

# University of Miami Law Review

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Volume 68  
Number 4 *Volume 68 Number 4 (Summer 2014)*  
Eleventh Circuit Issue: "Stand Your Ground"  
Laws

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Article 4

7-1-2014

## Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground

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Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. Miami L. Rev. 961 (2014)  
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# ARTICLES

## **Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground**

AYA GRUBER\*

*Stand-your-ground laws have come to symbolize, especially for many in the center-to-left, the intense racial injustice of the modern American criminal system. The idea now ingrained in the minds of many racial justice-seekers is that only by narrowing the definition of self-defense (and thereby generally strengthening murder law) can we ensure Trayvon Martin's death was not in vain. However, when the story of Martin's killing first appeared on the national stage, the conversation was not primarily about the overly lenient nature of Florida's self-defense law. It was a multi-faceted dialogue about neighborhood warriors, criminal racial profiling, and especially the racially discriminatory nature of police and prosecutorial discretion. After nearly two years of talking about the case, however, concerns over Florida state actors' racially biased application of the law have virtually evaporated in the face of the throng of arguments that stand your ground is inherently poor criminal policy. The nature of the Zimmerman conversation is now about how stand your ground has exonerated thugs, drug dealers, and vicious killers all over the racial spectrum and the law's correlation with increased homicides. This Article explores why many progressives decided to focus their advocacy efforts away from clear issues of inequality and toward legal reform to make it more difficult for future defendants to plead self-defense. It maintains that at least part of the explanation is a punitive impulse deeply entrenched in American psyche that leads even left-leaning racial justice proponents occasionally to hastily embrace proposals that augment the very police and prosecutorial power they otherwise criticize. It accordingly cautions progressives to be wary of remedying discrimination through programs*

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\* Aya Gruber, Professor of Law, University of Colorado Law School. I express special gratitude toward Ahmed White, Jorge Esquirol, Cynthia Lee, Song Richardson, Angela Onwuachi-Willig, Donna Coker, and Jeannie Suk for helping me think through the issues presented in this sensational case. I also thank Paulina Valanty, Eleventh Circuit Editor of the *University of Miami Law Review*, for inviting me to participate in this Symposium, and the editors at the *Law Review* for a thoughtful edit.

*that bypass nonpunitive social, cultural and economic restructurings in favor of selective carceral management of the few private (non-police) individuals that can be characterized as transgressing the social order.*

INTRODUCTION .....	962
PART I: STAND YOUR GROUND'S LEGAL AND CULTURAL MEANINGS .....	968
PART II: THE INGREDIENTS OF A RACIAL TRAGEDY .....	980
A. <i>Neighborhood Watches</i> .....	982
B. <i>Racial Profiling</i> .....	989
C. <i>Six-Person Juries</i> .....	994
D. <i>Racialized/Post-Racialized Discretion in Arrest and Prosecution</i> .....	1000
PART III: STAND YOUR GROUND'S RACIAL IMPLICATIONS .....	1003
PART IV: THE PUNITIVE IMPULSE .....	1014
CONCLUSION .....	1021

## INTRODUCTION

Stand-your-ground laws have come to symbolize, especially for many in the center-to-left, the intense racial injustice of the modern American criminal system. The lesson of the George Zimmerman trial saga is clear: Stand-your-ground laws, which remove from self-defense law the requirement to retreat before using force, must be repealed.<sup>1</sup> Stand your ground came under fire shortly after the Sanford Police Department's decision to release Zimmerman without charges, and opponents of the law ramped up their efforts in the wake of Zimmerman's acquittal.<sup>2</sup> There have been several recent state-level challenges

1. See, e.g., Trymaine Lee, *Minister: Latest Teen Murder Shows Stand Your Ground 'Reeks of Racism'*, MSNBC (Nov. 29, 2012, 10:35 PM), <http://www.msnbc.com/msnbc/minister-latest-teen-murder-shows-stand-your-ground> (discussing white gun collector's shooting of an unarmed black teenager); Sean Sullivan, *Four Reasons Why 'Stand Your Ground' Laws Won't Be Repealed*, WASH. POST (July 19, 2013, 10:11 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/19/four-reasons-why-stand-your-ground-laws-wont-be-repealed/>; Eugene Robinson, Op-Ed., *Dangerous 'Ground'*, WASH. POST, Mar. 27, 2012, at A17 (arguing for repeal on the ground that the laws "are nothing but a license to kill"); see also Sarah Childress, *Is There Racial Bias in "Stand Your Ground" Laws?*, PBS FRONTLINE.COM (July 31, 2012, 12:40 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/is-there-racial-bias-in-stand-your-ground-laws/> (quoting commissioner Michael Yaki as stating that the U.S. Commission on Civil Rights intends to determine whether "SYG statutes by their nature . . . create opportunities for racial bias to enter into the system"); cf. *Transcript: President Obama Addresses Race, Profiling and Florida Law*, CNN (July 19, 2013, 2:49 PM), <http://www.cnn.com/2013/07/19/politics/obama-zimmerman-verdict/index.html>, (calling for reexamination of stand-your-ground).

2. See Maggie Clark, *Zimmerman Verdict Renews Focus on 'Stand Your Ground' Laws*, USA TODAY (July 15, 2013, 2:56 PM), <http://www.usatoday.com/story/news/nation/2013/07/15/stateline-zimmerman-stand-your-ground/2517507/>; Adie Rolnick & Priscilla Ocen, Op-Ed., *Why We Must Do More than Repeal 'Stand Your Ground' Laws*, AL JAZEERA.COM (Aug. 3, 2013, 3:05 PM), <http://www.aljazeera.com/indepth/opinion/2013/07/2013728142158307153.html> ("In the wake [sic] the jury's acquittal of Zimmerman, people across the country marched, rallied, and protested to express their collective disgust with the unequal system of justice represented by the Zimmerman verdict.").

to the laws, some more successful than others.<sup>3</sup> Congress has even stepped in, convening hearings on the wisdom of continued retention of such laws and taking emotional witness testimony from Trayvon Martin's mother and other slain victims' family members.<sup>4</sup> The idea now ingrained in the minds of many racial justice-seekers is that only by narrowing the definition of self-defense (and thereby generally strengthening murder law) can we ensure Trayvon's death was not in vain.<sup>5</sup> Indeed, this notion follows a familiar pattern in American penal culture. Publicity of tragic killings of innocent youths at the hands of deviant criminals (or perceived criminals) often sparks calls for greater severity in the criminal law.<sup>6</sup> The Zimmerman case is nevertheless somewhat unusual given political conservatives' support for the criminal defendant and liberals' push for tough prosecution. Conservatives typically tend to embrace tough-on-crime responses to high-profile criminal cases while liberals are often more cognizant about the human, social, and economic costs of ratcheting-up punishment.<sup>7</sup> In this case, however, the political roles are reversed, with conservatives backing a robust murder defense and progressives, including racial justice scholars, supporting vigorous law enforcement and prosecution.<sup>8</sup>

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3. See 'Stand Your Ground Law' Survives Florida House Vote, FOX NEWS (Nov. 8, 2013), <http://www.foxnews.com/us/2013/11/08/stand-your-ground-law-survives-florida-house-vote/>; see also Sean Sullivan, *Everything You Need to Know About 'Stand Your Ground' Laws*, WASH. POST (July 15, 2013, 9:30 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/15/everything-you-need-to-know-about-stand-your-ground-laws/> (noting that a repeal bill passed the New Hampshire House but was defeated in the Senate).

4. See Laurie Kellman, *Trayvon Martin's Mother Testifies at Senate Hearing on 'Stand Your Ground' Laws*, WASH. POST (Oct. 29, 2013), [http://www.washingtonpost.com/politics/trayvon-martins-mother-testifies-at-senate-hearing-on-stand-your-ground-laws/2013/10/29/94285480-40c6-11e3-a624-41d661b0bb78\\_story.html](http://www.washingtonpost.com/politics/trayvon-martins-mother-testifies-at-senate-hearing-on-stand-your-ground-laws/2013/10/29/94285480-40c6-11e3-a624-41d661b0bb78_story.html).

5. See Editorial, *The Next Step After the Trayvon Martin Case*, SEATTLE TIMES (July 15, 2013, 4:35 PM), [http://seattletimes.com/html/editorials/2021400256\\_edittrayvonzimmerman16xml.html](http://seattletimes.com/html/editorials/2021400256_edittrayvonzimmerman16xml.html) ("The single best memorial to Trayvon Martin—Justice for Trayvon—is repeal of Florida's Stand Your Ground law."); Curt Anderson, *Sybrina Fulton, Trayvon Martin's Mother, Continues Fight to Repeal 'Stand Your Ground' Law*, HUFFINGTON POST (July 29, 2013, 2:31 PM), [http://www.huffingtonpost.com/2013/07/29/sybrina-fulton-trayvon-martin-stand-your-ground\\_n\\_3671615.html](http://www.huffingtonpost.com/2013/07/29/sybrina-fulton-trayvon-martin-stand-your-ground_n_3671615.html) ("We have to change the law so that this doesn't happen to someone else's child.").

6. Marcia J. Simon, Note, *An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland*, 65 MD. L. REV. 992, 1016 (2006) (noting the pressure on prosecutors to be tough on crime "especially in the midst of the public outcry that often accompanies a tragic death"); Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 7 (1998) (describing the ingredients of three strikes laws as including "a few horrible but isolated incidents of violence; and election-year politicians 'getting tough on crime' through a simple catch-phrase").

7. See *infra* Part IV.

8. See Sabrina Siddiqui, *Ted Cruz Defends Stand Your Ground, Says Lawmakers Want to 'Exploit' Trayvon Martin's Death*, HUFFINGTON POST (Oct. 29, 2013, 2:31 PM), [http://www.huffingtonpost.com/2013/10/29/ted-cruz-stand-your-ground\\_n\\_4174430.html](http://www.huffingtonpost.com/2013/10/29/ted-cruz-stand-your-ground_n_4174430.html) (reporting that Republican Louie Gohmert "cited his experience as a defense attorney and listed off a series of

Today, it is nearly impossible to talk about Trayvon Martin's killing without discussing the desirability of stand-your-ground laws. However, when the story first appeared on the national stage, the conversation was not primarily about the overly lenient nature of Florida's self-defense law. It was a multi-faceted dialogue about neighborhood warriors, racial profiling, and especially the racially discriminatory nature of police and prosecutorial discretion.<sup>9</sup> At that early stage, Martin's parents and their attorneys emphasized, not that the police merely followed an unjust law, but that a police force with a racially fraught history chose not to arrest, despite having valid legal grounds to do so.<sup>10</sup> The question arising most frequently in the immediate wake of the shooting was: "If the races were reversed, would police have made an arrest?"<sup>11</sup> After nearly two years of talking about stand your ground and numerous nascent studies of the law, this question has been buried if not answered in the negative.<sup>12</sup> Concerns over Florida police and prosecutors' racially biased application of the law have virtually evaporated in the face of the throng of arguments and evidence showing that stand your ground is inherently poor criminal policy.<sup>13</sup>

The nature of the Zimmerman conversation has thus fundamentally changed. It is now about how stand your ground has exonerated thugs, drug dealers, and vicious killers all over the racial spectrum and how the law correlates with an uptick in homicide rates.<sup>14</sup> Under this rubric, San-

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cases where he successfully defended black individuals against murder charges" and quoting Democrat Richard Durbin as stating stand-your-ground laws "are diminishing accountability under the justice system"). Fascinatingly, by some accounts, Democrats ended up voting for the Florida Bill in order to avoid being seen as "soft on crime." Katie Sanders, *Democrats Warned About 'Stand Your Ground' in 2005*, TAMPA BAY TIMES (Mar. 22, 2012, 7:29 PM), <http://www.tampabay.com/news/courts/criminal/democrats-warned-about-stand-your-ground-in-2005/1221368>.

9. See Monique O. Madan, *Shooting Mystery: Miami-Dade Teen Killed by a Crime Watch Captain*, MIAMI HERALD (Mar. 9, 2012), <http://www.husd.org/cms/lib07/AZ01001450/Centricity/Domain/2090/3-9%20Martin%20Shot.pdf> (reporting that Martin's mother objected to the police's reluctance to prosecute and noting that the Martins' attorney, Benjamin Crump, stated that "the neighborhood watch was supposed to protect him, not kill him" and opined that Martin was racially profiled).

10. John Rudolf & Trymaine Lee, *Trayvon Martin Case Spotlights Florida Town's History of 'Sloppy' Police Work*, HUFFINGTON POST (Apr. 9, 2012, 1:01 PM), [http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation\\_n\\_1409277.html](http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html) (discussing past mistreatment of African Americans by the Sanford police).

11. See Mike Schneider, *Parents of Slain Black Teen Want FBI Investigation*, CHARLESTON GAZETTE, Mar. 17, 2012, at 8C (stating that the parents of Trayvon Martin argued that Sanford police failed to arrest "Zimmerman because he is white and their son was black").

12. See *infra* notes 77, 265-68.

13. See Susan Taylor Martin et al., *Race Plays Complex Role in Florida's 'Stand Your Ground' Law*, TAMPA BAY TIMES (June 2, 2012, 1:00 PM), <http://www.tampabay.com/news/courts/criminal/race-plays-complex-role-in-floridas-stand-your-ground-law/1233152>.

14. See, e.g., Tim Murphy, *Justifiable Homicides up 200 Percent in Florida Post-Stand Your*

ford Police Chief Jim Lee and prosecutor Angela Corey are off the hook—they merely followed a misguided law that forced them to treat Zimmerman, and other culpable murderers, leniently.<sup>15</sup> But this new preoccupation with black letter leniency hides one of the most important points about the case. Florida's self-defense regime, like all criminal law regimes, invested Lee and Corey with discretion—discretion they arguably exercised in a racialized manner. Whatever the fate of the stand-your-ground provision, police discretion to arrest (or decline to arrest) and prosecutorial discretion to prosecute (or decline to prosecute) are destined to remain.<sup>16</sup> It is thus possible that repealing stand your ground will increase Florida murder convictions generally, but leave untouched, or possibly even exacerbate, racial disparities.<sup>17</sup> In any case, the racial disparity question has been all but forgotten in the rush of arguments that stand your ground is too lenient on criminals and encourages violence.<sup>18</sup> While debates continue to rage in statehouses over the fate of self-defense law, the racial outrage generated by the case has been relegated to a prospective celebrity boxing match between Zimmerman and troubled rapper DMX.<sup>19</sup>

This Article explores how radical concerns over racial stereotyping, fortified communities, and discriminatory policing and prosecution morphed into the old-hat, hackneyed set of retributive and utilitarian arguments that lenient self-defense laws underpunish offenders and

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*Ground*, MOTHER JONES (Sept. 16, 2013, 11:36 AM), <http://www.motherjones.com/mojo/2013/09/stand-your-ground-justifiable-homicide-increase> (citing report that found justifiable homicides have increased 53% on average in the twenty-two states that have stand-your-ground laws); Josh Gerstein, *Eric Holder: Stand Your Ground Undermines Public Safety*, POLITICO (July 16, 2013, 4:56 PM), <http://www.politico.com/story/2013/07/eric-ho> (quoting Attorney General Eric Holder stating stand-your-ground laws may be “allowing and perhaps encouraging violent situations to escalate in public”); Shankar Vendantam, *‘Stand Your Ground’ Linked to Increase in Homicides*, NPR (Jan. 2, 2013, 4:50 PM), <http://www.npr.org/2013/01/02/167984117-stand-your-ground-linked-to-increase-in-homicide>; Kris Hundley et al., *Florida ‘Stand Your Ground’ Law Yields Some Shocking Outcomes Depending on How Law Is Applied*, TAMPA BAY TIMES (Jun. 1, 2012, 11:25 AM), <http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133> (“Florida’s ‘stand your ground’ law has allowed drug dealers to avoid murder charges and gang members to walk free.”).

15. See *infra* notes 73–75 and accompanying text.

16. See *infra* notes 80, 258, and accompanying text. See also Rolnick & Ocen, *supra* note 2.

17. See *infra* notes 79, 242–46, 252, and accompanying text.

18. See, e.g., Morgan Whitaker, *Stand Your Ground: Good for Defense Attorneys, Bad for Citizens*, MSNBC (Nov. 22, 2013, 7:31 PM), <http://www.msnbc.com/politics/nation/stand-your-ground-who-it-helps-and-hurts>; David Hemenway, *Don't Ignore the Evidence: Stand Your Ground Is Bad for Florida*, HUFFINGTON POST (Nov. 13, 2012, 10:32 AM), [http://www.huffingtonpost.com/david-hemenway-phd/stand-your-ground\\_b\\_2119322.html](http://www.huffingtonpost.com/david-hemenway-phd/stand-your-ground_b_2119322.html).

19. Gerrick D. Kennedy, *DMX, George Zimmerman ‘Celebrity’ Boxing Match Not Done Deal*, L.A. TIMES (February 7, 2014, 11:54 AM), <http://www.latimes.com/entertainment/music/posts/la-et-ms-dmx-george-zimmerman-celebrity-boxing-match-not-done-deal-20140207,0,1681009.story#ixzz2sg4GSNys>.

increase crime. The relentless preoccupation with stand your ground is all the more amazing in light of evidence that police, prosecutor, and jury discretion ultimately contributed more to the verdict than stand your ground.<sup>20</sup> So why did many progressives decide to focus their advocacy efforts away from clear issues of inequality and toward legal reform to make it more difficult for future defendants to plead self-defense? The answer is undoubtedly complex and multifaceted. Perhaps it was happenstance. The media seized on stand your ground because it sounds provocative and audiences responded.<sup>21</sup> It also might be that progressives targeted stand your ground because of the law's close connection to the conservative gun lobby and the significance of the gun control debate at the time.<sup>22</sup> Nevertheless, racial equality has not historically been a principal ground for gun control, and yet stand-your-ground laws are currently a racial lightning rod.<sup>23</sup> This Article asserts that at least part of the explanation of some progressives' emphasis on repealing stand your ground involves a punitive impulse, deeply entrenched in the

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20. See *supra* notes 15–16, *infra* 189–91, and accompanying text; Kris Hundley, *Despite Backlash, 'Stand Your Ground' Laws Did Not Apply to Zimmerman Case*, TAMPA BAY TIMES (July 15, 2013, 9:31 PM), <http://www.tampabay.com/news/courts/criminal/despite-outcry-zimmermans-acquittal-was-not-based-on-stand-your-ground-laws/2131629>; *George Zimmerman's Attorneys Won't Use "Stand Your Ground" Defense*, CBS NEWS (Aug. 13, 2012, 7:32 PM), <http://www.cbsnews.com/news/george-zimmermans-attorneys-wont-use-stand-your-ground-defense/>.

21. The earliest post-Martin shooting mention of stand your ground in national media I could find was an Ashleigh Banfield interview with a criminal law talking head on March 13, 2012. Introducing stand your ground, attorney Paul Callan states, "You know, I was kind of shocked, Ashleigh, when I was looking at the research on this stand your ground law. There have been about 65 cases in Florida involving deaths where this law has been the deciding factor in the case. You know, in New York, for instance, most of the big states, if somebody attacks you, you have an obligation to try to retreat first before you can use deadly physical force," to which Banfield replies, "Wow!" *Early Start with Ashleigh Banfield*, VOXANT BUSINESS TRANSCRIPTS, Mar. 13, 2012 available at 2012 WLNR 5392624. Indeed, what the media emphasizes is often a function of hegemonic cultural forces that disfavor open discussions of more "touchy" subjects like racism in criminal justice.

22. See Matt Gertz, *ALEC Has Pushed the NRA's "Stand Your Ground" Law Across the Nation*, MEDIA MATTERS (Mar. 21, 2012, 11:41 AM), <http://mediamatters.org/blog/2012/03/21/alec-has-pushed-the-nras-stand-your-ground-law/186459>; John Nichols, *How ALEC Took Florida's 'License to Kill' Law National*, NATION (Mar. 21, 2012, 10:57 PM), <http://www.thenation.com/blog/166978/how-alec-took-floridas-license-kill-law-national#>. In the year following the Trayvon Martin shooting, two horrific mass shootings spurred heated national conversation and debates on Capitol Hill. See Michael Cooper, *Debate on Gun Control Is Revived, amid a Trend Toward Fewer Restrictions*, N.Y. TIMES, Dec. 15, 2012, <http://www.nytimes.com/2012/12/16/us/politics/connecticut-shooting-revives-gun-control-debate.html> (lawmakers review gun control laws following Sandy Hook shooting); see also Michael Martinez, *Gun-Control, Gun-Rights Groups Ready for Renewed Debate After Colorado Shooting*, CNN (July 21, 2012, 11:28 PM), <http://www.cnn.com/2012/07/20/us/colorado-gun-control-debate/> ("nation's largest citizens' lobby to prevent gun violence pledged aggressive action" following Holmes theater shooting).

23. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 337 (1991) (supporting a robust 2nd Amendment right as a matter of racial justice).

American psyche, that leads even left-leaning racial justice proponents occasionally to hastily embrace proposals that augment the very police and prosecutorial power they otherwise criticize.

The punitive impulse is a component of a late twentieth-century American penal eidos that gives criminal prosecution a high rank-order among possible methods of addressing pressing social problems.<sup>24</sup> Prevailing conventional punitive ideology views top-down policing as the solution to, not cause of, societal violence.<sup>25</sup> It leads policymakers and advocates to bypass nonpunitive social, cultural, and economic restructurings in favor of selective carceral management of the few private (non-police) individuals that can be characterized as transgressing the social order.<sup>26</sup> The long-term ascendancy of this ideology has left a distinctive mark in the form of a punitive impulse—a pre-political, almost unconscious correlation of social harm (in this case, the racial injustice of Trayvon Martin’s death) with the need for greater or more certain criminal punishment of the individual(s) most easily connected to the injustice (in this case, George Zimmerman and future Zimmermans). The punitive impulse triggers an instinctive reaction to harm that naturalizes increased criminal enforcement as a solution of first resort. The impulse accordingly operates to check the usual progressive inclination to regard criminal sanctions as a last resort to be chosen only after careful distributive analysis.<sup>27</sup> Thus, the evidence that the impulse is at work in progressive analysis of the Zimmerman case is not the fact that some progressives ultimately condemned stand your ground, but in many progressives’ precipitous rush to repeal stand your ground to the exclu-

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24. See *infra* notes 274–88 and accompanying text; see also Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL’Y REV. 853, 854 (1999) (book review) (noting that Reagan and Bush “embraced punishment as one of the few forms of domestic governance defensible within their political ideology”) (footnotes omitted); Angela P. Harris, *Bad Subjects: The Practice of Theory and the Constitution of Identity in Legal Culture*, 9 CARDOZO WOMEN’S L.J. 515, 516 (2003) [hereinafter Harris, *Bad Subjects*] (asserting that within conservative ideology “questions relating to crime and ‘welfare,’ for example, become personal moral issues rather than social problems”).

25. See *infra* notes 267, 274; Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 799 (2000) (“In liberal democracies, the exercise of state violence, both in the domestic realm and in foreign relations, is justified by reference to the values of protection, security, and order.”).

26. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 822–23 (2007) (asserting that “‘progressive’ criminal reforms rest on the assumption that proper education of state actors will enable the criminal system to empower rather than subordinate minorities”; however, “most criminal law reforms end up becoming yet another procedural vehicle for warehousing the worst off”).

27. See generally Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 COLO. L. REV. 129, 132–34 (2014) (contrasting progressives who seek narrower provocation laws and concentrate on spectacular gender-based harm with those who seek to remedy racial bias in the death penalty through abolition and concentrate on the distributive and institutional problems with capital punishment).



sion of emphasizing more radical, non-authoritarian, egalitarian, and culture-changing measures.

In making the case that a punitive impulse influenced, at least in part, certain progressives to focus on stand your ground, the Article will address several aspects of the Zimmerman case. Part I will trace the origin of the public stand-your-ground discussion in order to shed light on the continued emphasis on the doctrine, despite evidence that the law may have played a very small, if any, causal role in determining the verdict. Part II will examine several cultural and legal predicates of the shooting and the not-guilty verdict, aside from the stand-your-ground law, which have and should continue to give racial justice scholars pause, but receive little current attention. Part III will analyze whether stand-your-ground is an appropriate locus of racial symbolism by investigating the law's actual racial effects. Finally, Part IV will discuss the concept of a punitive impulse, including its origins, its operation, and the implications for progressive theorizing and advocacy.

#### PART I: STAND YOUR GROUND'S LEGAL AND CULTURAL MEANINGS

On the first day of my Spring 2014 criminal law course at the University of Colorado Law School, ninety-one first-year law students, not yet jaded by having experienced an entire year of legal matriculation, sat listening attentively to my introductory lecture on substantive criminal law. In the first class of each semester, I broadly describe general criminal law principles. This semester, in discussing ways to defend against a crime, I asked the class, "What's an example of a widely-known affirmative defense?" A student shouted out, "Stand your ground!" while others nodded vigorously. In these students' minds, not only is stand your ground an affirmative defense in itself, it is *the* affirmative defense. Stand your ground has come to virtually replace self-defense in popular vernacular. Moreover, stand your ground, it appears, is not just an idiom for self-defense—it has a particular meaning. For many, the meaning is literal.<sup>28</sup> The law is about standing up for oneself in the face of a current or immediate-past confrontation.<sup>29</sup> In this view, the law broadly enables

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28. See Jeannie Suk, *Self Defense Is Part of Our Heritage*, N.Y. TIMES (March 21, 2012, 9:22 PM) [hereinafter Suk, *Heritage*], <http://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/self-defense-is-part-of-our-heritage> ("The real outrages are not actually in the provisions of the new self-defense laws, as nothing in those laws give permission to shoot or refuse to retreat when one isn't attacked to begin with. The dangers lie rather in incorrect and confused law enforcement perceptions of what the law allows, fueled by the cultural background and emotions that surrounded the laws' passage.").

29. The familiar critical mantra is that stand your ground's main function is "allowing—and perhaps encouraging—violent situations to escalate in public." Lindsey Boerma, *Holder: "Stand Your Ground" Allows, Encourages Escalating Violence*, CBS NEWS (July 16, 2013, 10:39 PM),

a person to preserve his sense of security or pride through deadly means, even possibly allowing one to shoot his fleeing opponent in the back.<sup>30</sup> The expansive cultural meaning of stand your ground also encompasses the notion of “shoot first” and “shoot at anytime,” meaning that even the subtlest threats justify deadly force and even first aggressors may stand their grounds.<sup>31</sup>

Given that much of society interprets stand your ground to entitle people to just shoot away, it is no surprise that many believe that the 2005 Amendment to Florida’s self-defense statute adding the stand-your-ground provision<sup>32</sup> affected a monumental shift in self-defense doctrine.<sup>33</sup> However, the legal meaning of the doctrine (removing duty to retreat) is far narrower than the cultural meaning, and the law is not so doctrinally revolutionary.<sup>34</sup> Indeed, American jurists have debated for well over a century the question of whether a person who reasonably fears imminent bodily injury and reasonably believes defensive force is necessary must first attempt to retreat before using force.<sup>35</sup> For example, the Kansas Supreme Court declared in 1896, “A person who is unlawfully attacked by another may stand his ground, and use such force as at the time reasonably appears to him to be necessary to protect himself.”<sup>36</sup>

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<http://www.cbsnews.com/news/holder-stand-your-ground-allows-encourages-escalating-violence/> (quoting Attorney General Holder).

30. See Interview with Sunny Hostin, CNN NEWSROOM (CNN Mar. 14, 2012), available at 2012 WLNR 6247518 (stating that under stand your ground, “[y]ou can shoot the person in the back”); Hundley et al., *supra* note 14 (profiling stand-your-ground cases where defendants who had shot victims in the back successfully utilized the defense).

31. See, e.g., *Repeal Florida’s Reckless “Shoot First” Law That Shields Trayvon’s Killer*, CHANGE, <http://www.change.org/petitions/repeal-florida-s-reckless-shoot-first-law-that-shields-trayvon-s-killer> (last visited Mar. 21, 2014); John Nichols, *Outrage Is Rising Against Stand Your Ground*, NATION (July 16, 2013, 10:01 PM), <http://www.thenation.com/blog/175312/outrage-rising-florida-and-nationally-against-stand-your-ground> (Mayor Bloomberg referring to stand-your-ground laws as “shoot first” laws).

32. Codified as FLA. STAT. § 776.013(3) (2013).

33. See, e.g., Susan Ferriss, *NRA Was Behind Spread of ‘Stand Your Ground’ Laws Across Nation*, CHARLESTON GAZETTE, Mar. 28, 2012, available at 2012 WLNR 6612148 (calling the law “unprecedented”); Adam Weinstein, *How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide*, MOTHER JONES (June 7, 2012, 2:10 AM), <http://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground>.

34. See Suk, *Heritage*, *supra* note 28 (stating that “the provisions of legislation like Florida’s, eliminating the duty to retreat from an attacker in public space before killing in self defense, are not in themselves radical departures from what we have traditionally known”).

35. See *Recent Cases, Criminal Law—Self Defense—Duty to Retreat*.—State v. Gardner, 971 N. W. (Minn.) 971, 15 YALE L.J. 194, 196 (1906) [hereinafter *Recent Cases*] (“The application of the doctrine ‘retreat to the wall,’ as stated in Coke, has been undergoing a change in this country in recent years and in some of the jurisdictions has been positively relaxed. The Supreme Court, in recent cases, has approved of the modifications of the old common law doctrine and held that a person ‘was not obliged to retreat’ under the circumstances.”) (internal citations omitted).

36. State v. Hatch, 57 Kan. 420, 420 (1896); see also Beard v. United States, 15 S. Ct. 962, 967 (1895) (finding no duty to retreat).

The popularity of the retreat rule in state criminal law has peaked and troughed over time, reflecting different political and social sensibilities regarding defensive force. Even prior to the stand-your-ground revolution in the late 2000s, retreat was often the exception rather than prevailing rule in American self-defense law.<sup>37</sup>

The inherent political valence of the duty to retreat is not entirely clear. On the one hand, the notion of standing one's ground derives from a North American rugged-individualism sensibility in which free citizens must have access to self-protection.<sup>38</sup> Additionally, it reflects masculinist norms regarding "true men's" behavior during contests of power.<sup>39</sup> In these senses, self-defense laws without the duty to retreat are politically conservative in nature. On the other hand, there has always been civil-libertarian skepticism of the duty to retreat. One popular argument against the duty is that prosecutors, courts, and jurors are not in a good position to second-guess the decision making of defendants and should not require those being attacked to forfeit their lives.<sup>40</sup> Accordingly, defenders generally disfavor the duty to retreat because it permits prosecutors to gain convictions even in clear cases of unprovoked attacks by asserting the defendant could have retreated. In this sense, like other leniency principles in criminal law, stand your ground can be seen as progressive in that it protects individuals from the punitive authority of the state.<sup>41</sup>

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37. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batters*, 71 N.C. L. REV. 371, 389 n.51 (1993) (stating that "[t]he majority of jurisdictions today do not require retreat" and "[e]xceptions and limitations to the retreat rule exist even in jurisdictions requiring retreat" and citing extensive authority).

38. See RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* 5-6 (1991).

39. See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 245 (2008) [hereinafter Suk, *The True Woman*].

40. See *Recent Cases*, *supra* note 35, at 196 ("The reason for this change [eliminating the duty to retreat] appears to be the general introduction of firearms, and the recognition by courts that self-defense should not be distorted by an unreasonable requirement of the duty to retreat, into self-destruction."). Cf. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 265 (2006) (explaining one of the historical grounds for the castle doctrine as protecting from government invasions of the home and calling the doctrine "an important intellectual foundation of the Fourth Amendment").

41. In response to the Marissa Alexander case, a Florida Republican introduced a bill to expand stand your ground to cover "warning shots." In supporting the measure, a representative from the Florida Public Defender Association stated:

The public defenders are, in general, in favor of having judges have discretion about sentencing as opposed to mandatory punishments. And so we felt like, with the amendments that were made to House Bill 89 in its current version, that there was some really important legislative-intent language that talked about 10-20-Life and encouraged prosecutors to not seek those kinds of punishments on people who threaten to use force in self-defense.

*Public Defenders Back Revised 'Warning Shot' Bill*, CBS MIAMI (Dec. 13, 2013, 10:40 PM),

In recent times, the duty-to-retreat debate has increasingly comingled with the national gun-control debate.<sup>42</sup> Gun rights supporters in the last decade have called for broad judicial interpretations and legislative expansions of the historic “castle doctrine,” which allows the use of deadly force against a home invader, subject to various limitations.<sup>43</sup> In the early 2000s, the NRA and the conservative lobbying group American Legislative Exchange Council (“ALEC”) used Florida as a test case to determine the level of support for laws broadening the castle doctrine outside the home.<sup>44</sup> The test proved a conservative success, with the Florida legislature passing the stand-your-ground law in 2005, over vocal objections from many Democrats, but without a single negative vote in the Senate.<sup>45</sup> By 2012, over two dozen states had adopted the legislation.<sup>46</sup> The 2005 Florida stand-your-ground law vote was intensely politicized because of the overarching concern with gun control and Florida Democrats’ resistance to an NRA and ALEC victory. After its passage, opponents decried the law as an unprecedented and radical transformation of the law of self-defense.<sup>47</sup>

Stand your ground modified Florida self-defense law in two primary ways: (1) It removed the duty to retreat before using force in a public place;<sup>48</sup> and (2) it provided “immunity” to defendants against whom there was not enough evidence to establish probable cause.<sup>49</sup> Tak-

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<http://miami.cbslocal.com/2013/12/13/public-defenders-back-revised-warning-shot-bill/>. The article quotes the state attorney as saying, “We’re more concerned about guilty people who hide behind (‘stand your ground’). The defense bar has equal concerns about the other side of the coin. . . . I guess our position is that modifying or tweaking the concept is unnecessary in terms of what we already had in place.” *Id.*

42. See Trayvon Martin’s Mother Testifies on ‘Stand Your Ground’ Laws, AL JAZEERA AM. (Oct. 29, 2013, 10:00 PM), <http://america.aljazeera.com/articles/2013/10/29/trayvon-martin-smothertestifiesonstandyourgroundlaws.html> (noting that the congressional stand-your-ground hearings “reviv[ed] the politically charged gun control issue a year ahead of the 2014 midterm elections”); see, e.g., Max Conger, *Stand Your Ground Laws Are American Values in Action*, POLICYMIC (July 30, 2013), <http://www.policymic.com/articles/57051/stand-your-ground-laws-are-american-values-in-action> (“Stand Your Ground laws are the reasonable legal outcome of the Second Amendment.”).

43. See Suk, *The True Woman*, *supra* note 39, at 237–38.

44. See Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 836–40 (2013) (discussing history of Florida’s 2005 legislation).

45. See Sanders, *supra* note 8. See also Lave, *supra* note 44, at 839.

46. See Lave, *supra* note 44, at 839.

47. See *supra* note 28.

48. FLA. STAT. § 776.013(3) (2013) (“A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.”).

49. FLA. STAT. § 776.032(1) (2013) (“A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution . . .”).

ing each of these changes in turn, removing the duty to retreat is not an extraordinary reconstitution of self-defense law, given that for years many jurisdictions operated without a duty to retreat.<sup>50</sup> Moreover, while it may be intuitive to think that removing the duty to retreat makes it much easier for defendants to plead self-defense, this might not be the case. Jurisdictions that retain the duty to retreat do not require unequivocal departure but only *safe* retreat.<sup>51</sup> Thus, in retreat jurisdictions, juries still can acquit sympathetic defendants who could have retreated by finding that retreat would have been dangerous. Nevertheless, removing the duty might make the marginal difference of compelling otherwise unwilling juries to acquit unsympathetic defendants who could have retreated. Yet if a jury regards a defendant as wholly unsympathetic, there are many other avenues toward conviction, for example, finding that he was the first aggressor,<sup>52</sup> holding that harm was not imminent,<sup>53</sup> or concluding that deadly force was not necessary.<sup>54</sup>

The second change was to grant immunity from prosecution to those who meet the definition of self-defense. Specifically, Florida law provides that “law enforcement . . . may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.”<sup>55</sup> However, prior to stand your ground, individuals were already immune from arrest in the absence of probable cause to believe they committed a crime.<sup>56</sup> The most potentially impactful stand-your-ground reform came by way of Florida courts, not the legislature. Florida courts have interpreted the legislation to guarantee defendants pleading stand your ground a pretrial “immunity hearing,” in which they can prove by a preponderance of the evidence that they acted in self-defense and are immune from prosecution.<sup>57</sup> This appears to tangibly benefit defendants by giving them two bites of the apple. One may, however, reason that the first bite is not very consequential. The hearing puts the burden of proof on the defendant and proceeds in front of a judge. Given judges’ general dispositions toward murder defendants,

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50. See Rosen, *supra* note 37, at 388–89.

51. See Rosen, *supra* note 37, at 389 n.51 (stating, “[o]f course, a person is required to retreat only if she can do so in complete safety” and citing sources).

52. See FLA. STAT. § 776.041 (2013) (“The justification described in the preceding sections of this chapter is not available to a person who . . . [i]nitially provokes the use of force against himself or herself . . .”).

53. See FLA. STAT. § 776.012(1) (2013) (justifying deadly force when a person “reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony”).

54. See *id.*

55. FLA. STAT. § 776.032(2) (2013).

56. See U.S. CONST. amend. IV.

57. Peterson v. State, 983 So. 2d 27, 29–30 (Fla. Dist. Ct. App. 2008) (*approved by* Dennis v. State, 51 So. 3d 456 (Fla. 2010)).

one might not think that grants of immunity occur very often.<sup>58</sup> In any case, this procedure did not affect Zimmerman, as he waived his immunity hearing.<sup>59</sup>

It is difficult to know the exact role the stand-your-ground law played in the Sanford police's decision to release Zimmerman the morning after the shooting. There is little evidence the Sanford police were thinking about the case as a duty-to-retreat (or not) case. Sanford Police Chief Lee's initial statement to the press on March 12, 2012, explained that police lacked probable cause because Zimmerman had stated that he had acted in self-defense, there was no one to contradict his story, Zimmerman had injuries, and police had not yet processed the evidence from the scene.<sup>60</sup> I remember listening to that statement and thinking, "There is an unarmed dead boy on the street. In what world would the police find no probable cause based on the self-serving statements of the shooter?"<sup>61</sup> Now, it is possible that the stand-your-ground provision induced the Sanford police to be hyper-vigilant about probable cause and err on the side of not arresting, even in the face of colorable probable cause. Another explanation—the one initially publicized by the Martins' attorneys and supporters—is that the police used restraint in this case because Martin was a young black male and Zimmerman was a white(ish) neighborhood watch captain with close police ties.<sup>62</sup>

In the immediate aftermath of the February 26, 2012 shooting, the Sanford Police Department came under intense public scrutiny, and

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58. However, it seems that Florida judges are in fact granting immunity. See *Explore Our 'Stand Your Ground' Data*, TAMPA BAY TIMES, <http://www.tampabay.com/stand-your-ground-law/data>, (last visited Feb. 5, 2014). Interestingly, the vast majority of those immunity grants involve non-homicide cases and cases with women killers.

59. Erin McClam, *Zimmerman Gambles by Waiving 'Stand Your Ground' Hearing Before Trial*, NBC News (Apr. 30, 2013, 4:48 PM), [http://usnews.nbcnews.com/\\_news/2013/04/30/17987796-zimmerman-gambles-by-waiving-stand-your-ground-hearing-before-trial?lite](http://usnews.nbcnews.com/_news/2013/04/30/17987796-zimmerman-gambles-by-waiving-stand-your-ground-hearing-before-trial?lite).

60. CNN NEWSROOM (CNN Mar. 13, 2012), available at 2012 WLNR 6243191; *City of Sanford in Over its Head*, W. ORLANDO NEWS (Mar. 12, 2012), <http://westorlandonews.com/2012/03/12/city-of-sanford-in-over-its-head/>.

61. On March 13, 2012, the day after Chief Lee announced that he lacked probable cause to arrest and the day before Sanford police turned the case over to the prosecutor, Sanford homicide detective Christopher Serino filed a report recommending arrest stating that Zimmerman's wounds were "marginally consistent with a life-threatening episode, as described by him, during which neither a deadly weapon nor deadly force were deployed by Trayvon Martin." Julia Dahl, *Christopher Serino, Cop Who Said George Zimmerman Should Be Charged, Is Transferred from Investigative Unit*, CBS NEWS (June 26, 2012, 4:42 PM), <http://www.cbsnews.com/news/christopher-serino-cop-who-said-george-zimmerman-should-be-charged-is-transferred-from-investigative-unit/>.

62. See Schneider, *supra* note 11 (quoting the Martins' attorney Benjamin Crump as saying, "[d]o we really believe that if Trayvon Martin would have pulled the trigger, he would not be arrested? . . . This is obviously a cover-up, and we need a sweeping overhaul of the Sanford Police Department").

commentators began to uncover its checkered racial past.<sup>63</sup> Within a week, Martin's family had retained attorneys and were making statements to the press accusing the Sanford police of malfeasance and calling for Zimmerman's prompt arrest.<sup>64</sup> Critics derided Chief Lee for referring to Trayvon's tragic death as "an event."<sup>65</sup> Martin's supporters also chastised the police department for letting the deceased Martin languish as a "John Doe" for three days without even asking area residents to identify him.<sup>66</sup> Reports also surfaced that police had corrected a witness who said she heard Trayvon screaming for help, telling her that it was actually Zimmerman.<sup>67</sup> In the weeks following the shooting, much of the media commentary and most of the sentiments from Martin supporters involved the notion that race had impermissibly influenced white government officials to treat a white man who racially profiled and killed a black youth more leniently than other types of suspects.

By mid-March, the case was receiving regular national attention. CNN featured sound bites and updates on the Trayvon Martin tragedy as part of its news rotation. While much of the public outcry continued to revolve around racial profiling and racialized policing, media pundits began to introduce Florida's stand-your-ground law to news watchers.<sup>68</sup> However, at that early time, attention to the law did not tend to deflect from the assertion that police and prosecutors had ample grounds to arrest and charge Zimmerman.<sup>69</sup> By March 19th, the Department of Justice and FBI had opened a civil rights investigation into whether the shooting was racially motivated.<sup>70</sup> March 21st saw the "million hoodie march" in New York City, in which protesters shouted "we want

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63. See, e.g., Countusin, *Video 2010 Sanford FL: Cop Son Caught On Camera Beating Black Homeless Man . . . Sergeant Anthony Raimondo Declined to Arrest Him; Same Sergeant that Didn't Arrest Zimmerman*, WORDPRESS (Mar. 27, 2012), <http://countusin.wordpress.com/2012/03/27/2010-sanford-fl-cops-son-caught-on-camera-beating-homeless-man-sergeant-anthony-raimondo-declined-to-arrest-same-sergeant-that-didnt-arrest-zimmerman/>; *State Attorney's Offices Overwhelmed by Emails Demanding Justice for Slain Teen*, WFTV (Mar. 15, 2012, 5:03 PM), <http://www.wftv.com/news/news/local/state-attorneys-offices-overwhelmed-emails-demandi/nLTdJ/>.

64. See Rudolf & Lee, *supra* note 10.

65. Fabiola Santiago, *Unarmed Teen's Killing in Sanford Deserves Answers*, MIAMI HERALD (Mar. 13, 2012), available at 2012 WLNR 5409814.

66. See Isabelle Zehnder, *Trayvon Martin in Morgue 3 Days as 'John Doe' After Mom Reported Him Missing*, EXAMINER (Mar. 23, 2012), <http://www.examiner.com/article/trayvon-martin-morgue-3-days-as-john-doe-after-mom-reported-him-missing>.

67. See *Trayvon Lawyer: Police Trying to Blame Victim*, CBS News (Apr. 16, 2012, 9:34 AM), <http://www.cbsnews.com/news/trayvon-lawyer-police-trying-to-blame-victim/>.

68. See *infra* notes 76–80.

69. See, e.g., Interview with Sunny Hostin, *CNN Newsroom* (CNN Mar. 13, 2012), available at 2012 WLNR 6245521 ("[W]e know that Florida has sort of the most expansive, I think, stand-your-ground law in our country, meaning you don't have to retreat. You can defend yourself. But there's always that exception, even in Florida, about the first aggressor.").

70. See Matt Gutman et al., *FBI, Justice Department to Investigate Killing of Trayvon Martin*

arrests.”<sup>71</sup> On March 22nd, Chief Lee stepped down, and the embattled local prosecutor resigned from the case, citing a conflict of interest because of his close connection to the police.<sup>72</sup>

Amidst this politically and racially-charged backdrop, Governor Rick Scott appointed Jacksonville State Attorney Angela Corey to the case on March 22nd,<sup>73</sup> the day before President Obama put race at the forefront of the controversy by famously stating, “If I had a son, he’d look like Trayvon.”<sup>74</sup> In contrast to the President, Corey’s first public statement as lead prosecutor placed the facially neutral stand-your-ground law at the very center of the case in an ostensible effort to preempt any potential claim that failure to rigorously prosecute Zimmerman was due to racial bias. She stated to the press on March 26th, “The stand-your-ground law is one portion of justifiable use of deadly force. And what that means is that the state must go forward and be able to prove its case beyond a reasonable doubt. . . . So it makes the case in general more difficult than a normal criminal case.”<sup>75</sup> Despite the fairly nonsensical nature of the statement, given that the state always must prove its case beyond a reasonable doubt, Corey’s sentiment that stand-your-ground *a priori* rendered Zimmerman difficult to prosecute and convict, stuck.

Little by little, the once-central concerns over racial profiling and police bias started to fade in the face of a highly partisan and heated battle for the doctrinal future of self-defense law. While national news media outlets continued to cover the specific details of the Zimmerman case, the larger policy discussion nearly exclusively involved the past

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by *Neighborhood Watchman*, ABC NEWS (Mar. 19, 2012), <http://abcnews.go.com/US/fbi-justice-department-investigate-trayvon-martin-killing/story?id=15955985>.

71. See Deepti Hajela, *Trayvon Martin ‘Million Hoodie March’ March Draws Hundreds in New York City*, HUFFINGTON POST (Mar. 21, 2012, 11:37 PM), [http://www.huffingtonpost.com/2012/03/21/trayvon-martin-million-hoodie-march\\_n\\_1371403.html](http://www.huffingtonpost.com/2012/03/21/trayvon-martin-million-hoodie-march_n_1371403.html).

72. Kevin McVeigh & Amy Green, *Trayvon Martin Death: Sanford Police Chief Steps Down Temporarily*, GUARDIAN (Mar. 22, 2012, 17:18 PM), <http://www.theguardian.com/world/2012/mar/22/trayvon-martin-sanford-police-chief-steps-down>; Trymaine Lee, *Trayvon Martin Case: State Attorney Quits Investigation as State Studies ‘Stand Your Ground’ Law*, HUFFINGTON POST (Mar. 22, 2012, 10:12 PM), [http://www.huffingtonpost.com/2012/03/22/trayvon-martin-state-attorney\\_n\\_1374206.html](http://www.huffingtonpost.com/2012/03/22/trayvon-martin-state-attorney_n_1374206.html). The prosecutor had already committed to sending the case to the grand jury. See McVeigh & Green, *supra*.

73. See Tim Kephart, *Scott Appoints New Prosecutor in Trayvon Martin Case*, CBS MIAMI (Mar. 22, 2012, 9:17 PM), <http://miami.cbslocal.com/2012/03/22/scott-appoints-new-prosecutor-in-trayvon-martin-case/>.

74. Krissah Thompson & Scott Wilson, *Obama on Trayvon Martin: ‘If I Had a Son, He’d Look Like Trayvon,’* WASH. POST (Mar. 23, 2012), [http://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQAkPpVS\\_story.html](http://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQAkPpVS_story.html).

75. Matt Gutman & Seni Tienabeso, *Trayvon Martin Shooter Told Cops Teenager Went for His Gun*, CBS NEWS (Mar. 26, 2012), <http://abcnews.go.com/US/trayvon-martin-shooter-teenager-gun/story?id=16000239>.



and future of stand-your-ground laws.<sup>76</sup> Many media pundits and talking heads focused exclusively on whether or not the law tended to unjustly exonerate truly culpable killers like gang members, repeat offenders, and drug dealers.<sup>77</sup> In this sense, the anti-stand-your-ground bloc utilized the familiar racialized tropes of low-class recidivist street-criminals getting off easy to convince the public that the law is undesirable.<sup>78</sup> Commentators repeated another familiar tough-on-crime discourse, reminiscent of pro-capital punishment arguments, that lenient murder laws (those with broad self-defense formulations) predictably correlate with higher homicide rates.<sup>79</sup> Whatever the actual merits of these critiques of stand your ground, they have little to do with the formerly predominant argument that stand your ground invested Florida state actors with significant discretion that they ultimately applied in a racially biased manner.<sup>80</sup>

As the question of stand your ground's political and utilitarian desirability increasingly took center stage and the law reform movement gained momentum, Zimmerman's case moved to trial. The actual trial was almost anticlimactic from a stand-your-ground perspective. Relatively early, it became clear that the defense did not intend to argue that Zimmerman could have retreated but instead stood his ground.<sup>81</sup> Rather, the defense took pains to demonstrate that Zimmerman shot Martin in the midst of a physical altercation in which Martin was actively assailing him by smashing his head on the pavement.<sup>82</sup> To counter the notion that Martin was unarmed, attorney Mark O'Mara held up a now-famous heavy piece of concrete, declaring that this was Martin's weapon and

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76. See *infra* notes 97, 102, 109 and accompanying text.

77. See *supra* notes 14, 18, and accompanying text. It is true that some commentators accused the law of being inherently racist, but they could provide little support outside of the Zimmerman case itself and some other anecdotes. See, e.g., Nunn, *infra* note 110.

78. See *infra* notes 160, 293, and accompanying text.

79. See, e.g., sources cited *supra* note 14.

80. Consider this comment:

This case is about race because there is every indication that George Zimmerman would not have followed Martin that night but for his race. . . . It also appears that the Sanford Police Department did not initially give this case the type of scrutiny it deserved. It may also be possible that some of the jurors were unable to exclude race from their consideration. Having said all those things however the outcome of this case was a result of the law. Moving forward, it is time for a serious examination of the state of the law of self-defense in this country.

Gary Norton, *The Outrage in the Zimmerman Case Is the Law—Not the Judge, Jury, Defense or Prosecution*, DAILY KOS (July 15, 2013, 12:46 PM), <http://www.dailykos.com/story/2013/07/15/1223870/-The-Outrage-In-The-Zimmerman-Case-Is-The-Law-Not-The-Judge-Jury-Defense-Or-Prosecution>.

81. See CBS News, *supra* note 20.

82. See Lizette Alvarez, *In Zimmerman Case, Self-Defense Was Hard to Topple*, N.Y. TIMES, July 14, 2013, [http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all&_r=1&) (noting that the defense called the case "classic self defense" and stated that Zimmerman could not retreat).

calling any suggestion to the contrary “disgusting.”<sup>83</sup> The fraught nature of the trial had less to do with stand your ground, and much more to do with prosecutors’ lackluster performances and Angela Corey’s *ex ante* refusal to assert what most found so obvious—that Zimmerman had unjustly racially profiled Martin.<sup>84</sup> Corey’s clear position that Martin’s death and the subsequent events were not evidence of societal and governmental racism carried over into her (arguably poor) trial strategy.<sup>85</sup> And after the acquittal, a smiling Corey declared, “This case has never been about race.”<sup>86</sup>

In apparent agreement with Corey, many commentators interpreted the verdict as a product, not of racial bias, but of the inherently undesirable stand-your-ground law.<sup>87</sup> Critics clung to the notion that the law played a central role in the not-guilty verdict rendered by the jury of 5 white and 1 minority women. The jury instructions on self-defense did mention the stand-your-ground provision, and some of the jurors made oblique references to the principle in explaining the verdict. However, it appears that the jurors neither distinguished stand your ground from classic self-defense nor actually thought Zimmerman could have retreated.<sup>88</sup> Accordingly, to the extent that the stand-your-ground law affected juror motivations, it was surely not the *legal* meaning of the law regarding retreat, but rather the *cultural* meaning that stand-your-ground

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83. See Lizette Alvarez, *Zimmerman Case Goes to Jury, with Defense Urging it to Remove Emotion*, N.Y. TIMES, July 12, 2013, <http://www.nytimes.com/2013/07/13/us/zimmerman-trial.html>.

84. See *infra* note 85; see also Lisa Bloom, Op.-Ed., *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html?pagewanted=all> (noting that prosecutors never inquired as to why the defense said Martin “did match” the description of the robbers in the neighborhood without mentioning that the “match” was only that Martin was a black male, and that prosecutors did not mention Zimmerman’s previous 911 calls about suspicious African Americans).

85. The judge did not permit prosecutors to say that Zimmerman had “racially” profiled Martin, but allowed them to claim he “profiled” Martin. In any case, prosecutors signaled their intention not to claim Martin had been racially profiled. See Manuel Roig-Franzia, *George Zimmerman Trial: Race Is a Subtext, Not the Focus*, WASH. POST (July 2, 2013), [http://www.washingtonpost.com/national/george-zimmerman-trial-race-is-a-subtext-not-the-focus/2013/07/02/a296611e-e262-11e2-a11e-c2ea876a8f30\\_story.html](http://www.washingtonpost.com/national/george-zimmerman-trial-race-is-a-subtext-not-the-focus/2013/07/02/a296611e-e262-11e2-a11e-c2ea876a8f30_story.html).

86. Bloom, *supra* note 84.

87. See Mark Follman & Lauren Williams, *Actually, Stand Your Ground Played a Major Role in the Trayvon Martin Case*, MOTHER JONES (July 19, 2012, 2:00 AM), <http://www.motherjones.com/politics/2013/07/stand-your-ground-george-zimmerman-trayvon-martin>.

88. See *infra* notes 165, 176, and accompanying text. Juror B-37 stated she acquitted “because of the heat of the moment and the stand your ground. He had a right to defend himself. 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.” Anderson Cooper 360 Degrees, *Exclusive Interview With Juror B-37: Defense Team Reacts to Juror Interview*, CNN (July 15, 2013), <http://transcripts.cnn.com/TRANSCRIPTS/130715/acd.01.html> [hereinafter *Juror B-37 Interview*].

generally makes it difficult to convict anyone who claims self-defense.<sup>89</sup> Perhaps the jurors picked up on this cultural meaning because they were privy to the 2005 debates in which stand-your-ground critics predicted apocalyptic results from the legal change.<sup>90</sup> More likely, the jurors internalized the media commentary in the aftermath of the Martin shooting, in which stand-your-ground opponents and legal pundits decried the law as a shooting free-for-all.<sup>91</sup> Consequently, there is some irony in the fact that the sensational arguments intended to convince the public to condemn stand your ground may have constructed a cultural meaning of stand your ground that makes the law more likely to produce the very dystopia its opponents hope to prevent.

Today, six months after the verdict, the Trayvon Martin shooting is no longer front-page news. Zimmerman has cropped up in the media because of various post-verdict accusations of violent behavior.<sup>92</sup> These reports serve to confirm critics' notion that the stand-your-ground law served to exonerate yet another unstable murderer.<sup>93</sup> Currently, however, there is little talk of racial profiling and police and prosecutors bias in the Zimmerman case.<sup>94</sup> But stand-your-ground continues to appear in national news on a regular basis, and the cultural meaning becomes ever more expansive.<sup>95</sup> Critics decry stand your ground as the reason for the hung-jury on the murder count in the Michael Dunn ("thug" music) case.<sup>96</sup> Pundits fret over the possibility that Florida's "popcorn shooter"

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89. See Herbanreleaf, *5 Myths About Stand Your Ground Debunked*, DAILY KOS (July 17, 2013, 4:27 PM), <http://www.dailykos.com/story/2013/07/17/1224515/-5-Myths-about-Stand-Your-Ground-Debunked>.

90. One of the more interesting news tidbits is that after the law's passage, the Brady Campaign to Prevent Gun Violence issued a brochure warning tourists that Florida was a dangerous place because the stand-your-ground law escalates arguments into homicides. See Abby Goodnough, *Tourists to Florida Get a Warning as Greeting*, N.Y. TIMES (Oct. 4, 2005), <http://www.nytimes.com/2005/10/04/national/nationalspecial/04shoot.html>.

91. See, e.g., *supra* notes 29–31 and accompanying text.

92. See, e.g., Doug Stanglin et al., *Zimmerman Accused of Pointing Shotgun at Girlfriend*, USA TODAY (Nov. 18, 2013, 11:54 PM), <http://www.usatoday.com/story/news/nation/2013/11/18/zimmerman-trayvon-arrested/3628591/>.

93. See, e.g., Dale Archer, *George Zimmerman Is Arrested Again*, PSYCHOLOGY TODAY (Nov. 21, 2013), <http://www.psychologytoday.com/blog/reading-between-the-headlines/201311/george-zimmerman-is-arrested-again> (calling Zimmerman "unstable" and a "ticking time bomb").

94. My unscientific Westlaw news survey, consisting of typing "Zimmerman or Trayvon /p (within paragraph) racial-profiling" revealed only 28 news reports on the issue from January 4th to February 4th, 2014, many of which dealt with a prospective boxing match between Zimmerman and the Game. A search in that same period for stand your ground uncovered over 400 news articles.

95. *Id.*; see also Janell Ross, *Activists Batling 'Stand Your Ground' State by State*, THE ROOT (Nov. 11, 2013, 12:30 AM), [http://www.theroot.com/articles/politics/2013/11/stand\\_your\\_ground\\_battles\\_are\\_state\\_by\\_state.html](http://www.theroot.com/articles/politics/2013/11/stand_your_ground_battles_are_state_by_state.html) (calling stand your ground "globally infamous").

96. See, e.g., Lisa Bloom, *4 Reasons Why Stand Your Ground Made a Difference in the*

will successfully plead stand your ground.<sup>97</sup> New studies crop up every few weeks seeking to determine whether eliminating the duty to retreat increases the number of homicides or the percentage of justified homicides.<sup>98</sup> Stand your ground comes up routinely in the news, but the public discussion is relatively unmoored from race.<sup>99</sup>

The NAACP dubbed Trayvon Martin this generation's Emmett Till, and the comparison appears apt.<sup>100</sup> Both youths were racially profiled; both ended up dead; and the killers benefitted from racial bias in the administration of criminal justice.<sup>101</sup> Imagine, however, if the legacy of the Till tragedy were a set of arguments for mandating the death penalty, restricting jury and grand jury rights, and tempering double jeopardy, because these doctrines contributed to the killers Bryant and Milam's ability to avoid punishment. Rather, the actual lesson of the Till tragedy is not that criminal laws were generally too lenient on culpable murderers, but that the widespread existence of racism made it impossible for black victims (and defendants) to receive justice even under facially neutral laws. Consequently, there is a distinct "post-racial" turn in the analysis of the Martin case, given that the critical consensus seems to be that Martin's death and Zimmerman's acquittal are primarily products of overly permissive murder laws and less so of deeply entrenched

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*Michael Dunn Trial*, THE HUFFINGTON POST (February 21, 2014), [http://www.huffingtonpost.com/lisa-bloom/four-reasons-why-stand-yo\\_b\\_4821223.html](http://www.huffingtonpost.com/lisa-bloom/four-reasons-why-stand-yo_b_4821223.html).

97. See, e.g., Melanie Michael, *Popcorn Defense: Can Accused Florida Movie Shooter Use 'Stand Your Ground'?*, KSDK (Jan. 15, 2014, 8:10 AM), <http://www.ksdk.com/story/news/nation/2014/01/15/popcorn-defense-can-accused-florida-movie-shooter-use-stand-your-ground/4488939/> (discussing applicability of stand your ground in case where retired police officer shot fellow movie-goer who threw popcorn at him).

98. See, e.g., NAT'L URBAN LEAGUE ET AL., SHOOT FIRST: 'STAND YOUR GROUND' LAWS AND THEIR EFFECT ON VIOLENT CRIME AND THE CRIMINAL JUSTICE SYSTEM 6, 9 (SEPT. 2013) available at [https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/ShootFirst\\_v4.pdf](https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/ShootFirst_v4.pdf); Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?*, 48 J. HUM. RESOURCES 821, 823, 844 (2013), available at [http://econweb.tamu.edu/mhoekstra/castle\\_doctrine.pdf](http://econweb.tamu.edu/mhoekstra/castle_doctrine.pdf); Anton Strezhnev, *Some More Evidence that Florida's 'Stand Your Ground' Law Increased Firearm Homicide Rates*, CASUAL LOOP BLOG (July 16, 2013, 3:29 PM), <http://causalloop.blogspot.nl/2013/07/some-more-evidence-that-floridas-stand.html>.

99. See, e.g., Jeff Weiner & Arelis R. Hernández, *Another 'Stand Your Ground' Case? MetroWest Shooting Suspect Claims He Was Attacked*, ORLANDO SENTINEL (Jan. 17, 2014), [http://articles.orlandosentinel.com/2014-01-17/news/os-metrowest-shooting-stand-your-ground-20140117\\_1\\_trayvon-martin-apartment-complex-metrowest](http://articles.orlandosentinel.com/2014-01-17/news/os-metrowest-shooting-stand-your-ground-20140117_1_trayvon-martin-apartment-complex-metrowest); Charlotte Alter, *Florida Man Who Killed Teen Over Loud Music Dispute Due in Court*, TIME (Feb. 3, 2014) <http://nation.time.com/2014/02/03/stand-your-ground-michael-dunn-jordan-davis-killing-loud-music/#ixzz2sOUvfjIH>.

100. See *NAACP Calls for Federal Action*, NPR (July 14, 2013, 8:00 AM), <http://www.npr.org/templates/story/story.php?storyId=202011023>.

101. Keith A. Beauchamp, *Emmett Till, Trayvon Martin and the Resurgence of Injustice*, HUFFINGTON POST (Apr. 25, 2012, 8:15 PM), [http://www.huffingtonpost.com/keith-a-beauchamp/trayvon-martin-emmitt-till\\_b\\_1453854.html](http://www.huffingtonpost.com/keith-a-beauchamp/trayvon-martin-emmitt-till_b_1453854.html).

racial hierarchy.<sup>102</sup>

## PART II: THE INGREDIENTS OF A RACIAL TRAGEDY

In terms of criminal law equity, repealing stand your ground is one-sided: It benefits prosecutors. It seems obvious that without stand your ground, it is easier to gain murder convictions, which is why such laws are widely disfavored by police and prosecutors.<sup>103</sup> In this age of mass incarceration, an era in which prosecutorial power falls most heavily on the shoulders of young black men,<sup>104</sup> it is interesting that the issue from the Zimmerman case now eclipsing all others is the one publicized primarily by the prosecutor: Stand your ground makes it too difficult to arrest and prosecute people for murder. All the other issues brought up by the disturbing case cut both ways. Condemning racial profiling may serve to disadvantage the few defendants whose crime involved racial profiling. For the most part, however, reducing profiling will benefit minority defendants and suspects unfairly targeted by police.<sup>105</sup> Controlling bias in police and prosecutor decision making might burden certain white defendants who benefit from such bias; however, it would undeniably benefit minority defendants who, at this moment, bear the brunt of the punitive impulses of state actors.<sup>106</sup> Reforming Florida's six-person felony jury system could hurt defendants in the rare case where the

102. See *infra* note 102 and accompanying text.

103. See John F. Timoney, Op-Ed., *Florida's Disastrous Self-Defense Law*, N.Y. TIMES, Mar. 23, 2012, <http://www.nytimes.com/2012/03/24/opinion/floridas-disastrous-self-defense-law.html> (stating that he as a former Miami Police Chief "along with other Florida chiefs of police" wrote a letter to the Florida legislature in 2005 opposing stand your ground); Editorial, *More 'Stand Your Ground' Fantasizing*, N.Y. TIMES, November 23, 2013, [http://www.nytimes.com/2013/11/24/opinion/sunday/more-stand-your-ground-fantasizing.html?\\_r=0](http://www.nytimes.com/2013/11/24/opinion/sunday/more-stand-your-ground-fantasizing.html?_r=0) (noting that Ohio police organizations "strongly oppose" stand your ground); Lizette Alvarez, *A Florida Law Gets Scrutiny After a Teenager's Killing*, N.Y. TIMES (Mar. 20, 2012), [http://www.nytimes.com/2012/03/21/us/justice-department-opens-inquiry-in-killing-of-trayvon-martin.html?\\_r=0](http://www.nytimes.com/2012/03/21/us/justice-department-opens-inquiry-in-killing-of-trayvon-martin.html?_r=0) (discussing Florida's prosecutors' widespread opposition to the law and quoting the president of the Florida Prosecuting Attorneys Association as criticizing stand your ground as "a very broad law in terms of the availability of the defendant to try to take advantage of [it]").

104. See PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 40–61 (2009) (problematizing mass incarceration).

105. See *Floyd v. City of New York*, 813 F. Supp. 2d 417, 451 (S.D.N.Y. 2011) (citing research demonstrating that "consistently, across the most policy-relevant and frequent crime categories, that racial composition predicts stop patterns *over and above any predictions made by crime or other factors*" (citations omitted)).

106. See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013) (conducting empirical analysis and stating that "research shows that after controlling for the arrest offense, criminal history, and other prior characteristics, there remains a black-white sentence-length gap of about 10%. But judges' choices do not appear to be principally responsible. Instead, between half and the entire gap can be explained by the prosecutor's initial charging decision—specifically, the decision to bring a charge carrying a 'mandatory minimum.'").

majority of the six jurors happened to be pro-defense.<sup>107</sup> Nevertheless, one might expect that the minority juror voices silenced in a six-person jury are more prone to be minority-friendly<sup>108</sup> and defense-friendly voices.<sup>109</sup> In myopically focusing on stand your ground, some progressive commentators prioritized a subject that solely puts a negative spotlight on leniency over topics that challenge racial hierarchy and state criminal authority.

This Section provides a non-exhaustive list of problematic legal and social conditions contributing to the Martin tragedy. Because a comprehensive analysis is beyond the scope of this Article, it will only introduce the issues with the dual goals of generating a fuller discussion and providing insight on how the punitive impulse demotes progressive radical concerns. Here, I am not claiming that stand your ground played no role in the tragedy.<sup>110</sup> Rather, I assert that analysts may overstate the law's causal connection to the upsetting series of events and understate other contributors. It is distinctly possible that Zimmerman was aware of the specific stand-your-ground law, given his status as a "wannabe cop" who had taken courses covering Florida's self-defense law, and that the law motivated his decision to stalk and ultimately kill Martin.<sup>111</sup> It may also be the case that the police and prosecutors' apparent restraint and the jury's ultimate verdict were conditioned, at least in part, by stand your ground, as discussed in the previous section.<sup>112</sup> Nevertheless, one could easily imagine the case's series of events taking place in the exact same manner (save for Corey's deliberate citation of stand your ground as racial cover), even if Florida law had retained the duty to retreat.

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107. See *infra* notes 166–72 and accompanying text for a discussion of the constitutional history of the six-person jury.

108. See *Ballew v. Georgia*, 435 U.S. 223, 242 (1978) (observing in small juries "[n]ot only is the representation of racial minorities threatened . . . but also majority attitude or various minority positions may be misconstrued or misapplied by the smaller groups").

109. *Id.* at 234 (citing studies that the risk of convicting an innocent person increases when jury size decreases and the risk of not convicting a guilty person increases when jury size increases).

110. Cf. Kenneth Nunn, Op-Ed., *Racism Is the Problem Here*, N.Y. TIMES (Mar. 21, 2012), <http://www.nytimes.com/roomfordebate/2012/03/21/do-stand-your-ground-laws-encourage-vigilantes/racism-is-the-problem-not-the-stand-your-ground-laws> ("Simply eliminating Stand Your Ground . . . would not prevent young men like Trayvon Martin from getting killed and their killers getting off scot-free.").

111. See Cara Buckley, *Zimmerman Studied 'Stand Your Ground' in Class, Florida Court Is Told*, N.Y. TIMES, July 3, 2013, <http://www.nytimes.com/2013/07/04/us/witnesses-tell-of-zimmermans-interest-in-law-enforcement.html> (reporting that although Zimmerman told the press he had never heard of the law, he received an A in a course covering stand your ground); Richard Luscombe, *George Zimmerman: A Wannabe Cop 'Sick and Tired' of Criminals, Court Hears*, GUARDIAN (July 12, 2013, 3:02 PM), <http://www.theguardian.com/world/2013/jul/12/george-zimmerman-trayvon-martin-murder-trial>.

112. See *supra* notes 88–91 and accompanying text.

Consequently, stand your ground is only part of the story, and we ought to be circumspect about the missing aspects of the tale.

### A. *Neighborhood Watches*

An anti-neighborhood-watch movement never gained traction with critics of the Zimmerman case. Interestingly, Florida's history with "citizen patrols" is actually far more racially fraught than its history with self-defense principles.<sup>113</sup> Although Zimmerman's Twin Lakes neighborhood watch bore little resemblance to the segregationist citizen patrols of old, Trayvon Martin's death can be seen as a direct product of a very racialized "neighborhood watch mentality." This mentality conceives of neighborhoods as fortified castles to be defended from outside invaders and is intimately intertwined with exaggerated fear of crime, racial profiling, increased securitization, and state authoritarianism.<sup>114</sup> There is some nascent discussion of the neighborhood watch process stemming from the Zimmerman case.<sup>115</sup> This discussion, however, does not involve critiquing the neighborhood watch mentality, so much as discussing the ways in which Zimmerman violated neighborhood watch protocol by being armed and confronting Trayvon Martin.<sup>116</sup> Critics further assert that doctrines like stand your ground convert neighborhood watchers from proper police-controlled sentries into undesirable

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113. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 337 (1991) (discussing the 1825 Florida statute "An Act to Govern Patrols" which "provided that white citizen patrols 'shall enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms . . .'" (internal citations omitted). Indeed citizen patrols were instituted to enforce all the aspects of the "slave codes." Later, in Florida and elsewhere, citizen patrols enforced racial segregation. See Werner J. Einstadter, *Citizen Patrols: Prevention or Control?*, 22 CRIME & SOC. JUST., 200, 202 (1984) (noting that the white citizen patrols that grew out of the 1960s urban riots were formed with the purpose of "keeping blacks in place").

114. This is not unlike the "defended neighborhood" idea. "The defended neighborhood is a product of an urban environment, and a response to the fear of invasion by other ethnic, racial, and/or economic groups." JUDITH N. DeSANA, *PROTECTING ONE'S TURF* 12 (2005). See generally GERALD SUTTLES, *THE DEFENDED NEIGHBORHOOD* (1972).

115. See, e.g., Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES, Mar. 22, 2012, [http://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html?pagewanted=1&_r=0).

116. See *id.* (quoting the Sanford Police Department's volunteer coordinator as stating that the problem was that Zimmerman "didn't follow the basic philosophy of the neighborhood watch"); Soumya Karlamangla, *City Where Trayvon Martin Was Killed Changes Neighborhood Watch Rules*, L.A. TIMES (Nov. 2, 2013), <http://articles.latimes.com/2013/nov/02/nation/la-na-sanford-neighborhood-watch-20131103> ("Chris Tutko, who retired in June as director of national neighborhood watch for the National Sheriffs' Assn., said a volunteer is merely supposed to be the eyes and the ears of the police department. The association recommends that neighborhood watches be unarmed.").

vigilantes.<sup>117</sup>

By focusing on how Zimmerman, emboldened by stand your ground, strayed from neighborhood watch protocol, critics have lost sight of the fact that, in many ways, Zimmerman was a prototypical neighborhood watch captain. The neighborhood watch mentality rests on a set of ideas about criminal risk and prevention, to which Zimmerman clearly subscribed. The risk idea involves the notion that probability of crime is always extremely high and utmost vigilance is required.<sup>118</sup> This notion is not necessarily based on any systematic study of conditions, but rather on anecdote, racialized paranoia, and a socially embedded feeling that crime is omnipresent.<sup>119</sup> Indeed, Zimmerman's beliefs about ubiquitous criminal risk were easily confirmed by the recent break-ins in his neighborhood.<sup>120</sup> The prevention idea involves confidence that one may prevent crime through the random monitoring of outsiders.<sup>121</sup>

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117. See Robertson & Schwartz, *supra* note 115.

118. David Garland describes neighborhood watches as one of the many "low-level adaptations" private citizens make in the face of fear of crime. Others include gated communities, enclosed malls, private security, and private transportation. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 161-63. One Twin Lakes resident characterized the state of the neighborhood before the shooting:

There was definitely a sense of fear in the neighborhood after all of this started happening, and it just kept on happening. It wasn't just a one-time thing. It was every week. Our next-door neighbor actually said if someone came into his yard he would shoot him. If someone came into his house he would shoot him. Everyone felt afraid and scared.

Amy Green, *Zimmerman's Twin Lakes Community Was on Edge Before Trayvon Shooting*, DAILY BEAST, (Mar. 28, 2012), <http://www.thedailybeast.com/articles/2012/03/28/zimmerman-s-twin-lakes-community-was-on-edge-before-trayvon-shooting.html>.

119. Vanessa Barker observes that in latter twentieth-century America:

Fear of crime, real and imagined, spurred on in part by the spread of 24/7 news programming and by the politicization of crime, intensified concerns with safety and law and order, changing the character of social life and filling the landscape with surveillance cameras, car alarms, private security guards, neighborhood watch programs, gated communities, and metal detectors in schools and government buildings. Americans created their own "defensible space," protecting themselves, their loved ones, and their possessions against crime and violence and demanding harsh punishment against anyone who violated the law.

*Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 494 (2010) (citations omitted).

120. Community members in Twin Lakes formed the neighborhood watch after several burglaries, which then engendered "street knowledge" of even more incidents of burglary and vandalism. See Chris Francescani, *George Zimmerman: Prelude to a Shooting*, REUTERS, Apr. 25, 2012, available at <http://www.reuters.com/article/2012/04/25/us-usa-florida-shooting-zimmerman-idUSBRE83O18H20120425>. Indeed, studies show that the advent of community watch groups might actually heighten rather than allay fears of crime. See Dennis P. Rosenbaum, *The Theory and Research Behind Neighborhood Watch: Is It a Sound Fear and Crime Reduction Strategy?*, 33 CRIME & DELINQ. 103, 109-111 (1987).

121. The first page of the neighborhood watch manual handed out in Twin Lakes displays a logo, emblazoned with an eye, reading, "Warning - all suspicious persons and activities are immediately reported to the Sanford Police Department" and states "Looking out for each other."



Those who participate in neighborhood watches are engaged in the business of monitoring the “suspicious.” Although one might hope that the suspicious means people who are engaged in criminal-like activity, the reality is that many find individuals of certain races and classes suspect regardless of what they are doing.<sup>122</sup> In fact, many neighborhood watchers would regard an unknown young black male as suspicious *because* he is doing nothing.<sup>123</sup> This idea of policing through monitoring suspicious characters has driven some of the more questionable on-the-street policing tactics over the past few decades.<sup>124</sup> The statistical analysis emerging from the recent New York City stop-and-frisk litigation demonstrates that policing through inchoate suspicion is not only racially fraught, but also ineffective policy.<sup>125</sup>

The problematic risk and prevention assumptions endemic to the neighborhood watch mentality are ripe for progressive criticism. The notion of perpetual risk has fueled the exponential rise in criminal liability and punishment, which in turn has led to our present state of hyper-incarceration.<sup>126</sup> Professor Jonathan Simon has argued eloquently that the criminal risk notion has elevated criminal law to a new form of governance that regulates the lives of both potential criminals and potential victims (i.e. everyone). He states:

If we truly consider all the ways that the problem of crime oper-

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See Figure 1. *Stanford Police Department Neighborhood Watch: Neighborhood Watch Program-SPD PowerPoint*, fig.1 GEORGE ZIMMERMAN TRAYVON MARTIN MURDER CASE BLOG, available at [http://trayvonmartinmurdercase.blogspot.com/p/sanford-police-department-neighborhood.html#Uuq6vrHn\\_IU](http://trayvonmartinmurdercase.blogspot.com/p/sanford-police-department-neighborhood.html#Uuq6vrHn_IU) (last visited Mar. 22, 2014) [hereinafter *Sanford Police Neighborhood Watch Manual*].

122. See Rosenbaum, *supra* note 120, at 122 (finding that “efforts to ‘watch’ for ‘suspicious strangers’ may become synonymous with watching for blacks or Hispanics”); see also *infra* Figure 2, *Stanford Police Department Neighborhood Watch Manual*, *supra* note 121; see also *infra* Figure 3, *Stanford Police Department Neighborhood Watch Manual*, *supra* note 121.

123. See generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 302–16 (2012) (discussing how race operates as a “suspicion heuristic” and citing multiple studies linking race and perceptions of criminality); cf. *Chicago v. Morales*, 527 U.S. 41, 47 (1999) (discussing anti-gang statute that allowed for police intervention into “loitering,” defined as having “no apparent purpose”).

124. This occurs both in the traffic stop context, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997); David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Perpetual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546, 569–570 (1997), and the stop-and-frisk context. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225–226, 237–241 (1983); Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332, 334–338 (1994).

125. See *supra* note 104.

126. See Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 497–98, 507 (2005) (stating that “our experiment in mass incarceration” is in part driven by “fear of crime and social disorder” and “timidity is excessive fear, an unwillingness to bear up against even the ordinary and avoidable risks of life and human society”).

ates as the occasion and rationale for governance, we must include the millions of others who live in environments and routines shaped by fear of crime. This involves more than simply the widening of nets in our efforts to control criminal behavior. Indeed, by far the larger portion of people actively governed by crime are not criminal-law violators but persons affirmatively seeking to protect themselves and their families from crime. . . .

. . . The growth of incarceration and of “target hardened” residential communities has exacerbated racial tensions and rolled back many of the gains of the civil-rights revolution. In poor and minority communities that experience the highest rates of incarceration, the removal of large numbers of adult males from the community threatens the formation of families and the reproduction of informal social order, and it may actually impede the ability of those communities to informally control crime. The securitization of American cities and suburbs has contributed to a number of social problems including sprawl, traffic congestion, desertion of public spaces and institutions, and a national epidemic in childhood obesity exacerbated by the virtual imprisonment of both poor and privileged children in the name of keeping them safer.<sup>127</sup>

Thus, through leveraging the fear of crime, politicians have convinced the public to participate in legal regimes that may be largely against their actual interests in safety and liberty. Nevertheless, castle doctrines, and especially their modern iteration, stand your ground, can also be critiqued as stemming from the risk ideology that we are all besieged by an omnipresent criminal force.<sup>128</sup> While this point is well taken and the origin of these doctrines should be the subject of critical scrutiny, there is still a significant difference between neighborhood watches and stand your ground. Neighborhood watches have a primary purpose of profiling suspicious outsiders. Stand-your-ground law, it turns out, mostly applies outside the community protection/fear of crime context. The doctrine aids defendants who have killed in a wide variety of confrontational situations.<sup>129</sup> Consequently, although stand your ground certainly originated from problematic notions of perpetual criminal ubiquity and racial panic, in operation, the law acts as a general doctrine of leniency.

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127. Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CALIF. L. REV. 1415, 1416–17 (2002) (footnotes omitted).

128. See *supra* notes 117–18 and accompanying text; See Suk, *The True Woman*, *supra* note 39, at 259 (“The Castle Doctrine movement is driven by a core image of crime: violent invasion of the home. It harnesses the powerful intuitive appeal of giving ordinary people greater ability to protect themselves and their families from crime.”) (citations omitted).

129. See fatal cases profiled in *Tampa Bay Times’ Stand Your Ground Database. Those Who Stood, Those Who Fell: Fatal Cases*, TAMPA BAY TIMES, <http://www.tampabay.com/stand-your-ground-law/fatal-cases> (last visited Feb. 6, 2014). The vast majority of cases do not involve the shooting of suspicious persons.

The prevention component of neighborhood watch mentality is equally ripe for scrutiny. Instructing people that it is their neighborly duty to profile irregular characters operatively creates racial border patrols. In essence, there is a cultural norm that good community members redline their own neighborhoods.<sup>130</sup> Given conscious and unconscious biases, people will naturally target minorities and the poor as "suspicious," which is hazardous from both an equality and policy perspective.<sup>131</sup> Nevertheless, widespread monitoring (and banishment) of those who do not belong is an integral part of neighborhood watch mentality.<sup>132</sup> George Zimmerman's behavior, up until the confrontation, was completely consonant with neighborhood watch mentality norms. He was hypervigilant about crime and felt that crime could be prevented by closely monitoring suspicious outsiders.

Critics primarily claim that problems occurred only when Zimmerman exceeded his authority as an observant private citizen and actually confronted the suspicious person—a task reserved exclusively to the police. This criticism, however, reinforces rather than undermines one of the more disturbing aspects of neighborhood watches. Neighborhood watches serve to amplify state inquisitorial and authoritarian power by converting ordinary citizens into invigilators for the police.<sup>133</sup> Watches employ private individuals as sentinels, there to engage in profiling when police cannot.<sup>134</sup> But ultimately police are supposed to remain the actual enforcers of government power. Should progressives concentrate their disapprobation on private use of force and be unconcerned with a system in which private citizens profile outsiders and then call in the state to act upon the profiling? In the Zimmerman case, perhaps he was

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130. Robert Weisberg describes a spectrum of communitarian arrangements:

At one extreme, we have from the 1960s Saul Alinsky-type left-wing "community organizing," which explicitly seeks to create a new sense of community identity in order to achieve highly specific redistributive goals. But, at the other extreme, we have racist enclave-protecting crime aimed at solidifying a sense of community, and somewhere along the continuum we have Not In My Backyard environmental programs and the subtly exclusionary "Neighborhood Watch" programs.

*Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343, 373 (citations omitted).

131. See *supra* notes 121–23 and accompanying text.

132. See *supra* notes 112–13, 120, and accompanying text.

133. See Einstadter, *supra* note 113, at 204 ("The fact remains that [citizen patrols] add to and often are extensions of existing systems of state control, and as of now they neither *replace* that control nor promise to do so in the near future.").

134. STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 68–69 (1985) (noting the shift in the United States toward a "formalized type of enlistment of private citizens into police work" including "a formalization of neighbourhood surveillance and reporting systems: crime-stoppers groups, neighbourhood patrols, citizen crime-reporting projects, whistle-alert neighbourhoods, citizen-band radio reporting, block-watch projects").

particularly racist and paranoid and Sanford police officers were paragons of racial rationality and restraint, such that the outcome would have been much better had Zimmerman waited for officers to show up. In general, however, one is left to wonder if police intervention is less troubling from a racial and social justice standpoint than private behavior. Is it in fact the case that police are less rather than more likely to resort to force than private citizens? Are they less rather than more apt to see minorities as suspicious? Do police diffuse rather than foment racial tension? In a tiny enclave of Cambridge, Massachusetts, circa 2009, a concerned neighbor called police about a possible break-in involving a man who "might be Hispanic" and even speculated that it could be the resident trying to enter his house. An officer took over from there and escalated the encounter to the infamous "Gates arrest."<sup>135</sup>

Moreover, unlike many private citizens, police are always armed and have always had the right to stand their ground.<sup>136</sup> In the status quo, police killings of suspects are met with utter impunity.<sup>137</sup> Accordingly, it is plausible that had police shown up, they would not even have waited for a physical confrontation to shoot. The Amadou Diallo case tells us that.<sup>138</sup> Now, perhaps what would really have happened is that police would not have shown up at all or in time to confront Martin. However, one cannot justify the operation of the neighborhood watch program by the assumption that police will *not* show up. Consequently, critiquing Zimmerman's use of private force without critiquing the neighborhood watch context in which he used it serves to confirm the idea that individuals' hypersensitivity to crime and racial border patrolling is acceptable, so long as it is in service of augmenting the police authority of the state.

135. See generally CHARLES J. OGLETTREE, *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* (2010).

136. See, e.g., FLA. STAT. § 776.05 (2013) ("A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force . . .").

137. See Harris, *supra* note, at 25 (citing various authorities on police brutality and impunity); David Packman, *2010 National Police Misconduct Statistics and Reporting Project Police Misconduct Statistical Report, Draft*, CATO INST.'S NAT'L POLICE MISCONDUCT REPORTING PROJECT (Apr. 5, 2011, 12:55 AM), <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/> (finding that "prosecuting police misconduct in the US is very problematic with conviction rates, incarceration rates, and the amount of time law enforcement officers spend behind bars for criminal misconduct are all far lower than what happens when ordinary citizens face criminal charges").

138. See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>; CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 175–78 (2003) (discussing case).

FIGURE 1: SLIDE FROM SANFORD POLICE DEPARTMENT  
NEIGHBORHOOD WATCH POWERPOINT



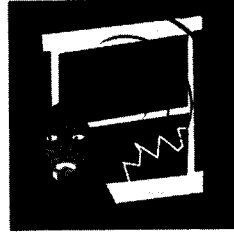
FIGURE 2: SLIDE FROM SANFORD POLICE DEPARTMENT  
NEIGHBORHOOD WATCH POWERPOINT



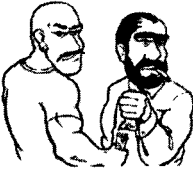
FIGURE 3: PAGE FROM STANFORD POLICE DEPARTMENT  
NEIGHBORHOOD WATCH BURGLARY PREVENTION PAMPHLET

### Tips (con't.)

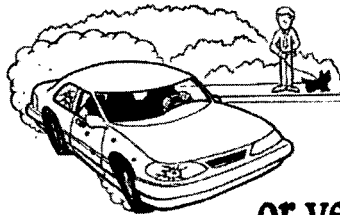
- ♦ **Burglars target homes that look deserted.**
  1. Make your house look like someone may be home.
  2. Leave a radio or TV on when you leave.
  3. Leave lights on if you won't be home before dark, or have lights on timers to turn on at dark.
  4. Open drapes.
    - A. Have a trusted neighbor (relative) take in your daily mail and newspapers.
    - B. If you leave for a weekend or a few days, leave your 2<sup>nd</sup> car in the driveway, or ask a neighbor to park theirs in your driveway while you are gone.
- ♦ **Don't feel that you have to open the door to anyone who knocks. If you didn't invite them, you don't have to open the door.**
  1. Ask who it is before you answer the door.
- ♦ **If someone wants to use your phone, make the call for them, don't let them in.**
- ♦ **Install window glazing for vulnerable areas like glass next to doors or glass doors.**
- ♦ **Call right away when you see suspicious people, vehicles or activity...don't wait an hour to do so.**



Report suspicious persons . . .



activities . . .



. . . or vehicles.

### B. *Racial Profiling*

The foregoing Section segues naturally to a discussion of racial profiling. Next to the stand-your-ground issue, the racial profiling issue received the most media and expert attention.<sup>139</sup> The studies confirming current Americans' cultural adherence to the black male-as-criminal

139. See *supra* notes 9, 80, and accompanying text.

stereotype, whether consciously or unconsciously, are so numerous as to be almost banal to the criminal law scholar.<sup>140</sup> And yet many, if not a majority of, society members still adhere to the prosaic, discredited collection of arguments that deny the existence of racial hierarchy.<sup>141</sup> One common assertion, for example, is that Zimmerman's status as an ethnic-looking Latino makes it impossible for the shooting to be an instance of racial subordination of African Americans.<sup>142</sup> Any student of

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140. See generally Richardson & Goff, *supra* note 123, at 302–04 (studies cited); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (overview of studies) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”). Cynthia Lee explains:

The Trayvon Martin shooting reminds us that Blacks in general, and young Black men in particular, are subjects of the “Black-as-Criminal stereotype.” This stereotype links Blacks with violence, dangerousness, and criminality. The existence of this stereotype has been documented by social psychologists for over half a century. 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 are also more likely to see hostility in African American faces than in White faces. While the Black-as-Criminal stereotype is more likely to be activated from a young Black male wearing baggy pants, a t-shirt, and a skull cap or a hoodie, even well-dressed Black men and women have found themselves the objects of suspicion by taxi drivers who refuse to stop for them; store clerks who follow their every move; women who, clutching their purses, cross the street to avoid an imagined possible mugging; and women who avoid getting on the same elevator with them.

Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580–82 (2013) (citations omitted).

141. A July 2013 Poll from the Rasmussen Reports is very telling of the presence of aversive racism in post-racial ideology. It finds that the majority of Americans believe that blacks are more likely to be “racist” than whites (37% of American adults believe blacks are racist whereas only 18% believe that whites are racist). *More Americans View Blacks as Racist than Whites, Hispanics*, RASMUSSEN REPORTS (July 3, 2013), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/july\\_2013/more\\_americans\\_view\\_blacks\\_as\\_racist\\_than\\_whites\\_hispanics](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/july_2013/more_americans_view_blacks_as_racist_than_whites_hispanics) [hereinafter RASMUSSEN REPORTS]. Even among blacks, “31% think most blacks are racist, while 24% consider most whites racist.” *Id.* Rasmussen polls further reveal that most Americans believe that the economy is fair to women, blacks, Latinos, and the poor and that it treats these groups better than the middle class. *Id.* Finally, most Americans believe that affirmative action discriminates against whites. *Id.*

142. See Arelis R. Hernández, *Trayvon-Zimmerman Tragedy Shows Labels Don't Fit When It Comes to Race, Ethnicity*, ORLANDO SENTINEL (Oct. 13, 2012, 7:18 PM), [http://articles.orlandosentinel.com/2012-10-13/news/os-trayvon-george-zimmerman-hispanic-identity-20121013\\_1\\_trayvon-martin-investigator-chris-serino-george-michael-zimmerman](http://articles.orlandosentinel.com/2012-10-13/news/os-trayvon-george-zimmerman-hispanic-identity-20121013_1_trayvon-martin-investigator-chris-serino-george-michael-zimmerman) (observing that the revelation of Zimmerman's “ethnic” identity made the case for many, “a different story devoid of any racial undertones: Zimmerman himself was a minority, they reasoned, so he couldn't possibly be racist or hold prejudices against other minorities”); *Trayvon Martin: Confusion over Zimmerman Highlights Changing Discourse on Race and Latinos*, FOX NEWS LATINO (Mar. 29, 2012), <http://latino.foxnews.com/latino/news/2012/03/29/trayvon-martin-confusion-over-zimmerman-highlights-changing-discourse-on-race/> [hereinafter *Confusion*] (quoting a right wing news blogger as tweeting, “I'm actually happy that George Zimmerman is Hispanic so the usual white people are all guilty by virtue of their skin color stuff won't work”). See also Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice*

race relations, however, would easily dismiss the notion that members of one minority group cannot harbor racial bias against another minority group.<sup>143</sup> Moreover, the black male-as-criminal stereotype is so utterly “entrenched and ubiquitous”<sup>144</sup> that individuals of all ethnicities, especially individuals particularly concerned about crime, internalize it to some extent.<sup>145</sup> Another popular anti-color-consciousness argument is that Zimmerman would have confronted Trayvon even if he had been white because he was wearing “criminal clothes,” namely a hooded sweatshirt.<sup>146</sup> But as respondents note, it strains credulity to believe that Zimmerman would have profiled any person wearing his or her hood up in the rain.<sup>147</sup> Moreover, to the extent that the hoodie was actually Zim-

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in *Post-Civil Rights America*, 95 MICH. L. REV. 821, 852–66 (1997) (discussing how discrimination law turned a blind eye to color-on-color discrimination).

143. See *Confusion*, *supra* note 142 (noting the history of tension between African Americans and Latinos in Florida); Caroline May, *Latino Organizations Dismiss George Zimmerman, Question His Ethnicity*, DAILY CALLER (Mar. 29, 2012, 11:48 AM), <http://dailycaller.com/2012/03/29/latino-organizations-dismiss-george-zimmerman-question-his-ethnicity/#ixzz2s6UDhcaY> (La Raza spokesperson stated, “Is [Zimmerman] Latino? Is he white? Is he both? Who knows? It’s irrelevant. What’s relevant are his actions, his racist comments, and his cold-blooded killing of an innocent young man.”).

144. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2063–64 (2011).

145. Recent studies of highly racially diverse and majority-minority police departments demonstrate that, especially for those whose job it is to monitor the suspicious, the tendency to engage in racial stereotyping can be more of a function of the individuals’ work culture and training than racial difference. See *supra* note 104 (finding racial profiling in the diverse NYC Police Department). U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 34–39 (Mar. 16, 2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf) (finding that the majority of minority NOPD officers engaged in rampant racial profiling of minorities). Cf. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 36–44 (2012) (discussing African American support for increased policing, prosecution, and punishment).

146. Bill O’Reilly stated:

The reason Trayvon Martin died is because he looked a certain way, and it wasn’t based on skin color. If Trayvon Martin had been wearing a jacket . . . and a tie, . . . I don’t think George Zimmerman would’ve had any problem. But he was wearing a hoodie, and he looked a certain way, and that way is how gangstas look. And therefore he got attention.

*Bill O’Reilly: Trayvon Martin Died Because He ‘Looked A Certain Way’ (VIDEO)*, HUFFINGTON POST (Sept. 14, 2013, 10:30 AM), [http://www.huffingtonpost.com/2013/09/14/bill-oreilly-trayvon-martin\\_n\\_3926484.html](http://www.huffingtonpost.com/2013/09/14/bill-oreilly-trayvon-martin_n_3926484.html). Recall also Geraldo Rivera’s highly controversial statements that minority parents should not let their “dark-skinned” children out wearing hoodies and baggy pants because people will think they are criminals. See Katherine Fung, *Geraldo Rivera: Trayvon Martin’s ‘Hoodie Is as Much Responsible For [His] Death as George Zimmerman’ (VIDEO)*, HUFFINGTON POST (Mar. 23, 2012, 10:22 AM), [http://www.huffingtonpost.com/2012/03/23/geraldo-rivera-trayvon-martin-hoodie\\_n\\_1375080.html](http://www.huffingtonpost.com/2012/03/23/geraldo-rivera-trayvon-martin-hoodie_n_1375080.html).

147. Even President Obama, normally reticent on race, noted frustration in the face of the racial “context” of the shooting being denied and noted the “sense that if a white male teen was involved in the same kind of scenario, that from top to bottom, both the outcome and the aftermath might’ve been different.” See Will Allen, *Obama: If Trayvon Had Been White, ‘Both the Outcome and the Aftermath Might’ve Been Different,’* NAT’L REV. ONLINE (July 19, 2013, 2:26 PM), <http://>



merman's basis for suspicion, clothing can itself be racialized as something that young black men (i.e. "criminals") wear.<sup>148</sup> Furthermore, individuals tend to interpret the meaning of things like clothing through a racial prism (i.e. a black man in ratty clothing is a drug dealer/criminal and a black man in fancy clothing is a drug dealer/criminal).<sup>149</sup> Consequently, even though racial profiling is already squarely on the radar screen of every progressive academic and activist, the issue cannot receive too much attention, given the resilience of aversive racism<sup>150</sup> and color-muteness<sup>151</sup> in our current post-racial era.<sup>152</sup>

For our purposes, the question is whether the intense attention to stand your ground shed a spotlight on racial profiling or detracted from the issue. Both are plausible scenarios and at least partly true. Focusing on stand your ground might bring to light other cases in which people who racially profiled and killed minorities were unfairly exonerated.<sup>153</sup> Moreover, critiquing the proponents of stand your ground serves to undermine the credibility of conservative policy makers who are likely to deny the existence of racial profiling.<sup>154</sup> In this sense, highlighting stand your ground furthers anti-racial-profiling interests. However, this

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[www.nationalreview.com/corner/353926/obama-if-trayvon-had-been-white-both-outcome-and-aftermath-mightve-been-different-will](http://www.nationalreview.com/corner/353926/obama-if-trayvon-had-been-white-both-outcome-and-aftermath-mightve-been-different-will).

148. Thus, clothing associated with young black men may trigger a prejudicial reaction regardless of the race of the wearer. A similar phenomenon has been observed when it comes to black sounding names. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992–93 (2004); cf. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 701 (2001) (discussing "identity performance").

149. See Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 140 (2000) (noting that "research suggests that police tend to view [clothing, jewelry, and type of vehicle] through a racial prism—defined differently depending on a person's race" and citing studies). These arguments were visually represented by the million hoodie march and T-shirts proclaiming, "I am Trayvon." See *supra* note 71 and accompanying text.

150. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 8 (2004) (describing a phenomenon in which self-described liberal and egalitarian individuals will engage in unconscious discrimination when they can "rationalize a negative response on the basis of some factor other than race").

151. Social scientist Mica Pollock states, "[m]y concept of colormuteness suggests that rather than not seeing people in racial terms, people are actively suppressing race labels when talking about people . . . . [T]hese kinds of deletions are frequently part of an active (though not always malicious) refusal to describe and analyze uncomfortable orders of racial inequality or power conflict." Abigail Bucuvalas, *When Race Matters: 'Colormuteness' in American Schools*, HARV. GRADUATE SCH. EDUC. NEWS, <http://www.gse.harvard.edu/~news/features/pollock10012003.html>.

152. See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1600–05 (2009).

153. See, e.g., Sarah Iverson, *Beyond 'Stand Your Ground': Florida's Other Racial Profiling Practices*, CENTER AM. PROGRESS (Oct. 11, 2013), <http://www.americanprogress.org/issues/race/report/2013/10/11/76860/beyond-stand-your-ground-floridas-other-racial-profiling-practices/>.

154. See *supra* notes 8, 22, and accompanying text & *infra* notes 229–31 and accompanying text (discussing political alignments on stand your ground).

is not how much of the stand-your-ground debate has played out. First, commentators appear to have paid far more attention to the laws' tendency to exonerate the "usual suspects" like repeat offenders, gang members, and drug dealers, than to whether it encourages frightened or paranoid citizens to engage in race-based violence.<sup>155</sup> In fact, as we will discuss in the next Part, it is unclear whether stand your ground, in itself, disparately burdens minorities.<sup>156</sup> More importantly, commentators, perhaps unwittingly, often situate stand your ground as an *alternative* explanation for why Zimmerman shot. Critics of stand your ground regularly assert that Zimmerman is simply a "hothead" who was encouraged by the doctrine to shoot at will.<sup>157</sup> While this may be true or partially true, an alternative plausible story is that Zimmerman was not just a trigger-happy guy emboldened by stand your ground. Rather, Zimmerman was convinced of the necessity to protect his neighborhood from crime; he was certain that crime-prevention required being armed and using force; and he was intensely influenced by racialized stereotypes of criminality. In this light, Zimmerman was not just a deviant hothead who acted outside of social convention—he was a product of deeply entrenched norms about crime, security, and race. Arguably, focusing on stand your ground's ability to encourage hotheads deflects from larger social questions about race, crime, and community.

Another way in which the stand-your-ground debate detracts from the racial profiling issue is that it scrutinizes private violence over the violence of the state. It is undeniable that on occasion, non-state actors like Zimmerman will engage in private profiling with disastrous results. When an innocent person is racially targeted and killed, it is a horrific event, regardless of who pulls the trigger. However, by relentlessly

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155. See sources cited *supra* note 14; see also, e.g., Lou Colagiovanni, *Drug Dealer Kills Two People and Walks away Thanks to 'Stand Your Ground' Law*, EXAMINER (Jan. 9, 2014), <http://www.examiner.com/article/drug-dealer-kills-two-people-and-walks-away-thanks-to-stand-your-ground-law>; 15 *Shocking Florida Stand Your Ground Cases (PHOTOS)*, HUFFINGTON POST (July 16, 2013, 3:58 PM), [http://www.huffingtonpost.com/2013/07/16/stand-your-ground-cases\\_n\\_3606405.html](http://www.huffingtonpost.com/2013/07/16/stand-your-ground-cases_n_3606405.html); Erin Fuchs, *The Florida Stand Your Ground Law Helped Drug Dealers Beat Murder Charges*, BUSINESS INSIDER (July 4, 2012, 1:02 PM), <http://www.businessinsider.com/the-florida-stand-your-ground-law-is-being-used-in-shocking-ways-report-2012-6#ixzz2s7DFFrwR>.

156. See *infra* notes 241–46 and accompanying text.

157. See, e.g., Robinson, *supra* note 1 ("These laws encourage hotheads to go into potential confrontations with loaded firearms."); Editorial, *Repeal 'Stand Your Ground,'* TAMPA BAY TIMES (June 9, 2012, 5:30 AM), <http://www.tampabay.com/opinion/editorials/repeal-stand-your-ground/1234388> ("[S]tand your ground" gives legal cover to hotheads who would escalate a tense situation and to people who carry weapons."). The day before the verdict, Angela Corey released the FBI report concluding that the shooting was not race-based and quoting Detective Serino as stating that Zimmerman had a hero complex but was not racist. See Patrik Jonsson, *FBI Report: No Evidence George Zimmerman Is Racist*, CHRISTIAN SCI. MONITOR (July 12, 2012, 2:45 PM), <http://www.csmonitor.com/USA/Justice/2012/0712/FBI-report-No-evidence-George-Zimmerman-is-racist>.

focusing on the stand-you-ground law's encouragement of *private* force, critics have lost sight of the fact that Zimmerman initially profiled Martin in his capacity as a quasi-agent of the state.<sup>158</sup> By condemning only private force, critics give a pass to those who most often racially profile and kill minority men—the police.<sup>159</sup> If anything, repealing stand your ground gives more power to police to arrest (and prosecutors to charge) individuals who have been involved in private confrontations, while leaving fully intact police's ability to continue to profile and kill those deemed suspicious.<sup>160</sup> While thoughtful progressives must condemn racial profiling and wanton violence, private or official, they should be careful lest their concentrated scrutiny on private wrongful behavior serves to normalize police racial profiling and give a monopoly on violence to the state.<sup>161</sup>

### C. *Six-Person Juries*

Moving on to the trial phase, several aspects of the proceedings received critical attention. Commentators highlighted the prosecutors' deficient performance and their apparent failure to properly prepare Rachel Jeantel for the trial.<sup>162</sup> Especially after juror B-37 began speaking to the media, commentators marveled at jurors' identification with "George," who had not even testified, and some charged the jury with racial bias.<sup>163</sup> Others, however, gave the jury credit for just following the

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158. See *supra* notes 132–33 and accompanying text. The Sanford Police Department specifically directed communities to elect neighborhood watch captains to work with them. See *Sanford Police Neighborhood Watch Manual* *supra* note 121.

159. See *supra* notes 135–37 and accompanying text.

160. See Aya Gruber, *Neofeminism*, 50 Hous. L. Rev. 1325, 1379 (2013) ("Emphasizing that evil individuals cause social problems allows the government to be seen as a white knight using its prosecutorial powers to stamp out social blight, while otherwise maintaining the attributes of small government."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. Rev. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

161. Cf. JACQUES DERRIDA, *Force of Law*, in ACTS OF RELIGION 230, 266–67 (1990) (noting that law prohibits private violence to give itself a "monopoly of violence").

162. See, e.g., Jonathan Turley, *Law and Legend: How the Zimmerman Case Was Lost by the Prosecution*, TURLEY BLOG (July 15, 2013), <http://jonathanturley.org/2013/07/15/law-and-legend-how-the-zimmerman-case-was-lost-by-the-prosecution/> (critiquing the prosecution's over-zeal in charging as a poor performance and calling Jeantel's testimony "a disaster"); Hal Boedeker, *George Zimmerman: Is State Throwing the Case?*, ORLANDO SENTINEL (July 3, 2013, 7:51 AM), <http://www.orlandosentinel.com/entertainment/blogs/tv-guy/os-george-zimmerman-is-state-throwing-case-20130703,0,3015158.post> (noting that TV legal analysts took a generally dim view of the prosecution's performance).

163. When asked by Anderson Cooper, "[i]s George Zimmerman somebody you would like to have on a neighborhood watch in your community? . . . Is he somebody you would be comfortable [with]?" B-37 replied, " . . . I think he was frustrated with the whole situation in the neighborhood, with the break-ins and the robberies. . . . I mean, I would feel comfortable having

law, given stand your ground and the prosecutorial burden of proof beyond a reasonable doubt.<sup>164</sup> Interestingly, those who believe that race impermissibly influenced the jury process have not emphasized Florida's exceptional rule allowing for six-person juries in serious felony cases.<sup>165</sup> Even after the lone minority juror, B-29, made statements indicating she may have felt pressure to acquit, the numerical issue never drew a bright public spotlight.<sup>166</sup>

Progressives' relative silence on the jury issue is quite surprising, given that for years liberal scholars have decried the six-person jury system as defective from a constitutional and policy perspective.<sup>167</sup> In the

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George, but I think he's learned a good lesson." *Juror B-37 Interview*, *supra* note 88. Based on the juror's comments that Zimmerman's "heart was in the right place" and explaining Jeantel's cracker comment as something Trayvon probably said because of "the type of life that they live, and how they're living, in the environment that they're living in," critics charged her with being overtly or implicitly racist. See, e.g., Dennis Loo, *The Zimmerman Trial Jurors & Invisibility of Racism*, OPEN SALON BLOG (July 21, 2013, 2:36 PM), [http://open.salon.com/blog/dennis\\_loo/2013/07/21/the\\_zimmerman\\_trial\\_jurors\\_invisibility\\_of\\_racism](http://open.salon.com/blog/dennis_loo/2013/07/21/the_zimmerman_trial_jurors_invisibility_of_racism); Igor Volsky, 7 *Mind Blowing Moments from Zimmerman Juror B37's First Interview*, THINK PROGRESS (July 16, 2013, 9:06 AM), <http://thinkprogress.org/politics/2013/07/16/2306901/7-mind-blowing-moments-from-zimmerman-juror-b37s-first-interview/>; "These People": The Most Deplorable Moments from Juror B37's Interview with Anderson Cooper, CLUTCH MAG. (July 16, 2013), <http://www.clutchmagonline.com/2013/07/these-people-the-most-deplorable-moments-from-juror-b37s-interview-with-anderson-cooper/>.

164. See, e.g., Turley, *supra* note 162; Andrew Guthrie Ferguson, *On the Zimmerman Jurors*, AM. CONST. SOC'Y BLOG (July 16, 2013), <http://www.acslaw.org/acsblog/on-the-zimmerman-jurors> (stating that "there was doubt" and that "a jury following its oath to follow the jury instructions as provided, and holding the government to the burden of proof may have been correct to acquit").

165. See FLA. STAT. § 913.10 (2013) ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.").

166. See *Zimmerman Juror: 'My First Vote Was Second-Degree Murder'*, ABC NEWS (July 26, 2013), <http://abcnews.go.com/GMA/video/george-zimmerman-juror-29-interview-gma-vote-degree-19779607> ("I was the juror that was going to give them the hung jury. I was. I fought until the end. . . . I don't know if I was bullied. I trust god that I wasn't bullied, but . . ."); Earl Ofari Hutchinson, *Why Zimmerman Juror B29 Believed in His Guilt but Still Voted to Acquit*, HUFFINGTON POST (July 28, 2013, 12:22 PM), [http://www.huffingtonpost.com/earl-ofari-hutchinson/why-zimmerman-juror-b29-b\\_3664610.html](http://www.huffingtonpost.com/earl-ofari-hutchinson/why-zimmerman-juror-b29-b_3664610.html) (analyzing reasons why Juror B-29 voted to acquit without discussing the numerical issue); cf. Eugene Volokh, *The Six-Person Jury in the Zimmerman Case*, VOLOKH CONSPIRACY (June 20, 2013, 5:26 PM), (noting that the six-person Florida jury system made it more likely to have a jury with an "unusual demographic mix"); Amy Pavuk, *Why Only Six on Florida Juries? Legislature To Push for 12 in Wake of Zimmerman Verdict*, ORLANDO SENTINEL (July 18, 2013), [http://articles.orlandosentinel.com/2013-07-18/news/os-jury-size-zimmerman-20130718\\_1\\_george-zimmerman-trayvon-martin-benjamin-crump](http://articles.orlandosentinel.com/2013-07-18/news/os-jury-size-zimmerman-20130718_1_george-zimmerman-trayvon-martin-benjamin-crump) (noting racial critique of six-person jury and the argument "[w]ithout knowing why a jury made the decision it did, how do you say that your trial was unfair based on the fact you had a six-person jury?") (internal quotations omitted). It is true that the verdict spawned a legislative challenge to the Florida jury law, see H.B. 39, 2014 Leg., Reg. Sess. (Fla. 2014) (to make the jury size twelve in all felony cases), available at <http://www.flsenate.gov/Session/Bill/2014/0039>. But this issue simply did not receive the coverage of the stand-your-ground issue.

167. See *supra* notes 107–08 and accompanying text & *infra* notes 170–73 and accompanying text.

1970 case, *Williams v. Florida*, a plurality of the Supreme Court, over vehement dissent, upheld Florida's felony jury system, stating that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics."<sup>168</sup> Although Justice Burger's *Williams* opinion declined to state a minimum felony jury composition number, he added, "we do not doubt that six is above the minimum."<sup>169</sup> Eight years later, in *Ballew v. Georgia*, the Supreme Court found that six was actually the bare minimum.<sup>170</sup> Relying on empirical scholarship demonstrating that smaller juries undermine group deliberation, increase the risk of false conviction, are more likely to make erroneous judgments, disparately disadvantage the defense, and reduce the likelihood of representative juries, Justice Blackmun, writing for the majority, opined, "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."<sup>171</sup> Since *Ballew*, civil libertarians and social scientists have intensely criticized the six-person jury system.<sup>172</sup> They contend that such a small jury poses an impermissible risk that those in the numerical majority will coerce those in the minority or single hold-outs to follow the general consensus.<sup>173</sup> The argument is that jurors are already under enormous pressure to reach unanimity, and the added pressure of being the sole holdout(s) undermines the integrity of the judicial process. Moreover, this lack of process will generally inure to the detriment of defendants.<sup>174</sup>

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168. 399 U.S. 78, 102 (1970) (internal quotations omitted). Justice Harlan critiqued the departure from common law practice, stating, "The only reason I can discern for today's decision that discards numerous judicial pronouncements and historical precedent that sound constitutional interpretation would look to as controlling, is the Court's disquietude with the tension between the jurisprudential consequences wrought by 'incorporation' in *Duncan* and *Baldwin* and the counter-pulls of the situation in *Williams* which presents the prospect of invalidating the common practice in the States of providing less than a 12-member jury for the trial of misdemeanor cases." *Baldwin v. New York*, 399 U.S. 117, 129 (1970) (Harlan, J., dissenting in part).

169. *Williams*, 399 U.S. at 91 n.28.

170. 435 U.S. 223, 243-245 (1978).

171. *Id.* at 239, 232-37. *But see id.* at 246 (Powell, J., concurring) ("Also, I have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies.").

172. *See, e.g.*, Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 749 (2010); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 517-18 (1997); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 897 (1998) (stating that "[s]ocial scientists, who have commented on the issue, appear unanimous in their opinions that larger juries are superior to smaller juries").

173. *See* Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 671-73 (1998) (citing studies).

174. *See* Smith, *supra* note 172, at 520 ("In criminal trials, six-person juries are more likely to

There is also a racial critique that smaller juries are more likely to be ethnically homogenous, thereby undermining the purpose of *Batson v. Kentucky*,<sup>175</sup> and disadvantaging racial minorities.<sup>176</sup> Moreover, when a racial minority makes it on to the jury, as the lone minority, she may be subject to extreme pressure from those in the numerical and racial majority.<sup>177</sup> The Zimmerman jury seems like the poster child for the racial and structural problems of six-person juries. Juror B-37, and perhaps the other white jurors, seemed to relate very well to Zimmerman's fear of young black Martin.<sup>178</sup> They were apparently receptive to Mark O'Mara's closing strategy of displaying the 8 x 10 photo of a shirtless, grim-faced Martin and stating, "this is the person . . . who George Zimmerman encountered that night."<sup>179</sup> By contrast, the one minority juror was not so sure.<sup>180</sup> Juror B-29 said she believed that George Zimmerman committed murder and was prepared to fight for her beliefs, but she ultimately felt compelled to vote with the rest of the jury.<sup>181</sup> Juror B-29, the sole minority, has since stated that the trial ruined her life.<sup>182</sup>

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convict than twelve-person juries, and the deliberations of twelve-person juries are more likely to result in a hung jury.").

175. 476 U.S. 79 (1986) (holding the use of racial peremptory strikes unconstitutional).

176. Miller, *supra* note 173, at 667. *See also* Higginbotham, *supra* note 171, at 757 ("Numerous studies show a significant increase in minority presence on twelve-person juries as compared with six-person juries.") (footnote omitted). *But see* Williams, 399 U.S. at 102 ("As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.") (internal citation omitted).

177. *See* Miller, *supra* note 173, at 668–69 ("Given what is known about the influence of group-conformity pressure, the presence of a minority juror or minority viewpoint on a jury, though significantly more likely on a twelve-person jury than on a six-person jury, will be most influential only if that minority position is joined by an ally.").

178. Juror B-37 stated that all the jurors had no doubt that it was Zimmerman's voice on the tape. When asked if she believed that Zimmerman felt his life was in danger, she replied, "I really do." Of the videotaped statements she says, "I think pretty much it happened the way George said it happened." Finally, when asked whether she believed that the defense's animation of what happened was what happened, she replied, "I found it credible." *See Juror B-37 Interview, supra* note 88. After the interview aired, four jurors distanced themselves from B-37's statements. *See 4 Zimmerman Trial Jurors Distance Themselves from Juror B37*, CBS News (July 17, 2013, 11:19 AM), <http://www.cbsnews.com/news/4-zimmerman-trial-jurors-distance-themselves-from-juror-b37/>.

179. *See* David Edwards, *Zimmerman Lawyer Closes by Showing Jury Shirtless Trayvon Photo*, RAW STORY (July 12, 2013, 12:19 PM), <http://www.rawstory.com/rs/2013/07/12/zimmerman-lawyer-closes-by-showing-jury-shirtless-trayvon-photo/>; Figure 4, Michael Pearson & David Mattingly, *Gun, Drug Tests Feature in New Trayvon Martin Shooting Evidence*, CNN (May 26, 2013, 1:21 PM), <http://www.cnn.com/2013/05/23/justice/florida-zimmerman-defense/>; Figure 5, *see* Edwards, *supra*.

180. *See Juror B-37 Interview, supra* note 88. Indeed, studies demonstrate that jurors of different races react very differently to factual issues, especially issues like police credibility, suspicious behavior, and the like.

181. *See* sources cited *supra* note 165.

182. *See* Hal Boedeker, *George Zimmerman Juror: Trial Ruined My life*, ORLANDO SENTINEL.

One might speculate that civil libertarians have not used the Zimmerman verdict as an occasion to argue for jury reformation because of their adherence to the value of the beyond-a-reasonable-doubt standard. One liberal spin on the verdict is that jurors rightly possessed reasonable doubt because the prosecution had no theory of the case.<sup>183</sup> Accordingly, after the verdict, many pro-defense progressives justified the acquittal as compelled by constitutional requirements and our country's commitment to preventing false convictions.<sup>184</sup> It would be strange then to turn around and critique this "correct" verdict by offering it as evidence that the Florida jury system is broken.<sup>185</sup> However, one could simultaneously believe that the prosecution failed to meet its burden and believe that the jury process was irretrievably flawed. If juror B-37 is any indication, the majority (racial and viewpoint) jurors had a particular vision of the facts, involving Zimmerman fighting for his life when he shot Martin, which they apparently believed without reservation.<sup>186</sup> It is plausible that the majority jurors adopted this vision because they could relate to the intense fear of young black men and then imposed this racialized vision of the facts on the lone minority juror.<sup>187</sup> Likely, a jury of culturally competent criminal law professors would have also acquitted, given the lack of proof. Nevertheless, whatever one believes about the ultimate

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(Oct. 31, 2013, 11:42 AM), <http://www.orlandosentinel.com/entertainment/blogs/tv-guy/os-george-zimmerman-juror-trial-ruined-my-life-20131031.0,7091899.post>.

183. See Maurielle Lue, *George Zimmerman Acquittal: U of D Mercy Law Professor Reacts*, MY FOX DETROIT (July 15, 2013, 9:13 PM), <http://www.myfoxdetroit.com/story/22847842/george-zimmerman-acquittal-university-of-detroit-mercy-law-professor-reacts#ixzz2s8rw8SxF> (quoting law professor as attributing the acquittal to the prosecution "never develop[ing] a theory of their case"); see also *supra* note 163.

184. See *supra* note 164; Bill Hoffman, *Alan Dershowitz: I Would Find Zimmerman 'Not Guilty'*, NEWS MAX (July 10, 2013, 6:22 AM), <http://www.newsmax.com/Newsfront/zimmerman-martin-trial-defense/2013/07/09/id/514186>.

185. Jonathan Turley, for example, argued that the verdict was only an indication that the jurors had reasonable doubt, stating, "[t]he acquittal does not even mean that the jurors liked Zimmerman or his actions. It does not even mean they believed Zimmerman. It means that they could not convict a man based on a presumption of guilt." Turley, *supra* note 162.

186. See *Juror B-37 Interview*, *supra* note 88. Juror B-37 further stated, "I had no doubt George feared for his life in the situation he was in at the time." *Id.* In fact, studies show that jurors do not really understand the concept of reasonable doubt. See Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655, 664-69 (1996).

187. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1010 (2003) (performing extensive literature survey and concluding that "substantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions"). Indeed, when asked about the one juror who was not sure that it was Zimmerman's voice screaming for help, Juror B-37 replied, "[s]he wanted to give everybody an absolute out of being guilty." In this juror's mind, finding Zimmerman not guilty equated with finding Martin guilty. In essence, Martin also a defendant on trial.

verdict, there is evidence that the process by which this “good” verdict was reached signifies structural and racial problems with Florida’s jury system. Such problems should particularly concern civil libertarians because they tend to disproportionately burden minority defendants.<sup>188</sup>

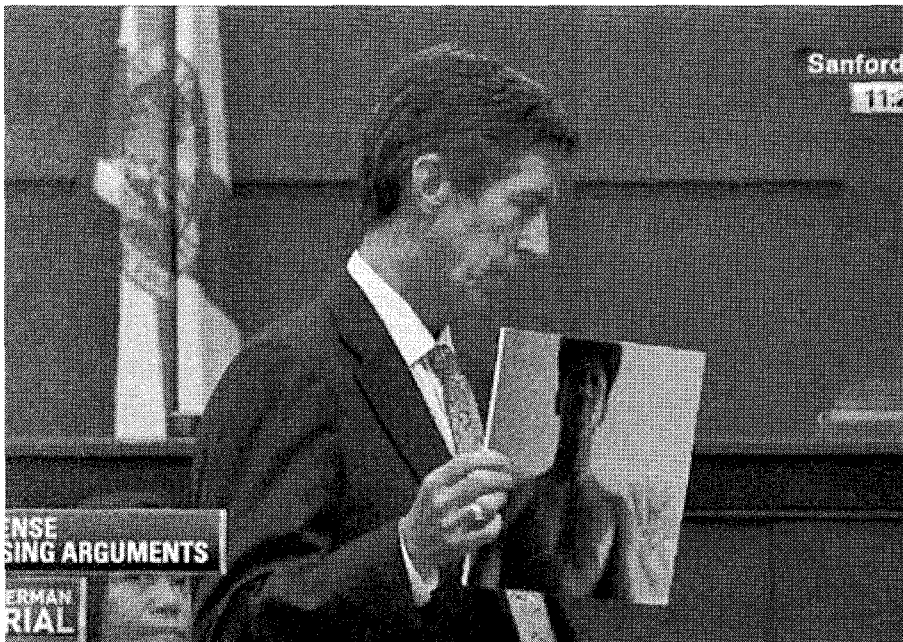
FIGURES 4 & 5: THE DEFENSE’S USE OF PHOTOS OF  
TRAYVON MARTIN



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188. See *supra* notes 104–07 and accompanying text.





#### D. *Racialized/Post-Racialized Discretion in Arrest and Prosecution*

Finally, we arrive at the issue that most concerned progressive commentators and race critics in the days following the shooting: the State's apparently biased handling of the case. Part I discussed extensively the early critique that police and prosecutors exercised undue restraint because George Zimmerman was a non-black neighborhood watch captain and Trayvon Martin was a young black man, so the discussion bears only brief repeating here.<sup>189</sup> In the initial days after the shooting, critics seized on an issue quite familiar to criminal law scholars, namely that the burdens of the American penal system are unevenly distributed on a racial basis.<sup>190</sup> Like the racial profiling issue, numerous studies and analyses confirm that discretion leads to racial inequality because blacks often bear the brunt of state actors' punitive tendencies and whites primarily benefit from state actors sympathetic impulses.<sup>191</sup>

189. See *supra* notes 63–69 and accompanying text.

190. See *supra* notes 103–09.

191. See, e.g., Starr & Rehavi, *supra* note 106, at 5 (conducting study and finding that racial disparities in federal sentences “stem largely from prosecutors’ charging choices, especially decisions to charge defendants with ‘mandatory minimum’ offenses”); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795–97 (2012); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007). In the death-penalty context, prosecutors’ discretion has been linked to disparities in that those who kill white victims, particularly blacks who kill white victims, are more likely to receive a death sentence than similarly situated defendants who kill

The critique of police racism is legion.<sup>192</sup> Race and death penalty litigation, most famously the 1987 case of *McCleskey v. Kemp*, have put a spotlight on racial bias in discretionary prosecution.<sup>193</sup> Today, many progressives critique our current web of carceral laws and policies as “the New Jim Crow.”<sup>194</sup> However, in our post-racial era, when many Americans cling to the notion that formal equality has been unequivocally achieved, this critique often falls on deaf ears.<sup>195</sup> A sizable portion of the public (and the majority of white Americans) believes that criminal prosecution is an objective, just, and race-neutral way to address social dysfunction.<sup>196</sup>

Thus, as with the racial profiling issue, progressives should continue to engage in efforts to spotlight state actors’ tendency to exercise discretion in a racialized manner. The Zimmerman case has proven to be a legal catalyst, causing the public and lawmakers to rethink their positions on criminal law and move toward actual changes. Progressives should use this catalytic moment to put pressure on police departments and district attorneys’ offices to address racial bias.<sup>197</sup> In the early days of the Zimmerman case, race critics scrutinized the Sanford Police Department for its handling of the case, which in turn uncovered other incidents of their racialized policing.<sup>198</sup> It became clear that media commentators and race scholars were prepared to transfer that scrutiny to the

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black victims. See Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1814–15, 1819–20 (1998); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 177 (2009); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 644 n.120 (1998); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 327 (1988).

192. See, e.g., sources cited *supra* notes 136–38 and 16.

193. 481 U.S. 279, 326 (1987) (Brennan, J., dissenting). The data involved in the case revealed that the race of the victim in Georgia exerts as much influence on the sentence outcome as whether the defendant had a prior murder conviction. Brief for Petitioner, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811), available at 1986 WL 727359, at 88.

194. See *supra* note 145.

195. See *supra* note 152 and accompanying text.

196. See RASMUSSEN REPORTS, *supra* note 141 (discussing finding that 45% of Americans believe the criminal justice system is fair to minorities); Frank Newport, *Gulf Grows in Black-White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), available at <http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx> (“While 68% of blacks say the American justice system is biased against blacks, 25% of whites agree. Blacks’ attitudes about the justice system have remained virtually constant over the past 20 years, but whites have become less likely to perceive bias.”).

197. See *supra* note 143 (discussing bias in Florida criminal system).

198. See *supra* note 10 and accompanying text.

prosecution of the case.<sup>199</sup> Enter stand your ground. Police Chief Jim Lee made a half-hearted attempt to argue that the legal requirements of self-defense and probable cause thwarted the ability of the police to affect a prompt arrest.<sup>200</sup> However, it was the prosecutor, Angela Corey, who brought the stand-your-ground law, which was already unpopular with district attorneys, to the forefront as a wedge issue.<sup>201</sup> We know that from those early days up until after the trial, Corey sought to divorce the case from race.<sup>202</sup> Even though the trial was not yet in its embryonic stages, Corey's insertion of stand your ground as a wedge effectively changed the tenor of the discussion, so that in the event of an acquittal critics would attribute the verdict primarily to prosecutorial ham-stringing by stand your ground and not to race-based prosecutorial restraint.<sup>203</sup> Consequently, stand your ground was intended to, and arguably did, silence claims that leniency toward Zimmerman was principally a product of racial inequality.<sup>204</sup>

Nevertheless, one might assert that the current focus on stand your ground includes a focus on whether state actors are applying the doctrine in a biased manner. In this sense, zeroing in on stand your ground could lead to discussions about how to reduce racial bias in police and prosecutor decision making more generally. Indeed, as will be discussed in Part III, the emergent studies on the doctrine have uncovered extreme racial disparities in how police and prosecutors treat potential self-defense cases, although interestingly they are not necessarily exacerbated stand your ground.<sup>205</sup> Nonetheless, it appears that the stand-your-ground discussion is more properly understood to diminish rather than highlight the importance of the race and discretion issue. First, although there is some discussion of the racialized application of the law, most of the current national conversation involves the overly permissive nature of the law.<sup>206</sup> Commentators tend to focus on the fact that the law forces police and prosecutors to go light on culpable killers and encourages people to kill.<sup>207</sup> Second, to the extent that race does crop up in the stand-your-ground discussion, critics tend to assume that the racial

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199. See *supra* note 99 and accompanying text.

200. See *supra* note 60 and accompanying text.

201. See *supra* note 75 and accompanying text.

202. See *supra* notes 85–86 and accompanying text.

203. See *supra* note 75 and accompanying text.

204. See, e.g., DeWayne Wickham, *Wickham: How Did Zimmerman Become Victim?*, USA TODAY (July 15, 2013, 2:00 PM), <http://www.usatoday.com/story/opinion/2013/07/15/george-zimmerman-trayvon-martin-dewayne-wickham/2515979/> (asserting that stand your ground “became Zimmerman’s get-out-of-jail-free ticker”).

205. See *infra* notes 241–42 and accompanying text.

206. See *supra* notes 14–15 and accompanying text.

207. See *supra* notes 14–15 and accompanying text.

problems are somehow endemic to the law itself.<sup>208</sup> In this view, equality can be restored though repealing the law, while leaving untouched the practices that cause that law (and most other criminal laws) to unequally burden minorities. Accordingly, stand your ground has come to *symbolize* racism in the administration of criminal justice, even though nothing about the law facially calls for a discriminatory result.<sup>209</sup> However, in targeting that law, we may actually be ignoring the real source of discrimination and creating a situation that is worse, not better, for minorities. Part III below focuses on whether stand your ground is an obvious or appropriate locus of racial outrage.

### PART III: STAND YOUR GROUND'S RACIAL IMPLICATIONS

Media, legal experts, and scholars elevated stand your ground to a racial symbol of utmost import, such that many now consider the doctrine's elimination an unequivocal necessity for racial justice, and conversely the doctrine's continued existence a racial justice defeat.<sup>210</sup> The last two Parts made the case that the focus on stand your ground may have deflected attention away from other axes of racial inequality, namely, the neighborhood watch mentality, the racial profiling of young black men, the six-person jury system, and racially biased state actor discretion. In addition, while progressives and critical race scholars continue to adhere to the notion that the problem with stand your ground is that it reflects and reinforces racial hierarchy, public commentary has in a sense de-racialized the law.<sup>211</sup> By emphasizing that the law is bad policy (i.e. too lenient on culpable murderers), some commentators have de-linked the law from the racially tragic details of Martin's case, namely that Zimmerman killed him specifically because of a racialized fear of crime.<sup>212</sup> Instead, they emphasize nonracial victimization aspects, namely that Zimmerman was a "hothead" and Martin was an innocent.<sup>213</sup> Moreover, the stand-your-ground law may not itself be more

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208. See *Jesse Jackson Files Lawsuit to Repeal Stand Your Ground in Georgia*, ATLANTA DAILY WORLD (Nov. 1, 2013), <http://atlantadailyworld.com/2013/11/01/jesse-jackson-files-lawsuit-to-repeal-stand-your-ground-in-georgia/> ("Critics have said that Florida's stand-your-ground law was the reason Zimmerman was acquitted on all charges. . . . [Jesse] Jackson and other critics say the more lenient laws lead to more violence, particularly against black males like Martin.").

209. See *supra* notes 99–101 and accompanying text; see Bill Cotterell, *Florida Stand Your Ground Law 'Not Repealable,' Says Expert*, HUFFINGTON POST (July 31, 2013, 4:15 PM), [http://www.huffingtonpost.com/2013/07/31/stand-your-ground-repeal\\_n\\_3681539.html](http://www.huffingtonpost.com/2013/07/31/stand-your-ground-repeal_n_3681539.html) ("Florida's self-defense law and the Zimmerman case are seen by many African Americans as emblematic of a lack of racial equality in the U.S. justice system.").

210. See *supra* note 5 and accompanying text.

211. See *supra* notes 76–77 and accompanying text.

212. See *supra* notes 76–77 and accompanying text.

213. This, in turn, sparked a response on the right that Zimmerman is not a hothead and Martin

prone to disparate application than any other criminal law principle, and its repeal may have some racial effects that progressives have not anticipated and might not actually want. This Part takes a critical look at the belief that stand your ground is an inherently racist law, the repeal of which is required for racial justice. It also questions whether, as a general matter, discrimination in the application of doctrines of criminal leniency should always be addressed through mainstreaming severity.

As noted in Part I, stand-your-ground-like doctrines have been on the books for well over a century in the United States, but have received little attention from racial critics.<sup>214</sup> The doctrine of self-defense, in general, has sometimes been the subject of critical race scrutiny. The most infamous case involving the racialized use of self-defense prior to the Zimmerman case was the Bernard Goetz case, in which Goetz, the New York City “subway vigilante,” successfully utilized New York’s self-defense law to achieve an acquittal for the admitted execution-style shooting of four black youths.<sup>215</sup> The bulk of the critical commentary involved the defense attorney’s explicit and implicit invocation of stereotypes of black male criminality and the malleability of the reasonableness standard.<sup>216</sup> Regarding the latter, scholars asserted that the standard invited jurors to apply prevailing racially hierarchical norms to Goetz’s decision making, specifically, the overarching fear of young black men.<sup>217</sup> To be sure, critical race scholars have argued that the “reasonable person” standard is raced and gendered in a variety of legal

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was, in fact, not innocent. See Eric Zorn, Op-Ed., *Guess What? We’re Having a Surmise Party*, CHI. TRIB., at A22 (Apr. 1, 2012) (noting the conservative view that Zimmerman is “a righteous citizen who’s being condemned for defending his life against a hothead”); ProLegs, *Limbaugh Says Zimmerman, Not Trayvon Martin, Is the Real Victim*, DAILY KOS (July 3, 2013, 1:37 PM), <http://www.dailykos.com/story/2013/07/03/1220985/-Limbaugh-Says-Zimmerman-Not-Trayvon-Martin-is-the-Real-Victim>.

214. See *supra* notes 35–38 and accompanying text.

215. See *People v. Goetz*, 497 N.E.2d 41, 41–43 (N.Y. 1986) (reinstating indictment against Bernard Goetz, a white man who shot and wounded four black youths on New York City subway train after one or two of them asked for five dollars, because he claimed they were going to rob him).

216. See, e.g., Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 428 (1988) (asserting that the defense “conjured . . . an image of innocent whiteness surrounded by threatening blackness”); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 782, 787 (1994); LEE, *supra* note 138, at 148–54.

217. See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 88 (1998) (“To many, allowing the reasonableness of Goetz’s actions to be judged in light of his past “victimization” by black youth is tantamount to saying that individuals should not be legally required to avoid being racist.”); Armour, *supra* note 214, at 790 (contending that “the error the ‘Reasonable Racist’ makes in claiming that the moral norm implicit in the objective test of reasonableness extends no further than the proposition that ‘blame is reserved for the (statistically) deviant’”); LEE, *supra* note 138, at 148.

areas outside of criminal law, such as torts and contracts.<sup>218</sup> Accordingly, the Goetz critique is essentially a critique of judge and juror discretion, stating that flexible reasonableness standards can lead to biased outcomes.<sup>219</sup> In the Goetz case, critics paid far less attention to the duty to retreat, and the case has never come to stand for the proposition that New York law should have required retreat.

Over the past several decades, the most vocal progressive critique of self-defense has involved the notion that the law is *too narrow*, failing to accommodate a specific subordinated class of people who kill—battered women.<sup>220</sup> Feminists have forcefully criticized the law's restrictive technicalities for disadvantaging female abuse survivors who kill male batterers. Gender scholars attack the imminence requirement, asserting that it puts women in danger to require them to wait for the moment or attack and that it inadequately accounts for the “cycle of violence.”<sup>221</sup> The duty to retreat has also drawn critical fire. In diametric opposition to the current progressive position that justice requires preservation of the duty to retreat, feminist critics called for the abolition or limitation of the duty in cases involving battered women.<sup>222</sup> In an ironic twist, before the 2005 stand-your-ground amendment, the last limitation on Florida's duty to retreat occurred in 1999, when feminists successfully moved the Florida Supreme Court in *Weiland v. State*, a battered woman case, to

218. See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 480–89 (1998).

219. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 609 (1981) (asserting that because reasonableness standards allow individual jurors to “determine whether the particular defendant was reasonable, jury verdicts will be inconsistent, unpredictable and biased”).

220. See, e.g., Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 368–78 (1984); Loraine Patricia Eber, Note, *The Battered Wife's Dilemma: To Kill or to Be Killed*, 32 HASTINGS L.J. 895 (1981); Cathryn Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 43 (1986); Walter W. Steele, Jr. & Christine W. Sigman, *Reexamining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 183 (1991); Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 387 (1992).

221. See, e.g., V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1283 (2001); Rosen, *supra* note 220; Benjamin C. Zipursky, *Self-Defense, Domination and the Social Contract*, 57 U. PITT. L. REV. 579, 605–09 (1996); see also Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 229 (2002) (“A battered woman who kills during a non-confrontational moment encounters two related problems when claiming self-defense—the requirement of imminence and her failure to leave the relationship.”).

222. See, e.g., Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617, 675–76 (2006); see generally Suk, *The True Woman*, *supra* note 39, at 253–59 (tracing doctrinal shifts and noting courts revised the duty to retreat to allow battered women to “kill in self-defense without retreating because, trapped in the dynamics of [domestic violence], she lacked the capacity to leave”); Nourse, *supra* note 221, at 1280 (“The feminist position has generally been hostile to retreat rules . . .”).

eliminate the duty retreat before using deadly force against a co-habitant in the home.<sup>223</sup>

In the end, progressives seek a self-defense law that simultaneously accommodates sympathetic defendants (battered women who kill abusers, minorities who kill those racially harassing them) and excludes unsympathetic ones (paranoid individuals who racially profile and kill minorities). Indeed, had the case played out differently—Zimmerman attacked Martin, who in the midst of the attack retrieved the gun and shot Zimmerman, many liberals would be quick to say that Martin did not have to retreat (or could not have safely retreated) and excoriate the state for charging Martin with murder.<sup>224</sup> However, completely removing discretion from the law to eliminate disparity, only serves to ensure that the law treats both minorities and majority individuals unjustly. It is equally unsatisfying to seek a world in which no one is ever criminally punished for killing and one in which everyone who kills is mandatorily subject to capital punishment. So what is a critical commentator to say when faced with a racial tragedy that the law could not or did not prevent? I assert that it is not enough to simply call for the elimination of leniency principles because a racial malefactor was able to utilize them. By the same token, one should not always call for greater doctrinal leniency whenever a defendant sympathetic to progressives is convicted.<sup>225</sup> Instead, progressives ought to engage in careful factual and analytical inquiry to determine whether the elimination or addition of a certain criminal law doctrine furthers racial equality.<sup>226</sup> Such a determination, in our current carceral state, necessarily occurs upon a backdrop of the mass incarceration of minorities.<sup>227</sup> I would thus propose that when progressives critically analyze the equities of a certain shift in criminal law, they do so with the assumption that greater severity in criminal law

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223. 732 So. 2d 1044, 1058 (Fla. 1999) (eliminating “duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm”). See Suk, *The True Woman*, *supra* note 39, at 256–57 (discussing case); Michelle Jaffe, Note, *Up in Arms over Florida’s New “Stand Your Ground” Law*, 30 NOVA L. REV. 155, 173–75 (2005).

224. Cf. Jarvis DeBerry, *Can You Imagine Trayvon Martin Using George Zimmerman’s Defense?: Jarvis DeBerry*, N. ORLEANS TIMES-PICAYUNE (July 17, 2013, 8:19 AM), [http://www.nola.com/opinions/index.ssf/2013/07/can\\_you\\_imagine\\_trayvon\\_martin.html](http://www.nola.com/opinions/index.ssf/2013/07/can_you_imagine_trayvon_martin.html) (arguing that if the races had been reversed “[c]onservatives wouldn’t have wasted a nanosecond considering Martin’s argument of self-defense”); see *infra* notes 256–58 (discussing Marissa Alexander case).

225. See generally Gruber, *Murder*, *supra* note 27, at 141–55 (discussing pro-severity and pro-leniency proposals to address discriminatory mercy); Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571 (2013) (arguing that severity should not be the natural solution to miscarriages of racial and gender justice).

226. Cf. Gruber, *Murder*, *supra* note 27, at Part IV (providing an “institutional” analysis of murder sentencing to aid in the determination of whether to limit or restrict the provocation defense because of the doctrine’s utilization by wife killers).

227. See *supra* notes 104, 126, and accompanying text.

adds to the problems of mass incarceration and racialized policing and thus with a *presumption against* greater severity in criminal law.

It seems that many liberal commentators did not engage in such analysis before condemning stand-your-ground laws. Indeed, calls to repeal the law and to study it occurred at the same time.<sup>228</sup> Thus, when stand your ground's repeal became the center of advocacy efforts, advocates had not yet fully grappled with two fundamental issues: (1) Whether state actors have generally applied the doctrine in a manner that unfairly disadvantages minorities; and (2) if so, whether the answer is to apply the doctrine to a greater number of minority defendants or to fewer white defendants. Turning to the first issue, now, roughly two years after the shooting, we have some empirical evidence on stand your ground and racial bias.<sup>229</sup> After perusing the studies, only a couple things are clear. First, the question of whether the stand-your-ground law, itself, disadvantages African Americans is extremely complex. Second, regardless of stand your ground, state actors apply self-defense doctrine in an intensely racially disparate manner.<sup>230</sup>

In a mind-blowing twist, amidst the stand-your-ground media fervor, none other than Fox News publicized the *Tampa Bay Times's* finding that Florida's stand-your-ground law may serve to benefit defendants of color more than white defendants, and conservative pundits used this finding as further ground to support the law.<sup>231</sup> This perhaps marked the first time that right-wing commentators supported a law because of its tendency to be merciful toward minority murder suspects

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228. The calls to repeal started within weeks of the shooting, even before the DOJ Civil Rights Commission announced on May 31, 2012, that it would investigate the laws for bias. *See supra* notes 205–07 and accompanying text; Adam Cohen, *A Push to Repeal 'Stand Your Ground' Laws*, TIME (Apr. 16, 2012), <http://ideas.time.com/2012/04/16/the-growing-movement-to-repeal-stand-your-ground-laws/#ixzz2sCJ31Ekg> (“The [anti-stand-your-ground] campaign is getting strong support from the NAACP and other civil rights groups, who argue that ‘Stand your ground’ laws are more likely to be used to defend white people who kill blacks than the reverse.”).

229. *See, e.g.*, John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URBAN INSTITUTE (July 2013), <http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf> (methodological analysis of race and stand your ground); Martin et al., *supra* note 13 (lay tally of racial effects of stand-your-ground law in Florida). I could find no other studies that look at the racial implications of only stand your ground (or lack of duty to retreat) versus self-defense in general.

230. *See infra* notes 244–49 and accompanying text.

231. *See* Sherwin Lott & John Lott, *What Liberal Media Won't Tell You—Blacks Benefit Most from Stand Your Ground Laws*, FOX NEWS (July 31, 2013), <http://www.foxnews.com/opinion/2013/07/31/what-liberal-media-wont-tell-blacks-benefit-most-from-stand-your-ground-laws/>. *But cf.* Emily Arrowood, *Hannity Is Wrong: Stand Your Ground Laws Don't "Benefit" African-Americans*, MEDIA MATTERS (Aug. 22, 2013, 1:19 AM), <http://mediamatters.org/research/2013/08/22/hannity-is-wrong-stand-your-ground-laws-dont-be/195528> (quoting conservative news commentator Sean Hannity).



and defendants.<sup>232</sup> Again, however, the stand-your-ground debate was mixed up with the highly publicized gun control debate, and politics certainly makes strange bedfellows.<sup>233</sup> Nevertheless, this underscores the point that, as a doctrine of general leniency, it was inevitable that the stand-your-ground law would sometimes benefit minority suspects and defendants.<sup>234</sup> Outside of the Florida study, research has not persuasively established that the law's primary effect is to advantage whites and disadvantage blacks.<sup>235</sup> In fact, one leading study indicates that the law's primary racial effect is increasing the probability of white male deaths by shooting, with no general effect on African American populations.<sup>236</sup>

One reason it is so difficult to examine the racial equities of leniency toward violent offenders is that violent crimes generate defendants and victims with competing interests, and these parties may be of the same race. In victimless crimes, one could easily predict that conscious and unconscious biases, as well as structural inequalities, will result in white defendants receiving more leniency than black defendants. For example, empirical evidence demonstrates that the criminal system treats black drug crime defendants more harshly than similarly situated white defendants.<sup>237</sup> However, inserting a victim into the equation complicates matters. State actors and jurors' racial biases may manifest as harshness toward black defendants or as leniency toward those who offend against black victims. In fact, it may be the case that the race of the victim is a greater predictor of outcomes than the race of the defendant.<sup>238</sup> Given that many violent offenses (and the vast majority of

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232. See Arrowood, *supra* note 231 (Fox contributor Jason Riley critiqued the liberal position, stating, "[s]o to the extent that we are limiting the ability of poor blacks to defend themselves—I mean, these efforts are actually resulting in people's lives being taken."); Lott & Lott, *supra* note 231 ("Do we really want to live in a country where poor people in high crime urban areas hunker down, afraid to leave their homes?").

233. See *supra* notes 22–23 and accompanying text.

234. See Gruber, *Murder*, *supra* note 27, at Part IV.B (citing statistics showing that young men of color disproportionately constitute murder suspects and defendants and speculating that making the law of murder more severe would significantly burden this population).

235. See *infra* notes 243–48 and accompanying text.

236. Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 18187, 2012), available at <http://www.nber.org/papers/w18187> ("Our results indicate that between 28 and 33 additional white males are killed each month as a result of these laws, accounting for about 8 to 9 percent of all the white male murder victims in 2010. We find no evidence to indicate that these laws cause an increase in homicides among blacks.").

237. See Traci Schlesinger, *Racial Disparities in Pretrial Diversion*, 3 RACE & JUST. 210, 223 (2013), available at <http://raj.sagepub.com/content/early/2013/04/05/2153368713483320.full.pdf> (quoting study finding that "[b]lack defendants have odds of receiving pretrial diversion that are 44% lower than those of White defendants charged with similar offenses").

238. This has been found to be the case in studies of the death penalty. Most experts agree that the racial bias is attached to the race of the victim and not necessarily to the race of the defendant,

murders) are intraracial,<sup>239</sup> if the victim's race is more salient than the defendant's race, it could be the case that, in general, black homicide defendants receive more lenient treatment than white homicide defendants.<sup>240</sup> One might also expect, however, that blacks-who-kill-whites receive the harshest treatment and that whites-who-kill-blacks receive the most lenient treatment, although death penalty studies seem to validate the first proposition but not the second.<sup>241</sup> Applying these observations to stand your ground, one might predict that black defendants, on average, benefit more from stand your ground than white defendants (given biases against black victims), blacks-who-kill-whites benefit the least from the doctrine, and perhaps whites-who-kill-blacks benefit the most. If this were the case, the situation would already be plenty complicated.<sup>242</sup> In fact, the empirical racial picture of stand your ground is even more convoluted.

As of the time of publication, it appears that a July 2013 Urban

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that is, a death sentence is more likely for those who kill whites. See Matthew B. Robinson, *The Real Death Penalty: Capital Punishment According to the Experts*, 45 CRIM. L. BULL. ART. 3 (2009) (surveying death penalty "experts," finding that eighty-four percent believed it was racially biased and that "the racial bias in capital punishment does not pertain to race of defendant but rather to race of victim"). See, e.g., Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2145 (2011) (conducting twenty-eight year study and concluding that victim race "is a strong predictor of who is sentenced to death in North Carolina"); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN L. REV. 27, 105 (1984) (conducting study of eight states' capital systems and finding that race-of-victim discrimination "is a remarkably stable and consistent phenomenon"); Unah, *supra* note 191, at 77 (conducting study and concluding that "[d]efendants of whatever race who kill White victims are significantly worse off than defendants who kill Black victims").

239. See Alexia Cooper & Erica L. Smith, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980–2008*, NCJ 236018, 13 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf> (finding that between 1980 and 2008, eighty-four percent of white victims were killed by whites and ninety-three percent of black victims were killed by blacks).

240. This was the case in the *McCleskey* litigation, see *supra* note 193, where the data exposed that white defendants were nearly twice as likely to receive a death sentence as black defendants. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (noting the "reverse racial disparity").

241. The "Baldus study" in *McCleskey* did find that blacks who killed whites were far more likely to receive a death sentence than any other group (a 22% chance). Brief for Petitioner, *supra* note 193, at 11–15. However, whites who killed blacks were slightly more likely to get the death penalty (3% chance) than blacks who killed blacks (1% chance). *Id.* Other studies have indicated that the race of the victim is the only clear predictor of outcomes. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 5–6 (1990) (synthesizing twenty-eight death penalty studies and concluding that "[t]he race of victim influence was found at all stages of the criminal justice system process" but "evidence for the influence of the race of defendant on death penalty outcomes was equivocal").

242. In the death penalty context, there is some progressive schizophrenia about how to frame the racial problem, given that abolition—the preferred solution—benefits minority defendants, but the identified problem is leniency toward killers of minority victims. See Gruber, *Murder*, *supra* note 27.

Institute study analyzing FBI crime report data is the leading, if not the only, systematic study of stand your ground's racial effects.<sup>243</sup> The study concludes that there is a racial effect from stand your ground and accordingly criticizes the law.<sup>244</sup> However, it is worthwhile to look at exactly what the racial effect is. In one data set, the author analyzes cases that bear "Martin attributes," namely the parties were male strangers involved in a one-on-one conflict with a gun.<sup>245</sup> This narrowing makes sense because these are the primary cases in which stand your ground might make a difference. In such cases, the existence of stand your ground did the following: (1) it dramatically increased the chances a white-on-white homicide would be ruled justified; (2) it significantly increased the chances that a black-on-white homicide would be ruled justified; (3) it negligibly increased the chances that a white-on-black homicide would be ruled justified; and, (4) it did not increase the chances that a black-on-black homicide would be ruled justified.<sup>246</sup> Moreover, the wide gap between the justification rates of white-on-black

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243. Roman, *supra* note 229. Analyzing the empirical methods of the study is certainly beyond the scope of the paper. Nevertheless, one obvious confound is that only states with stand-your-ground statutes are counted as stand-your-ground states. States that have eliminated the duty to retreat by judicial order or otherwise are counted as non-stand-your-ground states. *Id.* at 4. This makes little sense given that police, prosecutors, and jurors are subject to the same conditions whether by statute or judicial decision, unless the author intends to measure the psychological/cultural effect of recent legislative fights over stand your ground, and it may skew results in the sense that those states that enacted the ALEC version of stand your ground might already be predisposed to greater racial biases. (Apparently, Roman made the decision to separate legislative and judicial stand your ground on the political basis that the legislative versions of the doctrine are easier to change). *Id.* Moreover, given the nature of FBI statistics, the study only measures the effect of stand your ground on police decisions to arrest (and to a lesser extent prosecutor's decisions to charge a manslaughter or murder) and not on ultimate outcomes. *Id.* at 2.

244. Interestingly, the study says that the problem with stand your ground is that it may "exacerbate" the already extant disparities in self-defense law. *Id.* at 2. It is intuitive that if self-defense, a doctrine of leniency, is applied in a racially biased manner, adding the possibility of more leniency through stand your ground will widen the disparities. However, at least for Martin-like cases, Roman's research does not bear this out. *See id.* There are many reasons why increasing leniency might not increase disparity. The main reason is that broadening self-defense does not necessarily broaden state actor discretion. Although it increases police and prosecutor ability (or perceived ability) to treat favored defendants leniently, it may simultaneously decrease their power (or perceived power) to treat disfavored defendants harshly. Alternatively, the non-stand-your ground status quo might represent the fixed endpoints of racialized discretion. In other words, state actors are already inclined to treat whites who kill blacks so favorably that adding leniency is irrelevant and so inclined to treat blacks who kill whites harshly that they will find ways around any new doctrine of leniency.

245. *Id.* at 9.

246. *Id.* The percentage of justified white-on-white homicides was nearly double in stand-your-ground jurisdictions (12.95% in non-stand-your-ground states versus 23.58% in stand-your-ground states). The percentage of justified white-on-black homicides were only slightly higher in stand-your-ground states (41.14% versus 44.71%). Stand your ground had a more profound effect on black-on-white homicides (7.69% versus 11.10%), and virtually no effect on black-on-black homicides (in fact, the justification rate went down slightly: 10.24% versus 9.94%). *Id.*

killings and black-on-white killings (the former is about three times more likely to be ruled justified than the latter) was the same in stand-your-ground and non-stand-your-ground states.<sup>247</sup> Finally, in stand-your-ground states, blacks who killed whites were actually treated more leniently than blacks who killed blacks.<sup>248</sup>

What is a critical race scholar to make of this information? It is true that stand your ground did not benefit black defendants who killed other African Americans. But that seems to be a wash, given that a benefit to the black defendant in such a case can also be seen as a burden to a black victim.<sup>249</sup> In terms of the rather heavy burden on white victims and consequent benefit to white and black defendants, it is not clear that this is problematic from a racial hierarchy standpoint. One might assert that the principal effect of stand your ground is to temper some of the racial privilege state actors bestow on white victims. Given that privileging white victims has long been a source of consternation for race scholars in the death penalty context, perhaps it is actually more equalizing to take some of that privilege away.<sup>250</sup> Alternatively, studies confirm that prosecutors are extremely responsive to victims' families' demands and public outrage, which are likely to be greater in white-victim cases.<sup>251</sup> Perhaps stand your ground provides prosecutors political cover for leni-

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247. *Id.* Specifically, the gap was 33.45 percentage points in non-stand-your-ground jurisdictions and 33.61 percentage points in stand-your-ground jurisdictions. However, both types of killings were more likely to be justified in stand-your-ground states. *Id.*

248. *Id.* In non-stand-your-ground states, black-on-white killing had the lowest justification rate at 7.69%, compared with 10.24% for black-on-black homicides. In stand-your-ground jurisdictions, black-on-black homicides were the least justified (9.94%), compared with 11.10% for black-on-white homicides. *Id.* The study finds a more expectable racial effect (that is, a distinct benefit to white defendants, and especially whites who kill blacks) when it does not narrow the pool to Martin-type cases. *Id.* at 7 (finding the justification rate for white defendant homicides to nearly double, the justification rate for black-on-black homicides to increase significantly, and the justification rate for black-on-white homicides to increase minimally). The problem is that there is much noise in that comparison, given that it includes many types of homicides in which stand your ground would not likely apply. In any case, the main point is not so much that there is definitively no exacerbating effect of stand your ground, so much as the effect was not clear at the time the anti-stand-your-ground movement took hold, and it is still not clear.

249. Critics condemn uneven application of the death penalty on the principle ground that it devalues black victims. See Gross & Mauro, *supra* note 238, at 107 (observing that "it has been argued that our society tends to view blacks as 'devalued crime victims'"); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002) (contending disparity shows that "[w]hite lives are considered to be more valuable than black lives").

250. See *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J. dissenting) ("If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder 'for whites only') and no death penalty at all, the choice mandated by the Constitution would be plain.").

251. See Gross & Mauro, *supra* note 238, at 107 (noting the argument that prosecutors pursue the death penalty in "homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides").

ent treatment in close cases involving white victims.<sup>252</sup>

While stand your ground might not compound racial bias, it is clear that there are gross racial disparities in the application of self-defense law in general. Regardless of stand your ground, white defendants are far more successful when pleading self-defense than black defendants.<sup>253</sup> Moreover, white-on-black homicides are deemed justified far more often than black-on-white or black-on-black homicides.<sup>254</sup> Finally, those who kill white victims are charged with murder disproportionately to those who kill black victims (although stand your ground actually closes this gap quite a bit).<sup>255</sup> In the end, the current empirical evidence tends to show that self-defense law is riddled with anti-minority disparities, these disparities exist in stand-your-ground and non-stand-your-ground jurisdictions, but they are not necessarily worse in stand-your-ground jurisdictions.

This brings us to the second fundamental issue not necessarily addressed by stand-your-ground critics: What should be done when state actors and jurors apply doctrines of criminal leniency in a disparate manner? It is quite evident that the existence of self-defense disproportionately benefits whites who kill blacks, but surely the answer cannot be to eliminate self-defense. To do so might somewhat equalize homicide prosecution, but it would be at the cost of all the black defendants (and other defendants) who could have benefitted from that doctrine of leniency. In the same vein, assuming that George Zimmerman would have lost out in a non-stand-your-ground world, we might also ask who else would be on the losing end. Marissa Alexander, the black Florida woman who unsuccessfully asserted self-defense during her trial for shooting her allegedly abusive husband, has served as critics' irrefutable proof that stand your ground is indelibly stamped "for White defendants only."<sup>256</sup> The logic then proceeds that if stand your ground serves exclusively to benefit white defendants and burden black victims, it should be repealed.<sup>257</sup> Even if that were the case, which apparently it is not, the

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252. Thus, prosecutors rely on stand your ground the way that Corey attempted to. See *supra* notes 73–75 and accompanying text.

253. See Roman, *supra* note 229, at 7–9.

254. See *supra* notes 246–47.

255. See Roman, *supra* note 229, at 9. In non-stand-your-ground jurisdictions the gap between the justification rates for white-victim homicides and black-victim homicides is 15.37 percentage points, but only 9.98 percentage points in stand-your-ground jurisdictions. *Id.*

256. See Amanda Marcotte, *Marissa Alexander, Sentenced to 20 Years for Firing One Shot Into the Ceiling, Gets a Retrial*, SLATE (Sept. 26, 2013, 2:12 PM), [http://www.slate.com/blogs/xx\\_factor/2013/09/26/marissa\\_alexander\\_and\\_stand\\_your\\_ground\\_she\\_claimed\\_self\\_defense\\_but\\_was.html](http://www.slate.com/blogs/xx_factor/2013/09/26/marissa_alexander_and_stand_your_ground_she_claimed_self_defense_but_was.html) (observing that the "case created a national outcry" over the racially discriminatory application of stand your ground); *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J. dissenting) (using "for Whites only" in death penalty context).

257. See *supra* notes 208–09 and accompanying text.

question would remain: What to do about Marissa Alexander? If the problem is that Marissa Alexander deserved leniency under stand your ground but was denied the doctrine, should the answer be to deny everybody, including future Marissa Alexanders, benefit of the doctrine? Some may believe that Alexander could have been acquitted regardless of stand your ground, but the same might be said of George Zimmerman. Critics are clear that the injustice lay in the judge's unfair denial of Alexander's stand-your-ground claim, which predicated her unjust conviction.<sup>258</sup>

The problem racial critics of stand your ground face is two-fold. First, it seems quite unlikely that one can remedy disparity simply by making the law generally more severe.<sup>259</sup> Without some change to the way police, prosecutors, and jurors manage their discretion, broadening self-defense law simply makes the criminal system more lenient (more overall acquittals) with disparities intact,<sup>260</sup> while narrowing self-defense law simply makes the system more severe (more overall convictions) with the disparities intact.<sup>261</sup> Second, even if a unilateral legal change could address disparity, the question remains whether the law should be broader or narrower.<sup>262</sup> In the stand-your-ground context, the choice to retain leniency and the choice to make the law more severe are equally satisfying or unsatisfying depending on the context. An extremely broad self-defense law might force state actors and jurors to treat defendants like Marissa Alexander leniently, but might also tip the scales toward folks like Zimmerman. An extremely narrow self-defense law might stop state actors from letting people like Zimmerman off the hook, but it might make for a more difficult defense for defendants like Alexander. In principle, there is no reason to choose the punitive regime over the lenient one. Moreover, progressive critics have never had, and

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258. See Touré, *Where Was 'Stand Your Ground' for Marissa Alexander?*, TIME (Apr. 12, 2012), <http://ideas.time.com/2012/04/30/where-was-stand-your-ground-for-marissa-alexander/> (critic of stand your ground arguing that Marissa Alexander should have had a successful stand-your-ground claim).

259. Were one to eliminate diversion, see *supra* note 237, both black and white defendants could not receive a diversionary disposition, and such defendants would necessarily receive a harsher sentence. However, there would likely remain disparities in the actual sentences of black and white low-level offenders.

260. In fact, there is evidence that this is precisely what stand your ground did. It reproduced (if slightly reduced) racial disparities, just with greater leniency all around.

261. See Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1066 (2005) (reviewing LEE, *supra* note 138) ("If a bar is unlevel, it can be leveled only by adjusting one side more than the other" rather than simply "rais[ing] the bar entirely, with its original slant intact.").

262. Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 161–62 ("Every equal protection case poses the problem of whether to 'level up' or 'level down.'").

still do not have, good empirical evidence that the punitive regime is more racially palatable than the lenient regime. Nevertheless, as has often occurred in the domestic violence and provocation contexts,<sup>263</sup> when faced with a case of leniency toward an ostensible subordinator, many progressives choose greater punitivity in our current penal state.<sup>264</sup> The next Part ruminates on why many critics focus on repealing stand your ground, in lieu of the more obviously racialized issues generated by the Zimmerman case, and why they support remedying the perceived bias of stand your ground through mainstreaming severity, rather than mainstreaming leniency or something else altogether.

#### PART IV: THE PUNITIVE IMPULSE

Thus far, I have lamented that the ascendancy of the stand-your-ground issue prevented the Zimmerman case from serving as a catalyst of change on the various troubling issues laid out in Part II. I further asserted that stand your ground is a somewhat peculiar site of racial outrage and its perceived racial problems do not necessarily mandate repeal. This Part seeks to situate some progressive commentators' choice to elevate stand your ground in the context of larger shifts in late twentieth-century American ideology regarding social dysfunction and criminal punishment. In short, it asserts that at least part of the story is a "punitive impulse" that can lead progressives to seek solutions to race- and gender-based harm through strengthening criminal law's ability to punish individuals who commit offenses against minorities and women. Accordingly, this Part advances a caution to gender and race scholars that embracing solutions of criminal severity might actually undermine the progressive view that raced and gendered harms are substantially products of embedded social and cultural norms and instead reinscribe the prevalent concept that bigotry and criminality are individualistic deviations from the norm.<sup>265</sup>

To be sure, it seems natural, in the face of racist harm that goes unpunished, to seek greater criminal enforcement and punishment so that such future harm is less likely to occur. However, this move is neither natural nor pre-political. The retroactive application of harsh criminal sanctions to individuals is only one of many ways to approach harm and social dysfunction, even racialized harm and dysfunction.<sup>266</sup> The punitive model of addressing harm has a specific political history in

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263. See generally Gruber, *Feminist War*, *supra* note 26; Gruber, *Murder*, *supra* note 27.

264. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 249 (2006) (linking mass incarceration to the tendency of lawmakers to "level-up" rather than risk "leveling down" in the face of disparities).

265. See *supra* notes 153–57 and accompanying text.

266. See GARLAND, *supra* note 118, at 167–93 (discussing the ways in which late twentieth-

late twentieth-century America and connects with a particular vision of political economy.<sup>267</sup> This model has been so influential and consistent for decades that it approaches an unconscious impulse.<sup>268</sup> When faced with whatever they consider to be condemnable harm, people all over the political spectrum are quick to embrace ever more severe punishment of the individuals most readily identified as the causes of the harm.<sup>269</sup>

Before describing the punitive impulse in more detail, let me add a caveat. It is certainly impossible to prove in any systematic or even persuasive manner that stand your ground became a central issue in the Zimmerman case because progressives acted on punitive impulse. Indeed, there are a multitude of reasons why stand your ground rose to the forefront. Not the least of these reasons is its political connection to the gun-control debate.<sup>270</sup> Moreover, once stand your ground came to the fore, the media had a field day uncovering cases where its application seemed patently outrageous.<sup>271</sup> Thus, perhaps racial justice-seekers started out condemning Zimmerman's racial profiling and the police and prosecutors' biased reaction, but the flood of discussion on stand your ground stamped out alternate voices or led commentators to concentrate on the issue with most traction.<sup>272</sup> Moreover, some progressive critics may have just assumed based on anecdote that stand your ground provided very little distributive benefits to minorities and concluded that repeal represented the only or most effective avenue toward racial equality.<sup>273</sup> However, one cannot discount the possibility that some liberal thinkers, like many other Americans when faced with an instance of criminal harm, had a gut reaction that harsher criminal penalties would

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century punitivity is an embedded culture and contrasting it with other models governing, mentalities regarding, and policy choices directed toward reducing crime).

267. See *infra* notes 277–83 and accompanying text.

268. This is similar to the influence of rights formalism on progressives in the latter twentieth-century. See Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 189 (Wendy Brown & Janet Halley eds., 2002) (asserting that “rights now bear the main burden of universalization for both [liberals and conservatives]”).

269. Others have described this tendency as a strategic choice. See Simon, *supra* note 127, at 1417 (“[W]e govern through crime when crime becomes a metaphor or analogy through which we apply the same technologies and mentalities established to govern crime onto very different issues . . . . This means that activists seeking to change conditions in any and all of these settings have real incentives to model their complaints as concerns about crime, construct themselves as victims of the willful wrongdoing of others, and invoke a prosecutorial-like response from government.”).

270. See *supra* notes 22–23; Nichols, *supra* note 31 (quoting Mayor Bloomberg as stating, “[stand-your-ground] laws—drafted by gun lobby extremists in Washington—encourage deadly confrontations by enabling people to shoot first and argue ‘justifiable homicide’ later”).

271. See *supra* notes 96–97 and accompanying text.

272. See *supra* notes 76–80 and accompanying text.

273. See, e.g., *supra* note 228 (NAACP claiming stand your ground only benefits whites).



have deterred the criminal actor (Zimmerman) and prevented a death.<sup>274</sup> Given this reaction, it then seems to follow naturally that strengthening criminal sanctions is the primary way to address the Trayvon tragedy.<sup>275</sup> Consequently, this Part provides a caution against the hasty embrace of a punitive gut reaction, while fully recognizing that this is only part of the story of stand your ground's ascendancy to the primary issue in the Zimmerman case.

The punitive impulse stems from a distinct punitive ideology that embraces a particular set of normative commitments, empirical assumptions, and a specific view of the role of government. For decades, criminal law and policy in the United States has conceived of criminal offenders as dangerous, abnormal actors, who are the unique cause of social disorder, retributively deserve harsh punishment, and need to be totally incapacitated in order to prevent recidivism and deter others from committing crime.<sup>276</sup> The ideology of crime as a disease of inequality and social breakdown to be prevented through ex-ante social programs or addressed with ex-post treatment seems as passé as the zoot suits that were en vogue at the same time as the ideology. It is thus difficult to imagine a paradigm under which criminal punishment is a measure of last resort to be used exceedingly sparingly. Nevertheless, our current punitive paradigm did not always exist, and the penal sanction is not an inherently superior technology of social engineering.

Punitive ideology emerged alongside a cadre of other late twentieth-century conservative American ideologies. Increasing hostility toward New Deal social programs from the right, combined with racial integration and rising crime rates, made urban crime a natural issue for Richard Nixon to politicize in his 1968 presidential campaign.<sup>277</sup>

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274. See GARLAND, *supra* note 118 (noting the shift from a focus on reforming pathological individuals to the idea that most crime is opportunistic and may be deterred).

275. Cf. Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1057 (2008) ("The casting of an issue as a social problem for which the criminal law and justice system appear the answer is very much a matter of context, and the successful adoption of a criminal law framework may reflect the power of certain claims-makers and choices by the media, rather anything natural or inherent about the problem itself.").

276. See Simon, *supra* note 127, at 1418 (noting that the "dominant" penal ideology reflects "nineteenth-century notions of simple deterrence and elimination through exclusion or execution"); Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 586-87 (1998) (contending that society views defendants as "monsters," or "undifferentiated, poor, angry, violent, Black, or Latino male[s]"); GARLAND, *supra* note 118 (observing the trend toward dehumanizing defendants); Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 812 (2002) (lamenting that retributive rhetoric has justified a criminal "system of quarantine").

277. See *Richard Nixon for President 1968 Campaign Brochures: 'The Nixon Stand'*, 4PRESIDENT.ORG, <http://www.4president.org/brochures/1968/nixon1968brochure.htm> (last visited Feb. 6, 2014) ("As President I would recommend to the Congress a national program—to take the offensive against the criminal forces that threaten the peace and security of every

Nixon's "war on crime" and Reagan's "war on drugs" went hand in hand with their efforts to instill a certain view of government and society, now commonly termed "neoliberalism."<sup>278</sup> I and others have written extensively on the connection between punitive ideology and neoliberal political philosophy, so I will only briefly summarize that discussion here.<sup>279</sup> Neoliberalism can be thought of as a hyper-liberalism in which the conception of individuals as autonomous economic actors is more than an observational description—it is a moral paradigm.<sup>280</sup> Thus, those who make up the lower rungs of the socioeconomic ladder presumptively deserve their lot because their poverty is, in a sense, *res ipsa loquitur*—it is incontrovertible evidence of internal moral failing.<sup>281</sup> In this view, government intervention in matters of distribution of various forms of capital and maintenance of a social safety-net are morally indefensible.<sup>282</sup> Consequently, many conservatives today bear a deep distrust of any non-military, non-criminal government action.<sup>283</sup>

Tough-on-crime ideology reflects and reinforces the neoliberal vision of individuals and society. Within neoliberal political philosophy,

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American, and to rebuild respect for law across this country.”). See also GARLAND, *supra* note 118, at 57; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 Minn. L. Rev. 1447, 1462–1505 (2003) (discussing factors leading to the shift in penological views in the late 1960s through the 1980s); Vanessa Barker, *The Politics of Pain: A Political Institutional Analysis of Crime Victims’ Moral Protests*, 41 LAW & SOC’Y REV. 619, 625 (2007) (attributing the public attitude to increasing crime rates in the 1960s and 1970s).

278. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–19 (2009) (“The tough-on-crime philosophy that overtook America was not a singular phenomenon, divorced from a larger political and economic program, but a distinct part of a neoliberal paradigm of rampant individualism, minimization of government services, and unconstrained capitalism.”) (footnotes omitted); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 202–03 (2011) (asserting that the American penal state has “been facilitated by . . . the rationality of neoliberal penalty”).

279. See generally Gruber, *supra* note 278; HARCOURT, *supra* note 278; LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

280. See Gruber, *supra* note 278, at 620 (stating that neoliberalism “describes a moral directive in which considerations of nuance, inequality, and social conditions must necessarily yield to reductionists dichotomies of public-versus-private and right-versus-wrong”); Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 6 (2003).

281. See Gruber, *supra* note 278, at 620 (observing that in neoliberal philosophy, “the rationally calculating individual bears full responsibility for the consequences of his or her actions no matter how severe the constraints on this action, e.g., lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits”).

282. See Brown, *supra* note 280, at 6 (observing that under neoliberalism “a ‘mismanaged life’ becomes a new mode of depoliticizing social and economic powers and at the same time reduces political citizenship to an unprecedented degree of passivity”) (also cited in Gruber, *supra* note 278, at 620 n.204).

283. See, e.g., *About, LANIER TEA PARTY PATRIOTS*, <http://www.lanierpartypatriots.org/about/> (“Tea Party Patriots formed to support the millions of Americans seeking to improve our great nation through renewed support for fiscal responsibility, constitutionally limited government, and free market economic policies.”).

essentially there is no society, and central government is, for the most part, illegitimate; thus, grievous harm and suffering simply cannot be a product of poor social arrangement or ineffective governing.<sup>284</sup> Rather, abnormal, yet fully morally culpable, individual actors must be the cause of such harms.<sup>285</sup> Retributive rhetoric about monsters, predators, and prowlers reinforces the notion that dysfunction is neither socially conditioned nor governmentally created but internal to the individual.<sup>286</sup> Consequentialist expertise then enters to prescribe carceral incapacitation as the sole avenue toward community security.<sup>287</sup> Thus, there is some irony that those most critical of government interference in private economic liberty see a very robust role for government in restricting the liberty of deviants who draw the government's authoritarian gaze.<sup>288</sup> But conservatives are able to adopt a Nozickian version of a night-watchman state, where the minimal government retains power to prevent and punish "true" harm.<sup>289</sup>

The combination of an entrenched belief in the internal immorality of individual criminal actors and the willingness to suspend distrust of government when it comes to controlling criminogenic risk has proven explosive. For decades, crime has been regular front-page fodder, and politicians on both sides of the aisle continue to compete to be the toughest on deviants.<sup>290</sup> Today, the United States ranks as the most punitive Western nation,<sup>291</sup> and the criminal apparatus has transformed low-income neighborhoods into demilitarized zones, complete with roving

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284. Harris, *supra* note 24, at 516 ("Indeed, for many contemporary conservatives there is no 'society' at all, only individuals . . . . In this discourse, questions relating to crime and 'welfare,' for example, become personal moral issues rather than social problems."); Angelina Snodgrass Godoy, *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, 30 LAW & SOC. INQUIRY 515, 529 (2005) (observing that "conservatives . . . refram[ed] the crime issue from a question of inadequate social welfare to one of insufficient social control").

285. See *supra* note 280.

286. See *supra* notes 276–77 and accompanying text.

287. See GARLAND, *supra* note 118; Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414 (commenting that rehabilitation has been replaced by incapacitation).

288. HARCOURT, *supra* note 278, at 203 (observing the coexistence of "the assumption of government legitimacy and competence in the penal arena and, on the other hand, the presumption that the government should not play a role elsewhere").

289. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (advocating "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on").

290. See *supra* note 6; Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 853 (2009) (noting Democrats' support for "punitive criminal justice policy").

291. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) (observing that "the United States leads the world" in imprisonment).

squads of masked police combatants.<sup>292</sup> In essence, the price of neoliberal non-governance of economic actors has been the hyper-governance of minorities and the poor, the groups with the least political power.<sup>293</sup> On a macro-level, progressives are more than willing to critique punitive ideology. The profusion of commentary condemning mass incarceration grows daily. Attorney General Eric Holder, for example, recently used his bully pulpit to focus the public on the problem of the cradle-to-prison pipeline.<sup>294</sup> Progressives regularly critique sentences as too high, juvenile dispositions as too harsh, and police as too abusive.<sup>295</sup> When looking at punitive ideology in abstraction, those on the left readily counter the notion that offenders are internally evil, support prevention and rehabilitation rather than long incarceration, and call for strict limits on the power of the police.

The punitive impulse, however, is not an ideology. Thus, while as a philosophical matter, one might absolutely reject punitive ideology as too conservative, archaic, or immoral, one might nonetheless react to harm in ways that are influenced by punitive impulse. The impulse manifests as intuition that the best course of action is one that severely punishes the harm-doer.<sup>296</sup> In this way, progressives who normally resist punitive ideology might nonetheless manifest punitive impulses by precipitately embracing proposals to intensify penal severity against those who commit crimes involving racial or gender bias. Thus, for many feminists, the natural way to tackle the problem of domestic violence is by enacting laws that mandate state actors to subject abusers to harsh pun-

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292. See generally RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013).

293. See WACQUANT, *supra* note 279, at 297 ("The widening of the penal dragnet under neoliberalism has been remarkably discriminating: . . . it has affected essentially the denizens of the lower regions of social and physical space.").

294. See Press Release, House Committee on the Judiciary, Conyers and Scott Praise Attorney General Holder's Action to Curtail Mandatory Minimum Sentences (Aug. 12, 2013), *available at* <http://democrats.judiciary.house.gov/press-release/conyers-and-scott-praise-attorney-general-holder%E2%80%99s-action-curtail-mandatory-minimum>.

295. Compare Press Release, Dick Durbin, Durbin and Lee Introduce Smarter Sentencing Act (Aug. 1, 2013), *available at* <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736> ("Mandatory minimum sentences for non-violent drug offenses have played a huge role in the explosion of the U.S. prison population. . . . Many of these sentences have disproportionately affected minority populations and helped foster deep distrust of the criminal justice system") with Press Release, Dick Durbin, Durbin: It Is Time for Stand Your Ground Laws to Be Carefully Reconsidered (Oct. 29, 2013), *available at* <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736> ("Stand your ground' laws have allowed shooters to walk free in shocking and violent situations, including shootouts between rival gangs, drug deals gone bad and more.").

296. As one scholar notes, even for the skeptical, "it is difficult to shake the paradigm that the criminal law is the natural response to a social problem." Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1712 (2012).

ishment.<sup>297</sup> In the face of an “epidemic” of human trafficking, a number of progressives passionately called for strict international and domestic criminal penalties.<sup>298</sup> Minority legal theorists often view enhancing criminal sentences as the best way to deal with crimes motivated by bigoted animus.<sup>299</sup>

While progressives may hope that they can simultaneously pursue criminalization programs and strategies to undermine entrenched social and racial and gender institutional hierarchy, experience shows such a convergence is unlikely.<sup>300</sup> In our disciplinary culture, faith invested in the criminal system, especially by progressives, serves inevitably to bolster the existing racist, classist, and masculinist American penal state.<sup>301</sup> It is true that it is possible, depending on the context, for the anti-subordination benefits of a particular prosecutorial reform to outweigh the drawbacks, including the drawback of reinforcing punitive ideology. Nevertheless, the punitive impulse manifests, not in the fact that progressives sometimes support criminalization, but in the assumptions that criminalization must be part of addressing social harm, that criminal reform requires no special scrutiny, and that criminal law holds more

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297. See generally Gruber, *supra* note 26.

298. See Meghan Ashford-Grooms, *Perry Signs Bills with Stricter Penalties for Human Trafficking*, POLITIFACT (May 25, 2011), <http://www.politifact.com/texas/promises/perry-o-meter/promise/848/toughen-law-against-human-traffickers/> (reporting that Republican Governor Rick Perry signed a bill sponsored by two democratic state congresswomen that created a new life offense for human trafficking and that Perry kept his promise to “toughen the state’s laws against human trafficking”).

299. Ari Ezra Waldman, *Tormented: Antigay Bullying in School*, 84 TEMP. L. REV. 385, 437 (2012) (noting that “the objective gay rights activists hope to achieve through hate crime legislation [is] sending a message that gay bashing is no different than lynching an African American man simply because he is black”); but see Dean Spade, *Their Laws Will Never Make Us Safer*, in AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU (Ryan Conrad, ed. 2012) (critiquing reliance on hate crime legislation on the ground that “criminalization and imprisonment target and harm queer and trans people” and “hate crime laws will not address the urgent survival issues in our lives”).

300. I am not saying that progressives should never consider thoughtful criminal sanctions as a component of comprehensive programs to address pressing problems. However, given the transcendence of punitive ideology in late modern America, the criminal law portions of such comprehensive proposals quickly take over the distributive and cultural portions that challenge the neoliberal paradigm. See Gruber, *supra* note 26 at 811–14 (noting that domestic violence criminal law is extremely tough and the government funnels money to this punitive mission, yet lawmakers have remained reluctant to address the economic and social conditions precedent to continued abuse).

301. See Spade, *supra* note 299; Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 160 (1998) (stating that “[t]he criminal justice apparatus is about order and its reproduction, and about maintaining the existing hierarchy of status and privilege”); Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER, RACE & JUST. 309, 319 (1998) (stating that “the criminal justice system is a primary location of racist, sexist, homophobic, and class-biased oppression in this country”).

promise than peril to the progressive agenda.<sup>302</sup> The impulse, it appears, hastened a failure of progressive imagination and misguided priorities in the analysis of the Zimmerman case. Under its influence, one might believe that the best way to combat racial profiling by neighborhood watchers or others is to severely punish the few who end up killing the profilee. The punitive impulse might lead one to believe that the best way to control racial bias in policing and prosecution is by making it easier for prosecutors to achieve conviction. In short, the punitive impulse transmogrifies progressive anti-hierarchy, anti-authoritarian, and anti-subordination energy into passionate support for state-centric punitive intervention.

### CONCLUSION

This article tells the story of how political influences and prevalent punitive consciousness rendered the Zimmerman saga largely a cautionary tale about overly lenient, “pro-violence” criminal policies, rather than an exposé of rampant racial hierarchy in the administration of justice and society in general. In addition, it may be the case that the only fruit born of the massive progressive advocacy efforts in the wake of the case are proposals (now largely failed) to narrow self-defense and strengthen murder law. Perhaps commentators are correct that stand your ground does not strike the correct balance between convicting bad killers and exonerating good killers and the law encourages future wanton killings (especially because so many people have now heard of stand your ground and believe it means “shoot away”). However, as a critic of the penal state, I am generally skeptical of claims that strengthening criminal law ensures that the “right” people will be convicted and has a linear relationship to crime reduction. Nevertheless, that is beside my point, which is only that hegemonic cultural forces flattened the rich discussion of race, hierarchy, and state power, into a simple conversation about lack of efficient crime control.

The continued existence of stand your ground does introduce an interesting inconsistency into criminal law administration that may not be so obvious. Normally in homicide cases, police, prosecutors, and judges treat defendants particularly severely and are particularly inflexible with defense attorneys because of the crime’s gravity. Of course, one might believe that state actors should be more careful in such prosecutions, given what is at stake for the defendant. Nevertheless, it is hardly controversial to say that police and prosecutors are generally unreceptive to murder defendants’ side of the story. Wading through the stand-your-

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302. See *supra* notes 26–27 and accompanying text.

ground files on the *Tampa Bay Times*'s website is thus almost a surreal experience.<sup>303</sup> It emerges that the stand-your-ground law, in a sense, has humanized Florida homicide defendants. It seems that, in many cases, police and prosecutors did not adopt the typical attitude that there is a killer and a victim—case closed. Rather, state authorities were attuned to the contexts of the killings, the defendants' backgrounds and thought processes, and the human interactions involved.<sup>304</sup> Progressives might hope that police and prosecutors would adopt a similar attitude towards other classes of defendants—those accused of prostitution, drug possession, burglary, theft, etc. Progressives might be pleased if every defendant received an immunity hearing with a judge sympathetic to the context in which the crime occurred. Thus, the schizophrenic disparity created by stand your ground is that it leads police authorities to humanize defendants and contextualize facts in the set of cases for which prosecutorial severity and inflexibility seems particularly appropriate (even to progressives), leaving lower-level offenders to receive the full moral reprobation of the state.

One could certainly make the case that a piecemeal approach to a kinder and gentler form of policing and prosecution should not start with murder law. Homicide should probably not be the primary locus of decarceration efforts, and no criminal law scholar would propose to incrementally reduce incarceration rates primarily through exonerating murderers. However, one can still caution progressive critics of the penal state to be wary of hastily supporting programs that undo the few decriminalization reforms that have occurred, or call for new forms of criminalization directed toward purportedly privileged criminals. In addition to increasing actual incarceration, when progressives advocate criminalization for the harms they see as most pressing, it serves to further normalize, legitimize, and entrench the overarching punitive ideology. This in turn strengthens the punitive impulse, and the feedback loop is complete. The time may now have passed for the Zimmerman case to be a major catalyst of racial or anti-authoritarian change. The unfortu-

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303. See *supra* note 129.

304. In one fascinating case profiled by the *Times*, the prosecutors declined to prosecute two neighbors and former friends in a racially diverse/divided neighborhood, one black and one white, whose relationship had broken down and who ended up shooting each other over a petty dispute. In the non-surreal world of stand your ground, one might expect that both men would end up in jail with long prison terms, lives ruined. Instead, the prosecutor decided that both came under the umbrella of self-defense and declined to prosecute either man. Of course, both were upset, claiming the other was at fault. However, the ultimate result was that one neighbor moved away. The situation was thus resolved with no more violence and both men free, lives intact. See Susan Taylor Martin, *Sometimes, the 'Stand Your Ground' Defense Cuts Both Ways*, TAMPA BAY TIMES (Jun. 1, 2012, 11:26 AM), <http://www.tampabay.com/news/publicsafety/sometimes-the-stand-your-ground-defense-cuts-both-ways/1233131>.

nate reality is the case is not the first or last of its kind (although it may have exhausted public interest in the issue). My hope is that in the future progressive commentary will consistently critique state punitive authority and expose and fight institutionalized racial inequality, without allowing progressive “ideas and credibility [to be] appropriated to strengthen an apparatus that . . . should be dismantled.”<sup>305</sup>

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305. Martin, *supra* note 301, at 153.