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The Legacy of Trayvon Martin—Neighborhood Watches, Vigilantes, Race, and Our Law of Self-Defense

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THE LEGACY OF TRAYVON MARTIN— NEIGHBORHOOD WATCHES, VIGILANTES, RACE, AND OUR LAW OF SELF-DEFENSE

MARK S. BRODIN*

White people go around, it seems to me, with a very carefully suppressed terror of Black people — a tremendous uneasiness. They don't know what the Black face hides. They're sure it's hiding something. What it's hiding is American history. What it's hiding is what White people know they have done, and what they like doing.

—James Baldwin¹

Trayvon Martin was a household name in Europe in a way that Emmett Till never has been.

—Gary Younge²

Reflecting back a decade later, what is the enduring significance of the Trayvon Martin case—a Black teenager whose life is violently cut short, and a legal system that accepted his death without consequence? The poet Elizabeth Alexander speaks of “The Trayvon Generation” of Black youth who have grown up in the haunting shadow of his killing, and the anguished parents who cannot protect their children from such a fate. America’s first Black president spoke for them: “When I think about this boy, I think about my own kids. If I had a son, he’d look like Trayvon,” Barack Obama told the nation.

In its historical context, Martin’s fate fits squarely in the American tradition of legalized White vigilantism, embraced by a generous definition of self-

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1. Matthew Gilbert, *ABC’s Scrapped ‘20/20’ Segment on James Baldwin Resurfaces*, BOS. GLOBE (June 17, 2021), <https://www.bostonglobe.com/2021/06/16/arts/abcs-scrapped-2020-segment-james-baldwin-resurfaces/> [https://perma.cc/TTA7-JZ3P] (quoting James Baldwin).

2. Gary Younge, *What Black America Means to Europe*, N.Y. REV. BOOKS (June 6, 2020), <https://www.nybooks.com/online/2020/06/06/what-black-america-means-to-europe/> [https://perma.cc/R4JW-YH5P].

defense in such cases, and most recently by Stand Your Ground laws green-lighting a “shoot first and ask questions later” response to a perceived (but not necessarily actual) threat.

Neighborhood crime watch captain George Zimmerman identified the 158-pound dark-skinned high school junior leaving a convenience store with snacks as an intruder in his gated community. The ensuing confrontation ended when Zimmerman shot a single bullet in Trayvon’s heart from his semi-automatic handgun. As implausible as Zimmerman’s self-defense story was, it resonated with the all-White female jurors, who acquitted him of all charges—a verdict that can only be understood against the backdrop of the implicit bias, unconscious stereotyping, and deference to White-on-Black violence that insidiously infects our society.

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I. INTRODUCTION

Massachusetts Governor Michael Dukakis held a double-digit lead in the polls the summer before his 1988 Presidential election contest with George H.W. Bush. How Bush pulled out his surprise victory is the story of America, and it is the story of the killing of young Trayvon Martin in February 2012.

Lee Atwater, Republican strategist par excellence, devised a game plan tried and true, one that had worked since the first days Europeans landed on the shores of the New World—fear of The Other. Willie Horton, an African-American man serving a life sentence for murder in a Massachusetts prison,

had been released on a weekend furlough.³ He escaped, kidnapped a young couple, and proceeded to brutally rape the woman and torture her fiancé.⁴

Willie Horton's mug shot, the quintessential menacing Black male, quickly became the centerpiece of Bush's campaign.⁵ It mattered not that the furlough program was initiated by Dukakis's Republican predecessor.⁶ It mattered not that such tragic incidents had occurred as well in other release programs around the country.⁷ It mattered not that Horton was actually known as William; "Willie" was chosen to underscore the racial dimension of the scare.⁸ The ads devastated Dukakis's momentum, and are recognized as one of the ugliest but most successful campaign strategies in American political history.⁹

In 1989, the year after Dukakis was "Willie Hortoned," Charles Stuart shot and killed his pregnant wife as they sat in their Toyota outside the Boston hospital where they had just taken a childbirth class.¹⁰ Stuart had romantic and business plans that didn't include Carol.¹¹ When he called 911 and the police arrived, he reported that she had been shot by a young Black man in a hoodie—"the usual suspect."¹² To close the deal, he inflicted a wound in his own abdomen, and his fiction of a vile shooting of an innocent White couple was immediately accepted by police and the media.¹³

Boston went into a furious panic—any Black male of a certain age was aggressively stopped and frisked in the police dragnet.¹⁴ One in particular was selected to take the fall, and certainly would have if Stuart's brother Matthew

3. Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALTIMORE SUN (Nov. 10, 1990), <https://www.baltimoresun.com/news/bs-xpm-1990-11-11-1990315149-story.html> [https://perma.cc/4ARW-3747].

4. *Id.*

5. *Id.*; Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [https://perma.cc/VR72-DN7F].

6. See Simon, *supra* note 3.

7. See T.R. Reid, *Most States Allow Furloughs from Prison*, WASH. POST (June 24, 1988), <https://www.washingtonpost.com/archive/politics/1988/06/24/most-states-allow-furloughs-from-prison/ad22836e-111b-4f09-aa6d-6651d2e9a04e/> [https://perma.cc/52MT-KNWT].

8. Simon, *supra* note 3.

9. Baker, *supra* note 5.

10. Diane Bernard, *"They were Treated like Animals": The Murder and Hoax that Made Boston's Black Community a Target 30 Years Ago*, WASH. POST (Jan. 4, 2020), <https://www.washingtonpost.com/history/2020/01/04/they-were-treated-like-animals-murder-hoax-that-made-bostons-black-community-target/> [https://perma.cc/CL8N-JU4E].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

had not had second thoughts and let the true story out.¹⁵ Exposed, Charles Stuart leaped off the Tobin Bridge to his death.¹⁶ But before these revelations, the Boston press went wild with the story, juxtaposing photographs of the affluent White couple in loving poses against the foreboding Black suspect.¹⁷

Charles Stuart knew precisely the buttons to push to deflect blame to a hooded Black man, the image of the urban criminal that so many conjure up. Equally so Susan Smith, a South Carolina woman convicted in 1994 of drowning her two young children, but only after she unsuccessfully tried to divert attention to a fictitious Black man whom she claimed carjacked her and kidnapped the children.¹⁸

These stories are as old as America, and as current as George Floyd. D.W. Griffith's *Birth of a Nation* (based on the novel *The Klansman*) became a national sensation in 1915 after a celebrated showing in Woodrow Wilson's White House.¹⁹ Depraved Black males haunt the landscape, raping any White woman in sight.²⁰ The hooded KKK riders on White stallions come to the rescue, and a new nation is birthed from the oldest of racial stereotypes.

The falsely accused Scottsboro boys, the brutally murdered Emmett Till,²¹ the now-exonerated “wilding youth” of the Central Park jogger assault, the “super predators” of the 1990s political rhetoric—all a narrative of dehumanizing The Other; what the pioneering social psychologist Gordon Allport dubbed the “manufactured demon of race.”²²

It is the presumption of criminality²³ that underlay the thousands of lynchings across the land (mostly but not exclusively in the South), often to the

15. *Id.*

16. *Id.*

17. *Id.*

18. Marisa Lati, *She Captivated the Nation by Saying a Black Man Kidnapped Her Sons. Police Knew She Killed Them*, WASH. POST (Oct. 25, 2019), <https://www.washingtonpost.com/history/2019/10/25/she-captivated-nation-by-saying-black-man-kidnapped-her-sons-police-knew-she-killed-them/> [https://perma.cc/4ADN-ZDE9].

19. THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

20. See generally DICK LEHR, THE BIRTH OF A NATION: HOW A LEGENDARY FILMMAKER AND A CRUSADING EDITOR REIGNITED AMERICA'S CIVIL WAR 222–23 (2014).

21. For a comparison of the Till and Martin cases, see Angele Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being 'Out of Place' from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113 (2017).

22. GORDON ALLPORT, THE NATURE OF PREJUDICE 110 (1979).

23. Bryan Stevenson, *A Presumption of Guilt*, N.Y. REV. BOOKS (July 13, 2017), <https://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/> [https://perma.cc/UAW7-HX64]. Stevenson describes his own experience, when he was confronted by police in front of his new apartment in Atlanta. They drew their guns, threatened to “blow [his] head off,” threw him against his car, and searched it before releasing him with the remark that he should consider himself lucky. *Id.*

entertainment of the locals,²⁴ that drove the explosions of racial violence by White vigilantes as in Tulsa, Oklahoma in 1921—all with no consequences to the perpetrators, and often with the direct complicity of government actors.²⁵

What George Zimmerman saw that rainy Florida night in 2012 was not a skinny seventeen-year-old high school student bringing snacks to join his father to watch the NBA All-Star game,²⁶ but the dark figure in D.W. Griffith's wild distorted imagination, prowling in *his* neighborhood.²⁷ Trayvon was, as Reverend William Barber put it, “guilty of nothing more than walking while Black in a gated community.”²⁸

Reflecting back a decade later, what is the legacy of Trayvon Martin's case, a teenage life violently cut short, and a legal system that accepted his death without consequence? Among other things, there is “The Trayvon Generation,” poet Elizabeth Alexander's ruminations on the young African-Americans who have grown up in the haunting shadow of this killing, and the anguished

24. RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* 214–18 (1975). “The entire lynching ritual was structured to give dramatic warning to all black inhabitants that the iron-clad system of white supremacy was not to be challenged by deed, word, or even thought.” *Id.* at 218. Lynching served a form of White self-defense against the perceived threat of black males to the purity of White females, as illustrated by the brutal murder of Emmett Till for allegedly whistling at a White woman in a Mississippi grocery store in 1955. CAROLINE E. LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* 14 (2017). Till's killers were quickly acquitted by an all-White jury, but later admitted their guilt in an interview in *Look* magazine. *Id.* at 112–14. Activist journalist Ida B. Wells spent her career debunking “the old thread-bare lie that Negro men assault White women,” and pressing (unsuccessfully) for a federal anti-lynching law. *Id.* at 95.

25. See generally MARK ROBERT SCHNEIDER, “WE RETURN FIGHTING”: THE CIVIL RIGHTS MOVEMENT IN THE JAZZ AGE (2002).

26. See Karen McVeigh, *Trayvon Martin Death: Parents Call on FBI to Take Over Case as Anger Grows*, *GUARDIAN* (Mar. 19, 2012), <https://www.theguardian.com/world/2012/mar/19/trayvon-martin-death-parents-fbi> [<https://perma.cc/FAN4-S8VG>].

27. Research indicates that young black teenagers appear more threatening and less child-like than their White contemporaries. See Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *J. PERSONALITY & SOC. PSYCH.* 526, 539–40 (2014). “As a result, an unfamiliar young Black boy walking down the street in a largely White-populated neighborhood is automatically perceived as more suspicious, less innocent, and more grown up than his White counterpart would appear in the very same neighborhood doing the very same activities.” Adeoye Johnson, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 *U. PA. J. L. & SOC. CHANGE* 459, 465 (2016).

28. William Barber II & Jonathan Wilson-Hartgrove, Opinion, “*I Can't Breathe.*” *A Cry for Change*, *N.Y. TIMES* (May 23, 2021), <https://www.nytimes.com/2021/05/21/opinion/george-floyd-death-william-barber.html> [<https://perma.cc/M274-8968>].

mothers who cannot protect their children from such a fate.²⁹ “[T]o African-Americans and other racialized minorities, Martin’s death became emblematic of the extreme outcomes of racial profiling enmeshed in a history of criminal laws arbitrarily targeting Black men.”³⁰

I begin with a close look at the Zimmerman trial, expanding on my earlier *Howard Law Journal* article³¹ with new access to an official audio-visual transcript.³² Then I put the case in its historical context by surveying the American tradition of vigilantism and its incarnation in the “neighborhood crime watches” (like Zimmerman’s) that have become so pervasive. Next, I contrast the response of the legal system to Black as compared to White self-defense in notable cases. I conclude with a critical appraisal of our self-defense law—doctrine and practice—and the compelling need to reform it in light of what we have learned about implicit bias, unconscious stereotyping, and their role split-second panicked decision-making.

II. THE TRIAL: HOW IS IT THAT AN UNARMED BLACK YOUTH IS SHOT DEAD AND THE CIVILIAN SHOOTER WALKS FREE? PERHAPS BLACK LIVES DON’T REALLY MATTER?

Florida prosecutors brought charges against George Zimmerman for the fatal shooting only after nationwide protests, six weeks after the killing.³³ The local police treated Zimmerman more as victim than murderer, and the jurors apparently agreed when they rendered their not guilty verdict.³⁴ Buried along with Martin was the racial dimension of the case, kept out by the prosecution, the judge, and the defense (except, as we shall see, when it was used to their advantage by instilling fear in the female jurors).³⁵ The killing, the trial, the

29. Elizabeth Alexander, *The Trayvon Generation*, NEW YORKER (June 22, 2020), <https://www.newyorker.com/magazine/2020/06/22/the-trayvon-generation> [https://perma.cc/S72U-C4LJ].

30. Kirk James & Julie Smyth, *If George Zimmerman Were Found Guilty, Would the Criminal Justice System Be Considered Just?*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG 107, 107 (Kenneth J. Fasching-Varner, Rema E. Reynolds, Katrice A. Albert & Lori L. Martin eds., 2014).

31. Mark S. Brodin, *The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin*, 59 HOW. L.J. 765 (2016).

32. I have viewed two complete audio/video transcripts of the trial—one recorded gavel to gavel by WFTV Channel 9 in Sanford, Florida, and the official transcript obtained from the Seminole County Court. Given the nature of these recordings, precise citations (as with a paper transcript, which was prohibitively priced) are not feasible.

33. Brodin, *supra* note 31, at 773.

34. *Id.* at 776–79, 783.

35. *Id.* at 771.

acquittal, and the aftermath have reshaped the American landscape, giving rise to the Black Lives Matter (BLM) movement.³⁶

George Zimmerman was described in the media as Hispanic but “looking white,” and was identified as White in the Sanford police report of the shooting.³⁷ He joined the neighborhood crime watch at his gated community, Retreat at Twin Lakes, organized by a volunteer coordinator for the Sanford Police Department who was already overseeing at least ten such groups.³⁸ In her PowerPoint presentation and the handbook she distributed at the initial meeting, she emphasized that the Watch volunteers’ role was “being the eyes and ears” for the police, “not the vigilante.”³⁹ The motto is “We Look Out for Each Other.”⁴⁰ “Citizens participating in the Neighborhood Watch program are not law enforcement officers and should never attempt to apprehend a suspect. That is a law enforcement officer’s job.”⁴¹

Members of a neighborhood watch “are not supposed to confront anyone,” she warned: “We [the police] get paid to get into harm’s way. You don’t do that. You just call them from the safety of your home or your vehicle.”⁴² “This is not about being a vigilante police force. You’re not even supposed to patrol on neighborhood watch. And you’re certainly not supposed to carry a gun.”⁴³ Zimmerman was chosen as Watch Captain, without either a background check⁴⁴

36. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/65KD-C5CF].

37. Kathleen J. Fitzgerald, *The “Whitening” of Latinos*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE, *supra* note 30, at 26–27.

38. Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html> [https://perma.cc/M2UQ-FS39].

39. *Id.*

40. SANFORD POLICE DEP’T, NEIGHBORHOOD WATCH BLOCK CAPTAIN HANDBOOK 2019, <https://sanfordfl.gov/wp-content/uploads/2020/07/2019NeighborhoodWatchBlock.pdf> [https://perma.cc/5HV8-NBVN].

41. Michael Muskal & Tina Susman, *Rules for Neighborhood Watch Discussed in George Zimmerman Trial*, L.A. TIMES (June 25, 2013), <https://www.latimes.com/nation/la-xpm-2013-jun-25-la-na-nn-george-zimmerman-neighborhood-watch-20130625-story.html> [https://perma.cc/VK9M-5E8N]. The relevant testimony is at 1:30:51–1:32:45 State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings.

42. Robertson & Schwartz, *supra* note 38.

43. MICHAEL A. KNOX, INTERMEDIATE RANGE: THE FORENSIC EVIDENCE IN THE KILLING OF TRAYVON MARTIN 96 (2012).

44. A background check would have revealed that Zimmerman had been arrested in 2005 for assaulting an undercover Florida alcohol enforcement agent; the felony charges were dismissed after Zimmerman completed a pre-trial intervention program. *See id.* at 15. It would also have included

or training.⁴⁵ He had been rejected from at least one police department to which he applied.⁴⁶

The four 911 calls reporting suspicious persons that Zimmerman had made in the months before confronting Martin were also young Black males, none of whom were arrested.⁴⁷ On February 26, 2012, he again dialed 911 from his vehicle to report the Black high school student as someone who “looks like he’s up to no good or he’s on drugs or something. It’s raining and he’s just walking around looking about.”⁴⁸ Trayvon, described by witnesses as a baby-faced “little boy”⁴⁹ and referred to by the police detective who interviewed Zimmerman as the “child” he killed,⁵⁰ was walking with his hoodie up for the rain and carried a bag of Skittles and an iced tea while talking to friend Rachel Jeantel on his cell phone.⁵¹ Zimmerman complained to the 911 dispatcher: “Fucking punks. These assholes, they always get away.”⁵²

As the gated community reportedly was twenty percent African-American,⁵³ what apparently triggered Zimmerman’s attention was Trayvon’s race combined with his youth and attire. Commentators noted that the hoodie,

allegations of domestic violence made to the FBI by his former fiancée, leading to a restraining order against him. *Id.* at 16–19. She described Zimmerman as having a bad temper and reported he had spoken of killing himself during their strained relationship. *Id.* at 17. Trayvon had no reported history of violence. *Id.* at 15.

45. He had never been in the military, received no police training, and had only the minimum six-hours of firearm training required to obtain his concealed carry permit. *Id.* at 30.

46. Tom Winter, James Novogrod & Tracy Connor, *Prosecutors: George Zimmerman Applied to Be a Police Officer*, NBC NEWS (June 5, 2013), <https://www.nbcnews.com/news/us-news/prosecutors-george-zimmerman-applied-be-police-officer-flna6c10215923> [<https://perma.cc/2A3E-92N8>]; Trial Testimony of Lt. Scott Kearns, July 3, 2013.

47. For the details of Zimmerman’s 911 reports of black males on the premises of the Retreat at Twin Lakes, see Onwuachi-Willig, *supra* note 21.

48. Douglas O. Linder, *The George Zimmerman Trial: Critical Phone Calls*, FAMOUS TRIALS, <https://famous-trials.com/zimmerman1/2297-zimcalls> [<https://perma.cc/3F7R-4FAJ>]. Testimony at 30:00–30:34, *State of Florida v. George Zimmerman* (2013), Seminole Digital Court Recordings.

49. KNOX, *supra* note 43, at 60–61.

50. *Id.* at 171–72.

51. Kim L. Anderson, *No Heroes Here, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE*, *supra* note 30, at 21–22.

52. Linder, *supra* note 48; Abby Rogers, *Zimmerman Called Trayvon Martin ‘One of These Assholes’ In 911 Call*, BUS. INSIDER (June 21, 2012), <https://www.businessinsider.com/zimmerman-called-trayvon-martin-was-one-of-these-assholes-in-911-call-2012-6> [<https://perma.cc/63WH-DHUL>]. Testimony at 31:49–32:37, *State of Florida v. George Zimmerman* (2013), Seminole Digital Court Recordings.

53. Frances Robles, *Shooter of Trayvon Martin a Habitual Caller to Cops*, PALM BEACH POST (Mar. 17, 2012), <https://www.palmbeachpost.com/story/news/crime/2012/03/19/shooter-trayvon-martin-habitual-caller/7595183007/> [<https://perma.cc/GY8F-EV7X>].

closely associated with racial profiling, may have cost him his life.⁵⁴ Zimmerman apparently believed he had the “sixth sense” touted as the key neighborhood watch skill—to “instinctively know when something is not right.”⁵⁵

The probable cause affidavit ultimately charging Zimmerman with second-degree murder asserted that Zimmerman had “profiled” Martin and “assumed Martin was a criminal” because he “did not belong in the gated community.”⁵⁶ Trayvon was a person of color in a modern Sundown town, and Zimmerman was the sheriff. That the latter identified as Hispanic in no way immunizes him from racial stereotyping.⁵⁷

Armed with a 9 mm semiautomatic handgun loaded with lethal hollow-point ammunition (in violation of the rules of his neighborhood watch) and against the explicit instructions of the 911 police dispatcher,⁵⁸ Zimmerman pursued,⁵⁹ confronted, and fatally shot Trayvon Martin through the heart at point blank range within a minute’s walk of his father’s location in the Twin Lakes Retreat.⁶⁰ Zimmerman had never identified himself to his victim as a neighborhood watch captain, or a concerned citizen, even when Trayvon asked (as testified to by his friend on the cell phone call), “*Why are you following me?*”⁶¹ Instead, Zimmerman demanded that the teenager explain his presence in the gated community—“What are you doing here?”⁶²

54. Chike Jeffers, *Should Black Kids Avoid Wearing Hoodies?*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS 129, 129 (George Yancy & Janine Jones eds., 2013). Charles Stuart used the “hoodie” to identify his fictitious assailant. See Bernard, *supra* note 10.

55. Muskal & Susman, *supra* note 41; *Neighborhood Watch Skills*, NATIONAL NEIGHBORHOOD WATCH, <https://www.nnw.org/neighborhood-watch-skills> [<https://perma.cc/4LSN-9UKW>].

56. Jennifer Harvey, *Distorted Vision and Deadly Speech*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 105; Probable Cause Affidavit, State v. George Zimmerman (2013), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/04/12/us/13shooter-document.html?ref=us> [<https://perma.cc/3ZEW-K28L>].

57. Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 112–13 (2014).

58. Linder, *supra* note 48. Dispatcher Sean Noffke so testified at the trial.

59. Zimmerman admitted to the 911 operator that he was following Martin, prompting the dispatcher’s “We don’t need you to do that.” See George Yancy & Janine Jones, *Introduction*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 1, 3. And Trayvon was on his cell phone with his friend Rachel Jeantel while being stalked. She testified that Martin said, “Why are you following me?” and moments later, “Get off, get off!” Martin described his assailant as “crazy and creepy.” Linder, *supra* note 48.

60. Brodin, *supra* note 31, at 772.

61. Linder, *supra* note 48.

62. George Zimmerman Trial at 07:19–07:21, State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings.

Zimmerman was on a mission—*this punk* was not getting away on *his* watch. And so, Trayvon experienced what the prosecutor at trial called a child’s worst nightmare—being chased in the dark by a menacing stranger.⁶³

The lead detective on the case asked Zimmerman: “Did it ever occur to you to go ahead and ask this person what he was doing out there?,” observing that “if you had, we probably wouldn’t be here right now.”⁶⁴ The detective noted that Martin “wasn’t a violent kid,” wasn’t on drugs, wasn’t involved in any criminal activity, had every right to be there, and to defend himself.⁶⁵

The police interviews with Zimmerman that night and in the days following look more like defense preparation than police interrogation. The detective advised Zimmerman: “Had [Martin] been a goon, a bad kid, two thumbs-up, you know. [But he] does not fit the profile of what occurred, which is another unfortunate thing that *we* got going here.”⁶⁶ It’s clear whose side the Sanford police were on. If there is any doubt, the detective closed the interview: “We’re working for you. We’ve got to open your mind, and if there is anything that needs to be changed, this is it.”⁶⁷

The Sanford police treated Zimmerman almost like one of their own. Police witnesses during the trial would refer to the defendant as “George.”⁶⁸ Zimmerman referred to Trayvon as “the suspect” in his written statement to the police,⁶⁹ and they acted accordingly.

After the softball interview, this man who had just fatally shot an unarmed teenager was released without further investigation, the police accepting his version of events, which he re-enacted on video with them the next day. Having successfully eluded Zimmerman’s pursuit, he claimed, Martin suddenly jumped out from behind bushes, punching the much larger adult in the nose, tackling him, banging his head into the sidewalk, suffocating him, and screaming “you’re going to die tonight, [expletive].”⁷⁰ Then Martin, on top of

63. George Zimmerman Trial at 05:52–006:27, State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings; see also Erin Donaghue, *George Zimmerman Trial: In Closing Arguments, Defense Attorney Asks Jury Not to “Fill in Gaps” in State’s Case*, CBS NEWS (July 12, 2013), <https://www.cbsnews.com/news/george-zimmerman-trial-in-closing-arguments-defense-attorney-asks-jury-not-to-fill-in-gaps-in-states-case/> [https://perma.cc/JHJ6-P9DF].

64. KNOX, *supra* note 43, at 172.

65. *Id.*

66. *Id.* at 173 (emphasis added).

67. *Id.* at 182.

68. Brodin, *supra* note 31, at 775.

69. KNOX, *supra* note 43, at 135–36.

70. Richard Luscombe, *George Zimmerman Video Shows Morning-After Re-Enactment of Killing*, GUARDIAN (June 21, 2012), <https://www.theguardian.com/world/2012/jun/21/george-zimmerman-video-confrontation> [https://perma.cc/4U5C-9ZP9]. The State’s medical examiner

Zimmerman, supposedly reached for Zimmerman’s gun hidden in a holster at his back and under his shirt—leaving Zimmerman no choice but to shoot Trayvon in self-defense.⁷¹ After suffering the close-range fatal bullet wound through his heart, Martin (according to Zimmerman) was nonetheless able to yell, “You got me!” before dying.⁷² Expert testimony from the medical examiner at trial made such an exclamation highly improbable, but this was contested by a defense expert.⁷³

Trayvon, of course, had no say in what had happened. As Ta-Nehisi Coates put it, “Your side of the story is irrelevant if you are dead.”⁷⁴

It was not until the day after the shooting, when his father filed a missing person report, that Trayvon’s parents were notified by police of his death.⁷⁵ In the week following, news reports circulated that Martin had traces of marijuana in his blood at autopsy; no drug screens were performed on Zimmerman.⁷⁶

disputed this, finding Zimmerman’s injuries “very insignificant,” a matter contested by the defense. Michael Muskal, *Medical Examiner Calls Zimmerman’s Injuries “Very Insignificant,”* L.A. TIMES (July 2, 2013), <https://www.latimes.com/nation/nationnow/la-na-nn-george-zimmerman-medical-examiner-20130702-story.html> [<https://perma.cc/LW5J-ZDA4>].

71. LISA BLOOM, *SUSPICION NATION: THE INSIDE STORY OF THE TRAYVON MARTIN INJUSTICE AND WHY WE CONTINUE TO REPEAT IT* 57–61 (2014).

72. Christina Sterbenz, *Medical Examiner: Trayvon Martin Lived ‘In Pain’ For Up To 10 Minutes*, BUS. INSIDER (July 5, 2013), <https://www.businessinsider.com/trayvon-martin-lived-after-getting-shot-2013-7> [<https://perma.cc/T3V9-ZZG6>]. Zimmerman had no explanation for why Martin would attack him after he had escaped his pursuit. KNOX, *supra* note 43, at 183. The “crazed black male” and “drug-crazed Negro” have become familiar stories in the shootings of unarmed black men. Some version was put forth “when . . . Ferguson police officer Darren Wilson shot and killed teenager Michael Brown, when . . . Chicago police officer Jason Van Dyke shot and killed teenager Laquan McDonald, when . . . Minnesota police officer Jeronimo Yanez shot and killed a defenseless Philando Castile, and when . . . Tulsa police officer Betty Jo Shelby shot and killed a nonthreatening Terence Crutcher.” See Carl L. Hart, *The Claim That Drugs Killed George Floyd Relies on a Racist Trope*, VOX (Apr. 8, 2021), <https://www.vox.com/first-olperson/22373806/george-floyd-trial-derek-chauvin-minneapolis-black-lives-matter> [<https://perma.cc/8U6Y-YD66>].

73. Sterbenz, *supra* note 72; Allie Bidwell, *Forensic Pathologist Says Trayvon Martin Was on Top of Zimmerman*, U.S. NEWS & WORLD REP. (July 9, 2013), <https://www.usnews.com/news/newsgram/articles/2013/07/09/forensic-pathologist-says-trayvon-martin-was-on-top-of-zimmerman> [<https://perma.cc/JS55-MDME>]. The testimony is at 1:13:29–1:15:57, *State of Florida v. George Zimmerman* (2013), Seminole Digital Court Recordings.

74. Ta-Nehisi Coates, *Stand Your Ground and Vigilante Justice*, ATLANTIC (Mar. 22, 2012), <https://www.theatlantic.com/national/archive/2012/03/stand-your-ground-and-vigilante-justice/254900/> [<https://perma.cc/V75K-SUAV>].

75. CNN Editorial Research, *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 14, 2022), <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> [<https://perma.cc/T8LG-FDCR>].

76. Jacqueline Anderson, Sarah Lucia Hoagland & Anne Leighton, *Now You See It, Now You Don’t: Magic Tricks of White Supremacy in the United States*, in PURSUING TRAYVON MARTIN:

After public pressure both locally and nationally, Zimmerman was finally charged with second-degree murder in April.⁷⁷ He was tried before an all-female jury, five White and one Hispanic.⁷⁸ The population of Seminole County, from which the jury was drawn, was eleven percent Black, but no Black person sat on the panel.⁷⁹ Voir dire questioning of potential jurors focused mostly on exposure to media coverage of the case, not its racial dimension.⁸⁰

For strategic reasons Zimmerman did not formally invoke Florida's Stand Your Ground law,⁸¹ but it clearly hovered over the trial. The product of National Rifle Association drafting and intense lobbying,⁸² the law eliminates the common law duty to retreat in the face of danger and provides complete immunity (criminal as well as civil) to a person using force (including lethal) within the parameters of the statute.⁸³ These laws, now adopted around the country (Florida's was the first), expand the license for defense of one's "castle" to anywhere and everywhere. Testimony at trial established that Zimmerman, a criminal justice student at Seminole State College, was well

HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 25, 29; Barbara Liston, *Trayvon Evidence Fails to Answer Who Screamed for Help*, REUTERS (May 17, 2012), <https://www.reuters.com/article/us-usa-florida-shooting/trayvon-evidence-fails-to-answer-who-screamed-for-help-idUSBRE84G1HF20120518> [<https://perma.cc/E3EK-2UX5>].

77. Brodin, *supra* note 31, at 773.

78. Cara Buckley, *6 Female Jurors Are Selected for Zimmerman Trial*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/us/6-female-jurors-are-selected-for-zimmerman-trial.html> [<https://perma.cc/22NJ-W7U3>].

79. *Id.*

80. Dan Zak, *In Zimmerman Case, Potential Jurors Seem Largely Uninterested*, WASH. POST (June 13, 2013), https://www.washingtonpost.com/lifestyle/style/in-zimmerman-case-potential-jurors-seem-largely-uninterested/2013/06/13/a70772ee-d441-11e2-a73e-826d299ff459_story.html [<https://perma.cc/4DCT-6P9F>]. The defense retained one of the best-known jury consultants in the country.

81. *See* Lee, *supra* note 57, at 111–13.

82. *See generally* Shahabudeen K. Khan, *One Decade Later: Florida's Stand Your Ground Law Alive and Well*, 12 INTERCULTURAL HUM. RTS. L. REV. 115, 125–30 (2017); Ahmad Abuznaid, Caroline Bettinger-López, Charlotte Cassel & Meena Jagannath, "Stand Your Ground" Laws: *International Humans Rights Law Implications*, 68 U. MIA. L. REV. 1129, 1132 (2014); Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIA. L. REV. 827, 836, 840 (2013); Gina Jordan, *The Lobbyist Behind Florida's Stand Your Ground Law*, NPR (Mar. 29, 2012), <https://www.npr.org/2012/03/29/149591067/the-lobbyist-behind-floridas-stand-your-ground-law> [<https://perma.cc/L23H-97SB>].

83. FLA. STAT. ANN. § 776.013 (West 2022).

aware of the law of self-defense at the time of his encounter with Martin, and during police questioning afterward.⁸⁴

Remarkably and inexplicably, it was *the prosecution* that put Zimmerman's version of events before the jury,⁸⁵ through its own witnesses, recordings of Zimmerman's interviews, and Zimmerman's video "re-creation" of the crime. The teenager escapes from his pursuit, but then comes back, jumps him from behind bushes, punches him, knocks him to the ground, bangs his head on the sidewalk, reaches for his gun holstered in his back waistband, all the while screaming "You're gonna die tonight . . ." ⁸⁶ The accused was thus relieved of having to take the stand, under oath, and subject this dubious story to cross-examination.

The State's case was further undermined when the judge permitted the defense, during its closing argument, to show the jurors an animated video with

84. Christina Sterbenz, *Former Professor Says He Taught George Zimmerman The Law He Claimed He Knew Nothing About*, BUS. INSIDER (July 3, 2013), <https://www.businessinsider.com/alexis-carter-testifies-in-stand-your-ground-2013-7> [<https://perma.cc/NJA5-TSTF>]. The testimony is at 4:14:22–4:17:51, *State of Florida v. George Zimmerman* (2013), Seminole Digital Court Recordings.

85. I have reached out to the prosecution team for an explanation on several occasions but have received no response. It is axiomatic that a defendant's own statements, while admissible *against* him, are not admissible when offered *by him*, as they are self-serving hearsay. See FED. R. EVID. 801(d)(2)(A); see also FED. R. EVID. 801(d)(2)(A) advisory committee's note. The error in permitting the jurors to hear (and see) the defendant's version of events in this unchecked form was compounded when the judge included this boilerplate instruction:

GEORGE ZIMMERMAN'S STATEMENTS

A statement claimed to have been made by George Zimmerman outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made. Therefore, you must determine from the evidence that George Zimmerman's alleged statement was knowingly, voluntarily and freely made. In making this determination, you should consider the total circumstances, including but not limited to

1. whether, when George Zimmerman made the statement, he had been threatened in order to get him to make it, and
2. whether anyone had promised him anything in order to get him to make it. If you conclude George Zimmerman's out of court statement was not freely and voluntarily made, you should disregard it.

Jury Instructions, *Florida v. Zimmerman*, No. 12-CF-1083-A (Fla. Cir. Ct. July 13, 2013), <http://law2.umkc.edu/faculty/projects/ftrials/zimmerman1/Zimjuryinstructions.pdf> [<https://perma.cc/96KN-6MKB>]. Obviously directed at incriminatory statements offered *against* the accused, the jurors may well as seen this as license to credit Zimmerman's inadmissible exculpatory statements.

86. See BLOOM, *supra* note 71, at 57.

Martin, in a hoodie, throwing the first punch at Zimmerman.⁸⁷ The jurors went into their deliberations with this image in their minds.

The prosecution team also failed to object when its own police witnesses were asked on defense cross-examination whether they believed Zimmerman's story, and answered in the affirmative.⁸⁸ It was not until the next day that they finally lodged an objection and motion to strike the answer to this clearly inadmissible testimony opining on a party's credibility. The judge struck the testimony belatedly, after jurors had a day to absorb it and the damage to the State's case had been done.⁸⁹

The prosecution deliberately kept race out of its case, closing with this confusing observation:

Race. This case is not about race. It's about right and wrong. . . . Ask yourselves, all things being equal, if the roles were reversed and it was 28 year old George Zimmerman walking home in the rain with a hoodie on to protect himself from the rain, walking through that neighborhood, and a 17 year old driving around in a car who called the police . . . [a]nd if it was Trayvon Martin who had shot and killed George Zimmerman, what would your verdict be? That's how you know it is not about race.⁹⁰

The defense and trial judge obligingly cooperated, the former happy to color-blind the story, and the latter even forbidding use of the term "racial profiling" to describe what happened on February 26.⁹¹ The White jurors were

87. Patrik Jonsson, *Zimmerman Trial For Jury, Anguished Task to Resolve Death of Trayvon Martin*, CHRISTIAN SCI. MONITOR (July 12, 2013), <http://www.csmonitor.com/USA/Justice/2013/0712/Zimmerman-trial-For-jury-anguished-task-to-resolve-death-of-Trayvon-Martin> [https://perma.cc/YAP2-GJNU].

88. Brodin, *supra* note 31, at 776.

89. *George Zimmerman Trial — Day 7 — Part 1*, YOUTUBE (Feb. 7, 2013), <https://www.youtube.com/watch?v=erVzhz-OsYc> [https://perma.cc/8ZM5-VN2A].

90. Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG, *supra* note 30, at 31; see also Jonathan Capehart, *Race and the George Zimmerman Trial*, WASH. POST (July 12, 2013), <https://www.washingtonpost.com/blogs/post-partisan/wp/2013/07/12/race-and-the-george-zimmerman-trial/> [https://perma.cc/3JXK-UMZU]. The closing is at 3:48:39–3:49:49, *State of Florida v. George Zimmerman* (2013), Seminole Digital Court Recordings. A dramatic example of the effectiveness of such a race-switching comparison appears in the film version of John Gresham's *A Time to Kill*, depicting the trial of a Black man for murdering the two White men who brutally raped his ten-year-old daughter. Imagine, the prosecutor argues in closing, that the victim is blond and White, and her father kills her black assailants. In the book and the film, the jury acquits. But the Zimmerman prosecutors used it to illustrate their case was not about race, when in fact it was *all about race*.

91. Lisa Bloom, *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES (July 15, 2013), <https://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html>

also apparently willing to assume that his race had nothing to do with Trayvon's death.

The George Zimmerman trial was like telling Noah's story but leaving out the part about The Flood. The courtroom drama played out without its main character—the racial pathology behind this senseless killing, the irrational fear of The Dark Other.

The defense team, though, cleverly exploited the racial fears of the all-female jury. A young White mother living in Twin Lakes Retreat was called to tell the jurors how she had cowered in a closet, shielding her baby, as two African-American males burglarized her home months before.⁹² The prosecution declined to object, despite the very questionable relevance and demonstrable prejudicial impact of the stereotype of the Black male terrorizing a White woman.⁹³ And one of the last exhibits the defense showed the jury was the surveillance camera footage of Trayvon buying snacks in the 7-Eleven prior to his killing—the kind of chilling image of an armed robbery often shown on the nightly news.⁹⁴

The trial judge instructed the jury regarding Florida's generous definition of self-defense but restricted the jurors' attention to the immediate final encounter between the two, ignoring Zimmerman's stalking and confrontation that preceded it.⁹⁵ She also declined to inform them (as the prosecution requested) that if Zimmerman had *provoked* the confrontation, under Florida law he forfeited his defense.⁹⁶

Given all this, the verdict, not surprisingly, was not guilty on both counts, murder and the lesser-included offense of manslaughter.⁹⁷ Two jurors subsequently indicated in interviews that Stand Your Ground played a role in

[<https://perma.cc/BVS9-UA7K>]; see also Manuel Roig-Franzia, *Race is Playing Minor Part in Zimmerman Prosecution*, WASH. POST, July 3, 2013, at A1.

92. Trial Testimony of Olivia Bertalan at 4:19:38–4:22:21, State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings; see also Douglas O. Linder, *The George Zimmerman Trial: An Account*, FAMOUS TRIALS, <https://famous-trials.com/zimmerman1/2319-home> [<https://perma.cc/MD4W-4MXX>].

93. Anderson, *supra* note 51, at 21; Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1672–73 (2019).

94. Bloom, *supra* note 91.

95. Joe Kelley, *Document: Instructions for George Zimmerman Jury*, ATLANTA J.-CONST. (July 12, 2013), <https://www.ajc.com/news/national/document-instructions-for-george-zimmerman-jury/WUFXx2NcUiZjmdXk2sV1zL> [<https://perma.cc/8HYW-6DW5>].

96. CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 151 (2021); see also Kelley, *supra* note 95. The instructions are at 4:08:17–4:09:13, State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings. See *infra* notes 321–38 and accompanying text.

97. Brodin, *supra* note 31 at 783.

their deliberations, notwithstanding its explicit absence from the proceedings.⁹⁸ It apparently did not occur to them that *Trayvon, not Zimmerman*, was the actor who was compelled to defend himself. It did occur to conservative Fox News host Sean Hannity in his exclusive interview with George Zimmerman: “[M]aybe [Martin was running from you because] he was afraid of you and didn’t know who you were?”⁹⁹

Georgetown law professor Paul Butler spoke for many observers of the case:

If we reversed the races here, a not guilty verdict is impossible to imagine. So think about a big black man who followed a skinny white teenager, gets into a fight with him. The skinny white guy isn’t armed, and the big black guy shoots him dead and then claims self-defense. Does anybody think that a jury would buy that?¹⁰⁰

How could the jurors assess the reasonableness of Zimmerman’s self-defense without recognizing that his suspicions about Trayvon most probably were generated by stereotypes and implicit bias against, and fear of, Black youth?¹⁰¹ And what about the possible bias that jurors themselves may have brought to their deliberations? As one scholar put it, “Martin’s mere presence as a young Black man in the predominantly White middle-class gated community had constituted a threat to the sanctity of Zimmerman’s [and the jurors’] expansive castle.”¹⁰²

We will come back to these questions below.¹⁰³

The jurors apparently dismissed the compelling testimony of Martin’s nineteen-year-old friend Rachel Jeantel, who was on her cell phone with him during the entire encounter while he was stalked by what he described as a creepy White guy.¹⁰⁴ Over two days, often in tears (and apparently not adequately prepared by the prosecutors), she related Martin’s contemporaneous account of his last minutes, pleading with Zimmerman—“Why are you following me?” and the watch captain’s response “What are you doing around

98. Johnson, *supra* note 27, at 488.

99. KNOX, *supra* note 43, at 184.

100. Tell Me More, *Inside the Zimmerman Verdict*, NPR (July 15, 2013), <https://www.npr.org/templates/story/story.php?storyId=202335038> [<https://perma.cc/TN4S-KTVN>].

101. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1562–63 (2013).

102. LIGHT, *supra* note 24, at 166.

103. See *infra* notes 279–99 and accompanying text.

104. Linder, *supra* note 48.

here?” Moments later Martin screamed “Get off, get off!” Then the single gunshot.¹⁰⁵

Defense cross-examination was withering, overbearing, and disrespectful of this young Black woman with a soft voice relating a traumatic experience. The prosecutors sat by, rarely objecting or protecting their witness.¹⁰⁶ Much of the media was equally disrespectful in their coverage of her testimony.¹⁰⁷

Juror B29—described as Hispanic—later had second thoughts about the verdict, suggesting that Zimmerman was morally culpable but not legally guilty—he “got away with murder.”¹⁰⁸ She “believed Zimmerman’s story, and [said] that she’d welcome him as a neighbor to her community if . . . he didn’t go too far. . . . I think his heart was in the right place. It just went terribly wrong.”¹⁰⁹

Barack Obama’s Justice Department declined to pursue civil rights charges.¹¹⁰

As a coda, George Zimmerman announced in 2016 that he was selling the 9 mm pistol used to kill Trayvon as an “American Firearm Icon,” a “piece of American history.”¹¹¹

105. Seni Tienabeso & Matt Gutman, *Trayvon Martin Told Friend About Man Following Him in Final Moments*, ABC NEWS (June 26, 2013), <https://abcnews.go.com/US/trayvon-martin-told-friend-man-final-moments/story?id=19490796> [<https://perma.cc/LUS7-UEN3>]. The testimony of Rachel Jeantel is at 2:26:53–2:32:24, 5:08–5:28 State of Florida v. George Zimmerman (2013), Seminole Digital Court Recordings. The testimony of Rachel Jeantel is also at *George Zimmerman Trial*, YOUTUBE (June 26, 2013), https://www.youtube.com/watch?v=_iYVUt3_HOQ&list=PLYEBn4w1XOIeSjliyFTohqC6BQLI81vx&index=14 [<https://perma.cc/H7X4-KPJY>]. For the CNN transcript of the Jeantel Day 3 testimony, see CNN Newsroom, *Continuing Zimmerman Trial Coverage; Trayvon Martin’s Girlfriend Testifies*, CNN (June 26, 2013), <http://edition.cnn.com/TRANSCRIPTS/1306/26/cnr.10.html> [<https://perma.cc/22G2-A6J3>].

106. Daryl Lynn Dance, *Can Rachel Jeantel Speak?*, 58 CLA J. 139, 143 (2015).

107. See Kirsten T. Edwards, *Is it “Marissa” or “Michelle?”: Black Women as Accessory to Black Manhood*, in TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE, *supra* note 30, at 95–96.

108. William Saletan, *Did George Zimmerman Get Away with Murder?*, SLATE (July 26, 2013), <https://slate.com/news-and-politics/2013/07/did-george-zimmerman-get-away-with-murder-no-juror-b29-is-being-framed.htm> [<https://perma.cc/K8HM-TWU2>].

109. She insisted that race played no part in her deliberations. Fitzgerald, *supra* note 37, at 27.

110. Mark Berman & Sari Horwitz, *George Zimmerman Won’t Face Civil Rights Charges in Trayvon Martin’s Death*, WASH. POST (Feb. 24, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/02/24/george-zimmerman-wont-face-civil-rights-charges-in-trayvon-martins-death/> [<https://perma.cc/S3PH-DZ37>].

111. Elliott C. McLaughlin, *George Zimmerman’s Auction for Gun That Killed Trayvon Martin Ends*, CNN (May 18, 2016), <https://www.cnn.com/2016/05/18/us/george-zimmerman-gun-auction/index.html#:~:text=George%20Zimmerman's%20auction%20for%20the,website%20that%20hosted%20the%20auction> [<https://perma.cc/N667-BQPW>]. Linder, *supra* note 92.

An immediate legacy of the case was that Black parents needed to expand their warnings in “The Talk”¹¹² with their children to include the *risks posed by their White neighbors*. The fear was no longer just the police—White *civilians* could apparently kill unarmed Black males with impunity. If there was “good reason for George Zimmerman to shoot his gun [because] he was scared,”¹¹³ what Black youth is safe if Trayvon was not? He carried no weapon, committed no crime, was lawfully on the premises, threatened no one. *What did he do wrong?* What is a mother to advise her son to avoid such a fate?

One is reminded of W.E.B. Dubois’ question in 1903 to his fellow African-Americans: “How does it feel to be a problem?”¹¹⁴

Prison activist George Jackson some years ago observed that “Anyone who can pass the civil service examination today can kill me tomorrow. Anyone who passed the civil service examination yesterday can kill me today with complete immunity.”¹¹⁵ George Zimmerman, of course, did not pass any such examination. The neighborhood protector had become its predator.

The acquittal set off demonstrations across the nation, precursors to the Black Lives Matter movement (the phrase was first used regarding the Martin case)¹¹⁶ and the protests after the police killings of Michael Brown in Ferguson, twelve-year-old Tamir Rice in Cleveland, Eric Garner in Staten Island, and George Floyd in Minneapolis.¹¹⁷

112. TA-NAHISI COATES, *BETWEEN THE WORLD AND ME* 78 (2015).

113. Anderson, Hoagland & Leighton, *supra* note 76, at 30.

114. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 7 (1903).

115. GEORGE L. JACKSON, *BLOOD IN MY EYE* 7 (1990).

116. Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), <https://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/> [<https://perma.cc/E5G3-XGRD>].

117. Reis Thebault, *Trayvon Martin’s Death Set off a Movement That Shaped a Decade’s Defining Movements*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/nation/2022/02/25/trayvon-martins-death-set-off-movement-that-shaped-decades-defining-moments/> [<https://perma.cc/8GD5-Z7JS>]; Matt Zaposky, *Justice Dept. Quietly Curtailed Civil Rights Investigation into Tamir Rice Killing*, WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/national-security/tamir-rice-justice-department-investigation/2020/10/30/be8b60c8-1a35-11eb-aecc-b93bcc29a01b_story.html [<https://perma.cc/47UJ-R8L4>]; Abby Ohlheiser, Elahe Izadi & Cameron Barr, *N.Y. Grand Jury Declines to Indict Officer in Death of Eric Garner, Igniting Protests*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/politics/2014/12/03/8dc55084-7b2b-11e4-84d4-7c896b90abdc_story.html?tid=a_inl_manual&itid=lk_inline_manual_46 [<https://perma.cc/ZYL2-SK8H>].

Elijah McClain died when placed in a chokehold by Aurora, Colorado police while paramedics injected him with a fatal dose of ketamine.¹¹⁸ Police were responding to a 911 call reporting the unarmed twenty-three-year-old Black man wearing a ski mask as “sketchy.”¹¹⁹ Like Martin, his crime was walking home Black from a convenience store carrying an iced tea.¹²⁰ Trayvon’s fate was cruel, but not unusual.

American public opinion was sharply divided along racial lines over the Zimmerman verdict,¹²¹ consistent with the pronounced divide in public opinion on such defining events as the Rodney King beating by L.A. police and the acquittal of O.J. Simpson.¹²²

Now to put the Trayvon Martin case in its larger historical context.

118. Patty Nieberg, *Officials: Police in Elijah McClain Hometown Racially Biased*, AP NEWS (Sept. 15, 2021), <https://apnews.com/article/police-colorado-aurora-3d031ab7c20a5496c5249535cefdcf85> [<https://perma.cc/9NJK-SFCV>].

119. *Id.*

120. *Id.*; Michael Levenson, *Police in Aurora, Colo., Engaged in Racially Biased Policing, Inquiry Finds*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/15/us/elijah-mcclain-aurora-police-department.html> [<https://perma.cc/TH7S-8JQ8>]. The family received a \$15 million settlement. Colleen Slevin, *Denver Suburb to Pay \$15M to Settle Elijah McClain Lawsuit*, AP NEWS (Nov. 19, 2021), <https://apnews.com/article/lawsuits-colorado-denver-aurora-b12e7a524a5e8c3e144aed5849a7ce73> [<https://perma.cc/B7NS-B43Z>].

121. Alana Levinson, *Polls Show Wide Racial Gap on Trayvon Martin Case*, NPR (July 22, 2013), <https://www.npr.org/sections/itsallpolitics/2013/07/22/204595068/polls-show-wide-racial-gap-on-trayvon-martin-case> [<https://perma.cc/T85R-SD6G>]; Frank Newport, *Blacks, Nonblacks Hold Sharply Different Views of Martin Case*, GALLUP (Apr. 12, 2012), <https://news.gallup.com/poll/153776/blacks-nonblacks-hold-sharply-different-views-martin-case.aspx> [<https://perma.cc/J4P4-ABQ8>]; Jon Cohen, *Zimmerman Verdict: 86 Percent of African Americans Disapprove*, WASH. POST (July 22, 2013), <https://www.washingtonpost.com/blogs/post-politics/wp/2013/07/22/zimmerman-verdict-86-percent-of-african-americans-disapprove/> [<https://perma.cc/RB8A-HWQ8>]; Jon Cohen & Dan Balz, *Race Shapes Zimmerman Verdict Reaction*, WASH. POST (July 22, 2013), https://www.washingtonpost.com/politics/race-shapes-zimmerman-verdict-reaction/2013/07/22/3569662c-f2fc-11e2-8505-bf6f231e77b4_story.html [<https://perma.cc/TFZ2-SZTU>].

122. Emily Shapiro, *Nearly 70% of Americans Say Race Relations Are Bad, New Poll Says*, ABC NEWS (July 14, 2016), <https://abcnews.go.com/US/70-americans-race-relations-bad-poll-shows/story?id=40573062> [<https://perma.cc/4Q4V-BKYF>]; Rory Carroll, *OJ Simpson: An Eternal Symbol of Racial Division—or Has America Moved On?*, GUARDIAN (Oct. 1, 2017), <https://www.theguardian.com/us-news/2017/oct/01/oj-simpson-prison-release-america-race-debate> [<https://perma.cc/QX9F-282Q>].

III. THE “NEIGHBORHOOD WATCH” AND THE AMERICAN TRADITION OF VIGILANTISM



[T]he Neighborhood Watch, though often touted as a positive community-based crime prevention tactic, can actually be a source of abuse given its inherent exclusionary bias, and becomes even riskier when combined with a dangerous mix of permissive Concealed Carry and Stand Your Ground laws. Without a profound reassessment of the merits of Neighborhood Watch, the various states that already have Stand Your Ground and liberal Concealed Carry laws can expect . . . reruns of the Trayvon Martin tragedy.¹²³

“Neighborhood Watch Captain” may have been an unfamiliar term when reports of Trayvon Martin’s killing first appeared. Yet such anti-crime groups had been forming for years, particularly in gated communities like George Zimmerman’s.¹²⁴ They trace back to the night watchmen in colonial settlements, and later to slave patrols,¹²⁵ and have become more formalized

123. Johnson, *supra* note 27, at 460.

124. Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 101 (2013).

125. “[T]he review of the literature clearly establishes that a legally sanctioned law enforcement system existed in America before the Civil War for the express purpose of controlling the slave population and protecting the interests of slave owners. The similarities between the slave patrols and modern American policing are too salient to dismiss or ignore. Hence, the slave patrol should be considered a forerunner of modern American law enforcement.” K.B. Turner, David Giacomassi & Margaret Vandiver, *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, 17 J. CRIM. JUST. EDUC. 181, 186 (2006).

since 1972 when USAonWatch was created within the National Sheriffs Association.¹²⁶

With widely varying degrees of training, monitoring, responsibilities, and coordination, there are now tens of thousands of such “watch” groups, what one scholar dubs “Do-It-Your-Self (DIY) Security.”¹²⁷ Most are in predominantly White communities¹²⁸ and cover a substantial part of the U.S. population.¹²⁹ Those who have studied this proliferation note the obvious—the purpose is to keep out The Other, The Undesirable, The Stranger, often meaning minorities.¹³⁰ The Us/Them boundary created reinforces our society’s fears, stereotypes, and prejudices. Social psychology and other disciplines have closely examined the depth of the bias, much unconscious, that lies behind distinguishing one’s group from The Other.¹³¹ Regarding the identification of threats, “the grim reality is that [citizens patrolling their neighborhoods do so] through the prism of widespread social biases.”¹³²

“[M]embers of neighborhood watch programs often do not have the tools or insight to exercise the discretion or restraint that police utilize use to ensure that individuals’ rights are protected and constitutional safeguards are followed.”¹³³ Although participants are admonished against any form of intervention, some have become, in the words of one observer, “not ‘neighborhood watchers’ but ‘neighborhood instigators’, a form of pseudo-police without any of the limitations that apply to law enforcement.”¹³⁴

Groups formed to simply report suspicious activity have transformed, in some cases, into vigilante justice, even provoking violence rather than preventing it. New Yorkers have been familiar for decades with the Guardian

126. BUREAU JUST. ASSISTANCE, NEIGHBORHOOD WATCH MANUAL: USAONWATCH—NATIONAL NEIGHBORHOOD WATCH PROGRAM 1 (2010), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/nsa_nw_manual.pdf [<https://perma.cc/JAC5-465M>].

127. LIGHT, *supra* note 24, at viii.

128. In contrast, police auxiliaries are more formally structured, trained, and monitored by the departments. See Johnson, *supra* note 27, at 471–72. The New York City Auxiliary Police Program has numbered well over 5,000 members, who receive 50 hours of training and pass written and physical exams.

129. Some estimates are 40%. See Finegan, *supra* note 124, at 102.

130. See Johnson, *supra* note 27, at 464–67.

131. See generally ALLPORT, *supra* note 22.

132. LIGHT, *supra* note 24, at 165.

133. Finegan, *supra* note 124, at 106.

134. Ben Treutler, *Defining the Mission and Identity of the Neighborhood Watch, and How We Can Make Them Better*, JOHNS HOPKINS UNDERGRADUATE L. REV. (Feb. 20, 2019), <https://jhulr.org/2019/02/20/the-problems-with-neighborhood-watch-policies-and-how-we-can-begin-to-fix-them/> [<https://perma.cc/QG88-734V>].

Angels, a crime-watch group who became “street icons for patrolling scuzzy subway cars, intimidating chain snatchers, making the occasional citizen’s arrest, and irritating the police.”¹³⁵ Newark residents saw a “highly organized” White vigilante group (equipped with two-way radios and covering carefully planned routes) patrol Black neighborhoods in the 1960s after urban uprisings spurred by police killings and assassinations.¹³⁶

These community crime-prevention groups, like the rest of American society, have race embedded within, conscious or otherwise.¹³⁷ Social science has taught us that racial stereotypes deep within our psyches can drive behavior even if the actor is not a racist.¹³⁸ So all the speculation about whether George Zimmerman is himself a racist is really beside the point.

The groups are most active in “Whitopias,” White enclaves (usually affluent) that are spreading across the nation as people of color increasingly occupy the cities and suburbs.¹³⁹ “Barriers like gates, guard towers, policies that require visitors to register their license plates upon entering a community, signs warning of security cameras, and ever-vigilant neighborhood watch programs exist to police the boundaries of Whitopias.”¹⁴⁰ The gated community is, in some sense, the heir to the Sundown Towns of uglier racial times.¹⁴¹

Add to the mix that “watchers” like George Zimmerman may be armed, untrained in de-escalation, and highly suspicious of The Other—and you have the recipe for the Martin killing. Stand Your Ground laws¹⁴² serve to “unleash

135. Bruce Handy, *Back to the Eighties: Crime, Yucky Subways, and the Guardian Angels!*, NEW YORKER (Oct. 11, 2021), <https://www.newyorker.com/magazine/2021/10/18/back-to-the-eighties-crime-yucky-subways-and-the-guardian-angels> [<https://perma.cc/L3NV-U2PZ>].

136. Ronald Sullivan, *Newark’s White Citizen Patrol, Opposed by Governor, Sees Itself as Antidote to Fear and Riots*, N.Y. TIMES, June 24, 1968, at 23, <https://timesmachine.nytimes.com/timesmachine/1968/06/24/77308975.html> [<https://perma.cc/SX8E-677P>].

137. See Cheryl Staats, *Implicit Racial Bias, the Zimmerman Trial, the Verdict*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, OHIO STATE UNIV.: KIRWAN INST. FOR STUDY RACE & ETHNICITY, (Aug. 23, 2013), <https://kirwaninstitute.osu.edu/article/implicit-racial-bias-zimmerman-trial-verdict> [<https://perma.cc/D2MD-GWRR>].

138. *Id.*; Philip Abita Goff & L. Song Richardson, *No Bigots Required: What the Science of Racial Bias Reveals in the Wake of Trayvon Martin*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 59, 60.

139. See generally RICH BENJAMIN, SEARCHING FOR WHITOPIA: AN IMPROBABLE JOURNEY TO THE HEART OF WHITE AMERICA (2009).

140. Maria del Guadalupe Davidson, *Imagined Communities: Whitopia and the Trayvon Martin Tragedy*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 34.

141. See generally JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) (forbidding the presence of people of color after dark).

142. See generally LIGHT, *supra* note 24.

armed vigilantes who roam neighborhoods with a license to kill someone they reasonably believe might be doing something wrong,”¹⁴³ which in Trayvon Martin’s case was being a Black youth in a hoodie in a gated community. The experience with such laws, not surprisingly, is that Whites killing Blacks are far more successful in invoking the law’s protection than Blacks killing Whites.¹⁴⁴

And, of course, watch members are not state actors subject to constitutional limitations. The primary constraints on them flow from criminal and tort law (e.g., assault, false imprisonment).¹⁴⁵ But these, as we learn from the Trayvon Martin saga, are not self-enforcing.

Two years before the killing in Sanford, a Black fifteen-year-old was assaulted on a Baltimore street by members of Shomrim, one of many ultra-Orthodox Jewish patrol groups in the U.S. and elsewhere.¹⁴⁶ This group was equipped with police scanners and unmarked cars with flashing police lights.¹⁴⁷ Finding the presence of a Black teen in the largely Jewish neighborhood suspicious, Eliyahu Werdesheim and his brother Avi pursued him in their van, jumped out and threw him to the ground, and beat him in the head with a hand-held radio while yelling “[y]ou wanna [expletive] with us, you don’t belong here, get outta here!”¹⁴⁸ A third man got out of the van and pinned the teen with

143. David R. Dow, *George Zimmerman Will Never Be Convicted of Murdering Trayvon Martin*, DAILY BEAST (May 22, 2012), <https://www.thedailybeast.com/george-zimmerman-will-never-be-convicted-of-murdering-trayvon-martin> [<https://perma.cc/V45B-FMEZ>].

144. Stephen C. Ferguson II & John H. McClendon III, *Indignity and Death: Philosophical Commentary on White Terror, Black Death, and the Trayvon Martin Tragedy*, in PURSUING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS, *supra* note 54, at 41.

145. Finegan, *supra* note 124, at 126–29.

146. Justin Fenton, *Member of Jewish Patrol Group Accused of Striking Teen in City*, BALTIMORE SUN (Dec. 1, 2010), <https://www.baltimoresun.com/maryland/baltimore-city/bs-xpm-2010-12-02-bs-md-ci-shomrim-member-arrest-20101201-story.html> [<https://perma.cc/H399-YXB7>].

147. The Borough Park Shomrim in Brooklyn receives government funding, used to purchase bulletproof vests and command trucks. Johnson, *supra* note 27, at 474, 476. The Brooklyn South Safety Patrol secured \$300,000 from the City Council for a mobile command center. Alan Feuer, *Brooklyn’s Private Jewish Patrols Wield Power. Some Call Them Bullies*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/nyregion/brooklyn-private-jewish-patrols-wield-power-some-call-them-bullies.html> [<https://perma.cc/4SDN-LVH4>] (detailing the groups’ usurping of the role of the police).

148. Fenton, *supra* note 146.

his knee while they patted him down.¹⁴⁹ The youth was later able to call police and was taken to the hospital with lacerations to the head and a broken wrist.¹⁵⁰

The brothers were identified, charged with second-degree assault and false imprisonment, and tried in May 2012.¹⁵¹ No hate crime charges were brought.¹⁵² They elected a bench trial, fearing a jury after the publicity of the recent Martin case.¹⁵³ Eliyahu was convicted but given a suspended sentence; the conviction was later overturned, allowing him to apply to law school without a criminal record.¹⁵⁴

A police spokesman praised the department's partnership with such neighborhood watch groups, but noted that their job is just to report crime and leave interventions to police.¹⁵⁵ "Since the Trayvon Martin case, people cannot help but think about that case and draw comparisons," a federal prosecutor observed.¹⁵⁶

In another instance, twenty-year-old Kouren-Rodney Bernard Thomas was fatally shot in August 2016, by a neighborhood watch volunteer who told a 911 dispatcher that he was protecting his Raleigh, North Carolina home from "hoodlums."¹⁵⁷ Chad Copley, who is White, fired his shotgun at the Black youth from inside his garage.¹⁵⁸ Copley had told the dispatcher he was on neighborhood watch and was "locked and loaded."¹⁵⁹ He later reported he had "fired my warning shot like I'm supposed to by law" at the "frigging black

149. *Id.*

150. *Md. Neighborhood Watch Trial Set Against Fla. Fury*, CBS BALT. (Apr. 22, 2012), <https://baltimore.cbslocal.com/2012/04/22/md-neighborhood-watch-trial-set-against-fla-fury/> [<https://perma.cc/RWW9-VSRF>].

151. Steve Kilar, *Elder Werdesheim Brother Convicted in Assault of Teen*, BALT. SUN (May 3, 2012), <https://www.baltimoresun.com/latest/bs-md-werdesheim-verdict-20120503-story.html> [<https://perma.cc/YNH3-NPAW>].

152. *See id.*

153. *Id.*

154. Ian Duncan, *Convictions Stricken in Neighborhood Watch Beating Case*, BALT. SUN (Dec. 17, 2013), <https://www.baltimoresun.com/news/crime/bs-xpm-2013-12-17-bs-md-ci-werdesheim-probation-20131217-story.html> [<https://perma.cc/6NY9-K2FE>].

155. CBS BALT., *supra* note 150.

156. *Id.*

157. Elliott C. McLaughlin & Devon M. Sayers, *Man "On Neighborhood Watch" Kills 20-Year-Old Outside Home*, CNN (Aug. 6, 2016), <https://www.cnn.com/2016/08/09/us/raleigh-north-carolina-man-shoots-african-american-outside-home-911-calls> [<https://perma.cc/LNS7-8L8V>].

158. *Id.*

159. *Id.*

males outside” who he claimed had firearms.¹⁶⁰ The group was actually at a party two doors down.¹⁶¹

Copley, described by some as “George Zimmerman 2.0,” was charged with the death and convicted.¹⁶² In closing arguments at the trial, the prosecutor did what Zimmerman’s prosecutors conspicuously failed to do—talked about “the elephant in the room. Ask yourself if Kourey Thomas and these people outside were a bunch of White males walking around wearing N.C. State hats, is he laying dead bleeding in that yard?”¹⁶³ The intermediate appeals court reversed the conviction, concluding race was “irrelevant” to the case, but the North Carolina Supreme Court reinstated it, ruling the defendant had failed to establish a reasonable possibility the jury would have acquitted him absent the prosecutor’s comments about race.¹⁶⁴

Eight months after Trayvon Martin’s killing, the Sanford PD announced plans to impose restrictions on its Neighborhood Watch programs, including a ban on carrying firearms, requiring training, registration, and closer oversight by the community relations unit of the police department.¹⁶⁵ The gun restriction was removed within a month.¹⁶⁶ In 2013, the Retreat Lakes neighborhood association settled a wrongful death suit filed by Trayvon’s family for an undisclosed amount.¹⁶⁷

What can be done to assert more control over neighborhood watches, and avoid future Trayvon Martins? Typical suggestions are more training,

160. *Id.*

161. *Id.*

162. Josh Shaffer, *New Trial Ordered for Raleigh Homeowner Who Was Convicted in Slaying of Partygoer*, NEWS & OBSERVER (June 5, 2019), <https://www.newsobserver.com/news/local/article230113179.html> [<https://perma.cc/K688-LWTW>].

163. *Id.*

164. Josh Shaffer, *Murder Conviction Upheld in Racially Charged Homeowner Shooting*, NEWS & OBSERVER (Apr. 3, 2020), <https://account.newsobserver.com/paywall/stop?resume=241744461> [<https://perma.cc/J8RB-22D9>].

165. Barbara Liston, *Florida City Bans Guns for Neighborhood Watch Volunteers*, REUTERS (Oct. 30, 2013), www.reuters.com/article/2013/10/30/us-usa-guns-florida-idUSBRE99T13520131030 [<https://perma.cc/QK7G-8UPG>] (discussing attempts by the Sanford Police Department to change the negative image of Neighborhood Watch by returning it to the simple observe-and-report format, in light of the recent death of Trayvon Martin and the Zimmerman trial); Soumya Karlamangla, *Neighborhood Watch Rules to Change in Fla. City Where Trayvon Martin Was Killed*, L.A. TIMES (Nov. 2, 2013), <https://www.latimes.com/archives/la-xpm-2013-nov-02-chi-neighborhood-watch-rules-to-change-in-city-where-trayvon-martin-died-20131102-story.html> [<https://perma.cc/ME7N-SWT5>].

166. Johnson, *supra* note 27, at 482.

167. Lizette Alvarez, *Settlement Is Reached with Family in Slaying*, N.Y. TIMES (Apr. 5, 2013), <https://www.nytimes.com/2013/04/06/us/trayvon-martins-parents-settle-wrongful-death-suit.html> [<https://perma.cc/ZD5V-KKJ8>].

background checks, and more strictly restricting activities to observing and reporting (as was tried in Sanford after Trayvon Martin's killing).¹⁶⁸ But the problems go far deeper than that. We are witnessing, as in so many sectors of American society, a slow privatization of law enforcement.¹⁶⁹

It may take a Derek Chauvin verdict¹⁷⁰ against a George Zimmerman to begin to get the message out that there will be accountability for pretend cops, when they take the law into their own hands. In any event, the very underlying premise of such groups—that “crime is higher in ‘socially disorganized areas’ marked by weakened informal control due to an erosion of shared norms”¹⁷¹—carries a chilling Orwellian tone.

IV. ORGANIZED VIGILANTISM IN THE U.S.

The neighborhood watch is part of the continuing story of vigilantism in the United States.¹⁷² Lynch mobs were long a regular feature of life, primarily but far from exclusively in the South, where they served ghoulishly as a form of entertainment.¹⁷³ The Fugitive Slave Law (enacted to enforce the constitutional

168. See Finegan, *supra* note 124, at 129–33 (proposing statutory reforms that would limit the ability of neighborhood watch members to confront suspects, mandate training for those engaged in law enforcement activities, and expand the exclusionary rule to evidence seized illegally by private citizens engaged in law enforcement functions); Treutler, *supra* note 134.

169. Private security for US embassies has replaced the Marines, and private contractors like Eric Prince's infamous Blackwater mercenaries fight wars in Iraq and Afghanistan. See generally Brian G. Lebon, Jr., *Running Before Walking: The Underlying Costs of Privatized Violence & the Future of the Privatized Industrial Complex*, 15 LOY. J. PUB. INT. L. 63 (2013). For more examples, see Nicholas Elliott, *The Growth of Privatized Policing*, FOUND. FOR ECON. EDUC. (Feb. 1, 1991), <https://fee.org/articles/the-growth-of-privatized-policing/> [<https://perma.cc/DMD4-RZWK>]. Outsourcing immunizes government actors who would otherwise be held responsible for the crimes and misdeeds committed. Finegan, *supra* note 124, at 90. This is return to the state of affairs before governments got into the criminal justice business during the Industrial Revolution. *Id.* at 94. Our civil justice system also competes with private Alternative Dispute Resolution and mandatory arbitration clauses. See Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 773–74 (2008). Outsourcing immunizes government actors who would otherwise be held responsible for the crimes and misdeeds committed.

170. John Eligon, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html> [<https://perma.cc/5UMD-8ZQZ>]; Holly Bailey, *Chauvin Sentenced to 20 Years for Violating Floyd's Federal Civil Rights*, WASH. POST (July 7, 2022), <https://www.washingtonpost.com/nation/2022/07/07/derek-chauvin-federal-sentencing/> [<https://perma.cc/RP3L-XVBA>].

171. *Our History*, NATIONAL NEIGHBORHOOD WATCH, <https://www.nnw.org/our-history> [<https://perma.cc/WM55-U4U6>].

172. For a thorough treatment of the origins and history of American vigilantism, see BROWN, *supra* note 24.

173. *Id.* at 21–22.

obligation to return escaped slaves in Art. 4, Section 2, Clause 3) delegated state authority to private bounty hunters and thus incentivized the capture of escaped slaves by any means necessary.¹⁷⁴ In turn, vigilance committees arose in the North to protect runaway slaves from capture, exemplified by the Boston mob that attacked the courthouse and then attempted unsuccessfully to block federal authorities from taking Anthony Burns to the wharf and returning him to his owner in Virginia.¹⁷⁵

The most notorious of the vigilante groups, the Ku Klux Klan, terrorized Blacks, Catholics, and Jews with violence in the years after the Civil War, and continued into the Twentieth Century, particularly against civil rights activists in the 1960s.¹⁷⁶ After World War I, the Klan expanded from the South into the North and West and became a national organization, even dominating the politics in states like Indiana and Oregon.¹⁷⁷

Perhaps most troublesome is the Klan's sometimes close association with law enforcement. In a number of infamous cases, including the murder of three young civil rights workers in Philadelphia, Mississippi, in the summer of 1964, local police and sheriffs joined the White Knights in the brutal crimes and coverups.¹⁷⁸

Klan activity persists to the present day, although much scaled down as a result of government and private efforts to curtail it, including prosecutions of cold cases like the Mississippi murders, and civil actions that bankrupted the organization brought by civil rights lawyer Morris Dees.¹⁷⁹ The Klan still strikes fear when its members appear in their menacing White sheets.

Most recently, Texas has drawn on another American tradition—the posse (familiar to viewers of cowboy westerns), mobilized by the sheriff to assist in the capture of alleged lawbreakers or in defense of the town.¹⁸⁰ The Texas anti-abortion statute (S.B.8) is enforced not by state officials but by private bounty

174. History.com Editors, *Fugitive Slave Acts*, HISTORY (Feb. 11, 2020), <https://www.history.com/topics/black-history/fugitive-slave-acts> [<https://perma.cc/NM3F-7JLS>].

175. Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 388 (2015).

176. BROWN, *supra* note 24, at 272.

177. *See id.*

178. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/XD4T-XGYZ>].

179. *See id.*; Bill Laytner, *Civil Rights Lawyer who Bankrupted KKK Gets Hero's Welcome in Detroit*, DET. FREE PRESS (Jan. 31, 2018), <https://www.freep.com/story/news/local/michigan/detroit/2018/01/28/civil-rights-hero-morris-dees-visits-detroit-speaks-nations-strength-immigrants/1073266001/> [<https://perma.cc/DDU6-PTWY>].

180. BROWN, *supra* note 24, at 112–18.

hunters incentivized by a \$10,000 reward for identifying abortion providers and anyone who “aids or abets” in the now prohibited procedure.¹⁸¹ The clever effort at avoiding a constitutional challenge to state action has apparently worked.¹⁸² Other states are preparing similar legislation.¹⁸³

Have we circled back to the Wild West of yesteryear?¹⁸⁴

V. THE FREELANCERS

Three men took it upon themselves to make a “citizen’s arrest” of Ahmaud Arbery, whom they believed (without evidence) had committed burglaries in the neighborhood.¹⁸⁵ Armed with a .357 Magnum revolver and 12-gauge shotgun, the McMichaels (father and son) and William “Roddie” Bryan pursued the twenty-five-year-old Black jogger in two pickup trucks on a suburban Georgia street on February 23, 2020.¹⁸⁶ They “trapped [him] like a rat” (in the

181. Kimberly Atkins Stohr, *Supreme Court Inaction Won’t Just Bring an End To Roe. It’ll Make Bounty Hunting the Norm*, BOS. GLOBE (Sept. 2, 2021), <https://www.bostonglobe.com/2021/09/02/opinion/supreme-court-inaction-wont-just-bring-an-end-roe-itll-make-bounty-hunting-new-norm/> [<https://perma.cc/3W8C-PSX8>]; TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a)(1)–(a)(2), (b)(2) (West 2021).

182. Stohr, *supra* note 181.

183. Jon Michaels, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html> [<https://perma.cc/KA3V-ASJY>]; *Capitol Breach Cases*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao-dc/capitol-breach-cases> [<https://perma.cc/J2FB-SVUD>] (last visited Mar. 27, 2023).

184. LIGHT, *supra* note 24, at ix–x.

185. Ashish Valentine, *What is the Citizen’s Arrest Law at the Heart of the Trial over Ahmaud Arbery’s Death?*, NPR (Oct. 26, 2021), <https://www.npr.org/2021/10/26/1048398618/what-is-the-citizens-arrest-law-in-the-trial-over-ahmaud-arberys-death> [<https://perma.cc/2GWQ-L75A>].

186. Richard Fausset, *Before Breonna Taylor and George Floyd, There Was Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html> [hereinafter Fausset, *Before Briana Taylor*] [<https://perma.cc/UQ7Q-WJQT>]; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [hereinafter Fausset, *What We Know About the Shooting Death*] [<https://perma.cc/88HL-AYXB>]. For the concept and history of such arrests, see generally Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, *The Puzzling Persistence of Citizen’s Arrest Laws and the Need to Revisit Them*, 64 HOW. L. J. 161 (2020); Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J. L. & PUB. POL’Y 557 (2016). Citizen’s arrests were recognized as far back as the English Statute of Winchester in 1285, outlining both the authority and indeed responsibility of private citizens to apprehend perpetrators. Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J. L. & PUB. POL’Y 557, 562 (2016). American common law often required a showing of actual guilt to justify the arrest (otherwise the arrestor was strictly liable), and limited arrests to felonies committed in the presence of the citizen. *Id.* at 565–67. The volunteer watch group the Guardian Angels have famously engaged in citizen arrests, *Id.* at 580. For a survey of citizen arrest laws around the country, see Kimberly Kessler Ferzan, Response, *Taking Aim at Pointing Guns? Start With Citizen’s*

words of one), and shot him to death.¹⁸⁷ At least one of the White attackers yelled racist slurs during the pursuit.¹⁸⁸

The three represent what we might call unaffiliated vigilantes.

We know what happened only because Bryan recorded the events on his cell phone.¹⁸⁹ The trio told a very different story at the time, shifting the blame to Arbery, who they claimed attacked them.¹⁹⁰ Their version was initially accepted by the authorities.¹⁹¹ The senior McMichael was a former police officer and retired investigator in the district attorney's office.¹⁹² Only when the video was released months later were the three finally charged.¹⁹³ Public pressure brought a nine-count indictment for murder, and later federal hate crime charges.¹⁹⁴ As with George Zimmerman, the killers claimed the victim attacked them and they acted in self-defense.¹⁹⁵

Georgia's citizen's arrest law dates (not coincidentally) to the year of the Emancipation Proclamation.¹⁹⁶ The original prosecutor on the case concluded that the men acted within their rights to "arrest" the unarmed man, with force,

Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles, and Darrell A.H. Miller, Pointing Guns, 99 *TEX. L. REV.* 1173 (2021), 100 *TEX. L. REV. ONLINE* 1, 7–10 (2021).

187. Emily Crane, *Ahmaud Arbery was "Trapped Like a Rat" Before Being Shot Dead: Police Testimony*, *N.Y. POST* (Nov. 10, 2021), <https://nypost.com/2021/11/10/ahmaud-arbery-trapped-like-a-rat-before-being-killed-trial/> [<https://perma.cc/7GEC-QWFJ>].

188. Elliott C. McLaughlin, *Ahmaud Arbery was Hit with a Truck Before He Died, and His Killer Allegedly Used a Racial Slur, Investigator Testifies*, *CNN* (June 4, 2020), <https://www.cnn.com/2020/06/04/us/mcmichaels-hearing-ahmaud-arbery/index.html> [<https://perma.cc/B6L3-XNHD>].

189. Fausset, *What We Know About the Shooting Death*, *supra* note 186.

190. *Id.*

191. Dakin Andone, *A Timeline of the Killing of Ahmaud Arbery and the Case Against 3 Men Accused of His Murder*, *CNN* (Nov. 12, 2021), <https://www.cnn.com/2021/10/18/us/ahmaud-arbery-case-timeline/index.html> [<https://perma.cc/YEE4-PTBR>].

192. *Id.*; Fausset, *Before Briana Taylor*, *supra* note 186.

193. Erin Donaghue, *3 Men Indicted on Murder Charges in Killing of Ahmaud Arbery*, *CBS NEWS* (June 24, 2020), <https://www.cbsnews.com/news/ahmaud-arbery-killing-indictments-travis-greg-mcmichael-william-bryan/> [<https://perma.cc/EX8Z-PKTW>]; Andone, *supra* note 191.

194. Donaghue, *supra* note 193; Andone, *supra* note 191.

195. Obvious similarities to Trayvon Martin's killing have been noted in the press. "Both the 17-year-old Martin and the 25-year-old Arbery were accosted by self-appointed White vigilantes who shot them at point-blank range after a scuffle. In both cases, prosecutors initially declined to pursue charges, which were filed only after weeks of sustained pressure from the Black communities in both Deep South states." *Killings of Arbery and Martin Tragically Similar*, *MINN. SPOKESMAN-RECORDER* (June 4, 2020), <https://spokesman-recorder.com/2020/06/04/killings-of-arbery-and-martin-tragically-similar/> [<https://perma.cc/SD2A-ZN3S>].

196. Fausset, *Before Briana Taylor*, *supra* note 186. The law was the work of a slaveholding attorney. *See* Flanders, Brooks, Compton & Riley, *supra* note 186, at 182.

even though one admitted to police “he didn’t know if Mr. Arbery had stolen anything or not, but he had a gut feeling” he had committed prior break-ins.¹⁹⁷ That prosecutor has been indicted for conflict of interest, as McMichael had previously worked in her office.¹⁹⁸

A nearly all-White jury ultimately convicted the men after a trial that minimized the role of race in the killing, with the prosecutor mentioning it only once—during her closing argument.¹⁹⁹ The three were sentenced to life in prison.²⁰⁰ Subsequently they were convicted of federal hate-crimes, and upon sentencing, asked the judge to send them to federal rather than state prison because (ironically) they feared “vigilante justice” in state custody.²⁰¹ A § 1983 civil rights action was also filed.²⁰²

Donald Trump in effect put the Presidential stamp of approval on such vigilante attacks. A St. Louis couple in June 2020, brandished their AR-15 assault rifle and pistol threateningly at Black Lives Matter protesters marching past their home in an upscale gated community.²⁰³ A video of the gun-toting couple went viral.²⁰⁴ Although charged with felony counts of unlawful use of a weapon, they were issued summonses rather than arrested, and received public support from Trump and the Missouri Governor, who indicated he would pardon them if convicted.²⁰⁵ The Governor called for the resignation of the

197. *Ahmaud Arbery Killing: What we Learned from Latest Court Hearing*, WRDW (June 5, 2020), <https://www.wrdw.com/content/news/Ahmaud-Arbery-killing-What-we-learned-from-latest-court-hearing-57104001.html> [<https://perma.cc/5LST-AJ2Z>]; Andone, *supra* note 191.

198. Alissa Marque Heyardi & Ronald Wright, *The Ahmaud Arbery Case: Lessons to Prevent Prosecutor Conflicts*, BLOOMBERG L. (Sept. 22, 2021), <https://news.bloomberglaw.com/us-law-week/the-ahmaud-arbery-case-lessons-to-prevent-prosecutor-conflicts> [<https://perma.cc/YM79-KNKD>].

199. Richard Fausset, *How a Prosecutor Addressed a Mostly White Jury and Won a Conviction in the Arbery Case*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/25/us/prosecutor-white-jury-conviction-ahmaud-arbery.html> [<https://perma.cc/3WGJ-9PYK>].

200. *Id.*

201. Richard Fausset, *Two in Arbery Case Sentenced Again to Life in Prison, Third Man Gets 35 Years*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/arbery-killer-sentencing.html> [<https://perma.cc/7AJV-X38W>].

202. Complaint at 30, *Cooper v. McMichael*, No. 2:21-CV-20 (S.D. Ga Feb. 23, 2021).

203. Tom Jackman, *St. Louis Couple Who Aimed Guns at Protestors Charged with Felony Weapons Count*, WASH. POST (July 20, 2020), <https://www.washingtonpost.com/nation/2020/07/20/st-louis-couple-who-aimed-guns-protesters-charged-with-felony-weapons-count/> [<https://perma.cc/Z8KJ-ZF3J>].

204. *Id.*

205. *Id.*; *St. Louis Couple Who Waved Guns at Protest Have Spoken to Trump About their Case, Lawyer Says*, ASSOCIATED PRESS (Oct. 14, 2020), <https://www.nbcnews.com/news/us-news/st-louis-couple-who-waved-guns-protest-have-spoken-trump-n1243391> [<https://perma.cc/HRJ5-UAV9>].

African-American prosecutor who brought the charges, and she was subjected to racist death threats from across the country.²⁰⁶

The couple emerged as celebrities in conservative circles, and made a video appearance at the Republican National Convention in August.²⁰⁷ The prosecutor was removed from the case on defense charges of bias,²⁰⁸ and the couple were permitted to plead to misdemeanor charges, with no jail time and a \$2,750 fine.²⁰⁹ In August 2021, the governor pardoned them, as promised, and they stated publicly that they would have done the same thing again.²¹⁰

The July 5, 2021 issue of the *New Yorker* featured “Kyle Rittenhouse, American Vigilante,” chronicling the story of a seventeen-year-old White man who carried an illegal assault weapon (he was under-age) across state lines to confront antiracist protestors in Kenosha, Wisconsin.²¹¹ The protests followed the police shooting of Jacob Blake, a Black man who scuffled with police officers when they tried to arrest him on a domestic violence warrant as he tried to enter his car, where his young children sat in the back.²¹²

A former city alderman had posted on social media a call for “Armed Citizens to Protect Our Lives and Property” from the “evil thugs” who were demonstrating.²¹³ Other posts urged that “law-abiding citizens have no choice but to protect their own communities as their forefathers did at Lexington and Concord in 1775.”²¹⁴ Many showed up in military fatigues and carried assault

206. Jackman, *supra* note 203.

207. Christine Byers & Dori Olmos, *St. Louis Judge Denies McCloskey’s Motion to Send Case Back to Grand Jury*, KSDK (Apr. 30, 2021), <https://www.ksdk.com/article/news/crime/mark-patricia-mccloskey-trial-date-set/63-9099828c-ad13-4824-8fba-ea945fff7d2> [https://perma.cc/A7YW-FQ3F].

208. Christine Byers, *Dismissals and Appeal Put Prosecution of McCloskey Case on Hold, For Now*, KSDK (Jan. 4, 2021), <https://www.ksdk.com/article/news/local/dismissals-and-appeal-put-prosecution-of-mccloskey-case-at-standstill/63-2326acae-8e33-4fe6-b2bd-40ed7f76ea6d> [https://perma.cc/4AFG-4BFJ].

209. Azi Paybarah, *St. Louis Couple Who Aimed Guns at Protesters Plead Guilty to Misdemeanors*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/17/us/mark-patricia-mccloskey-st-louis-couple-protesters.html> [https://perma.cc/VRF3-9AAD].

210. Jim Salter, *Missouri Governor Pardons Gun-Waiving St. Louis Lawyer Couple*, AP NEWS (Aug. 3, 2021), <https://apnews.com/article/michael-brown-st-louis-20062ccc6593bd91757ad1ea4a190db5> [https://perma.cc/BGS4-6XLQ].

211. Paige Williams, *Kyle Rittenhouse, American Vigilante*, NEW YORKER (July 5, 2021), <https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante> [https://perma.cc/CU2W-42FZ].

212. *See Jacob Blake: What We Know About Wisconsin Police Shooting*, BBC NEWS (Aug. 31, 2020), <https://www.bbc.com/news/world-us-canada-53909766> [https://perma.cc/7BGW-AXEG].

213. Williams, *supra* note 211.

214. *Id.*

weapons, some were in various militias and considered themselves “deputized.”²¹⁵

Rittenhouse shot three in the protest crowd, killing two (one of whom had just wandered into the chaos), yet was allowed to leave the scene carrying his assault rifle, walking right by police officers who told him to “go.”²¹⁶ “The police,” the *New Yorker* asserted, “almost certainly wouldn’t have let a Black man pass.”²¹⁷

The story went viral, and Rittenhouse was glorified as a hero among hard-right groups.²¹⁸ But to many others he became emblematic of the wide double standard separating violent White vigilantes from peaceful antiracist protesters routinely rounded up by aggressive police tactics. Arrests in the George Floyd demonstrations exceeded 10,000.²¹⁹

Rittenhouse was finally charged with intentional homicide and illegal possession of the weapon.²²⁰ He claimed self-defense, that he was acting as a member of a “well-regulated militia” protected by the Second Amendment.²²¹ Conservatives rallied to his defense, securing him private counsel and putting up his \$2 million cash bail.²²² His trial in November 2021 ended in acquittal on all charges, even on the unlawful possession of a firearm charge, which the judge inexplicably dismissed himself.²²³

The judge appeared quite clearly to side with the defense, including constantly berating the prosecution team, applauding a key defense witness, and even forbidding the prosecution from referring to the people shot by Rittenhouse as “victims.”²²⁴ The jury of seven women and five men accepted

215. *Id.*

216. *Id.*

217. *Id.*

218. Ryan Bort, *How the Right Found a Hero in Kyle Rittenhouse*, ROLLING STONE (Nov. 19, 2021), <https://www.rollingstone.com/culture/culture-news/kyle-rittenhouse-right-wing-violence-1257856/> [<https://perma.cc/5X2Y-2NY2>].

219. Anita Snow, *AP Tally: Arrests At Widespread US Protests Hit 10,000*, AP NEWS (June 4, 2020), <https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7> [<https://perma.cc/BF3Z-HBNY>].

220. Williams, *supra* note 211.

221. Anderson, *supra* note 96, at 159.

222. Williams, *supra* note 211.

223. Julie Bosman, *Kyle Rittenhouse Was Found Not Guilty of Intentional Homicide and Four Other Charges*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial#kyle-rittenhouse-verdict> [<https://perma.cc/2UTA-2UQ5>].

224. Nicholas Reimann, *Judge in Rittenhouse Case Slammed With Accusations of Bias—Here’s Why*, FORBES (Nov. 11, 2021), <https://www.forbes.com/sites/nicholasreimann/2021/11/11/judge-in-rittenhouse-case-slammed-with-accusations-of-bias-heres-why/> [<https://perma.cc/FK97-W8RX>];

Rittenhouse’s “pushing the limits” self-defense—that he feared someone in the group *he menaced* would take his weapon and use it on him—and acquitted him.²²⁵

Wisconsin’s definition of self-defense permits an actor who provokes the violence to nonetheless seek acquittal on the grounds he has “exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.”²²⁶ Rittenhouse’s attorneys had secured a police use-of-force expert who viewed the videos of the events and testified at the trial that Rittenhouse was in fact defending himself from attacks by the protestors.²²⁷ As the *New Yorker* piece concludes, “If a jury appears to sanction vigilantism [(as this jury did)], it seems likely that more altercations between protesters and counter-protesters will turn deadly.”²²⁸

Indeed, armed vigilante groups saw vindication in the Rittenhouse verdict. As a *Times* commentator observed, it “represented the lethal culmination of this idea: that the United States had reached a point of crisis in which citizens were required to take up arms to defend it from their fellow citizens. It was an idea with deep roots in American history, and also one deeply entangled with the country’s legacy of racial conflict.”²²⁹

But what happens when Black persons are the ones who take up arms?

Ewan Palmer, *Anger Over Kyle Rittenhouse Trial Judge Grows After Week of Controversies*, NEWSWEEK (Nov. 12, 2021), <https://www.newsweek.com/kyle-rittenhouse-trial-judge-bruce-schroeder-controversies-1648569> [<https://perma.cc/5KCC-DQ99>]; Becky Sullivan, *Why the Rittenhouse ‘Not Guilty’ Verdict is Not a Surprise to Legal Experts*, NPR (Nov. 19, 2021), <https://www.npr.org/2021/11/19/1057422329/why-legal-experts-were-not-surprised-by-the-rittenhouse-jurys-decision-to-acquit> [<https://perma.cc/6MRT-MUKC>]; Nicholas Bogel-Burroughs, *In Scrutinized Kyle Rittenhouse Trial, It’s the Judge Commanding Attention*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/11/us/kyle-rittenhouse-judge-bruce-schroeder.html> [<https://perma.cc/2FXR-DU22>].

225. Bosman, *supra* note 223.

226. WIS. STAT. § 939.48(2)(a) (2021–2022); see Shaila Dewan & Mitch Smith, *When It Comes to Self-Defense, the Prosecution Has a Heavier Burden*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/us/rittenhouse-acquittal-self-defense.html> [<https://perma.cc/7YNL-GUKX>].

227. Michael Tarm & Todd Richmond, *Force Expert: Rittenhouse Decisions to Shoot Were Reasonable*, ASSOCIATED PRESS (Oct. 5, 2021), <https://www.usnews.com/news/us/articles/2021-10-04/rittenhouse-due-in-court-for-likely-final-motions-hearing> [<https://perma.cc/72Z8-MXK3>].

228. Williams, *supra* note 211.

229. Charles Homans, *To Paramilitary Groups, Rittenhouse Verdict Means Vindication*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/2021/11/21/us/rittenhouse-militia-paramilitary.html> [<https://perma.cc/JYS8-7XMN>].

VI. WHAT HAPPENS WHEN PEOPLE OF COLOR DEFEND THEMSELVES?

Malcolm X famously asserted the right of African-Americans to defend themselves “by all means necessary,” given the historical failure and refusal of the White community to protect them or punish the violence perpetrated against them.²³⁰ “The history of unpunished violence against our people,” he argued, “clearly indicates that we must be prepared to defend ourselves or we will continue to be a defenseless people at the mercy of a ruthless and violent racist mob.”²³¹ Those efforts, however, have often ended in tragedy.²³²

Ossian Sweet was an African-American doctor who moved into a segregated neighborhood of Detroit in 1925.²³³ When an armed White mob attacked the house, Sweet and his friends defended it and his family, firing gunshots that wounded one and killed another of the attackers.²³⁴ Sweet and his friends were charged and tried for murder.²³⁵ Only the support of the NAACP and the defense mounted by legendary lawyer Clarence Darrow secured their ultimate acquittal.²³⁶

Similarly, when an angry mob of hundreds, deputized and armed by city officials, rampaged, burnt, and destroyed the thriving neighborhood of Greenwood (dubbed “Black Wall Street”) in Tulsa, Oklahoma in the summer of 1921, it was the surviving Black defenders and their neighbors who were taken into custody and interned in the thousands.²³⁷ Estimates of the dead ran to 300, and at least 800 injured.²³⁸ The only White person prosecuted for his

230. Malcolm X, Speech at the Founding Rally of the Organization of Afro-American Unity (June 28, 1964), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity/> [https://perma.cc/9SRH-JPRU].

231. MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 112–13 (George Breitman ed., 1989).

232. For a history of the dramatically different treatment of armed black men and armed White men defending themselves, see generally ANDERSON, *supra* note 96 and LIGHT, *supra* note 24.

233. Victoria Wolcott, *Defending the Home: Ossian Sweet and the Struggle Against Segregation in 1920s Detroit*, OAH MAG. HIST., Summer 1993, at 23, <https://www.jstor.org/stable/pdf/25162908.pdf?refreqid=excelsior%3A318db9267b588e6290d2b99e3d48388e&absegments=&origin=> [https://perma.cc/LNG2-CRFK].

234. *Id.*

235. *Id.*

236. *Id.*

237. History.com Editors, *Tulsa Race Massacre*, HISTORY (May 24, 2022), <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [https://perma.cc/CG72-HMXD].

238. *June 1, 1921: The Attack On Black Wall Street*, BLACK THEN (July 28, 2021), <https://blackthen.com/june-1-1921-the-attack-on-black-wall-street-concludes-with-more-shootings-bea/> [https://perma.cc/Y8JT-V42E].

part in the violence was the chief of police, who was convicted of negligence in failing to stop the riot, together with unrelated corruption charges.²³⁹

Nearly fifty years later, members of the Black Panther Party for Self-Defense would also discover that the latter term had a different meaning for Black persons. The Party followed the model of the Deacons for Defense and Justice in the Old South, heavily armed Black men (mostly war veterans) organized to protect civil rights workers and activists against Klan and police violence.²⁴⁰ The Deacons had some notable successes, including providing security for key campaigns like James Meredith's effort to integrate the University of Mississippi and for CORE leader James Farmer.²⁴¹ But the group attracted the attention of J. Edgar Hoover's FBI and were subjected to the repressive abuses of the infamous COINTELPRO program.²⁴²

The Panthers' high-profile community patrols of Oakland, California were "aimed at inspiring black and brown communities to fight back [against police brutality] and served as a warning to law enforcement of the party's willingness to defend its communities with violence, if necessary."²⁴³ Openly displaying guns and ammunition belts (permitted at the time under California law, where the party was founded), they engaged in dramatic confrontations with police at public events. In May 1967, the Panthers entered the California Capitol Building and proceeded to the assembly floor during the debate on a bill directed at them that would ban carrying loaded weapons in public.²⁴⁴

The Mulford Act became law, with the enthusiastic support of the usually militant anti-gun control National Rifle Association and the signature of the new Governor, Ronald Reagan.²⁴⁵ The first federal gun control law followed in

239. OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/EF3B-ZRJH>]; BLACK THEN, *supra* note 238.

240. Javonte Anderson, *Are Black Militias a New Phenomenon? The History of Black Armed Self Defense, USA TODAY*, (Nov. 9, 2021), <http://libus.csd.mu.edu/wamvalidate?url=https://www.proquest.com/newspapers/are-black-militias-new-phenomenon-history-armed/docview/2595023410/se2?accountid=100> [<https://perma.cc/7A62-N9MQ>].

241. LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT* 222, 245–46 (2004).

242. *See id.* at 112–13. A television movie starring Forest Whitaker portrays the violent events of 1965 in Louisiana. *DEACONS FOR DEFENSE* (2003).

243. EDDIE S. GLAUDE, JR., *BEGIN AGAIN: JAMES BALDWIN'S AMERICA AND ITS URGENT LESSONS FOR OUR OWN* 86 (2020).

244. Thaddeus Morgan, *The NRA Supported Gun Control When the Black Panthers Had the Weapons*, *HISTORY* (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act> [<https://perma.cc/Y7YL-54XF>].

245. ANDERSON, *supra* note 96, at 134; *see also* LIGHT, *supra* note 24, at 122–24.

1968, prompted by the urban uprisings in Los Angeles, Detroit, and Newark, which “evoked the worst fears about Negroes with Guns.”²⁴⁶

As one historian put it, “[a]rmed black men asserting their right to defend the African-American community against the police conjured up a horrifying specter,”²⁴⁷ and the media (local and national) portrayed them as such. “Oakland’s Black Panthers Wear Guns, Talk Revolution” headlined the *San Francisco Examiner*.²⁴⁸ Black self-defense did not play any better north of the Mason-Dixon line than south, and the Panthers played an unwitting role in the successful “law and order” presidential campaign of Richard Nixon in 1968.²⁴⁹ Malcom X aptly quipped that if “you’re South of the Canadian border, you’re in the South.”²⁵⁰

The Black Panther Party was targeted by Hoover’s FBI for “neutralization,” meaning planting false reports in the media, constant harassment, wrongful arrests and prosecutions, and ultimately the assassination of Chicago leaders Fred Hampton and Mark Clark while they slept in their Chicago apartment.²⁵¹

Historian Carol Anderson has even traced the much-revered centerpiece of American self-defense, the Second Amendment, to fear of armed people of color taking up arms.²⁵²

If Trayvon Martin *did* in fact try to defend himself against his ominous stalker on that February night, as Zimmerman contended, the jurors nonetheless refused to acknowledge that as *Trayvon’s right of self-defense*, as *Trayvon’s right to stand his ground*.²⁵³ In fact, the defense team made much of the minor injuries their client had suffered—head abrasions and possible broken nose (for

246. ANDERSON, *supra* note 96, at 138.

247. *Id.* at 132.

248. *Id.* at 133.

249. *Id.* at 131–32.

250. Malcolm X, The Ballot or the Bullet (Apr. 2, 1964), http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html [<https://perma.cc/8TFY-EB55>].

251. *See generally* JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER (2011).

252. *See* ANDERSON, *supra* note 96 (documenting the racial divide embedded in the roots, history, and application of the right to bear arms). For more on the checkered history of black self-defense in the U.S., see LIGHT, *supra* note 24, at 8–17, 50.

253. “Where,” asks Professor Robin D .G. Kelley, “was the NRA on Trayvon Martin’s right to stand his ground? What happened to their principled position? Let’s be clear: the Trayvon Martins of the world never had that right because the ‘ground’ was never considered theirs to stand on.” Robin D.G. Kelley, *The U.S. v. Trayvon Martin: How the System Worked*, HUFFINGTON POST (July 15, 2013), <https://newsroom.ucla.edu/stories/the-u-s-v-trayvon-martin-how-the-247451> [<https://perma.cc/Y694-42UZ>].

which Zimmerman declined to go to the hospital or seek medical attention), using them to portray Martin as the aggressor, and Zimmerman the victim.²⁵⁴

VII. THE TRAYVON MARTIN CASE IN RACIAL REVERSE—*GEORGIA V. JOHN MCNEIL*

A telling comparison of self-defense narratives can be found in the case of a Black businessman in Georgia who shot a White man charging at him and his son on their own property after threatening them with a knife. Unlike George Zimmerman, John McNeil was convicted and jailed for life.²⁵⁵

In December 2005, McNeil's son got into an argument with Brian Epp, a contractor his father had hired but whom the son did not recognize.²⁵⁶ When asked to leave the premises, Epp pulled a knife and threatened him, at which point he telephoned his father, who called 911 and raced home.²⁵⁷ "When you get a call from your kids that somebody's got a knife pulled on them, threatening them, the first thing you want to do is to get home and protect your kid," McNeil testified.²⁵⁸

Upon McNeil's arrival home, Epp reached into his truck, grabbed something and put it in his pocket, and rushed McNeil, who by now had gotten a revolver from his car and warned Epp to back off.²⁵⁹ When he kept charging, McNeil retreated and fired a warning shot to the ground, but Epp kept advancing, and the next shot killed him.²⁶⁰ The knife was found in Epp's pocket.²⁶¹

Despite the testimony of McNeil's White neighbors, who corroborated that McNeil was in danger and attempting to back off, he was convicted of murder and sentenced to life imprisonment.²⁶²

The Georgia Supreme Court affirmed the conviction, ruling that the State had met its burden of disproving McNeil's self-defense beyond a reasonable

254. *See Medical Examiner Calls George Zimmerman's Injuries 'Minor,'* CLICK ORLANDO (July 3, 2013), <https://www.clickorlando.com/news/2013/07/03/medical-examiner-calls-george-zimmermans-injuries-minor/> [<https://perma.cc/UZP6-X7T9>].

255. *McNeil v. State*, 669 S.E.2d 111, 112–13 (Ga. 2008).

256. *Id.* at 113.

257. *Id.*

258. Rhonda Cook, *Was it Self-Defense or Murder?*, ATLANTA J.-CONST. (Oct. 27, 2012), <https://www.ajc.com/news/local/was-self-defense-murder/Se5HXOYibSoLQBBZynZdVJ/> [<https://perma.cc/KGA3-57YQ>].

259. *McNeil*, 669 S.E.2d at 115.

260. *Id.*

261. *Id.*

262. *Id.* at 117.

doubt.²⁶³ The dissenting justice, noting there was testimony at trial by other homeowners who had also had violent encounters with Epp, concluded:

[T]he evidence was overwhelming in showing that a reasonable person in McNeil's shoes would have believed that he was subject to an imminent physical attack by an aggressor possessing a knife and that it was necessary to use deadly force to protect himself from serious bodily injury or a forcible felony. Under the facts of this case, it would be unreasonable to require McNeil to wait until Epp succeeded in attacking him, thereby potentially disarming him, getting control of the gun, or stabbing him before he could legally employ deadly force to defend himself.

This is not what Georgia law requires. To the contrary, “[i]t is not essential to justify a homicide that there should be an actual assault made upon th[e] defendant. Threats accompanied by menaces, though the menaces do not amount to an actual assault, may in some instances be sufficient to arouse a reasonable belief that one's life is in imminent danger or that one is in imminent danger of great bodily harm or that a forcible felony is about to be committed upon one's person.”²⁶⁴

Neither the trial nor appellate court recognized Georgia's recently adopted Stand Your Ground law, providing a person “has no duty to retreat and has the right to stand his or her ground and use force . . . including deadly force [where he reasonably believes his life, or a third person's, is in imminent danger].”²⁶⁵ The law grants immunity from prosecution to anyone acting under its provisions, which was the reason given under the Florida law for sending George Zimmerman home after Trayvon's killing and not arresting him for nearly two months.²⁶⁶ The McNeil jury was not so advised about the new law.²⁶⁷ The verdict was ultimately overturned in 2012 because of errors in the instructions given to the jury, and McNeil was released.²⁶⁸

263. *Id.* at 113.

264. *Id.* at 117–18 (Sears, C.J., dissenting) (quoting *Bennett v. State*, 453 S.E.2d 458, 460 (Ga. 1995)).

265. GA. GA. CODE ANN. §§ 16-3-23.1, 16-3-24(a) (West 2006).

266. See Ta-Nehisi Coates, *How Stand Your Ground Relates to George Zimmerman*, ATLANTIC (July 16, 2013), <https://www.theatlantic.com/national/archive/2013/07/how-stand-your-ground-relates-to-george-zimmerman/277829/> [<https://perma.cc/N8R2-82PR>].

267. Cook, *supra* note 258.

268. *Id.*; see also Rhonda Cook, *John McNeil to Leave Jail Tuesday*, ATLANTA J.-CONST. (Feb. 12, 2013), <https://www.ajc.com/news/local/john-mcneil-leave-jail-tuesday/oK7Nh6RbXxRNwCJXR16YoJ/> [<https://perma.cc/F6K2-62NQ>].

Granting the complexities of comparing McNeil's case with Zimmerman's, the contours of each quite clearly point to the influence of race on the opposite results. If anything, McNeil appeared in considerably more danger from an adult armed with a knife and with a history of belligerent threats to his neighbors than Zimmerman, confronting an unarmed teenager with no such history.

An even more startling comparison is the case of Marissa Alexander in Florida in 2010.²⁶⁹ Prosecuted by the same state attorney who only reluctantly initiated the charges against Zimmerman, Alexander was a domestic violence victim who was threatened, together with her children, by her enraged abusive husband in her home.²⁷⁰ She grabbed a gun and fired a warning shot into the wall.²⁷¹ No one was injured.²⁷² Alexander was nonetheless charged with aggravated assault with a deadly weapon, convicted, and sentenced to the maximum term of twenty years.²⁷³ The judge ruled that the Stand Your Ground law did not protect her because Alexander "didn't appear afraid," but acted out of anger.²⁷⁴ The jury deliberated for only twelve minutes.²⁷⁵

VIII. REFORMING OUR LAW OF SELF-DEFENSE

What acquitted George Zimmerman of the killing of Trayvon Martin was obviously a confluence of factors, among them the deeply flawed conduct of the prosecution, as noted above. But race clearly played its insidious part. Had the racial roles been reversed, the White police detectives would not in all likelihood have allowed a Black shooter to go home after a soft-pedaling interview, with no further investigation or even a visit to the crime scene. Nor would police and prosecutors have so readily and uncritically accepted Zimmerman's implausible version of events, and allow him to remain free for two months, before finally bringing charges. Nor in all probability would a Black shooter's defiance of the 911 dispatcher's instruction "we don't need you

269. See LIGHT, *supra* note 24, at 177.

270. Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 years for "Warningshot": Did She Stand Her Ground?*, CBS NEWS (May 16, 2012), <https://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground/> [https://perma.cc/DQ5U-4KM2].

271. *Id.*

272. *Id.*

273. *Alexander v. State*, 121 So. 3d 1185 (Fla. Dist. Ct. App. 2013).

274. *Id.* at 1190 n.5.

275. ANDERSON, *supra* note 96, at 146–48; LIGHT, *supra* note 24, at 178–81. After intense public pressure, a new trial was ordered and she was released pursuant to a plea deal to house arrest, having served three years. LIGHT, *supra* note 24, at 177.

to follow him” be so ignored. Nor would the prosecutors and judge likely have so scrupulously sanitized the racial dimension of the narrative.

Would a White jury likely have acquitted a twenty-eight-year-old Black man of killing an unarmed White high school student who had done nothing more than walked “suspiciously” in the rain? The verdict appeared to be a triumph of American tribalism. The Black Lives Matter movement arose in reaction to the devaluing of Trayvon Martin’s life, and the other victims of such violence, be it by police or vigilante.

A diverse jury may have brought more skepticism to Zimmerman’s self-defense narrative, especially since they did not hear it *from him*—as noted above, he avoided (with the help of the prosecution) having to present his story at trial under oath and subject to cross-examination. Jurors routinely penalize defendants who do not testify, inferring guilt in what is dubbed “the silence penalty.”²⁷⁶ Zimmerman somehow avoided this fate.

More broadly, cases like Trayvon Martin’s raise the pressing question of whether our current standards for self-defense need to be significantly revised. Jurors now must assess whether the defendant *actually and reasonably believed* himself or herself to be in imminent danger. The accused does not have to be *correct* in this view, his belief need only be “reasonable” in the eyes of the factfinder.²⁷⁷ It has been noted, however, that the “fictional ‘average reasonable person,’ who is the touchstone of all judgments of *reasonableness*, is thus born in the courtroom carrying all the prejudices of the twelve [jurors] who gave that person life.”²⁷⁸ If fear of Black males is as prevalent in our society as studies indicate, assessments of the reasonableness of lethal force against persons of color are at real risk of distortion.²⁷⁹

In short, the requirement for “reasonable” belief in imminent danger may not act as the objective check it is designed to be if the prosecutor, judge, and jurors share the same biases (implicit or conscious) as the accused.²⁸⁰

The acquittal of “subway shooter” Bernard Goetz by a nearly all White jury for seriously wounding four unarmed Black youths in December 1984 is a case in point.²⁸¹ Approached by the teens, who merely asked for five dollars, Goetz

276. See Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 399 (2018).

277. Cynthia Lee, *Race and Self-defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 388 (1996).

278. Aaron Goldstein, *Race, Reasonableness, and the Rule of Law*, 76 S. CALIF. L. REV. 1189, 1199 (2003) (emphasis added).

279. Addie Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1666–68 (2019).

280. *Id.* at 1562–63, 1673.

281. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986); see also LIGHT, *supra* note 24, at 144–48; Lee, *supra* note 277, at 416–23. See generally GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW OF TRIAL* (1988).

fired his unlicensed Smith & Wesson .38 revolver, contending at trial that he could tell from their demeanor that he was in mortal danger.²⁸² Goetz admitted his intention was to murder them, to inflict as much suffering as possible.²⁸³ When one of the wounded youths appeared to Goetz to be “all right,” he fired another shot (emptying his pistol) that severed his spine.²⁸⁴ Goetz was hailed by many, and much of the New York media, as a crime-fighting folk hero.²⁸⁵

Despite serious questions about whether Goetz met the requirements for self-defense under New York law—*imminent* danger, a necessary and *proportional* response, and *no intention* to inflict injury beyond fending off the danger—the jury gave the accused the benefit of reasonable doubt.²⁸⁶

As in Zimmerman’s trial, the judge’s instructions made no mention of race or racial stereotypes.²⁸⁷ Yet the defense in both cases exploited the fears of the nearly all-White juries, in Goetz’s by referring to the victims as “savages,” “predators,” and “vultures.”²⁸⁸

The decades-old precedent of *Graham v. Connor*²⁸⁹ opens an even wider berth in police shootings by reading into “the calculus of reasonableness . . . allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving.”²⁹⁰ This split-second decision-making gloss now dominates litigation in this area.²⁹¹

282. *Goetz*, 497 N.E.2d at 43–44.

283. *Id.* at 44.

284. FLETCHER, *supra* note 281, at 1.

285. *Id.* at 28.

286. *Id.* at 19–28, 196–97.

287. News 13 Florida, *Jury Instructions in the George Zimmerman Trial*, SPECTRUM NEWS (July 12, 2013), https://www.baynews9.com/fl/tampa/news/2013/7/12/zimmerman_jury_instructions [<https://perma.cc/G6BC-SQEP>].

288. Lee, *supra* note 277, at 422–23.

289. 490 U.S. 386 (1989); see Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 ILL. L. REV. 629, 642–48 (2018); Kelly Hogue, *When an Officer Kills: Turning Legal Police Conduct into Illegal Police Misconduct*, 98 TEX. L. REV. 601, 605–06 (2020).

290. *Graham*, 490 U.S. at 396–97; see also Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. REV. 261 (2003); David D. Kirkpatrick, *Split-Second Decisions: How a Supreme Court Case Shaped Modern Policing*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2021/04/25/us/police-use-of-force.html> [<https://perma.cc/9T8H-PKGV>]; Goff & Richardson, *supra* note 138, at 64–66.

291. Eric R. Zimmerman, *The Incompatibility of the Police Use of Force Objective loss Reasonableness Standard and Split-Second Decision-Making*, CRIM. JUST., Summer 2022, at 36, 38–39.

The exoneration narrative has worked well for defendants, at least until Derek Chauvin's conviction for killing George Floyd (where there was infamously nine and a half minutes of time elapsed). Ferguson police officer Darren Wilson, by way of example, testified that eighteen-year-old Michael Brown suddenly and without provocation attacked him in his cruiser—"I felt like a five-year-old holding onto Hulk Hogan," and he shot him to death in self-defense.²⁹² In fact, he fired the fatal shot while Brown was fleeing the scene (although some witness accounts had Brown turning back towards the officer, perhaps to surrender).²⁹³ No serious injuries were found on Officer Wilson.²⁹⁴

Media stories often quickly emerge about the "criminality" of the victims, what has been dubbed their "thugification."²⁹⁵ Trayvon was suspended from school for traces of marijuana found in his book bag; Floyd may have passed a counterfeit \$20 bill at the convenience store before being killed; Michael Brown may have lifted cigarillos from a store—as if any of that, especially learned *afterward*, could ever justify the lethal violence.²⁹⁶

The officer-friendly legal standard is particularly troublesome given what we now know about the influences of unconscious biases and the effect of stereotypes on quick decision-making. White actors are more likely to read the actions of people of color as more threatening than they would other White persons.²⁹⁷ Tamir Rice, a Black twelve-year-old playing with a toy gun, was shot and killed by officers *two seconds* after they arrived at the playground.²⁹⁸ No charges were brought. Derek Chauvin, on the other hand, the one officer convicted in the death of a citizen, knelt on George Floyd's neck for a period

292. Marc Fisher, Kimbriell Kelly & Amy Brittain, *In Three Minutes, Two Lives Collide and a Nation Divides over Ferguson Shooting*, WASH. POST (Dec. 6, 2014), https://www.washingtonpost.com/investigations/in-three-minutes-two-lives-collide-and-a-nation-divides-over-ferguson-shooting/2014/12/06/b78b878e-7983-11e4-9a27-6fdb612bfff8_story.html [<https://perma.cc/B3PT-LSTM>].

293. *Id.*

294. *Id.*

295. ANDERSON, *supra* note 96, at 150–51.

296. Fisher, Kelly & Brittain, *supra* note 292.

297. Goff & Richardson, *supra* note 138, at 64–65.

298. Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), <https://www.nytimes.com/2014/11/27/us/video-shows-cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html> [<https://perma.cc/T963-DMB2>]; *Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland Ohio*, U.S. DEP'T OF JUST. (Dec. 29, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland> [<https://perma.cc/TE9A-4GX4>].

of nine-plus minutes, hardly the split-second that might have also exonerated him as well.²⁹⁹

The stereotype of Black criminality played itself out when in 1999 four NYPD officers thought they saw a gun in Amadou Diallo's hand as they surrounded him in his Bronx apartment doorway—it was in fact the wallet that held the very identification that they were demanding from him.³⁰⁰ Research documents the tendency to “see” a weapon on unarmed Black persons.³⁰¹ The subjects in a 2018 study identified Black men with something in their hand as more threatening than White men holding something.³⁰² And observers famously migrated a knife held by a White man into the hands of an unarmed Black man in another experiment.³⁰³ “[O]bserving an armed Black perpetrator automatically activates a stereotype linking Black men with weapons and crime.”³⁰⁴ Numerous studies teach that “seeing black” all too often means seeing imminent danger.³⁰⁵

As Professor Cynthia Lee observes,

This empirical research has disturbing implications for self-defense cases. In self-defense cases, a critical question is whether the defendant's belief in the need to use deadly force in self-defense was reasonable. A defendant claiming self-defense to defend against a homicide charge will only be acquitted if the jury finds that the defendant honestly and reasonably believed it was necessary to use deadly force to protect against an imminent, unlawful threat of death or serious bodily injury. If most individuals would be more likely to “see” a weapon in the hands of an unarmed Black person than in the

299. *George Floyd: Jury Finds Derek Chauvin Guilty of Murder*, BBC NEWS (Apr. 21, 2021), <https://www.bbc.com/news/world-us-canada-56818766> [<https://perma.cc/Y2EH-TE7L>].

300. Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES, February 5, 1999, at A1; Andrea Reiher, *What Happened to Amadou Diallo's Killers?*, HEAVY (May 11, 2020), <https://heavy.com/entertainment/2020/05/amadou-diallo-police-officers-killers/> [<https://perma.cc/9JC7-ZWLB>].

301. See Lee, *supra* note 101, at 1582–84. “The shooter bias studies discussed above provide strong evidence that individuals are quicker to associate Black individuals with weapons and to perceive Blacks as armed and dangerous, regardless of whether they are actually armed and dangerous.” *Id.* at 1585.

302. Kerri L. Pickel & Danielle E. Sneyd, *The Weapon Focus Effect is Weaker with Black Versus White Male Perpetrators*, 26 MEMORY 29, 39 (2018) (“[T]he data serve to illustrate how racial stereotypes can lead to disparate treatment of Black and White offenders.”).

303. Brent Staples, *How a Black Man's Wallet Becomes a “Gun”*, N.Y. TIMES, Mar. 12, 2000, at 14 (“The point was that racial categories are freighted with negative meanings that sometimes make us view people as threatening without cause and that sometimes get us to see things that do not exist.”).

304. Pickel & Sneyd, *supra* note 302, at 29.

305. ANDERSON, *supra* note 96, at 152–53; Lee, *supra* note 101, at 152–215.

hands of an unarmed White person and are thus more likely to shoot an unarmed Black person when they would not shoot a similarly situated White person, then jurors in self-defense cases may also be more likely to find that an individual who says he shot an unarmed Black person in self-defense because he believed the victim was about to kill or seriously injure him acted reasonably, even if he was mistaken. Jurors are unlikely to realize that negative stereotypes about Blacks may be influencing their evaluation of the reasonableness of the defendant's beliefs and actions unless they are made aware of this possibility.³⁰⁶

Data confirms that White killers of Black victims are far more likely to be ruled as justified than Black on White killings.³⁰⁷ The experience with Stand Your Ground laws has only exacerbated racial disparities in the criminal justice system—SYG laws have proven far more likely to exonerate a White killer of a Black victim than a Black killer of a White victim.³⁰⁸

The law of self-defense, as well as the standards for police shootings, need to meaningfully address these realities of race.

In cases like Trayvon Martin's and Tamir Rice, experts should be permitted to educate the jurors about the distorting effects of race on perceptions of danger and the science of implicit bias regarding the mere seconds it takes for tragic misjudgments to be made. Jury instructions along the lines of the admonitions that now typically accompany eyewitness identification testimony—advising lay jurors of the social science learning regarding the foibles of human perception, memory, as well as the problems of suggestibility and confirmation bias—may serve as an example.

Some model instructions do address race explicitly, warning jurors not to be improperly influenced by it in their deliberations, as this admonition used in the district courts in the Ninth Circuit:

Perform these duties fairly and impartially. You should not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases.

306. Lee, *supra* note 101, at 1584–85; see also L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 295 (2012) (“What is required is a new legal and theoretical framework that can account for these biases—one that does not rely upon the fiction of the objective decision-maker or the scapegoat of the consciously biased actor.”).

307. See Addie Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1653–54 nn. 44–49 (2019).

308. LIGHT, *supra* note 24, at 162–63; Lee, *supra* note 57, at 111–12.

Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.³⁰⁹

No such instruction was given to the Zimmerman jurors. The closest the judge got to the issue was the cryptic “[y]our verdict should not be influenced by feelings of prejudice, bias or sympathy.”³¹⁰

Focused training and seminars for prosecutors facing such self-defense scenarios should prepare them to dissect and disassemble dubious defense claims of reasonable fear in order to avoid verdicts of acquittal like Zimmerman’s, where the government failed to even acknowledge the clear racial dimensions of the defendant’s wholly irrational reaction to a teenager walking in the rain, and then his resort to lethal violence.

Complicating the self-defense picture is the matter of “officer-created jeopardy,” where the actor himself creates the very danger he asserts justifies his violence.³¹¹ An officer, for example, jumps on the hood of a fleeing suspect’s car, then fears the motion will eject him and shoots the driver, claiming self-defense. If we look at *just the final frame*, we miss the fact that it was the officer’s *own* earlier decision that put him at risk.

George Zimmerman similarly did so when he stalked a teenager on a dark, rainy night, precipitating a struggle on the ground where he claimed he feared his gun would be taken and used against him. While the prosecutor urged the jurors to *go back to the beginning*—Zimmerman’s dogged pursuit of Martin by car and foot—the trial judge instead directed their attention to the final fatal encounter.³¹²

The jurors were directed to begin their assessment of Zimmerman’s self-defense claim with the struggle on the ground, ignoring how the two ended up there. All that mattered to them, we now know from interviews, was “who was on top and who was on the bottom.”³¹³

309. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 1.1. (2010).

310. Jury Instructions, *Florida v. Zimmerman*, No. 12-CF-1083-A (Fla. Cir. Ct. July 13, 2013), <http://law2.umkc.edu/faculty/projects/ftrials/zimmerman1/Zimjuryinstructions.pdf> [<https://perma.cc/96KN-6MKB>].

311. Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer’s Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362 (2021); David D. Kirkpatrick, Steve Eder, Kim Barker, & Julie Tate, *How Broken Taillights End in Killings by Police*, N.Y. TIMES, Oct. 31, 2021, at 17.

312. ANDERSON, *supra* note 96, at 151.

313. BLOOM, *supra* note 71, at 20.

Kyle Rittenhouse forced his way through a crowd of demonstrators brandishing an assault rifle. The armed killers of Ahmaud Arbery pursued him in two pick-up trucks, cornered him, and attempted a forcible “citizen’s arrest.” Those back stories are critical to an understanding of what *really* precipitated their perceived necessity for “self-defense.”

Ignoring what led up to these killings is like coming into Shakespeare’s *Julius Caesar* at Act III, and being perplexed by the *inexplicable* brutal stabbing of the emperor by best friend Brutus.

As Professor Michael Avery has observed,

A police officer’s insistence that he was forced to make a split-second decision would often seem to be a rationalization of his own actions that precipitated a crisis during an incident. The training given to police officers, when followed, minimizes the need for split-second decisions. Indeed, many of the decisions about how such incidents should be handled have already been addressed in the training materials. The officer should not be in the position of attempting to develop [de-escalation techniques] on the street, from scratch.³¹⁴

Kimberly Kessler Ferzan has argued that a citizen who, in our gun-drenched society,³¹⁵ uses his firearm in what he claims was “self-defense,” but who (like Rittenhouse and Zimmerman) in fact put himself in the very situation where he feared his gun would be taken and used against him, has forfeited that defense.³¹⁶ The law in many jurisdictions, including Florida, actually does provide that a person who provokes the very risk that he violently responds to is not entitled to claim self-defense.³¹⁷ Florida law provides:

JUSTIFIABLE USE OF FORCE

776.041 Use or threatened use of force by aggressor.—The justification described in the preceding sections of this chapter is not available to a person who:

. . .

(2) Initially provokes the use or threatened use of force against himself or herself, unless:

314. Avery, *supra* note 290, at 322.

315. There are more guns than people, sales of firearms have soared in recent years, and those states desirous of some limited regulation have been thwarted by the Supreme Court. *See* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

316. Ferzan, *supra* note 186, at 7–8.

317. The Model Penal Code § 3.04(2)(b) provides that self-defense is not available where “the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter.” MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST., Proposed Official Draft 1985).

- (a) Such force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or
- (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force.³¹⁸

In words that seem to describe exactly what happened on February 26, 2012, the Florida Supreme Court long ago observed: “The law is quite clear that one may not provoke a difficulty and having done so act under the necessity produced by the difficulty, then kill his adversary and justify the homicide under the plea of self-defense.”³¹⁹ In a post-*Zimmerman* opinion, interestingly, a Florida court affirmed the trial court’s inclusion of the initial aggressor instruction where the provocation included (as in Martin’s case) stalking of the victim, leaving the issue to the jury.³²⁰

The Zimmerman trial judge nonetheless refused the State’s request that she give the initial aggressor instruction—that if Zimmerman’s *own* behavior provoked the violence, he forfeited his defense.³²¹ The trial judge perhaps accepted the defense position that stalking Martin did not constitute “provocation.” That ruling may in itself have sunk the State’s case.³²² The jury was not given the chance to determine whether Zimmerman created his own crisis, as in the case noted above. They may well have concluded he forfeited his defense.

Nor, in the judge’s thirty-minutes of instructions emphasizing that all Zimmerman needed was a *reasonable belief* he was in danger, is there any mention of the legal significance of Zimmerman pursuing Martin against the

318. FLA. STAT. § 776.041 (2022). Florida Standard Jury Instruction (Criminal 3.6(f)) tracks this language. Similarly, in Massachusetts: “Self-defense is generally not available to a defendant who provokes or initiates an attack, unless the initial aggressor withdraws from the fight and announces his intention to retire and the other party continues to attack. This is so because someone who provokes or initiates an attack cannot be said to be taking advantage of every opportunity to avoid the combat.” *Commonwealth v. Andrade*, 174 N.E.3d 281, 310 (Mass. 2021).

319. *Mixon v. State*, 59 So. 2d 38, 39–40 (Fla. 1952).

320. *Moorer v. State*, 278 So. 3d 181, 189–90 (Fla. Dist. Ct. App. 2019).

321. *Lee*, *supra* note 90, at 34.

322. Alafair Burke, *What You May Not Know About the Zimmerman Verdict: The Evolution of a Jury Instruction*, HUFFPOST (July 15, 2013), https://www.huffpost.com/entry/george-zimmerman-jury-instructions_b_3596685 [<https://perma.cc/Q5WL-H2MJ>].

explicit warning of the 911 dispatcher, thereby creating the very crisis that he then claimed required his lethal response. She instructed:

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself. In deciding whether George Zimmerman was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. *The danger facing George Zimmerman need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force.* Based upon appearances, George Zimmerman must have actually believed that the danger was real.³²³

Having covered the Zimmerman trial for NBC News, legal expert Lisa Bloom found utterly unreasonable, indeed implausible, Zimmerman's fear that, while on his back in the wet grass with his pistol hidden *inside a holster clipped to the back of his waistband*, Martin could possibly have grabbed it.³²⁴

And then there is the matter of proportionately. Even assuming Zimmerman could rightfully defend himself when Martin was on top of him, was *lethal* force justified? Was a bullet through the heart *the only* alternative available to him? Most states (like New York's)³²⁵ insist that self-defense force be proportional to the threat. Some state's laws explicitly require, for self-defense in police shootings, that the officer's actions be reasonable *and not excessive*.³²⁶ An actor, police, or civilian who carries stereotypes of Black violence may, as George Zimmerman did, resort immediately to lethal force.

With regard to lethal force by civilians like Zimmerman, it must be noted, we do not face the usual objection raised in cases of police violence—i.e., that to impose punishment will cause officers to hesitate from quick response to a threat, at the risk of their own and others lives.

Professor Ferzan bemoans what she sees as the “shift in cultural norms . . . moving from citizen *defense* to citizen *offense*”:

[W]hat we see percolating to the top of the cultural conversation is not the language of defense—it is the language of aggression. Citizens' arrests, and more generally the idea of

323. For the complete instructions, see Jury Instructions, *supra* note 310 (emphasis added).

324. BLOOM, *supra* note 71, at 2, 60–72.

325. See FLETCHER, *supra* note 281, at 19–28.

326. See citations in Lee, *supra* note 311, at 1369–71 nn.9–14.

using violence *in the name of the state*, is where the action is.³²⁷

Fear of The Other in our society is too often racialized, as it apparently was in George Zimmerman’s mind on February 26, 2012. Social psychologist Gordon Allport long ago identified “the two basic ingredients of [all] prejudice—denigration and gross overgeneralization.”³²⁸ Zimmerman simply saw a Black kid in a hoodie, who did not belong in his gated community, and he responded accordingly.

It is well beyond time to integrate this reality into our law of self-defense.

IX. FINAL REFLECTIONS

What can be said about the historical and legal significance of the Trayvon Martin case ten years hence? For many it stands as proof that in America, Black lives *still* don’t matter. Could anyone honestly say the story would have had the same ending with a *White* teenage victim and *Black* adult shooter?

Martin and Zimmerman each played roles long carved in the American hills. The case lives on as “a narrative Rorschach that each side will interpret as it wishes.”³²⁹ Just as with the double homicide trial of O.J. Simpson and the prosecutions of the police who beat Rodney King, race is the prism through which Americans view and assess the trial, seeing Zimmerman as either hero or villain.³³⁰ Even the “liberal” *New York Times* led its story on the jury

327. Ferzan, *supra* note 186, at 2, 8 (emphasis added).

328. ALLPORT, *supra* note 22, at 34.

329. Alan Dershowitz, *The “Rorschach” Facts in the Killing of Trayvon Martin*, HUFFPOST (June 11, 2012), https://www.huffpost.com/entry/the-rorschach-facts-in-th_b_1418441 [<https://perma.cc/758P-ETW3>].

330. See Bryan Adamson, *Thugs, Crooks, and Rebellious Negroes: Racist and Racialized Media Co Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 191–92 (2016) (examining the media’s framing of Black deaths at the hands of police officers and the effects of that framing); Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350–66 (2016) (“[I]nvestigat[ing] the historical criminalization of Black males and its connection to contemporary unarmed victims of law enforcement.”); Adam Johnson, Opinion, *How the Media Smears Black Victims*, L.A. TIMES (Mar. 30, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-johnson-black-victim-20170330-story.html> [<https://perma.cc/74YF-VKXD>] (providing examples of headlines humanizing White perpetrators of violence and dehumanizing Black victims of police violence); Nick Wing, *When The Media Treats White Suspects And Killers Better Than Black Victims*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/media-black-victims_n_5673291 [<https://perma.cc/Z32X-5QZM>] (same); Video: *The Media Doesn’t Humanize Black Victims The Way It Does White Killers*, HUFFPOST (Mar. 22, 2018), https://www.huffpost.com/entry/headlines-seem-to-show-racial-double-standard-for-violent-acts_n_5ab406c5e4b0bc0061c670cb [<https://perma.cc/5BX7-V7EA>].

selection with reference to “an altercation” between Zimmerman and Martin, not even mentioning the stalking and confrontation that preceded it.³³¹

We witness the flagrant disparity in treatment between White versus Black protestors in the shocking images of the January 6th insurrectionists being escorted out by police and sent on their way after the brutal storming of the Capitol, when only months before non-violent protestors of George Floyd’s killing were met with batons, tear gas, rubber bullets, arrest, and even death.³³² Most prosecutions to date that have been brought for the attack on our seat of government have been for relatively minor charges, and sentences have been lenient given the unprecedented gravity of the crime.³³³

George Floyd’s case focused worldwide attention on the killing of unarmed Black males under color of law. It produced the largest social justice protests in American history, consuming much of the spring and summer of 2020, a record \$27 million civil settlement with the Floyd family,³³⁴ and a rare guilty verdict against the officer.

But unlike Floyd and the numerous other police-involved victims, Trayvon Martin was killed *by a civilian*, a wannabe cop with no legal authority, no training, and, ultimately, no accountability. His story is the familiar one of

331. Buckley, *supra* note 78.

332. Kiara Brantley-Jones, Abby Cruz & Meredith Deliso, *Extraordinary Dichotomy in Police Response to Black Lives Matter Protests, Capitol Chaos: DC Attorney General*, ABC NEWS (Jan. 8, 2021), <https://abcnews.go.com/US/extraordinary-dichotomy-police-response-black-lives-matter-protests/story?id=75118567> [<https://perma.cc/6NZR-LWT7>]; John Eligon, *Racial Double Standard of Capitol Police Draws Outcry*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/capitol-trump-mob-black-lives-matter.html> [<https://perma.cc/8RXD-4NY5>]; Leila Fadel, *BLM Protesters Express Frustration Over Police Treatment Of Mob On Capitol Hill*, NPR (Jan. 8, 2021), <https://www.npr.org/2021/01/08/954994383/blm-protesters-express-frustration-over-police-treatment-of-mob-on-capitol-hill> [<https://perma.cc/YG4M-LVKU>]; Jared Goyette, Joey Peters & Becky Z. Dernbach, *Black Protesters in Minneapolis Have Encountered Tear Gas, Rubber Bullets, and Batons. White Pro-Trump Crowds Took Selfies with U.S. Capitol Police*, SAHAN J. (Jan. 7, 2021), <https://sahanjournal.com/police/minneapolis-george-floyd-protesters-u-s-capitol-riot/> [<https://perma.cc/Y36W-L3HU>]; Janelle Griffith & Deon J. Hampton, *Capitol Police Response to Rioters Draws Claims of Racist Double Standards*, NBC NEWS (Jan. 7, 2021), <https://www.nbcnews.com/news/us-news/capitol-police-response-rioters-draws-claims-racist-double-standards-n1253363> [<https://perma.cc/Y8Q4-9VJZ>].

333. Many were charged with “[k]nowingly [e]ntering or [r]emaining in any Restricted [b]uilding or [g]rounds without lawful authority.” U.S. DEP’T OF JUST., *supra* note 183.

334. Nicholas Bogel-Burroughs & John Eligon, *George Floyd’s Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. TIMES (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html> [<https://perma.cc/2S7A-ZPL2>].

vigilantism. Trayvon was a victim of the moral panic about crime³³⁵ (especially *Black crime*) played out, in his case, in the form of the Neighborhood Crime Watch phenomenon.

So much, and so little, has changed since 2012. The division in the populace's views on hot-button issues has calcified into a potentially unbreachable chasm, sometimes accompanied by violence. To comprehend the insistence of some of our fellow citizens that George Zimmerman, Bernard Goetz, Kyle Rittenhouse and the three killers of Ahmaud Arbery, are *the real* victims in their stories, or anti-crime superheroes, we might look back sadly at Chief Justice Taney's infamous declaration in *Dred Scott*—Black persons “had no rights which the White man was bound to respect.”³³⁶

Of course that is no longer *entirely* true—there are the post-Civil War amendments, *Brown v. Board of Education*, the landmark civil rights legislation of the 1960s—major advances to be sure. But DuBois' question to his fellow Black Americans one hundred and twenty years ago—*How does it feel to be a problem?*—still resonates.

Trayvon Martin was a problem on February 26, 2012, in the wrong place at the wrong time. George Zimmerman saw the problem, and he dealt swiftly with it. The police saw the problem as well, and let its solution walk out the door a free man. The prosecutors saw the problem, and saw fit to let Zimmerman go uncharged for two months. The jurors (the voice of the community) saw the problem, and retroactively invested Zimmerman with lawful authority to deal with it as he had.

Perceptions of American reality have long divided on racial, gender, religious, and ethnic lines. The current effort to sanitize history represented by the anti-Critical Race Studies (actually *anti-History*) movement would erase the Native American genocide, slavery, Jim Crow, lynching, and anything that might engender guilt in White individuals—and substitute a mythic narrative of the “land of the free and home of the brave,” the “cradle of liberty,” Ronald Reagan's “City on the Hill.”³³⁷

This is what makes keeping Trayvon Martin's case in the public memory so very important. It's not yesterday's news.

335. See Chas Critcher, Moral Panics, OXFORD RSCH. ENCYCLOPEDIA: CRIMINOLOGY & CRIM. JUST. (Mar. 29, 2017), <https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-155?rskey=Y4hRHd&result=1> [<https://perma.cc/B47V-GS4Y>].

336. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

337. Daniel Kreiss, Alice Marwick & Francesca Bolla Tripodi, *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), <https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/> [<https://perma.cc/V8RW-247M>].