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THE NEW DREAD, PART I: THE JUDICIAL OVERTHROW OF THE REASONABLENESS STANDARD IN POLICE SHOOTING CASES

Kindaka J. Sanders*

Abstract

This Article series argues that the U.S. Supreme Court's excessive force jurisprudence from *Graham v. Connor*[1] to the present has undermined the objectivity of the reasonableness standard. In its place, the Court has erected a standard that reflects modern conservative political ideology, including race conservatism, law-and-order, increased police discretion, and the deconstruction of the Warren Court's expansion of civil rights and civil liberties. Indeed, the Court, dominated by law-and-order conservatives, is one of the greatest triumphs of modern conservatism, which developed as a backlash against various social movements like the Civil Rights Movement in the 1960s and the spontaneous urban rebellions that characterized the decade.

Politicians like Barry Goldwater and Richard Nixon offered a regressive response to Black demands for economic, social, and political equality and an end to oppressive policing. The response was considered radical at the time because it endeavored to haul the United States back to the days before *Brown v. Board of Education*[2] was decided in 1954. Nixon called for "law and order" during his successful bid for president of the United States in 1968, using the slogan as a short form for the subjugation of disgruntled people—particularly Black people—back to their pre-Civil Rights era places. This "law and order" slogan was the primary social weapon for Nixon's "southern strategy," an appeal to race-prejudiced whites in the South disgusted with the civil rights gains for Blacks and to paranoid whites in the North, Midwest, and West afraid that African Americans would ravage the entire country. After successfully deploying the southern strategy, Nixon and a series of race conservative presidents from Ronald Reagan to Donald Trump set out to place "law and order" on the Supreme Court. They were wildly successful.

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1. Graham v. Connor, 490 U.S. 386, 391 (1989).
2. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

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Once a quasi-objective standard, the Supreme Court's excessive force standard is now almost wholly subjective. The Supreme Court often uses facially objective language: the officer's actions must be judged from the perspective of "the reasonable officer on the scene."[3] However, the Court then adds language that it excludes in other contexts involving objective reasonableness tests.[4] The Court prohibits the use of "20/20 vision of hindsight" to assess the reasonableness of the officer's conduct and requires consideration of the "split-second judgments" officers must make in "circumstances that are tense, uncertain, and rapidly evolving." This means that the Court does not consider, for example, a person's race, background, and experience with the police in determining what constitutes a seizure or flight.[5]

But aren't threatening situations with police "tense, uncertain, and rapidly evolving" for civilians too? Doesn't the little old lady walking through a dark park at night have to make "split-second judgments?" Is she more prepared to deal with the situation she faces than experienced officers trained to deal with confrontations? The Supreme Court's language, in practice, reveals a standard that is deferential to an officer's subjective perception of danger, irrespective of the perception's rationale. The standard is not objective. At best, it is one of rationalized fear or rationalized dread.

This double standard is counterintuitive. Many would expect police officers, who possess greater power and authority, to be less apprehensive, more responsible, and more careful than ordinary citizens facing "stressful" situations and, thus, more accountable for their mishaps. The logical expectation is that the reasonable police officer would be *more* "reasonable" than the average citizen. Yet, the Supreme Court's opinions on the issue imply a *lower* expectation of rationality from police officers than ordinary citizens.

In a typical unarmed police shooting case, the officer shoots an unarmed civilian (or an armed civilian with a concealed weapon he lawfully carries), who did not provoke the encounter, made no false movements, or posed no immediate threat.[6] The officer's fear may be genuine but

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3. Graham, 490 U.S. at 391.
4. See Universal Health Servs., Inc. v. United States, 579 U.S. 176 (2016); Pope v. Illinois, 481 U.S. 497, 501 (1987); Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175, 176 (2015); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).
5. Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 53 Val. U. L. Rev. 1045, 1052 (2019).
6. Several incidents illustrate this point. In 2016, a police officer shot Philando Castile after Castile told the officer he had a registered gun in the car. Castille never reached for the gun. Also, in 2016, a police officer shot unarmed Terrence Crutcher while he had his hands up. An officer shot Laquan McDonald in 2014 while McDonald, unarmed, was walking away; *see, e.g., Fatal Force*, The Wash. Post, https://www.washingtonpost.com/graphics/investigations/police-shootings-database.

unattached to the objective facts of the situation. Such fear would be unjustifiable, but for the Supreme Court's characterization of "circumstances that are tense, uncertain, and rapidly evolving" as viewed, apparently, from the subjective perspective of the officer.[7] Most decisionmakers would consider the officer's use of deadly force reasonable under these circumstances, even though the reasonable citizen in an analogous situation (for example, a citizen observing an individual talking to a neighbor with a knife by her side but exhibiting no outward signs of hostility, or a resident observing a twelve-year-old playing with a toy gun in the park) would not have perceived a deadly threat. Moreover, if a citizen irrationally perceived a threat, that citizen would be guilty of criminal homicide or not guilty because of insanity.[8] That is, a reasonable person cannot be irrational.[9] They are unreasonable because they are irrational—unless they're a cop.

Why the difference? The answer is not simple, but has two broad explanations: the unreasonable reasonable person is (1) a law enforcement professional and (2) usually white. Law enforcement professionals get the benefit of the doubt from prosecutors, judges, jurors, and white Americans at large. This benefit overlies any favorable presumptions granted by law. Whiteness adds other favorable presumptions like credibility and unearned empathy when the victim is Black. On the other hand, Blackness invokes a flurry of negative beliefs that undermine all favorable presumptions—legal and extrajudicial—and piles on other negative associations to boot. These include the presumptions of violence, criminality, immunity to pain, superhuman strength, and relative social worthlessness, all of which form the foundation of irrational white fear and are more thoroughly addressed in Part I.

The first of these presumptions, a violent nature and relative worthlessness, are rooted in slavery. The original dread (the fear of Black reprisal) and rationalization (slavery is ethical because Blacks are subhuman) spurred such presumptions and gained layers as the African American community accumulated more freedoms, economic gains, and political power. The layers correspond to the evolution of white fear and the country's need to rationalize social, economic, and political inequity.

The presumptions inform the deadliest legal standard in the modern era, the Supreme Court's rationalized dread standard. The rationalized fear or new dread standard is a subtle outgrowth of the Supreme

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7. Graham, *supra* note 1, at 396.
8. In State v. Simon, 231 Kan. 572 (1982), the Supreme Court found that the defendant's subjective belief that an Asian neighbor presented a deadly threat was unreasonable because the defendant's fear was based on the racial stereotype that all Asians knew Karate.
9. The Supreme Court definition of reasonableness basically tracks the common law definition with the notable exceptions of excessive force and the purely objective standard in pretext cases. See 579 U.S. 176 (2016); 481 U.S. 497 (1987); 575 U.S. 175 (2015); 457 U.S. 800 (1982); 524 U.S. 775 (1998).

Court's infamous decision in *Dred Scott v. Sandford*,[10] where Chief Justice Taney held that a Black man had no rights a white man was bound to respect. But it is not just the undervaluing of Black people that connects the various iterations of the Supreme Court. The law-and-order Supreme Court justices who created the rationalized dread standard also adopted Taney's judicial interpretative methodology, namely "originalism." The law-and-order Court, however, has necessarily updated Taney's perspective. The subtext underneath the Supreme Court's new dread standard now reads: a Black man has no rights a white officer is bound to respect if the officer is afraid for his life. Any fear will do. Reasonable or not.

Part I of this Article series examines fear from a biological, political, and sociological perspective. It highlights how most Americans impute reasonability to statistically unjustifiable perceptions of danger. Part I also examines the concept of reasonableness and analyzes the native and inevitable partiality of the standard. Finally, Part I explores the relationship between the social value of unarmed victims of deadly force and the perceived reasonableness of an officer's use of such force. It posits an inverse relationship between the perceived social status of the victim and the degree of statistical unreasonableness the law is willing to tolerate.

The lower the victim's rank on America's racial hierarchy—the hierarchy created by nineteenth century pseudo-scientist Samuel Morton to justify slavery—the more likely decisionmakers are to find a statistically unjustifiable fear to be reasonable. African Americans are ranked the lowest. The same presumption of Black inferiority that Taney so boldly proclaimed in *Dred Scott* lies covertly beneath the contemporary Court's decisions involving unarmed police killings.

Part II of this Article series discusses the sea change in excessive force standards from the common law's reasonableness standard to the current "rationalized fear" or "new dread" standard. Part II chronicles the change from different social, institutional, and legal perspectives, which have been factors influencing the sea change. These factors include: (1) the erosion of the common law right to resist an unlawful arrest; (2) the evolution of the modern police force; (3) the development of the law-and-order Supreme Court after the social tumult in the 1960s and the simultaneous development of radical social conservatism; (4) the Court's holding in *Graham v. Connor* which was the first to express the shift legally; (5) the culture of police accountability encouraged by the law-and-order Supreme Court; and (6) the judicial creation and expansion of the qualified immunity doctrine. Part II exposes how the new dread standard operates by providing evidence that distills the current, amorphous excessive force rule into an articulable legal standard reflecting its true effect and intent.

10. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (enslaved party), superseded by *constitutional amendment*, U.S. Const. amend. XIV.

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To Rationalize: ra·tion·al·ize,
raSHənlˌīz, ˈraSHnəˌlīz/
"An attempt to explain or justify (one's own or another's behavior or attitude) with logical, plausible reasons, even if these are not true or appropriate

Introduction

Law professors Richard Simmons and Renee M. Hutchins euphemistically write, "the Fourth Amendment" has been under constant "pressure to answer the needs of law enforcement" over the last several decades.[11] The truth is that since the law-and-order political movement in the late 1960s and the formation of the law-and-order Court in the 1970s, the U.S. Supreme Court has increasingly expanded police power and reduced police accountability. In *Graham v. Connor,* the Supreme Court created a new framework for evaluating excessive force. There, the Court held:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[12]

This framework has the veneer of objective reasonableness because it refers to "the perspective of the reasonable officer on the scene."[13] The standard also includes expressly objective language:

> [T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[14]

However, as the Court issued rulings and other federal appellate courts applied the standard, it became increasingly clear that objective reasonableness was being transformed into acceptable irrationality. Now, subjective police fear has replaced objective reasonableness as the standard in excessive force cases. That is, federal courts seem first to presume an officer's actions are reasonable and then scour the record for granules of objectivity or, worse, excuses to support the position. This process of justifying or rationalizing police misconduct and the *Graham* Court's excessive force framework hatched a new legal standard, the rationalized fear standard, and a new legal archetype: the unreasonable reasonable officer.

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11. Richard Simmons and Renee M. Hutchins, Learning Criminal Procedure 317 (2d ed. 2019).
12. Graham v. Connor, 490 U.S. 386, 397 (1989).
13. *Id.*
14. *Id.*

The Supreme Court's modern excessive force jurisprudence affords the benefit of the doubt, the balance of empathy, and the constitutional right of way to law enforcement in the sweepstakes of constitutional rights. Without being hyperbolic, it can be argued that the Supreme Court's excessive force jurisprudence provides circumstantial evidence of an incremental devolution towards a police state.

On the other hand, certain classes of Americans have always existed in a police state. When America's forefathers founded the country, "The People," as established in the Declaration of Independence, did not include certain groups as a matter of general practice. Furthermore, the founders chose a republican form of government. As it was understood at the time, a republic required a homogenous citizenry, a society of equals alike in ethnicity and wealth and tethered by a belief in rugged individualism.[15]

Generally, the country did not configure Native Americans and African Americans for the benefits of democracy. The "men" that were "created equal" and "endowed by their Creator with certain unalienable rights" did not include women, browns, yellows, the queer, the poor, or members of the un-landed class either.

Moreover, the United States has never discounted its treatment of the race aggrieved from its final tally of its effective democracy, nor has it ever fully humanized the original American others. The country, instead, has commuted along an ideological continuum from denial to indifference. Consequently, government assaults on the race aggrieved and other retro-excluded classes of people's "inalienable rights" to "life, liberty and the pursuit of happiness" have never been appropriately understood as threats to democracy itself. Indeed, the country could only maintain its homogeneity and self-image by fighting any compulsion to acknowledge and, thereby, reconcile its internal inconsistencies.

Current claims by the race aggrieved and the retro-excluded classes of people remain tentative as heirs to the full gambit of democratic prerogatives. America's history of exclusion suggests that current excessive force jurisprudence is not a coincidence. Instead, this trend indicates that modern excessive force jurisprudence is a cloaked continuation of its peculiar preference for homogeneity and oppressive order over universal equality.

The hypothesis, here, is that the law-and-order Supreme Court's excessive force jurisprudence extends from the same racial premise that informed *Dred Scott v. Sandford* in 1855: that a Black man had no rights that a white man was obligated to respect.[16] Like *Dred Scott,* the current "objective" standard governing excessive force cases is rooted

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15. Allen C. Guelzo, *Alexander Hamilton's Republic*, https://www.wondrium.com/americas-founding-fathers?tn=undefined___0_0_683&lec=7 [https://perma.cc/ZQ5Q-TC9S].

16. Scott W. Gaylord et al., Cases and Materials on Federal Constitutional Law 215 (Carolina Academic Press ed., 2d ed. 2016).

in a historical insolence regarding the rights of nonwhites. It is a standard born from rationalization, "which is a defense mechanism in which people justify difficult or unacceptable feelings with seemingly logical reasons and explanations."[17] Judicial rationalization is, thus, a shrouding mechanism used to mask anti-other or similarly biased decisions by advancing "seemingly logical reasons and explanations."[18] When judicial rationalization inhabits a legal standard, the standard itself becomes a rationalization. The rationalized fear standard governing excessive force is a prime example. The rationalized fear standard is, in part, a current rationalization of *Dred Scott*.

Besides the devaluation of Black life, fear relativity drives the new standard. Fear relativity is a phenomenon where individuals accept irrational fears shared by the group as reasonable.[19] Fear relativity normalizes paranoia. The rationalized fear or new dread standard, for example, posits that the fear of Blackness is reasonable because most Americans either consciously or unwittingly adopt negative Black stereotypes. These stereotypes imagine Black men and boys as everything from enemy combatants to super subhuman.

Irrational fears of Blackness are as old as the history of the United States. Irrational fear initially stemmed from the slaveholding states' paranoia about Black reprisal (slave rebellions).[20] From the end of slavery to the present, the specter of Black social, economic, and political advancement has rooted these fears. This fear has its own evolutionary history.

During Reconstruction and for the remainder of the nineteenth century, irrational white fear was based on the specter of "Negro rule."[21] During the first few decades of the twentieth century Jim Crow era, intolerance of the Black community's self-defense against mobs of white masochists who torched Black businesses, lynched Black bodies, and slaughtered Black men, women, and children by the bundle, spawned white fear.[22] In the later Jim Crow era, irrational white fears related to images of Black brutes raping white women,[23] boot-licking Negroes

17. *Rationalization*, Psychology Today, https://www.psychologytoday.com/us/basics/rationalization [https://perma.cc/Y88Y-JMQE].
18. *Id.*
19. Daniel Gardner, The Science of Fear 17 (2008) ("psychologists have. . .discovered that people are vulnerable to something called group polarization—which means that when people who share beliefs get together in groups, they become more convinced that their beliefs are right and they become more extreme in their views").
20. Carol Anderson, The Second: Race and Guns in a Fatally Unequal America 21–22 (2021).
21. *The Myth of Reconstruction*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-myth/ [https://perma.cc/Y88Y-JMQE].
22. Anderson, *supra* note 20, at 101–126.
23. Emma Gray, *The History of Using White Female Sexuality to Justify Racist Violence*, Huffington Post (Jun. 19, 2015), https://www.huffpost.com/entry/white-female-sexuality-and-racist-violence-a-history_n_7613048 [https://perma.

flooding white neighborhoods, and rebellious "nigras" running to the polls.[24] In the 1960s and 1970s, the imagined threat of Black revolution developed during hundreds of urban uprisings (Black riots),[25] the rise of revolutionary groups like the Black Panther Party,[26] the influence of Black revolutionary intellectuals like Malcolm X,[27] and the encroachment of the national government, the Supreme Court, Dr. King and his followers, as well as others on rights and prerogatives typically reserved for whites, which grounded irrational white fear. In the 1980s and 1990s, the delusion of Black "superpredators," lying in wait in urban communities for the opportunity to invade and pillage suburban principalities fueled the fear.[28] Today, the paranoia has created a mythical creature: the Black super subhuman.

The archetype of the Black male super subhuman is a superstition entertained by too many Americans. The belief is no more reasonable than the widespread colonial belief in witchcraft, which led to the infamous Salem Witch Trials.[29] Unfortunately, like those individuals regarded as witches, African American males are persecuted and murdered in unacceptable numbers by obtuse adherents to this deadly superstition.

Empirical facts evidence the belief in the Black super subhuman. African American males are perceived as immune to pain,[30] older than their peers,[31] more violent, and more criminal than their white counter-

cc/AJP3-NPRX].

24. Farrell Evans, *How Jim Crow-Era Law Suppressed the African American Vote for Generations*, History (May 13, 2021), https://www.history.com/news/jim-crow-laws-black-vote [https://perma.cc/Q2SR-9WV3].

25. Lawrence Glickman, *How White Backlash Controls American Progress*, The Atlantic (May 22, 2020, 10:41 AM), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914 [https://perma.cc/D53A-9JS9].

26. Sarah Pruitt, *How the Black Power Movement Influenced the Civil Rights Movement*, History (Apr. 16, 2021), https://www.history.com/news/black-power-movement-civil-rights [https://perma.cc/ML8V-WW7G].

27. Gary Younge, *Scaring White America*, The Guardian (Sept. 15, 2007), https://www.theguardian.com/theguardian/2007/sep/16/malcolm-x-scaring-white-america [https://perma.cc/VG9S-63T2].

28. Rachel Leah, *The "superpredator" myth was discredited, but it continues to ruin young black lives*, Salon (Apr. 21, 2018, 7:30 PM), https://www.salon.com/2018/04/21/the-superpredator-myth-was-discredited-but-it-continues-to-ruin-young-black-lives [https://perma.cc/887E-YZMN].

29. Rebecca Beatrice Brooks, *The Salem Witch Trials: Who Were They?*, History of Massachusetts Blog (Aug. 19, 2015), https://historyofmassachusetts.org/salem-witch-trials-victims [https://perma.cc/DR3R-843R].

30. Janice A. Sabin, *How We Fail Black Patients In Pain*, Ass'n of Am. Med. Colleges (Jan. 6, 2020), https://www.aamc.org/news-insights/how-we-fail-black-patients-pain [https://perma.cc/2SJQ-QS3E].

31. *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds*, Am. Psychological Ass'n (2014), https://www.apa.org/news/press/releases/2014/03/black-boys-older [https://perma.cc/EG2Y-J6X2].

parts.[32] Appellate courts bake these misperceptions, wittingly or not, into the yardsticks governing excessive force. Trial courts, grand juries, and trial juries distribute sentences, make findings, issue verdicts, and award damages based on these misconceptions. Prosecutors and law enforcement professionals target suspects, apply discretion, and preface treatment based on these skewed presumptions.

The top player in reinforcing the narrative of the African American super subhuman is the Supreme Court. In a typical unarmed shooting case, an officer shoots a civilian who has not provoked the encounter, made no false movements, or does not present an immediate threat.[33] The officer's fear may be genuine but detached from the objective nature of the situation. This fear would be unjustifiable but for what the Supreme Court characterizes as "circumstances that are tense, uncertain, and rapidly evolving."[34] Under these circumstances, too many decision-makers, including the Supreme Court, regard the police use of deadly force as reasonable, even though logical, unbiased citizens confronting analogous threats (for example, a person seeing an individual talking to a neighbor with a knife by her side while exhibiting no outward signs of hostility, or a twelve-year-old playing with a toy gun in the park) might perceive no threat at all.

The new dread standard derives, in part, from overblown and, thus, inappropriate judicial empathy for law enforcement professionals. Imagine a 21-year-old unemployed black male, Rasheed, walking past a public park in an urban neighborhood. He sees a 12-year-old white child, Aiden, playing with what he believes is a real gun. There is no one else in the park. Aiden is just aiming the toy gun randomly. Rasheed is genuinely afraid that Aiden is going to shoot him or someone else. Consequently, Rasheed pulls out a 44-caliber pistol and shoots and kills Aiden. Should Rasheed be convicted of a crime? What if Rasheed was a police officer?

In most jurisdictions, the civilian Rasheed is guilty of some form of homicide, while the officer Rasheed would probably escape punishment. A similar situation happened to twelve-year-old Tamir Rice, who was walking under a gazebo when a police car approached him.[35] A white officer jumped out of his patrol vehicle and then shot and killed Rice.[36] Someone had reported that a Black male was in the park waving a pistol around. The grand jury declined to indict the white officer.[37]

Race also played a role in the incident. Tamir was a Black male; thus, he was automatically considered a member of the super subhuman

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32. *Id.*
33. *Supra* note 6.
34. Graham v. Connor, 490 U.S. 386, 397 (1989).
35. Jamiel Lynch et al., *Justice Department won't pursue charges against officers in Tamir Rice shooting*, CNN (Dec. 29, 2020, 9:35 PM) https://www.cnn.com/2020/12/29/us/tamir-rice-shooting-no-federal-charges/index.html [https://perma.cc/8TN8-2LAP].
36. *Id.*
37. *Id.*

class. The officer was white. However, a blue uniform also benefits Black officers to some extent. That is, the result would have likely been the same in many jurisdictions if the officer was Black. Although the outcome would be less clear if Tamir was a 12-year-old white child, courts and jurors tend to prefer law enforcement officers irrespective of race. Race can confer additional privileges, less accountability, and more understanding to white officers killing African American males.

In this way, the new dread standard is counterintuitive. Law enforcement professionals have more power, authority, training, and experience than the average civilian. They must also "protect and serve." Yet, courts and jurors alike allow cops to be more apprehensive, less careful, and less responsible than ordinary citizens facing "stressful" and "rapidly evolving" situations and, thus, less accountable for their mistakes. In other words, the reasonable citizen is expected to act more reasonably than the reasonable police officer. That is, the legally reasonable police officer is not necessarily reasonable at all.

Both white rationalized fear of Black people and the historical undervaluation of Black life have enabled the current Supreme Court's excessive force standard: the new dread standard. The new dread standard is an actual, but intentionally amorphous, legal standard. This Article examines the social, historical, biological, and political realities that shaped the standard.

Subpart II of this Article discusses the *Dred Scott* case and its social and legal relevance to police shootings of unarmed Black people. Subpart II argues that the same presumptions of race inferiority that underlie Chief Justice Taney's decision in *Dred Scott* lay covertly beneath the contemporary Supreme Court's decisions involving the state killings of unarmed Black people.

However, it is not just the *Dred Scott* Court and the law-and-order Court's presumptions about race, one overt and the other implicit, that expose the new dread standard, but also the method of judicial interpretation shared by both. First created by Chief Justice Taney in the *Dred Scott* opinion, originalism has been mastered by Supreme Court Justices Scalia and Alito in the current era. This methodology invokes the Framers of the founding documents to interpret the meaning and scope of the Articles and Amendments of the U.S. Constitution. But the problem with originalism is that it allows race conservative justices to scapegoat the Founders for their own socially regressive views.

Subpart III discusses fundamental self-defense law to anchor further discussions about the roles race, biology, sociology, and politics play in disfiguring the four corners of defensive force doctrines. Subpart IV discusses the concept of reasonableness and the reasonable person. The Subpart also examines the historical reasonable person to highlight the native partiality of the reasonable person standard. Subpart V examines fear from biological, statistical, political, and sociological standpoints. It

explains how socially acceptable irrational fears legitimize the shooting of unarmed Black men and boys.

Subpart VI explores the relationship between social value and social injustice, including failures of police accountability. A target's racial value corresponds to the target's place on America's racial hierarchy, adapted by pseudo-scientist Samuel Morton and his followers from other eighteenth century pseudo-scientists based in Europe. The Subpart posits that a person's social worth prognosticates whether and to what relative extent the target will be a target of injustice. An inverse relationship exists between a victim's perceived racial worth and the victim's chances of experiencing injustice, particularly criminal injustice and police unaccountability. Finally, Subpart VII concludes Part I of this Article series and Subpart VIII introduces Part II.

I. *Dred Scott* and its Remains

The new dread standard originates from *Dred Scott v. Sandford,* the 1857 Supreme Court case that held that African Americans had no right to sue in federal courts because they were considered property at the country's founding and, thus, were not citizens of the United States.[38] Chief Justice Taney's opinion provided the regressive Constitutional interpretive methodology favored by modern conservative jurists, known as "originalism." Taney concocted originalism to rationalize his attempt to establish slavery as a Constitutional ideal by using the purported beliefs of the founders and seventeenth century society to interpret the Constitution.[39] Taney's methodological descendants have used originalism to make race-motivated decisions under the veneer of objectivity.

In *Dred Scott v. Sandford*, Chief Justice Taney infamously opined that a Black man had no rights a white man was bound to respect.[40] According to Taney, African Americans:

> . . . had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic.[41]

He later added: "On the contrary, they were at that time [of America's founding] considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights

38. Gaylord, *supra* note 16, at 215.
39. Cass R. Sunstein, *The Dred Scott Case*, 1 Green Bag 39, 40 (1997).
40. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 409–410 (1857) (enslaved party), superseded by *constitutional amendment*, U.S. Const. amend. XIV.
41. Gaylord, *supra* note 16, at 216.

or privileges but such as those who held the power and the Government might choose to grant them."[42]

The case arose after Dred Scott, an enslaved African American, was transported into two free states by his master-by-law, John Emerson.[43] In court, Mr. Scott argued that he was free because he had resided in states that prohibited slavery.[44] Eliza Sandford, Emerson's widow, argued that Mr. Scott was property and that the government could not deprive citizens of property rights without due process.[45]

The Supreme Court ruled that: (1) Mr. Scott had no right to sue in federal court because he was not a citizen of the United States; (2) the Missouri Compromise, a federal law that made slavery illegal in the Louisiana Territory, was unconstitutional; (3) Mr. Scott remained a slave even after living in the free state of Illinois because he was someone's property; and (4) his taking was a violation of the Fifth Amendment Due Process Clause.[46] Judge Douglas Ginsburg of the Washington, DC, Circuit notes that the Supreme Court "did something the Framers never imagined: they invented a Constitutional right to own slaves."[47]

A. *Taney's Rationalization*

Using originalist methodology, Taney claimed "that legislation and histories of the time, and the language used in the Declaration of Independence show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged, as a part of the people."[48] However, neither the Constitution nor federal law actually defined citizenship, nor did they determine who qualified for citizenship at the time.[49] Additionally, they said nothing about race aside from a reference to Native Americans.[50]

The Framers intentionally excluded direct references to slavery in the Constitution.[51] Instead, it refers to the enslaved as migrants and imports.[52] U.S. Representative Liz Cheney notes the Framers' use of "[e]uphemisms were a way of avoiding the terrible truth that slavery existed."[53] Indeed, most of them would have been jolly to avoid discussing the institution altogether. Even the relatively progressive who opposed slavery, Framers like James Madison and Founders like Thomas Jefferson, still treated the subject like a dirty little secret and owned hundreds of slaves themselves. Others were less demur. Framer Gouverneur Morris, who

42. *Id.* at 404–05 .
43. *Id.*
44. Sunstein, *supra* note 39, at 43.
45. *Id.*
46. *Id.*
47. A Constitution For All, PBS (2020), at 22:42.
48. Gaylord, *supra* note 16, at 215.
49. *Id.*
50. *Id.* at xxi.
51. *Id.* at xxi-xxviii.
52. *Id.* at xxiv.
53. Lynne Cheney, James Madison: A Life Reconsidered 149 (2015).

wrote the preamble and transcribed the Articles of the Constitution,[54] called slavery "the curse of heaven on the states where it prevailed."[55] Yet to Framers that adored the institution, a constitution that prohibited slavery meant that there would be no constitution at all.[56] The issue had to be addressed.

The slave addicts attempted to justify the institution, employing the greatest rationalization in American history: that slavery was the white man's burden and his lot was to civilize a savage population. In other words, they argued that slavery was being used to benefit Black people.[57]

If the Framers meant to constitutionalize slavery as a natural right, they would have expressly done so. However, their relative silence on race and citizenship created a blank space for originalist justices like Taney to fill using their own ideologies. This is the problem with originalism. It invites jurists to fill in the blanks with their own beliefs and rationalizations, especially when a few agreeing Framers or Founders can be found.

However, Taney's opinion was not meant to resolve a legal issue but a political one.[58] The *Dred Scott* decision was not the result of legal reasoning but of malicious rationalization. As Pulitzer prize winning author Paul Finkelman points out: "Behind his mask of judicial propriety, the chief justice had become privately a bitter sectionalist, seething with anger at 'Northern insult and Northern aggression.'"[59] American historian Melvin I. Urofsky provides a better critique: "[Taney] ignored precedent, distorted history, imposed a rigid rather than a flexible construction on the Constitution, ignored specific grants of power in the Constitution, and tortured meanings out of other, more-obscure clauses."[60]

B. *Slavery as Sacrosanct*

In his *Dred Scott* opinion, Taney rationalized that "slavery was constitutionally sacrosanct, so that even if Congress had authority over new territories, it could not ban slavery there."[61] Without providing any constitutional proof—there was none—Taney simply declared that slavery

54. A Constitution in Writing, PBS (2020), at 18:20.
55. Cheney, *supra* note 53, at 148.
56. Gordon S. Wood, *Was the Constitution a Pro-Slavery Document*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/books/review/james-oakes-the-crooked-path-to-abolition.html [https://perma.cc/WTW2-9CXA].
57. Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 Geo. Wash. L. Rev. 944, 945 (2002); *Southern Justification of Slavery*, U.S. History, https://www.u-s-history.com/pages/h244.html [https://perma.cc/D2CQ-X8N8].
58. *See Dred Scott decision*, Encyclopedia Britannica, https://www.britannica.com/event/Dred-Scott-decision [https://perma.cc/54J5-SVBH].
59. Paul Finkelman, Slavery in the Courtroom: an Annotated Bibliography of American Cases 47 (1998) (quoting Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 311 (2001)).
60. *Dred Scott decision*, *supra* note 58.
61. *Id.*

was a cornerstone of the Constitution and that the Missouri Compromise, which prohibited slavery in the Louisiana Territory, was unconstitutional. And that was that.

Taney also asserted that "The right of property in a slave is distinctly and expressly affirmed in the Constitution."[62] This was a misrepresentation, to put it kindly. No language in the Constitution describes the enslaved as property or overtly refers to slaves or slavery.[63] The "distinctly and expressly affirmed" language in the Constitution that defines the enslaved as property and African blood as inferior to white blood is as follows:

> *Article 1, Section 2*: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.[64]
> *Article 1, Section 9*: The migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by Congress prior to the year one thousand eight hundred and eight . . . [65]
> *Article 4, Section 2*: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[66]

None of these sections refers to the enslaved as slaves or the enslaved as property. The language in each Article refers to the enslaved as "Persons." How Taney got "property" from the word "Person" attests to his intellectual wants or the manipulability of originalism. That is, hearing someone refer to a horse as a person would probably confuse most people and therefore demand interpretation, but hearing someone call a person a person needs no interpretation. Indeed, it is the interpretation itself that causes the confusion. So why use it? Taney had to find a reason to reach a preordained result.

The legislative record of the Constitution nullifies Taney's rationalization. During the debate over the end date of the importation of the enslaved and, by extension, the start date of congress' power to end slavery, Framer Gouverneur Morris took issue with the language used to describe slavery. Lyn Cheney writes:

> A compromise had been reached between states that wanted Congress to have no authority over [slavery] (South Carolina, North

62. Gaylord, *supra* note 16, at 215.
63. Martin Kelly, *What Does the Constitution Say About Enslavement*, Thought Co. (Jun. 19, 2019) https://www.thoughtco.com/what-does-constitution-say-about-slavery-105417 [https://perma.cc/2U4X-GV6B].
64. Gaylord, *supra* note 16, at xxi.
65. *Id.*
66. *Id.* at xxviii.

> Carolina, and Georgia) and other states, including Virginia that wanted Congress to end it. The agreement was that Congress would have no authority until after 1800 . . . but . . . General Charles Cotesworth Pinkney of South Carolina . . . immediately moved to extend the date to 1808 . . . [James] Madison objected, declaring that "so long a term will be more dishonorable to the national character than to say nothing about it in the Constitution" . . . But . . . General Pinkney's amendment passed. Gouverneur Morris wanted to be very clear about what had happened. Instead of "such persons as the several states now existing shall think proper to admit," he wanted the word "slaves" to be used. Madison objected, saying that he "thought it wrong to admit in the Constitution the idea that there could be property in men," and his view prevailed.[67]

Clearly, the father and architect of the Constitution, James Madison,[68] as well as most of the other Framers "thought it wrong to admit in the Constitution the idea that there could be property in men."[69] While this does not prove that the enslaved were considered persons (they still were considered property), it does establish the Framers never meant to constitutionalize a right to human property.

C. *Citizenship and Constitutional Property*

Taney's assertion that Black people were never considered citizens in the history of the United States is questionable. The Constitution clearly excludes unfree people from citizenship. The enslaved had no constitutional rights like the right to vote, the right to bear arms, the right to assemble, etc. Free Blacks also had little to no rights in the slave states. However, free Blacks had certain rights in free states. State citizenship, at the time, was, perhaps, the only viable way to determine U.S. citizenship. The dissenting justices in *Dred Scott* argued just that.

In his dissent, Justice Curtis points out that at the Constitution's ratification, Black men had the right to vote in five of the thirteen states.[70] He also listed several state court decisions and state statutes that refuted Taney's citizenship assertion.[71] Another dissenting Justice, John Mclean, noted that the notion that Black people were not citizens was "more a matter of taste than of law."[72] He revealed that, "Several of the States have admitted persons of color to the right of suffrage, and in this view

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67. Cheney, *supra* note 53,at 148–49.
68. *Id.*
69. *Id.*
70. Abraham Lincoln, *Speech on the Dred Scott Decision*, Teaching American History (June 26, 1857), https://teachingamericanhistory.org/document/speech-on-the-dred-scott-decision [https://perma.cc/XA8C-FYHQ].
71. Joel William Friedman, Champion of Civil Rights: Judge John Minor Wisdom 24 (2009).
72. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 533 (1857) (enslaved party), superseded by *constitutional amendment*, U.S. Const. amend. XIV.

have recognized them as citizens; and this has been done in the slave as well as the free States."[73]

Taney's retort was that U.S. citizenship was disconnected from state citizenship. However, there were no other grounds at the time to determine U.S. citizenship. Neither the Constitution nor subsequent legislation defined it. This legal gap gave Taney the opening he needed to consecrate slavery, and he thus called upon the Framers and seventeenth-century Western societies to legislate the end of the slavery debate.

D. *Taney's Invention of Originalism*

The primary method Taney used to rationalize that African Americans were ineligible for citizenship was a judicial invention that would come to be known as originalism. Taney created the substance of originalism for the extrajudicial and political purpose of resolving the contentious issue of slavery once and for all.[74]

Taney spoke originalism into existence with the following words: "It is the duty of the court to interpret the instrument [the framers] have framed . . . according to its true intent and meaning when it was adopted."[75] In this way, Taney's opinion was "very much a very self-consciously 'originalist' opinion - that is, it purported to draw nearly all of its support from the views of the framers."[76] Taney never explains why it is the Court's "duty" to interpret the Declaration of Independence "according to its true intent." He just created the "duty" out of thin air—another hallmark of judicial rationalization.

After declaring the Supreme Court's "duty," Taney applies his methodology. Taney leaned heavily on the Declaration of Independence to rationalize his citizenship holding. Unfortunately, even his rationalization was hopelessly bereft of reason. According to Taney:

> The language of the Declaration of Independence is equally conclusive [on the slavery question]: [. . .] 'We hold these truths to be self-evident: that all men are created equal[. . .]' The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race was not intended to be included [. . .]; for if the language, as understood in that day, would embrace them, the conduct of distinguished men who framed the Declaration of Independence would have utterly and flagrantly inconsistent with the principles they asserted. [. . .]" Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew it would not in any part of the civilized world be supposed to embrace

73. *Id.*
74. *Dred Scott decision*, *supra* note 58.
75. Gaylord, *supra* note 16, at 215.
76. Sunstein, *supra* note 39, at 40.

> the negro race [. . .]. The unhappy black race were separated from the white by indelible marks, and laws long before established and were never thought of or spoken of except as property [. . .][77]

It is difficult to tell which is worse about Taney's reasoning. He either does not understand the concept of hypocrisy, or his interpretive methodology depends on his opinion about the purported character of individuals he never met. Either way, his analysis is shockingly rudimentary—yet another sign of rationalization—and completely disgraces any legitimacy originalism might have had. Taney proclaims, "The Language of the Declaration of Independence is equally conclusive,"[78] on the citizenship question. The language he cites as "equally conclusive" is the phrase, "All men are created equal."[79] He then explains that the "language, as understood in that day," excludes Black men from the "men" who are "created equally." His conclusion, however, is not based on how eighteenth-century society used the term "men." Nor is it based on legislative notes from the framing. Taney simply decides that the term "men" could not have included Black men because if it had, "The conduct of the distinguished men who framed the Declaration of Independence would have been utterly, and flagrantly inconsistent with the principles they asserted [. . .]"[80]

According to Taney, those distinguished men were "incapable of asserting principles inconsistent with those on which they were acting,"[81] because they were "great men—high in literary acquirements—high in their sense of honor."[82] Here, Taney's originalism includes assessing the drafters' character to determine what they meant by "men." He, of course, did not know the framers. His application of originalism is bizarre, to say the least, but clearly signals rationalization.

Neither the scope of the Declaration of Independence nor the Constitution is evident from the Framers' personal beliefs, despite Taney's claims. The Framers' beliefs are largely unascertainable. Beliefs exist in the minds and hearts of individuals. Unless Taney could read minds, dead minds at that, such professed reliance is questionable. Beliefs are also volatile. They can change on a whim. Moreover, beliefs are very different from intentions, but Taney seems to confuse the two.

Thomas Jefferson, for instance, believed Black people were an inferior race of being, but he intended to end slavery. Furthermore, Jefferson owned six hundred enslaved people over his lifetime.[83] However, in the

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77. Gaylord, *supra* note 16, at 216.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Yohuru Williams, *Why Thomas Jefferson's Anti-Slavery Passage Ras Removed from the Declaration of Independence*, History (June 29, 2020), https://www.history.com/news/declaration-of-independence-deleted-anti-slavery-clause-jefferson [https://perma.cc/3U9W-28DA].

original version of the Declaration of Independence, he blamed Britain for "imposing" the wretchedness of slavery on colonial America and cited the imposition as a part of the British monarch's long train of abuses. Jefferson subsequently removed any direct references to the institution when slave owning parties to the document objected. Jefferson's beliefs and intentions were undiscernible at the time he wrote the Declaration because they conflicted with his actions.

Furthermore, different Framers had different beliefs and intentions. Thirty-nine of them and over thirteen hundred ratifiers of the Constitution, which incorporated the Declaration of Independence in the Bill of Rights, played roles in the Constitution's passage. It would be impossible to discern the beliefs and intents of fourteen hundred dead people. Therefore, the documents themselves best represent the final understanding of the Framers and ratifiers of the Constitution. The documents themselves and, secondarily, the notes from the framing debates provide the proper sources.[84] This is true for several reasons.

Taney not only relied on the purported character and beliefs of the Founders and Framers, but also endeavored to interpret the founding documents according to popular beliefs at the time these documents were written. As Taney rationalizes, "[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted [. . .]"[85] people of the African diaspora "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations."[86] Taney recounts how this view also prevailed in pre-colonial England. He concludes that since both societies considered Black people inferior, Black Americans had no constitutional rights white folks were pained to oblige.[87]

Taney's originalism seems to conflate the Framers' alleged beliefs with the ideals they ultimately meant to deposit in the Declaration of Independence, but this is flawed logic. Could not one, for instance, believe that killing animals is wrong and still eat meat? Many of the Founders lived such hypocrisy by holding slaves while simultaneously pushing for an end to slavery. Other instances of hypocrisy, like the fact that many of the Constitution's drafters were white supremacists, yet did not want their personal predilections to sully the document itself, were just part of the country's foundation. Hypocrisy is the nation's true original sin, and slavery was its most horrible consequence. Indeed, as historian Joseph Ellis notes, "The vast majority of [Framers], even Southern slave owners recognize that slavery is incompatible with the values the American Revolution claims to stand for."[88]

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84. Wood, *supra* note 56.
85. Gaylord, *supra* note 16, at 216.
86. *Id.*
87. *Id.*
88. A Constitution For All, *supra* **note 47 at 27:47;** A Constitution in Writing,

While Taney's reasoning is atrocious (in no small part because his motives are impure), he was spot on about two things. First, enslaved Black bodies were considered property by the laws of the slave states, the public, and the Framers. James Madison simply did not want to "admit" that fact in the Constitution because it would have desecrated its purity, undermined its moral force, and exposed the dark underbelly of the American revolution, the Declaration of Independence, the Bill of Right and the Articles of the Constitution to posterity. Such was the country's founding act of denial.

The second thing Taney was right about is that America was founded by white people for white people. Virtually none of the Founders envisioned a heterogenous society. A republic was understood as requiring a harmonious, homogenous, independent, and self-sufficient citizenry to survive.[89] A homogenous citizenry is a collective of people ethnically, economically, and socially similar.[90] By definition, what the Framers sought to create was not a diverse, multicultural, multiracial society or, even, a generous society. America was meant to be the type of society into which originalism promises to reconvert it. Conservatives are correct when they complain that the Founders would not be able to recognize modern day America.

Madison, the primary force behind the Constitution, believed, at least at one point in time, that Black people should be expatriated after slavery. Jefferson favored creating a separate reserve for African Americans upon emancipation in the uncharted territory then known as Louisiana. Even Abraham Lincoln, nearly eighty years later, wanted to ship African Americans to Costa Rica or any place south of North America. Thus, a court's reliance on originalism and the purported beliefs of even some of the most progressive Framers and Founders all but guaranties an exclusionary result when diversity, race, immigration, discrimination, police misconduct, criminal justice, and social safety nets are at issue.

Consequently, American diversity and progress demand a fair and well-meaning interpretive methodology true to the American dream, not the original Constitution. This method, coined here as constitutional perfectionism, should look backward in time through the lens of the most recent Amendments and judicial precedents that have made America freer and fairer than initially envisioned and impose them on the original Constitution. Not vice versa. From this perspective, the future is the Founder.

E. *Modern Originalism and the Ghost of* Dred Scott

As discussed, originalism was hardly created to be an objective tool for properly interpreting the Constitution as today's originalists would

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supra note 54 at 18:20.

89. Guelzo, *supra* note 15.

90. *Id.*

have the nation believe. But many members of the Supreme Court over the last fifty years, none more than Justice Scalia, have relied heavily on Taney's originalism to rationalize questionable holdings.[91]

Where Taney comes off like an idiot, his heirs would become idiot savants. The Supreme Court's race-related rulings evolved from *Dred Scott's* crude ignorance to the sophisticated imbecility of *Plessy v. Ferguson*, which adopted an oxymoron of "separate but equal" as doctrine, to *McClesky v. Kemp's* rationalized racial prejudice, which found that although racism underlies the administration of the death penalty, the Court was powerless to do anything about it. In the last decade, a judicial nostalgia for Taney-style thoughtlessness and judicial inventionalism has resurged. The Supreme Court's opinion in *Shelby County v. Holder* provides one of the most notable examples. In *Shelby County*, Chief Justice Roberts declared crucial sections of Voting Rights Act of 1965 unconstitutional because it violated the fabricated right of "equal state sovereignty." Roberts's opinion is steeped in rationalization.[92]

F. *The Modern Relevance of the* Dred Scott *Decision*

Dred Scott is important for several reasons. One is the similarity between Taney's methodology (including originalism, judicial invention, and racial prejudice) and the law-and-order Supreme Court's methodology and approach. The relationship between the Courts is most manifest in the law-and-order Court's race-related jurisprudence, including but not limited to affirmative action, school desegregation, voting rights, criminal justice, and criminal procedure. The Court's post-1960s rulings on excessive force and qualified immunity reflect a discreet version of Taney's degradation of Black life and penchant for rationalization.

To be fair, the tenure of the Supreme Court has not been an uninterrupted dumpster fire of race regression. The Court has had sporadic fits of consciousness. The Warren Court from the mid-1950s until the late 1960s and, to a more limited extent, the Supreme Court under President Franklin D. Roosevelt were brief oases.[93] The Warren Court introduced an unprecedented era of expanded liberties with cases like *Brown v. Board of Education*, which ended "separate but equal" in 1954, and the 1966 case *Miranda v. Arizona* where the Court acknowledged the inherent imbalance of power between citizens and law enforcement officials in environments dominated by police.[94]

However, the Supreme Court's descent back into race regression in social policy and criminal justice began with the demise of and as a response to the Warren Court.[95] By the end of the second decade of the

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91. *Id.*
92. Shelby County v. Holder, 570 U.S. 529, 588 (2013).
93. *See, e.g.*, Patterson v. Alabama, 294 U.S. 600, 601 (1935); Norris v. Alabama, 294 U.S. 587, 599 (1935); *Brown v. Mississippi, 297 U.S. 278, 281 (1936).*
94. Brown v. Board of Education, 347 U.S. 483, 495 (1954); Miranda v. Arizona, 384 U.S. 436, 458 (1966).
95. Adam Cohen, Supreme Inequality 273–274 (2020).

twenty-first century, the Supreme Court had regressed so much that it prompted a reporter in 2018 to exclaim, "even in the era of Jim Crow, African Americans could often count on the federal court system to right some of the most egregious wrongs perpetrated at the local level."[96]

One of the law-and-order Court's starkest rights reversals involved the judicial standards governing excessive force. The regressive standards reincarnated the remains of the *Dred Scott* decision. Law professor Vincent Southerland, in the wake of the Ferguson protests of the police shooting of unarmed teenager Mike Brown wrote:

> While slavery is now a very distant memory, its residue—that wrong-headed presumption of inhumanity and inferiority—has cast a long and unyielding shadow that informs the attitudes and behaviors of all people, both consciously and subconsciously. Time and again, that same presumption of inhumanity and inferiority has infected American policy. When people are not seen as human, but rather as "less than," it becomes very easy to do all manner of things to them. That is what happened to those brutalized or killed by police. That is why, in America, we continue to assign benefits and burdens along the fault line of race.[97]

II. Basic Defensive Force Law

A. *Self Defense*

An individual can use defensive force to repel an attack if she is faultless in provoking the violence. Both the use of force and the degree of force must be reasonably necessary.[98] The threat has to be immediate, and the degree of force must be proportionate to the threat.[99] For instance, shooting an assailant who threatens to "punch you in the face" if you do not "stop looking at him" is unnecessary because a bullet surpasses a punch.[100] Shooting the assailant is unnecessary because the threat is not immediate; it has a condition precedent, continued staring. Moreover, a defender can only use deadly force when she reasonably believes she is facing the imminent use of unlawful deadly force by an aggressor.[101]

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96. Mohammed A. Nurhussein, *New Dred Scott Ruling: One Cent Awarded in Police Killing of Black Man*, Black Star News (June 2, 2018), http://www.blackstarnews.com/us-politics/justice/new-dred-scott-ruling-one-cent-awarded-in-police-killing-of-black [https://perma.cc/PWH8-89XF].
97. Vincent Southerland, *Addressing the Scourge of Police Violence*, St. Louis Post-Dispatch (Nov. 25, 2014), https://www.stltoday.com/opinion/columnists/addressing-the-scourge-of-police-violence/article_2a1c7342–2cd5–58c3–923e-2326c6ecbd9e.html [https://perma.cc/7UD5-HYYF].
98. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367, 377 (1996).
99. *Id.*
100. Joshua Dressler & Stephen P. Garvey, Criminal Law: Cases and Materials 518 (7th ed. 2015).
101. *Id.* at 380 – 381.

The concept of reasonableness has two components: (1) subjective belief and (2) objective belief.[102] A subjective belief is an honest, good-faith belief.[103] An objective belief is a belief shared by reasonable people.[104] Thus, a belief may be objectively reasonably but not subjectively reasonable and vice versa. Consider the following: A suspect approaches a citizen with a gun in his buckle. When the suspect notices the citizen, he puts his hand on the gun handle. The citizen is not scared at all. He does not believe that the suspect is going to shoot him. However, he dislikes the suspect and figures this is the perfect time to kill him. As the suspect pulls the pistol from his waistband, the citizen shoots and kills the suspect. Here, the citizen is guilty of murder because he did not honestly believe deadly force was necessary to quell the threat, although most citizens in his situation would so believe. Similarly, where the suspect is reaching for his phone when the citizen (genuinely afraid for his life) shoots him, the result would be the same, but for the opposite reason. The citizen has a subjectively honest belief in the necessity of force, but his belief is not objectively reasonable.[105]

Traditional self-defense measures the defendant's actions from the perspective of a reasonable person (a normal person) under similar circumstances.[106] Over time, however, the "reasonable person" grew, developing diverse personalities like age, gender, disability, profession, and the like. The reasonable person is now the reasonable woman, the reasonable sixteen-year-old, and, most relevantly here, the reasonable police officer.

Customized perspectives of reasonability are usually progressive, accentuating vulnerabilities specific to certain classes of people. These vulnerabilities might justify earlier or more forceful responses, as with some women, children, and persons with physical disabilities.[107] Strangely, the "reasonable police officer" has no such vulnerabilities but gets the vulnerability discount, nonetheless. Indeed, many of the basic elements of defensive force are inapplicable or relaxed when the individual using force is a police officer. The requirement of a non-discounted objective belief is only one of many that are excepted in such cases.

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102. Major John J. Merriam, *Natural Law and Self-Defense*, 206 Mil. L. Rev. 43, 74 (2010).

103. *Id.*

104. *Id.*

105. *Id.*

106. Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 San Diego L. Rev. 651, 655 (2013).

107. *Reasonable* Person, Cornell L. School: Legal Info.Inst., https://www.law.cornell.edu/wex/reasonable _person [https://perma.cc/LEB2-M6NA]; *See* State v. Wanrow, 88 Wash. 2d 221, 241 (1977) (holding that women are entitled to self-defense instructions that require the jury to consider their conduct in light of physical handicaps that are the product of sex discrimination).

B. *Police Self-Defense and the Use of Force*

In criminal cases where a state charges an officer with an assault-related crime like assault with a deadly weapon, murder, or manslaughter, the officer's defense typically involves a watered-down version of self-defense. The pivotal question is whether the officer acted reasonably under the circumstances.[108] Again, reasonableness is traditionally judged both subjectively and objectively, meaning that under the common law view, a defender must prove he genuinely believed deadly force was necessary and that his belief was reasonable from the perspective of the logical citizen.[109] However, many modern states allow "the officer's subjective belief to control."[110] And even states with objective standards focus on "the reasonableness of the officer's beliefs, not the reasonableness of his actions [. . .]" leading to situations where "legal decisionmakers may be quicker to find an officer's use of deadly force justified even if deadly force was not necessary to control the situation."[111]

Furthermore, decisionmakers often determine the reasonableness of a police officer's use of force from the reasonable officer's perspective instead of from the perspective of the reasonable person. Although one would think this imposes a higher burden on police professionals, it does the opposite.

Decisionmakers typically grant two privileges to police officers in self-defense cases: blue empathy and the benefit of the doubt. Blue empathy occurs when judges and juries import a presumption of vulnerability into the reasonable police officer standard like those present in the reasonable woman, child, or disabled person standards. The reasonable police officer, in effect, is a member of a vulnerable class.

Blue empathy is counter-analytical. The reasonable person is held to a higher standard than the reasonable officer. Yet, the average reasonable person does not undergo use of force training and stress tests. They are without confrontational experience, the authority to arrest, a virtual license to kill, or a duty to serve and protect. So, decisionmakers hold the most powerful party in a state-verses-citizen conflict the least accountable. Said differently, the reasonable officer standard privileges police officers.

Police officers also have another use-of-force privilege. This privilege is not formally connected to the law. It is a social privilege that law enforcement professionals carry into the courtroom. Decisionmakers and society at large, aside from some minority communities, give law enforcement professionals the benefit of the doubt in interactions with

108. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629, 654 (2018).
109. Merriam, *supra* note 102.
110. Lee, *supra* note 108.
111. *Id.* at 655.

marginalized citizens.[112] When an officer shoots or brutalizes a citizen, the average American believes that the citizen did something to deserve it or is the brand of individual who deserves police abuse.[113] The officer's testimony is deemed more credible in court, and his actions are presumed justified.[114] This social privilege doubles an officer's presumption of innocence.

Most of the other self-defense requirements are also missing in cop-defense cases. Professor Cynthia Lee reports:

> In most police use-of-force statutes, there is no imminence requirement. The officer need not reasonably believe he or she is faced with an *imminent* threat of death or serious bodily injury before using deadly force . . . .many use-of-force statutes appear to include a proportionality requirement but do not actually require proportionality. And while most use-of-force statutes include language suggesting a necessity requirement, those same statutes permit an officer to use deadly force even if that force was not actually necessary.[115]

Civil claims against police officers also centralize reasonableness. Federal courts refer to the concept of unreasonable force in civil litigation as excessive force. But excessive force is not easily defined. As Lee points out, the reasonability standard in excessive force cases "provides little-to-no guidance to the jury deciding whether an officer's use of force was justified."[116] The lack of guidance, however, may be intentional. Obscure standards allow jurors' natural predilections to control. Furthermore, federal appellate courts, particularly the Supreme Court, have predictable views on excessive force, especially when these courts review lower court decisions about excessive force.

Federal courts use the amorphous totality of the circumstances test to determine reasonability. Specifically, the Supreme Court has held that a determination of reasonability "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[117] By doing so, the Court takes a subjective approach to reasonableness.

In *Graham v. Connor*, the Court mandated that factfinders and decisionmakers examine the "reasonableness" of an officer's use of force

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112. Drew Desilver et al., *10 Things We Know About Race and Policing in the U.S.*, Pew Rsch. Ctr. (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s [https://perma.cc/EM4Y-PLG6].
113. *Id.*
114. Eric Niiler, *Why Juries Rarely Rule Against Cops*, Seeker (Dec. 4, 2014), https://www.seeker.com/why-juries-rarely-rule-against-cops-1769352404.html [https://perma.cc/44YE-EP9R].
115. Lee, *supra* note 108, at 656.
116. *Id.* at 655.
117. *Id.* at 644 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

from the perspective of "a reasonable officer on the scene."[118] This language privileges law enforcement because it allows the jury to speculate about what a reasonable officer, not what a reasonable person, would have done. This speculation opens the door for blue empathy and the extrajudicial benefit of the doubt. However, the Supreme Court did not stop here. The Court then constitutionalized the oxymoron of the vulnerable police officer by using language that should apply to all defenders but reserving it for law enforcement professionals. The Court prohibits the use of "20/20 vision of hindsight" to assess the reasonableness of the officer's conduct and requires consideration of the "split-second judgments" officers must make in "circumstances that are tense, uncertain, and rapidly evolving."[119] In essence, the *Graham* Court created an extraordinary standard of reasonableness, privileging a powerful class: law enforcement professionals.

III. The Reasonableness Standard

A. *Inherent Reasonableness*

The hallmark of American legal standards is reasonableness.[120] In criminal and tort law, culpability often turns on how the hypothetical reasonable person would have responded under the circumstances. This thought experiment yields, at best, a biased educated guess because it depends on the subjective judgment of the decisionmaker who, almost invariably, believes himself to be the prototypical reasonable person.[121] The thinking is, "I am a reasonable person, so if I believe something, my belief must be reasonable."

The danger is evident. A decisionmaker who is not aware of the irrationality of her paradigm-setting belief will regard the belief as an unassailable fact.[122] They, thus, render judgements based on prejudices they deem to be facts. This type of irrational self-confidence, privilege, or earned ignorance is pervasive in all areas of American life, belief structures, and institutions. It is, however, particularly damaging at the hand of state and national power and, to a lesser degree, judicial, police, and juror power.

Most relevant here is the earned ignorance of the players in the criminal and civil justice systems. Earned ignorance creates a presumption of guilt or innocence, favoring the party-beneficiary of the wielder's faulty beliefs. Most white Americans, for instance, believe that Black people present a greater danger to them than other white people.[123] Most Americans certainly believe that African Americans are more prone to

118. *Graham*, 490 U.S. at 396.
119. *Id.* at 396–97.
120. Jackson, *supra* note 106, at 654.
121. *Id.* at 657.
122. *See generally* Robin J. DiAngelo, White Fragility 100 (2018).
123. *Id.* at 45–46.

criminality than whites.[124] Many, if not most, Americans are unaware that their presumption of Black criminality is only fact by social consensus, not by statistical reality. In other words, inherent Black criminality is an alternative fact based on consensus reality.

The myth of transferable intelligence exacerbates this situation of implicit bias and stereotypical assumptions. Transferable intelligence, as coined here, is the belief that one's proficiency or mastery in one context translates to other unrelated contexts. Thus, a medical doctor with absolutely no ability to think critically may feel competent to diagnose social problems because of his M.D, or a star lawyer with no background in biology may believe he is qualified to diagnose illnesses or, God forbid, perform surgery because of his J.D.

The same thing applies to judges and jurors. A juror who is an accountant, for instance, may deem himself proficient at making accurate social judgments that require empathy, self-awareness, or critical thinking simply because he is educated. Judges masterful in one area of the law, such as business transactions, might, consequently, deem themselves proficient in all areas of the law. The result in both cases is people are empowered to render certain judgments without the qualifications to do so.

Indeed, this was the case with Taney's decision in *Dred Scott*. Whatever abilities Taney had in other areas of the law, his critical thinking skills regarding social matters were null. Taney's belief in transferable intelligence was also manifest when he expressed that the purported character and academic achievements of the Framers of the Declaration of Independence insulated them from hypocrisy and asymmetrical thinking.[125] As previously noted, Jefferson, the quintessential American, attempted to pass legislation ending slavery at least twelve times throughout his life, yet died possessing more than two hundred Black bodies, having owned upwards of six hundred Black bodies in his lifetime.[126]

Statistical evidence confirms the reality of judicial self-overestimation. Not so long ago, researchers performed an experiment in New York City pitting judges from around the city against a computer program to determine bail for criminal defendants.[127] The computer program was decisively more accurate in predicting defendants who would jump bail and were threats to the community.[128]

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124. *Id.*

125. Gaylord, *supra* note 16, at 216.

126. William, *supra* note 83.

127. Noah Graff, *Talking to Strangers*, TODAY'S MACHINING WORLD (Oct. 2, 2019), https://todaysmachiningworld.com/talking-to-strangers (last visited Jul 13, 2021) [https://perma.cc/5DBE-ZP8V].

128. *Id.*; To be sure, computers have proven less accurate and even discriminatory in setting bail for black defendants. Yes, computers can produce racially disparate results too. However, the Standard Computational Police Lab attributes this bias to "machine learning algorithm[s] that considers where a person lives . . . as a proxy for race in ways that reinforce bias. Shara Tonn, *Can AI help judges make the bail system fairer and safer?* STAN. SCH. OF ENG'G (Mar. 19, 2019), https://engineering.stanford.edu/magazine/article/

Clearly, the twin storms of earned ignorance and transferable intelligence have created all manner of historical mischief. From the eighteenth- through the early- to mid-twentieth-century, European American males created countless injustices from atop the judges' pew and inside the jury box, under the mistaken belief that they possessed heightened intelligence and impeccable judgment deriving chiefly from their race, gender, and academic achievements. When they considered themselves well-meaning, good, and just, this self-overestimation was exacerbated. Most of them undoubtedly believed that their racist or sexist decisions were made with absolute detachment.

Worse, the very arrogance that produced their delusions protected these delusions and, thus, created a carousel of injustice. How can one come to know what he does not know when one is convinced that he knows? Under such circumstances, the nature of reality is inaccessible. Blind to himself, he is blind to justice; immune from correction, he is oft to repeat it. Yet, he is (or, at least, was) the legally reasonable person.

Almost by its nature, the reasonableness standard reflects the demographic characteristics of those empowered to participate in the decision-making processes. Women and nonwhites were, by and large, prohibited from serving on juries and excluded from serving as judges and justices for much of the country's history. The logical outgrowth of these prohibitions and exclusions were juries who rendered decisions in a white-male vacuum. For example, as a matter of law, the reasonableness standard did not account for the gender of a female defendant when determining whether her use of deadly force against a male was "reasonable."

Another example of the white-male paradigm was how the common law treated the element of adequate provocation in manslaughter prosecutions. The common law had set categories of adequate provocation. One of the categories was witnessing adultery, or more accurately, catching one's wife in the act of adultery. That is, the woman who killed her husband after catching him *in flagrante delicto* had no claim of adequate provocation, although her husband would if the script were flipped. Her murder charge would not be mitigated to manslaughter. In other words, her actions were less understandable simply because she was not a man.

The common law rule requiring a woman to resist rape forcibly in order to establish lack of consent is another example of the irrationality that once overtly informed the reasonable person standard. A tone-deaf male line of thoughtlessness that went, "If I were her, I would have died before allowing him to take me," grounded his requirement. The obvious retort to this is, "But you are not her." And this is exactly the point.

The identity of the reasonable person at common law was pretty clear: he was typically middle-aged, preferably middle-classed, and always

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can-ai-help-judges-make-bail-system-fairer-and-safer (last visited Jul 13, 2021) [https://perma.cc/4B4L-79TQ]. In other words, it is not the computer's fault but the human programmers.

white. Thankfully, he has been displaced. Somewhat. The cognitive-social development of modern lawmakers, undoubtedly due, in large part, to the civilizing forces of women and American others, has enabled some updates to antiquated, intellectually underdeveloped assumptions about race and gender and, by extension, to the reasonable person standard.

The reasonable person has undergone several growth spurts over the last few decades. However, his cognitive development is far from complete. He has yet to recognize race-aggrieved status as a legitimate perspective. Nor has he developed the capacity to value the perspectives of the poor, the gay, and the immigrant. In fact, he has continued to maintain the perspective of the white American facing the Black assailant. In *People v. Goetz*, a predominately white jury found Bernhard Goetz innocent of the attempted murder of several unarmed Black teenagers, essentially determining that Goetz acted reasonably under the circumstances.[129]

On a Saturday afternoon in New York City, Goetz boarded a subway bound for the Bronx.[130] He sat in a subway car occupied by Black teenagers Barry Allen, James Ramseur, Darryl Cabey, and Troy Canty.[131] Canty then asked Goetz, "How are you?" Goetz responded, "Fine." Canty later approached Goetz and asked him for "five dollars" to which Goetz pulled out a gun and shot Canty in the chest.[132] Goetz then shot Ramseur in his arm and left side and Allen in the back.[133] Lastly, he shot at Cabey, who had not even glanced at Goetz.[134] Upon noticing that Cabey (who had been seated furthest from him) was still moving, Goetz, somehow disturbed by his aiming deficiency, declared, "[You] seem to be alright, here's another" and shot again, this time severing the teenager's spine, crippling him for life.[135]

During his post-arrest interview, Goetz admitted he did not believe the teenagers were armed. He shot because he could tell that Canty wanted to "play with me" and he feared being injured.[136] He told investigators that he had established a pattern of how he would fire before he began shooting, deciding to shoot from left to right.[137] He stated that he intended to "murder [the four youths], to hurt them, to make them suffer as much as possible."[138] If this sounds like revenge, not necessity, and premediated murder, not self-defense, that's because it was. Technically. Goetz's subjective intent, as he stated, was to murder the teenagers and

129. Cynthia Lee & Angela P. Harris, Criminal law: Cases and Materials 598 (2014).
130. *Id.* at 589–590.
131. *Id.* at 590.
132. *Id.* at 591–92.
133. *Id.* at 591.
134. *Id.* at 592.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

make them suffer, not to combat a deadly threat. This would render the potential objectivity of his actions irrelevant.

The New York Court of Appeals considered the distinction between the two. Before the *Goetz* case went to trial, the trial court and an affirming appellate court dismissed his indictment. Both courts found that the prosecutor's presentation to the jury that reasonableness required both a subjective and objective belief was erroneous.[139] In other words, these courts found that the reasonable person standard was a subjective standard.

In reversing, the Court of Appeals held that the New York statute allowing the use of defensive force "when and to the extent he *reasonably believes* such to be necessary . . . " requires the jury to "first determine . . . whether [the defendant] believed deadly force was necessary . . . then the jury must also consider whether these beliefs were reasonable."[140] In other words, the Court of Appeals held, consistent with the common law view, that a reasonable belief encompasses both a subjective and objective belief.[141] The court noted, importantly, the consequences of allowing a person's subjective belief to determine whether his use of force was necessary: "To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force."[142] By this ruling, the New York Court of Appeals acted presciently and with common sense.

The *Goetz* jury displays the most accurate illustration of the reasonable person. It is not the objective or subjective person, nor is it both the objective and subjective person. The reasonable person, simply, is the individual(s) making the decision. In *Goetz*, the jury acquitted, at least partly because the jurors empathized with Goetz's situation—while the rest is traditional Black stereotyping. New York, at the time, was drenched in crime.[143] Many, if not most, citizens were terrified, and the ones who rode the subway or lived or worked near the city center probably had some legitimate reason to be.[144] In other words, the jurors saw crime as a major problem and thus understood why Goetz would shoot. However, the jury's refusal to hold Goetz accountable for the premeditated attempted murder of the boys after any perceived threat had ended was the product of irrational white fear and the myth of the Black savage, who roamed in packs.

The notion that the reasonable person is the decisionmaker is not limited to white Americans. However, the notion generates more injustice for American others, particularly African Americans, because white

139. *Id.* at 595.
140. *Id.* at 593– 94.
141. *Id.* at 594.
142. *Id.*
143. Dressler & Garvey, *supra* note 100, at 539; *supra* note 4, at 540–41.
144. Dressler & Garvey, *supra* note 100, at 539

Americans disproportionately represent the decisionmakers in civil and criminal cases involving American others.[145] Thus, the reasonable person as a decisionmaker is a product of venue.

In *People v. Davis*, a majority-Black jury acquitted defendant Larry Davis, an admitted drug-dealer, for the attempted murder of nine cops, six of whom he wounded.[146] Davis was at his sister's apartment when more than twenty police officers arrived on scene, and seven of the officers burst into the apartment without a warrant.[147] The officers argued at trial that Davis initiated fire, and they simply returned it.[148] Davis argued the opposite.[149] When the smoke cleared, six officers were wounded.[150] The state of New York charged Davis with six counts of attempted murder.[151] At trial, Davis' trial counsel insinuated that the police officers were trying to kill Davis due to information Davis had about the officers' involvement in drug distribution. The defense did not offer evidence to prove the point.[152] At trial, Davis was found not guilty of attempted murder. The twelve person jury, selected from Bronx residents, included ten Black jurors.

These cases illustrate that the reasonableness standard is not objective, but relative, amorphous, and one that welcomes bias. Put more subtly, jurors "are subconsciously relying on their values to determine what the facts are. Confronted with factual disputes, individuals are motivated to adopt (and to persist in) the beliefs that cohere best with their defining cultural and ideological commitments, both to avoid a form of dissonance and to protect their connection to others who share their values."[153]

Whatever the case, the reasonable person standard, as is, is incapable of producing consistent results. Unless, of course, the decisionmakers are static. The U.S. Supreme Court (and other federal appellate courts) is the most static group. Today's Supreme Court might very well have found Goetz action's reasonable, and history would suggest, even more so, if Goetz was a cop. What is certain is that the Court would have made Davis the poster child of unreasonableness.

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145. Emmanuel Felton, *Many Juries in America Remain Mostly White*, American Renaissance (Dec. 23, 2021), https://www.amren.com/news/2021/12/many-juries-in-america-remain-mostly-white [https://perma.cc/WTH7-QR5J].
146. Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 San Diego L. Rev. 695, 731 (2015) (referencing to People v. Davis, 537 N.Y.S.2d 430, 432 (N.Y. Sup. Ct. 1988)); William G. Blair, *Jury in Bronx Acquits Larry Davis In Shooting of Six Police Officers*, N.Y. Times (Nov. 21, 1988).
147. Sanders, *supra* note 146 at 730.
148. *Id.* at 731.
149. *Id.*
150. Blair, *supra* note 146.
151. People v. Davis, 537 N.Y.S.2d 430, 432 (N.Y. Sup. Ct. 1988).
152. Sanders, *supra* note 146, at 731.
153. Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 Am. Crim. L. Rev. 1, 62 (2008).

The principal problem with the reasonable person standard as far as this Article is concerned is that it accepts irrational beliefs so long as they are socially shared. Too many Americans presume their personal biases as fact if everyone they know shares them. This consensus reality is particularly the case when it comes to race. As law professor Jody D. Armour points out:

> The flaw in the Reasonable Racist's . . . claim lies in his primary assumption that the sole objective of criminal law is to punish those who deviate from statistically defined norms. For even if the "typical" American believes that blacks' "propensity" toward violence justifies a quicker and more forceful response when a suspected assailant is black, this fact is legally significant only if the law defines reasonable beliefs as typical beliefs. The reasonableness inquiry, however, extends beyond typicality to consider the social interests implicated in a given situation. Hence not all "typical" beliefs are per se reasonable . . . If we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is "typical.[154]

The justness of a conclusion reached depends on the quality of the decision maker's judgment, an ability imperfect by nature. Superior judgment requires either great instincts, an ability in short shrift, or a combination of talents and abilities that can collectively be termed self-correcting self-knowledge. Great instincts might allow one to reach the right conclusion, even if for the wrong reasons or despite one's impaired reasoning due to personal prejudice. A racist judge, for instance, may sentence an African-American defendant to a life sentence because he instinctively "knows" that the person will re-offend. The judge bases the decision on a belief that the defendant's race predisposes them to criminality, when, in actuality, the defendant is likely to re-offend because of social circumstances and a personality disorder.

Self-correcting self-knowledge includes basic empathy, critical thinking, critical awareness, social awareness, and self-awareness. Critical thinking is "the process of thinking carefully about a subject or idea, without allowing feelings or opinions to affect you."[155] Critical awareness derives from critical thinking and is "an active, persistent and careful consideration of a belief or supposed form of knowledge in light of the grounds that support it, and the further conclusions to which it tends."[156]

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154. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan. L. Rev. 781, 787–90, 792–93, 795–96, 799–800, 802–03 (1994).

155. Cambridge Dictionary, *critical thinking*, https://dictionary.cambridge.org/us/dictionary/english/critical-thinking [https://perma.cc/JM9T-4BRF].

156. Lesley Friedmann & Katherine Covell, *Focus 2.1 – Identification: Critical Awareness*, Children's Rights Education (2012) http://www.childrensrightseducation.com/15-take-action.html (choose button showing "2.1 Identification") [https://perma.cc/8DGX-MQPK].

Self-awareness is "conscious knowledge of one's own character, feelings, motives, and desires."[157] Self-correcting self-knowledge thus refers to the capacity to think critically about social issues, individual behavior, social behavior, and social-psychological patterns. It is the ability to observe the external world and recognize inconsistencies, identify hypocrisy, and, on a more practical level, attune to nuance, perceive similarity in seemingly disparate behavior and circumstances, and comprehend differences in apparently similar conduct and circumstances. Most of all, it is the ability to put oneself in the shoes of an "other."

The reasonable person is irredeemably flawed because human beings are inescapably flawed, including those adept at self-correcting self-knowledge. But some are less flawed or more willing to grow than others. These are the individuals who should mount the bench and man the pew. They are the reasonable people.

B. *Reasonable Police Fear*

The faultiness of the reasonable person standard is most evident in modern police shooting cases. Formerly, the standards governing police use of force at common law were virtually the same as those governing the use of force by ordinary citizens, except in the case of fleeing suspects guilty of capital crimes.[158] In other words, the reasonable police officer at common law was the same as the average reasonable person. The same reasonable fear of imminent death or serious bodily injury requirement to justify the use of deadly force by the ordinary citizen applied with equal force to cops.

Under the common law defense of life doctrine, "[T]he only justification for using deadly force was to protect human life, either the police officer's own life or a civilian's life. The only justification for taking life was the preservation of another life."[159] Similarly, a citizen's use of deadly force was justified only by a reasonable belief that the defender or another was in imminent threat of death or serious bodily harm.

Indeed, the "belief" standards governing police and citizen use of deadly force in the criminal context are theoretically still the same. American journalist Audie Cornish asserts, "When police shoot an unarmed suspect, it's often ruled justified as long as the officer's fear of grave harm in that moment is reasonable."[160] And Professor Geoffrey

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157. Lexico, *self-awareness*, https://www.lexico.com/en/definition/self-awareness [https://perma.cc/X2Y5-YXZ8] (last visited Apr 1, 2022).

158. Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 Ind. L.J. 939, 943 (2011); at common law, police officers had the prerogative to use deadly force against fleeing felons because all felonies at common law carried the penalty of death.

159. Dr. Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. Crim. L. & Criminology 241, 243 (1994).

160. All Things Considered, *'Reasonableness' Standard For Police Is Under Pressure After High-Profile Shootings*, NPR (March 12, 2019 4:53 PM ET), https://www.npr.org/2019/03/12/702735028/reasonableness-standard-for-police-is-under-pressure-after-high-profile-shooting [https://perma.cc/7RN9-LHXQ].

P. Alpert, expert on high-risk police activities, offers, "It's a very simple analysis, a threat analysis. If a police officer has an objectively reasonable fear of an imminent threat to his life or serious bodily harm, he or she is justified in using deadly force. And not just his life, but any life."[161] Finally, criminology professor and former police officer, David Klinger explains how the reasonable police officer standard should work: "[A] blow to the head by itself would not justify a shooting, but other factors could be at work. 'Sometimes you make a straight-up mistake. 'He punched me, so I shot him.' Punching and shooting don't go together unless you're much bigger than me or you have martial arts training."[162]

But the objectively reasonable fear standard is clearly not applied objectively. Professor Lee notes:

> A second problem involves the fact that reasonableness is usually equated with typicality. Because the officer's beliefs are measured against the beliefs of the reasonable officer, understood to mean the average or typical officer, any subconscious racial biases that a typical officer might have become part of the reasonable officer's perspective.[163]

A major problem with the reasonableness fear standard, especially when cops or want-to-be cops are involved, is that many juries only consider the shooter's subjective point of view. One example is the tragic case of Trayvon Martin. Seventeen-year-old Martin was walking home through a middle-class, predominately white neighborhood when George Zimmerman phoned the police. Zimmerman described Martin as "suspicious." The 911 operator told him not to follow Martin. Zimmerman did anyway. A tussle ensued. Zimmerman shot and killed Martin. He was prosecuted, and a predominately white jury found him not guilty.

One juror remarked during deliberations: "'All I go back to is the law . . . That is what we have. We're a democracy, and what we've got is the law. We're to apply it blind to any other thing. At that moment, *at that moment*, did that person think their life was in jeopardy? That's the way you have to answer the question.' "[164] Yet another Juror argued, "'If he felt threatened that his life was going to be taken away from him, or he was going to have bodily harm, he had a right.' "[165] Both jurors were implying that the reasonableness standard is a subjective test.

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161. Michael Wines & Frances Robles, *Key Factor in Police Shootings: 'Reasonable Fear'*, The New York Times (Aug. 22, 2014), https://www.nytimes.com/2014/08/23/us/ferguson-mo-key-factor-in-police-shootings-reasonable-fear.html [https://perma.cc/GZ6T-HKYU].
162. *Id.*
163. Lee, *supra* note 108, at 655.
164. Christian Holub, *George Zimmerman jurors explain their controversial verdict in The Jury Speaks*, Ent. Weekly (Jul. 24, 2017), https://ew.com/tv/2017/07/24/jury-speaks-george-zimmerman-trayvon-martin [https://perma.cc/3HKD-GBFJ].
165. *The George Zimmerman Trial: Comments of Jurors*, Famous Trials (2013), https://famous-trials.com/zimmerman1/2316-zimmermanjurycomments [https://perma.cc/DH26-XCRF].

However, the judge's instruction to the jury read: "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."[166] Another instruction most likely caused the confusion: "[T]o 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."[167] The "actually believe" in this last phrase refers to subjective intent. However, the prior sentence instructed that the standard to apply was that of "a reasonably cautious and prudent person." In the end, too many jurors and sometimes even judges confuse or ignore the objective element of reasonability when African Americans are the victims.

In addition to the "belief" standards, police use of deadly force also requires (in theory) a proportionate use of force. As Professor Klinger stated earlier, after having investigated over 300 police shootings, "'Punching and shooting don't go together . . . .'"[168] Despite what theory suggests, the Supreme Court has, in reality, created a different, more lenient standard of reasonableness when evaluating police use of force under the Fourth Amendment. This double standard departs from common law standards (civil and criminal) and many modern state statutory standards. The Supreme Court's excessive force standards, the new dread standard, has several fathers but no mothers.

IV. The Origins of Unreasonable Fear

As previously established, the legally reasonable person is an individual who has reasonable beliefs about potential threats. Her reasonable belief hinges on the reasonableness of her apprehension. The unreasonable fear that informs the rationalized dread standard derives from the separate yet mutually reinforcing disciplines of biology, political science, and social science. The foundation of irrational fear is biological and to understand this biology, an incursion into the science of fear is necessary.

A. *The Science of Fear*

In many ways, reasonable fear is an oxymoron. Fear tends to subvert reason and distort reality. American economists George Loewenstein and Jane Mather studied American fear by employing threat types, including HIV and crime. The researchers concluded that: "There is no generally applicable dynamic relationship between perceived risk

166. Judge Debra Nelson, *Jury Instructions for George Zimmerman Case*, Genius (2012), https://genius.com/Judge-debra-nelson-jury-instructions-for-george-zimmerman-case-annotated#about [https://perma.cc/6UJB-5NYV].

167. *Id.*

168. Wines & Robles, *supra* note 161.

and actual risk."[169] This means that humans are generally suboptimal at fear assessment.[170] As human beings, we overestimate, sometimes grossly, the chances that a feared anomaly like a terrorist attack, a plane crash, or nuclear meltdown will come to pass.[171] During the Great Depression, President Roosevelt called this form of panic "unreasoning fear."[172] Modern American history is replete with examples of such unreasoning fear.

In April 1999, two student gunmen entered their high school armed with a TEC-DC9, a carbine rifle, and sawed-off shotguns.[173] They moved from classroom to classroom, emptying their weapons at teachers and students alike.[174] A teacher and twelve students died in the carnage.[175] It was a tragedy of epic proportions.

The Columbine shooting was the biggest story of 1999, sending shockwaves around the country.[176] After the incident, a Gallup poll revealed that Americans ranked the safety of school-aged children at school as the number one issue facing the country.[177] Another Gallup poll found that over half of American parents believed that their children's schools were under threat of similar attacks, though the actual statistics regarding school danger remained unchanged through the school shooting panic, and violent crime, in general, had reached a decade low (fifty percent below the decade high).[178] The previous year, the Jonesboro massacre, another school shooting, was the biggest story.[179] Shortly after, a media poll revealed that an astounding 71 percent of Americans believed a school shooting in their communities was highly likely.[180] And in the fall of 2006, two school shootings again ramped up the "feedback loop."[181] But a government report in 1999 had found that "a student's risk of being murdered in school was de minimus-so tiny that it was effectively zero."[182]

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169. Gardner, *supra* note 19, at 10.
170. *Id.*
171. *Id.* at 1–8.
172. *Id.* at 231.
173. *Id.* at 232; C. Shepard, *Weapons at Columbine*, A Columbine Cite, http://acolumbinesite.com/weapon.php [https://perma.cc/9MKQ-XPQQ] (last visited Jul. 14, 2021).
174. History.com Editors, *Columbine Shooting*, History (March 4, 2021) https://www.history.com/topics/1990s/columbine-high-school-shootings [https://perma.cc/9AT4-A6FQ].
175. *Id.*
176. *Id.*
177. Linda Lyons, *Parents Concerned About School Safety*, Gallup (Sept. 17, 2002), https://news.gallup.com/poll/6808/parents-concerned-about-school-safety.aspx.
178. Mark Gillespie, *One in Three Say it is Very Likely That Columbine-Type Shootings Could Happen in Their Community*, Gallup (Apr. 20, 2000), https://news.gallup.com/poll/2980/one-three-say-very-likely-columbinetype-shootings-could.aspx.
179. Gardner, *supra* note 19, at 234.
180. *Id.*
181. *Id.*
182. *Id.*

Terrorism presents another classic case of fear distortion. After the unforgivable 9/11 terrorist attacks in 2001 and the anthrax scare of 2011, over 50 percent of Americans reported worry that a family member would fall prey to terrorism.[183] Author and neuroscientist Daniel Gardner notes that "these are startling results," especially since "the chance of anyone American dying in the attacks that day was 0.00106 percent."[184] Five years after 9/11, 50 percent of Americans still believed that chances were more likely than not that terrorists would attack in the next several weeks.[185] In fact, an even greater share of Americans in 2006 felt members of their families would fall victim to terrorism than those polled immediately after 9/11.[186] This was despite the reality that Americans were 14 times more likely to die in a car accident than a terrorist attack, even in a year like 2001where there was a terrorist attack. On average, the lifetime risk of succumbing to a terrorist attack is 1 in 1,000,000, while the risk of dying in a car accident is astronomically higher and the lifetime risk of being struck by lightning is 1 in 79,746.[187]

But this type of fear distortion is not merely social. It is also biological. The biological causes of fear distortion precede humanity's days as hunter-gatherers. Until the last ten thousand years, humans were not at the top of the food chain for most of human history.[188] Instead, they fell "solidly in the middle."[189] Author and historian Yuval Noah Harari notes that humans, "despite their big brains and sharp stone tools, dwelt in constant fear of predators."[190] He continues, "For millions of years, humans hunted small creatures and gathered what they could, all the while being hunted by larger predators."[191] The survival mechanisms developed during this period carried over to the present. Humanity's mastery over nature and concomitant steps up the food chain outpaced once necessary survival mechanism.[192] In sum, human technology significantly outpaced biological adaptation.

Large animals like lions and sharks who once inhabited the top of the food chain assumed the position painstakingly after millions of years and, thus, had time to adjust as they climbed.[193] Humanity, on the other hand, reached the top of the food chain relatively overnight.[194] Advances in technology from the invention of agriculture 12,000 years ago to the rise of contemporary cities was the equivalent of taking a caveman and

183. *Id.* at 271.
184. *Id.* at 271–72.
185. *Id.* at 272.
186. *Id.*
187. *Id.* at 274.
188. *See* Yuval N. Harari, Sapiens:A Brief History of Humankind, 28-54 (Harper Perennial, 2017).
189. *Id.* at 18.
190. *Id.*
191. *Id.*
192. *Id.* at 17–18.
193. *Id.*
194. *Id.*

placing him in the middle of Chicago.[195] As a result, says Harari, "[W]e are full of fears and anxieties . . . "[196]

The problem is that "modern developed countries have become some of the most peaceful societies in human history."[197] Indeed, the levels of violence in today's world "are very likely among the lowest in all human history.[198] The homicide rate in thirteenth century London, for instance, was "almost eleven times higher than the current rate."[199] In other words, our biological fear mechanisms are ill-equipped for today's society. A once reliable, naturally selected survival mechanism has become a reality distorting machine.[200]

Further, disproportionate media focus exacerbates outmoded biological fear mechanisms. The media tends to focus on the sensational, which increases the expectations that the sensational will happen. Gardner notes, "Politicians, newspapers, the evening news, novels, movies: They are all portraying the fantastically rare as typical, while what truly is typical goes all but unmentioned."[201] In the context of criminal justice, the same rule applies. To be sure, the media "create[s] an image of crime that bears little resemblance to reality."[202] To make matters worse, when crimes rates drop, the media's coverage of crime remains constant.[203]

The fear of crime, however, is not the problem. It is the effect of that fear. Gardner continues, "The media's image of crime may turn reality upside down, but it is a very accurate reflection of our feelings"[204] and "[w]hen we succumb to wildly improbable fears, there are consequences."[205] Understandably, there are even more significant consequences when the nation's leaders stoke these fears.

B. *The Politics of Fear*

Unreasonable fear can be a product of political exploitation. Yet, political exploitation is not possible without unreasonable fear. To explain this, psychiatrist and neuroscientist Arash Javanbakht, M.D. points out that, "Fear is illogical and often dumb" and "Demagogues have always used fear for intimidation of the subordinates or enemies and shepherding the tribe by the leaders."[206] He adds, "Fear is a very strong

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195. *See generally Id. at* 8.
196. *Id.* at 18.
197. Gardner, *supra* note 19, at 236.
198. *Id.* at 238.
199. *Id.*
200. *Id.* at 27.
201. *Id.* at 188.
202. *Id.* at 190.
203. *Id.* at 188.
204. *Id.* at 222.
205. *Id.* at 234.
206. Arash Javanbakht M.D., *The Politics of Fear*, Psychol. Today, https://www.psychologytoday.com/us/blog/the-many-faces-anxiety-and-trauma/201903/the-politics-fear [https://perma.cc/237X-7N6L].

tool that can blur humans' logic and change their behavior."[207] More particularly, fear limits critical thinking ability.[208]

Javanbakht notes that tribalism is a "biological loophole" that political leaders can readily exploit.[209] Politicians often use "ideologies" to seize control "of our fear circuitry," causing individuals to "regress to illogical, tribal and aggressive human animals, becoming weapons ourselves—weapons that politicians use for their agenda."[210] Tribalism is the outward expression of the "primitive and basic element of our brain."[211] This primitive element "shape[s] our emotions, how we organize our attachment to others, our seeking protection and safety, and the very way we form our cultures and governments."[212]

Professor of behavioral sciences, Steven E. Hobfoll notes, "The most effective way to add fervor, strength, and resolve to any political or social argument is to invoke the specter of loss and doom . . . Framing in black and white, not shades of gray, is both the means and the terminus for attracting any audiences' attention . . . It is therefore a highly effective strategy to speak in terms of extremes."[213]

Historically, American politicians and strategists have exploited this natural human weakness just as leaders have since time immemorial. But in the modern age, no American president has done so more than President Richard Nixon except for Donald Trump. And, arguably, no president has been as effective as President Trump at exploiting fear only because his campaign and political strategy compounded the successes of virtually all conservative presidents for the last fifty years.

The Jim Crow Era was decidedly more gruesome than the 1980s and 1990s. However, the white fear that animated each era, bore an awful resemblance to each other. In fact, the eras differ only regarding how the paranoia was ultimately expressed. Attorney, activist, and author Faya Rose Toure dubs the modern expression of irrational white race fear the "new noose."[214] She explains that the term denotes the punctuation of Black life by corrosive police power, inequitable laws, and abominable social policy. Examples include unlawful police violence, racial prejudice in the courtroom, and mass incarceration.

It is, thus, the unthinking fear of Blackness that binds the mean-spirited, rabid racists of Jim Crow to the race conservatives who grew in response to the era's end and the crop of well-meaning, implicitly biased Americans borne out of both eras that dominate today. Indeed, racism is reinforced by well-meaning whites who abhor the rabid racists of old and

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207. *Id.*
208. *Id.; see* Jaron D. Pearlman, The Politics of Fear 20 (2020).
209. Pearlman , *supra* note 208 at 35.
210. *Id.*
211. *Id.*
212. *Id.*
213. Steven E. Hobfoll, Tribalism 4–5 (2018).
214. Interview with Faya Rose Toure, Alabama Civil Rights Lawyer and Artist (2021).

avoid racist language, yet harbor and perpetuate racist ideas.[215] Author Robin Diangelo considers the notion that racist ideas lessen from generation to generation to be false and that "even those who are young and profess to be progressive" harbor these ideas.[216] She continues:

> Research in implicit bias has shown that perceptions of criminal activity are influenced by race. White people will perceive danger simply by the presence of black people; we cannot trust our perceptions when it comes to race and crime . . . Racist images and resultant white fears can be found at all levels of society, and myriad studies demonstrate that white people believe that people of color (and blacks in particular) are dangerous.[217]

Scientific research confirms the effects of implicit racial bias, particularly "how implicit bias can operate to distort a person's interpretations of the evidence in a case."[218] Research establishes how "people interpret ambiguously hostile behavior as more hostile when performed by a black compared with a white actor."[219] Furthermore, "people who test high on implicit racial bias were found to be more likely to interpret ambiguous expressions in a negative manner (i.e., as angrier) on black faces (but not white faces) compared with those who test low on implicit racial bias."[220]

Most white Americans do not consider themselves racist and most, technically, are not. Professor Lee points out, "While most Americans are aware of negative stereotypes about Blacks, 'only a subset of these individuals actually endorse the stereotypes.'"[221] Nevertheless, most do harbor racist ideas about Black people, "Because stereotypes are established in children's memories at an early age and constantly reinforced through the mass media and other socializing agents, stereotype-congruent responses may persist long after a person has sincerely renounced prejudice."[222] They are not necessarily bad people.[223] They are just not self-aware about this aspect of themselves. And this lack of self-awareness, like any others, creates a false sense of objectivity and maybe even hubris.[224]

Since most, if not all, people have implicit biases, a lack of racial self-awareness, in and of itself, is relatively harmless. But as a heterogeneous society (and a global world), the acts of one group affect the other groups. The larger and more powerful the group, the greater its effect on

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215. *See generally* Diangelo, *supra* note 122.
216. *Id.* at 48.
217. *Id.* at 45–46.
218. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the Am. Juror*, 51 Court Rev. 116, 117.
219. *Id.*
220. *Id.*
221. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1580 (2013).
222. *Id.* quoting Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Calif. L. Rev. 733, 743 (1995).
223. Diangelo, *supra* note 122 at 45–46.
224. *Id.* at 100.

the other groups. In other words, implicit racial bias is dangerous because white Americans dominate positions of influence like the judge's bench, the jury box, and blue regalia. These are positions where the fortunes of African Americans and others depend on thoughtful, reflective, and careful judgment, free from "our need to deny the bewildering manifestations of anti-blackness that reside so close to the surface [that] makes us irrational."[225]

In 2012, President Obama's reelection tour stopped in Arizona and the governor of Arizona, Jan Brewer met him on the tarmac.[226] In one of the most remarkable displays of disrespect by a sitting governor, Brewer stuck her finger in the President Obama's face and waved it around, chastising him as though he was a child, or, more accurately, like he was Black person.[227] Amazingly (but predictably), Brewer later revealed that she felt threatened by the president, even though the exchange had been in full view of cameras, the Secret Service, and elected officials. She seemed oblivious to the fact that she had been the one to make intimidating gestures, not the other way around.[228] Her distorted perception is the nature of irrational white fear.

Governor Brewer is not alone. Political scientist Ashley Jardina writes, "[T]he symbolism of Obama's election was a profound loss to whites' status" and a challenge to the absoluteness of whites' dominance."[229] American journalist Isabel Wilkerson explains that the "sense of fear and loss . . . " birthed "a sense of needing to band together to protect their place in the hierarchy.[230]

1. The History of White Fear

White paranoia is a consequence of the country's original sin: hypocrisy since its founding. Thomas Jefferson, who embodies the two faces of American history, captured the origin of white paranoia when he wrote, "[We] can neither hold [the slave], nor safely let him go. Justice is in one scale, and self-preservation in the other."[231] History would prove this to be false. It was bound to do so because Jefferson's perception was not reality, although shared by many of his generation. It was a fear based on guilt, not fact. As was the case then and is now, if Black people are free and treated as such, white America has little about which to worry. Thomas Jefferson's irrational fear prevented him from seeing the real threat: the threat of not letting them go, which kept them chained.

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225. *Id.* at 98.
226. Isabel Wilkerson, Caste: The Origins of our Discontents 316 (Random House 2020).
227. *Id.*
228. *Id.* at 317.
229. *Id.* at 315–16, quoting Ashley Jardina, White Identity Politics 227 (Cambridge Univ. Press 2019).
230. *Id.* at 316.
231. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), Library of Congress, https://www.loc.gov/exhibits/jefferson/159.html.

As a result of white paranoia, the enslaved and free Blacks were prohibited, either by law or de facto, from carrying guns for most of the country's history (90 percent of African Americans lived in the South until the Great Migration from 1916 to 1970).[232] Indeed, irrational white fear almost cost the founding generation the American revolution because the Continental Army did not allow Black men to join.[233] As a consequence, "the American rebels were confronted with both chronic manpower shortages and the reality that the state militias were completely unreliable and would sometimes simply run away rather than fight."[234] Exacerbating white race fear was Britain's promise to free the enslaved who rebelled or escaped.[235]

Most Americans were opposed to Blacks serving in the military. However, some states recovered their sanity at the last moment, primarily Northern states, and General George Washington reluctantly integrated the Continental Army.[236] Other states in the deep South, on the other hand, remained truculent.[237] South Carolina was particularly blockheaded. Despite having built up a sizable militia to fight the specter of slave rebellion, they had insufficient personnel to defend against the British.[238] A colonel of the Continental Army offered an obvious suggestion that was later recommended by the Continental Congress: South Carolina should arm its enslaved.[239] The choice was either that, or be captured by the British. As historian and professor Carol Anderson puts it, "The choice was actually quite simple. The United States could be sacrificed."[240]

South Carolina legislatures were alarmed and "disgusted" that Congress would even consider such a thing and so, insisted on a more palatable solution than arm Black men.[241] The South Carolina Legislature recommended to the Continental Congress that South Carolina "surrender to the British, declare its neutrality in the war, and take its chances with the king."[242] Anderson writes, "In South Carolina's estimation, armed Blacks were infinitely more dangerous and frightening than the might of the British military and the wrath of a king dealing with

232. *See* Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration (Random House 2010); Carol Anderson, The Second: Race and Guns in a Fatally Unequal America (Bloomsbury Publishing 2021).
233. Anderson, *supra* note 232 at 18–19.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 20.
238. *Id.*
239. *Id.* at 21.
240. *Id.*
241. *Id.* at 21–22, quoting Robert G. Parkinson, The Common Cause: Creating Race and Nation in the American Revolution, Loc. 9865–9866, 9890–9901 (Univ. of North Carolina Press 2019).
242. *Id.* at 21.

American traitors."[243] Major General Nathanael Greene, sent to South Carolina to talk some sense into the legislature, confirms Anderson's assessment. He complained to General George Washington that the state's obstinance boiled down to the "dread of armed blacks."[244] The upshot of the "dread of armed blacks," or, more accurately, the dread of men armed with Blackness, is obvious. Whites can shoot Blacks, but Blacks cannot shoot back, particularly in the grey zone of reasonableness where subjective white fear is sufficient and objective black fear is questionable.

The "dread of armed blacks" continued after slavery ended, although Blacks made no efforts at revenge. Still, the recently defeated Southern states began to disarm Black soldiers returning from the Civil War forcibly. Things were so bad that the South forced President Ulysses Grant's hand. He had to send the U.S. military to the South to protect the newly freedmen's constitutional rights, including their right to bear arms. After Grant's presidency, however, Southern Democrats reached an agreement with Republican President-elect Rutherford B. Hayes following his questionable election, to remove federal troops from the South in exchange for the Presidency. The agreement ended what W.E.B. Dubois called "a brief moment in the sun" for African Americans.[245]

During this "brief moment in the sun," known as Reconstruction, the newly freed accomplished amazing economic, political, and educational feats. However, the end of Reconstruction would unleash another edition of white paranoia. Now, this paranoia had been festering for more than a decade, suppressed from action by the U.S. military, and further aggravated by Black economic and political advancement. Once a talented oppressor, white fear would now become a stark, raving lunatic.

Southern scholar Amy Louise Wood notes that "beginning in the 1890s," and in response to the "new social order" that "most threatened white dominance," which had been brought about by modernization and the African American's coming "to expect the same legal and civil rights accorded to whites, many white southerners expressed their apprehensions about economic and political dislocations and disruptions as anxieties about moral dissolution and personal safety."[246] She continues:

> White southerners insisted that, above all, their moral and physical integrity was at stake. Industry drew laborers—mostly young, unattached men, black and white—into towns and cities . . . . Many white southerners fervently believed that this new environment had unleashed an innate propensity for violence and sexual transgression in African American men. Stories of black crime and moral dereliction dominated southern newspapers which further fueled racial fears . . . . It was in this context of heightened alarm that white southerners felt inclined and justified to lynch African Americans

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243. *Id.* at 22.
244. *Id.* at 22, quoting JOHN BUCHANAN, ROAD TO CHARLESTON, 6309, 6343 (UNIV. OF VIRGINIA PRESS) (2019).
245. *See* W.E. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935).
246. AMY LOUISE WOOD, LYNCHING AND SPECTACLE 5–6 (2019).

> with such unbridled fury. Lynching tended to occur in places that were already wrestling with problems of crime and anxieties about moral decay, where lynchings were understood to be just and necessary retributions against abominable crimes, a means to ensure not only white dominance but the larger social and moral order.[247]

In other words, the Jim Crow South, one of the most wildly undemocratic societies in world history, felt justified in slaughtering African American men, women, and children. Consequently, Southern injustice, lynch law, and mob rule, substituted the rule of law. This age of domestic terrorism claimed over 50,000 Black lives by some estimates.[248] The terrorism was fueled by irrational white fear, which, in turn, was generated by hallucinations of rapacious Black savages or, in the parlance of the Clinton White House, Black "superpredators." In the end, this paranoia made real savages and superpredators, not out of Black people, but thousands of white lawyers, businesspersons, doctors, politicians, and blue-collar workers.

The media reinforced the rabid white paranoia of the Jim Crow South, the most explosive example of which was the 1920 film *Birth of a Nation* which placed the mythology of the black savage on steroids and reincarnated the Ku Klux Klan. The film was a cultural sensation that glorified the confederacy and depicted Black men as sexually ravenous, monstrous beasts.[249] It also "was a tremendously accurate prediction of the way in which race would operate in the United States."[250] The film resolved with the Klan apprehending the Black (or rather white actor in Black face) rapist and executing him.

The real Klan, reconstituted, would go on to lynch thousands of African American men and women (some even pregnant) in a tragic case of life imitating art.[251] The film spawned the worst type of confirmation bias in the weak minds of those who embraced it. The Klan even adopted fabricated rituals in the movie included simply for dramatic effect, the chief one being burning crosses in the yards of terrified Blacks.

The Klan and other mob terrorist groups and individuals lynched many African Americans on false allegations of violence against whites or sexual violence against white women. Mere allegations were enough to justify execution. The myth of the rapacious Black savage was so pervasive that Southern juries routinely acquitted patently guilty domestic terrorists—when the terrorists were arrested at all.

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247. *Id.*
248. Gregory Downs, Why the Second American Revolution Deserves as Much Attention as the First, The Washington Post, (July 19, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/07/19/why-the-second-american-revolution-deserves-as-much-attention-as-the-first [https://perma.cc/3M9R-G8ER].
249. *See* 13th (Netflix Studios 2016).
250. *Id.*
251. *Id.*

Modern white paranoia began when Jim Crow ended, preserving the malady's continuation. The 1960s brought nearly unprecedented social upheaval and social change. The Civil Rights Movement helmed by Martin Luther King, Jr. and others was gradually gaining ground in the pursuit of legal equality. But the pace of change was much too slow and mainly irrelevant to African Americans in urban centers, whose problems were more about social conditions and economic policies than any particular law like legal segregation or poll taxes in the South. After decades of poor housing, police violence, and poverty, urban rebellions spread around the country like wildfire.

White America was terrified. They perceived threats from all directions: (1) Black anger fueling urban rebellions; (2) rising crime rates; (3) rapid social, cultural, and political change; and (4) encroaching Black advancement. Consequently, it "became very easy for politicians to then say the civil rights movement itself was contributing to rising crime rates, and if we were to give the Negroes their Freedom, then we would be repaid, as a nation, with crime."[252] Race conservatives, fully understanding that "To an unconscious mind so sensitive to feelings that even minor changes in language can influence its perception of a threat . . . ", would take full advantage.[253] A series of U.S. presidents would craft campaigns designed to exploit white angst.

2. The Race of White Fear

The first president during this period to weaponize white angst and this advanced form of dog-whistle politics was Richard Nixon. He was able to exploit the sum of white fears with a single phrase: "law and order." "Law and order," coded language that boils down to controlling Black people, became the rallying cry of race conservatives.[254] In her book, *The New Jim Crow*, Michelle Alexander writes, "the rhetoric of 'law-and-order was first mobilized in the late 1950s as Southern governors, and law enforcement officials attempted to generate and mobilize white opposition to the Civil Rights Movement."[255] The 1960s saw near unprecedented social upheaval. Dissatisfaction in the Black community reached a boiling point. After decades of Jim Crow segregation, lynching, poor housing, ill access to a living wage, and police violence, urban rebellions, boycotts, and protests spread through the country like wildfire.[256] The wildfire, however, instigated sweeping social changes and perhaps was the true source of the new-era white fear that would bedevil the American other for another fifty years and counting.

White America was terrified of the Black anger fueling urban rebellions in the 1960s. Much of the country was disturbed by rising crime

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252. *Id*.
253. Gardner, *supra* note 19, at 270.
254. 13th *supra* note 249.
255. Michele Alexander, The New Jim Crow 40 (2010).
256. Keeanga-Yamahtta Taylor, From #BlackLivesMatter to Black liberation 54–55 (2016).

rates and encroaching Black equality. For white Americans, the nation was changing too quickly. It "became very easy for politicians to then say the civil rights movement itself was contributing to rising crime rates, and if we were to give the Negroes their Freedom, then we would be repaid, as a nation, with crime."[257] The country, from middle America's perspective, was on the brink of chaos and conservative leaders capitalized on this perception, thoroughly understanding that their constituents harbored "an unconscious mind so sensitive to feelings that even minor changes in language can influence its perception of a threat . . . "[258]

The law-and-order Court descended from the Nixon branch of anti-civil rights, pro-segregation, and tough-on-crime presidents who successfully weaponized white fear of perceived encroaching Blackness. Legal scholar Michelle Alexander explains, "The most ardent opponents of civil rights legislation and desegregation were the most active on the merging crime issue."[259] She continues, "[F]rom the mid-1950s until the late 1960s—conservatives systematically and strategically linked opposition to civil rights legislation to calls for law-and-order, arguing that Martin Luther King Jr.'s philosophy of civil disobedience was a leading cause of crime." [260] Many segregationists argued that integration caused crime.[261] Others argued that the rash of urban rebellions in the 1960s was proof that civil rights for African Americans fueled crimes.[262]

Nixon was elected due, in large part, to the white angst the law-and-order moniker exploits. However, since law-and-order is traditionally the province of the states,[263] the Nixon Administration had to find a way "to project the federal government into law-and-order."[264] Ultimately, the administration decided to use drugs as a point of entry.[265] Soon after that, Nixon announced at a press conference, "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new all-out offensive."[266] Following his statement, Nixon enacted the Comprehensive Drug Abuse Prevention and Control of 1970 and created the Drug Enforcement Administration (DEA) to help carry out his real offensive on the phantom problem of drug abuse.[267] Of course, Nixon's target was not drug abuse at all. According to John Ehrlichman, one of Nixon's top aids:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people . . . We knew we

257. 13TH *supra* note 249.
258. GARDNER, supra note 19, at 281.
259. *Id*. at 42.
260. *Id.* at 40–41.
261. *Id.* at 41.
262. *Id.*
263. PUBLIC ENEMY NUMBER ONE (Gravitas Ventures 2020).
264. *Id*.
265. *Id.*
266. *Id.*
267. *Id.*

> couldn't make it illegal to be either against the war or black . . . but by getting the public to associate the hippies with marijuana and the blacks with heroin, and then criminalizing both heavily, we could disrupt those communities . . . We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[268]

The faux war on drugs was a part of Nixon's "southern strategy," his political plan to race bait Southern Dixiecrats and the "silent majority" into the Republican party and his "law-and-order" slogan belonged to the strategy's propaganda wing.[269] The Dixiecrats had become irate with the gains of the civil rights movement and fearful of being displaced by Black political and social advancement.[270] The "silent majority" was terrified of the rash of urban riots and the rise of crime rates.[271] Nixon and his "silent majority" of Americans "would influence a generation of crime policy geared toward giving police more power, more authority, and permission to use more force."[272] Ultimately, this was not limited to just one generation. But several. The Nixon Era and the law-and-order when crime begins to stand in for race.

Nixon's southern strategy led him straight to the White House and, it would not follow him out. Lee Atwater, the political strategist who advised both Ronald Reagan and George H. W. Bush, stated in an anonymous interview during Reagan's 1981 Presidential campaign:

> Y'all don't quote me on this. You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you. Backfires. So you say stuff like forced busing, states' rights, and all that stuff. You're getting so abstract now [that] you're talking about cutting taxes, and all these things you're talking about are totally economic things, and a byproduct of them is [that] blacks get hurt worse than whites. And subconsciously, maybe that is part of it. I'm not saying that. But I'm saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, "We want to cut this," is much more abstract than even the busing thing, and a hell of a lot more abstract than "nigger, nigger." So, any way you look at it, race is coming on the back-burner.[273]

As Atwater's remarks show, the race conservatives' antics continued with Ronald Reagan. In many ways, Reagan improved the southern strategy. This was most evident when Reagan launched his own war on

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268. 13TH *supra* note 249.
269. *Id*.
270. *Id.*
271. *Id.*
272. *Id.*
273. Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy [https://perma.cc/FF6Q-F7A6].

drugs, which drastically increased the white vote for the Republican party in the South. Reagan's war on drugs, announced in 1982, was aided by the early crack era in the early 1980s that would eventually go on to be an epidemic. The crack epidemic brought with it drug wars in major urban areas around the country and Reagan's campaign featured the Anti-Drug Abuse Act, which mandated the same sentence for possessing 5 grams of crack cocaine, a drug associated with Black people, and 500 grams of cocaine, a drug associated with whites.[274] Yet white suburbanites, safely removed from these urban centers, were more afraid than the inner-city denizens who lived there.[275]

The political exploitation of white fear continued with George H.W. Bush's 1988 presidential campaign. In part, George H.W. Bush won the election on the strength of the notorious "Willie Horton" ad that painted Bush's opponent, Michael Dukakis, as soft on crime while Black savages like Willie Horton were overrunning the country.[276] Horton, "whose name became shorthand first for Black crime, then dog-whistle politics,"[277] was a convicted criminal who benefited from the Massachusetts weekend release program. While out of custody, he raped a white woman.[278]

The "Willie Horton" ad was simple, and so was the message. The ad featured a mug shot of Willie Horton, a description of his crimes, and, in closed captions, "Weekend Prison Passes[,] Dukakis on Crime." The ad not so covertly appealed to one of white America's greatest fears and the greatest dread of the historical South: the merging of the urban Black super predator and the rapacious Black rapist. Political science professor Claire Jean Kim echoes this perspective: "[T]he insinuation is, if you elect Gov. Dukakis as president, we're going to have black rapists running amok in the country." Bush's campaign manager Lee Atwater commented before the ad's release, "By the time we're finished, they're going to wonder whether Willie Horton is Dukakis' running mate."[279] The ad was "widely condemned for playing on racial fears by featuring a Black man's mug shot and linking Blackness with depravity."[280] Because the "Willie Horton" ad successfully raised white fear and helped put H.W. Bush in the White House, it "remains the key reference point for dog-whistle politics."[281]

274. Alexander, *supra* note 255 at 58.
275. Gardner, *supra* note 19, at 222.
276. Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always be the Reference Point for Dog-Whistle Racism*, Vox (Dec. 1, 2018), https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics, [https://perma.cc/AL3P-PJ9L].
277. *Id.*
278. Doug Criss, *This is the 30-year-old Willie Horton ad everybody is talking about today*, CNN (Nov. 1, 2018), https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html.
279. *Id.*
280. Withers, *supra* note 276.
281. *Id.*

By this point, the unreasonable fear of Black criminality had graduated to rank paranoia in the American imagination. Yet, false political amplification continued into the Bill Clinton administration. Clinton, a Southern Democrat, was heir to the race conservative tradition of dog-whistle race-politics and continued to exploit white race paranoia. Determined to out tough the law-and-order crowd, Clinton went so far as to appoint a military general with no experience in drug abuse to implement his "war on drugs."[282]

Despite Clinton's protestations, the roots of white race fear, a fear that has always been rooted in racial prejudice, preceded the rise in urban violence in the 1980s and early 1990s by generations. Clinton's attempt to justify historical white paranoia sounds strangely similar to the justifications offered for the violation of the natural, human, and Second Amendment rights of Black folk through the white domestic terrorism of the Jim Crow era, until the 1960s and beyond.

Under Clinton's administration, the Black criminal reached super villain status. The Clinton administration adopted political scientist John J. Dilulio Jr.'s super predator theory. The theory predicted that a new wave of crime would overtake the country due to the rise of young urban super predators who were "brutally remorseless youngsters," "the youngest, biggest and baddest generation any society has ever known."[283] The myth continued a long pseudo-scientific tradition that insisted on imaginary Black biological inferiority and depravity. The myth also continued a tradition almost as long, the "the dread of armed blacks," except now they were not simply armed and revengeful, they were monsters with evil predilections.[284]

Clinton, during a speech, legitimized stereotypical media constructions that sensationalized Black crime:

> Blacks must understand and acknowledge the roots of white fear in America. There is a legitimate fear of the violence that is too prevalent in our urban areas . . . By experience or at least what people see on the news at night, violence for those White people too often has a Black face.[285]

The problem is that white fear patterns are inconsistent with statistical reality. Gallup polling since the late 1980s has consistently shown that most Americans believe crime is getting worse when it is getting

282. Public Enemy Number One, *supra* note 263.

283. Rachel Leah, *The "Superpredator" Myth was Discredited, but it Continues to Ruin Young Black Lives*, Salon (April 21, 2018), https://www.salon.com/2018/04/21/the-superpredator-myth-was-discredited-but-it-continues-to-ruin-young-black-lives, [https://perma.cc/RVN9-3UN8].

284. *See generally* Robert W. Sussman, The myth of race: the troubling persistence of an unscientific idea (2016).

285. *Transcript of President Clinton's Speech on Race Relations*, CNN (Oct. 17, 1995), http://www.cnn.com/US/9510/megamarch/10-16/clinton/update/transcript.html, [https://perma.cc/7DXM-M6N3].

better.[286] Gardner attributes this phenomenon partly to the media, explaining that the media sensationalizes crime and warps the public perception of reality.

Another problem with Clinton's remark is that it conflates media coverage with reality. That is, he hangs the legitimacy of white fear on "what people see on the news at night." Clinton suggests that anything portrayed or reinforced by the media legitimizes perceptions based on the coverage, no matter how false or ridiculous. In other words, Clinton presumes that a statistically unreasonable fear of Blackness, if promoted by the media, is legitimate and, thus, reasonable.

However, the media concentrates "heavily on individual acts" and, thus, media coverage reveals "little about broader contexts and issues."[287] That is, media coverage misrepresents the actual players in the crime saga in narrates. Clinton's statement about the "black face" of crime reflects this misrepresentation. His suggestion that crime has a Black face is synonymous with saying the victims of crime have a white face. But even if crime had a "black face," the victim's face would not be white.[288]

The truth is that people commit crimes overwhelmingly against members of their own race.[289] Therefore, in the white community, crime overwhelmingly has a white face, not a Black one. Similarly, the group who should be most fearful of young Black males are not white males, or white females, but other young Black males. Still, Hillary Clinton described super predators as urban youth with "no conscience, no empathy."[290] The superstition of the Black super subhuman legitimizes presumptions of Black dangerousness. Americans take these presumptions with them into the jury box. Judges bring them to the bench. Cops are armed with them on the streets.

Unsurprisingly, the super predator theory was discredited after crime fell dramatically over the next several years and both Hillary Clinton and Dilulia, Jr. have since apologized.[291] However, as observed by professor of criminology Bahiyyah Muhammad in 2018, "That super predator myth really scared generations" and that fear is "continuing to go on, even in the midst of the apology for it."[292] It is difficult to believe that Clinton did not know, or at least have access to, the actual facts and

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286. Justin McCarthy, *Perceptions of Increased U.S. Crime at Highest Since 1993*, Gallup (Nov. 13, 2020), https://news.gallup.com/poll/323996/perceptions-increased-crime-highest-1993.aspx.
287. Gardner, supra note 19, at 207.
288. *Id.* at 210.
289. *Id.*
290. Leah *supra* note 283.
291. *Id.*
292. *Id.*; Robin Abcarian, *Column: Maga hats and blackface are different forms of expression, but they share a certain unfortunate DNA*, LA Times (Feb. 5, 2019), https://www.latimes.com/local/abcarian/la-me-abcarian-maga-hat-20190205-story.html [https://perma.cc/X88V-J7FB].

statistics on crime and race. Thus his sole purpose must have been to legitimize white paranoia and increase his support through white fear.

3. The Presidency of White Fear

During his 2016 presidential campaign, Donald Trump resurrected the southern strategy in full, using "Make America Great Again" and Nixon's racially coded language of "law and order."[293] Indeed, Trump even trumped the southern strategy, reaching back to a political playbook straight out of the Jim Crow political era. During his presidential run in 2016, Trump labeled African American communities "war zones."[294] He added, "Right now you walk down the street and you get shot" and retweeted false statistics that claimed Black people are at fault for most white Americans that are killed.[295] In reality, the reverse is true.[296] Other whites kill most whites.[297] While it is unclear whether Trump is a white supremacist, he clearly set out to exploit the race-prejudiced fears of race conservatives.

Throughout his presidential campaign, his presidency, and his run for a second term, Trump longed for the times of *Gone with the Wind*, evoking the "old days" of mob rule and domestic terrorism of African Americans in the South.[298] In her bestseller, *White Fragility*, Robin Diangelo opines, "Claiming the past was socially better than the present is . . . .a hallmark of white supremacy."[299] After an aggressive protestor's demonstration at one of his campaign rallies, Trump stated:

> Oh, I love the old days, you know? You know what I hate? There's a guy, totally disruptive, throwing punches, we're not allowed to punch back anymore. I love the old days. You know what they used to do to guys like that when they were in a place like this? They'd be carried out on a stretcher, folks. You know, I love our police, and I

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293. *Id.*
294. Jonathan Easley, *Trump casts inner cities as 'war zones' in pitch to minority voters*, HILL (Aug. 22, 2016) https://thehill.com/blogs/ballot-box/presidential-races/292283-trump-casts-inner-cities-as-war-zones-in-pitch-to [https://perma.cc/N25G-SSHC].
295. Philip Bump, *Trump's Candidacy and presidency have been laced with racist rhetoric*, WASHINGTON POST (Jan. 12, 2018) https://www.washingtonpost.com/news/politics/wp/2018/01/11/trumps-candidacy-and-presidency-have-been-laced-with-racist-rhetoric [https://perma.cc/A9A6-UH6L]; Melissa Chan, *Donald Trump Claims Black and Hispanic People Are 'Living in Hell'*, FORTUNE (Sept. 27, 2016), https://fortune.com/2016/09/26/presidential-debate-donald-trump-living-in-hell-black-people [https://perma.cc/A5KM-A73X].
296. *Id.*
297. *Id.*
298. *Gone with the Wind* was a film produced in 1939 which portrayed slavery as the white man's burden, a happy time for slaves, and attempted to revise the reconstruction-era American south, more akin to Nazi Germany than the American North, into a region of gentility and chivalry; *see* DAVID REYNOLDS, AMERICA, EMPIRE OF LIBERTY: A NEW HISTORY, 241–242 (Penguin UK 2009); *see* UNFIT: THE PSYCHOLOGY OF DONALD TRUMP (Prime Video 2020) for Trump's remarks on the film.
299. DIANGELO, *supra* note 122 at 100.

> really respect our police, and they're not getting enough. They're not. Honestly, I hate to see that. Here's a guy, throwing punches, nasty as hell, screaming at everything else when we're talking, and he's walking out, and we're not allowed—you know, the guards are very gentle with him, he's walking out, like big high fives, smiling, laughing—I'd like to punch him in the face, I'll tell you."[300]

This was not Trump's first time advocating vigilante justice. The Huffington Post reports that "[Trump] encouraged the mob justice that resulted in the wrongful imprisonment of the Central Park 5," referring to five African American teenagers that were falsely accused of raping a white woman in Central Park in the 1980s. Even then, Trump raged, "They should be forced to suffer" and "executed for their crimes,"[301] a response eerily reminiscent of the rabid racists of the Jim Crow South who lost rational thought at the mere rumor of a Black man raping a white woman.[302]

Trump then released an ad not just calling for the reestablishment of the death penalty in New York state, but for it to apply to children as well.[303] Outlandishly, the ad was released before the falsely accused teenagers had even been tried and convicted of the rape.[304] To this day, Trump believes the teenagers, now men, are guilty, despite undisputable DNA evidence and an admission from the real rapist.[305] He considered the settlement New York City reached in 2014 to be "a disgrace" and during his 2016 campaign, Trump continued to insist on the guilt of the Central Park Five [306] The entire affair demonstrates the irrationality of white race paranoia, its consequences for Black people, and the refusal of those infected to acknowledge these impacts.

As Ibram X. Kendi points out in his seminal work, *Stamped from the Beginning*, Trump's "Birther Theory," the ludicrous claim that President Barack Obama was an illegal alien, "proved to be the beginning of

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300. Chris Deaton, *Protester Would Be 'Carried out on a Stretcher' in the Old Days, Trump Reminisces*, WASH. EXAMINER, (Feb. 23, 2016), https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fweekly-standard%2Fprotester-would-be-carried-out-on-a-stretcher-in-the-old-days-trump-reminisces [https://perma.cc/3CMC-TY4H].
301. David A. Graham et. al., *An Oral History of Trump's Bigotry*, ATLANTIC (Jun. 2019) https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/ [https://perma.cc/DNS2-B8CJ].
302. See AMY LOUISE WOOD, LYNCHING AND SPECTACLE 6–7 (2009) (discussing lynchings and mob violence related to allegations of African American man raping white women; "the specter of violated white women lay at the center of pro-lynching rhetoric and instigated the most horrific lynching tortures and spectacles.")
303. *Id.*
304. *Id.*
305. *Id.*
306. *The Central Park Five*, HISTORY (SEPT. 23, 2019), https://www.history.com/topics/1980s/central-park-five (last visited Jul 20, 2021) [https://perma.cc/EG2D-JJM2].

his successful presidential campaign of bigotry."[307] On the Fox News Network, Trump commented, "If you are going to be President of the United States, you have to be born in this country, and there is a doubt as to whether or not he was. He doesn't have a birth certificate."[308] During another interview on Fox News, he suggested Obama's birth announcement was fraudulent.[309] On NBC, Trump claimed he had dispatched investigators to Hawai'i to investigate the President Obama's birth certificate. He had people studying the birth certificate and "you can't believe what they're finding."[310] Of course, at a later date on CNN, either not aware of his earlier statement or despite it, he claimed that the birth certificate was missing and that it doesn't exist.[311] In the wake of all of this, 40 percent of Republicans believed the false and evidence-less claim that President Obama was a Muslim born in Kenya.[312]

Perhaps, Trump's most effective effort at fear-mongering resulted in the storming of the Capitol on January 6, 2021. For months, Trump had trumpeted claims that the Democratic Party stole the presidential election of 2020, dog-whistling that Black Democrats were responsible for the stealing. Donald Trump Jr. called for "total war."[313] Trump's political strategy for contesting the election started before he had even lost. Both he and the Republican Party successfully convinced the Republican base that voter fraud was a major problem. In June 2020, Trump suggested that if he lost the election, voter fraud was to blame.[314] Of course, no evidence existed to support this political maneuver.[315] It seemed like Trump was putting together a contingency plan in the event that he lost the election, which he did.

When the election results were announced, President Trump immediately vowed not to accept them and filed several unsuccessful lawsuits contesting them.[316] He prodded his Attorney General to proclaim the

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307. Ibram X. Kendi, Stamped from the Beginning (2016).
308. Barack obama, A Promised Land, 37:30 (2020).
309. *Id.*
310. *Id.* at 674.
311. *Id.*
312. *Id.* at 674–75.
313. Donald Trump Jr. (@DonaldJTrumpJr), Twitter (2:08 PM Nov. 5, 2020) https://twitter.com/DonaldJTrumpJr/status/1324473707121778688 [https://perma.cc/8ZNP-KZ2A].
314. Maegan Vazquez & Donald Judd, *Trump Predicts 'Most Corrupt Election' in US history While Making False Claims About Mail-In Voting*, CNN: Politics (June 23, 2020, 9:32 PM), https://edition.cnn.com/2020/06/23/politics/donald-trump-mail-voter-fraud-most-corrupt-election/index.html [https://perma.cc/BQ5C-YN36].
315. Jess Bidgood, *Trump's False Election Claims Reach Far Beyond the Capitol Riots, and Into the Georgia Electorate*, Boston Globe (Jan. 6, 2021), https://www.bostonglobe.com/2021/01/06/nation/trumps-false-election-claims-permeated-georgias-republican-electorate [https://perma.cc/LE4W-X5RW].
316. William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/

election suspect and was refused. He wanted to consider the nuclear option, a declaration of martial law to re-hold the election, but his advisors informed him that this was not an option.[317]

Then, Trump deployed the most dangerous contingency, even worse than the nuclear option. The sitting president of the United States incited the more extreme sectors of his base to physically prevent Congress from certifying the election.[318] Some of Trump's supporters openly called for violence against congresspersons and Vice President Mike Pence.[319] A 200-year American tradition of peaceful transfer of power was under siege.[320]

On the day of the confirmation vote, Trump's supporters flooded Washington, DC.[321] They met up with Trump and other conservative figures at the Ellipse within the National Mall, a couple of blocks away from the Capitol.[322] Several Republicans addressed the crowd, including Trump advisor and former New York mayor Rudy Giuliani, wherein Giuliani called for "trial by combat."[323]

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trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/GQ25-BHCF].

317. Zeke Miller et al., *Trump Tries to Leverage Power of Office to Subvert Biden Win*, AP News (Nov. 20, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-local-elections-arizona-7174555c2545f8afb69f0ce2ac0b2156 [https://perma.cc/H5LQ-PQAC].

318. Garret M. Graff, *Behind the Strategic Failure of the Capitol Police*, Politico (Jan. 8, 2021), https://www.politico.com/news/magazine/2021/01/08/capitol-police-failure-456237 [https://perma.cc/J3KW-DDRD].

319. *Id.*

320. Jacob Jarvis, *Trump Branded 'Tinpot Tyrant,' Over 'Thinly Veiled Threat' On Peaceful Transfer of Power*, Newsweek, (9/24/20 at 7:04 AM EDT), https://www.newsweek.com/donald-trump-transfer-power-democrat-criticism-1534016 [https://perma.cc/96XQ-XAG3].

321. Garret M. Graff, *Behind the Strategic Failure of the Capitol Police*, Politico (Jan. 8, 2021), https://www.politico.com/news/magazine/2021/01/08/capitol-police-failure-456237 [https://perma.cc/J3KW-DDRD]; Blair Miller, *At Impeachment Trial, Neguse Says Group of Rioters Was 'Assembled', 'Incited' by Trump*, Denver 7 (Feb. 10, 2021), https://www.thedenverchannel.com/news/politics/at-impeachment-trial-neguse-says-group-of-rioters-was-assembled-incited-by-trump [https://perma.cc/B9TE-E9D7].

322. Andrew Beaujon, *Here's What We Know About the Pro-Trump Rallies that Have Permits*, WASHINGTONIAN: News & Politics (Jan. 5, 2021), https://www.washingtonian.com/2021/01/05/heres-what-we-know-about-the-pro-trump-rallies-that-have-permits [https://perma.cc/73KD-FYW5].

323. Rob Hayes, *Faculty Call for Firing of Chapman University Professor Who Spoke at Pro-Trump Rally*, ABC7: Los Angeles (Jan. 11, 2021), https://abc7.com/chapman-university-professor-john-eastman-pro-trump-rally/9568820 [https://perma.cc/7EC7-6ZR8]; Aaron Blake, '*Let's Have Trial by Combat' How Trump and Allies Egged on the Violent Scenes on Wednesday*, Washington Post (Jan 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/lets-have-trial-by-combat-how-trump-allies-egged-violent-scenes-wednesday [https://perma.cc/25EP-E6FM].

Trump's speech pulsed with revolutionary fervor.[324] He avowed he would "never concede."[325] He encouraged the crowd to "fight like hell."[326] Trump, then, suggested that the crowd had the power to prevent Biden from taken office and encouraged the riled crowd to descend on the Capitol as Congress prepared to certify President-elect Biden's victory.[327] They did as encouraged.[328] The rioters breached the police perimeter, forced entry, and swept through the Capitol Building, forcing elected officials and their staffs to hide and, eventually, surrender the building.[329] Some of the insurgents attacked police officers and reporters. Others searched for congresspeople to intimidate, assault, hold hostage, or, conceivably, even murder.

Trump was "initially pleased" with the actions of his supporters and refused to intervene.[330] But after continuous pressure from influential conservative leaders, he reluctantly asked the rioters to go home, though they were simultaneously excused their crimes:[331]

> This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel.[332]

Later in the day, Trump was unapologetic: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been

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324. Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html [https://perma.cc/E4KK7GBE].
325. *Id.*
326. CNN, *Transcript: Donald Trump, January The Ellipse*, CNN 15 (Jan. 6, 2021), https://s3.documentcloud.org/documents/20475169/trump-speech-jan6.pdf [https://perma.cc/Q7GK-AS43].
327. Aaron Blake, *What Trump Said Before His Supporters Stormed the Capitol, Annotated*, Washington Post (Jan. 11, 2021), https://www.washingtonpost.com/politics/interactive/2021/annotated-trump-speech-jan-6-capitol [https://perma.cc/28WJ-5Y96].
328. Dalton Bennet et al., *41 Minutes of Fear: A Video Timeline from Inside the Capitol Siege*, Washington Post (Jan. 16, 2021), https://www.washingtonpost.com/investigations/2021/01/16/video-timeline-capitol-siege/?arc404=true [https://perma.cc/TW2X-N4T5].
329. CBS News, *Trump Supporters Storm Capital in Washington, D.C.*, (Jan. 6, 2021), https://www.cbsnews.com/pictures/washington-dc-trump-protests/7 [https://perma.cc/T5KV-2VCX].
330. Peter Baker & Maggie Haberman, *Capitol Attack Leads Democrats to Demand That Trump Leave Office*, N.Y. Times (Feb. 21, 2021), https://www.nytimes.com/2021/01/07/us/politics/trump-leave-office-resignation.html [https://perma.cc/C4SE-V2NZ].
331. Brett Samuels, *Trump Tells Rioters to 'Go Home,' While Stoking Election Fury*, Hill (Jan. 6, 2021), https://thehill.com/homenews/administration/532976-trump-tells-rioters-go-home-we-love-you [https://perma.cc/XW6S-WVN5].
332. *Id.*

badly and unfairly treated for so long."[333] From the beginning of Trump's presidency to the end, the art of fear exploitation was at its best.

4. The Race of Police Fear

National Security Expert, Matthew Horace, who spent decades in various state and federal law enforcement institutions, promptly explains in his book, *The Black and the Blue*, "Implicit bias lives in our police departments, just as it exists among our coworkers, families, and associates."[334] He adds, "[I]t affects us all and consumes some of us. . . . Unfortunately, when [implicit biases] are held by someone with a badge and a gun, and the power to take a life, those biases can play out negatively and people who shouldn't be end up dead."[335]

Studies support Horace's view. Global health scholar Aldina Mesic reports:

> [T]here is experimental evidence from computer simulation studies to support the hypothesis that implicit racial biases influence police officers' decisions whether to shoot unarmed suspects. There is also evidence from investigations of actual police incidents that police are more likely to use lethal force with black suspects than white suspects. Our findings suggest that the degree of racial bias among police officers in a state may be related to underlying levels of structural racism in that state.[336]

Professor Lee points out:

> Racial stereotypes linking certain minorities with criminal activity often cause ordinary people to fear those minorities. The same racial stereotypes linking Blacks and other minorities with criminal activity that influence most people are likely to influence police officers as well, especially those who work in high-crime neighborhoods and have repeated contact with individuals involved in criminal activity.[337]

Finally, Resmaa Menakem, in his New York Times Bestseller, *My Grandmother's Hands*, notes:

> The police body senses that all bodies need its protection. However, it sees Black bodies as often dangerous disruptive, as well as superhumanly powerful and impervious to pain. It feels charged with

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333. Alison Durkee, *Trump Justifies Supporters Storming Capitol: "These are the Things and Events that Happen,"* FORBES (Jan. 6, 2021), https://www.forbes.com/sites/alisondurkee/2021/01/06/trump-says-he-loves-supporters-storming-capitol-but-tells-them-to-leave/?sh=1386444d3cd7 [https://perma.cc/6H95-GTKS]

334. MATTHEW HORACE, THE BLACK AND BLUE 1 (2019).

335. *Id.* at 2.

336. Franklin A. Mesic et al. *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, J. NAT'L MED. ASS'N 106, 109 (APR. 2018).

337. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 655 (2018).

> controlling and subduing Black bodies by any means necessary—including extreme.[338]

James Baldwin wrote in 1972, "The white cop in the ghetto is as ignorant as he is frightened, and his entire concept of police work is to cow the natives."[339] Several police shooting cases over the past few years illustrate this point. In 2015, police officer Darren Wilson fired twelve shots from a .40 caliber pistol at unarmed teenager Michael Brown in Ferguson, Missouri. Wilson testified before the grand jury, "as if he was describing an altercation with a Monster, not an eighteen-year-old."[340]

Wilson, roughly the same height as Brown, testified that Brown hit him with his fists two times and that he feared "the third one could be fatal."[341] He subsequently shot Brown two times and then alleged that Brown ran towards him through a hail of gun fire.[342] He shot Brown "at least once" causing Brown to merely "flinch" without breaking stride.[343] Wilson then claimed that he shot at Brown several more times, hitting him "at least once" causing Brown to "flinch again."[344]

If this was not already fantastic enough, his next description was straight out of an Incredible Hulk movie script.[345] Wilson testified that after being shot at least twice, Brown "looked like he was almost bulking up to run through the shots like it was making him mad that I'm shooting him."[346] Wilson's testimony made it seemed like he was facing a raging bull: "He made like a grunting, like aggravated sound . . . And the face that he was looking straight through me like I wasn't even there, I wasn't even anything in his way . . . . Just coming straight at me like he was going to run through me.[347] And when he gets about 8 to 10 feet away, I look down, I remember looking at my sites and firing, all I see is his head, and that's what I shot."[348] At some point, Wilson also described Brown as a "demon."[349]

However, the facts from some witnesses tell a different story and suggest that paranoia, or something worse, distorted Wilson's perception. Dorian Johnson, who was walking with Brown at the time, recalls Wilson pulling up next to them and commanding, "Get the fuck on the

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338. Resmaa Menakem, My Grandmother's Hands loc. 36 (2017).
339. James Baldwin, No Name in the Streets (1972) in James Baldwin, The Price of the Ticket: Collected Nonfiction 1948–1985, 540 (Beacon Press 1985).
340. Taylor, supra *note 256 at* 11.
341. Rachel Clarke and Mariano Castillo, *Michael Brown Shooting: What Darren Wilson told the Ferguson grand jury*, CNN (Nov. 26, 2014) https://www.cnn.com/2014/11/25/justice/ferguson-grand-jury-documents/index.html [https://perma.cc/HC9B-PPKR].
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. Taylor, *supra* note 256.

sidewalk."[350] Johnson responded, "We're just having a conversation. We'll be out the street shortly."[351] Then, Wilson turned around and pulled in front of Brown and Johnson, retorting, "What the fuck did you say?"[352] Wilson then opened his car door quickly, hitting Brown and Johnson with the door.[353] The door bounced off them and back on to Wilson.[354] Wilson then grabbed Brown by the throat and pulled him towards the window.[355] Witness Tiffany Mitchell saw "[Brown] tussling through the window. . . the kid was pulling off and the cop was like pulling in."[356] As Brown was trying to escape the choking, Wilson let go of Brown, reached for his gun, and trained it on Johnson and Brown.[357] According to Johnson:

> [I] was still standing in the window shocked that it's going this far . . . it literally was second after second going up. You could see the anger pouring out of his pores! And I was just like 'why is he this mad?' we didn't, we didn't literally do anything. I had nothing around my waistline or anything that made it look like I had something to defend ourself. Mike Brown had nothing. He had on flip flops for God's sake. He had nothing that looked like a weapon. So, for officer Darren Wilson to feel that threatened to where he pulled out his firearm . . . I was shocked even more like what was he finna do? And in the midst of him saying, 'Stop! Stop' 'fore I fuckin'. . . but before he can say it a second time. . . BOOM! The gun just went off! I was so afraid to look at myself. . . I'm like please God don't let me be shot. . . But when I looked over at Mike, he was the one bleeding.[358]

Johnson and Mitchell are describing the opposite of what Wilson told the Grand Jury. Johnson asserts that he and Brown were clearly unarmed and confessed confusion about what made Wilson "feel that threatened to where he pulled out a gun."[359] Several witnesses agree on what happened next. Johnson emphatically stated, "I saw with my two eyes Darren Wilson shot his gun a second time with Michael Brown back facing him and me."[360] Witness Piaget Crenshaw said, "[Brown] was unarmed, he ran for his life, they shot him, and he fell."[361] Michael Brady recalls, "The officer gets out of the car, just emerges and immediately starts shooting."[362]

The witnesses and Wilson's description of Brown tell a story of crazed paranoia, not of self-defense. The real culprit that "threatened

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350. Stranger Fruit (Boom 2017).
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.* at 11:40.
356. *Id.* at 14:12.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 16:18.
361. *Id.*
362. *Id.* at 14:40.

[Wilson] to where he pulled out a gun" and to shoot Michael Brown several times was the monstrosity of Blackness. That is, Brown was armed, but only with his Black skin. Ultimately, Wilson murdered Brown not because he was an aggressor, but because of the white paranoia that Black skin provokes.

In 2016, Officer Jeronimo Yanez stopped Philando Castile in a suburb of Saint Paul, Minnesota.[363] Philando's girlfriend, Diamond Reynolds, was in the passenger seat and her four-year-old daughter was in the back seat.[364] Yanez requested Castile's documents. Castile, calm and polite, notified the officer that he had a gun in the car for which he had a permit to carry.[365] Yanez responded, "Okay, don't reach for it, then. . . don't pull it out."[366] Castile responded, "I'm not pulling it out." Castile's girlfriend also told Yanez, "He's not pulling it out."[367] Yanez, in his paranoia, apparently began to see things that were not there. He raised his voice and repeated, "Don't pull it out!" before quickly pulling his weapon. Reynolds screamed, "No!" But before she could finish her sentence, Yanez shot Castillo five times in rapid succession.[368] Castile moaned, "I wasn't reaching for it." Reynolds yelled, "He wasn't reaching for it." Yanez, apparently still deluded, again hollered, "Don't pull it out!" Reynolds again responded, "He wasn't." Yanez, recovering his senses, finally said, "Don't move! Fuck!" The state charged Yanez with Castile's death. At his trial the officer testified, "I thought I was going to die."[369] A jury found Yanez not guilty.

Would Castile have been shot if he were white? The circumstantial evidence suggests he would not. Castile volunteered his possession of a legal firearm. He made no false movements. But Yanez was afraid, too afraid, which caused him to grossly overreact. Why was he so scared? It could not simply have been a licensed gun owner exercising his constitutional rights. The only thing that makes sense is that Yanez's fear turned to paranoia not because of a gun threat but due to the officer's perception of an inherent danger of a Black man with a gun.

Another example of irrational police fear occurred in Tulsa, Oklahoma in 2016. Terrence Crutcher was walking down the road when Officer Betty Shelby got out of her patrol car and asked him whether a

363. Camila Domonoske, *Minnesota Gov. Calls Traffic Stop Shooting 'Absolutely Appalling At All Levels'* NPR, https://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video (last visited Jul 22, 2021) [https://perma.cc/QBS3-YPW7].

364. *Id.*

365. Menakem, *supra* note 338, at 118.

366. Matt DeLong et al., *Breaking Down the Dashcam Video: The Philando Castile Shooting Timeline*, Star Tribune, https://web.archive.org/web/20201204183122/https://www.startribune.com/castile-shooting-timeline/429678313 (last visited Jul 22, 2021) [https://perma.cc/4LBC-5LYF].

367. *Id.*

368. *Id.*

369. Menakem, *supra* note 338, at 118.

nearby SUV was his.[370] Crutcher put his hands in his pocket and Shelby ordered him to remove them.[371] Crutcher complied. He put his hands up in the air then walked away with his hands up.[372] Shelby drew her weapon and commanded Crutcher to stop and get on his knees, although none of the other officers present drew their weapons.[373] Crutcher did not comply. He kept walking with his hands in the air.[374] Shelby then shot Crutcher multiple times.[375]

Crutcher was unarmed, had not threatened Shelby or anyone else, and had not been wanted for any crime.[376] There was nothing suspicious about Crutcher.[377] His only crime seemed to be disobedience.[378] Horace offers a better explanation: "Crutcher, like so many black men, was dead because too many of us view an African American man as the real-life boogeyman."[379] At trial, Shelby testified, "I've never been so scared. . . I thought he was going to kill me."[380] However, as Horace notes, "If anyone should have been in fear for his life, it was Crutcher. Shelby had her gun trained on him. . . He was surrounded by armed police."[381] Nevertheless, the jury found the officer not guilty.[382]

Shelby's irrational fear made her abandon her training and skip steps in the use-of-force continuum. Horace, who was "an ATF agent and an agent training instructor at the Federal Law Enforcement Training Center in Brunswick, Georgia, explains:

> There are five steps in the continuum. The officer's first step is to establish *command presence*. If officers present themselves well, no force is required in most cases. . . The next step is *verbalization*, which refers to the officer establishing verbal contact with the individual. The officer should give very clear, concise, nonthreatening instructions. . . As you talk with people, your tone should be polite but authoritative. . . Sometimes you must shorten commands or raise your voice. Unfortunately, some officers arrive on the scene and immediately start shouting commands, addressing people disrespectfully, and treating victims like suspects. African Americans and Latinos know this response all too well. . . The next step up is *empty hand control*. Now, you are using bodily contact to control the subject in a way that protects the individual and you. . . if there is resistance, we start moving to the next level. . . *intermediate force* . . . Officers may have to use punches and kicks to restrain an

370. *Id.* at 121; Horace, *supra* note 334, at 7.
371. Horace, *supra* note 334, at 7.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. Horace, *supra* note 334, at 9.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. Menakem, *supra* note 338 at 22.

> individual. They can use batons or chemical sprays or tasers to get the person under control . . . you may need to swarm an individual and take the person down to the ground . . . None of this stuff looks pretty. . . In Crutcher's case, Shelby skipped the use of intermediate force and went from *verbalization* immediately to the last step on the continuum—the *lethal force* that took Crutcher's life.[383]

If Shelby did not follow proper procedure and irrationally perceived a threat to her life, how could she have acted reasonably? Professor Philip M. Stinson suggests one explanation: "As soon as the officer gets on the witness stand and says, 'I was fearing for my life,' many juries are not going to convict at that point . . . We've seen it over and over again."[384] The facts here suggest just that. Stinson's research found that from 2005 through 2017, state police shot and killed an average of 900 to 1,000 people per year, but decisionmakers convicted only twenty-nine officers for either murder or manslaughter.[385] Juries convicted fifteen of them, and fourteen others pled guilty. But more than twice that, thirty-three officers, were not convicted by a jury, plea, or otherwise after being arrested and charged with murder or manslaughter.

These numbers represent a police conviction rate of about 46 percent in unarmed shooting cases.[386] In 2015, the federal conviction rate was around 98 percent measured by pleas and trial convictions.[387] State juries convict around 80 percent of defendants accused of serious crimes.[388] All told, juries are much less likely to convict cops than civilians. This fact is true even without controlling for race. As legal scholar Corinthia A. Carter notes, the bottom line is, "Officers are given special treatment whereas civilians would be charged and sentenced to the full extent of the law."[389]

And juries are even more likely to find cops innocent when African Americans are the victims. That is, jury verdicts reflect the biases and fears of the jurors themselves, meaning that many verdicts are determined, in

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383. Horace, *supra* note 334, at 10–11.

384. Mitch Smith et al., *Grim echoes for Families: An Officer Shoots and a Jury Acquits*, N.Y. Times (Jun. 17, 2017), https://www.nytimes.com/2017/06/17/us/police-shootings-philando-castile.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news [https://perma.cc/QZY8-TE7J].

385. *Id.*

386. *Id.*

387. *Id.*

388. Jason Krause, *Judge v. Jury*, ABA Journal, (June 5, 2007), https://www.abajournal.com/magazine/article/judge_v_judge/#:~:text=Though%20the%20percentage%20of%20convictions%20varied%20from%20crime,still%20offered%20lower%20conviction%20rates%20across%20the%20board [https://perma.cc/DQ5G-62HG].

389. Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #hashtag Activism*, 20 CUNY L. Rev. 521, 537–38 (2017); *see, e.g.*, *White Ex-Police Chief Makes Plea Deal in Shooting of Black Man*, AP NEWS (Sept. 1, 2015), http://www.cbsnews.com/news/richard-combs-white-police-chief-south-carolina-plea-deal-shooting-narmed-Blackman [https://perma.cc/DQ5G-62HG].

part, by juror subjectivity. Horace remarks, "As jury after judge after jury has refused to find officers guilty of anything, including misdemeanor charges, in deaths of unarmed black men and boys, America is saying to us that it is officially reasonable to be afraid of a person just because he is black. And because you fear him, it is okay to kill him."[390]

Juror subjectivity is less concerning on its own because all people bring their biases and fears into the courtroom. But white Americans dominate the general population and are often overrepresented in the jury system, meaning that Black victims in civil cases and Black defendants in criminal cases are often exposed to juries permeated with white bias.

Lee notes, "Not only are individuals more likely to perceive mildly aggressive behavior as more threatening when performed by a Black person than when performed by a White person, they also are more likely to compute more hostility in African American faces than in white faces."[391] Furthermore, negative racial stereotypes about African Americans are "more likely to lead to behavior errors" when individuals are "forced to make a quick decision."[392] Studies, for example, have confirmed the presence of implicit bias in the most dangerous contexts: when those that are biased are armed with guns.[393] Shooter bias describes a cognitive condition where "individuals are quicker to identify weapons and slower to recognize harmless objects, like tools, in the hands of a Black person than in the hands of white persons."[394]

Lee describes how shooter bias may be transferred to jurors in cases where the state attempts to prosecute police officers like Wilson, Yanez, and Shelby for criminal homicide:

> 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 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.[395]

390. Horace, *supra* note 334 at 17.
391. Lee, *supra* note 221 at 1581.
392. *Id.* at 1583.
393. *Id.*
394. *Id.* at 1582.
395. *Id.* at 1584-85.

In other words, jurors "[a]re often unaware of the extent to which implicit racial bias can influence perceptions of fear and reasonableness determination in self defense cases . . . in the run-of-the-mill case, when an individual claims he shot and killed a Black person in self defense, legal decision makers are likely to find reasonable the individual's claim that he felt his life was being threatened."[396] Several studies suggest the same. One study found that jurors are biased against darker-skinned litigants and that this may influence jurors' "interpretation of evidence, in turn, predict[ing] subsequent guilty verdicts."[397]

Statistics about justifiable homicide reveal irrational police fear in its starkest form. About 2 percent of all homicides are deemed justifiable by law enforcement officials.[398] Though this is the average, this percentages fluctuate wildly along racial lines.[399] When Latinx individuals kill African Americans, law enforcement finds the killings justifiable around 5 percent of the time.[400] When African Americans kill other African Americans, law enforcement deems the homicides justifiable 2 percent of the time. However, when Blacks kill whites, law enforcement only finds the homicides justifiable 1 percent of the time.[401] Most tellingly, when whites kill Blacks, law enforcement finds the killings justifiable a whopping 16 percent of the time.[402] This figure suggests a presumption of threat based on Blackness alone.

White America does not hold a monopoly on irrational race fear. Black men's fear of police officers is disproportionate to the statistical reality of police shootings as well. Compared to the number of encounters Black males have with the police, only a small percentage result in death.[403] On the other hand, Black men are more likely to have repeated encounters with the police, increasing the chances of police violence. More importantly, African American men are over twice as likely to experience police violence than White men are. And as a whole, irrational Black fear of police violence generally poses no threat, while irrational police fear of Blackness can be deadly. So, Black victims bear the harm and the blame.

In the normal criminal context, homicides that result from legally unreasonable conduct are per se criminal. This means that criminally negligent defendants, irrespective of social placement, should be found guilty of involuntary manslaughter, criminally negligent homicide, or imperfect self-defense where a defendant acts objectively unreasonably

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396. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116, 116–117 at fn. 6 (2015).
397. *Id.* at 117.
398. HORACE, *supra* note 334, at 17–18 .
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. Police killings account for less than one-tenth of a percentage point of total deaths. *See* FRANKLIN E. ZIMRING, WHEN POLICE KILL 25 (2017).

despite being subjectively genuine in his fear. All three are felonies. However, when white police officers kill unarmed Blacks, subjective fear (genuine fear) becomes per se reasonable.

The result should be the opposite. Police officers should be more careful, more patient, less frazzled, and less willing to shoot civilians because of their training, power over life and death, experience with volatile situations, and duty to protect and serve. To make this contradictory double standard clearer:

> Variations of 'I feared for my life' get repeated over and over by law enforcement professionals who fired their weapons when they shouldn't have . . . Will that phrase become the standard, default defense—the magic words—of almost *any* law enforcement professional who pumps bullets into a person of color? . . . I f so then should Black men routinely be frightened of being shot by police, especially when they are pulled over for little or no reason? What if one of those Black drivers, scared to death, were to shoot the police officer who pulled him over? Does 'I feared for my life' constitute a valid defense for that dark-skinned man?[404]

V. Social Otherness/The Social Justice Inversion

Fear is only one side of the equation. It explains to a large degree the irrationality that causes too many officers to act prematurely. However, that irrational fear alone might not have caused those officers to pull the trigger had they valued Black life the same as they do white life. They may have been more inclined to stick to their training, following the force-continuum or, at least, seizing a moment to second guess themselves.

The more white America undervalues a victim of deadly force, the less likely courts and juries are to find that the force used against the target was unreasonable. That is, an inverse relationship exists between the social status of the target and the degree of unreasonableness the law is willing to tolerate. The lower the victim's social status, the higher the court system's tolerance; the darker the victim is racially, the more reasonable irrational fear appears to be to the decisionmaker.

A. *History of Racism and Degradation*

Race and color unequivocally influence an individual's social worth.[405] This race/worth hierarchy appears in its rawest form in the adoption industry. Dr. Brian H. Williams notes, "Children of color are devalued at all stages of life."[406] The cost of adopting a white child is ap-

404. Menaken, *supra* note 338.
405. *See* Brian H. Williams, *Why Adopting Black Babies Costs Less than Adopting White Babies*, Dallas Morning News (Oct. 27, 2018), https://www.dallasnews.com/opinion/commentary/2018/10/27/why-adopting-black-babies-costs-less-than-adopting-white-babies/ [https://perma.cc/V5HG-7BCH].
406. *Id.*

proximately $35,000 plus legal expenses.[407] Biracial children's adoption costs range between $24,000 and $26,000.[408] Adopters see Black babies as worth only $18,000.[409] Some agencies even run specials like buy one Black baby and get another half off.[410] Families adopt Asian and white children at much higher rates than African American children.[411] The adoption rates reflect this hierarchy.[412]

Today's social worth index reflects centuries-old imaginary categorizations of race. The concept of race was invented by European French Zoologist Carl Linnaeus and perfected by American pseudo-scientist Samuel Morton in a successful effort to justify slavery. Linneaus was the first to suggest a hierarchy of peoples and "classified varieties of humans in relationship to their supposed education and climatic situation."[413]

The unwitting father of racism, Friedrich Blumenbach (1750–1840), was Linnaeus's disciple. Blumenbach was one of the first to label different geographical groups as races, although he believed, like Linnaeus, that all humans were members of the same species.[414] Nonetheless, "Blumenbach's hierarchical model of human races was a major factor in the creation of the modern racists' paradigm."[415] American paleontologist Stephen Jay Gould writes:

> The shift from a geographic to a hierarchical ordering of human diversity marks a fateful transition in the history of Western science—for what, short of railroads and nuclear bombs, had more practical impact, in this case almost entirely negative, upon our collective lives and nationalities. Ironically, J. F. Blumenbach is the focus of this shift—for his five-race scheme became canonical, and he changed the geometry of human order from Linnaean Cartography to linear ranking by putative worth.[416]

Blumenbach derived his racial hierarchy from naturalist Georges Cuvier's (1769–1832) model.[417] Curvier created three races, maintaining that the Mongolian race remained stationary in civilization and that the Black race never progressed beyond utter barbarism.[418] He believed that

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407. NPR Staff, *Six Words: 'Black Babies Cost Less To Adopt'*, NPR (Jun. 27, 2013), https://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt [https://perma.cc/8LJ5-QC6W].
408. *Id.*
409. *Id.*
410. Williams, *supra* note 405.
411. *Id.*
412. *See* NPR Staff, *supra* note 407.
413. Robert W. Sussman, The Myth of Race: The Troubling Persistence of an Unscientific Idea 16 (2014).
414. *Id.* at 18-19.
415. *Id.* at 20.
416. *Id.* at 20.
417. *See Id.*
418. *Id.*

humans were created in a fixed state by God and blamed God for the hierarchy he created.[419]

Blumenbach imagined five categories in his race hierarchy, which "with some slight variations . . . [is] still with us today:" (1) White—Caucasians; (2) Yellow—East Asians and some Central Asians; (3) Brown—South East Asians and Pacific Islanders; (4) Black-sub-Saharan Africans; and (5) Red—American Indians.[420] Blumenbach seated Caucasians, the name he coined to describe people of European descent, at the top of the hierarchy.[421] His reasons for doing so were whimsical and speculative. One rationalization was that whites were "the most beautiful" and the "closest to God's image."[422] Another reason was Blumenbach's fanciful notion that the first humans originated in the Caucus Mountains, and other races degenerated from them as they spread further and further from the Caucasian nucleus.[423] Of course, the notion that the Caucus Mountains are the birthplace of humanity has been debunked by scientific consensus based on evidence that placed the original homo sapiens in Africa. Using this scientific evidence and applying Blumenbach's reasoning, Africans would be the superior race, followed by Asians, with Caucasians ranking somewhere near the bottom.

While Blumenbach's hypothesis established the ranking of races, modern racism (racism based on claims of biological supremacy) was developed to justify slavery. Samuel Morton (1799–1851), an American physician and paleontologist, and his disciples, the Mortonites, believed, at least ostensibly, that African Americans were biologically inferior in intellect and physical ability to whites; that they were a separate species somewhere between apes and whites.[424] To justify African slavery after Native American slavery became unsustainable, Morton moved African Americans to the bottom of Blumenbach's race tree and promoted Native Americans in the hierarchy.[425]

A watershed moment of American white supremacy was the publication of the Mortonites' 1854 book, *Types of Mankind*. Sussman writes, "[T]he main purpose of the book was to show that findings of science justified the institution of slavery."[426] The book shifted the basis of Black inferiority from Blumenbach's silly degeneration hypothesis to Morton's extravagantly ignorant hypothesis about skull sizes.[427] The Mortonites claimed that these purported differences in skull sizes proved that the races represented separate species originating from disparate sources.[428]

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419. *Id.*
420. *Id.* at 19.
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.* at 30–33.
425. *See id.* at 13, 31.
426. *Id.* at 34.
427. *Id.*
428. *Id.* at 31, 34.

However, Diangelo explains the true impetus behind the Mortonites' claims. She writes, "Black people are the ultimate racial 'other,' because social classifications based on race derived from 'the need to justify the enslavement of Africans.'"[429] She explains, "Creating a separate and inferior black race simultaneously created the 'superior' white race: one concept could not exist without the other."[430] Thus, the idea of Blackness became "essential to the creation of white identity," an identity defined exclusively by its opposite, making Blackness the very definition of "other."[431]

As a result, white society began to use stereotypes about Blacks as a depository for its fears, hostilities, and negative views about its humanity.[432] As the "badges and indicia" of slavery transformed from chattel slavery; to post-slavery domestic terrorism; to convict leasing; to sharecropping; to Jim Crow lynching; to urban police violence; and now to mass incarceration, white America seemed to project more and more of what it loathed about its dark history onto its victims, its perceived opposite, which its forebearers had deemed to be Blackness.[433]

One of the original white projections involves work ethic. For example, "White masters of enslaved Africans consistently depicted Africans as lazy . . . even as they toiled at backbreaking work from sunup to sundown."[434] Of course, these white masters by law purchased Black bodies to do work they did not want to or could not do themselves. Not to mention, they forced the enslaved to work, so to claim an enslaved person was lazy, even if they were, says something about the roots of lapses in white critical thinking about race.

The myth of the rapacious Black rapist is also ironic. The rape of Black women during and after slavery was so ubiquitous that almost no descendant of slavery living today has purely African DNA.[435] Today, white projection continues. The American mainstream now "depict[s] blacks as dangerous, a portrayal that perverts the true direction of violence between white and blacks since the founding of this country."[436]

In the end, modern science has established that humankind originates from a single African ancestor.[437] Science has also recognized that there is no such thing as race from a phenotypical standpoint.[438] Although race is not real as a phenotypic expression, too many Americans have either not gotten the memo or refused to believe its contents. Sussman captures the incredulity of the scientific community:

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429. DIANGELO, *supra* note 122, at 91.
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *See* MERRIL D. SMITH, ENCYCLOPEDIA OF RAPE 234–35 (2004).
436. DIANGELO, *supra* note 122, at 91.
437. Chris Stringer, *Out of Ethiopia*, 423 NATURE 692 (2003).
438. SUSSMAN, *supra* note 285, at 1.

> How can this be when there is so much scientific evidence against it? Most educated people would accept the facts that the earth is not flat and that it revolves around the sun. However, it is much more difficult for them to accept modern science concerning human variation. Why is this so? It seems that the belief in human races, carrying along with the prejudice and hatred of 'racism,' is so embedded in our culture and has been an integral part of our worldview for so long that many of us assume that it just must be true.[439]

The degradation of Black life began as a rationalization of slavery. I t then transformed into white American projection, which rationalized Black degradation post-slavery. At one point in American history, this effort even became nigh genocidal.

B. *American Eugenics*

Eugenics, a junk science form of racism, also elevated the belief in inherent Black criminality, particularly in the United States' urban cities that boasted elite groups of academics, social and natural scientists, business leaders, and government officials. Eugenics is based on genetic determinism: the belief that genes alone determine character and capacity, with educational and environmental factors playing little to no role.[440] It also encompasses government policies like selective breeding, forced sterilization, and anti-miscegenation laws.[441]

According to the National Center for Fair and Open Testing, eugenics "[h]istorically has claimed that Europeans, particularly those from northwestern Europe, are genetically superior intellectually, physically and morally."[442] In the United States, the American eugenics movement was based on the idea that race, a social construct, was hereditary and that the Black race and, to a lesser extent, southern and eastern Europeans, were less intelligent, and thereby more prone to poverty and crime.[443] Initially, the early movement even considered Italians and Greeks inferior despite the fact that Ancient Greece and Rome provided the entire model for western civilization.[444] Indeed, aside from the Mediterranean states, Europe did not develop comparable civilizations until well into the Common Era, hundreds of years after the Middle East, Africa, India,

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439. *Id.* at 2.

440. Garland E. Allen, *The Roots of Biological Determinism: Review of The Mismeasure of Man by Stephen Jay Gould*, 17 J. Hist. Biology 141, 142–43 (1984); Robert May, *Sociobiology: A New Synthesis and an Old Quarrel*, 260 Nature 390, 391 (1976).

441. *See generally* Russell McGregor, *Breed Out the Colour' or the Importance of Being White*, 33 Austl. Hist. Stud. 286 (2008).

442. *Racism, Eugenics and Testing—Again*, FairTest, https://www.fairtest.org/racism-eugenics-and-testing-again [https://perma.cc/A37Y-EMJY].

443. Edwin Black, War Against the Weak, 66–68 (2012).

444. *Human History Timeline: Combined Timeline*, WordPress https://humanhistorytimeline.com [https://perma.cc/JGQ4-FFG7] (last visited Mar. 29, 2021).

China, South America, and Central America had already established great civilizations.[445]

Yet, Frances Galton, the father of Eugenics, stated, "I do not join in the belief that the African is our equal in brain or in heart; I do not think that the average negro cares for his liberty as much as an Englishman, or as a self-born Russian; and I believe that if we can in any fair way, possess ourselves of his services, we have an equal right to utilize them to our advantages."[446]

Eugenicists, heavily influenced by Charles Darwin's *Origin of Species* and his theory of natural selection, sought to create a master race and eliminate social and economic ills through forced sterilization and by discouraging the reproduction of groups with less desirable traits. Indeed, the American eugenics movement provided Adolf Hitler with his model of a master race and inspired his genocidal efforts to exterminate Jewish people in Germany.[447] "I have studied with great interest the laws of several American states concerning prevention of reproduction," Hitler wrote.[448] Germany had no sterilization laws until 1933, while American states began to pass sterilization laws in 1927.[449] Furthermore, Germany modeled its sterilization law after an American statute. Educator and sociologist Harry Laughlin, "an enthusiastic supporter of the Third Reich," [450] created the model.[451] Laughlin called for the sterilization of millions of people he categorized as defective.[452]

The American eugenics movement was not a fringe one. In fact, "[a]t the turn of the 20th-century, eugenics was widely accepted in the United States as a solid science among the country's top psychologists, scientists, politicians, and social thinkers."[453] In 1928, America's top universities featured almostfour hundred eugenics courses.[454] By 1930, thirty states had adopted forced sterilization laws, many inspired by Laughlin's model.[455] Why were eugenics and forced sterilization so popular?

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445. *Id.*
446. ABS Contributor, *10 Disturbing Facts African-Americans Should Know About Eugenics*, ATLANTA BLACK STAR (Feb. 25, 2014), https://atlantablackstar.com/2014/02/25/10-disturbing-facts-african-americans-should-know-about-eugenics [https://perma.cc/3GWF-HESP].
447. A DANGEROUS IDEA: EUGENICS, GENETICS, AND THE AMERICAN DREAM (Passion River Films 2018) at 1:01:34–1:01:41.
448. BLACK, *supra* note 443 at 83.
449. A DANGEROUS IDEA, *supra* note 447 at 1:07:24-1:07:35; 1:08:15-1:08:21.
450. *Id.* at 1:08:47-1:08:52.
451. EUGENICS RECORD OFFICE (Oct. 1, 1910) *reprinted in* Truman St. U., *Eugenic Archives: Eugenics Record Office, Board of Scientific Directors and Functions*, THE HARRY H. LAUGHLIN PAPERS, http://www.eugenicsarchive.org/html/eugenics/static/images/971.html [https://perma.cc/86PS-V3CT].
452. *Id.*
453. A DANGEROUS IDEA, *supra* note 447, at 1:01:43-1:01:56.
454. Susan Ciancio, *Eugenic Sterilization Laws in the U.S.*, HUMAN LIFE INT'L (Dec. 3, 2020), https://www.hli.org/resources/eugenic-sterilization [https://perma.cc/C2WN-7469].
455. *Id.*

In his book *War Against the Weak*, eugenics expert Edwin Black argued that eugenics allowed "influential and eloquent thinkers . . . to slap numbers and a few primitive formulas on their class and race hatred, and, in so doing create a passion that transcended simple bigotry."[456] According to William Tucker, professor of psychology at Rutgers University, "One reason that the eugenics movement was so influential at the time was because it provided a scientific solution or a supposedly scientific solution to a political problem."[457] Van Jones explains that "in 1900, there was no middle class in America. In 1900, there was no weekend in America. There's not one single paid holiday. We had this extreme laissez-faire, Social Darwinist reality, and the vast majority of Americans were fighting to change it."[458]

The people correctly identified the source of their poverty as unregulated, laissez-faire capitalism, and "took to the streets, held massive general strikes, demanded better living and working conditions," to change it.[459] If the people were correct then, as biology professor Garland Allen explains, "The true way to fix that is to pay higher wages and to give people a better environment in which to live."[460] This solution was untenable to the profitmongering powerholders at the time. The other option was manipulating biology, "and it was clear which explanation would be preferable to the captains of capitalist industry in the early 20th Century."[461] The robber barons, including such industrialists as John D. Rockefeller, Andrew Carnegie, and other members of the super rich began donating massive amounts of money to research initiatives aimed at proving that social ills like poverty were hereditary and, thus not, a result of capital's ruthless exploitation of labor.[462] These titans of industry, along with many other Americans, believed that:

> Society should not coddle in any way the poor. Don't help them. Don't help them through charity. Don't help them through legislation. You see, if you help them, according to the Social Darwinists, you would only enable them to reproduce more of them. Society would be better if we instituted survival of the fittest. We would get stronger, just as species become stronger when their weakest members die off and their strongest members live on to reproduce.[463]

However, genocide by attrition would take too long, "so many eugenicists considered a quicker solution, one that would eventually be used by the Nazis, euthanasia." Some called for outright execution

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456. Black, *supra* note 443.
457. A Dangerous Idea, *supra* note 447, at 1:02:09-1:02:21.
458. *Id.* at 1:03:02-1:01:20.
459. *Id.* at 1:03:22-1:03:29.
460. *Id.* at 1:03:34-1:03:43.
461. *Id* at 1:03:43-1:03:51.
462. *Id.* at 1:03:51-1:04:12.
463. *Id.* at 1:05:44-1:06:13.

and the lethal neglect of newborns considered defective.[464] One solution which all, including the Supreme Court, could agree on was forced sterilization.[465]

In 1927, in *Buck v. Bell*, the Supreme Court upheld a Virginia forced sterilization statute based on Laughlin's model, holding, eight to one, that the law was constitutional.[466] The holding featured one of the most infamous statements of a sitting Supreme Court justice. In his opinion upholding the law, Chief Justice Wendell Holmes stated, "Three generations of imbeciles are enough."[467]

Another impetus for the American eugenics movement was plain old racism. According to political writer Seema Metha, "Eugenics arose in the U.S. as the gains Black people had made during the Reconstruction era came under attack by white people aiming to maintain power."[468] For eugenicists, criminality and violence are engrained in the Black DNA.

In *Skinner* v. *Oklahoma* (1942), the Supreme Court overturned an Oklahoma statute rooted in eugenics that authorized the forced sterilization of criminals, but only for a particular brand of criminal.[469] Under the Oklahoma statute, criminals who committed crimes typically associated with Blacks and poor whites, like theft and robbery, were liable, while criminals who committed crimes associated with the business and political classes, like embezzlement, were not.[470] The *Skinner* court ruled the statute to be unconstitutional because it was unevenly applied in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Justice William O. Douglas captured the apparent dangers of forced sterilization laws in his majority opinion: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear."[471] The opinion, however, did not prohibit forced sterilizations generally, which was used to control people of color and other "undesirable" populations.[472] North Carolina's eugenics program, for instance, remained primarily focused on breeding out Black people.[473]

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464. *Id.* at 1:06:19-1:06:37.
465. *Id.* at 1:06:54-1:07:35.
466. *Id.* at 1:07:24–1:07:35.
467. Buck v. Bell, 274 U.S. 200, 207 (1927).
468. Seema Mehta, *Trump's Touting of 'Racehorse Theory' Tied to Eugenics and Nazis Alarms Jewish Leaders*, L.A. Times (Oct. 5, 2020), https://www.latimes.com/politics/story/2020-10-05/trump-debate-white-supremacy-racehorse-theory [https://perma.cc/7MMX-HRKU].
469. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
470. *Id.* at 541–542.
471. *Id.*
472. Black, *supra* note 443, at 99.
473. Hayley Fowler, *'Act of genocide.' Eugenics Program Tried to 'Breed Out' Black People in NC, Report Says*, News & Observer (Aug. 18, 2020), https://www.newsobserver.com/news/state/north-carolina/article244411987.html.

In the end, "Eugenics was nothing less than an alliance between biological racism and mighty American power, position and wealth against the most vulnerable, the most marginal and the least empowered in the nation."[474] The American eugenics movement established the "supremacy of the white race in the United States of America, without racial prejudice or hatred,"[475] and thus allowed well-meaning purveyors to inform urban law and policy that continued to bottle the African American community in without consequence. One of the great American rationalizations allowed non-southerners to "claim they harbored no ill will toward Negroes," because eugenics was simply a matter of science.[476] Eugenics absolved northern white supremacists, who did not want to be associated with the rabid racists of the south, of accountability. As usual, the costs were to be borne by those least able to absorb them.

1. The Legacy of Eugenics

Eugenic thinking came into public disfavor only after World War II, which was a conflict motivated by eugenicist thinking.[477] Several "[o]rganizations and journals changed the word eugenics in their names to genetics to avoid association with the unpopular movement."[478] But many prominent scientists, encouraged by the discovery of DNA, continued to advocate for eugenics—only now with a fresh way to hide it.[479]

Eugenic thinking, now hidden beneath the guise of genetics, corrupted the race-related policies of post–Civil Rights conservative presidential administrations. The Nixon and Reagan administrations, for instance, advanced rhetoric and policies consistent with eugenic thinking. Indeed, these administrations came into power largely due to their latent eugenicist rhetoric because most continued to Americans tacitly support it.

The law-and-order era stemmed from President Lyndon B. Johnson's anti-eugenicist policies, advancing civil rights and reducing poverty. Johnson believed the reasons for crime and poverty to be solely environmental and launched a war on poverty.[480] His "Great Society represented a total rejection of the eugenic worldview."[481] He passed sweeping legislation aimed at securing the equal rights of immigrants, people with disabilities, and the race-aggrieved,[482] and by 1970, the war on poverty

474. Black, *supra* note 443, at 99.
475. *Id.* at 229 (quoting John Powell, The Breach in the Dike: An Analysis of the Sorrels Case, Showing the Danger to Racial Integrity From Intermarriage of Whites with So-Called Indians at 3 (Anglo-Saxon Clubs of America 1924)).
476. Black, *supra* note 443, at 229.
477. *See* A Dangerous Idea, *supra* note 447, at 1:12:53–1:14:10.
478. *Id.* at 1:14: 11–1:14:20.
479. *Id.* at 1:14:21–1:14:30.
480. *Id.* at 1:16:11–1:16:44, 1:18:16–1:18:31.
481. *Id.* at 1:16:36.
482. *Id.* at 1:17:00 – 1:17:38.

and other Great Society programs "led to the fastest and sharpest decrease in poverty in the country's history."[483]

Law professor Peter Edelman writes, "[t]he sixties saw an explicit focus on reducing poverty, and poverty fell from 22.4 percent in 1959 to 11.1 percent in 1973. African American poverty dropped from 55.1 percent to 31.4 percent over the same period, with the historic civil rights statutes enacted during the sixties playing a significant role."[484] However, "the success of these programs disrupted power relations across the country."[485] Consequently, state, local, federal officials pressured the Johnson Administration to defund these programs.[486] The administration refused.[487]

The fact that Johnson's programs were so successful "[went] completely against the genetic theory. No one was changing genes at this time, this was done through social programs."[488] Instead of accepting reality, race conservative politicians launched a counterrevolution, arguing that Johnson's policies were either useless (because the poor and people of color were incapable of being helped) or made social problems worse.

When Richard Nixon came to power, he rapidly began to deconstruct Johnson's Great Society programs and Nixon's words, not to mention his actions, say everything about what lies beneath his law-and-order policies: " . . . Black Africans, most of them basically are just out of the trees. Now let's face it, they are."[489] Nixon believed that "programs like Head Start were essentially not workable because the difference between inner-city black kids' IQs and white Caucasian IQs was genetic and that because of genetic determinism, there's nothing you can do in the environment and the educational process that would really make up for that difference."[490]

Nixon's "secret tapes recorded in the Oval Office" also "revealed Nixon's racist view that certain groups of people were less evolved than others," an ideology that was not limited to just Nixon.[491] "Pseudo-scientific papers came out at the time that bolstered Nixon's prejudices and revived eugenic claims about IQ."[492] One of these pseudo-scientific papers, written by Arthur Jenson, claimed that Black people were less intelligent than whites, and thus needed to be phased out of social programs because welfare only exacerbated problems created by bad genes.[493]

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483. *Id.* at 1:21:20.
484. Peter B. Edelman, Not a crime to be Poor: The Criminalization of Poverty in America, xi (New Press) (2017).
485. Public Enemy Number One, *supra* note 263, at 1:20:50.
486. *Id.* at 1:20:57.
487. *Id.* at 1:21:00.
488. *Id.* at 1:21:30.
489. *Id.* at 1:22:00.
490. *Id.* at 1:22:45.
491. *Id.* at 1:22:05.
492. *Id.* at 1:22:13.
493. *Id.* at 1:23:20.

Consequently, Nixon advocated for "a total reform of our welfare system,"[494] rationalizing that Black people "ain't gonna make it for 500 years. They aren't." In other words, Nixon's welfare reform presumed that it was a waste of money to try to improve the lives of people he deemed unfit to survive and unable to be helped. His policies similarly reflected this thinking. While he cut the budget for Johnson's war on poverty agencies by more than 50 percent,[495] he simultaneously and enthusiastically increased the budget for programs that offered "birth control for the poor" including sterilizations, the eugenicist plan for eradicating poverty.[496]

Nixon's birth control strategy was a human rights disaster. The federal government consciously failed to issue rules, regulations, and guidelines that prohibited clinics from performing sterilizations without informed consent or consent procured by coercion.[497] According to a federal judge, there was evidence that an "indefinite number of poor people [were] improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn," with "many others [being] sterilized without their knowledge."[498]

Forced sterilization and anti-education policies were not the only relics of eugenicist thinking. According to one commentator, "Ronald Reagan finished the job that Nixon started."[499] Reagan "opposed every major piece of civil rights legislation and Great Society programs, Reagan rolled back major gains made by social movements and, like Nixon he used language coded with racial and class prejudices that appealed to many white voters."[500] Reagan also embraced new age eugenicist Charles Murray's, "scholarly work," which "called for scrapping the entire federal welfare system and income support structure, Medicaid, food stamps, unemployment, worker's compensation, subsidized housing."[501] According to Former Secretary of Labor for the Clinton Administration, Robert Reich:

> The implication was, why should we provide welfare and other public benefits to these people? We don't want them to take over our society. The society in order to be fit needs to have, in fact, again not stated explicitly, but this was the implicit message, fewer of them.[502]

Murray himself confirmed the purpose of his scholarship: to counter government policy premised on the belief that "everybody is equal

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494. *Id.* at 1:23:32.
495. *Id.* at 1:24:58.
496. *Id.* at 1:25:15.
497. *Id.* at 1:25:56 – 1:26:22.
498. *Id.* at 1:29:25.
499. *Id.* at 1:32:27.
500. *Id.* at 1:32:35.
501. *Id.* at 1:33:35.
502. *Id.*

above the neck."[503] And it worked. Reagan's cuts led to lower taxes for the wealthy and a "shredding of the safety net."[504] The Reagan administration took lunches from a million children,[505] stripped welfare from 500,000 Americans, and confiscated Medicaid from hundreds of thousands of Americans with disabilities.[506]

Modern eugenicist thinking is not restricted to the Republican party—although the policies, legislation, and court rulings of conservative Republicans over the past half-century have predominately reflected this thinking. As a democratic race conservative, Clinton was also a fan of Charles Murray's hypothesis that social welfare programs and education initiatives for the disadvantaged were counterproductive.[507] Clinton stated in a 1993 interview that Murray's analysis of welfare reform was "essentially correct."[508] In another interview, he commented that he "read Charles Murray's latest article. . . and I think he did the country a great service."[509] Unfortunately, Murray's neoeugenicist dribble informed Clinton's "Draconian cuts to social programs."[510]

Clinton ended federal aid to struggling parents with dependent children and "slashed children nutrition programs" with his Welfare Reform Bill of 1996.[511] Analysts at the time predicted that the bill would push over a million children back into poverty, but "he signed it anyway."[512] The results were worse than expected. The legislation pressed three million children into poverty.[513] Millions, disproportionately people of color, died prematurely.[514] One commentator argued, "People are dying from poverty and inequality at similar rates as other leading causes of death. . . demonstrating that the United States has been implementing on a large scale what would otherwise be considered a eugenic program."[515]

Murray's views on race and intelligence, including allegations that Blacks were innately less intelligent than whites, were subsequently

503. Gavin Evans, *The Unwelcome Revival of 'Race Science'*, The Guardian (Mar. 2, 2018), https://www.theguardian.com/news/2018/mar/02/the-unwelcome-revival-of-race-science [https://perma.cc/LAN9-FXQL].

504. *See* Demetrious Caraley, *Dismantling the Federal Safety Net: Fiction Versus Realities*, 111 Pol. Sci. Q. 225 (1996), https://www.jstor.org/stable/2152320?seq=1.

505. *Id.*

506. Public Enemy Number One, *supra* note 263, at 1:34:14.

507. *Id.*

508. Ryan Cooper, *The Grotesque Moral Atrocity of Blaming the Poor for Being Poor*, The Week (Nov. 3, 2015), https://theweek.com/articles/586503/grotesque-moral-atrocity-blaming-poor-being-poor (last visited Jul 26, 2021) [https://perma.cc/BQ49-VD6P].

509. Public Enemy Number One, supra note 263, at 1:35:05.

510. *Id.* at 1:35:40.

511. *Id.* at 1: 36:14.

512. *Id.* at 1:36:23; *Basic statistics*, Talk Poverty, https://talkpoverty.org/basics [https://perma.cc/8S58-BMCJ].

513. *Id.* at 1:36:38.

514. *Id.* at 1:36:38.

515. *Id.* at 1:38:42.

discredited by scientists.[516] Today, the scientific community almost unanimously agrees that biological races do not exist.[517] Sussman makes it plain: "This scientific fact is as valid and true as the fact that the earth is round."[518] Indeed, Murray's views had been discredited by scientists even before he developed them. In 1950, a panel of anthropologists, geneticists, sociologists, and psychologists with UNESCO concluded that race as a biological reality was a myth.[519] But as a matter of popular opinion, Murray's views remained immune to science and facts, as has always been the case with racial prejudice.

The real tragedy of eugenics is that in informing social policies, it confirmed its biased premise. That is, while crime does not correlate with race, it does with poverty.[520] African Americans make up a disproportionate percentage of the impoverished—18 percent in 2019.[521] However, politicians and the media overreport Black poverty, essentially making African Americans the face of poverty,[522]despite the fact that 14 million white Americans are poor compared to 8 million Blacks.[523] President Trump even believed that the majority of America's poor population was African American.[524] When confronted by a congressperson who opposed his welfare cuts because the cuts would hurt her constituency, "not all of whom were black," Trump responded, "Really? Then what are they."[525]

The upshot is white America equates crime with Blackness, not poverty. This equation is problematic for several reasons. Although the conflation influences policy preferences that end up hurting millions of white Americans, the Black community continues to be harmed much more than the white community because of disproportionate poverty rates. More African Americans are affected by "poverty is Black" thinking than members of the white community because the ideology shrinks

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516. Evans, *supra* note 503; Eric Turkheimer et. al., *There's Still No Good Reason to Believe Black-White IQ Differences Are Due to Genes*, Vox (Jun. 17, 2017), https://www.vox.com/the-big-idea/2017/6/15/15797120/race-black-white-iq-response-critics [https://perma.cc/J22W-3VKU].
517. *Id.*
518. Robert Wald Sussman, The Myth of Race 1 (2014).
519. *Id.*
520. Kendi, *supra* note 307.
521. *Basic Statistics*, Ctr. for Am. Progess: Talk Poverty, https://talkpoverty.org/basics [https://perma.cc/977Y-FP7S] (listing the African American poverty rate at 19.5 percent versus the White poverty rate of 8.2 percent).
522. *Black Americans Are Over-Represented In Media Portrayals Of Poverty*, The Economist (Feb. 20, 2018), https://www.economist.com/democracy-in-america/2018/02/20/black-americans-are-over-represented-in-media-portrayals-of-poverty [https://perma.cc/76SG-CPCE].
523. *Basic Statistics*, *supra* note 521; Keeanga-Yamahtta Taylor, From #BlackLivesMatter to Black Liberation 116 (2016).
524. Taylor, *supra* note 524.
525. *Id.*

welfare rolls, dwarfs public education, and builds new prisons. As Atwater puts it, the bottom line is that "blacks get hurt worse than whites."[526]

In this way, African Americans have become the face of both crime and poverty. But the face of crime is treated more harshly and with less remorse than that of poverty, although the face of poverty is treated unconscionably. The conflation of Blackness with crime has led to the over-policing and over-incarceration of African Americans, which, in turn, reinforces the eugenicist view of innate violence and criminality.[527] The result is self-fulfilling white paranoia that justifies the use of unreasonable force against unarmed Black men. What many Americans do not know is that this shared paranoia is de facto eugenicist thinking.

2. Eugenics and Trump

Trump's single presidential term and two campaigns for the presidency illustrate the enduring legacy of eugenicist thinking. Amongst a litany of other foolishness, Trump has expressed beliefs that Latinx immigrants are "mostly criminals and rapists," many white supremacists are "very fine people," immigrants from Haiti "all have AIDS,"[528] Black immigrants are from "shithole countries,"[529] and "we should have more people from places like Norway."[530] Additionally, Nigerian immigrants would never "go back to their huts"[531] after seeing the United States. On top of this, for most of his political career, Trump refused to denounce the Ku Klux Klan and other white supremacist organizations. As far as his other eugenicist remarks go, one of his rawest comments concerned "Black guys counting money:"

> I hate it. The only kind of people I want counting my money are short guys that wear yarmulkes every day. . . I think that guy is lazy. And it's probably not his fault because laziness is a trait in blacks. It really is, I believe that. It's not anything they can control.[532]

According to acclaimed journalist, Timothy L. O'Brien:

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526. *Id.*
527. *Id.*
528. Kendi, *supra* note 307, at 8.
529. Josh Dawsey, *Trump Derides Protections For Immigrants From 'Shithole' Countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [https://perma.cc/4Q7M-D7KK].
530. Nurith AIzenman, *Trump Wishes We Had More Immigrants From Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018), https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did [https://perma.cc/U86K-EA63].
531. Melissa Chan, *Donald Trump Claims Black and Hispanic People Are 'Living in Hell'*, Fortune (Sept. 26, 2016), https://fortune.com/2016/09/26/presidential-debate-donald-trump-living-in-hell-black-people [https://perma.cc/9ZPA-X858].
532. John R. O'Donnell, Trumped!: The Inside Story Of The Real Donald Trump—His Cunning Rise And Spectacular Fall (1991).

> [Trump] trusts his gut on issues surrounding race, because he's got a simplistic, deterministic, and racist perspective on who people are. I think at his core, he has a genetic understanding of what makes people good and bad or successful. And you see it all the time—he talks about people having good genes. He looks at the world that way. He's got a very Aryan view of people and race.[533]

In September of 2020, after warning a white audience in Minnesota that Joe Biden would overrun the state with African refugees, Trump commented:

> You have good genes, you know that, right? You have good genes. A lot of it is about the genes, isn't it, don't you believe? The racehorse theory? You think we're so different. You have good genes in Minnesota.[534]

Human rights activist Gregory J. Wallance believes the racehorse reference relates to a white supremacist belief that "a careful study of thoroughbred horse breeding would yield findings that could be applied to humans to produce what one eugenicist called 'a highly gifted race of men.'"[535] Despite Trump's history of bigoted remarks, 56 percent of white Americans elected him in 2016, thus demonstrating the popularity of his erroneous beliefs about race and crime, at least amongst his supporters.[536]

Trump went on to attack former President Obama's intelligence, despite clear, visceral evidence to the contrary. Obama was president of the Harvard Law Review and a constitutional law professor at the University of Chicago, one of America's highest ranking law schools. In spite of all this, Trump remarked on Fox News Network that Obama's Harvard admission remained questionable.[537] He told host Laurie Ingram that he was sure Bill Ayers, Obama's Chicago neighbor and former activist, was the true author of Obama's book *Dreams of My Father*, "since the book was too good to be written by someone of my intellectual caliber," President Obama observed.[538]

Trump attracted similar (and even worse) minds to his administration. In July 2016, Trump's chief strategist, Steve Bannon, suggested that some of the unarmed African American men and boys killed by police were responsible for their own murders, stating, "There are, after all, in

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533. David A. Graham et al., *An Oral History of Trump's Bigotry*, The Atlantic (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067 [https://perma.cc/7KAN-8YUR].
534. Gregory J. Wallance, Opinion, *Trump's 'Good Genes' Speech Echoes Racial Eugenics*, The Hill (Sept. 25, 2020), https://thehill.com/opinion/civil-rights/518031-trumps-good-genes-speech-echoes-racial-eugenics [https://perma.cc/C4V7-8VBM].
535. *Id.*
536. Fabiola Cineas & Anna North, *We Need To Talk About The White People Who Voted for Donald Trump*, Vox (Nov. 7, 2020), https://www.vox.com/2020/11/7/21551364/white-trump-voters-2020 [https://perma.cc/L8JN-Z9F3].
537. Barack Obama, A Promised Land (2020).
538. *Id.*

this world, some people who are naturally aggressive and violent."[539] Trump and his advisors' rhetoric reinforced the perception of Black criminality and encouraged violence against both Black and white supporters of the Black Lives Matter movement.[540] After a Black Lives Matter activist protested at a 2016 campaign rally for presidential candidate Bernie Sanders, Trump remarked, "That will never happen with me. I don't know if I'll do the fighting or if other people will."[541] In a rally months later, Trump defended his supporters for beating up an African American activist, commenting, "Maybe he should have been roughed up."[542]

Ultimately, Trump's views are dangerous not because he possesses them but because he distributes them. Throughout his presidency, he created a powerful following of individuals that shared his beliefs. There is a sobering number of similarities between Germany during World War II and the United States today. Before World War II, both the American people and the German people were suffering economically and experiencing low levels of morale.[543] Two leaders arose amid each country's crisis: Franklin D. Roosevelt for the United States and Adolph Hitler for Germany. Both countries featured popular eugenics movements. Both countries were at crossroads. In response, Hitler led his country to an authoritarian state built on the fallacy of white supremacy and rallied the German people with the slogan, "Make Germany great again!"[544]

America found itself at another crossroads in 2020 during Trump's run for a second term and again chose the path to stabilize (at least the white portion of) the country, but almost half of the population did not. Over 60 million Americans voted for Trump in 2016 and 10 million more did so in 2020. [545] A poll in 2016 found that "Trump Supporters [were]

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539. Gavin Evans, *The Unwelcome Revival Of 'Race Science'*, The Guardian (Mar. 2, 2018), https://www.theguardian.com/news/2018/mar/02/the-unwelcome-revival-of-race-science [https://perma.cc/MG59-LTRH].

540. There is a history of white supremacists treating white supporters of black equality as traitors, and, in many cases, reserving the brunt of their wrath for them. Indeed, the Fourteenth Amendment was passed not only to protect the newly freed, but also white supporters of the black cause. This disdain for race collaboration was also prevalent in the Sixties with the murder of white activist like Reverend James Reeb, Andrew Goodman, Michael Schwerner, and Viola Liuzzo.

541. Eric Levitz, *Donald Trump Misses the 'Old Days' When Your Were Allowed to Beat Up Protestors*, New York Magazine (Feb. 23, 2016), https://nymag.com/intelligencer/2016/02/trump-on-protester-id-like-to-punch-his-face.html [https://perma.cc/E6AY-HUDK].

542. *Id.*

543. Matthew Johnston, *Economic Conditions That Helped Cause World War II*, Investopedia (Jan. 17, 2022), https://www.investopedia.com/articles/markets/022516/economic-conditions-helped-cause-world-war-ii.asp [perma.cc/28CF-HZUR].

544. Dan Evon, *Hitler and Trump: Common Slogans?*, Snopes (Mar. 4, 2016), https://www.snopes.com/fact-check/make-germany-great-again [perma.cc/AG7S-G4HT].

545. Ford Fesseden et. al., *Even in Defeat, Trump Found New Voters Across the U.S.*,

More Likely to View Black People as 'Violent' and 'Lazy'."[546] Other research found that "racism, sexism, and status fears drove Trump voters," showing that white racial anxiety accounted for a significant number of Trump supporters.[547]

Although Trump is no longer president, his ideology continues to work through his supporters and their spheres of influence. Many enduring Trump supporters will end up on juries that determine the guilt of Black criminal defendants, decide whether police officers guilty of shooting unarmed Black men will be charged or convicted, and adjudicate the civil claims of families destroyed by police violence. A few other Trump supporters will end up in prosecutors' offices and on judges' benches.

C. *The Numbers*

Morton's race hierarchy reflects an inversion of rights in the criminal justice system, meaning that the lower a group is on the hierarchy, the more likely they are to have their rights violated. This inversion informs sentencing, arrest rates, conviction rates, and the imposition of the death penalty. African American men are more than six times as likely to be incarcerated than white men; Native Americans are more than four times as likely;[548] and Latino men are nearly three times as likely.[549] In 2010, white men were incarcerated at a rate of 678 inmates per 100,000. In 2018, African American males were incarcerated at a rate of 2,272 per 100,000 in the general population verses 1,018 for Latino males and 392 for white males.[550]

Today, African Americans account for nearly 40 percent of the prison population, yet only represent 13 percet of the general population. Native Americans represent 2.3 percent of the prison population but are only 1.3 percent of the general population.[551] Latinx Americans account

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N.Y. Times (Nov. 16, 2020), https://www.nytimes.com/interactive/2020/11/16/us/politics/election-turnout.html.

546. Kenrya Rankin, *Poll: Trump Supporters More Likely to View Black People as 'Violent' and 'Lazy'*, Colorlines, (July 1, 2016), https://www.colorlines.com/articles/poll-trump-supporters-more-likely-view-black-people-violent-and-lazy [perma.cc/R5GA-JZCT].

547. Tom Jacobs, *Research Finds That Racism, Sexism, and Status Fears Drove Trump Voters*, Pacific Standard (April 24, 2018), https://psmag.com/news/research-finds-that-racism-and-sexism-and-status-fears-drove-trump-voters [perma.cc/95NZ-RLR7].

548. Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, Prison Policy Initiative (Apr. 22, 2020), https://www.prisonpolicy.org/blog/2020/04/22/native [perma.cc/7KPK-NHUG].

549. Pew Research Report, *Chapter 3: Demographic and Economic Data, by Race*, Pew Research (Aug. 22, 2013), https://www.pewresearch.org/social-trends/2013/08/22/chapter-3-demographic-economic-data-by-race [perma.cc/D87V-2KUJ].

550. *Id.*

551. Amber Pariona, *US Prison Population by Race*, World Atlas (July 18, 2019), https://www.worldatlast.com/articles/incarceration-rates-by-race-ethnicity-and-gender-in-the-u-s.html [perma.cc/8DS4-WD3Q].

for 16 percent of the prison population and 19 percent of the general population.[552] A third of recently born African American children will go to prison compared to 1 out of 6 Latino boys and 1 out of 17 white boys.[553]

African Americans also represent 48 percent of Americans serving life sentences, while Latinx people serve life sentences equal to their general population numbers.[554] However, whites comprise only 32 percent of individuals serving life sentences, almost two times less than their share of the general population.[555] Blacks are also wildly overrepresented on death row, comprising 42 percent of all death row inmates—equal to whites, who make up 42 percent of death row inmates as well, despite making up almost five times the amount of Black people in the general population. Latinx Americans represent 13 percent of death row inmates.[556]

This pattern continues throughout the criminal justice system. In 2015, African Americans were 12 percent of the general population, but 18 percent of people stopped by cops on the streets.[557] Fifteen percent were Latinx, who represented 16 percent of the population, and 60 percent were white, who represented 65 percent of the population.[558] Today, Black youths comprise 35 percent of youths arrested, 23 percent are Latinx, while 62 percent are white. Compare this to their numbers in the general population, 15 percent, 25 percent, and 72 percent, respectively.[559]

More importantly, at least as far as this Article series is concerned, police use of force is more deadly and common against Black Americans. In his statistical analysis of police killings, *When Police Kill*, Professor Franklin E. Zimring, concluded, "The [l]argest population group with outsized death tolls is 'Blacks/African Americans.'"[560] At the time of his study, African Americans made up 12.2 percent of the country's population, but were 26.1 of Americans killed by police.[561] The National Violent Death Reporting System (NVDRS) found the number to be 32 percent, 2.8 times higher among Blacks than whites.[562] Another study placed the number at 32.4 percent.[563]

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552. *Id.*
553. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, Prison Policy Initiative (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/#slideshows/slideshow1/2 [perma.cc/D35G-EMZ3].
554. *Id.*
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. Zimring, *supra* note 403, at 45.
561. *Id.*
562. Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 Am. J Prev Med, S173 (Special Issue 5, Supplement 3).
563. Camille Caldera, *Fact check: Rates of white-on-white and Black-on-Black crime are similar*, USA Today (Sept. 29, 2020), [https://perma.cc/X44J-AB3L].

Zimring's study revealed Hispanic/Latinx Americans comprised 16.4 percent of the general population and 16.5 percent of police killings.[564] White Americans comprised 55.7 percent of the country, but less than 52 percent of those killed by police—by far the lowest population-to-police killing ratio.[565] These numbers demonstrate that the lower a group is on Morton's hierarchy, the more likely they are to be killed by police.

The Morton inversion also exists in social settings like neighborhoods. Diangelo shares, "The highest level of segregation is between blacks and whites, the lowest is between Asians and whites, the level between Latinx and whites occupies an intermediate position. Most whites, in both expression of their beliefs and in practice, do not want to integrate with blacks."[566] Researchers at the Boston University School of Public Health developed a study that considered residential segregation, incarceration rates, educational attainment, economic indicators, and employment status, determining that states with higher disparities on racial lines had correlative disparities in fatal police shootings.[567] Residential segregation was found to be the most robust indicator of fatality disparities.[568]

Studies suggest that the Morton inversion is getting worse. A 2012 study found that anti-Black attitudes and racial stereotyping rose in President Obama's first term.[569] Forty-eight percent of Americans expressed explicit anti-Black attitudes and 49 percent expressed implicit anti-Black bias in 2008.[570] Explicit race bias increased to 51 percent by 2012 and implicit race bias climbed to 56 percent over the same period.[571] The study also found that after Obama's first election, higher percentages of white respondents saw African Americans as violent.[572] By the second term of the Obama Administration, police were killing unarmed African Americans at five times the rates of white Americans.[573] It was a trend that would make police killings a leading cause of death for young African American men and boys in 2015.[574]

564. Zimring, *supra* note 403.
565. *Id.* at 45.
566. Diangelo, *supra* note 122, at 93.
567. Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 Nw. U. L. Rev. 1465, 1468 (2018) (citing Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. Nat'l Med. Ass'n 106, 113 (2018)).
568. *Id.*
569. Wilkerson, *supra* note 232 at 318.
570. *Id.*
571. *Id.*
572. *Id.*
573. *Id.* at 319.
574. *Id.* at 318.

D. *White Backlash to the Specter of Black Equality*

White backlash has occurred at every point of Black advancement. Black soldiers were disarmed after their service in both the American Revolution and the Civil War. White domestic terrorism was spurred by the success of Black Reconstruction and led to the attacks on and the lynching of Black soldiers returning from World I and II who dared to assert their equality at home. Cycles of white backlash continued in response to forceful Black resistance in the 1950s and 1960s and preyed upon upwardly mobile Blacks who moved into white communities, as well as on Black people who attempted to vindicate their right to vote. Most recently, this historical insecurity was aggravated by the election of the country's first Black president, and white backlash manifested in the Trump movement and the storming of the Capitol.

It is important to note that these historical backlashes to Black advancement have been social, political, and legal. The post-slavery U.S. Supreme Court authored several opinions that gutted the Fourteenth Amendment, accelerated the end of Reconstruction, and began the Jim Crow era.[575] And remember that Reconstruction effectively ended after the federal government removed the military from the South in exchange for the presidency of Rutherford Hayes, after white Republicans in the North came to the opinion that Blacks had advanced enough.

A similar pattern happened after the 1960s. The law-and-order Court chipped away at civil rights gains, including programs like affirmative action, which had generated a minor second Reconstruction. Politicians provided state and local police establishments with military-style weapons, effectively creating a reverse Reconstruction with state and local police agencies occupying communities the U.S. military had been ordered to protect during Reconstruction. The law-and-order Supreme Court made reverse reconstruction even more dangerous and oppressive by rendering decisions that enabled police to shoot, harass, and arrest more African Americans with impunity.

Finally, and in response to the election of Barack Obama, the law-and-order Supreme Court began to attack legislation that had once ensured a more inclusive democracy like Section V of the Voting Rights Act of 1965, which required former Confederate states to seek preapproval for any changes in their voting laws that would restrict the right to vote.[576] As though this was not enough, Trump appointed even more law-and-order justices to the Supreme Court during his presidency and gave race conservatives a supermajority. It is, thus, likely that the backlash to African Americans reaching the highest office in the land has just begun

575. *See* The Civil Rights Cases, 109 U.S. 3 (1883); *See also* Slaughter House Cases, 83 U.S. 36 (1872); *See also* United States v. Cruikshank, 92 U.S. 542 (1875); *See also* Plessy v. Ferguson 163 U.S. 537 (1896), overruled by Brown v. Bd. of Ed. Of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).
576. *See* Shelby County, Ala. v. Holder, 570 U.S. 529 (2013).

and the counter-revolution to return African Americans to their places on Morton's race hierarchy is still in progress.

VI. Conclusion

Two forces underlie the rationalized fear or new dread standard: (1) irrationality fueled by the specter of Black advancement and (2) the degradation of Black life. The degradation of Black life is as old as the country itself. Once regarded as property, the Black body remains in a netherworld that hangs between property and full humanity. This place has sometimes been more dangerous for Blacks than the bottom world from which they ascended; there is an incentive to care for one's property, but none to preserve the competition.

Immediately after slavery, white politicians, merchants, and professionals massacred hundreds of innocent Blacks in New Orleans[577] and Memphis.[578] Congress responded to the insanity by passing the Fourteenth and Fifteenth Amendments and several congressional acts. The Ku Klux Klan Act, for instance, gave President Grant the authority to dispatch federal troops to the South to enforce the constitution. This military occupation led to the period of Reconstruction, which W.E.B Dubois termed "a brief moment in the sun," and saw African Americans advance politically, economically, and educationally at, literally, alarming rates.

The emancipated property had now become a real threat: free, powerful, and educated, which had been the South's second-worst nightmare—the first being slave rebellions. The Republican Congress's removal of federal troops from the South during Reconstruction unleashed a rabid predatory element in the South that had been lying in wait. Race massacres and lynchings abounded. One historian estimates that more than 50,000 African Americans were terminated during this period. White fear of "Negro rule" in the South had run past paranoia, paused at derangement, and jumped straight off the cliff of insanity. Too many Southerners would eventually project their own inhumanity, wickedness, and pure evil onto Black faces. Around the same time, business, academic, scientific, and political elites in the North set out to prove that biology justified the degradation of Black life.

However, after almost 380 years of chattel slavery, white domestic terrorism, the strong arming of constitutional rights, and obstructions to the American dream, the Black community exploded in the 1960s. Predictably, the result was more white paranoia, as if Black fear, real fear, from nearly 380 years of documented terror was somehow unconscionable when African Americans rebelled for only a few years during that decade. This self-indulgent paranoia fanned by the political class and denied by the "silent majority" (now the vocal hegemon) rendered the

577. Edward Ball, *Life of a Klansman: A Family History in White Supremacy* 211 (2020).

578. Mackenzie Lanum, *Memphis Riot, 1866*, Blackpast (Nov. 20, 2011) [https://perma.cc/WE8V-3LSE].

country unable to deal with the real monster: its own hypocrisy. Instead, the country chose its next best option, an alternative that would preserve its identity and self-image: it transformed the historical victim into a veritable threat.

The irrational and unrighteous fear white America has used to gaslight African Americans throughout the country's history continues to pervade society, its institutions, its governments, its criminal justice system, and its highest Court, a court that has assumed more power than it was initially given and currently deserves. White paranoia continues to present an inordinate threat to black life. The law-and-order Court legitimizes irrational white dread and validates the myth of the Black super subhuman. In particular, it has institutionalized the unreasonable reasonable officer as an archetype of American law and placed endcaps on Taney's *Dred Scott* opinion: that a Black man has no rights a white man is bound to respect.

Introduction and Summary of Part II

Part II of this Article series discusses the sea change in excessive force law from the common law standard of reasonableness to the current "rationalized fear" or "new dread" standard governing police shooting cases. The Article chronicles the shift from a variety of social, institutional, and legal perspectives, including (1) the erosion of the common law right to resist an unlawful arrest; (2) the evolution of the modern police force; (3) the growth of a culture of police unaccountability; (4) the development of the law-and-order Supreme Court and the concurrent development of radical social conservatism; (4) the Court's holding in *Graham v. Connor* as the point of origin for the legal expression of the shift; (5) and the judicial creation and development of the qualified immunity doctrine. Part II also attempts to distill the current, amorphous excessive force standard into an articulable legal standard reflecting its effect and intent.