly force is allowed in the home only if the use is by one who was not the initial aggressor in the altercation.[148] Other states offer limited or no Castle law granting the right to protect the home.[149]

Popularly dubbed "stand your ground," "line in the sand," or "no duty to retreat" laws are laws that authorize an individual to self-

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144. *Id.*

145. *Id.* ("By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion . . . .").

146. *Id.*

147. Price v. Sery, 513 F.3d 962, 964 (9th Cir. 2008) (reasoning that, "members may be required to use deadly force when their life or the life of another is jeopardized by the actions of others . . . [if] to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury.").

148. N.Y. PENAL LAW § 35.15 (McKinney 2016).

149. Cristina G. Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. CRIM. L. & CRIMINOLOGY 593, 594 ("Some states still require individuals who are attacked in their own home by a cohabitant to 'retreat to the wall,' instead of 'standing their ground' against their attacker. As such, some victims of domestic violence find themselves in a precarious situation, having to retreat farther than they would have to if they were being attacked by a stranger.").

defend against threats and perceived threats.[150] These laws essentially support a strong Castle principle that covers an individual, not simply in the home or car, but anywhere that individual has a legal right to be. Hence, the variety of laws, as the monikers imply, suggest that an individual should not have to retreat but can legally stand one's ground. This scope of this view is expressed candidly in statutory language that grants law-abiding citizens the right to "protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others."[151]

Other states that have passed or are considering such laws already have implemented these principles in case law. For example, in Virginia, a state that lacks Castle statutes, has common law versions of the principles that make it clear that deadly force in self-defense may be used anywhere a citizen has a right to be.[152] In *State v. Toler*, the Colorado Supreme Court interpreted the state's existing Castle law as embodying the common-law principle of "no retreat," and that unless a person was the first aggressor, "a person does not have to 'retreat to the wall' before using deadly force to defend himself."[153]

III. POLICE AS TRIGGER, THE VERY TYRANNY THE SECOND AMENDMENT MEANT TO CHECK

There is a strong case to be made that gun rights and self-defense laws described above were never intended for Blacks and other ethnic

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150. Denise Crisafi, No Ground to Stand Upon? Exploring the Legal, Gender, and Racial Implications of Stand Your Ground Laws in Cases of Intimate Partner Violence 90 n.3 (2016) (unpublished Ph.D. dissertation, University of Central Florida) (on file with University of Central Florida Libraries) (stating that twenty-three states have Stand Your Ground Statutory Law, ten states have Stand Your Ground Case Law, and seventeen states have a Duty to Retreat); *id.* at 108–09 (stating that, of the states that have Stand Your Ground laws, eight currently require a "Duty to Retreat" for victims of domestic violence, intimate partner violence, or family violence).

151. S.C. CODE ANN. § 15-11-420(b) (2006).

152. Veronica Gonzalez, *Recent Cases Support Shooting Intruders if a Life is in Danger*, VIRGINIAN-PILOT, Feb. 12, 2011 at A1 (providing examples of case law where citizen use of deadly force was deemed reasonable).

153. *See* People v. Toler, 9 P.3d 341, 343–44 (Colo. 2000) (noting that the very idea of a statutory "castle doctrine" in Colorado is a little strange because the castle doctrine, by its own terms, is an exception to another doctrine—the duty to retreat. And except in certain specific circumstances, there has never been a duty to retreat in Colorado).

minorities.[154] Indeed, gun laws have historically been used as a way to keep guns out of the hands of non-whites, and during the times of slavery, self-defense was legally impossible.[155] But what about today in Twenty-First Century America—what happens when police are the source of physical force that triggers an individual's right to self-defend? One of the core rights enshrined in the Second Amendment is the right to self-defense, which was largely intended to be a direct check against government oppression.[156] Yet as recent headlines in the United States reveal, police are perpetrators of conduct that can get no more graphic in oppression: Blacks have been shot unarmed, with arms raised, in the back, while lawfully carrying firearms, as well as while handcuffed.[157] As noted nearly two decades ago, a comprehensive review on the police use of deadly force reported that, "every study that has examined this issue found that blacks are represented disproportionately among those at the wrong end of police guns."[158] This section continues the story by examining recent killings that have sparked unrest, followed by a more focused look at the two recent high profile police killings that sparked the Dallas protests. These episodes evince situations in which a civilian may very well have been justified in intervening against the police. As the earlier section detailed that self-defense protects against unlawful force that threatens serious harm, this section considers when Blacks are the subject.

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154. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?, 70 CHI.–KENT L. REV. 1307, 1316 (1995).

155. Liz Mineo, *The Loaded History of Self-Defense*, HARV. GAZETTE (Mar. 7, 2017), https://news.harvard.edu/gazette/story/2017/03/the-loaded-history-of-self-defense/ (noting that, "most black codes prohibited African-Americans from possessing weapons for self-defense.").

156. Joe Wolverton II, *Rand Paul Bill Protects Gun Owners From Executive Orders*, NEW AM. (Dec. 24, 2015), https://www.thenewamerican.com/usnews/constitution/item/22201-rand-paul-bill-protects-gun-owners-from-executive-orders ("[E]xisting or proposed executive action that infringes on the powers and duties of Congress under section 8 of article I of the Constitution of the United States [or] of the Second Amendment to the Constitution of the United States shall have no force or effect.") (quoting The Separation of Powers Restoration and Second Amendment Protection Act, S. 2434, 114th Cong. § 4) (2015)).

157. Joshua Correll et. al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 ("Police officers were compared with community members in terms of the speed and accuracy with which they made simulated decisions to shoot (or not shoot) Black and White targets. Both samples exhibited robust racial bias in response speed.").

158. James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 189 (1988).

Supreme Court precedent places constitutional limits on the use of police force.[159] As a general matter, the Fourth Amendment doctrine regulating the use of force by police officers has been described as "deeply impoverished."[160] In the textbook case, *Tennessee v. Garner*, police used deadly force to stop a fleeing nonviolent suspect who was believed to have committed a burglary.[161] After being told to halt by police, the suspect tried to escape by jumping a fence but was shot and killed.[162] The Court held that police effected a "seizure" for Fourth Amendment purposes and that the seizure was unlawful if it was unreasonable.[163] Simply shooting at the suspect without regard to whether the suspect posed a risk of injury was per se unreasonable and thus violated the suspect's constitutional rights.[164]

When considering limits of police conduct, it is important to clarify unlawful police conduct from excessive force that threatens bodily harm or death. The MPC and most jurisdictions abide by the general rule that an arrestee has no privilege to resist arrest if the arrest is merely unlawful and the officer is using the permissible amount of force, even if a court later determines that the arrest was unlawful.[165] On the contrary, just over a dozen states permit an individual to resist an unlawful arrest.[166] However, when police use excessive force that threatens bodily harm or death, the right to self-defend is triggered, regardless of whether the seizure would otherwise have been lawful. The harm is qualitatively different from cases that involve merely unlawful searches and seizures. In those cases, public policy dictates that one seek remedy in court rather than use force to resist an

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159. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 197 (2004) ("[C]laims of excessive force are to be judged under the Fourth Amendment's 'objective reasonableness' standard."); Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

160. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) (arguing that justification law should be imported into Fourth Amendment doctrine regulating police violence).

161. *Garner*, 471 U.S. at 3.

162. *Id.* at 4.

163. *Id.* at 11.

164. *Id.*; *see also* Scott v. Harris, 550 U.S. 372, 381 (2007) (holding that an officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment); Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that a Fourth Amendment inquiry is one of "objective reasonableness").

165. CRUMP ET AL., *supra* note 67, at 409.

166. Robinson et. al., *supra* note 91, at 111; Jeffrey F. Ghent, Annotation, *Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest*, 44 A.L.R.3d 1078, § 3 (1972).

unlawful arrest.[167] However, this prohibition on resisting arrest is excepted when the arrestee believes that the officer intends to use excessive force in making the arrest.[168] That a civilian should not use force to repel an unlawful search or seizure by police is rooted in the notion that the individual should endure the unlawful treatment and then have his day in court.[169] When an unlawful arrest threatens bodily harm or death, the equation changes and self-defense is proper; after all, a lethal outcome could result in no day in court at all.[170] This possible outcome evokes the old saying, "better judged by twelve than carried by six."

For victims of unlawful police conduct, the theory is that there are other avenues of redress. Most prominent is the so-called "Exclusionary Rule," which gives a criminal defendant a means of challenging evidence found as a result of police violation of the Fourth, Fifth, and Sixth Amendments.[171] Civil law also affords remedies for police violations of civil rights.[172] In these instances, the law can provide a shield or sword as necessary to redress police wrongs in court.

When unlawful police conduct is coupled with excessive force, however, an individual or intervener is justified in using force to repel the police, even deadly force if necessary.[173] As a California court declared in *People v. Curtis*: "allowing resistance to excessive force, which applies during a technically lawful or unlawful arrest, protects a person's right to bodily integrity and permits resort to self-defense. Liberty can be restored through legal processes, but life and limb cannot be repaired in a courtroom."[174]

Understanding this distinction is critical for analyzing police killings. In recent years, police killings of black males continue to be the subject of headline news. "In organizing around accountability for police killings in black communities, movement actors have raised questions about the role of legal process in limiting police violence and

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167. *See* Unied States v. Ferrone, 438 F.2d 381, 390, 390 n. 21 (3d Cir. 1971); *see also* MODEL PENAL CODE § 3.04(2)(a)(i) (1985).

168. Jaffe, *supra* note 120, at 158.

169. *Ferrone*, 438 F.2d at 390.

170. MODEL PENAL CODE § 3.04(2)(b)(i)–(2)(b)(ii) (1985).

171. Gilbert v. California, 388 U.S. 263, 273–74 (1967); Wong Sun v. United States, 371 U.S. 471, 487 (1963); Mapp v. Ohio, 367 U.S. 643, 657 (1961).

172. *See* 42 U.S.C. § 1983 (2012). *But see* Dukes v. Deaton, 852 F.3d 1035, 1046 (11th Cir. 2017) (holding that even though a police officer used excessive force in the detonation of a flashbang, the officer was entitled to qualified immunity for § 1983 purposes).

173. Ghent, *supra* note 166, at 1085–86.

174. People v. Curtis, 450 P.2d 33, 39 (Cal. 1969).

have challenged the purported fairness, neutrality, and evenhandedness of police and the state."[175] Part of the phenomenon is intertwined with technological tides that have simplified the ability to record and share recordings instantly. With widespread technology available, American society is becoming privy to the widespread world of police aggression that was once treated as mere anecdote. In instances where clearly a stun gun or baton would have sufficed to subdue an individual, police have not hesitated in using the deadliest of force, including a recent case of an officer shooting involving a black therapist who was shot even though he was unarmed, lying on the ground, with arms raised in surrender.[176] In this news story, the officer was asked why he shot the man, to which he replied, "I don't know."[177] It is highly likely that he was not aware that his own implicit bias may have been the starting point.

In this video era, the shooting of Oscar Grant stands as one of the inaugural high-profile instances of police killing captured on camera. Footage of the incident looked like a scene from Beat Street, featuring San Francisco BART Officers, who had detained Grant and others who were allegedly involved in an altercation on the subway earlier that New Year's morning.[178] The situation went awry when Grant tried to stand up, which was greeted by officers rushing him and restraining him to the floor.[179] Without hesitation, one officer shot him in the back as he lay face down, handcuffed and unarmed.[180] In the video, onlookers scream and utter sounds of disbelief after Grant is shot.[181] The killing went viral and sparked protests in nearby Oakland, which turned violent on multiple occasions.[182] The killing

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175. Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 360 (2015).

176. Caroline Simon, *An Unarmed Black Therapist Was Shot by Florida Police While Helping a Person with Autism*, BUS. INSIDER (July 21, 2016, 9:46 AM), http://www.businessinsider.com/an-unarmed-black-therapist-was-shot-by-florida-police-while-helping-an-autistic-patient-2016-7.

177. Charles Rabin, *Charles Kinsey Was Shot Less Than Six Minutes After Police Arrived*, MIAMI HERALD (Aug. 5, 2016, 5:22 PM), http://www.miamiherald.com/news/local/crime/article94009242.html.

178. *See* Streetgangs, *New BART Footage of Oscar Grant Getting Shot in The Back by Police with Audio*, YOUTUBE (July 6, 2010), https://www.youtube.com/watch?v=5h-IEg8c6uI.; Movieclips, *Beat Street (6/9) Movie CLIP – Caught By the Cops*, YOUTUBE (July 15, 2013), https://www.youtube.com/watch?v=SiJQJiUZ5Jw.

179. Streetgangs, *supra* note 178.

180. *Id.*

181. *Id.*

182. *See* Sean Alfano, *Oakland Shooting Verdict Sparks Riots After Johannes Mehserle Dodges Murder Rap in Oscar Grant Death*, N.Y. DAILY NEWS (July 9, 2010, 8:06 AM), http://www.nydailynews.com/news/national/oakland-shooting-verdict-

inspired the movie, *Fruitvale Station*, which covers Grant's last 24 hours before his shooting.[183]

Following the killing of Grant, the killing of seventeen-year-old Trayvon Martin caused a social uproar for what looked like an instance of criminal homicide to many.[184] Although this was not a police-involved killing, for many it left the same impression when prosecutors initially refused to charge the killer, basing their rationale on the Florida's "stand your ground" law.[185] The failure to prosecute launched widespread protest and mounting public pressure, which eventually led to Martin's killer being charged with murder, but acquitted.[186] For many, the outcome offered further proof that black lives mattered little, and that even civilians could get away with killing Blacks.

Two years later in 2014, an explosion of police killings received widespread media attention, particularly those caught on camera. The cases of Michael Brown, Freddie Grey, Tamir Rice, and Eric Garner occupied headlines and catalyzed widespread protest throughout the country.[187]

In 2015, police killings continued to mount. According to Mapping Police Violence, more than one hundred unarmed black people were

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sparks-riots-johannes-mehserle-dodges-murder-rap-oscar-grant-death-article-1.464411; *see also* Jesse McKinley, *In California, Protests After Man Dies at Hands of Transit Police*, N.Y. TIMES (Jan. 8, 2009), http://www.nytimes.com/2009/01/09/us/09oakland.html.

183. FRUITVALE STATION (Forest Whitaker's Significant Productions 2013).

184. *See generally* Dan Berry et. al., *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES (Apr. 1, 2012), http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html (describing both sides of the incident and its social impact).

185. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/us/george-zimmerman-verdict-trayvon-martin.html.

186. *Id.*

187. *See* Deborah Bloom & Jareen Imam, *New York Man Dies After Chokehold by Police*, CNN (Dec. 8, 2014, 5:31 PM), http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/; *Freddie Gray's Death in Police Custody - What We Know*, BBC NEWS (May 23, 2016), http://www.bbc.com/news/world-us-canada-32400497; Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events That Led to the 12-Year-Old's Death*, CLEVELAND.COM (Jan. 18, 2017, 2:00 PM), http://www.cleveland.com/court-justice/index.ssf/2017/01/tamir_rice_shooting_a_breakdow.html; Elliot C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/.

either killed by police or died in police custody.[188] Of these, the case of Sandra Bland is among the most egregious of deaths.[189] As video footage reveals, Bland was forcibly removed from her vehicle, and was forced to the ground by the arresting officer.[190] Later, Bland would be found dead in her cell, a death that the police department ruled a suicide.[191]

Bland's death set the stage for a violent 2016, which would feature a new round of killings on tape that would graphically illustrate police aggression and human bloodshed on cell phone, computer, and TV screens across America. Hardly half of 2016 had passed when more killings exposed police violence against black suspects. For two consecutive days, the world witnessed police killings that painted in blood the tensions between Black communities and the police. The killings of Alton Sterling and Philando Castile were recorded, and in Castile's case, his girlfriend held onto her phone and streamed the aftermath of the shooting live.[192]

These killings set protests and cataclysmic events in motion when days later at a protest of the killings in Dallas, a sniper attacked the crowd, specifically targeting police.[193] The killing spree left at least five officers dead and others seriously wounded, set a new standard in anti-police violence, and left some rethinking the prudence of open carry laws.[194]

The Dallas shooting visually illustrated how open carry laws can have a direct impact on policing dynamics. In the attacks against police, one Black individual openly carrying a rifle was widely

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188. *Police Killed More Than 100 Unarmed Black People in 2015*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/unarmed/ (last visited Nov. 26, 2017).

189. Matti Hautala, *In the Shadow of Sandra Bland: The Importance of Mental Health Screening in U.S. Jails*, 21 TEX. J. C.L. & C.R. 89, 90 (2015).

190. Sophia Bollag & Terri Langford, *Video: DPS Officer Became Enraged Over Cigarette*, TEX. TRIB., July 21, 2015, https://www.texastribune.org/2015/07/21/video-officer-became-enraged-bland-over-cigarette/.

191. *Id.*

192. Richard Fausset et. al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html?_r=0; New Day, *Woman Streams Graphic Video of Boyfriend Shot by Police*, CNN, http://www.cnn.com/videos/us/2016/07/07/graphic-video-minnesota-police-shooting-philando-castile-ryan-young-pkg-nd.cnn (last visited Nov. 26, 2017).

193. Manny Fernandez et. al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html.

194. *Id.*

broadcast as a person of interest throughout the media.[195] However, further police investigation revealed that this individual was in fact not associated with the attacker. This scenario raises critical questions about how police are supposed to handle such terror emergencies when others openly have weapons. In situations like the Dallas sniping, where the enemy is unknown, anyone with a gun is a potential threat. At the same time, police may be hindered in their work by focusing attention and resources on wrong suspects, particularly when they are Black suspects. The point was evident at the 2016 Republican National Convention when the head of the Cleveland police patrolman's union, Steve Loomis, asked the governor to suspend the state's open carry laws for the span of the convention.[196]

In some of these instances, it is important to understand that just because some of the officers involved either did not face prosecution or were not convicted for their actions, it scarcely means that their conduct did not warrant self-defense. There may indeed have been justification had any of the victims or a third party chosen to use force to repel the police. One obvious reason for this is that a criminal prosecution requires a higher standard of proof than a self-defense claim.[197] That many of these officers were not charged or convicted of a crime says nothing as to whether a jury would have rejected a self-defense claim had a civilian struck back. The different elements and standards of proof involved make it impossible to know with certainty whether legal self-defense could have prevailed in either situation. These tensions show that little has changed from a decade ago where it was noted: "Police officers are rarely prosecuted for murder because most fatal police shootings are deemed justified by prosecutors who

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195. Ben Guarino, *Man Falsely Connected to the Shooting by Dallas Police is Now Getting 'Thousands' of Death Threats*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/during-deadly-dallas-shooting-confusion-swirled-around-armed-man-carrying-a-rifle/?utm_term=.d546f89346a0.

196. Adam Ferrise, *Cleveland Police Union to Ask Governor to Suspend Open Carry Law for RNC*, CLEVELAND.COM (July 17, 2016, 10:52 PM), http://www.cleveland.com/rnc-2016/index.ssf/2016/07/cleveland_police_union_to_asks.html.

197. Nicole Shoener, *Burden of Proof in Civil and Criminal Cases*, LEGALMATCH (May 12, 2016, 10:15 PM), https://www.legalmatch.com/law-library/article/burden-of-proof-in-civil-and-criminal-cases.html. The burden of proof in a criminal case is "beyond a reasonable doubt," which is the highest burden. *Id.* When an individual claims self-defense, the burden is the lower "preponderance" standard. CRUMP ET AL., *supra* note 67, at 365. Thus, just because a police officer avoids a criminal conviction, it does not preclude the possibility of a successful self-defense claim.

decline to prosecute or by grand juries that decline to return indictments."[198] In cases where an officer is prosecuted, the officer is usually acquitted or given a lighter sentence than when a civilian commits the same act.[199]

This section supports the proposition that no one should be above the law and especially the law of self-defense. When police officers cross the boundary and engage in unlawful behavior that threatens a civilian's life or limb, self-defense must be considered the greatest asset an individual possesses against the state. When combined with gun laws that allow open or concealed carry and the right to possession of a weapon in the home, these legal rights can provide a power check on police misconduct. Exactly how these ideas might best be broadcast and practiced are discussed below.

IV. EDUCATION FOR SELF-PRESERVATION & MAXIMIZING RIGHTS

That self-defense is about protecting from unlawful force and that police are sometimes the source of unlawful force, forges the conclusion that self-defense necessarily includes defending against police. Still, the challenge stands as to how to implement practical defenses in the real world. The law of self-defense, as discussed throughout, is the basis for one's self-preservation in life, yet the topic has hardly been an intellectual endeavor for Americans, with some exceptions, including licensed gun carriers who tend to be self-defense minded. This section tries to fill in the gap by positioning Street Law programs as a means of promoting greater civilian and police awareness of a civilian's right to defend and defend others—and how lawful gun carrying can lead to greater social justice—even if it means using a gun to resist a police officer. There is great public benefit in teaching civilians their rights, however, there is added public good when gun owners assert their rights to protect themselves and fellow-citizens from police abuses. This section also considers the practical obstacles that prevent these ideas from materializing in a meaningful way, and how self-defense law is compromised by the execution of no knock warrants.

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198. Cynthia Lee, *"But I Thought He Had a Gun": Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 2 (2004).

199. Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 727 (1996).

A. Street Law 2.0: Spreading the Word

A potentially practical method for educating civilians on these issues is grassroots street law programs. Street Law is an approach to teaching the basics of law to community audiences.[200] Street Law programs in the past have focused on civil rights, voting, conflict resolution, criminal and civil law, as well as family and consumer rights.[201] The point of such programming is to teach citizens about areas of law that are most practical to the target community's day to day experiences. Moreover, Street Law programs offer the benefit of legal services by teachers who operate "away from the constraints of legal service delivery; because the relationship between teacher and student is not necessarily structured around active legal dilemmas."[202] "There is potentially much more freedom to formulate the goals of the interaction, and to share, question, and shape narratives regarding the interrelationship of life and law."[203] Such a self-defense campaign might plug into existing Street Law infrastructure and highlight the justificatory aspect of self-defense as favorable conduct. The education might also stress how the right to carry is a privileged position in society that can be used to promote greater justice for all citizens.

Street Law programs have typically involved law students teaching youth about juvenile justice and other areas of law.[204] In addition to these core issues, future programming should invest in teaching the law of self-defense as the most basic of an individual's rights—the right to self-preservation—which is the basis for practically all other rights a person may possess. Police, civilian, and juror training in implicit bias would also help to ensure that self-defense is a reality for all, with a cautious eye on how the system tilts on race.[205]

The basic nature of self-defense, coupled with the seemingly non-

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200. *About Us*, STREET LAW INC., http://streetlaw.org/en/about/who_we_are (last visited Nov. 26, 2017) (a private, non-profit organization, whose goal is to promote citizen legal education).

201. *Id.*

202. Elizabeth L. MacDowell, *Law on the Street: Legal Narrative and the Street Law Classroom*, 9 RUTGERS RACE & L. REV. 285, 325 (2008).

203. *Id.*

204. *What is Street Law?*, STREET LAW INC., http://streetlaw.org/en/Page/916/What_is_Street_Law (last visited Nov. 26, 2017).

205. *See* Lee, *supra* note 32, at 847 (prescribing that "educating jurors about implicit bias and encouraging them to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence can be beneficial in helping to ensure a truly impartial jury").

stop assault on minority civilians by police warrant an education campaign that is directed not only at civilians, but at police as well.[206] Police training suffers in fundamental ways, including problems in morality and deliberation.[207] Hence, police training could be enhanced through such programing, and ongoing reminders that civilians have self-defense rights and that escalating violence only risks it in turn. Such an educational program would be valuable for all Americans as a means for both checking police power, as well as teaching civilians that everyone is invested with the power to help defend other civilians. With greater knowledge about self-defense law, there may be greater understanding about the difference between civilian shootings and police shootings. As it stands, police rarely ever face prosecution when they kill civilians. Of those, only the tiniest fraction is ever convicted. Greater public awareness and monitoring may stem the tide of police abuse when citizens take greater charge of their right to ensure justice on the streets.

For gun enthusiasts and advocates of the Second Amendment, these ideas should be welcome as convergent with what the Second Amendment is at the core concerned about—self-defense and freedom from oppression.[208] This is not just about the ability to walk around with a concealed gun, but about protecting the underlying meaning of the right to possess a gun. Understanding these principles is critical for gun carriers to make the most of their lawful possession of firearms.

B. Obstacles for the Thesis

Determining whether more robust gun rights actually distribute more firepower to the people is complicated. There are multiple factors at play that undermine whether any meaningful defense is ever possible against police. These are the realpolitik of the American criminal justice system, where acting to save one's life can sometimes cost the same. At the same time, certain portions of America are more

206. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, WASH., DC: OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (highlighting recommendations on improving policing, including officer training.); *see also* Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 150–51 (2016).

207. *See* EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING 138–89 (5th ed. 2006).

208. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (stating that "the inherent right of self-defense has been central to the Second Amendment right").

armed than others—by law—as described below. The legal disenfranchising of felons from gun ownership renders underclass, ethnic minority communities less able to arm themselves legally. Moreover, the fact remains that when it comes to exercising the right to resist police, African Americans are at a disadvantage because they live in jurisdictions where it is unlawful to resist an unlawful arrest.[209] These facts of life tame the thesis at various levels, much of which is due to the relentless grind of racism and infirm policies that permit seemingly unlimited collateral consequences on felons that make recidivism the rule rather than the exception in American corrections.[210]

i. Felony Disenfranchisement and the White Man's Burden to Carry

Perhaps one of the most pressing complications for gun advocates who seek greater social justice is that minorities are disproportionately prohibited from possessing a firearm.[211] This is so because nearly all state and federal felons are unable to possess a firearm lawfully. According to 18 U.S.C. § 922(g)(1) (2012) possession: "shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."[212]

This collateral consequence governs both state and federal felons by effectively banning possession for anyone who has committed a state or federal felony. [213] The inability to possess a firearm disparately impacts minority populations since ethnic minorities are disproportionately convicted of felonies. Hence, in addition to revoking a felon's ability to vote, to serve jury duty, and to exercise a full range of social benefits, many state laws cause felons, regardless of the underlying felony, to forfeit their right to own firearms even for

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209. Robinson et. al., *supra* note 91, at 113 ("[A]mong the sixteen most urban jurisdictions . . . only Nevada allows an actor to resist unlawful arrest.").

210. Matthew R. Durose et. al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. DEP'T OF JUSTICE 1, 1 (April 2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf ("Overall, 67.8% of the 404,638 state prisoners released in 2005 in 30 states were arrested within 3 years of release, and 76.6% were arrested within 5 years of release.").

211. *See* David Badat, *The Discriminatory History of Gun Control*, 140 SENIOR HONORS PROJECTS 1, 1 (2009), http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1142&context=srhonorsprog.

212. 48 U.S.C. § 922(g)(1) (2012).

213. *Id.* § 921(a)(20) (felons convicted of business offenses involving antitrust violations or unfair trading practices and state misdemeanors punishable by a term of imprisonment of two years or less are exempt from the prohibition).

self-defense. Federal courts have upheld a federal statute that makes firearm possession unlawful even for domestic-violence misdemeanants.[214] The disenfranchisement is broad and odd, considering that non-violent felons are the majority in prison.[215] The bans thus extend to disenfranchise those who did not commit assaultive crime. Felony disenfranchisement and other forces create a presence in which white males represent the most armed class of citizenry, while minorities are disproportionately deprived of the same Second Amendment rights.[216]

At both federal and state levels, such laws have not gone unchallenged.[217] This is particularly the case in light of the Second Amendment rights recognized in the *Heller* and *McDonald* cases.[218] As both opinions seemingly approved of disenfranchising felons of gun possession rights, states have been somewhat unpersuaded that the rights granted to individuals in *Heller* disturbs laws that ban felons

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214. *Id.* § 922(g)(9); *see* United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010); United States v. White, 593 F.3d 1199, 1205-06 (11th Cir. 2010).

215. *Offenses*, FED. BUREAU OF PRISONS (SEPT. 23, 2017), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

216. Here it is worth noting another potential area of convergence between Black Lives Matter campaigns and gun enthusiasts. For example, there are currently millions of Americans who have had the right to bear arms revoked by the government, yet the NRA has failed to push back on this relatively easy way of stripping a civilian of the right to gun ownership. While the NRA has propagated the idea that politicians want to take away gun rights, for many, this has happened already. Here then, the NRA's interest in fighting laws that deprive citizens of guns overlaps with minority groups who have disproportionately lost the right to own guns. To the present, the NRA has been somewhat silent to felony disenfranchisement and the plight of fellow Americans, even though gun disenfranchisement laws seemingly represent an ongoing attack on the Second Amendment.

217. *See* United States v. Joos, 638 F.3d 581, 589 (8th Cir. 2011) (upholding 18 U.S.C. § 922(g)(1)'s federal ban on felony possession of a firearm); United States v. Davis, 406 F. App'x 52, 53–54 (7th Cir. 2010) (rejecting a defendant's argument that firearm possession by a felon was protected by the Second Amendment and upholding denial of a motion to dismiss an indictment under 18 U.S.C. § 922(g)(1) as frivolous); United States v. Kanios, No. 1:10cr100, 2011 WL 841080, at *1, *2 (N.D.W. Va. Feb. 18, 2011) (holding that the defendant's indictment did not infringe upon his Second Amendment rights because language in Heller and McDonald about felons supported the outcome); United States v. Hart, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (denying defendants motion to suppress evidence because the right Heller protects is to possess a firearm in the home for self-defense, thus "it was not a violation of Hart's Second Amendment rights to stop him on the basis of the suspicion of a concealed weapon"); Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 127–32 (2013).

218. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

from possessing a firearm.[219] Many courts note that in both cases, the opinions specifically mention that the rulings should not be viewed as casting doubt on prohibitions on the possession of firearms by felons.[220] To be sure, bans have been upheld when the felon purchases or possesses a firearm,[221] possesses a firearm in his own home[222] or automobile,[223] possesses ammunition,[224] or is convicted of a non-violent offense.[225]

Despite the fact that felony disenfranchisement laws seem straightforward, there are soft points to recognize. For example, "courts have been relying upon the public versus private nature of the use of firearms in order to decide Second Amendment challenges . . . [and] some courts may be willing to base their decisions solely on the location of the regulatory infringement."[226] One court has stressed that there should be two standards for reviewing felons in possession charges: a strict scrutiny standard applying to regulations for in-home possession and an intermediate standard for possession on the street.[227] Self-defense and justification defenses to a felon-in-possession charge have been recognized in every federal circuit.[228] Furthermore, federal courts have signaled that the ban against felons is not absolute and the presumption that a felony is disqualifying may be rebutted.[229] For example, under the right circumstances, a "law abiding" citizen whose felony was not serious and long ago might effectively challenge the ban.[230]

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219. *McDonald*, 561 U.S. at 742; *Heller*, 554 U.S. at 570; *see* James D. Lockhart, Annotation, *Respecting Second Amendment Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons*, 64 A.L.R. 6th 131 (2008).

220. *McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 626.

221. Farmer v. Alaska, 235 P.3d 1012, 1012–13 (Alaska 2010).

222. People v. Cross, No. C060735, 2010 WL 5113807, at *2 (Cal. Ct. App. 2010).

223. State v. Curtiss, 242 P.3d 1281, 1281 (Kan. Ct. App. 2010).

224. People v. Allen, No. F055410, 2009 WL 1697981, at *12 (Cal. Ct. App. 2009).

225. People v. Schwartz, No. 291313, 2010 Mich. App. LEXIS 2046, at *20, *21 (Mich. Ct. App. 2010); State v. Whitaker, 689 S.E.2d 395, 405 (N.C. Ct. App. 2009).

226 Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 510 (2012).

227. *See* United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011).

228. Kahn, *supra* note 217, at 119.

229. *See* Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 181 (2013).

230. United States v. Moore, 666 F.3d 313, 320 (4th Cir. 2012) ("We do not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to § 922(g)(1) could succeed."); United States v. Barton, 633 F.3d 168, 174 (3d Cir. 2011) ("To raise a successful as-applied challenge [defendant] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections."); United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010) ("Heller

Needless to say, one who cannot lawfully possess a gun, by default, cannot carry one. The inability to possess a gun coincides with the fact that most felons are disproportionately minority and return to neighborhoods with high rates of crime and violence, or as one commentator notes, "Post-incarceration, felons are more likely than other groups to move to neighborhoods where the use of armed self-defense is imperative."[231] The inability to possess a firearm for their family's protection leaves many vulnerable. As felons tend to concentrate in poor, marginalized communities, the question arises: How many people in ethnic minority neighborhoods can lawfully carry a gun in the first place? To be sure, as Blacks and Latinos are disproportionately prosecuted and punished in the criminal justice system with felony convictions, their communities are systemically more vulnerable. Second Amendment disenfranchisement renders individuals the least able to protect themselves in communities with the highest rates of crime.

This is not to imply that disenfranchisement is solely responsible for this racially lopsided state of affairs. There are other forces; and as some scholars have noted, concealed handgun laws were passed as a method of prohibiting Blacks from carrying arms in some parts of the United States.[232] In *Watson v. Stone*, Justice Buford commented on the law's racist historical origins as a means of disarming Negro laborers in Florida:

> The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their

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referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."); United States v. Duckett, 406 F. App'x 185, 187 (9th Cir. 2010) (Ikuta, J., concurring) ("I would examine whether, notwithstanding the Supreme Court's dicta in *District of Columbia v. Heller*, the government has a substantial interest in limiting a non-violent felon's constitutional right to bear arms."); United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("The question may be less clear, however, where the underlying felony is non-violent . . . permanently restricting their Second Amendment right to self-defense.").

231. Kahn, *supra* note 217, at 130.

232. Cramer & Kopel, *supra* note 64, at 681.

> possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people . . . .[233]

This judge's words indicate that the very type of law that Whites use to arm themselves today was used in a past era by police to disarm blacks through selective enforcement. Back then, Whites were carrying guns illegally, but were hardly checked for this or prosecuted; meanwhile, Blacks were rigorously searched and prosecuted if they did not have a permit to carry.

These historical factors have had long-lasting impacts, but today's federal ban is equally harsh. Consider the following personal anecdote: The law makes it such that a college student from Texas who went to school in Massachusetts in 1988 and brought a .22 caliber rifle for protection in a private home rental can be convicted of failing to possess a Firearm ID Card, a felony in Massachusetts. The gun, legally purchased at a flea market in Houston, became a penal liability that would last indefinitely. Twenty-five years later, back in Houston, he is still barred from possessing a firearm. Although now he is a tenured, double-doctorate law professor, he is still not entrusted to own a gun legally. Despite having no arrests or altercations with police since this non-violent felony and despite that the very felony that has barred him from owning a gun has never been a crime in the State of Texas and is not a crime today, he is barred by federal law from possessing a firearm to protect his four children. Even at the workplace, he is less protected now that campus carry has started in Texas as of August 1, 2016,[234] which means that he will physically be outgunned at work, as well. Such is the long reach of felony disenfranchisement.

Needless to say, disenfranchisement laws also leave ex-felons less able to protect third parties against unlawful injurious conduct from police. Indeed, the places where Garner, Gray, Sterling, and others were killed are statistically less likely to be places where an individual can lawfully carry. As collateral consequences go, the racial spin highlights that while more and more Americans arm themselves legally, statistically, fewer and fewer are Black or Latino.

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233. Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially).

234. Trymaine Lee, *New Texas Law Allows College Students to Carry Guns on Campus*, NBC NEWS (Aug. 1, 2016, 12:51 PM), https://www.nbcnews.com/news/us-news/new-texas-law-allows-college-students-carry-guns-campus-n620911.

ii. Risks of Defending: From Death to Death Sentence

There are a number of risks for would-be defenders to defend themselves or others against police. The case of Matthew Stewart offers a stark account of the dangers of self-defending against police. When a raid team served a no-knock warrant on the veteran Stewart's home, he is alleged to have killed one officer and wounded others.[235] Stewart was in jail awaiting trial on one charge of aggravated murder and seven counts of attempted aggravated murder, all first-degree felonies,[236] and was also charged with growing marijuana in his home, a second-degree-felony. However, the day after a judge rejected his attorney's arguments that a police officer lied to obtain the warrant that police used to intrude on Stewart's premises, Stewart committed suicide.[237] This case continues to be investigated and the raid has been characterized as an instance of police incompetence.[238]

Among other aspects of defending oneself or another against excessive force by police is the risk of counter-violence. This is to say that even if an individual is justified in employing force against police, a jury may never get the chance to hear this defense if the alleged defender is deceased from the violence. Having one's day in court to plead self-defense is meaningless in circumstances that leave a would-be defender dead. When an officer kills a suspect who has not been tried, the "officer assumes the role of judge, jury, and executioner without offering the suspect any of the protections normally accorded through the criminal justice system."[239] The disadvantages of self-defending are many and harsh, but self-defense transcends these rational considerations in favor of survival.

Moreover, as Guy's case illustrates, the full weight of the system threatens any individual who contemplates self-defense when doing

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235. Radley Balko, *How a Drug Raid Gone Wrong Sparked a Call for Change in the Unlikeliest State in the Nation*, HUFFINGTON POST (Oct. 27, 2013, 7:31 AM), http://www.huffingtonpost.com/2013/10/24/utah-drug-raid-matthew-david-stewart_n_4138252.html; Ben Lockhart, *Lessons Gained from Stewart Shooting Review*, STANDARD EXAMINER (July 26, 2014, 8:28 PM) http://www.standard.net/Courts/2014/07/27/Learning-from-the-Stewart-incident-Shooting-summary-released.html.

236. Lockhart, *supra* note 235.

237. *Id.*

238. *See* Andreas Rivera, *'Peace Officer' Film Claims Coverup in Matthew Stewart Shooting*, STANDARD EXAMINER (Oct. 1, 2015, 12:07 PM), http://www.standard.net/Police/2015/09/30/Peace-Officer-film-claims-coverup-in-Matthew-Stewart-shooting.

239. Lee, *supra* note 198, at 33.

so results in having to be locked up in jail awaiting a capital trial. Although he has not been convicted of a crime, Guy remains jailed waiting to see whether a jury convicts him and demands his life or a life sentence.[240] In his case, the move to save his life might end up costing it in the end, showing that for some, exercising the Second Amendment and self-defense is not a guarantee.

iii. Unequal Application of Discretion

The problem of discretion pervades practically every aspect of this discussion. From the would-be defender to police officer, prosecutor, and jurors, there are multiple discretionary judgments that could collectively thwart not just a more robust self-defense system and more firepower to the people, but thwart racial justice as well.

How discretion manifests can be viewed in multiple contexts. In the initial instance, when a lawful gun carrier witnesses a situation in which police have triggered a response in self-defense, the call to exercise discretion arises. Here, the question is whether an armed civilian would come to the defense of an individual like Garner. The assumption that an able-bodied carrier would come to the defense of someone being unlawfully subjected to deadly police force is hardly a given. In a time where racism is reality, it could be said that would-be defenders simply assume young Blacks or Latinos are getting their just deserts or worse, that police are just doing their job.

Additionally, prosecutors and police exercise immense discretionary powers. Police are largely responsible for enforcing the laws, and they are notoriously biased, as noted in several high-profile Department of Justice studies on Baltimore, Chicago, and New York police departments.[241] Moreover, police are trained to use force along a continuum in response to a subject's resistance:

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240. Josh Sullivan, *Orders Signed in Marvin Guy Capital Murder Case,* KILLEEN DAILY HERALD (Feb. 23, 2017), http://kdhnews.com/news/crime/orders-signed-in-marvin-guy-capital-murder-case/article_8a69875a-f9f2-11e6-9abd-bf6b2aedd9dd.html (Killeen police officer shot by Guy when officers attempted to serve a no-knock warrant at his home).

241. *Justice Department Announces Findings of Investigation into Baltimore Police Department*, U.S. DEP'T OF JUSTICE (Aug. 10, 2016), https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department; *Justice Department Announces Findings of Investigation into Chicago Police Department*, U.S. DEP'T OF JUSTICE (Jan. 13, 2017), https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-chicago-police-department; *Justice Department Reaches Agreement with City of Yonkers, New York, to Enhance Police Department Policies and Procedures*, U.S. DEP'T

> In a typical framework, verbal noncompliance from the suspect may be met with verbal commands. But "passive resistance" (failure to comply with commands) may be met with "hands-on tactics" or pepper spray; active resistance (efforts to escape or avoid arrest that are unlikely to inflict injury) may be met with batons, Tasers, and other nondeadly force; and in accordance with the doctrinal standards discussed above, any threat of death or serious bodily injury to the officer or anyone else may be countered with deadly force.[242]

This posture not only illustrates the principle that disobedience is not to be tolerated, but that there are multiple discretionary decision-making steps that can be undertaken to de-escalate most encounters.

The discretionary stops, searches, and arrests performed by police produce the defendant-fodder for prosecutors, who then exercise another level of discretion in the decision to file a complaint against an individual or seek a grand jury indictment.[243] There are seemingly few constraints of either type of discretion, police or prosecutorial, which leave a broad scope for discretionary decisions. Yet, the discretionary decisions are internal as well since police and prosecutors must work closely together to enforce the law.[244] That prosecutors rely on police in a way that make it all the less likely that they will ever prosecute police misconduct—it is like turning on one's own.[245] More certain is that an individual who self-defends against police is near-guaranteed to be prosecuted. On the contrary, in cases of killings of unarmed Black men by police, it is common that cases against the officers are not even brought to a grand jury.[246]

The judiciary as an institution likewise harbors biases that affect the successful use of self-defense by minority defendants. For example, the defendant must meet the burden of production to the requisite level of proof before a jury will be instructed on self-defense as a basis for acquittal. Hence, judges are critical in determining

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OF JUSTICE (Nov. 14, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-yonkers-new-york-enhance-police-department-policies.

242. Ristroph, *supra* note 3, at 1212–13.

243. Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty,* 97 B.U. L. REV. 489, 490 (2017).

244. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1469–70 (2016).

245. *Id.* at 1470.

246. Roger L. Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS L.J. 363, 377 (2016) ("Even where the prosecutor does take the case to state grand juries, they rarely indict.").

whether a defendant meets this initial burden of proof and whether a judge accepts or rejects the claims may be based on implicit understandings. In addition, the role of the juries are equally as critical as the judges' role. A grand jury's refusal to indict and a petit jury's decision to acquit are no different from the police or prosecution, subject to discriminatory forces.

Of course, the white elephant of this phenomenon is whiteness itself, which will allow some to be treated as self-defenders, while others are tried for capital murder. The potential for self-defense law to be racially applied is nothing theoretical, but embodies another aspect of racism in criminal justice. The cases of Magee and Guy illustrate the point with the White man getting off at the early stage of grand jury indictment, while the Black man is put through the capital grind of the criminal justice system.

Some of the racial underpinnings of this inequity are blunt, but some are the result of implicit biases or what might be described as "unconscious racism" that affect police, prosecutors, judges, and juries[247] or those "attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it."[248] As research has shown, the bias has a systemic effect, starting with police officers who believe Blacks and Browns are more criminal, and hence, they spend more time in such neighborhoods, which results in more arrests and convictions.[249] Even the decision to shoot may be influenced by a person's ethnicity, as studies have demonstrated that Blacks are shot "more rapidly and/or more

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247. *See generally* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (explaining the concept of "unconscious racism" and its effect on police, prosecutors, judges, and juries).

248. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 293 (2012) ("[P]eople are more likely to see weapons in the hands of unarmed black men than unarmed white men, and to more quickly shoot them as a result.").

249. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1555 (2013) ("Failure to recognize the effects of implicit racial bias is especially problematic in cases involving black male victims and claims of self-defense because such bias can make the defendant's fear of the victim and his decision to use deadly force seem reasonable."); *see also* L. Song Richardson, *Response: Implicit Racial Bias and the Perpetrator Perspective: A Response to Reasonable but Unconstitutional*, 83 GEO. WASH. L. REV. 1008, 1015 (2015) ("[R]esearch consistently demonstrates that most people unconsciously associate Blacks with criminality, even if this association conflicts with their consciously held beliefs.").

frequently."[250] "The implications of this bias are clear and disturbing. Even more worrisome is the suggestion that mere knowledge of the cultural stereotype, which depicts African Americans as violent, may produce Shooter Bias and that even African Americans demonstrate the bias."[251] Research also indicates that racial bias occurs in visual processing that associates darkness with criminality.[252] For example, black youth joking around on a street corner is viewed as investigation-worthy, while the same conduct by Whites is viewed as innocuous and not worthy of suspicion.[253]

The potential for these biases to infect jury reasoning is equally compelling. Indeed, jury members may also harbor overt and implicit biases when it comes to ethnic minorities. This would make a person like Guy suitable for prosecution as opposed to Magee. The attitudes might also help to explain how only 100 miles away, things could turn out so differently.

Finally, it is worth noting that implicit or unconscious biases "cannot help but disadvantage Blacks."[254] What makes the implicit bias possible is that Blacks serve as a prototype for criminality, and this affects decision-making without conscious understanding of why this is happening. The "I don't know" from the officer when asked why he shot an unarmed black man prostrate with hands raised points to the reality of these biases.[255] The answer reveals one of the core truths of implicit bias, namely that there is no cognitive understanding of why the black man had to be shot, but on the subconscious, the need is clear:

> When police officers shoot unarmed Black citizens, they may be responding to racial cues that link Blacks to criminality and violence. All of us are influenced by such racial cues, but police officers, more than private citizens, often find themselves in situations in which they have to respond quickly without thinking. In the field, police officers may not have time to evaluate whether they are responding to actual danger

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250. Joshua Correll et. al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327 (2002).

251. *Id.*

252. Jennifer L. Eberhardt et. al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004).

253. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596–97 (1976).

254. Richardson & Goff, *supra* note 248, at 310.

255. *See* Rabin, *supra* note 177.

or assumptions based on a person's race.[256]

C. A Malady in Criminal Procedure: No-Knock Warrants

One of the clear lessons from the home self-defense cases is that no-knock warrants are a glaring malady in criminal procedure. The warrants are unnecessary and costly, seemingly violate Fourth Amendment privacy rights, trump self-defense rights, and needlessly endanger police and civilians. Police have been killed during botched raids, by individuals who thought they were being attacked. In turn, civilians have suffered great losses at the hands of police, such as a flash grenade used by police whose explosion sent a nearby toddler into a coma.[257] Such unnecessary violence persists despite that over two decades ago one study admonished that, "[r]educing violence is a national priority not only because violence injures and kills, but also because it imposes other high costs on American society."[258]

Whereas the knock-and-announce principle constituted reasonableness under the Fourth Amendment, a no-knock warrant poses a number of legal challenges. To obtain a no-knock warrant, police must show that announcing their presence would be dangerous, futile, or inhibit their investigation.[259] Whether any of these conditions existed at the time of the warrant's issuance may be raised in a motion to suppress evidence.[260] It is doubtful if it makes any difference, however, since suppression for dispensing with the knock-and-announce rule may not be an appropriate remedy.[261] As the current status quo shows, no-knock warrants give police power that is nearly inscrutable, even in hindsight.

More critically, the no-knock warrant pits an officer's legal intrusion under warrant against the homeowner's reasonable right to self-defend. The warrant allows police to use guerilla tactics on an unsuspecting and likely sleeping civilian, which invariably includes an element of surprise. The logic behind such warrants is to surprise the suspects so as not to lose evidence that could be used in a criminal

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256. Lee, *supra* note 198, at 10.

257. Alison Lynn & Matt Gutman, *Family of Toddler Injured by SWAT 'Grenade' Faces $1M in Medical Bills*, ABC NEWS (Dec. 18, 2014, 2:10 PM), http://abcnews.go.com/US/family-toddler-injured-swat-grenade-faces-1m-medical/story?id=27671521.

258. COMMITTEE ON LAW AND JUSTICE ET. AL., VIOLENCE IN URBAN AMERICA: MOBILIZING A RESPONSE 5 (1994).

259. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

260. *Id.* at 389.

261. Hudson v. Michigan, 547 U.S. 586, 594 (2006); Chase Patterson, *Don't Forget to Knock: Eliminating the Tension Between Indiana's Self Defense Statute and No-Knock Warrants*, 47 IND. L. REV. 621, 627 (2014).

prosecution. The problem is that the homeowner is more likely to act in self-preservation despite the legal consequences. No-knock warrants represent a dangerous and unnecessary procedure that should be abolished or at most, reserved for situations where saving human life is at stake or there is de minimis threat of violence.

Case law highlights the tensions between no-knock entries and a reasonable self-defense claim.[262] In *Maye v. State*, a jury convicted Maye of murder and sentenced him to a life sentence without the chance of parole.[263] On a tip that he was holding significant amounts of marijuana, narcotics officers obtained a search warrant for his apartment.[264] Police stormed the apartment where a 14-month infant was sleeping, and Maye, who thought his home was being invaded, returned with gunfire, killing an officer and earning a charge of first-degree murder.[265] He would eventually plead guilty to manslaughter with a sentence of ten years served.[266] Maye's case offers a prime example of how a reasonable act of self-defense can be a mistake that could cost another life.

State v. Spisak is the leading case that demonstrates that no-knock warrants may be issued on the mere fact that the property sought in the warrant is capable of easy destruction.[267] In this case, a Utah court held that a police entry without notice was not unlawful where a magistrate issued a no-knock warrant and reasonably inferred that the property could be easily destroyed.[268] In the request for the warrant, an affidavit sworn by an officer alleged that the defendant had six marijuana plants, which "might be easily and

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262. Associated Press, *Pa. Woman Pleads Guilty in Shooting of FBI Agent*, FOX NEWS (Jan. 18, 2011), http://www.foxnews.com/us/2011/01/18/pittsburgh-area-woman-set-fbi-shooting-plea.html (woman pled guilty to voluntary manslaughter despite her claims that she shot at police who burst through her doors while alone with her two kids); Radley Balko, *Another Drug Raid Nightmare*, REASON (Mar. 18, 2008), http://reason.com/archives/2008/03/18/another-drug-raid-nightmare (Frederick found guilty of manslaughter despite the assertion that he thought he was being robbed when he killed a SWAT officer); Tim McGlone, *Guilty of Manslaughter, Ryan Frederick Faces 10 Years*, VIRGINIAN-PILOT (Feb. 5, 2009), http://pilotonline.com/news/local/crime/guilty-of-manslaughter-ryan-frederick-faces-years/article_ec93eb57-174d-59b6-8ffd-de154e552753.html; Sullivan, *supra* note 49 (Killeen police officer shot by Guy when officers attempted to serve a no-knock warrant at his home).

263. Maye v. State, 49 So. 3d 1124, 1128 (Miss. 2010).

264. *Id.* at 1126.

265. *Id.* at 1127.

266. Radley Balko, *Cory Maye Freed After 10 Years in Prison: The Back Story*, HUFFINGTON POST (July 6, 2011), https://www.huffingtonpost.com/2011/07/06/cory-maye-freed-after-10-years_n_890456.html.

267. State v. Spisak, 520 P.2d 561, 563 (Utah 1974).

268. *Id.*

quickly disposed of."[269] Considering the notion that a court would agree that it is possible to destroy this many plants in a number of seconds underscores the Fourth Amendment's low bar.[270]

Such cases highlight how it is possible for a warrant's "reasonable belief" standard for the manner of entry to trump the all-important right to privacy. Prior to the issuance of a search warrant, police must show probable cause that evidence subject to seizure will be found in the place to be searched.[271] However, a general warrant may be executed with a no-knock entry on an officer's reasonable suspicion of danger.[272]

To be certain, police breaking into someone's home unannounced is only one aspect of the harm. When the execution occurs under SWAT teams, with militaristic weaponry, the scope for damage magnifies. Officers typically execute no-knock warrants at night or before daylight, and executing officers can enter with the stealth of the most seasoned burglar or can enter blasting.[273] Officers employ a number of methods to break down a civilian's door, including using heavy weaponry, battering ram, or explosives.[274] Diversionary devices may be employed as well, including detonating chemical spray or flashbang grenades which intend to cause temporary blindness and deafness, and compounds the confusion of sleeping people being ambushed.[275]

It may go without saying, but is still necessary to recognize the overwhelming advantage executing officers have over unsuspecting, often sleeping civilians. They have ammunition, trucks, helicopters, and other artilleries, not to mention combat weaponry and protective

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269. *Id.* at 561.

270. Because courts often fail to define "reasonable suspicion," jurisdictions vary as to the sufficient proof requirement to issue a no-knock warrant. Some courts look to the facts known to police at the time of entry, which others consider only the facts known to the warrant-issuing magistrate. *See* Lee, *supra* note 198, at 2; *see also* State v. Shively, 987 P.2d 1119, 1125 (Kan. Ct. App. 1999) (holding that it is necessary to evaluate police action in light of exigent circumstances at the time of the warrant's execution); Garza v. State, 619 N.W.2d 573, 577 (Minn. Ct. App. 2000) (holding that the state may not rely on an officer's testimony to support authorization of a no-knock warrant since the information was not provided to the issuing judge).

271. Ker v. California, 374 U.S. 23, 34–35 (1963).

272. Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

273. Kevin Sack, *Door-Busting Drug Raid Leaves a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html.

274. Jessica M. Weitzman, *They Won't Come Knocking No More:* Hudson v. Michigan *and the Demise of the Knock-and-Announce Rule*, 73 BROOK. L. REV. 1209, 1232 (2008).

275. *Id.*

gear.[276] The imbalance shows police who come well-protected with guns and armor against unsuspecting civilians. Scenarios of police invasion of American homes can resemble footage one might see from American troops at the frontlines of the Iraq or some other American War. Restoring a firm knock-and-announce rule would strengthen the core of the Fourth Amendment and help civilians avoid the mistake of defending against police.

i. Unleashing Silent Armies in America

The no-knock warrant, as a procedural device, was born in the early 1960s, particularly after *Ker v. California*, which exempts police from the knock-and-announce requirement if the exigent circumstances would lead to the destruction of evidence.[277] The warrant contravenes the historical notion that officers must announce themselves prior to executing a search warrant. This aspect of the no-knock warrant has its roots in Fourth Amendment jurisprudence, which embeds the right of privacy under the knock-and-announce rule that accompanied execution of a warrant.[278] Although federal law does not expressly allow use of no-knock warrants, federal judges and magistrates may constitutionally issue no-knock warrants under certain circumstances.[279] Moreover, some states have codified direct authority for state judges and magistrates to issue no-knock warrants.

The American practice of executing a search warrant under a knock-and-announce principle derives from the common law.[280] The Fourth Amendment draws on this notion, guaranteeing the right to be free from unreasonable searches and seizures.[281] The purpose of

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276. KARA DANSKY ET AL., ACLU FOUND., WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 13 (2014), https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf.

277. State v. Spisak, 520 P.2d 561, 563 (Utah 1974); *see also* Ker, 374 U.S. at 40.

278. Weitzman, *supra* note 274, at 1209.

279. Authority of Federal Judges and Magistrates to Issue "No-Knock" Warrants, 26 Op. O.L.C. 44, 44–46 (2002).

280. Agnello v. United States, 290 F. 671, 675 (2d Cir. 1923) (stating that the Fourth Amendment, in respect to search and seizure, is a declaration of the common law); Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 627 (2012); Fern L. Kletter, Annotation, *Propriety of Execution of No-Knock Search Warrant*, 59 A.L.R. 6th 311, § 2 (2010).

281. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

this amendment is to protect citizens' privacy.[282] Hence, police have traditionally been required to knock and announce their presence when executing a warrant. However, this rule has not been absolute, and judges and police officials may circumvent the rule with warrants that affirm the need to intrude unannounced.[283]

The knock-and-announce common law principle has been a part of federal statutory law since at least 1917.[284] The rule is codified under 18 U.S.C. § 3109, which outlines execution of a warrant by federal officers: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . ."[285] Most states authorize warrants either by common law or statute;[286] however, "[a]uthorities differ as to whether a . . . warrant may . . . giv[e] advance authori[ty] to dispense with the knock and announce requirement."[287]

In 1970, Congress passed a comprehensive drug abuse prevention act that provided blanket authority for the issuance of a no-knock search warrant under certain circumstances.[288] Under this provision,

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affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

282. While not specified in the Federal Constitution, the Court recognizes the right to privacy as a distinct constitutional right that exists in the "penumbra" of provisions that implicate the Fourth Amendment. *See* Katz v. United States, 389 U.S. 347, 350 (1967) (describing that a person's right to privacy includes "his right to be let alone by other people"); United States v. Hanon, 428 F.2d 101, 104 (8th Cir. 1970).

283. Patterson, *supra* note 261, at 627.

284. Espionage Act, Pub. L. No. 65-24, tit. XI, § 8, 40 Stat. 217, 229 (1917); Hudson v. Michigan, 547 U.S. 586, 589 (2006).

285. 18 U.S.C. § 3109 (2012).

286. Ruth D. Peterson, *Discriminatory Decision Making at the Legislative Level: An Analysis of the Comprehensive Drug Abuse Prevention and Control Act of 1970*, 9 LAW & HUM. BEHAV. 243, 262 (1985).

287. Kletter, *supra* note 280; *see, e.g.*, Commonwealth v. Santiago, 896 N.E.2d 622, 624 (Mass. 2008) ("The purposes of the 'knock and announce' rule are threefold: to protect the privacy interests of individuals; to minimize the likelihood of property damage; and to reduce the possibility of violence after an unannounced entry.").

288. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 509(b), 84 Stat. 1236, 1274 ("Any officer authorized to execute a search warrant relating to offenses involving controlled substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) has included in the warrant a direction that the officer executing it shall not be required to give such notice. Any officer acting

officers could obtain warrants authorizing their entrance into private premises without warning, based largely on the rationale that it would prevent drug traffickers from destroying supplies of drugs while officers knocked and made their announcement.[289] That section of the Act was repealed four years later by a Senate amendment due to abuse by officers.[290]

Today, although the knock-and-announce rule still exists, police executing a search warrant can dispense with it if they have "reasonable suspicion" that there is a threat of physical violence or that evidence will be destroyed if notice is given.[291] Furthermore, if police believe prior to the execution of the warrant that either of these situations exist, they can obtain a no-knock warrant. Under either situation, no-knock or traditional warrants, police are permitted to force their way into a person's home.

ii. Overkill & Other Unintended Consequences

The liberal use of no-knock warrants produces an array of social and economic costs. Ridding policing of this guerilla tactic would yield immediate benefits, including saving officer and civilian lives, and saving taxpayer funds. The use of these warrants exposes both police and civilians to unnecessary threats and should always be the exception to the rule. The escalation of violence under such warrants grew out of the War on Drugs, which saw a tremendous escalation of judicial grants of no-knock warrants.[292] This may have seen a heyday in the era of crack epidemic, but today, heavily armed SWAT teams have not hesitated to execute such a warrant, even for simple possession of marijuana.[293] Although no-knock warrants are intended

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under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.").

289. Tom Wicker, '*No-Knock,' Drug Users and Crime*, N.Y. TIMES (Nov. 11, 1973), http://www.nytimes.com/1973/11/11/archives/noknock-drug-users-and-crime-in-the-nation.html?_r=0.

290. *See* Controlled Substances Act, Pub. L. No. 93-481, § 709(d), 88 Stat. 1455, 1456 (1974) (requiring all warrants to follow the knock and announce rule).

291. Hudson v. Michigan, 547 U.S. 586, 589–90 (2006).

292. *See* Alicia Hilton, *No-Knock Searches: Reasonable or Deadly?*, POLICE MAG. (Mar. 27, 2011), http://www.policemag.com/blog/swat/story/2011/03/no-knock-searches-reasonable-or-deadly.aspx; *see also* Bob Adelmann, *War on Drugs Claims SWAT Team Member Using No-Knock Warrant*, NEW AM. (Feb. 10, 2014), https://www.thenewamerican.com/usnews/crime/item/17596-war-on-drugs-claims-swat-team-member-using-no-knock-warrant; Sack, *supra* note 273.

293. RADLEY BALKO, CATO INST., OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 1, 2 (2006), https://object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf.

to keep police and evidence safer, the existing evidence suggests the contrary.[294]

Perhaps the most negative aspect of the no-knock warrant is how it undermines a self-defense claim. No-knock warrants weaken the Castle doctrine considerably by forcing residents to pay a high price for being "wrong" when defending their home. In some states, where a law enforcement exception revokes the presumption of "necessary force" when an officer is involved, there is no defense, regardless of the homeowner's belief.[295] Instead of a person's home being a "castle," no-knock warrants whittle the doctrine down to promote showdowns between police and civilians, which could lead to the home becoming a dungeon. Responding reasonably to police intrusions is deadly business for would-be defenders of the castle since police may enter a property without notification to the homeowners. Since the no-knock warrant does away with the police need to identify themselves before forcefully entering the dwelling, a resident is left in an unreasonable position. When police act in such quasi-criminal ways, a resident may reasonably believe that he is under attack. Hence, in those jurisdictions that strictly follow the "unlawful force" requirement, repelling police who execute a no-knock warrant would not meet the elements of self-defense.[296] That is not to say that grand juries will strictly follow the law since the Guy grand jury seemed intent on enforcing this aspect of Texas law, whereas the Magee panel disregarded it.

Reliance on no-knock warrants produces a number of undesirable outcomes, both financial and social. Most profoundly, the use of no-knock warrants results in civilian and officer lives lost, and sometimes further loss of life when the death penalty is sought against a defendant. In addition to possible payments from insurance companies and the federal government, states pay surviving spouses

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294. Radley Balko, *Death by SWAT*, REASON (Jan. 2009), http://reason.com/archives/2008/12/05/death-by-swat (only about half of no-knock warrants uncover evidence that the warrant alleges will be found in the search).

295. G. Todd Butler, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After* Hudson v. Michigan, 27 MISS. C. L. REV. 435, 450 (2008).

296. *Compare* Clay Falls & Michael Oder, *Man Charged With Killing Burleson County Deputy No Billed by Grand Jury*, KBTX (Feb. 7, 2014, 8:50 PM), http://www.kbtx.com/home/headlines/Man-Charged-With-Killing-Burleson-County-Deputy-No-Billed-by-Grand-Jury-243993261.html (white male not indicted on capital murder charges for killing a police officer executing a no-knock warrant at his home where marijuana plants were found), *with* Sullivan, *supra* note 240 (black man charged with capital murder for killing a SWAT officer executing a no-knock warrant at his home where no drugs were subsequently found).

for officers killed in the line of duty.[297] There is also a dark side to executions of no-knock warrants, which disparately affect darker-skinned people.[298] According to a 2014 report, 42% of people impacted in police raids are African American.[299] Beyond are other financial downsides to botched or mistaken executions, which can trigger litigation and civil liability[300] as well as other economic costs that directly relate to the issuance and execution of no-knock warrants.[301]

Although some have tried to promote the idea of "blue lives matter," for police, the liberalizing of no-knock warrants wills toward the opposite, by treating police officer lives recklessly and expendably. In the majority of these raids, which are for drug violations,[302] a warrant is issued in the name of preserving evidence. Here, then, is an unabashed glimpse of how no-knock warrants devalue the lives of police officers and place property over the lives of people.

iii. Alternative Abolishments

Exactly how no-knock warrants may be tamed is a matter of which branch of government has the greatest political will. With police executing approximately 20,000 no-knock warrants a year,[303] the growth of this tactic should impel all three to action. For example, the judiciary could intervene and refuse to grant no-knock warrants on the grounds that they contradict principles of self-defense and Castle doctrine. Legislation may be equally plausible assuming that the very legislatures that have codified no-knock warrants have the political

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297. METROPLEX CONCERNS OF POLICE SURVIVORS, BENEFITS AVAILABLE TO SURVIVING FAMILIES OF LAW ENFORCEMENT OFFICERS KILLED IN THE LINE OF DUTY 1, 3–4 (2015), http://metroplexcops.org/assets/texas.pdf.

298. DANSKY ET AL., *supra* note 276, at 5.

299. *Id.*

300. Kletter, *supra* note 280, § 30–31.

301. The economic costs are myriad, and there is little data to develop a sense of how much government expenditures no-knock warrants incur. The range of costs might include investigations, apprehension, adjudication, incarceration and supervision of the arrestee of a no-knock warrant. Further processing of such an individual includes judicial and administrative costs like salaries and expenses, clerical, and staff. *See, e.g.*, Abstract of D.E. Olson & L.S. Stout, Cost of Processing a Drug Offender Through the Criminal Justice System, NAT'L CRIMINAL JUSTICE REFERENCE SERV. (1991), https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=159580.

302. DANSKY ET AL., *supra* note 276, at 2.

303. Dara Lind, *Cops Do 20,000 No-Knock Raids a Year. Civilians Often Pay the Price When They Go Wrong*, VOX (May, 15, 2015, 12:12 PM), https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs.

fortitude to strike them from police procedural repertoire. In theory, it is equally possible, but far less imaginable, for executive decision-makers to self-regulate by no longer seeking no-knock warrants. There are other means for departments to carry out arrests and warrants short of risking so much for what too often turns up too little.

These facts support the notion that no-knock warrants are not worth the lives and money they cost. Creating an exception for the knock-and-announce rule hardly affords police a benefit that cannot be met by requiring them to knock and announce. Police should always be required to announce themselves clearly because failure to do this entraps the homeowner into using self-defense, despite the genuine and reasonable belief that the unannounced intrusion is life-threatening. The no-knock warrant should be retired as a relic of a failed War on Drugs, and should be used only for the rarest occasions when there is a possibility of saving human life or de minimus threat of violence. It is time to decide categorically that these warrants are self-fulfilling prophecies that are issued as a means of protecting evidence and police from dangerous encounters, but which yield the opposite effect. If such a warrant is to be issued, it should be on the principle that there is a potential life to be saved. A life may be worth a life, but the preservation of evidence should never justify the risk.

Short of abolition, there are a number of judicial prescriptions to oversee, improve, and limit the current administration of no-knock warrants. From the judicial perspective, there are principled reasons to impose limitations on the issuance and execution of no-knock warrants. In this regard, courts might develop guidelines for what constitutes sufficient exigency and set that bar at human life such that issuance of a no-knock warrant must be premised on saving human life. The Supreme Court might deviate from its decision in Hudson and reinstate the exclusionary rule against entry by police without proper announcement. As such, the exclusionary rule would be an available remedy for violation of the Fourth Amendment and dispense with knock-and-announce. Moreover, many jurisdictions that execute no-knock warrants fail to have written policy regarding the execution of a no-knock warrant.[304] This could be improved, particularly with the use of mandatory cameras to record executions. Moreover, the creation of Civilian Review Boards can help oversee policy and procedures.

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304. *See* DANSKY ET AL., *supra* note 276, at 28; *see also* Michael McLaughlin, *Texas Police 'No-Knock' Raids Often Violate Constitution and Risk Lives: Rights Group*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/02/19/texas-police-no-knock-raids_n_4816235.html (last updated Feb. 19, 2014).

V. TOWARD A FUTURE OF HOPE AND DESPAIR

This Article offers a theoretical framework for grassroots curbing of police misconduct. The plan involves combining existing laws with understanding how they can interact and be consciously used toward greater social justice. In essence, this Article advocates public praxis that maximizes benefits at the intersection of lawful gun possession and lawful self-defense. Whether these ideas can manifest only time will tell, but if history is any indication, there will be victories[305] and defeats that make this thesis sometimes seem sensible, and other times, silly.

Perhaps the most important normative point is that there must be space for self-defense, especially against the police. A correlative point is that in all instances of violence in society, police should be held to higher standards compared to civilians. They are the ones with training and temperament that should make violence a last resort. Instead, violence is the first resort, particularly when it comes to minorities. "African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures."[306] On this point, social science evidence shows that people around the world are more likely to obey the law when they have the moral authority, in addition to the legal basis for telling them what to do.[307] At the present, it is backwards when it comes to minority communities who see citizens being killed and, if they attempt to fight back, pay an exacting price to the state.

Police should not be afforded greater deference nor protected as a special class—they are the hand of the state, which should always be held more accountable, while all leniency should go to civilians. Indeed, there is not even a system of professional licensing and decertification for police officers, who may be terminated in one geographical area, but hired on the force of a different department.[308]

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305. *See, e.g.*, Jack Burns, *Texas Jury Sends a Message to SWAT Raid Cops, Finds Man Not Guilty for Shooting Three of Them*, ALTERNET (Dec. 15, 2016), http://www.alternet.org/drugs/texas-jury-sends-message-swat-raid-cops-finds-man-not-guilty-shooting-three.

306. Carbado, *supra* note 19, at 130.

307. TOM R. TYLER ET. AL., *Legitimacy and Criminal Justice: International Perspectives*, *in* LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 10 (Tom. R. Tyler ed., 2007).

308. The work of Roger Goldman is critical in this area, the current state of which is most recently summarized in Candice Norwood, *Can States Tackle Police*

"Officers are entrusted with the power to use deadly force to enforce the law. They should use this power sparingly and with an eye to causing the least amount of harm."[309] This naturally leads to the question of whether police might work to minimize contacts with civilians since, as one scholar notes, *Terry* stops are "probably the most common negative interactions that citizens have with the police."[310] For many Americans it is almost never a good idea to engage with police voluntarily, which suggests that many of the lawful contacts by police are in fact unwanted. Beyond these considerations, it may also be worth asking:

> whether suspicion of any legal violation merits a forcible police intervention. Instead of prosecuting police officers, we might ask them to do less—to give up on protecting the country from the scourge of broken taillights, for example, and to focus more narrowly on addressing the most serious forms of criminal conduct.[311]

Such police pretenses and misconduct inspire attacks against police, the likes of which reveal a radicalization occurring in America.[312] It has been well over a decade since researchers reported that disparities in treatment of minorities contribute to lower opinions of police legitimacy.[313] In recent times, police persecution of Black communities has amplified and helped manufacture ambushers who are willing to die to kill police officers. Additionally, this urges officers whose training has been described as encouraging a warrior mentality, which likely leads most of these officers to consider the people they are supposed to serve, the enemy.[314] Hence, while

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Misconduct with Certification Systems, ATLANTIC (Apr. 9, 2017), https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/.

309. Lee, *supra* note 198, at 33.

310. Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57 (2014).

311. Ristroph, *supra* note 3.

312. Jeremy I. Levitt, *"Fuck Your Breath": Black Men and Youth, State Violence, and Human Rights in the 21st Century*, 49 WASH. U. J.L. & POL'Y 87, 113 (2015) (describing police and their connection to radicalization, which builds from "tensions between African Americans and their communities across the nation and local and state police agencies have also exponentially increased due to a well-document and disquieting pattern of unlawful police practices such as 'stop and frisk,' excessive uses of force, police brutality, and the extrajudicial killings of African Americans, particularly men").

313. NAT'L RESEARCH COUNCIL ET. AL., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 2–3 (Wesley Skogan & Kathleen Frydl eds., 2004).

314. DANSKY ET AL., *supra* note 276, at 3.

politicians and political pundits decry terrorism committed in the name of race or religion, police brutality might rightly be seen as a radicalizing force.

Video recordings will likely help to push these issues along, and hopefully result in reforms that increase both civilian and officer safety. The ability of mass citizens to record police encounters is already changing the Americans' commentary and debate about the criminal justice system. More citizens armed with video recorders promises to help deter police misconduct even further. More video recordings of these encounters will be powerful evidence for juries to evaluate self-defense claims. Even more promising, the recordings might prompt prosecutors not to press charges against an individual who claims self-defense. Video recordings, however, are not a guarantee since they can shape public opinion in favor of police, which tempers their force. Noting that the Rodney King beating was captured on video but that all police officers were acquitted, one scholar describes that "[v]ideotape is not a deterrent, particularly when it can be stopped, started, and edited to conform to a narrative that excuses police misconduct."[315]

Finally, the killings of police officers, no matter how important the issue is, should not be subject to a "blue lives matter" campaign. Such a posture is flawed not only because it suffers from the same infirmities as "all lives matter" slogans or any others that diminish the power of the Black Lives Matter campaign. The idea poaches from the violence and oppression visited upon Black civilians. To appropriate this language is to present police as suffering the same victimization as Blacks have, which is untenable in the age of the "warrior cop."[316] To say that "blue lives matter" is to suggest that police need special protection as a class, which only dilutes the real problems faced by communities.[317]

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315. Teri A. McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 MERCER L. REV. 651, 703 (2016).

316. BALKO, *supra* note 133, at 307–08.

317. *See, e.g.*, Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612 (2016) ("In too many communities, however, the principles that have grown out of Warrior policing have proven counterproductive, contributing to a distrustful, adversarial, and sometimes aggressive approach to policing that has undermined good police-community relations and exposed officers and civilians alike to unnecessary risk.").