Race and Self-Defense: Toward a Normative Conception of Reasonableness

Cynthia Kwei Yung Lee Jr.

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Race and Self-Defense: Toward a Normative Conception of Reasonableness

Cynthia Kwei Yung Lee*

Introduction ..................................... 368

I. The Law of Self-Defense .......................... 377
   A. Traditional Self-Defense Doctrine .......... 377
      1. The Objective-Subjective Debate ......... 381
   B. Attempts to Improve Traditional Self-Defense Doctrine ............ 391
      1. The Model Penal Code Approach to Self-Defense ................. 391
      2. Imperfect Self-Defense Doctrine .......... 395

II. Race And Reasonableness ........................ 398
   A. The Black-as-Criminal Stereotype .......... 402
   B. The Asian-as-Foreigner and Other Stereotypes ................. 423
      1. The Asian-as-Model Minority .............. 424

* Associate Professor of Law, University of San Diego. J.D., Boalt Hall School of Law, University of California at Berkeley. First and foremost, the author thanks Dwight Aarons, Jody Armour, Angela Harris, Jean Montoya, Rachel Moran, and Mary Jo Wiggins for their encouragement and critical reads of previous drafts of this Article. She also thanks Larry Alexander, Keith Aoki, Laura Berend, Roy Brooks, Jack Chim, Angela Davis, Richard Delgado, Joshua Dressler, Neil Gotanda, Em Herzstein, Marina Hsieh, Kevin Johnson, Gene Labovitz, Tom Morawetz, Michael Pfau, Robert Schopp, and Jorge Vargas for reading prior drafts of this Article and providing useful suggestions for improvement. She thanks Elaine Alexander, Luis Carillo, Bob Chang, John Cotsirilos, Lynne Dallas, Anthony Farley, Jean Stefancic, and Paul Wohlmuth for conversations which helped her to think through her ideas on this Article. The author thanks Michelle Jacobs and the 1995 Southeastern-Southwestern Teachers of Color Legal Scholarship Conference for permitting her to present this paper as a work-in-progress. She thanks Kristine Strachan and the University of San Diego School of Law for the summer research grant which enabled her to write this paper, and Chanmaly Kendie Chung, Kathryn Dove, Lise Forquer, Karen Heumann, Phi Nguyen, and Shannon O'Brien for providing excellent research assistance. Finally, the author thanks Laura Walvoord, Helen Chae, and the Minnesota Law Review for excellent editorial assistance. This paper received the 1996 Thurgood Marshall Memorial Paper Prize Competition Honorable Mention Award.
INTRODUCTION

It is hard for everyone who wants to believe in ultimate fairness to acknowledge that the typical decisionmaker is not the ideal decisionmaker, that racial prejudice is not an aberration, that it taints everyone it touches, and that it touches everyone.

—Sheri Lynn Johnson

At the start of the tour of the Museum of Tolerance in Los Angeles, one is confronted with two doors. One is marked "Prejudiced." The other is marked "Not Prejudiced." If one tries to open the "Not Prejudiced" door, it will not open. The only door that one can pass through is the door marked "Prejudiced." The people who designed the Museum of Tolerance had the right idea. Most of us are prejudiced—some of us more or less so than others. The extent to which we act upon our prejudices, however, may depend in part upon our aware-

ness and understanding of the stereotypes that inform our daily lives.  

This Article examines the topic of race and self-defense through the lens of socially constructed stereotypes about Blacks, Asian Americans, and Latinos. Crimes of violence
involving claims of self-defense and victims of color represent a microcosm of broader questions concerning race and the criminal justice system. The term "race" is utilized broadly in this Article to include race, ethnicity, and culture, recognizing that race is a shifting concept which means different things to different people. Even though stereotypes based on a person's perceived race may be described more accurately as cultural or ethnic stereotypes, this paper purposely describes these stereotypes, using a race rather than an ethnicity model, as a means of linking the common experiences of African Americans, Asian Americans, and Latinos. The commonality of such experi-
ences may be obscured when certain people of color are treated as a race and others are treated as an ethnicity. 8

To a large extent, legal scholarship about race and the criminal justice system has focused on how legal decisionmaking by police officers, prosecutors, jurors, judges, and others involved in the criminal justice system might be unduly influenced by the race of the defendant. The discussion has centered around Black and White defendants; 9 other non-White defendants have received little attention. The influence of racial stereotypes about the victim on legal decisionmaking paradigm, which focuses on commonalities between communities of color, in opposition to the ethnicity-based paradigm, which preaches an assimilationist European Protestant work-ethic).

8. It is important, in this regard, to recognize that Latinos, as individuals residing in the United States who come from Latin American countries, may be White, Black, or Asian. See, e.g., David E. Hayes-Bautista & Jorge Chapa, Latino Terminology: Conceptual Bases for Standardized Terminology, 77 AM. J. PUB. HEALTH 61, 62-63 (1987) (criticizing widespread conflation of the term "race" with nationality in describing Mexicans and Latinos); Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twentieth Century, 8 LA RAZA L.J. 42, 67-70, 77 (1995) (discussing the heterogeneity within the Latino community); see also Robert Chang, Racial Cross-Dressing, 1 HARV. LATINO L. REV. (forthcoming 1997) (pointing out that persons of Korean descent can also be Latino). Despite the many commonalities associated with Latino identification, "[f]or the Latino community, race is not the primary criterion for community membership." Johnson, supra, at 77.

It is also important to recognize that, technically speaking, there is no Asian American race. Asian Americans may be Chinese, Japanese, Filipino, Korean, or a variety of other races. Use of the term "race" to describe Asian Americans and Latinos is not new. Historically, Asian Americans and Latinos have been described as racial groups, though not without criticism. See Frank H. Wu, Changing America: Three Arguments About Asian Americans and the Law, 45 AM. U. L. REV. 811, 813-18 (1996) (discussing ways in which "mainstream society repeatedly refers to the race of Asian American individuals in making judgments") (emphasis added); Norimitsu Onishi, New Sense of Race Arises Among Asian-Americans, N.Y. TIMES, May 30, 1996, at A1 (discussing emerging racial consciousness among Asian Americans).

has also received less attention than the influence of racial stereotypes about the defendant.\(^{(10)}\)

Racial stereotypes about members of the victim's racial group may influence jurors and other legal decisionmakers in two ways. First, many tend to view individuals who belong to particular racial groups in certain ways because of deeply ingrained racial stereotypes. If the victim belongs to a racial group whose members are stereotyped as dangerous or violent criminals or gang members, jurors may be more likely to perceive actions of the victim as hostile or violent than if the victim belonged to another racial group. Second, members of society tend to value people who are similar to themselves more than those who are different from them. This phenomenon has been described as in-group favoritism and out-group antagonism. If the victim belongs to a racial group whose members have been socially constructed as foreigners or illegal immigrants, such as Asian Americans and Latinos, jurors may subconsciously minimize the harm suffered by the victim and may be more willing to view the defendant's use of force as reasonable than if the victim were perceived to be an "average" American.

Whether racial stereotypes about the victim actually influence verdicts in self-defense cases is difficult to prove empirically. The universe of self-defense cases resulting in acquittals is elusive because the Double Jeopardy Clause of the Fifth Amendment prevents reversal of an acquittal.\(^{(11)}\) Acquittals in self-defense cases, like acquittals in other cases, generally are not appealed, and consequently are not reported in the case reporters. Only acquittals in high-publicity cases end up on the printed pages of newspapers and magazines.

Because reasonableness is the touchstone of self-defense jurisprudence, this paper examines the impact of racial stereotypes on the reasonableness requirement in self-defense doctrine in an effort to confront the larger question of how to

\(^{(10)}\) But see George P. Fletcher, With Justice for Some: Protecting Victims' Rights in Criminal Trials 6 (1995) (criticizing the American criminal justice system for betraying its purported solidarity with victims of crime); Stephen L. Carter, When Victims Happen to Be Black, 97 Yale L.J. 420, 421 (1988) (demonstrating that "the meaning of victimhood in our society is constructed by a dominant culture that often displays difficulty conceiving that important harms can come in varieties unlikely to afflict its members").

\(^{(11)}\) The Double Jeopardy Clause provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
minimize the influence of racial stereotypes leading to bias in criminal justice decisionmaking. This Article adds to the legal landscape in three ways. First, in examining self-defense doctrine, this Article focuses on substantive criminal law, as opposed to criminal procedure. Most race-based legal scholarship focuses on race and criminal procedure, rather than on race and substantive criminal law. Second, this Article looks at how racial stereotypes about the victim might influence legal decisionmaking, in contrast to the more common focus on the defendant. Finally, discussions about race are often binary, centering on the Black-White dichotomy, while ignoring other non-Whites (i.e., non-Black racial minorities) who also face stigma and racial discrimination in the United States. This Article abandons the Black-White paradigm in favor of a multi-layered examination of how racial stereotyping of African

12. This Article was inspired by Jody Armour’s 1994 article on race and self-defense, which proposes an instrumentalist reading of the Equal Protection Clause to deal with the problem of racial bias in self-defense cases involving African American victims. Jody D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781 (1994). Armour and other scholars have addressed questions regarding race and self-defense. See, e.g., Mark Kelman, Reasonable Evidence of Reasonableness, 17 CRITICAL INQUIRY 798, 815 (1991) (opining that we are willing to convict racist subway killers while acquitting battered women who kill their abusers because of our social assessment of the consequences of the defendant’s error in judgment); Shirley Sagawa, A Hard Case for Feminists: People v. Goetz, 10 HARV. WOMEN’S L.J. 253, 272 (1987) (arguing that “[r]ace should not be considered . . . [because] [a]llowing the race of Black victims to stand as a proxy for certain stereotyped characteristics promotes not fairness, but injustice”). This Article, however, provides additional insight into the problem of race and self-defense by examining how racial stereotypes about other non-Whites, such as Asian Americans and Latinos, might affect the reasonableness determination. The proposals suggested in this Article are also unique.


14. See FLETCHER, supra note 10, at 2-3 (describing the shift of what Fletcher calls “the political trial” from the previous focus on the defendant to the current focus on the victim).

Americans, Asian Americans, and Latinos may influence legal decisionmaking about self-defense. This is neither an exclusively White problem (i.e., Whites are not the only people who are influenced by racial stereotypes about Blacks, Asian Americans, and Latinos) nor an exclusively interracial problem. It includes intraracial crimes, such as Black-on-Black crimes, as well as other color-on-color crimes, such as Asian-on-Black crimes.

Part I discusses traditional self-defense doctrine (also known as perfect self-defense), including the debate over whether an objective or subjective standard of reasonableness should be employed. Although it recognizes that objective standards do not necessarily lead to neutral and unbiased decisions, Part I nevertheless concludes that either an objective or a hybrid subjectivized-objective standard of reasonableness in self-defense cases is preferable to a purely subjective standard which would permit the racially biased motivations of the defendant to control the outcome.

Part II examines ways in which socially constructed stereotypes about Blacks, Asian Americans, and Latinos might influence jurors in self-defense and other cases. While recognizing that socially constructed images of race are not merely single-dimensional, but are influenced by race, class, and gender, this Article selectively examines only a few stereotypes that pertain to Black, Asian American, and Latino men; it does so not because stereotypes about others, such as Jews, gays, women, and Whites are unimportant, but because of space limitations. Additionally, the selected stereotypes highlight the different ways in which stereotyping can influence decisionmaking in self-defense cases. Part II concludes that self-defense doctrine does not adequately address the potential for racial stereotypes to affect the reasonableness determination.

Part III explores ways in which the risk of racial stereotypes influencing the reasonableness determination in self-defense cases might be reduced. Two tentative proposals are examined in this Part. The first, clarification of the act-belief distinction, is a reform that applies across the board both in cases in which race is transparently relevant and those in which race is not apparently relevant. This reform suggests that in states in which the standard jury instructions on self-defense require the jury to find only that the defendant's beliefs were honest and reasonable, jury instructions should be clarified to make explicit that both the defendant's beliefs and her
actions must be reasonable in order to acquit a defendant on self-defense grounds. This doctrinal reconstruction is not a radical reform; it merely makes explicit that which is already required. Nevertheless, clarification of the act-belief distinction is significant and necessary. Even when race is not an issue, jurors in self-defense cases tend to conflate the belief and action requirements. This problem may be accentuated when there is a racial component to the case. Requiring jurors to find that the defendant's beliefs and actions were reasonable ensures that jurors do not confound the different elements of self-defense. It also requires jurors who, because of racial stereotypes, might be inclined to view the defendant's beliefs as reasonable, and thus assume that the defendant's actions were also reasonable, to address separately the reasonableness of the defendant's beliefs and the reasonableness of his actions.

In recognition of the need for gradations of criminal liability that reflect differing degrees of culpability, Part III proposes a new two-tiered approach to self-defense that gives meaning to the act-belief distinction. Under this approach, which is similar to the imperfect self-defense doctrine's two-tiered approach to liability, defendants who both (1) reasonably believe in the need to use force in self-defense, and (2) act reasonably in defending themselves should be acquitted. Defendants who reasonably believe in the need to use self-defense, but whose actions are unreasonable, may be convicted of manslaughter, a less serious offense than murder.

Second, to address more directly the problem of racial stereotyping, a supplemental limiting instruction on racial stereotypes is proposed. In any self-defense case in which ei-

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16. Sometimes, focusing on racial problems forces us to scrutinize our legal doctrines more carefully than we otherwise would. Such careful scrutiny can highlight general flaws in the ways we approach problems. Careful examination of self-defense cases involving victims of color alerted the author to the need for clarification of the act-belief distinction, a much-needed reform that is applicable to all self-defense cases.

17. One might argue that racial stereotypes only affect beliefs, not actions. Stereotypes can affect beliefs and actions. Reliance on the stereotype that Blacks are more violent and prone to criminality than others might cause a person to believe that a particular Black person is prone to violence or criminality. The stereotype might also cause a person to take action, such as using deadly force against an approaching Black person much sooner than if the person were White. The person who merely believes that a particular innocent Black person is prone to violence but takes no action harming that Black person is differently situated than the person who acts upon this belief and uses deadly force against the innocent Black.
ther the parties or the judge feels it appropriate, the trial judge should give the jury a supplemental limiting instruction advising the jury that racial stereotypes should not be relied upon to support a finding that the defendant’s use of deadly force was reasonable. Under this second proposal, evidence regarding race would still be admissible. The supplemental instruction would merely clarify the inappropriateness of using racial stereotypes as a proxy for danger. In conjunction with the supplemental limiting instruction, attorneys could be encouraged to present arguments and evidence to the jury, illustrating how stereotypes influence perception and judgment.

This second proposal may be resisted by both liberals and conservatives because it seems to undercut the principle of equality through color-blindness. It is true that the proposed limiting instruction purposely makes race salient (rather than ignoring race or pretending racial differences do not exist) by alerting jurors to the fact that racial stereotypes may operate to create bias and unfair results. In asking jurors to treat defendants and victims of color as they would treat White defendants and victims, this race-conscious proposal furthers, rather than undermines, the principles of fairness and equality.

This Article recognizes that it is unclear whether such a limiting instruction would actually influence outcomes in self-defense cases, given the fact that stereotypes are so well-ingrained that they often operate beneath the surface on an unconscious level. Recent research in social cognition, however, suggests that making race salient may encourage jurors to suppress stereotype-driven responses in favor of non-prejudiced beliefs. Moreover, a limiting instruction on racial stereotypes would be worthwhile for its symbolic and educational value. The strong normative message such a limiting

18. Gary Peller, Notes Toward a Postmodern Nationalism, 1992 U. ILL. L. REV. 1095, 1095-96 (discussing movement away from the discourse of “color-blindness” and its concomitant insistence on the possibility of neutral social practices, and towards a deeper understanding of the significance of racial identity).

19. Jody Armour writes:

According to the [dissociation] model, for [low-prejudiced people] . . . to resist falling into the discrimination habit, they repeatedly recall their personal beliefs so that their social judgments become based on these beliefs rather than the stereotypes. Reminding decisionmakers of their personal beliefs, therefore, may help them to resist falling unconsciously into the discrimination habit.

Armour, supra note 2, at 759-60. For a definition of “low-prejudiced,” see infra text accompanying note 96.
instruction would convey would be significant because it would reach not only jurors in self-defense cases, but all people in society.

I. THE LAW OF SELF-DEFENSE

A. TRADITIONAL SELF-DEFENSE DOCTRINE

Under traditional self-defense doctrine, also known as perfect self-defense, a defendant who is not the aggressor in an encounter is justified in using a reasonable amount of force against another person if she honestly and reasonably believes that: (1) she is in imminent or immediate danger of unlawful bodily harm from her adversary, and (2) the use of such force is necessary to avoid such danger. Traditional self-defense doctrine includes a necessity requirement (the defendant must have honestly and reasonably believed it was necessary to use the amount of force used), an imminence requirement (the defendant must have honestly and reasonably believed that an unlawful attack was imminent), and a proportionality requirement (the defendant may use only that amount of force which is not excessive in relation to the threatened force; this

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20. In most jurisdictions, "perfect" self-defense requires an honest and reasonable belief, and leads to complete acquittal. This is in contrast to what is known as the "imperfect" self-defense doctrine in which a murder charge may be mitigated to a manslaughter charge if the defendant's belief in the need to use deadly force and/or the imminence of the threat was honest, but not reasonable. See, e.g., In re Christian S., 872 P.2d 574, 575 (Cal. 1994).

Some jurisdictions, however, permit acquittal on the ground of self-defense based solely on a finding that the defendant's belief was honest. State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990) ("In Ohio, to prove self-defense, it must be established that the person asserting this defense had 'a bona fide belief that he [or she] was in imminent danger of death or great bodily harm and that his [or her] only means of escape from such danger was in the use of such force.'" (quoting State v. Robbins, 388 N.E.2d 755, 758 (Ohio 1979))).


22. See LAFAVE & SCOTT, supra note 21, at 653-55 (explaining and providing examples of necessity requirement).

23. See id. at 655-57 (explaining and providing examples of imminence requirement).
generally means the defendant may use deadly force only against deadly force and may not use deadly force against non-
deadly force.

Traditionally, reasonableness in self-defense cases was
defined by reference to a reasonable man. Today, several ju-
risdictions have adopted a reasonable person standard. At

24. "Deadly force" is defined differently in different jurisdictions. A standard definition of "deadly force" is force likely to cause death or serious bodily injury. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.03[A], at 201 (2d ed. 1995).

25. Rollin M. Perkins and Ronald N. Boyce explain the proportionality requirement as follows:

It is a rule of law that deadly force may not be used to defend against nondeadly force, but that nondeadly force may be used to defend against any unlawful force endangering the person, provided the force so used is not unreasonable under all the circumstances. In such a case, if the only threat was with obviously nondeadly force and the jury finds that the defendant used deadly force to defend against it, the inquiry should go no farther. The instruction will be that the defendant is guilty upon such a finding. If the jury finds that the defendant used only nondeadly force in his defense, a further finding is necessary; namely, whether the force thus used was reasonable under the circumstances. And if the finding is that defendant used no more force than a reasonable person would have used in a similar situation, the verdict should be not guilty.


27. See, e.g., ARIZ. REV. STAT. ANN. § 13-404 (West 1989) ("[A] person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.") (emphasis added); CAL. PENAL CODE § 198 (West 1988) (describing the sufficiency of the fear needed for justifiable homicide as "sufficient to excite the fears of a reasonable person") (emphasis added); Wetta v. State, 456 S.E.2d 696, 698 (Ga. Ct. App. 1995) ("To establish a plea of self-defense, the defendant must show, if circumstances were such as to excite fears of a reasonable person, that his safety is in danger.") (emphasis added), cert. denied, 116 S. Ct. 707 (1996); State v. Ricks, 894 P.2d 191, 194-95 (Kan. 1995) (holding that the standard is "whether a reasonable person in defendant's circumstances would have perceived self-defense as necessary") (emphasis added); Lentz v. State, 604 So. 2d 243, 246 (Miss. 1992) ("[A] killing is justified if the person who kills did so under circumstances which would lead a reasonable person under similar circumstances to conclude she was in imminent danger of death or great bodily harm.") (emphasis added); State v. Abeyta, 901 P.2d 164, 170 (N.M. 1995) (noting that the standard is whether "a reasonable person in the same circumstances would have reacted similarly") (emphasis added); State v. Williams, 467 S.E.2d 392, 394 (N.C. 1996) (noting that "perfect self-defense excuses a killing when at the time of the killing . . .

378 MINNESOTA LAW REVIEW [Vol. 81:367
least one court has held that if the defendant is a woman, the reasonableness of her beliefs should be measured against those of the reasonable woman. In some jurisdictions, the defendant must retreat before using deadly force if she can do so in complete safety.

The belief requirement in self-defense doctrine is twofold. The defendant’s belief in the need to use force in self-defense must be both honest and reasonable. It is generally agreed that the defendant’s belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. See Gentry v. State, 441 S.E.2d 249, 250 (Ga. Ct. App. 1994) (noting that the trial court used the reasonable woman standard in instructing the jury on defendant’s self-defense claim). In other areas of the law, namely sexual harassment cases, courts have also adopted a reasonable woman standard in lieu of a reasonable person standard. See, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a reasonable woman standard in a hostile environment sexual harassment case involving a woman plaintiff). In 1993, the United States Supreme Court avoided the opportunity to clarify whether the appropriate standard of reasonableness in hostile environment sexual harassment cases was a “reasonable person” or a “reasonable woman” standard. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22-23 (1993). As law professor Caroline Forell points out:

Although the Court uses the term “reasonable person” in describing the objective standard, the Court did not discuss whether the objective standard must be the “reasonable person” standard. Although the Harris trial court applied the “reasonable woman” standard, the Supreme Court’s Harris opinion does not mention, much less analyze, whether that standard is either permissible or impermissible under Title VII. Therefore, the form of the objective test remains unresolved.


See State v. Abbitt, 174 A.2d 881, 884-85 (N.J. 1961) (agreeing with the retreat rule’s underlying theory that there is no necessity to kill in self-defense if deadly force could have been avoided by retreat); State v. Charles, 647 P.2d 897, 901 (Or. 1982) (embracing the retreat rule as part of the larger concept of necessity). Even in “retreat jurisdictions,” one need not retreat if one is attacked in one’s home. See ALA. CODE § 13A-3-23(b)(1) (1975); Gainer v. State, 391 A.2d 856, 860 (Md. Ct. Spec. App. 1978); State v. Marsh, 593 N.E.2d 35, 38 (Ohio Ct. App. 1990).
that an honest belief in the need for self-defense exemplifies a subjective standard. A defendant honestly believes in the need to use self-defense if she actually believes it is necessary to use self-defense.\textsuperscript{30} There is less agreement on what it means to have a \textit{reasonable} belief. Some academics support a subjective standard of reasonableness,\textsuperscript{31} while others support an objective standard of reasonableness. Many jurisdictions have compromised by employing a hybrid subjectivized-objective reasonable person standard. Endorsing an objective standard of reasonableness does not mean that an actor is relieved of liability whenever she acts in an objectively reasonable way without regard to her subjective culpability. If A shoots B under circumstances in which a reasonable person would have felt it necessary to shoot in self-defense, but A did not know that B was about to shoot A, A's claim of self-defense will be unsuccessful even though objectively reasonable.\textsuperscript{32} Self-defense generally is

\textsuperscript{30} Recently, the California Supreme Court opined that using the term "honest" to describe the defendant's belief in the need to use self-defense is problematic. A belief can be genuine or actual, or it can be nonexistent. It is difficult, however, to characterize a belief as "dishonest." \textit{See In re Christian S.}, 872 P.2d 574, 576 (Cal. 1994) (substituting the term "actual" in place of "honest" to better reflect the meaning of the subjective standard).

\textsuperscript{31} Few states have adopted a subjective standard of reasonableness in self-defense doctrine. North Dakota is one such state. In North Dakota, the proper standard that is to be applied in self-defense cases is as follows:

\textit{[A] defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.}

\textit{State v. Leidholm}, 334 N.W.2d 811, 818 (N.D. 1983). To some extent, it is a misnomer to call a subjective standard a standard of reasonableness since it merely requires that the defendant honestly believed it was reasonable to act in self-defense.

\textsuperscript{32} George Fletcher poses a similar hypothetical in which a physician is about to inject air into a patient's veins with the intent to kill the patient. The patient, unaware of the doctor's intentions, desires to kill the doctor. As the doctor stands over him with the needle poised, the patient grabs the doctor and begins to choke him. \textit{George P. Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson}, 23 UCLA L. REV. 293, 299 (1975). Fletcher suggests that the patient, who lacks a subjective belief in the need to defend himself, would not be excused on the ground of self-defense unless one were to adhere to a moral forfeiture theory of self-defense, a theory which Fletcher himself finds problematic. \textit{See id.} at 320 (opining that "objective manifestations of self-defense are not sufficient to bar conviction"). \textit{But see Paul H. Robinson, A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability}, 23 UCLA L. REV. 266, 289 (1975) (arguing that justifi-
not available to one who uses deadly force without an honest belief in the necessity of using such force to protect against an imminent threat of death or serious bodily injury.

1. The Objective-Subjective Debate

Under traditional self-defense doctrine, the meaning of reasonableness depends on whether one utilizes an objective or subjective standard of reasonableness. The question of whether an objective or a subjective standard of reasonableness should be used is part of a larger debate about whether criminal liability should be based upon an objective or subjective model. An objective model views social harm, in the form of bad conduct or bad results, as the linchpin of criminal liability. A subjective model, in contrast, views culpability as the central defining feature of criminal liability.

The objective-subjective debate also reflects an even broader debate about whether the criminal law should adhere to a non-instrumentalist approach that focuses on an actor's culpability or an instrumentalist approach that utilizes the criminal law to achieve broader social ends. Existing criminal law encom-
passes both approaches. In embracing the general rule that voluntary action is not criminal unless accompanied by mens rea, or a guilty mind, the criminal law recognizes the importance of assigning blame to culpable parties.

In other respects, the criminal law follows an instrumentalist approach. For example, the law imposes a reasonableness requirement on provocation claims at least in part for instrumental reasons. Even if the actor was actually provoked into a heat of passion and acted before he cooled off, he will not receive the benefit of mitigation unless the reasonable person would have also been provoked into a heat of passion and not cooled off. In punishing provoked killers who act unreasonably as intentional murderers, the law sends a message that unreasonable provoked killings are wrongful.

Any time the criminal law imposes a reasonableness requirement, one might argue that it is favoring an instrumentalist approach, or an approach that uses law to achieve social purposes, over a model of liability that focuses exclusively on the actor's subjective state of mind. In general, a necessity

814 (asserting that, ultimately, a non-instrumentalist approach to equal protection is unjust).

36. Provocation doctrine also serves the non-instrumental or culpability-focused goal of differentiating between more and less serious crimes based on the offender's culpability. Joshua Dressler, When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard, 85 J. CRIM. L. & CRIMINOLOGY 726, 751 (1995). In receiving a manslaughter conviction rather than a murder conviction or complete acquittal, the provoked killer is punished less than the intentional murderer but more than the completely nonculpable killer.

37. Similarly, strict liability crimes serve broad social purposes, such as deterring socially undesirable behavior and encouraging socially desirable behavior. DRESSLER, supra note 24, §§ 11.02[B], 11.03[A], at 127-28. A person who commits a strict liability offense by engaging in prohibited behavior or by causing the prohibited harm may be held criminally liable even if the actor acted without intent, awareness, or even negligence. Id. § 11.03[C], at 127. Mistake of law claims are generally disallowed for instrumental reasons. Id. § 13.01[B][4], at 149. Even if the actor did not know she was breaking the law, her ignorance of the law is no excuse. LAFAYE & SCOTT, supra note 21, § 5.1(a), at 406. This is because the law seeks to encourage people to learn the law. See PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES § 181(b)(1), at 374 n.3 (1984) (discussing the individual's duty to find out what his/her legal obligations are). The "ignorance of the law is no excuse" rule provides the additional social benefit of discouraging false claims of ignorance. DRESSLER, supra note 24, § 13.01[B][3], at 149.

38. This is not to suggest that utilization of a reasonableness requirement eliminates concerns with culpability. When a person acts unreasonably, she is also acting culpably. A reasonableness standard is instrumentalist in nature because it does not determine criminal liability by exclusive reliance on the defendant's subjective beliefs. See Armour, supra note 12, at 785 n.12
defense will not succeed no matter how sincere the actor’s belief in the need to violate the law to avoid a greater harm if his belief is not reasonable. A duress defense will not succeed no matter how sincere the actor’s belief in the need to violate the law in order to avoid death or bodily injury unless the reasonable person in the actor’s situation would have acted similarly. Likewise, a claim of self-defense will not succeed no matter how sincere the defendant’s belief in the need to use deadly force if a reasonable person in the actor’s situation would not have acted similarly. In each of these situations, a reasonableness requirement is imposed to encourage adherence to societal norms. The reasonable person standard, which is supposed to reflect these societal norms, is implemented to provide incentives for people to act in socially desirable ways.

A number of critical race and feminist legal scholars have criticized the use of purportedly objective standards on the ground that such standards are not truly neutral and unbiased. Kimberlé Crenshaw and Gary Peller, for example, observe that seemingly neutral and objective standards such as the concepts of reasonable force and equal protection are mediated through narratives of racial power. According to Crenshaw and Peller, the Simi Valley jury’s acquittal of the four police officers who brutally beat Rodney King and then claimed they justifiably used reasonable force, should not be understood as an aberrational act of jury nullification, but rather as a reflection of the dominant ideological paradigm that obscures the way race is experienced by African Americans and other people of color in this society.

Dolores Donovan and Stephanie Wildman have criticized use of the reasonable man standard in battered women self-
defense cases because the standard ignores the social reality that each human being is a unique individual and, when strictly applied, precludes consideration of relevant circumstances particular to the individual case. Donovan and Wildman observe that when a battered woman kills her abusive husband, use of an objective reasonable man standard might preclude reliance on the fact that a woman who has been repeatedly beaten by her husband would fear death or serious bodily injury if her husband advanced towards her during a quarrel.

Similarly, Richard Delgado has criticized use of objective standards such as the reasonable man standard on the ground that objective standards reflect the norms of the dominant culture and exclude the values of other groups in society. In


42. Donovan & Wildman, supra note 26, at 445-46. Many jurisdictions have responded to such criticism by permitting expert testimony regarding battered woman syndrome and allowing evidence regarding the battered woman defendant's experiences of being beaten by her partner. See Linda L. Ammons, Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome, 1995 WIS. L. REV. 1003, 1005 n.7 (citing cases permitting expert testimony on battered woman syndrome); Elizabeth M. Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 14 WOMEN'S RTS. L. REP. 213, 219 n.27 (1992) (noting that most appellate courts admit expert testimony on battered woman syndrome). When consideration of such evidence is limited to assessing the honesty, but not the reasonableness, of the defendant's beliefs, the original objection to an objective standard remains. For example, before 1996, California courts held that battered woman syndrome evidence was probative of the honesty, but not the reasonableness, of the battered woman's belief in the need to defend herself. People v. Day, 2 Cal. Rptr. 2d 916, 921 (Cal. Ct. App. 1992) (citing People v. Aris, 264 Cal. Rptr. 167, 181 (Cal. Ct. App. 1989)), overruled by People v. Humphrey, 921 P.2d 1 (Cal. 1996). In 1996, the California Supreme Court held that battered woman syndrome evidence is also relevant to the reasonableness of the battered woman's beliefs. Humphrey, 921 P.2d at 10.

criminal law, this problem may surface when a defendant from a different culture is denied the opportunity to explain why his actions were reasonable under the traditions of his culture because his behavior does not conform to the customs and traditions of American culture. Courts disagree about whether and to what extent cultural evidence may be admitted at a criminal trial.

While a subjective approach has certain appeal, adopting a subjective standard of reasonableness, i.e., one that views as reasonable those beliefs which the defendant sincerely thinks are reasonable, is problematic for several reasons. A subjective standard of reasonableness ignores the harm caused by a defendant's acts, allowing a defendant's subjective belief in the need to use self-defense to outweigh all other considerations. Subjectivists might justify such a result by arguing that the harm caused by a defendant's acts is irrelevant. If, for example, one shoots at another person and misses, a subjectivist might argue that one deserves to be punished to the same extent as if one killed the other person because all that matters are acts that one can control. The social harm caused by the defendant's acts, however, is not completely irrelevant. The criminal law recognizes that there is a difference between one

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44. See Holly Maguigan, Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?, 70 N.Y.U. L. REV. 36, 41-43 (1995) (discussing the tension between feminists who argue that admissibility of cultural evidence in cases involving male violence against women reinforces patriarchal norms and condones such violence, and multiculturalists who advocate use of cultural information to counteract the unfairness of applying the dominant culture's legal standards to defendants from other cultures); Leti Volpp, (Mis)Identifying Culture: Asian Women and the "Cultural Defense," 17 HARV. WOMEN'S L.J. 57, 91-97 (1994) (discussing ways in which recognition of the cultural defense can harm immigrant women of color); see also Carlos Villarreal, Culture in Lawmaking: A Chicano Perspective, 24 U.C. DAVIS L. REV. 1193, 1238 (1991) (discussing a proposal to allow a cultural defense in cases in which the crime "is confined to voluntary participants within the defendant's culture").

45. Maguigan, supra note 44, at 69-86 (discussing cases in which courts allowed cultural evidence and cases in which courts refused to allow such evidence).


47. See generally Alexander, supra note 34 (arguing that, for purposes of the criminal law, the culpability of the defendant is more significant than the harm caused by the defendant's actions).
who intends to kill but fails (the attempted murderer) and one who intends to kill and succeeds (the murderer) by assigning different punishments to attempts and completed crimes.48

A subjective standard of reasonableness might also be criticized for allowing people to set their own standards governing the permissible use of force. A defendant who acts in an idiosyncratic manner can escape liability under a subjective standard if she sincerely believes it is reasonable to act in self-defense, even if the very manner in which she acts indicates a failure to conform her conduct to the most basic standards. As the high court of New York explained in rejecting a purely subjective approach to reasonableness:

We cannot . . . allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate . . . an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.49

Under a subjective standard of reasonableness, if a defendant honestly but erroneously believes persons of a particular racial group are peculiarly susceptible to aggressive conduct, and acts on this belief by using deadly force against members of this racial group whenever he encounters them, the defendant may be acquitted.50 A subjective standard is also troublesome because of its potential for fraudulent claims. For instance, many people were troubled by the ease with which the Menendez brothers were able to convince several jurors in their first trial that they honestly believed their parents were about to kill them simply by testifying that they were afraid of their parents because of past abuse.51 The fact that the broth-

48. See DRESSLER, supra note 24, § 27.02[C], at 348-49 (discussing punishment of attempts).
50. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.06[A], at 213 (1987).
ers' claims of past abuse did not surface until right before the trial did not help to alleviate such discomfort.\textsuperscript{52}

Objectivists support the position that a defendant's belief is reasonable if and only if the hypothetical reasonable person would have held a similar belief.\textsuperscript{53} Under an objective standard of reasonableness, the defendant's beliefs are measured against the beliefs of a hypothetical reasonable person of "ordinary intelligence, temperament, and physical and mental attributes."\textsuperscript{54} In most jurisdictions, though, the standard used is more accurately described as a hybrid subjectivized-objective standard.\textsuperscript{55} Most courts are willing to allow juries to infuse physical characteristics of the defendant, such as height, weight, and even physical disabilities, into the reasonable person standard, thereby subjectivizing an otherwise purely objective standard.\textsuperscript{56}

\textsuperscript{52} See Gail Diane Cox, Abuse Excuse: Success Grows, NAT'L L.J., May 9, 1994, at A26 ("[T]he fact that the abuse angle was late in coming and it was uncorroborated . . . has created great skepticism."); Mary Jane Stevenson, Defense Offers New Theory in Menendez Case, L.A. DAILY J., July 20, 1993, at 1 (reporting on new defense theory offered during the pretrial hearing that the brothers killed their parents in self-defense because of past abuse). In a tape-recorded therapy session months after they shot their parents, Lyle and Erik Menendez never mentioned sexual abuse or self-defense. Alan Abrahamson, Tape Could Undermine Key Menendez Claims, L.A. TIMES, Nov. 13, 1993, at A1.

\textsuperscript{53} See, e.g., People v. Day, 2 Cal. Rptr. 2d 916, 921-22 (Cal. Ct. App. 1992) ("California law expresses the criterion for [the] evaluation [of the defendant's assertedly defensive acts] in the objective terms of whether a reasonable person, as opposed to the defendant, would have believed and acted as the defendant did."), overruled by People v. Humphrey, 921 P.2d 1 (Cal. 1996); People v. Aris, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989) (same), overruled by Humphrey, 921 P.2d at 10.

\textsuperscript{54} DRESSLER, supra note 24, § 18.05, at 202; see also 2 FRANCIS WHARTON, CRIMINAL LAW § 127, at 184 (15th ed. 1994) ("According to some courts, the reasonableness of a defendant's belief in the need to take life is measured not by the standards of a coward, but by those of a person of ordinary firmness and reason.").

\textsuperscript{55} See, e.g., People v. Goetz, 497 N.E.2d 41, 51-52 (N.Y. 1986) ("[A] determination of reasonableness must be based on the 'circumstances' facing defendant or his 'situation.'") (citation omitted); see also Nadine Klansky, Bernard Goetz: A "Reasonable Man": A Look at New York's Justification Defense, 53 BROOK. L. REV. 1149, 1152-53 (1988) (noting that the high court of New York established a hybrid objective and subjective standard of reasonableness in the Goetz case).

\textsuperscript{56} See, e.g., People v. Matthews, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994) (holding that a blind and hearing-impaired defendant claiming self-defense was entitled to be held to the standard of a reasonable blind and hearing-impaired person as opposed to that of a reasonable person with normal eyesight and hearing); Rodriguez v. State, 641 S.W.2d 669, 672 (Tex. Ct.
An objective standard may be problematic for reasons other than those noted above. A jurisdiction which requires an honest and objectively reasonable belief in the need to act in self-defense may not adequately recognize differences in culpability. In a jurisdiction that does not recognize the doctrine of imperfect self-defense, if a defendant honestly but unreasonably believes she is being attacked and uses deadly force against her perceived attacker, the defendant is criminally liable to the same extent as an intentional killer. The result is an all-or-nothing approach that does not differentiate between varying degrees of culpability. The defendant either succeeds in persuading the jury of the reasonableness of her beliefs and is acquitted, or fails and is convicted of murder.

Some might object to the objective standard of reasonableness because of the anomalous situation that results when an actor's beliefs are unreasonable but ultimately accurate. Gen-

App. 1982) (holding that the relative weight, size, and strength of a defendant claiming self-defense compared with that of his victim are matters that may be considered in determining the reasonableness of the defendant's actions), aff'd, 710 S.W.2d 60 (Tex. Crim. App. 1986); cf. State v. Cramer, 841 P.2d 1111, 1118 (Kan. Ct. App. 1992) (holding that a jury considering a self-defense claim need not be advised to employ an objective test based on the "reasonably prudent battered woman"; rather, the correct standard was whether a reasonable person in the defendant's circumstances would have perceived self-defense as necessary). Incorporating the physical characteristics of the defendant into the hypothetical reasonable person can have a great influence on the outcome of the reasonableness inquiry. If the defendant is an eighty-pound, five-foot-tall woman with one arm and her attacker is a six-foot-tall man weighing two hundred pounds, the defendant's fears might well be considered reasonable if the reasonable person is defined as the reasonable eighty-pound, five-foot-tall woman with one arm. If, on the other hand, the reasonable person is defined as the reasonable able-bodied man, the defendant's fears might not be considered reasonable.

57. See infra Part I.B.2 (discussing the imperfect self-defense doctrine).


60. Jurisdictions wishing to retain an objective standard of reasonableness have addressed this concern by recognizing what is known as the imperfect self-defense doctrine in which a defendant who honestly but unreasonably believes in the need for self-defense is convicted of manslaughter rather than murder. See infra Part I.B.2 (discussing the imperfect self-defense doctrine at greater length).
erally, if the defendant's beliefs were honest and correct, but unreasonable, then self-defense is not available. This is because an objective standard requires a reasonable, though not necessarily correct, belief to exculpate. In contrast, a defendant whose beliefs are honest and reasonable, but mistaken (i.e., the perceived attacker in fact was not about to kill or seriously injure the defendant), is exculpated under normal self-defense rules. The accuracy or inaccuracy of the defendant's beliefs is irrelevant under a model of self-defense which requires reasonableness. This objection, however, is not so much a criticism of the objective standard of reasonableness as a complaint about the role of mistake in traditional self-defense doctrine. Even under a subjective standard of reasonableness, the accuracy or inaccuracy of the defendant's subjective belief is generally considered irrelevant. As long as the defendant honestly or sincerely feared imminent death or serious bodily injury, the defendant is exculpated even if the defendant's belief was completely mistaken.

An objective standard of reasonableness might also be criticized for focusing too heavily on what the average or ordinary person, rightly or wrongly, would think or do. The ordinary person might act in undesirable ways. She might use deadly force against a Black man to protect herself against an imagined threat even though she would not do so if the person she was attacking was White. The ordinary man might become enraged enough to kill another man he thinks is trying to sexually proposition him. An objective standard might discourage such behavior by clarifying that the reasonable man is neither a racist nor a homophobic person. This, however, does not solve the problem because both people who fear Blacks and men who become enraged by nonviolent homosexual advances might be motivated, not by hatred or bigotry, but by the normal human process of categorization, of which stereotyping is a

61. See Robert B. Mison, Comment, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 CAL. L. REV. 133, 134-35 (1992) (describing use of the “nonviolent homosexual advance” as provocation sufficient to mitigate a murder to a manslaughter). But cf. Dressler, supra note 36, at 757 (stating that the Ordinary Reasonable Man is not homophobic or racist).

62. Most self-defense jury instructions do not clarify that the reasonable man is not a racist nor a homophobic person. See infra notes 404 & 424 and accompanying text (listing several states' model jury instructions on self-defense).
It is unclear whether the concern that an objective standard of reasonableness perpetuates the less than desirable views of the majority can be addressed without eliminating the reasonable person standard. Part III briefly discusses one way of addressing this problem without eliminating the reasonableness standard by making more explicit the normative nature of the reasonableness inquiry and broadening the focus beyond a positivist or descriptive model (what would the ordinary person actually do) to include a normative inquiry (what should the reasonable person do).

The objective-subjective debate reflects another tension in the criminal law regarding the question whether the law should lead or follow. This question is linked to the justification-excuse distinction. To the extent the law recognizes harmful behavior as justified action, it sends a message that such behavior is not wrongful, but right action. When behavior is excused, the law recognizes the behavior as wrongful, but does not assign blame to the actor because he is considered nonculpable. In recognizing excuse defenses, the law recognizes that people may act in socially undesirable ways, yet not deserve punishment. The law accepts the inevitable shortcomings of human beings who cannot always act in ideal ways.

An extended discussion on justifications and excuses is beyond the scope of this Article. The distinction, however, is worth noting because whether one thinks of self-defense as a justification or an excuse may influence one's views on whether the law should require people to overcome their inclination to act in certain ways in response to racial stereotypes or whether the law should accept the shortcomings of ordinary people who may use deadly force in response to what they mistakenly perceive to be an imminent threat. The fact that self-defense can be viewed either as an excuse or a justification depending on the circumstances makes this larger question a difficult one.


65. FLETCHER, supra note 64, at 759 ("[A]n excuse [speaks] to whether the actor is accountable for a concededly wrongful act.").

66. George Fletcher, for example, believes putative self-defense claims,
If one thinks of self-defense as a justification, one should support the view that the law of self-defense should encourage normatively correct behavior. If one thinks of self-defense as an excuse, one might prefer a subjective standard of reasonableness that places emphasis on the actor's individual blameworthiness. An objective standard of reasonableness that attempts to encourage adherence to social norms of behavior reflects a law-should-lead approach, while a subjective standard of reasonableness that gives more weight to the actor's subjective beliefs reflects a law-should-follow approach. Despite debate between academics on this point, self-defense is generally considered a justification defense. This suggests that requiring individuals to overcome prejudice arising out of reliance on racial stereotypes may be appropriate because killings in self-defense are supposed to constitute socially acceptable or right actions.

B. ATTEMPTS TO IMPROVE TRADITIONAL SELF-DEFENSE DOCTRINE

1. The Model Penal Code Approach to Self-Defense

The Model Penal Code, drafted in 1962, attempted to improve traditional self-defense doctrine by recognizing the differences in culpability among: (1) defendants who honestly, non-negligently, and non-recklessly believe in the need for self-defense; (2) defendants who honestly but recklessly believe in the need for self-defense; and (3) defendants who honestly but negligently believe in the need for self-defense. The Model Penal Code gives a defendant a complete defense to an intentional crime of violence when the defendant honestly believes her use of deadly or nondeadly force against another person was immediately necessary to protect herself against the use of

i.e., claims in which the defendant reasonably but mistakenly believes in the need to use self-defense, should be treated as excuses rather than justifications. Fletcher, supra note 64, at 762-67. But see Dressler, supra note 33, at 92-93 (critiquing Fletcher's mistake thesis); Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897, 1897 (1984) (noting that some defenses such as self-defense and duress contain justificatory and excuse characteristics); Thomas Morawetz, Reconstructing the Criminal Defenses: The Significance of Justification, 77 J. Crim. L. & Criminology 277, 287-88 (1986) (noting that genuine self-defense claims constitute justifications while putative self-defense and claims of reasonable mistake of fact are excuses).

67. LAFAVE & SCOTT, supra note 21, § 5.7, at 649-51.
unlawful force by that person.68 There is no reasonableness requirement per se.69 If, however, the defendant was reckless or negligent in believing that the use of force was necessary, the defendant can be held liable for an offense for which recklessness or negligence suffices to establish culpability.70 In other words, if a defendant's belief in the need to use self-defense was honest but unreasonable (due to recklessness or negligence), then the defendant would not be guilty of murder, which requires purpose or knowledge,71 but might be guilty of manslaughter or negligent homicide if recklessness or negligence is sufficient to establish culpability for these lesser offenses.72

68. Section 3.04 of the Model Penal Code, entitled “Use of Force in Self-Protection,” provides:

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

MODEL PENAL CODE § 3.04(1) (1962).

69. Id.

70. Section 3.09 of the Model Penal Code, entitled “Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons,” provides:

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Id. § 3.09.

71. Id. § 210.2.

72. At least two states, Delaware and Kentucky, appear to follow the approach taken in section 3.04 of the Model Penal Code in requiring that the defendant asserting self-defense have only an actual or honest belief in the need to use force against the victim. DEL. CODE ANN. tit. 11, § 464 (1995); KY. REV. STAT. ANN. § 503.050 (Michie 1990). But see Coleman v. State, 320 A.2d 740, 743 (Del. 1974) (noting that, although the former objective test of what a reasonable man would have believed has been supplanted by the subjective test of what the defendant actually believed, the jury may consider what a reasonable man in the defendant's circumstances would have believed as one factor to be considered with all other factors). Kentucky also follows the approach of section 3.09 of the Model Penal Code. KY. REV. STAT. ANN. § 503.120 (Michie 1990) (disallowing the justification if the defendant is wanton or reckless in
The Model Penal Code approach addresses the failure of traditional self-defense doctrine to recognize differing levels of culpability, but it, too, is not perfect. When the defendant is accused of killing another person, the Model Penal Code approach works because most jurisdictions recognize differing degrees of homicide with differing mens rea requirements. Murder generally requires an intent to kill, an intent to commit serious bodily injury, or gross recklessness coupled with an extreme indifference to human life. If a defendant in a jurisdiction which follows the Model Penal Code's approach to self-defense honestly, but recklessly or negligently, believes that deadly force is necessary, the defendant will not be guilty of murder but may be guilty of manslaughter or negligent homicide.

The Nebraska and Pennsylvania statutes on self-defense appear at first glance to follow the Model Penal Code. See, e.g., NEB. REV. STAT. § 28-1409 (1995) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.") (emphasis added); 18 PA. CONS. STAT. ANN. § 505 (West Supp. 1995) (Official Comment—1972) ("This section is derived from Section 3.04 of the Model Penal Code, and makes no substantial change in existing law."). However, both Nebraska and Pennsylvania require that the defendant's belief be reasonable as well as honest. 18 PA. CONS. STAT. § 501 (1983) (defining "believes" or "belief" as "reasonably believes" or "reasonable belief"); State v. White, 543 N.W.2d 725, 728 (Neb. 1996) ("[I]n order to successfully assert the claim of self-defense, one must have both a reasonable and good faith belief in the necessity of using deadly force.") (emphasis added); Commonwealth v. Harris, 665 A.2d 1172, 1174 (Pa. 1995) ("[I]n order to establish self-defense in this situation where appellant used deadly force upon another, it must be shown that... the actor must have reasonably believed that he was in imminent danger of death or serious bodily injury and that there was a necessity to use such force.") (emphasis added); Commonwealth v. Samuel, 590 A.2d 1245, 1247 (Pa. 1991) ("[I]n order to prevail on a theory of self-defense, the defendant must establish that (a) he reasonably believed that he was in imminent danger of death or serious bodily injury.") (emphasis added). Hawaii, too, appears at first glance to follow the Model Penal Code in requiring only an honest or actual belief. HAW. REV. STAT. § 703-304 (1993) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary.") (emphasis added). Hawaii, however, also requires that the defendant's belief must have been reasonable, not merely honest. HAW. REV. STAT. § 703-300 (1993) (defining the term "believes" as meaning "reasonably believes").

cide, lesser homicides which generally require only a reckless or negligent state of mind.\textsuperscript{74} 

The Model Penal Code approach does not operate quite as well if the substantive crime does not include a lesser crime with a lesser mens rea equal to the mental state possessed by the defendant at the time he committed the offense.\textsuperscript{75} For example, the crime of attempted murder generally requires that the defendant had the purpose or intent to bring about the death of the victim.\textsuperscript{76} A defendant in a Model Penal Code jurisdiction who shoots another in the honest but negligent belief that the shooting is necessary to protect against deadly force would not be guilty of attempted murder (because his honest belief in the need to use self-defense would provide him with a complete defense to attempted murder, an offense which requires proof of a specific intent to kill) nor would he be guilty of any lesser attempted homicide (because there is no such thing as a negligent attempt). Unlike the defendant who kills with the honest but negligent belief that the killing is necessary to protect against death or serious bodily injury, who can at least be found guilty of negligent homicide, the defendant who wounds with a negligent belief cannot be convicted of any lesser crime if no lesser crime with a mens rea of negligence

\textsuperscript{74} McGinnis v. Commonwealth, 875 S.W.2d 518, 526 (Ky. 1994) (noting that, if the jury believes the defendant wantonly or recklessly perceived a need for self-protection where none existed, the defendant may be convicted of manslaughter in the second degree or reckless homicide, but not murder). In Kentucky, a defendant who kills while wantonly or recklessly perceiving a need for self-defense may not be convicted of intentional murder nor may he be convicted of wanton murder (also known as depraved heart murder) because wantonness or recklessness does not suffice to establish culpability for either type of murder. \textit{Id.} at 525. Intentional murder requires an intent to kill, and wanton murder requires an extreme indifference to human life in addition to wantonness. \textit{Id.}

\textsuperscript{75} FLETCHER, supra note 59, at 55.

\textsuperscript{76} Attempt crimes require an intent to bring about the particular result described by the target offense. Miguel Angel Mendez, \textit{A Sisyphean Task: The Common Law Approach to Mens Rea}, 28 U.C. DAVIS L. REV. 407, 410 (1994) ("Attempts are comprised of two elements. One element, a mental one, consists in the offender's desire to bring about the harm the criminal law proscribed. The other, a physical one, consists of the conduct the offender undertakes in the hope of causing the harm."). Thus, for example, "attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)." \textit{Gilliam}, 541 A.2d at 311 (quoting LAFAVE & SCOTT, supra note 73, § 59, at 428-29); see also Anderson, 610 A.2d at 1052 (discussing difference between attempted aggravated assault and attempted murder—one requires a specific intent to commit serious bodily injury and the other requires a specific intent to kill).
exists. Even in jurisdictions that recognize offenses such as reckless endangerment and assault, such offenses often require a mens rea of recklessness. Some might argue that this result is fine since the defendant who honestly but negligently attempts to kill and fails has not committed a social harm (no one has died) and does not have the culpable mental state required to be guilty of attempted murder (no intent to kill unlawfully given his honest belief in the need for self-defense). The problem is that this negligent defendant, who may not be completely blameless, completely escapes blame under the Model Penal Code scheme.

2. Imperfect Self-Defense Doctrine

Another attempt to improve traditional self-defense doctrine is reflected in the adoption by numerous jurisdictions of the “imperfect self-defense” doctrine. Under this doctrine, if

77. *Fletcher*, supra note 59, at 55.

78. See, e.g., N.Y. PENAL LAW § 120.10 (McKinney 1987) (“A person is guilty of assault in the first degree when . . . he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person”) (emphasis added); id. § 120.25 (“A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.”) (emphasis added); People v. Register, 457 N.E.2d 704, 706-09 (N.Y. 1983) (describing the mental state required for proving the crime of reckless endangerment); People v. Tocco, 525 N.Y.S.2d 137, 140-41 (Sup. Ct. Bronx County 1988) (discussing mental state required for reckless endangerment in the first degree).

79. Social harm need not be tangible in order to exist. “Swinging a fist at a person may not injure him as intended, but it may cause an apprehension of injury that is itself a harm.” *Robinson*, supra note 32, at 268.

80. If the defendant were reckless, as opposed to negligent, he might be liable for reckless endangerment. *Model Penal Code* § 211.2 (1962). Reckless endangerment is a misdemeanor. *Id.*

81. See, e.g., *In re Christian S.*, 872 P.2d 574, 577, 580 (Cal. 1994) (holding that, although the California Penal Code Amendments eliminated the diminished capacity defense, the doctrine of imperfect self-defense remains intact); State v. Griblin, 753 P.2d 843, 843 (Kan. Ct. App. 1988) (requiring a jury instruction regarding the lesser degree crime in second-degree murder if the jury could reasonably have believed victim was the original aggressor); Shannon v. Commonwealth, 767 S.W.2d 548, 552 (Ky. 1988) (allowing the imperfect justification in KY. REV. STAT. ANN. § 503.120 (Michie 1990)); State v. Grant, 418 A.2d 154, 156 (Me. 1980) (stating that the trial court instructed the jury on “imperfect self-defense” according to ME. REV. STAT. ANN. tit. 17-A § 101); State v. Faulkner, 483 A.2d 759, 771 (Md. 1984) (recognizing partial defense of “imperfect” self-defense in MD. ANN. CODE art. 27, § 12 (1957)); State v. Arias, 847 P.2d 327, 327 (N.M. Ct. App. 1993) (holding that “defendant was
the defendant honestly but unreasonably believed in the need to use deadly force to protect against an imminent threat of deadly force, the defendant may be liable for manslaughter as opposed to murder.\textsuperscript{82} The honest but unreasonable belief allows mitigation of the charge from murder to manslaughter ostensibly because the malice aforethought required for murder is absent.\textsuperscript{83}

The imperfect self-defense doctrine might be criticized because it enables untruthful defendants to avoid punishment for what amounts to murder if they credibly claim they believed they needed to use deadly force to protect against an imminent threat of death or serious bodily injury. The imperfect self-defense killer, however, does not completely escape the consequences of his actions since imperfect self-defense is only a partial defense that mitigates the offense from murder to manslaughter. Nonetheless, the doctrine is problematic because it allows unscrupulous defendants to manipulate the assessment of their culpability by providing an after-the-fact justification for murder. For example, many people believed the

\textsuperscript{82} DRESSLER, supra note 24, § 18.04, at 207. The doctrine is called "imperfect" self-defense in contrast to "perfect" self-defense because the defendant's belief need not be both honest and reasonable; it need only be honest for the defendant to receive the mitigation from murder to manslaughter. See Christian S., 872 P.2d at 575. In some jurisdictions, such as Michigan, the doctrine of imperfect self-defense does not turn on the honesty of the defendant's belief, but applies if the defendant would have had the right to use force in self-defense if he had not been the initial aggressor. People v. Deason, 384 N.W.2d 72, 74 (Mich. Ct. App. 1985).

\textsuperscript{83} Christian S., 872 P.2d at 575. In fact, however, malice aforethought is most likely present in cases where the defendant uses deadly force in the honest belief that such force is necessary to defend against an imminent attack. Malice aforethought is a legal term of art that is satisfied by the presence of an intent to kill, an intent to commit serious bodily injury (in some jurisdictions), or gross recklessness and extreme indifference to the value of human life. DRESSLER, supra note 24, § 31.02[B][2], at 468. A defendant who shoots another in the belief that the other was about to attack him usually intends to kill or at least seriously injure his presumed attacker. Because of this, the absence of malice aforethought justification for the imperfect self-defense doctrine (as well as for perfect self-defense) is at least confusing and perhaps even misguided.
Menendez brothers manufactured an after-the-fact abuse defense. The brothers' claim that they were sexually and physically abused by their father did not surface until right before their first trial.\textsuperscript{84}

The Menendez brothers' case highlights the profound consequences of an imperfect self-defense instruction. At the first trial, Judge Stanley Weisberg refused to give a jury instruction on perfect self-defense on the ground that it was not reasonable for the defendants to have believed they were in imminent danger from their parents at the time of the shooting, but allowed an instruction on imperfect self-defense.\textsuperscript{85} Both juries deadlocked when some jurors accepted the brothers' claims of imperfect self-defense and voted for manslaughter convictions while other jurors rejected these claims and voted for murder; Judge Weisberg declared mistrials in both cases.\textsuperscript{86} At the brothers' retrial, Judge Weisberg ruled that there was insufficient evidence to support a jury instruction on imperfect self-defense.\textsuperscript{87} Subsequently, the brothers were found guilty of first-degree murder and sentenced to life in prison without parole.\textsuperscript{88}

While both the Model Penal Code approach to self-defense and the imperfect self-defense doctrine may provide some positive improvement on traditional self-defense doctrine, neither adequately addresses problems of ambiguity with the reasonableness determination. What constitutes a reasonable belief in the need to use self-defense and who the reasonable person is remains undefined. It is unclear to jurors whether they can rely on assumptions about members of the victim's racial group to support a finding that the defendant's fear of the victim was reasonable because the jury instructions on self-

\textsuperscript{84} See supra note 52 (stating that the delay in offering an abuse defense "created great skepticism").


defense do not address this issue. If jurors are influenced by racial stereotypes to find that the defendant acted reasonably, the Model Penal Code's reckless or negligent offense solution and the imperfect self-defense doctrine's mitigation from murder to manslaughter will not be utilized. Moreover, both the Model Penal Code approach and the imperfect self-defense doctrine, like traditional perfect self-defense doctrine, ignore the significant distinction between beliefs and acts encompassed in self-defense jurisprudence.

II. RACE AND REASONABLENESS

This Part examines ways in which racial stereotypes about the defendant or victim may influence legal decisionmaking. Traditionally, scholars and people in general equated the terms "stereotypes" and "prejudice." Recently, scholars have begun to distinguish the two concepts. Under the current view, "stereotypes" constitute well-learned sets of associations among groups that result in automatic, gut-level responses. Stereotypes are corollational constructs, reflected in statements such as "Blacks are athletic," "Hawaiians are friendly," "Women are emotional." Stereotypes correlate membership in a particular group (e.g., Blacks, Hawaiians, women) with particular traits (e.g., athleticism, friendliness, emotionalism).

89. Sagawa, supra note 12, at 257 (noting that the objective reasonable man test "does not determine clearly whether Goetz's fear of attack by Black male teenagers is a characteristic of the reasonable man").
90. See Armour, supra note 2, at 738 (noting the longstanding tradition of equating stereotypes and prejudice); Krieger, supra note 63, at 1187 (noting that, until the 1970s, stereotypes were understood as rationalizations of prejudice). Even Gordon Allport, one of the leading social psychologists of the Twentieth Century defined both terms by referring to beliefs. Allport defined the term "stereotype" as "an exaggerated belief associated with a category" and defined the term "prejudice" as an attitude of favor or disfavor related to an over-generalized (and therefore erroneous) belief. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 6-7, 191 (1979) (emphasis added).
91. Armour, supra note 2, at 741. Stereotyping is simply a form of categorization engaged in by all people, not just prejudiced ones. Krieger, supra note 63, at 1187-88.
93. Stereotypes represent a phenomenon called an "illusory correlation" when they reflect a correlation between two things which, in reality, (1) are not correlated; (2) are correlated to a lesser extent than reported; or (3) are correlated in the opposite direction from that which is reported. Id.
“Prejudice,” in contrast, is defined as one’s set of personal beliefs which may or may not be congruent with the stereotypes one has learned. A person may be either a “high-prejudiced” or a “low-prejudiced” individual. These terms of art regarding degrees of prejudice are defined in relation to stereotypes. If one’s personal beliefs about a particular group of people are congruent with the stereotypes about that group, one is considered “high-prejudiced.” If one’s personal beliefs about a particular group of people are not necessarily congruent with the stereotypes about that group, one is considered “low-prejudiced.”

Recognizing the distinction between stereotypes and prejudice is useful because doing so reveals the possibility of disassociating one’s automatic stereotype-congruent responses from one’s controlled personal beliefs. Making racial stereotypes salient in criminal trials through limiting jury instructions may encourage low-prejudiced jurors (i.e., jurors whose personal beliefs are inconsistent with the stereotype at issue) to decide cases in accordance with their egalitarian-congruent personal beliefs rather than their stereotype-congruent responses.

In self-defense cases, racial stereotypes about either the defendant or the victim can influence the reasonableness determination in different ways. For example, we all tend to associate certain characteristics with particular racial groups. If the defendant or victim belongs to a racial group whose members are perceived as dangerous or violent criminals, jurors may perceive ambiguous actions of the actor to be more hostile or violent than they actually are. Additionally, we tend to emphasize the positive attributes of others who are perceived to

94. Armour, supra note 2, at 742.
95. Id.
96. Id. It is theoretically possible that a person’s beliefs might be incongruent with the stereotypes, and that the term “low-prejudiced” would not be an appropriate label to describe that person. For example, it is possible (though not probable) that a person could believe all Blacks are lousy athletes. Even though this belief is not congruent with the stereotype that Blacks are good athletes, calling the person “low-prejudiced” is inappropriate. The person is prejudiced in a manner inconsistent with the stereotype. Given the pervasiveness of stereotypical images which are reproduced in the media and in everyday conversations, the likelihood of someone actually believing that all Blacks are lousy athletes is small. Nonetheless, the hypothetical reveals a problem in the definition.
97. See id. (describing disassociation model).
98. Id.
be more like ourselves while focusing on the negative traits in people we perceive to be different from us. In general, people tend to value those who are like them, or perceived to be like them, more than others who are perceived to be different. For instance, if the victim belongs to a racial group whose members are associated with foreignness or immigrant status, jurors may subconsciously minimize the harm suffered by the victim and may be more willing to view the defendant’s use of force as reasonable than they would otherwise.

Fact finding is a difficult task, even when race is not an issue. First-hand observation is no guarantee that people will reach the same conclusion about the observed events. In criminal cases, jurors do not observe the alleged criminal conduct first hand. Instead, they learn the facts through eyewitness testimony and other circumstantial evidence. Factual disagreement results from the different lenses through which we view the world. One’s interpretation of the facts is influenced by one’s background and experience. Recent research on cognitive theory suggests that “decision-makers actively construct representations of the trial evidence based on their prior expectations about what constitutes an adequate explanation of the litigated event. . . . [T]hese representations, rather than the original ‘raw’ evidence, form the basis of the jurors’ final decision.”

When race is a consideration, fact finding can be even more difficult. Race, to a large extent, is a product of social construction. Our thoughts and beliefs about race are

99. See generally Krieger, supra note 63.
100. Id.
101. In a University of San Diego undergraduate class on research methods in political science, political science professor Michael Pfau conducted the following experiment to demonstrate that reasonable people do not always agree on the facts. First, Pfau turned out the lights. Next, he approached a closed door, looked around cautiously as if checking to see that no one was around, took something from his pocket, then tried several times to open an apparently locked door before finally opening it. Pfau asked his students to report what they saw. One student said she saw a would-be burglar trying to break into a house. Another said she saw a drunk person having difficulty opening the door to his home. Yet another said she saw a person opening a door.
103. A variety of different conceptions of “race” have been espoused. Biologists have used the term “race” to distinguish groups of human beings by referring to differences in physical traits, such as skin color, hair, and facial features. See Roy L. Brooks, Race As an Under-Inclusive and Over-Inclusive
shaped by social influences and personal experiences. To say that race is socially constructed, though, is "not to say that race is a useless idea in talking about American society or responding to social needs." In self-defense cases involving defendants or victims of color, race or, to be more precise, racial stereotypes, may influence our assessment of whether the defendant's use of force against the victim was reasonable. This Part selectively examines only a few of the numerous stereotypes about Blacks, Asian Americans, and Latinos, those which might directly or indirectly influence juror determinations of reasonableness in self-defense cases.

The existence of the Black-as-criminal stereotype, discussed in Part II.A, is supported by social science studies showing that people tend to view the behavior of Blacks as more hostile or aggressive than the same behavior conducted by Whites. Actual cases also illustrate the pervasiveness of...
this stereotype. The Bernhard Goetz case is used to illustrate how the Black-as-criminal stereotype may have influenced one jury to return a verdict of acquittal in a racially charged case involving a White defendant who claimed he shot at four Black victims in self-defense.

With respect to stereotypes about Asian Americans and Latino/as, there is a striking paucity of social science research on the existence of such stereotypes and the influence such stereotypes might have on jurors. Just as race-based legal scholarship focuses on the Black-White paradigm to the exclusion of other non-Black minorities, the social science research also largely ignores Asian American and Latino/a interests. To fill the void, Parts II.B and II.C draw upon actual cases to illustrate how stereotypes about Asian Americans and Latino/as might influence juror perceptions of reasonableness in self-defense cases.

A. THE BLACK-AS-CRIMINAL STEREOTYPE

Despite the abolition of slavery, passage of the Civil Rights Act, and other positive changes in the law following the Civil Rights Movement, many African Americans today still suffer from discrimination based on race.105 Over time, as society has publicly denounced racism, overt racial prejudice appears to have declined.106 Negative stereotypes of African Americans,

105. Socioeconomic disparity between Blacks and Whites is as pronounced today as it was in the 1970s. Roy L. Brooks, Integration or Separation? A Strategy for Racial Equality (forthcoming 1996).

106. Overt racial prejudice may appear to have declined because racism has become more covert or subtle. See Erick L. Hill & Jeffrey E. Pfeifer, Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism, 16 Contemp. Soc. Psychol. 6, 6 (1992) (noting that legal and political changes in the 1960s which made overt displays of racism unlawful and immoral have led to what a number of researchers call an era of "respectable racism" or "subtle racism," in which racist tendencies are only expressed in situations which are ambiguous enough to allow for non-racist interpretations). On the other hand, there may be less racial prejudice today than there was 40 years ago. Jody Armour states:

This view of prejudice as inevitable and ubiquitous, however, does not square with the survey literature on racial attitudes indicating that prejudice has been declining steadily over the past 40 years . . . . [According to one series of reports on attitudes of White Americans toward Black Americans,] there has been a continuous increase in the percent of whites who favor equal treatment for blacks in all areas of American society since 1942.

however, still persist. One of the stereotypes most often applied to African American males is that they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society.\footnote{Addis, \textit{Recycling in Hell}, supra note 107} Adeno Addis has aptly observed that crime has “become a metaphor to describe young black men.”\footnote{Addis, \textit{Recycling in Hell}, supra note 107} Although the Black-as-criminal stereotype is mostly a gendered concept that applies to Black men, Black women have also suffered from the perception that they are untrustworthy, criminal, or dangerous.\footnote{Addis, \textit{Recycling in Hell}, supra note 107}

American society, a fact that must be recognized in constitutional adjudication.


\footnote{Addis, \textit{Recycling in Hell}, supra note 107.} Taunya Banks, a Black woman law professor at the University of Maryland, recounts the following incident:

One Saturday afternoon I entered an elevator in a luxury condominium in downtown Philadelphia with four other Black women law professors. We were leaving the apartment of another Black woman law professor. The elevator was large and spacious. A few floors later, the door opened and a White woman in her late fifties peered in, let out a muffled cry of surprise, stepped back and let the
The Black-as-criminal stereotype may cause people to perceive ambiguously hostile acts (i.e., acts that can be perceived as either violent or nonviolent) as violent when a Black person

door close without getting on. Several floors later the elevator stopped again, and the doors opened to reveal yet another White middle-aged woman, who also decided not to get on.

Following the first incident we looked at each other somewhat puzzled. After the second incident we laughed in disbelief belatedly, belatedly realizing that the two women seemed afraid to get on an elevator in a luxury condominium with five well-dressed Black women in their thirties and forties. Our laughter, the nervous laugh Blacks often express when faced with the blatant or unconscious racism of White America, masked our shock and hurt.

The elevator incident is yet another reminder that no matter how well-educated, well-dressed, or financially secure, we are Black first and thus still undesirable "others" to too many White Americans. It reminds me that no matter what my accomplishments, I am still perceived as less than equal—and even dangerous!


Patricia Williams, a Black woman law professor at Columbia University, recounts a similar experience:

Buzzers are big in New York City. Favored particularly by smaller stores and boutiques, merchants throughout the city have installed them as screening devices to reduce the incidence of robbery. When the buzzer sounds, if the face at the door looks "desirable," the door is unlocked. If the face is that of an "undesirable," the door stays locked. Predictably, the issue of undesirability has revealed itself to be primarily a racial determination. Although the buzzer system was controversial at first, even civil rights organizations have backed down in the face of arguments that the system is a "necessary evil," that it is a "mere inconvenience" compared to the risks of being murdered, that discrimination is not as bad as assault, and that in any event, it is not all blacks who are barred, just "17-year-old black males wearing running shoes and hooded sweatshirts."

Two Saturdays before Christmas, I saw a sweater that I wanted to purchase for my mother. I pressed my brown face to the store window and my finger to the buzzer, seeking admittance. A narrow-eyed white youth who looked barely seventeen, wearing tennis sneakers and feasting on bubble gum, glared at me, evaluating me for signs that would pit me against the limits of his social understanding. After about five seconds, he mouthed, "We're closed," and blew pink rubber at me. It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for their mothers.

... [That salesperson's] refusal to let me into the store was an outward manifestation of his never having let someone like me into the realm of his reality. He had no connection, no compassion, no remorse, no reference to me, and no desire to acknowledge me even at the estranged level of arms' length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.

engages in these acts and non-violent when a non-Black person engages in the same acts. Birt Duncan tested this hypothesis on 104 White undergraduate students at the University of California at Irvine. Subjects observed two people involved in a heated argument which resulted in one shoving the other. Just after the shove, the subjects were asked to rate the behavior of the person who shoved the other. The subjects were randomly assigned to one of four experimental conditions: Black shover/White victim, White shover/Black victim, Black shover/Black victim, and White shover/White victim. Duncan found that when the person shoving was a Black person and the person being shoved was White, 75% of the

110. People of all races seem to be influenced by the Black-as-criminal stereotype. Black taxicab drivers, for example, often refuse to pick up Black men. African American attorney Gilbert Gordon relates an all too common experience:

In the year 1990, if I hail a cab, particularly after six o'clock, there's a good chance the cabbie's going to be concerned that I want to take him in [sic] a black area and he doesn't want to go there. I don't have the duty to explain, "I'm not like those kind of people you're thinking about." I'm a lawyer. I have money. Why should I bare my soul? He's just a guy trying to make a living and I'm just a guy trying to get home, and we ought to have something in common. But he's not going to give me that chance. If he sees somebody white standing on the corner, he'll go to him. Even a black cabdriver will do that. Fear's the big thing.


112. Id.

113. Id. at 593.

114. Id.
subjects thought the shove constituted "violent" behavior, while only 6% characterized the shove as "playing around." When subjects observed the same events with a White person as the shover and a Black person as the victim, only 17% characterized the White person’s shove as “violent,” while 42% described the White person’s shove as “playing around.” Duncan concluded that the threshold for labeling an act as violent was significantly lower when subjects viewed a Black person committing the act than when subjects viewed a White person committing the same act.

In 1980, H. Andrew Sagar and Janet Ward Schofield conducted a similar study, testing whether Black as well as White children perceive ambiguously aggressive behavior by Blacks as more violent or aggressive than similar behavior by Whites. Sagar and Schofield, expanding on Duncan's study which only tested reactions to ambiguously hostile behavior, also examined whether clearly non-aggressive behavior by Blacks also triggered the Black-as-violent stereotype. They found that both Black and White children tended to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites.

These studies suggest that stereotypes about Blacks as violent or dangerous people influence perception and judgment. As Birt Duncan observed,

If this finding is so readily available for college subjects, its generalizability to other subject populations can be expected to be even more dramatic. One may be tempted to ask, in the real world where violence is a fact of life, have Blacks been the victims of mislabeling or errors in cases where there was a "reasonable doubt" (i.e., low perceptual threshold acts)?

One example of how the Black-as-criminal stereotype can influence perception and judgment occurred recently in San Francisco, California. On August 23, 1995, Louis Waldron, a 22-year-old Black college student, was involved in an altercation with Patrick Hourican, a 33-year-old White Irish Ameri-

115. Id. at 595.
116. Id.
117. Id. at 596.
119. Id.
120. Id. at 596.
121. Duncan, supra note 111, at 597.
can construction worker, stemming from Hourican's refusal to pay for damage he caused to Waldron's car. Hourican had ridden his bicycle past Waldron's car and knocked off the side view mirror. Waldron chased after Hourican. When Waldron caught up with Hourican, Hourican punched Waldron and then left. Ten minutes later, Waldron caught up with Hourican again and demanded money for the mirror. According to Waldron, Hourican used a racial epithet against Waldron and refused to pay for the mirror he broke. Waldron then punched Hourican in the face. Hourican fell, hit his head on the pavement, and died two days later. Former San Francisco District Attorney Arlo Smith charged Waldron, who had never before been arrested or convicted of a crime, with first-degree murder.

The first-degree murder charge seemed excessive in light of the fact that the decedent Hourican initiated the confrontation by knocking the side mirror off Waldron's car and throwing the first punch. Many believed race—specifically, the fact that Waldron was Black and Hourican was White—influenced the charging decision. John Runfola, Waldron's attorney, commented, "If the person who died in this case—and who had 28 misdemeanors and three felony contacts with police—had been African American, and if the person who punched him was [W]hite, I'm not sure that person would have been charged at all." The racial nature of the Waldron case was high-

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125. Id. A passenger in Waldron's car jumped out and stole Hourican's bike. Id.

126. Id.


131. Schuyler, supra note 122, at 4.

132. Cole, supra note 122, at A3. In February 1996, Terence Hallinan, who replaced Arlo Smith as San Francisco's District Attorney, asked Judge David Allen to reduce the first-degree murder charge filed against Waldron to invol-
lighted by the fact that just two months before Hourican's death, a man died after he was punched once outside a popular bar in San Francisco. Both the person who threw the punch and the victim were White, and the White man who threw the punch was never charged.

The Black-as-criminal stereotype is so deeply entrenched in American culture that false claims of Black criminality are made and, in many cases, readily believed. In 1989, Carol Stuart, who was seven months pregnant at the time, was shot and killed in an inner-city neighborhood of Boston, Massachusetts. Carol's husband, Charles Stuart, told police that a Black man had abducted them at gunpoint, robbed the couple, and then shot Carol in the head and Charles in the abdomen. Police arrested William Bennett, a Black man who had spent most of his life in trouble with the law and had served two terms in prison for threatening and shooting police officers.


134. Rosenfeld & Opatrny, supra note 133, at A1.


136. Id. Carol Stuart died that night after her son, Christopher, was delivered prematurely by Cesarean section. Boston Mourns Pregnant Woman Killed by Robber, L.A. TIMES, Oct. 29, 1989, at A25. The baby died two weeks later. Massachusetts: Baby Born to Victim of Shooting Dies, L.A. TIMES, Nov. 10, 1989, at A27. More than one hundred police officers went to the inner-city neighborhood where the shooting had occurred and randomly searched young Black men, looking for the gun used to shoot the Stuarts. Karen Tumulty, Wife Killing Puts Boston in Worst Racial Crisis in Years, L.A. TIMES, Jan. 10, 1990, at A1. During the four days following the shooting, it was estimated there were more than 150 stop-and-frisk searches in the neighborhood each day. Jim Naughton, The Murder That Ravaged Boston: Revelations About the Stuart Deaths Leave the City Awash in Recriminations, WASH. POST, Jan. 8, 1990, at B1. Black men throughout the city complained of public strip searches and repeated interrogations by police. Id. "I got stopped three times one night just walking from here to my apartment," said a clerk at an expensive hotel. Id. "We [Black men] were all suspects." Id.

137. Tumulty, supra note 136, at A1. Several witnesses testified against Bennett before a specially-convened grand jury. Naughton, supra note 136, at B1. One person claimed to have seen Bennett carrying a gun and jewelry in the area where the shooting took place on the night of October 23rd. Id. Another said Bennett had admitted to the shooting. Id. It was not until police pulled from the river a gun with registration numbers matching a pistol reportedly stolen from the shop where Charles Stuart worked that Stuart's brother Matthew came forward and confessed that he had played a part in
Later, Charles Stuart admitted to a family member that he killed his wife for the insurance money; Stuart then committed suicide.138

Charles Stuart's false claim that a Black man murdered his wife is not the only case of its kind.139 In 1992, Jesse Anderson claimed two Black men attacked his wife by stabbing her in the face and neck.140 Anderson was later convicted of first-degree murder.141 In 1994, Susan Smith told police that a Black man took her car at gunpoint and kidnapped her two young boys.142 Smith later confessed to pushing her car into a lake and watching it sink with her two young children strapped inside, and was convicted of first-degree murder.143

Social cognition theorists would explain the willingness of many Americans to accept Charles Stuart's, Jesse Anderson's, and Susan Smith's claims that a Black man committed the violent criminal acts they themselves committed as a natural function of the human need to categorize in order to make sense of experience.144 Stuart, Anderson, and Smith, consciously or subconsciously, relied on the Black-as-criminal

Carol Stuart's death. Id. Matthew told police that Charles killed his pregnant wife and Matthew helped him get rid of the murder weapon. Id.

138. Massachusetts: Pistol in Pregnant Wife's Death Sought, L.A. TIMES, Jan. 6, 1990, at A3. The Stuart case illustrates the deep-rooted nature of the "Black-as-criminal" stereotype. The police and the public were quick to believe Charles Stuart's claim that a Black man shot his wife. JOE R. FEAGIN & HERNAN VERA, WHITE RACISM 62-70 (1995) ("Charles Stuart counted on the strong presumption among powerful whites that a white businessperson would be telling the truth in his account of a black male attacking a white woman, even though his story was full of obvious inconsistencies."). Had the police been a bit more skeptical of Stuart's story, they might have discovered earlier that Stuart had taken out several large life insurance policies on his wife, had previously plotted with his brother to kill his wife, and had been having an affair with another woman, giving Stuart plenty of motivation to kill his wife. Tumulty, supra note 136, at A1.


144. See Krieger, supra note 63, at 1187-88 (describing work of social cognition psychologists).
stereotype when they falsely accused Black men of committing these crimes. At some level, Stuart, Anderson, and Smith knew that others would be most likely to believe their false claims if they attributed their crimes to Black men.

To justify the fear of Blacks as criminals, many people point to statistics which show that Blacks are arrested and convicted of crime far more often than Whites. In 1990, the Sentencing Project published a report entitled Young Black Men and the Criminal Justice System: A Growing National Problem. The report found that on any given day in 1989, 23% of Black men between the ages of twenty to twenty-nine were in prison, on probation or parole, or in some way connected with the criminal justice system. Five years later, the Sentencing Project updated its study, reporting that “as of 1994, 30.2% of African American males in the age group 20-29 were under criminal justice control—prison, jail, probation, or parole—on any given day.”

While these statistics appear at first glance to provide support for some people’s conclusion that it is reasonable to fear all Black men because there is a one-in-three chance that any given Black man is a criminal, and thus violent and dangerous, an accurate reading of the report casts doubt on such a proposition. According to the Sentencing Project, “The typical African American male in the criminal justice system is not a violent offender.” The large number of African American males connected with the criminal justice system is largely due to the “War on Drugs” and increased law enforcement of drug crimes. Moreover, the statistics only show that 30% of Black men in their 20s are connected with the criminal justice sys-

146. Id. at 2-3.
148. MAUER & HULING, supra note 147, at 14 (emphasis added).
149. Id. at 9; see also David A. Sklansky, Cocaine, Race, and Equal Protection, 47 STAN. L. REV. 1283, 1289-90 (1995) (discussing the disparate impact of severe crack cocaine penalties on Black crack offenders versus White powder cocaine offenders).
RACE AND SELF-DEFENSE

tem, presumably a much smaller population than 30% of all Black men.

The Sentencing Project also reports that contrary to common expectations, "the majority of arrestees for violent offenses are white."150 The Federal Bureau of Investigation's Uniform Crime Reports (UCR) for 1993 confirms this. According to the 1993 UCR, 52.6% of arrestees for violent crime were White, while only 45.7% were Black.151 In 1994, the percentage of White arrestees for violent crime went up to 53.4% and the percentage of Black arrestees for violent crime declined to 44.7%.152 Given that Whites constitute 82.9% of the population in the United States,153 it is not surprising that Whites would constitute a majority of those arrested for violent crimes. The fact that Blacks constitute approximately 12% of the population,154 but almost half of those arrested for violent crimes (44.7%), is disturbingly disproportionate. Some people might interpret such statistics as supporting the view that it is reasonable to fear Blacks because they constitute a disproportionate number of violent crime arrestees. This view, however, attributes the criminality of some Blacks to the entire Black population. When the total number of Blacks arrested for violent offenses is compared to the total number of Blacks in America, only a small percentage of the Black population are arrested for violent crimes. In 1991, for example, Blacks arrested for violent crimes comprised less than 1% of the total Black population and less than 1.7% of the Black male population.155 In 1994, Blacks arrested for violent crime still com-

150. MAUER & HULING, supra note 147, at 14 (emphasis added); see also Delgado, supra note 107, at 547 (noting that more human lives are lost each year due to corporate action as opposed to street crime).
154. Id.
155. Armour, supra note 12, at 791 (citing ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 94 (1993)). Ellis Cose explains:

   It is true, as Koch indicates, that blacks account for about 45 percent of those arrested for America's violent crimes. But it is not true that most black males are vicious. FBI statistics show that blacks were arrested 245,497 times in 1991 for murder, forcible rape, robbery, and aggravated assault. The country's total population then was just un-
prised less than 1% of the total Black population and only 1.86% of the total Black male population.¹⁵⁶

It is not reasonable to attribute the criminality of a few Blacks to the entire Black population or even the entire Black male population. The illogic of the statistical argument in support of the Black-as-criminal stereotype becomes apparent if one considers using a similar argument to support an all-men-are-criminal stereotype:

According to the FBI Uniform Crime Report, in 1990, men, regardless of age, were arrested for violent crimes at levels that dwarfed the numbers for women. Men twenty-five to thirty-four unders 249 million, including nearly 31 million blacks and roughly 15 million black males. If we assume that each arrest represents the apprehension of a separate individual, blacks arrested for violent crimes made up less than 1 percent of the black population in 1991—and just under 1.7 percent of the black male population (less, in fact, since the aggregate figure of 245,437 includes crimes committed by females). In other words, less than one-tenth of a percent of the population—not 6 percent—is committing 45 percent of violent crimes.

Cose, supra, at 94 (emphasis in original); see also Erika L. Johnson, "A Menace to Society": The Use of Criminal Profiles and Its Effects on Black Males, 38 How. L.J. 629, 634 (1995) (pointing out that Blacks arrested for street crimes constitute only a small fraction of the Black population; approximately 97.9% of the national population of Blacks are not arrested for criminal activity).

¹⁵⁶. According to the Federal Bureau of Investigation, 288,133 Blacks were arrested for violent crimes in 1994. Uniform Crime Reports, supra note 151, at 235. According to the Bureau of the Census, the total Black population in the United States in 1994 was 32,672,000, and the total Black male population was 15,491,000. Statistical Abstract, supra note 153, at 21. 288,133 divided by 32,672,000 equals .00881895 (or .88%). 288,133 divided by 15,491,000 equals .0186 (or 1.86%).

Racial discrimination by police officers in choosing whom to arrest may exaggerate the differences between Blacks and Whites arrested for violent crimes. Armour, supra note 12, at 792 (citing Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1473, 1508 (1988)). Many scholars, however, have concluded that differences in racial patterns of offending constitute the principal reason why Blacks are arrested in greater numbers than Whites. See Michael Tonry, Malign Neglect—Race, Crime, and Punishment in America 3 (1995) (discussing the interaction between race and crime). These scholars believe that racial bias by police officers and other government officials is not the major factor leading to disproportionate arrest patterns. Id.

The race of the defendant may also influence the judges who sentence offenders. A computer analysis of all 1992 and 1993 federal court convictions found that Black defendants on average receive sentences 10% longer than similarly situated White defendants. Laura Frank, Equal Crime, but Not Equal Time, The Tennesseean, Sept. 24, 1995, at 1A. In some federal districts, Black defendants' sentences were up to 40% longer than similarly situated White defendants. Id.
years old were seven times as likely as women in the same age bracket to be arrested for murder, forcible rape, robbery, and aggravated assault. Those from thirty-five to forty-four were seven to eight times as likely to land in jail, and those over sixty-five were nearly fifteen times as likely.

If one applies [the argument that it is reasonable to fear Blacks over Whites because Blacks are arrested for violent crimes at rates greater than Whites] to those statistics, one would expect discrimination against men to be much more prevalent than discrimination against women. One would expect that until such time as the male crime rate is made to equal the female crime rate, society would treat men as objects of fear and horror.

To state the argument in these terms is to suggest exactly how ridiculous it is. Yet it is the kind of absurd argument that extremely intelligent people make with perfectly straight faces when discussing the treatment of blacks. And it feeds on the oft-unstated assumption that blacks are still on probation—that unlike white men, who are demonstrably more dangerous than white women (and even more dangerous than black women), blacks are not necessarily granted a presumption of innocence, competence, or even complete humanity.5

Ultimately, the use of statistics is problematic because statistics can be manipulated either to support or refute the claim that it is reasonable to fear Blacks. While it is more common to hear the statistical argument in support of the claim that it is reasonable to fear a Black person, a statistical argument can also be made that it is unreasonable to fear a Black person. Which statistical argument is more persuasive may depend more on the reader's own biases than on the actual validity of the statistical argument. This is because individuals often "credit only those statistics and images which confirm their preexisting biases."158

According to government statistics, a White person is more than four times as likely to be killed by another White person than a Black person.159 These statistics might be interpreted to support the argument that it is more reasonable for a White person to fear being killed by another White person than

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157. COSE, supra note 155, at 72.
158. Armour, supra note 12, at 791.
159. In 1993, 4,686 Whites were convicted of murdering White victims while only 849 Blacks were convicted of murdering White victims. UNIFORM CRIME REPORTS, supra note 151, at 17 (Table 2.8 - Victim/Offender Relationship by Race and Sex, 1993 [Single Victim/Single Offender]). About 80% of all crimes of violence occur among persons of the same race. Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 HARV. L. REV. 1255, 1255 n.2 (1994).
to fear being killed by a Black person. The "more than four times as likely" statistic, however, does not separate out homicides between people who know one another, arising out of domestic violence, love triangles, business deals gone bad, and other unfortunate situations, from stranger-on-stranger homicides. Such separation may be necessary before one can draw any inferences either for or against the argument. Additionally, the use of statistics to support or refute claims of reasonableness in self-defense cases involving Black male victims is of little help because people in situations of perceived danger often do not act in reliance on statistics, but instead respond to deeply ingrained racial stereotypes.

The fear of Black-on-White violence is reinforced by incidents such as the Reginald Denny beating in which several Black men pulled a White truck driver from his truck and brutally beat him during the 1992 Los Angeles riots.\(^6\) It is important, however, to keep in mind that hate crimes are not just Black-on-White incidents. Ellis Cose reminds us that when hate crimes occur, it is more often Whites who attack Blacks (and other minorities) than Blacks who attack Whites:

In 1992, the FBI published its first tabulation ever of "hate crime offenses," covering cases of murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, arson, simple assault, intimidation, and vandalism, as reported by local law enforcement agencies for 1991. In instances where the perpetrator's race was recorded, 65 percent of assailants were believed to be white, 29 percent to be black, and less than 3 percent to belong to "multiracial" groups. Conversely, of those thought to be targeted because of race, 57 percent were black and 30 percent were white. In other words (calculating from statistics that are admittedly flawed since many localities did not keep good records, and adjusting for the fact that the white population is almost seven times the size of the black population), any particular black person is thirteen times more likely to be the victim of a so-called bias crime than any particular white person.\(^161\)

Despite these statistics, the fear of Black criminality is so pervasive that many well-intentioned people empathize with the White woman who crosses the street when she sees a Black man coming her way even if she were to continue walking on the same side of the street if the man were White,\(^162\) and the

161. COSE, supra note 155, at 108-09.
162. Suzanna Sherry expresses this sentiment in the following response: [Aleinikoff's] description of the young black man who felt resentful
taxi driver who passes up the Black man waiting for a ride and picks up the White man on the next block. Having concern for one's physical safety does not mean one is a bad person. What drives many to empathize with the woman who crosses the street and the taxi driver who refuses to pick up Black passengers may be bias in perception resulting from racial stereotypes such as the Black-as-criminal stereotype. Similar racial filtering might cause some individuals to use deadly force on non-culpable Black persons when they would not react similarly to non-Black persons.

Without trivializing the stigma that comes from being repeatedly snubbed, it is important to recognize the difference between attempting to avoid perceived danger by crossing the street and using deadly force to kill someone. The rationality or accuracy of the factual judgment may be the same in both situations, but the social consequences or costs of error in the

when a white woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being, but she fears for her physical safety. I, at least, would rather be snubbed than raped.

Suzanna Sherry, The Forgotten Victims, 63 U. COLO. L. REV. 375, 375 (1992) (emphasis added). Implicit in the emphasized statement is the belief that a Black man would rape. The Black-as-criminal stereotype persuades Sherry and others to view the hypothetical rape as a virtual certainty. This is not to criticize women who take precautions when walking alone, but Sherry has made a leap by equating the fact of being snubbed with the possibility of being raped.

163. Jody Armour recounts his own experience in this regard:

Two years ago, I attended a meeting in Washington, D.C., for the American Association of Law Schools. After a series of meetings that ran into the evening, I tried to hail a cab to return to my hotel. Although several of my white colleagues were picked up immediately, I nearly got tennis elbow trying to flag down a taxi. I eventually had to prevail upon one of my white colleagues to hail a cab for me. It came as no surprise, therefore, when I later learned that a lawsuit had been filed against three D.C. cab companies for refusing to stop for blacks.

When I related my experience to colleagues and students, I found that many felt deep ambivalence about the issue: On the one hand, they understood my frustration, but, on the other, they (and I) also felt sympathy for the cabdrivers, many of whom live in constant fear of violence.

Armour, supra note 12, at 816 (emphasis added).

164. I do not use the word "racist" here because of its confusing meanings. Many people think of racism as bigotry and racists as people who believe they are better than others because of their race. Traditional views of racism rely on the assumption that racial bias must be conscious and intentional. Today, social cognition theorists recognize that people can be racially biased without consciousness or intent. Krieger, supra note 63, at 1188 ("Stereotypes . . . operate beyond [the] reach of the decisionmaker[s] self-awareness.").
two situations are strikingly different.\textsuperscript{165} This difference suggests the importance of examining whether racial stereotypes influence jurors to find reasonableness in self-defense cases. The Bernhard Goetz case is a useful vehicle to explore this question.

On December 22, 1984, at about 1:00 p.m., Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen, four Black youths, boarded an express subway train in the Bronx.\textsuperscript{166} The four youths rode together in the rear portion of one of the cars of the train.\textsuperscript{167} Bernhard Goetz, a White man, boarded the same car a little later and sat down on a bench near the rear section.\textsuperscript{168} Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition and concealed in a waistband holster.\textsuperscript{169}

Canty, accompanied by Allen, approached Goetz and said, "Give me five dollars."\textsuperscript{170} Neither Canty nor any of the other youths displayed a weapon.\textsuperscript{171} Goetz responded by standing

\textsuperscript{165} In his forthcoming book, Jody Armour uses the example of a pet-owner chaining his pet Rottweiler to a tree in a fenced-in backyard. In the first situation, pet-owner's wife asks pet-owner whether the dog is chained. Pet-owner personally hooked the chain to the dog's collar three hours earlier and responds affirmatively. If pet-owner's claim that the dog is chained is incorrect, the consequences of error are insubstantial. "If the dog is not still chained, he will roam the backyard all night, strategically squirting urine on lawn chairs and fixtures in service of his territorial instincts. It takes fifteen minutes the following morning for me to retrace his steps and hose down all that he has marked—a chore I do not relish but cannot honestly characterize as more than an inconvenience." JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 63 (forthcoming 1997) (draft on file with author). In the second situation, the pet-owner's sister's one-year-old infant wants to play in an area of the backyard beyond the reach of the chain. If sister asks pet-owner whether Rottweiler is chained, it would not be reasonable for pet-owner to claim (without checking) that the dog is chained even though the statistical risk of error in pet-owner's factual judgment that the dog is chained, i.e., the accuracy of his factual judgment about the dog, is the same in both situations. What is different is that the costs of error in the second situation (the life of pet-owner's niece) far exceed the costs of error in the first (minor inconvenience). \textit{Id.} at 63-64.

\textsuperscript{166} People v. Goetz, 497 N.E.2d 41, 43 (N.Y. 1986); FLETCHER, \textit{supra} note 59, at 1-3.

\textsuperscript{167} \textit{Goetz}, 497 N.E.2d at 43.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} Although none of the youths displayed any weapons at this time, the two youths who did not ask Goetz for money, Ramseur and Cabey, did have
up, pulling out his handgun, and firing it rapidly at the four youths. Notice that Cabey seemed to be unhurt, Goetz walked up to him and said, "You seem to be all right, here's another," then fired his last bullet at Cabey. This last bullet severed Cabey's spinal cord, paralyzing him permanently. Later, Goetz would admit, "[I]f I had had more [bullets], I would have shot them again, and again, and again."

After the shooting, Goetz fled. Interestingly, while flight is usually considered evidence of guilt, Goetz's flight did not seem to affect his popularity with a large segment of the American people. Complete strangers called Goetz a subway hero, an average man-on-the-street citizen who had courageously stood up to the bad guys. Goetz was reconstructed as

screwdrivers inside their coats which they said were to be used to break into the coin boxes of video machines. Id.

172. Id.
173. Id. at 44.
174. Id.; Subway Shooting Suspect Agrees to Return to N.Y., L.A. TIMES, Jan. 2, 1985, at A2 (noting that Cabey was paralyzed from the waist down) [hereinafter Subway Shooting].
175. Goetz, 497 N.E.2d at 44.
177. As an intuitive matter, many people feel that flight is evidence of guilt. Commentators criticized prosecutors in the O.J. Simpson case for not presenting evidence of the Bronco chase in which Simpson appeared to be fleeing from justice. See, e.g., Michael D. Harris, DA Discusses Decisions in Simpson Case, L.A. DAILY J., Oct. 12, 1995, at 1. At a news conference following the verdict, District Attorney, Gil Garcetti, fielded questions about why the prosecution did not present evidence of Simpson's flight, especially in light of the fact that thousands of dollars, a passport, and a disguise were found in Simpson's Ford Bronco; Garcetti claimed the evidence was ambiguous and did not necessarily indicate flight. Id. In California v. Hodari D., 499 U.S. 621 (1991), a case involving a Black youth suspected of criminal activity when he ran upon seeing police officers, Justice Scalia, writing for the Court, echoed the sentiment that flight is evidence of guilt by suggesting that flight might provide a police officer with reasonable suspicion that criminal activity was afoot:

That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth."). We do not decide that point here, but rely entirely upon the State's concession [that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari].

Id. at 623 n.1. Flight from police does not necessarily indicate guilt. See Maclin, supra note 9, at 276 (discussing alternative reasons why a Black man might flee from police, such as not wanting to drop his pants in public or not wanting to be roughed up by the police).

the true victim while the four Black youths were constructed as menacing criminals who had threatened Goetz.\textsuperscript{179}

On December 31, 1984, Goetz surrendered himself to the police.\textsuperscript{180} Goetz admitted that when he shot at the youths, he was certain none of them had a gun, but claimed he could tell from the smile on one of the youth's faces that the youths wanted to "play with me."\textsuperscript{181} Goetz admitted that he intended to kill the youths, telling police:

> When I saw what they intended for me, my intention was worse than shooting. My intention was to do anything I could do to hurt them. My intention... I know this sounds horrible, but my intention was to murder them, to hurt them, to make them suffer as much as possible.\textsuperscript{182}

At his trial for assault, attempted murder, reckless endangerment and illegal possession of a weapon, Goetz claimed he acted in self-defense.\textsuperscript{183} The jury found Goetz not guilty on all
of the charges except illegal possession of a weapon.\textsuperscript{184}

As a textbook criminal law hypothetical, Goetz's self-defense claim should have been rejected for several reasons. First, under New York law, a defendant is justified in using defensive physical force only if he honestly and reasonably believed two things: (1) that his assailant was attacking or was about to attack him (i.e., an attack was \textit{imminent}), and (2) that the use of physical force was \textit{necessary} to defend himself.\textsuperscript{185} Even though Goetz may have subjectively feared an attack, and even if his fear seemed reasonable to him, a strong argument can be made that it was not objectively reasonable for Goetz to believe that he was under threat of \textit{imminent} death or great bodily harm. Neither of the two youths who approached Goetz displayed a weapon, and neither made any menacing movement suggesting an imminent physical attack. An even stronger argument can be made that it was not \textit{necessary} for Goetz to shoot at the youths to defend himself. Goetz could have chosen less violent means of resolving the conflict. He could have said "No" to the youths' demand for money. He also could have moved to another section of the subway car—perhaps even another car altogether. Goetz might have given the youths something less than the five dollars they requested. Or, Goetz could have warned the youths not to bother him by showing them his gun (not shooting it), and then he could have walked away. Instead, Goetz's immediate response was to fire upon the youths, endangering the lives of the youths and everyone else in that subway car.

Second, Goetz's use of a loaded gun was not proportionate to the threatened harm. Goetz admitted that he was certain that none of the youths had a gun, yet he chose to shoot them. Under New York law, deadly force is not an appropriate response unless the defendant reasonably believes that such deadly force is necessary to defend himself from the imminent use of deadly physical force against him and that he cannot retreat.\textsuperscript{186} Here, Goetz's use of deadly force was inappropriate because Goetz was responding to a verbal request for five dollars, a request unaccompanied by any show of force, movement, or other indication of an imminent unlawful deadly attack. Goetz admitted that he knew none of the youths had a gun.

\textsuperscript{184} \textit{Id.} at xiii.

\textsuperscript{185} \textsc{Criminal Jury Instructions, New York} § 35.15(2)(a) (1989).

\textsuperscript{186} \textit{Id.} § 35.00, at 848.
Therefore, he could not have reasonably believed it was necessary to use deadly force to protect against deadly force.

Third, one who does not reasonably believe that he is being attacked, but strikes first anyway, is the initial aggressor and loses all right to avail himself of the self-defense doctrine unless he withdraws from the encounter and effectively communicates his withdrawal to the other person. If Goetz did not reasonably believe he was being attacked, his use of a loaded gun in response to a request for five dollars made him the initial aggressor. As an aggressor, Goetz did not have the right to use deadly force in self-defense.

Finally, Goetz admitted his intent was to murder the youths, to hurt them, and make them suffer as much as possible. Far from constituting self-defense, Goetz's act of shooting the youths with the intent to kill them fits the textbook definition of attempted murder.

Some who commented on the Goetz case believed race was not a significant factor leading to the verdict. Yet, whether the jurors were conscious of it or not, race probably influenced the jury's perception of whether Goetz acted reasonably. Re-

187. Id. at 846.
188. For example, George Fletcher, a law professor who observed the Goetz trial, commented:

As the prosecution of Bernhard Goetz unfolded, it became clear to me that this was a case in which the theory of criminal law was indispensable to a proper understanding of what was going on. For many, the pending trial of Bernhard Goetz loomed as a struggle between black and white, between crime victims and the law-enforcement establishment. For me, the trial presented itself rather as a gripping realization of moral and theoretical questions that have long been on my agenda.

FLETCHER, supra note 59, at ix-x (emphasis added); see also LESLY, supra note 183, at xvii-xviii (explaining that his purpose in writing a book about the Goetz trial was to explain why race was not a factor in the jury's decision).

It appears that Fletcher has modified his views on this subject since writing A Crime of Self-Defense. See Sam Roberts, Exploring Laws and the Legacy of the Goetz Case, N.Y. TIMES, Jan. 23, 1989, at B1 (noting that in his book, Fletcher seemed to believe race did not influence Goetz, but now Fletcher believes race was important); Kenneth W. Simons, Self-Defense, Mens Rea, and Bernhard Goetz, 89 COLUM. L. REV. 1179, 1199 (1989) (book review) (noting that Fletcher, in interviews since the publication of his book on the Goetz case, has suggested he is now more inclined to believe race was a factor motivating public reaction to the case).

189. Joshua Dressler notes, "[R]acism was probably a factor in the 'subway vigilante case,' People v. Goetz, in which the jury acquitted the defendant, a white man, of attempted murder of four black teenagers because the man feared they were about to rob him when one or two of them requested five dollars from him on a subway." Dressler, supra note 36, at 759.
consider the reasonableness of Goetz’s actions in a hypothetical with a Black Goetz and four White youths on an elevator. Patricia Williams illustrates the difference race can make in the following race-switching vignette:

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor, and a crowd of noisy white high school students got on. The black man took out a gun, shot as many of them as he could, before the doors opened on the first floor and the rest fled for their lives. The black man later explained to the police that he could tell from the “body language” of the students, from their “shiny eyes and big smiles,” that they wanted to “play with him, like a cat plays with a mouse.” Furthermore, the black man explained, one of the youths had tried to pan-handle money from him and another asked him “how are you?”... His intention, he confessed, was to murder the high school students.190

Few people would find that the Black man in Professor Williams’s vignette acted reasonably even though the facts of this vignette, with minor alterations, were excerpted from Goetz’s videotaped confession.191 Few people would rush to the Black man’s defense and call him a “hero” for shooting the White youths, yet Goetz was viewed as a hero for trying to kill four Black youths who asked him for money.192

Williams’s race-switching vignette might be criticized for not mirroring precisely the circumstances of the Goetz case. It is not clear that crime occurs as often on elevators in busy downtown department stores as it does on the New York subway. An elevator ride is likely to be shorter than any subway ride between subway stops, and thus it might be more reasonable for a person on a subway than for one on an elevator to

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191. Id.
192. Stephen Carter points out: the public knew the skin colors of everyone involved. If one knows in advance that black people tend to be transgressors and white people tend to be victims, it is fairly simple to sort out who’s who once the participants are identified by race. The short of it is that the story of the subway car as perceived by Mr. Goetz’s public—the choice of transgressor, the choice of victim—might have been starkly different had Mr. Goetz been black and the others white, and had Mr. Goetz cried “self-defense” while the others insisted that when he pulled the gun, they had been minding their own business. For in that event, a public with no real knowledge of the facts other than the stories told by the participants and the skin colors of the shooter and his victims would not have raced at once to Mr. Goetz’s defense. But his victims happened to be black, and the rush was on.

Carter, supra note 10, at 425-26 (emphasis added).
believe there is no other recourse but to use deadly force in self-defense. Nonetheless, race-switching, especially if the only facts that are modified are the races of the parties, can be a useful vehicle to test whether racial stereotypes have influenced one's assumptions about a given case.

The interesting thing about the Goetz case is that race was never explicitly mentioned during the trial. Perhaps if the racial nature of the case had been made salient during the trial, the jury might have come to a different conclusion. Instead, Barry Slotnick, Goetz's attorney, appealed to the Black-as-criminal stereotype in a subtle, almost covert, manner. In his opening statement, Slotnick referred to the victims as "savages," "predators," "vultures," and the "gang of four," conjuring up images of gang members preying on society. Additionally, Slotnick cleverly played the race card when he recreated the subway shooting using four young Black men from the Guardian Angels to play the victims.

The covert appeal to racial bias came out most dramatically in the recreation of the shooting, played out while Joseph Quirk was testifying. The defendant called in four props to stand in for the four victims Canty, Allen, Ramseur, and Cabey. The nominal purpose of the demonstration was to show the way in which each bullet entered the body of each victim. The defense's real purpose, however, was to recreate for the jury, as dramatically as possible, the scene that Goetz encountered when four young black passengers began to surround him. For that reason Barry Slotnick asked the Guardian Angels to send him the four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts of the four victims in a courtroom minidrama.

194. *See* FLETCHER, *supra* note 59, at 102 (noting that Goetz's attorney used racial stereotypes to Goetz's advantage).
195. *Id.* at 206-07. Similar appeals to the Black-as-criminal stereotype were made during the first Rodney King trial in which four White police officers were acquitted of assaulting a Black man even though the prosecution had a videotape of the brutal beating. Sheri Lynn Johnson points out that even though Officer Koon did not explicitly refer to race, his characterizations of King "resonate(d) with images of black people as criminal." Johnson, *supra* note 1, at 1747. For example, Koon testified that King was "very buffed out" or muscular, and that he thought this meant King was an ex-con. *Id.* Koon further testified that he attributed King's unusual strength and insensitivity to pain to the use of the illegal drug PCP. *Id.*

Just as Barry Slotnick referred to the four Black victims as "savages," "predators," and "vultures," Officer Koon also referred to Rodney King as animal-like or subhuman. He testified that King "gave out a bear-like yell,"
In the Goetz case, the jury instructions, which did not mention race or racial stereotypes, did not reduce the chances that the race of the victims might prejudice the jurors in Goetz's favor.\textsuperscript{196} If the jurors were inclined to perceive the actions of the four Black youths as hostile or violent, at least in part because the youths were Black, they were allowed to rely on these stereotype-driven feelings. If the jurors were inclined to empathize more with Goetz than his victims because of racial affinity, the jury instructions did nothing to discourage such racially selective empathy.\textsuperscript{197}

Additionally, the jury instructions did not clearly distinguish between beliefs that are reasonable and conduct that is reasonable.\textsuperscript{198} The jurors may have imagined themselves in Goetz's situation and felt that they too would have been afraid of four Black youths asking them for five dollars. Apprehension of some speculative future bodily harm, however, is not sufficient to acquit a defendant on self-defense grounds. Both the defendant's beliefs and actions must have been reasonable.

B. THE ASIAN-AS-FOREIGNER AND OTHER STEREOTYPES

Most discussions on the subject of race and the American criminal justice system have focused on the Black-White paradigm.\textsuperscript{199} Such focus may be justified because of the history of slavery and the current discrimination practiced against

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\textsuperscript{196} CRIMINAL JURY INSTRUCTIONS, NEW YORK, § 35.15(2)(a) (1989).

\textsuperscript{197} The Goetz jury was composed of ten Whites and two Blacks. Otto Friedrich, "Not Guilty," TIME, June 29, 1987, at 10. Even though there were two Black jurors on the case, this fact alone could not guarantee fair consideration of the facts. Some legal scholars believe at least three jurors of the same race as the defendant are needed to ensure a fair trial. See, e.g., Johnson, supra note 9, at 1698 (discussing the impact of the jury's racial composition). Others have noted that internalized racism may cause some African Americans to devalue Black lives—either those of others or their own. Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 694 (1995).

\textsuperscript{198} See supra notes 185-87 (citing relevant New York jury instructions).

\textsuperscript{199} Chang, supra note 4, at 1265.
Blacks in this country. Nonetheless, because of this focus, issues concerning other non-Whites tend to be overlooked. This is unfortunate because other non-Whites are also subject to socially constructed notions about race.

1. The Asian-as-Model-Minority

The ways in which Asian Americans have been socially constructed in American society are contradictory. While racial representations of Blacks are largely negative, Asian Americans have been racially represented in conflicting ways. For example, Asian Americans appear to benefit from the model minority stereotype that seems to have become the predominant image in the 1990s. Under the Asian-as-model-minority stereotype, Asian Americans are perceived as smart, hard-working, law-abiding, and respectful of authority. This

200. See COSE, supra note 155 (describing incidents in which Blacks suffer discrimination); Addis, Recycling in Hell, supra note 107, at 2256-57 nn.11-13 (listing studies on racial discrimination against Blacks); Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817, 897 (1991) (offering empirical evidence that retail car dealerships consistently offer substantially better prices on identical cars to White men than they do to Black men, Black women, and White women).

201. Chang, supra note 4, at 1267; see also Neil Gotanda, Asian American Rights and the “Miss Saigon Syndrome,” in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1095-96 (Hyung-Chan Kim ed., 1992) (observing that Asian Americans, unlike African Americans, are generally viewed as foreigners rather than American citizens); Gotanda, supra note 15, at 1188 (noting that traditional discrimination issues focus on Blacks); Perea, supra note 15, at 990 (concluding that “Latinos are made invisible and foreign . . . in several contexts: in the reporting of significant racial events, in the bookstores, in the historical conception of America as a white and English-speaking nation, and in the operation of the ‘national origin’ concept . . . despite [their] longtime presence, substance, and citizenship”).

202. In this Article, I discuss only one of the negative images of Blacks in American society—that of the African American as a violent, dangerous criminal. Other negative stereotypes include the notion that Blacks are mentally inferior, lazy, and sub-human. See Delgado & Stefancic, supra note 107, at 1261-67 (describing other stereotypical images of the African American throughout American history); Johnson, supra note 1, at 1750-60 (discussing racial imagery in the courtroom). “Positive” images of Blacks (e.g., Blacks as good dancers, athletes, and musicians) are demeaning to the extent that they imply that Blacks are competent only in these limited ways.

203. See Pat K. Chew, Asian Americans: The “Reticent” Minority and Their Paradoxes, 36 WM. & MARY L. REV. 1, 24 (1994) (“Model minority” conveys the belief that Asian Americans, through their hard work, intelligence, and emphasis on education and achievement have been successful in American society); Cho, supra note 7, at 4 (“Model minority mythology hails Asian Americans as examples of success who have advanced because of putative cultural
stereotype may have operated to benefit a Korean American woman store owner who shot and killed a fifteen-year-old African American girl, claimed she acted in self-defense, and was placed on probation, serving no jail time.

On March 16, 1991, Soon Ja Du, a Korean American woman who owned and operated a liquor store in Los Angeles with her husband, shot and killed Latasha Harlins, a fifteen-year-old African American girl, after a dispute over a bottle of orange juice. Harlins had entered the store, gone to the section where the orange juice was shelved, selected a bottle of orange juice, and placed it in her backpack. Harlins then approached the counter with two dollars visible in her hand. The bottle of orange juice, which cost only $1.79, was also partially visible from the backpack. Du confronted Harlins and accused her of trying to steal the orange juice. After a verbal (Du called Harlins a "bitch") and physical (Du pulled on Harlins sweater and Harlins hit Du in the eye twice with her fist) altercation, Harlins put the orange juice on the counter. As Harlins turned to leave, Du reached under the counter and pulled out a .38 caliber revolver. Du then shot Harlins in the back of the head from a distance of about three feet, killing Harlins instantly. At trial, Du claimed she shot Harlins in self-defense.

Although Du was found guilty of voluntary manslaughter, which indicates that the jury rejected her claim of self-defense, the sentencing judge imposed an extraordinarily lenient sen-

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204. People v. Superior Court (Soon Ja Du), 7 Cal. Rptr. 2d 177, 186-87 (Cal. Ct. App. 1992) (holding that Judge Karlins did not abuse her sentencing discretion in placing defendant Soon Ja Du on probation).


206. Id.

207. Id.

208. Id.

209. Id.

210. Id.

211. Id.

212. Id.
tence. By using a firearm in the commission of a crime, Du was presumptively ineligible for probation under California Penal Code section 1203(e)(2). Nonetheless, Judge Joyce Karlin suspended execution of Du’s prison sentence and placed Du on probation for five years without imposing any jail time as a condition of probation. Professor Neil Gotanda has aptly observed that Judge Karlin’s sentencing colloquy suggests Karlin relied on positive stereotypes about Korean Americans and negative stereotypes about Blacks in deciding Du’s sentence. Judge Karlin described Du as a dutiful mother who was tending the store that day “to shield her son from repeated robberies.” In contrast, Judge Karlin portrayed Latasha Harlins, the victim, as a criminal associated with gangs and gang theft. Notably, Judge Karlin ignored several positive facts about Harlins. As the Court of Appeals noted:

The probation report also reveals that Latasha had suffered many painful experiences during her life, including the violent death of her mother. Latasha lived with her extended family (her grandmother, younger brother and sister, aunt, uncle and niece) in what the probation officer described as “a clean, attractively furnished three-bedroom apartment” in South Central Los Angeles. Latasha had been an honor student at Bret Hart Junior High School, from which she had graduated the previous spring. Although she was making only average grades in high school, she had promised that she would bring her grades up to her former standard. Latasha was involved in activities at a youth center as an assistant cheerleader, a member of the drill team and a summer junior camp counselor. She was a good athlete and an active church member.

The Soon Ja Du case illustrates how the model minority stereotype can benefit some Asian Americans. What is often overlooked, however, is the fact that the positive attributes of the model minority stereotype (e.g., intelligent, hard-working, law-abiding) are linked with corresponding negative attributes (e.g., lacking personality, unfairly competitive, clannish, unwilling to assimilate, rigidly rule-bound). Frank Wu observes:

In the [model minority] stereotype, every positive element is matched to a negative counterpart. To be intelligent is to lack personality. To be hard-working is to be unfairly competitive. To be family-oriented

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215. Id. at 89.
216. Id.
217. People v. Superior Court (Soon Ja Du), 7 Cal. Rptr. 2d 177, 184 n.7 (Cal. Ct. App. 1992).
is to be clannish, "too ethnic," and unwilling to assimilate. To be law-abiding is to be rigidly rule-bound, tied to traditions in the homeland, unappreciative of democracy and free expression.\(^\text{218}\)

In times of economic uncertainty, resentment against Asian Americans seems to increase, perhaps because of the perception that "model" Asian Americans take away valuable job opportunities from other Americans.\(^\text{219}\) Reactions to the


Richard Delgado and Jean Stefancic place this tendency to blame the Asians in historical context:

In the middle years of the nineteenth century, Chinese were welcomed into the land for their labor: They were needed to operate the mines, build railroads, and carry out other physical tasks necessary to the country's development. The industrious immigrants soon, however, began to surpass white American workers. They opened small businesses, succeeded in making profitable mines that others had abandoned. Not surprisingly, Chinese became the scapegoats for the 1870s Depression. Unionists and writers exaggerated negative traits thought associated with them—opium smoking, gambling—and succeeded in having anti-Chinese legislation enacted. By 1882 public sentiment had been mobilized sufficiently so that Congress was able to pass an Exclusion Act, which reduced the number of Chinese in the U.S. from 105,000 in 1880 to 65,000 in 1908.

Delgado & Stefancic, supra note 107, at 1270-71.

Resentment against Asian Americans manifests itself not only in hate crimes but also in adverse action against Asian Americans in public education. In 1984, the University of California at Berkeley adopted an admissions policy which raised the requisite verbal score on the SAT to 400. Grace W. Tsuang, Assuring Equal Access of Asian Americans to Highly Selective Universities, 98 YALE L.J. 659, 674 (1989). The new policy was not publicly announced, but when Asian American groups noticed a sharp decline in the number of newly enrolled Asian Americans (from 1,303 in 1983 to 1,031 in 1984—a 20.9% drop
Los Angeles riots of 1992 following the Simi Valley jury's acquittal of the four White police officers who brutally beat African American Rodney King reflected conflicting sentiments of sympathy for and resentment against the Korean Americans caught up in the destruction. On the one hand, Korean American store owners were constructed oppositionally to African American and Latino looters as unfortunate victims of the riots and looting. On the other hand, Korean Americans were portrayed as property-loving, gun-toting store owners who valued material possessions over human life.

in one year), they suspected Berkeley had raised the SAT verbal score requirement to limit the number of Asian immigrant admissions. *Id.* at 673-74. For many Asian immigrants and first generation Asian Americans, English is a second language. Because of this, Asian immigrant applicants on average score lower than non-Asian immigrant applicants on the verbal portion of the SAT. Initially, the Chancellor denied the existence of a minimum verbal score. *Id.* at 674. Finally, under pressure from the Asian American community, the Chancellor admitted that such a policy had been adopted in 1984, but was withdrawn after a brief period. *Id.*

Given today's difficult job market, it is not surprising that efforts to restrict immigration (both legal and illegal), arising out of the perception that Asian immigrants and other minorities are taking over the country, and efforts to eliminate affirmative action have popular support. Many perceive affirmative action as unfairly benefiting Asian Americans who supposedly do not need affirmative action, or as unfairly disadvantaging Asian Americans whose enrollments are limited to accommodate other minorities. Gabriel Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice (A Policy Analysis of Affirmative Action)*, 4 UCLA ASIAN PAC. AM. L.J. (forthcoming Feb. 1997) (manuscript at 17, on file with author).


221. The film “Sa-I-Gu” by Christine Choy illustrates that media images of Korean Americans during the Los Angeles riots focused on property-protective Korean Americans atop store rooftops with firearms and ignored the substantial numbers of Korean Americans who were killed during the riots. For an excellent analysis of the multi-layered portrayals of Korean Americans caught in the Los Angeles riots, see Sumi K. Cho, *Korean Americans vs. African Americans: Conflict and Construction*, in *READING RODNEY KING*, supra note 39, at 196.
2. The Asian-as-Foreigner

Fear of the foreign is sometimes a black streak that runs through America's political culture. We see instances of [this] when it involves hate crimes, not necessarily directed at black Americans, but at foreign Americans.

—Mike McCurry
White House Press Secretary

It is almost oxymoronic to speak of foreign Americans, yet the term “foreign American” conveys meaning—Asian Americans and Latinos. Many Americans associate Asian Americans with foreignness. The person who asks an Asian American “Where are you from?” usually expects a response like “Japan” (or China or Korea)—not “Texas” (or Ohio or Northern California). This focus on the Asian in Asian American is deep-rooted. During World War II, when the United States was at war with Japan, hostility toward Japan was extended to all persons of Japanese ancestry. From 1942 to 1945, Japanese Americans were incarcerated in internment camps because of

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223. There is some basis in reality for the “Asian-as-foreigner” stereotype since two-thirds of Asians in this country were born outside the United States. Joseph R. Meisenheimer II, How Do Immigrants Fare in the U.S. Labor Market?, U.S. BUREAU OF LABOR STATISTICS, MONTHLY LAB. REV., Dec. 1, 1992, at 4. A recent study by the UCLA Asian American Studies Center, however, reports that Asian immigrants are just as likely as immigrants of European ancestry to become U.S. citizens and actually have a higher rate of naturalization than European immigrants because more naturalized Europeans return to their homelands than naturalized Asians. K. Connie Kang, Asians Lead U.S. Immigrants in Naturalization, L.A. TIMES, Mar. 27, 1996, at A1.
224. Pat Chew recounts the following:

When people first meet me, it is not unusual for them to comment, “You speak so well, you don’t have an accent,” intending their observation to be a compliment. “Where are you from?” they continue, expecting my response to be a more foreign and exotic place than Texas or Pennsylvania.

A tall red-haired, casually dressed gentlemen that I didn’t know recently knocked on my office door. “Yes?” I greeted. “Sorry to interrupt you,” he stammered. “I was visiting the law school and I saw the name on your door, and old family friends are named ‘Chew,’ and I thought you might be related, but,” he paused, “I can see I’m wrong. They’re American.”

Chew, supra note 203, at 33.
their Japanese heritage.\textsuperscript{225} The internment took place even though there was no evidence that Americans of Japanese descent were disloyal to the United States.\textsuperscript{226} Even though the United States was at war with Germany and Italy, as well as with Japan, persons of German and Italian ancestry were not similarly incarcerated.\textsuperscript{227}

The Asian-as-foreigner stereotype is evident today, though it has taken on more subtle forms. During the O.J. Simpson trial, much of the racial joking in the case was directed at two Asian Americans associated with the case.\textsuperscript{228} The Honorable Lance Ito, the judge who presided over the trial, and criminalist Dennis Fung, two Asian Americans who speak articulately and without a noticeable accent, were portrayed as bumbling, heavily-accented Asians who could barely speak English by radio station disc jockeys, publishing houses, and even a United States senator.\textsuperscript{229} During the Simpson trial, the historical impulse to mock others on the basis of racial difference was fulfilled by poking fun at the Asian Americans associated with the trial, constructing them as Asians with heavy accents characteristic of the Asian-as-foreigner stereotype.\textsuperscript{230}

\begin{itemize}
\item \textsuperscript{225} Lorraine K. Bannai & Dale Minami, Internment During World War II and Litigations, in \textit{Asian Americans and the Supreme Court}, supra note 201, at 755, 757-58.
\item \textsuperscript{227} Mary L. Dudziak, \textit{Desegregation as a Cold War Imperative}, 41 STAN. L. REV. 61, 70 n.38 (1988) ("Whereas immigrants from Germany and Italy remained at liberty during the war, American citizens as well as resident aliens of Japanese descent living on the West Coast were excluded from this area and interned in camps in remote areas of the West."); see also Yamamoto, supra note 226, at 14 (noting that Asian Americans presented no more of a threat to national security than did "German, Italian and communistic portions of the United States population").
\item \textsuperscript{229} Id. at 175, 181-83, 187, 191-92, 193-94, 199.
\item \textsuperscript{230} In 1989, similar evidence of the "Asian-as-foreigner" stereotype surfaced when Bruce Yamashita, a third generation Japanese American, was subjected to racial harassment by Marine training officers at Marine Officer Candidate School. One staff sergeant, either unaware or unwilling to accept that Yamashita's country was the United States, told Yamashita on the first day of school, "We don't want your kind around here—go back to your coun-
Sometimes the Asian-as-foreigner stereotype takes on more ominous manifestations. In 1982, Vincent Chin, a Chinese American, was beaten to death with a baseball bat by Ronald Ebens and Michael Nitz, two White Detroit autoworkers. Before killing Chin, Ebens and Nitz, illustrating the all-too-common confusion between Chinese Americans and Japanese Americans and between Asian Americans and Asian nationals, called Chin a "Nip." They also accused Chin of contributing to the loss of jobs in the automobile industry, yelling "It's because of you little motherfuckers that we're out of work." They pled guilty to manslaughter and were each sentenced to three years of probation and fined $3,780. When discussing the no jail time sentence that he imposed on the two men, the judge explained, "Had it been a brutal murder, those fellows would be in jail now." It is unclear what led the

231. Chin and a group of friends were at Fancy Pants, a Detroit strip bar, celebrating Chin's upcoming marriage. United States v. Ebens, 800 F.2d 1422, 1427 (6th Cir. 1986). Ronald Ebens and Michael Nitz were sitting directly across the elevated dance floor from Chin and his friends. Ebens made a few racial remarks about Chin, calling him a "Nip" and making remarks about foreign car imports. Id. The word "Nip," derived from the word "Nippon" which means "Japan" in Japanese, is a derogatory word used to refer to people of Japanese ancestry. It was used extensively during World War II to refer to the Japanese enemy. Lee, supra note 228, at 192. Ebens then yelled out, "It's because of you little motherfuckers that we're out of work." Ebens, 800 F.2d at 1427. Chin got out of his chair and walked up to Ebens. Id. A scuffle ensued and Chin, Ebens, and their friends were removed from the bar. Id. at 1427-28. Chin challenged Ebens to finish the fight outside. Id. at 1428. Ebens went to Nitz's car and removed a baseball bat from the hatchback. Id. Chin fled and Ebens and Nitz chased him. Id. Ebens and Nitz finally caught up with Chin, and Ebens struck Chin several times with the baseball bat, causing Chin to fall to the ground. Id. Chin died four days later. ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE U.S. SINCE 1850 at 342 (1988). Ebens remembers waking up the morning after the murder feeling like a "jerk," not because he had just caused the death of another human being, but because it was Father's Day and he was in jail, rather than with his family. Dana Sachs, The Murderer Next Door, MOTHER JONES, July/August 1989, at 54; "WHO KILLED VINCENT CHIN?" (a film by Renee Tajima and Christine Choy).

232. Sachs, supra note 231, at 54; "WHO KILLED VINCENT CHIN?", supra note 231.

233. Chang, supra note 4, at 1252.

234. Sachs, supra note 231, at 54.
judge to think the baseball bat beating was not a brutal murder, yet the judge was not alone in his sentiments. Friends of Ebens and Nitz claimed the beating was just an accident, despite the fact that witnesses reported that Ebens swung the baseball bat at Chin's head as if he were hitting a home run, Chin's skull was fractured in several places, and police officers who arrived on the scene said pieces of Chin's brain were splattered all over the sidewalk.

Because of the confusion between Asian Americans and Asian nationals, symptomatic of the Asian-as-foreigner stereotype, the killing of Yoshihiro Hattori, a Japanese foreign exchange student, by Rodney Peairs, a Louisiana homeowner who claimed he acted in self-defense and was acquitted, has special significance for both Asian nationals and Asian Americans. On October 17, 1992, two sixteen-year-old high school students, Yoshihiro Hattori and Webb Haymaker were looking for a Halloween party in the suburbs of Baton Rouge, Louisiana when they came to the home of Rodney and Bonnie Peairs and rang the doorbell. The Peairs's home was decorated for Halloween and was only a few doors away from the correct house. Hattori was dressed as the character played by John Travolta in "Saturday Night Fever," wearing a white tuxedo jacket and carrying a small camera. No one answered the front door, but the boys heard the clinking of window blinds coming from the rear of the carport area. The boys walked around the house in that direction. A moment later, Bonnie Peairs opened the door. Webb Haymaker started to say, "We're here for the party." When Yoshi came around the corner to join Webb, Mrs. Peairs slammed the door and

235. "WHO KILLED VINCENT CHIN?", supra note 231.
236. Id.
241. Id.
242. Id. at 512.
screamed for her husband to get the gun. Without asking any questions, Rodney Peairs went to the bedroom and grabbed a laser-scoped .44 magnum Smith and Wesson, one of a number of guns Peairs owned.

The two boys had walked away from the house and were on the sidewalk about ten yards from the house when Peairs rushed out of the house and into the carport area. The carport light was on and a street light was located in front of the house, illuminating the carport and sidewalk area. Hattori, the Japanese exchange student, turned and approached Peairs, smiling apologetically and explaining, "We're here for the party," in heavily accented English. Rather than explaining to Hattori that he had the wrong house, Peairs pointed his gun at Hattori and shouted the word "freeze." Hattori, who did not understand the English word "freeze," continued to approach Peairs. Peairs fired one shot at Hattori's chest. Hattori collapsed and died on the spot. The entire incident—from the time Peairs opened the door to the time he fired his gun at Hattori—took place in approximately three seconds.

Peairs was charged with manslaughter. At trial, Peairs's attorney argued that Peairs shot Hattori because he honestly

244. Id.; Telephone Interview with Richard Haymaker, Webb Haymaker's father (Mar. 14, 1996).
246. Defense Depicts Japanese Boy as "Scary," supra note 237, at A10; Gun Crazy, N.Y. TIMES, May 25, 1993, at A22; see infra note 263 (noting that, following the shooting, Peairs told police he was sorry he ever stepped out the door).
249. Id.
253. Homeowner Testifies, supra note 245, at 1. Hattori was holding a camera in one hand. It is unlikely that he was pointing his camera at Peairs the way one would point a gun if one were intending to shoot it.
and reasonably believed the unarmed Hattori was about to kill or seriously harm him. The judge instructed the jury that in order to acquit Peairs on the ground of self-defense, the jury needed to find that Peairs reasonably believed he was in imminent danger of losing his life or receiving great bodily harm and that the killing was necessary to save himself from that danger. After little more than three hours of deliberating, the jury returned a verdict of not guilty. Spectators in the courtroom responded to the verdict with applause. In contrast to the public's outrage at the perceived shortness of the deliberation process in the O.J. Simpson case when jurors in that case reached a verdict in less than four hours, there was little if any public outrage at the three hours of deliberation and resulting acquittal in the Peairs case.

The not guilty verdict is legally defensible in a narrow context. Peairs claimed he believed Hattori was armed, and it is conceivable that Peairs mistook the camera in Hattori's hand for a gun. When Hattori failed to stop after Peairs yelled "Freeze!" it might have been reasonable for Peairs to have believed Hattori was about to attack him—especially if one believes Peairs's testimony at trial that he said "Stop" several times before firing (a claim disputed by Webb Haymaker). One has the right to use deadly force to protect oneself against

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255. Id.
256. In Louisiana, a homicide is justifiable "[w]hen committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger" or

[w]hen committed by a person lawfully inside a dwelling . . . against a person who is attempting to make an unlawful entry into the dwelling . . . or who has made an unlawful entry into the dwelling . . . and the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave the premises.

259. Hattori v. Peairs, 662 So. 2d 509, 515 (La. Ct. App. 1995). This argument, however, is undermined by the fact that Peairs admitted in his civil trial testimony that he did not see a gun, knife, stick, or club in Hattori's hand. Id. It appears that this fact did not come out at the criminal trial.
260. See Worthington, supra note 257, at A20 (suggesting that Peairs changed his story to claim that he, in fact, yelled "Stop" several times).
what one reasonably believes to be deadly force. As Justice Oliver Wendell Holmes once stated, "Detached reflection cannot be demanded in the presence of an uplifted knife."\textsuperscript{261}

On the other hand, a guilty verdict would have been legally defensible as well. On the issue of whether Peairs acted with the intent to kill or seriously injure Hattori, several facts suggest that Peairs acted with such purpose.\textsuperscript{262} On the issue of whether Peairs acted reasonably in self-defense, several facts suggest Peairs acted hastily and unreasonably. Rather than calling the police, looking outside the window to see what was outside, or even asking his wife why she was screaming, Peairs immediately went to his bedroom closet, grabbed a loaded gun, and went to the carport area to confront the boys outside.\textsuperscript{263} At that time, the boys were in the process of leaving the premises.\textsuperscript{264} Peairs easily could have avoided any confrontation by

\textsuperscript{261} Brown v. United States, 256 U.S. 335, 343 (1921).

\textsuperscript{262} At trial, Peairs testified on cross-examination as follows:

\begin{quote}
Q. Once you got to the bedroom, you had to go to a little effort to obtain the gun, didn't you?
A. Yes.

Q. Tell the Jury exactly what you did; where was the gun located?
A. In the top of the closet. There are two closets on this wall, my wife's and mine. There is a closet here. I opened the door, bifold doors, reached in the top and got the suitcase down.

Q. What did you take out?
A. I took the suitcase down, and I laid it on my bed.

Q. And, after you laid it on your bed, what did you do with it?
A. I unlatched it.

Q. And, after you unlatched it, what did you do with it?
A. I pulled out the gun.
\end{quote}


\textsuperscript{263} There is some dispute as to whether or not Peairs came out of his house to confront the youths. Webb Haymaker, Hattori's friend, testified that Peairs was standing in front of the carport door when he shot Hattori. Testimony of Webb Haymaker at 34, State v. Peairs (May 20, 1993) (on file with author). Peairs testified on direct examination that he was standing in the doorway of the carport door during the entire confrontation. Testimony of Rodney Peairs at 18, State v. Peairs (May 22, 1993) (on file with author). During cross-examination, Peairs acknowledged that, following the shooting, he told police he was sorry he ever stepped out the door. Id. at 69.

\textsuperscript{264} Man Who Shot Japanese Student Said He Was Terrified, supra note 239, at 1. There is some question as to whether Peairs called out to the boys or whether the noise from Peairs's cocking of his gun caused Hattori to turn back. It appears, however, that Hattori heard something which made him believe they had located the correct house, turned back, and started walking to-
permitting them to leave. Additionally, Peairs might have chosen a less fatal course of action. Peairs could have fired a warning shot or aimed for a less vital portion of Hattori's body. Instead, Peairs, whose familiarity with guns might be assumed since he had several other firearms in his house that night, shot Hattori directly in the chest with his laser-scoped .44 magnum.

The Peairs case is complicated by the fact that the racial nature of the case was less obvious than that of the Goetz case. While many Asian American groups felt the verdict was unjust and racist, non-Asian Americans explained the verdict as merely a tragic misunderstanding or an unfortunate incident. Most people have overlooked the degree to which racial stereotypes about Japanese people might have affected the jury's interpretation of the facts and their determination that Peairs acted reasonably.


265. In a similar case, a defendant came out of his house with a gun and warned the victim not to come back into his yard or he would kill him. However, the victim, who had been in the process of leaving the premises, returned to the defendant's backyard with a wrench in his raised hand. As the victim approached the defendant, defendant shot and killed the victim. At his trial, the defendant claimed he acted in self-defense. The jury, however, rejected this claim and convicted him of manslaughter. The D.C. Circuit affirmed his conviction. United States v. Peterson, 483 F.2d 1222, 1233, 1234, 1238 (D.C. Cir. 1973).

266. A newspaper article reported, "Peairs said he got his .44-caliber Magnum revolver, the most accessible gun at the time," and that he "also owns a rifle, a double-barreled shotgun and two pellet guns." Feared Japanese Teen- ager, supra note 245, at A23.


268. See Japanese American Group Urges Investigation of Student's Death, REUTERS, LTD. (North American), May 25, 1993, at 1, available in LEXIS, News Library, Wires File ("The slaying of a Japanese student who was clearly unarmed raises questions of whether racial prejudice may have played a role in what happened."); U.S. Civil Rights Inquiry Is Sought in Louisiana Slay- ing, N.Y. TIMES, May 28, 1993, at B7 (quoting the National Asian Pacific American Legal Consortium, which noted that Peairs "called on the stereotype of the 'out of control' Japanese").

269. Peter Applebome, Verdict in Death of Student Reverberates Across Nation, N.Y. TIMES, May 26, 1993, at A14 ("[G]un proponents and many re- searchers say they are not convinced the Louisiana case reflects anything more than a tragic misunderstanding.").

270. Id.

271. Peairs's jury was composed of six men and six women, none of whom were Asian American. Ten of the jurors were White and two were Black. Tim Talley, Jury Selected; Opening Arguments Begin Today in Rodney Peairs Trial, BATON ROUGE ADVOC., May 20, 1993, at 1A.
Just as the attorney representing Bernhard Goetz covertly and effectively played the race card, Peairs's attorney subtly and effectively appealed to prejudice against the Japanese "enemy." Playing on the Asian-as-foreigner stereotype, which was all the more readily believed in this case involving a true Asian foreigner, Peairs's attorney told the jury that Hattori was acting in a menacing, aggressive fashion, "like a stranger invading someone's home turf." The use of language suggesting an invasion of home turf is striking in light of the way Japanese people have been viewed in this country. Historically, Japanese nationals and Japanese Americans have been viewed as the enemy. In more recent times, the Japanese have also been viewed as the enemy—the economic yellow peril responsible for the loss of American jobs. Indicative of this tendency to view Japan as the enemy, one writer, commenting on Japanese outrage at the not guilty verdict in the Peairs case, wrote: "America excels at overreaction to a singular occurrence; it's gratifying to witness our economic arch rival suffer the same weakness. They've bloodied our nose enough in the business markets of the world... At least Americans can see hysteria is no less common in 'perfect Japan.'" The notion of foreignness embedded in this "invasion of home turf" language was so subtle that this indirect reference to national origin went unnoticed by the prosecution.

Bonnie Peairs's trial testimony is also significant. When asked to describe Hattori, Mrs. Peairs responded, "I guess he appeared Oriental. He could have been Mexican or whatever." Mrs. Peairs was unable to tell whether Hattori was

273. The most egregious example of this occurred during World War II when Japanese Americans were interned. Bannai & Minami, supra note 225, at 757.
275. Interestingly, if Rodney Peairs, as the defendant, had been Japanese and if the prosecutor made a similar remark about Peairs, the defense attorney could have moved for a mistrial under a Louisiana statute providing for a mistrial when

[A] remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to... face, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury.

LA. CODE CRIM. PROC. ANN. art. 770(1) (West 1996) (emphasis added).
276. Testimony of Bonnie Peairs at 22, State v. Peairs (May 22, 1993) (on
“Oriental” or “Mexican” or neither. All she knew was that Hattori looked different, foreign. 277 Her comment highlights the way minorities are often lumped together as a homogenous group outside the American community.

If Webb Haymaker had been the victim, it is unlikely that the spectators in the courtroom would have responded with applause to the not guilty verdict. 278 If Haymaker, the boy from the neighborhood, rather than Hattori, a foreigner from Japan, had been the victim in this case, the defense would have had a more difficult time portraying the victim as “a crazy man,” 279 “frightening,” 280 or “scary,” 281 terms used to describe Hattori. If Haymaker had been the victim, the presence of Haymaker's parents in the courtroom and in the community would have made it much more difficult for the defense to paint a credible picture of the victim as the bad guy. But Haymaker was not the victim; Hattori, a Japanese foreigner, was the one shot and killed. 282

3. The Asian-as-Martial Artist

Another common belief about Asians and Asian Americans is encompassed in the Asian-as-martial artist stereotype. Many people assume that young Asian men know martial

file with author); Telephone Interview with Richard Haymaker, Webb Haymaker's father (Mar. 14, 1996).

277. Mrs. Peairs also knew that Hattori was a boy, not a man. On cross-examination, Mrs. Peairs admitted that when she called “911” to report the incident, she stated that a “boy” had been shot, despite only briefly glimpsing Hattori. Homeowner Testifies, supra note 245, at 2.

278. See Yoshinaga, supra note 258, at B12 (noting that spectators in the courtroom responded to the not-guilty verdict with applause).

279. Worthington, supra note 257, at A20.


281. Id.

282. After Peairs's acquittal, Yoshihiro Hattori's parents filed a wrongful death civil action against Rodney Peairs. Scott Medintz, A Criminal Acquittal, but Civil Justice, AM. LAW. 43 (Nov. 1994). After a bench trial, Judge William Brown ordered Peairs to pay Hattori's parents $653,000 in damages and funeral costs. Id. The Hattoris offered to withdraw their lawsuit (and release Peairs from the $653,000 civil judgment) if Peairs would give up the gun he used to kill their son. Hattori's Parents to Ask Peairs for Gun Rather Than $650,000, THE DAILY YOMIURI, Nov. 2, 1994, at 1. The Hattoris explained that they sued Peairs not for the money, but to demonstrate that he should be held responsible for their son's death. Id. Peairs refused the Hattoris' offer of settlement and appealed the civil judgment against him. Man Refuses Money, N.Y. TIMES, May 26, 1993, at A14. In 1995, a Louisiana appellate court affirmed the civil judgment against Peairs. Hattori v. Peairs, 662 So. 2d 509, 518 (La. Ct. App. 1995).
In *State v. Simon*, the Asian-as-martial artist stereotype helped secure an acquittal for a man who shot his Chinese neighbor and then claimed self-defense. Anthony Simon, an elderly homeowner, shot his neighbor, Steffen Wong, a Chinese man, as Wong was entering his own duplex. Simon was charged with two counts of aggravated assault.

At trial, Simon argued that he assumed, by virtue of Wong's racial heritage, that Wong was an expert in the martial arts. Simon claimed he was afraid of Wong and that heated words had been exchanged between the two neighbors. Simon also said he was fearful because more Orientals were moving into the neighborhood and one had even expressed interest in purchasing Simon's home. In addition to Simon's testimony, the defense called a clinical psychologist who testified Simon was a psychological invalid who suffered from anxiety neurosis. Defense counsel argued to the jury that the evidence showed Simon reasonably believed Wong was an imminent threat to him.

The jury acquitted Simon on all counts. Although the instruction on self-defense given to the jury utilized a subjective standard of reasonableness, the fact that the jury could...
find Simon's fear to be reasonable when it was quite clear that his fear of Wong was based almost solely on a racial stereotype is quite astounding. The Asian-as-martial artist stereotype may have influenced jurors to sympathize with Simon's misplaced belief that because of Wong's Asian heritage, Wong must have been a dangerous martial arts expert.\textsuperscript{294}

Racial representations of Asian Americans, like the Asian-as-foreigner and Asian-as-martial artist stereotypes, can have a subtle, but far-reaching impact. Such racial representations might influence legal decisionmakers to discount injuries suffered by Asians and Asian Americans. The judge who sentenced the men who killed Vincent Chin by beating him with a baseball bat felt that what happened to Chin was not a brutal murder\textsuperscript{295} even though Chin's brains were splattered all over the sidewalk and his skull fractured in several places.\textsuperscript{296}

\begin{quote}
the jury should have been instructed that a "reasonable belief implies both a belief and the existence of facts that would persuade a reasonable man to that belief." \textit{Id.} at 1122.
\end{quote}

\textsuperscript{294} Another incident that illustrates the Asian-as-martial artist stereotype occurred on November 4, 1994, when Curtis Steiner, a twenty-five-year-old man, attacked Chong San Cho, a forty-year-old Korean American who was a graduate student at the University of Idaho. Jim Jacobs, \textit{Two Men Charged in Nov. 4 Assault}, LEWISTON MORNING TRIB., Nov. 22, 1994, at 5A. Steiner knocked Cho to the ground and kicked Cho's leg hard enough to break it in two places. As Steiner was stomping on Cho's leg, he laughed and asked Cho either, "You know judo? You know judo?" or "Are you Judo? Are you Judo?" Steiner's precise words are unclear. \textit{See} Steve McClure, \textit{Investigation into UI Attack Ends}, MOSCOW-PULLMAN DAILY NEWS, Nov. 15, 1994, at 1A; Steve McClure, \textit{UI International Students Question Attack Motivation}, MOSCOW-PULLMAN DAILY NEWS, Nov. 8, 1994, at 9A; \textit{Moscow Man Sentenced to Jail, Fined for "Prank" Attack on U of I Student, IDAHO STATESMAN, Jan. 29, 1995}, at B3 [hereinafter \textit{Moscow Man Sentenced}]. The prosecutor told Cho that his assailant could not be charged with a felony because Cho's injuries were not serious enough even though the attack, which broke Cho's leg in two places and required three operations, left Cho with no feeling in two parts of his leg and unable to move two of his toes. Jacobs, \textit{supra}, at 5A.

Steiner pled guilty to misdemeanor battery and was sentenced to eighteen days in jail plus restitution in the amount of $27,000 to repay Cho's medical bills. \textit{Moscow Man Sentenced, supra}, at B3. Steiner claimed his attack on Cho was just a stupid prank, and the media characterized the attack as a prank. \textit{Id.} Steiner further claimed that Cho's race had nothing to do with the attack. \textit{Id.} One can only wonder whether Steiner would have asked Cho "You know Judo? You know Judo?" if Cho had not been Asian. Ironically, the only thing Steiner could think of in the heat of the moment as he stomped on a Korean American man's foot was whether Cho knew judo, a Japanese martial art.

\textsuperscript{295} \textit{See supra} text accompanying note 234 (explaining the judge's view that the men would be in jail \textit{had it been a brutal murder}).

\textsuperscript{296} \textit{See supra} text accompanying note 236 (detailing Chin's fatal injuries).
Likewise, the juries which acquitted Rodney Peairs and Anthony Simon believed each defendant’s claim of self-defense, even though it is difficult in hindsight to understand how the jurors could find these defendants’ beliefs and actions objectively reasonable. Racial stereotypes about Asians as foreigners, economic rivals, "gooks" we fought in Vietnam, "Japs" responsible for Pearl Harbor, "chinks" who take our jobs, not only deindividualize, they also dehumanize Asian Americans. Racial representations might also influence legal decisionmakers to accept more readily claims of self-defense by defendants who kill Asian Americans, not necessarily because Asian Americans are thought to be more violent or more dangerous than others (although this may occur under the Asian-as-martial artist stereotype), but because Asian and Asian American lives, seen as foreign or outside the American community, are not valued to the same extent as other lives.

C. THE LATINO-AS-FOREIGNER AND LATINO-AS-CRIMINAL STEREOTYPES

The stereotyping of Latinos and Latinas in American culture has received relatively little attention in legal scholarship. Notwithstanding the paucity of legal attention to Latino stereotypes, it is clear that Latino stereotypes are varied and complex. Not all Latinos suffer from the same stereotypes because some Latinos look like their White but non-Latino counterparts, while other Latinos do not. The fair-skinned Cuban in Florida who can pass as White may receive different treatment than the dark-skinned Mexican American in the Southwest.

Unfortunately, Latinos suffer from an aggregation of negative stereotypes experienced by both African Americans and Asian Americans. Perhaps most commonly, Latinos, like Asian Americans, are perceived as foreigners, outsiders, or immigrants. Kevin Johnson discusses how the Latino-as-foreigner stereotype may have influenced a Capitol police security aide to accuse Congressman Luis Gutierrez, a Puerto Ri-

297. See supra text accompanying notes 257 & 292 (noting that, in the Peairs and Simon cases, the juries found the defendants not guilty on the ground of self-defense).

298. For explanation of the terms “Latino” and “Latina,” see supra note 5.

299. This section discusses only a few of the many stereotypes about Latinos. For additional discussion, see Delgado & Stefancic, supra note 107, at 1273-75 (describing various stereotypes of Mexican Americans).
American who was born in Chicago and is a United States citizen, of presenting false congressional credentials. Leaping to the conclusion that the Congressman was a foreigner after seeing his daughter and niece with two small Puerto Rican flags, the security aide told Gutierrez that he should go back to where he came from.

The Latino-as-foreigner stereotype is particularly troublesome when it slides into the Latino-as-illegal immigrant stereotype. In certain parts of the country, people commonly associate brown-skinned persons who speak English with a Spanish accent with illegal immigration, particularly if those persons are unskilled or employed as domestic or menial laborers. Even if the person speaks English without an accent, he or she may be subject to the illegal immigrant stereotype.

Like African Americans, Latinos suffer from a Latino-as-criminal stereotype. The Latino-as-criminal stereotype often


302. See Roberto Rodriguez & Patrisia Gonzales, Anti-Latino Stereotypes Stir up Melting Pot of Hate, CHI. SUN-TIMES, Nov. 4, 1995, at 15 (noting two common stereotypes of Mexican Americans—that they are either illegal aliens "stealing" American jobs or lazy and on welfare).

303. In alluding to English without an accent, I succumb to the “norm of non-accent” when, in reality, we all speak with some kind of an accent. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1361 (1991) (“Everyone has an accent, but when an employer refuses to hire a person ‘with an accent,’ [that employer is] referring to a hidden norm of non-accent—a linguistic impossibility, but a socially constructed reality.”).

304. See Greene, supra note 107, at 1992 (positing that the news portrays both Latinos and Blacks as key culprits in crimes ranging from drug trafficking to street crime). In addition, Latinos are often associated with drug crimes. Rose Marie Arce, Crime, Drugs and Stereotypes, NEWSDAY, Dec. 2, 1991, at 5 (indicating that many Latinos think that non-Latinos believe drugs to be “creatures of Latino culture”). Robert Gangi, Executive Director of the Correctional Association of New York, notes, “It’s striking that the majority of the people who use and sell drugs are white, but 90 percent of the people arrested are Black and Latino.” Id. The Latino-as-drug-abuser stereotype contradicts reports that “whites and Blacks are more likely than [Latinos] to have ever used drugs.” BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 28 (1992). News stories about Colombian drug cartels may feed this Latino-as-criminal stereotype. See id. (noting that “there is no shortage of stories in the newspapers and on television to feed this myth [that drugs are a creature of Latino culture]—stories about Colombian drug cartels, Dominican money-laundering operations and
affects young male Latinos who are assumed to be gang members, particularly if they live in a low-income high-crime neighborhood and wear baggy pants and T-shirts. The Latino-as-criminal stereotype is linked to the Latino-as-illegal immigrant stereotype because the undocumented are often characterized as lawbreakers. Another stereotype, the Latino-as-macho stereotype, casts Latinos as hot-tempered and prone to violence. When a Latino loses his temper, his outburst is often characterized as a cultural manifestation of “machismo.” The Latino-as-macho stereotype is gendered; “macho” and “machismo” are terms used to describe males from Latin American countries, not females.

The perception that young Latinos who dress a certain way are dangerous criminal gang members who pose a threat of serious bodily injury to those who confront them, coupled with the notion that Latinos tend to be hot-blooded and prone to violence, may contribute to the frequency with which homicide and assault cases involving Latino victims are not prosecuted. In numerous instances, Latinos have been shot, beaten, and/or killed by citizens or police officers claiming justifiable use of deadly force under circumstances calling into question whether the use of deadly force was truly warranted.

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Puerto Rican drug addicts’); Susan Ferriss, Study Shows Latinos Have Bad TV Image, S.F. EXAMINER, Sept. 7, 1994, at A2 (reporting results of a study on the media that found that Latino characters on prime time television are four times more likely to be portrayed as gangsters, drug dealers and other criminals than are other ethnic groups).


306. Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. REV. 1509, 1531 (1995) (“The parallel between criminal aliens and ‘illegal aliens’ is strengthened by the fact that the undocumented are often characterized as lawbreakers.”).

307. Rivera, supra note 5, at 240.

308. See id. (“Macho is the accepted—and expected—single-word description synonymous with Latino men and male culture.”).

309. Latinas (women residing in the United States who come from Latin America) are stereotyped as either the familial good wife, sister, or mother or as a sexual object. Id. at 240-41.

310. Id.

After exiting the car he was driving, Ortiz tried to run from police. Richard A. Serrano, *Deputy's Shot Hit Boy in Back of Neck*, L.A. TIMES, Sept. 17, 1991, at B4. According to witnesses, Ortiz stopped running at the deputies' commands, but was shot when he did not turn around. *Id.* Initially, sheriff's officials defended the shooting, claiming Ortiz was shot because he appeared to be reaching for a weapon in his waistband. *Id.* The Los Angeles County Sheriff's Department later fired Deputy Sheriff Jose Belmares for shooting Ortiz. Kenneth Reich, *Slain Youth's Family Demands Trial of Deputy in Shooting*, L.A. TIMES, Aug. 29, 1992, at B3. However, a Los Angeles county grand jury refused to indict Belmares. Sheryl Stolberg & Richard Simon, *Jury Refuses to Charge Deputies in 4 Killings*, L.A. TIMES, Dec. 21, 1991, at A1. To date, no criminal prosecution has been brought against Belmares for shooting the unarmed Ortiz in the back.

On July 29, 1994, Compton police officer Michael Jackson beat Felipe Soltero, a seventeen-year-old Latino youth. Susan Moffat, *Youth in Video Beating Sues for $10 Million*, L.A. TIMES, Aug. 11, 1994, at B1. The incident was captured on home videotape by a neighbor who witnessed the confrontation. *Id.* The tape shows the 180-pound Officer Jackson lunging at the 130-pound 5-foot-3-inch youth, then knocking the youth to the ground with a sudden blow from the butt of his police baton to the youth's cheek. Richard Lee Colvin & Shawn Hubler, *Beating on Videotape is Investigated*, L.A. TIMES, Aug. 4, 1994, at B1. Bystanders can be heard screaming in the background as the officer reared back and struck Soltero at least four times more before dropping his knee into the back of the youth's neck to hold him down while putting the youth in handcuffs. *Id.* One neighbor who witnessed the beating said, "When he was hitting him with the baton I thought he was going to kill him." *Id.* In his police report, Officer Jackson claimed he hit Soltero only after Soltero hit him first. *Id.* After investigating the incident, the Los Angeles County District Attorney's Office declined to file criminal charges against Officer Jackson, explaining that there was insufficient evidence to prosecute the officer. Edward Boyer, Jr. & Eric Malnic, *Officer Won't Be Charged in Beating*, L.A. TIMES, Feb. 10, 1995, at B1.

On July 9, 1995, Sheriff's deputies shot and killed Jesus Vargas Trejo, a twenty-five-year-old Mexican national, as he lay face down in the doorway of a home in Compton, California. *Official Business: Suit Filed in Slaying by Deputies*, L.A. TIMES, Aug. 5, 1995, at B2. Sheriff's deputies claimed they shot Vargas because he lunged for their guns, appeared to be armed, and fit the description of a gunman in a Compton bar shooting earlier that evening. Edmund Newton & Emily Adams, *Slain Man's Girlfriend Denies He Lunged Toward Deputies' Guns*, L.A. TIMES, July 13, 1995, at B3. In fact, Vargas was unarmed at the time of the shooting and the suspect in the earlier bar shooting was Black, not Mexican. *Id.* Moreover, according to a man who witnessed the shooting, Vargas was shot while lying face down in front of his own house. Edmund Newton, *Witnesses Saw Deputies Kill Man, Discuss Alibi, Statement Claims*, L.A. TIMES, July 15, 1995, at B3. According to this witness, after the shooting, one deputy said, "Don't worry, we're gonna say he had a gun." *Id.* To date, no criminal charges have been filed against the deputies who were involved in this shooting. Telephone Interview with Luis Carillo, attorney for Vargas's girlfriend (June 24, 1996).

On December 21, 1995, police officers shot Joseph Pulido, a seventeen-year-old Latino youth, in the back as he fled from police. Julio Laboy, *Police Shoot Teen to Death in Chase*, ORANGE COUNTY REGISTER, Dec. 22, 1995, at B1. Police officers had stopped to ask two youths why they were drinking beer in public when Pulido, who was with the two youths but had not been
many of these cases, despite the fact that the Latino victim was unarmed or shot in the back, criminal charges were not brought against the person claiming justifiable homicide. In recent history, the most widely publicized incident of this type occurred in January 1995.

On January 31, 1995, eighteen-year-old Cesar Rene Arce and twenty-year-old David Hillo, two young Mexican Americans, were spray-painting columns supporting the Hollywood Freeway in Los Angeles at about 1:00 a.m. William Masters II, a White man carrying a loaded gun without a permit in his fanny pack, was out for a late-night walk and saw the two boys spray-painting the columns. Masters picked up a piece of paper from the ground and wrote down the license plate number of the young men's car. Masters claims that when Arce saw him writing, Arce blocked the sidewalk and de-

Under California law, a homicide is justifiable when necessarily committed by public officers "in retaking felons who have . . . escaped, or when necessarily committed in arresting persons charged with [a] felony, and who are fleeing from justice or resisting such arrest." CAL. PENAL CODE § 196(3) (West 1988). California courts have construed this section to prohibit the use of deadly force . . . against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm [to the officer or another], or unless there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.


On March 24, 1996, a White man, Danny Cargill, shot a Latino man, Luis Garcia, who was masturbating outside Cargill's home. Bill Hetherman, Fatal Shooting Is Ruled to Be Self-Defense, SAN GABRIEL TRIB., June 12, 1996, at A1. Cargill claimed he thought Garcia was an armed prowler and therefore acted in self-defense. Even though Garcia was shot in the back, the District Attorney's Office declined to file charges against Cargill. Id.


313. See Ann W. O'Neil, Tagger's Killer Faces Firearms Charges, L.A. TIMES, Feb. 24, 1995, at B1 (indicating that Masters was charged with carrying a loaded firearm without a permit).

314. See Night Walk Ends with Dead Teen; Threats Answered with Fatal Shots, ARIZ. REPUB., Feb. 5, 1995, at A30 (relaying the events of the evening).

315. Id.
manded that he hand over the paper. A scuffle ensued in which Arce tried to rip the paper from Masters's hand and Masters tried to jam the rest of the paper into his pocket. According to Masters, when Hillo held up a screwdriver in a threatening manner, Masters handed over the piece of paper and began walking away. Masters claims he thought the boys were behind him, so he swung around, and fired at Arce. Masters then shot Hillo in the buttocks. Arce died from the shot which entered him from his back.

Masters told the first police officers at the scene, "I shot him because he was spray-painting." Later, Masters claimed he shot the boys in self-defense. In yet another explanation, Masters claimed that he shot the boys because they tried to rob him. Masters was arrested and jailed on suspicion of murder. When he was released from custody, Masters called the two youths he shot "skinhead Mexicans," blamed Arce's mother for his death because she failed to raise Arce well, and said that as a former Marine, he was trained to take down as many of the enemy as he could.

The Los Angeles County District Attorney's Office declined to prosecute Masters on the ground that Masters acted in self-defense when he shot Arce. The determination that Masters

316. Id.
317. Id.
318. Id.
320. Nicholas Riccardi, Death of a Tagger a Typical Street Mystery for Police, L.A. TIMES, Apr. 7, 1995, at A1 ("The coroner's report showed Arce was hit in the 'left rear flank.'").
321. Luis A. Carillo, How to Kill a Latino Kid and Walk Free, L.A. TIMES, Nov. 27, 1995, at B5; O'Neill, supra note 313, at B1; see also Riccardi, supra note 320, at A1 (noting that Masters first told police he shot Arce because he was tagging).
322. O'Neill, supra note 313, at B8.
323. Riccardi, supra note 312, at B1. Hillo denied that the two boys tried to rob Masters. Id. Hillo claimed that Masters shot him, walked up to him, held the gun to his head, and said, "This all happened because you were tagging." Nicholas Riccardi & Julie Tamaki, 1 Tagger Killed, 1 Hurt After Confrontation over Graffiti, L.A. TIMES, Feb. 1, 1995, at B1.
reasonably believed he was about to be attacked by Arce is surprising given the fact that the shot that killed Arce entered him from his back.\(^3\) In contrast, the Los Angeles County District Attorney's Office filed murder and manslaughter charges against two Black men (one of whom was the rap singer known as Snoop Doggy Dogg) who claimed they shot another Black man in self-defense, disbelieving their self-defense claim largely because the victim was shot in the back and buttocks.\(^3\)

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Cohen decided it was reasonable for Masters to fear that he was in danger of serious injury and was, therefore, warranted in shooting the “attackers”) [hereinafter O'Neill, Lawyers, Garcetti Meet]. The City Attorney's Office subsequently filed misdemeanor gun-carrying charges against Masters. O'Neill, supra note 313, at B1. Masters was tried before a judge and found guilty of one count of carrying a concealed firearm in a public place and one count of carrying a loaded firearm in a public place. Weapons Conviction in Tagger’s Death, SAN JOSE MERCURY NEWS, Oct. 3, 1995, at 3B. Although Masters faced a maximum possible sentence of 18 months in jail and a $2,000 fine, he received no jail time. Efrain Hernandez, Jr., Vandal’s Slayer Sentenced to Clean Graffiti, L.A. TIMES, Nov. 9, 1995, at B3 (reporting that the sentence included four days incarceration, but since Masters had already spent four days in jail after his arrest, he received credit for time served). Masters was sentenced to three years of probation. Id. Additionally, Masters was ordered to remove graffiti for thirty days as community service, give up his guns while on probation, and attend a 10-hour Hospital and Morgue program in which participants view victims of violent crimes. Id. Later, Masters was allowed to switch from graffiti removal to freeway trash pickup after probation officials expressed concern that Masters might be attacked by a fellow member of the graffiti cleanup crew. Masters Sentence, CITY NEWS SERVICE OF LOS ANGELES, Dec. 28, 1995.

Even though he was shot and his friend killed, Hillo was treated by police more like a suspect than a victim. O'Neill & Riccardi, supra note 319, at B3. Hillo was charged with misdemeanor vandalism. In a plea bargain agreement with prosecutors that resolved a number of other charges, Hillo pled no contest to vandalism, pled no contest to grand theft (in connection with the theft of eye drops and cold medicine from a Van Nuys supermarket), and admitted two probation violations. John Johnson, Tagger Gets 2½-Year Jail Term in Plea Bargain, L.A. TIMES, July 6, 1995, at B3. In contrast to Masters's no-jail-time sentence, Hillo was sentenced to a two-and-a-half year jail term. Id. The judge told Hillo at sentencing that she was “reluctantly” going along with the plea bargain, but warned Hillo that if he violated even the smallest condition of probation after his release from County Jail (two-and-a-half years later), she would not hesitate to send him to state prison. Id.

327. Riccardi, supra note 320, at A1 (noting the coroner's report showed Arce was hit in the "left rear flank").

328. Tina Daunt, Prosecution Calls Rapper's Contention “Not Logical,” L.A. TIMES, Feb. 9, 1996, at B3 (noting that a prosecutor in the Snoop Doggy Dogg murder trial told jurors to ask themselves: “If the famous rapper and his bodyguard acted in self-defense, why was the victim shot in the back?”); Michael White, Rapper, Guard Acquitted of Gang Murder, L.A. DAILY J., Feb. 21, 1996, at 2 (“Prosecutor Robert Grace disputed the self-defense claim, arguing in closing statements that Woldemariam, 20, was shot in the back and buttocks as he tried to flee Broadus and Lee.”).
The decision not to file criminal homicide charges against Masters was also based on the prediction that the government would have had a difficult time convincing a jury to return a conviction against Masters.\(^3\) The government's case would have rested primarily on testimony by Hillo, the young man who survived the shooting. Hillo would have been a problematic witness since he gave conflicting versions of the facts in interviews with the police.\(^3\) Moreover, judging from public reaction to the event, the community was extremely supportive of Masters.\(^3\) Telephone calls reportedly flooded into the police station where Masters was held, offering money and legal assistance.\(^3\) Sandi Webb, a Simi Valley Councilwoman, declared her support for Masters by stating, "Kudos to William Masters for his vigilant anti-graffiti efforts and for his foresight in carrying a gun for self protection. If [Los Angeles] refuses to honor Masters as a crime-fighting hero, then I invite him to relocate to our town."\(^3\)

While the Masters case is about the exercise of prosecutorial, not jury, discretion, it is nevertheless relevant to the discussion of the effect of racial stereotypes on legal decisionmaking. Racial stereotypes affect all people, including prosecutors, judges, and jurors.\(^3\) The Masters case is difficult because fear

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329. O'Neill, Lawyers, Garcetti Meet, supra note 326, at B1 (noting that one of the reasons Los Angeles District Attorney Gil Garcetti decided not to file murder or manslaughter charges against Masters was the belief that it would be impossible to win a jury conviction).

330. Initially, Hillo told police that he was not involved in the confrontation and explained his gunshot wound by claiming he had been shot in a drive-by shooting. Riccardi, supra note 320, at A1. Two hours later, during questioning by a police detective, Hillo admitted that he had been shot by Masters, but denied having a screwdriver at the scene. Id. Later, during questioning by different detectives, Hillo admitted he had a screwdriver in his pocket that must have fallen out. Id. Then, after detectives falsely told Hillo that a security guard had witnessed the whole incident, Hillo admitted that he had the screwdriver in his hand, but denied using it to threaten Masters. Id. Hillo claimed he used the screwdriver as a tagging tool to scale signposts. Id.

331. Hernandez, supra note 326, at B3 ("Masters' case exploded onto national talk radio, where he drew widespread support, much of it from gun owners and anti-criminal anti-graffiti forces.").


334. The Masters case raises difficult questions. If there is widespread public support for a particular defendant, should prosecutors decline to press charges on the ground that it will be difficult to win a conviction? Most legal observers would probably agree that in light of limited law enforcement re-
of crime and increasing gang violence are legitimate fears held by many people, particularly in Southern California. Graffiti on freeway overpasses, public buildings, and private property is a reminder that the threat of violent crime is not far off. Supporters of Masters were likely reacting to this fear of crime and gang violence. As one supporter explained, "Whatever he did doesn't bother me. I'm not saying shooting people is the way to do it... But [the graffiti] is just disgusting. It doesn't seem like anyone's doing anything about it."335

However legitimate the fear of crime and the threat of gang violence that graffiti symbolizes, such fear of crime in general does not satisfy the more specific requirement in self-defense doctrine that one have a reasonable belief in an imminent threat of death or serious bodily injury by a particular individual. In this country, defacing property with graffiti is not a capital offense.336 If the state is not permitted to execute graffiti offenders after a trial and conviction, surely private citizens have no greater right to kill such offenders.

One finds this modern conception in Blackstone, who argued that if we do not execute petty thieves for their crimes, neither should we permit the use of deadly force in resisting petty theft. The property

sources, the likelihood of success is a legitimate factor that the prosecution may consider in exercising its charging and plea bargaining discretion. Cynthia Kwei Yung Lee, Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines, 42 UCLA L. Rev. 105, 162 (1994) (discussing the "can I win" question that prosecutors ask themselves before committing time, effort, and limited law enforcement resources to prosecuting a case). Yet, it is also widely agreed that the prosecution has a higher duty than merely serving as an advocate for the people. Besides trying to win convictions, the prosecutor is supposed to seek justice. Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 50-102 (1991) (providing a framework for understanding the "do justice" ethical standard and opining that, before trial, doing justice means ensuring that innocent people are not prosecuted). Some legal observers felt justice required sending the Masters case to a jury so that twelve citizens could decide whether Masters acted in self-defense. Attorney Luis Carillo opined, "If they have the evidence, they should charge him and let the chips fall where they may." O'Neill, Lawyers, Garcetti Meet, supra note 326, at B1.

335. Riccardi & Tamaki, supra note 323, at B1.

owner should not be able to react more severely on the street than does the sentencing authority in the courtroom.\textsuperscript{337}

The support William Masters generated for shooting two young Mexican American males engaged in spray-painting is striking when contrasted with the Michael Fay incident, involving a non-Latino White American teenager who was caught engaging in graffiti in Singapore, which occurred less than one year earlier. In 1994, Michael Fay pled guilty to two counts of vandalism and two counts of mischief, admitting that he was one of a group of youths who spray-painted eighteen cars, threw eggs at other cars, and switched license plates on still other cars.\textsuperscript{338}

When a Singaporean judge sentenced Fay to four months in prison, a $2,230 fine, and \textit{six lashes with a rattan cane}, many Americans rallied to Fay's defense.\textsuperscript{339} Fay's mother appealed to U.S. government officials, asking them to assist in gaining clemency for her son. When explaining why her son should not be subjected to caning, the punishment typically imposed in Singapore for vandalism, Fay's mother stated, "Caning is not something the American public would want an American to go through. It's barbaric."\textsuperscript{340} Fay's mother further


\textsuperscript{339} Not everyone felt Michael Fay's caning sentence was inappropriate. \textit{Flogging in Singapore}, L.A. TIMES, Mar. 11, 1994, at B6 (letters to the editor supporting the caning of Michael Fay). Following this incident, legislators in several states introduced legislation authorizing paddling as a form of punishment for graffiti. Assemblyman Mickey Conroy attracted much attention when, following Michael Fay's caning, he introduced a bill to make young graffiti vandals in California subject to as many as ten paddle strokes in juvenile court. Eric Bailey, \textit{Paddling Bill Puts Conroy in Hot Seat of National Debate}, L.A. TIMES, June 23, 1994, at A1. The bill was approved by the Assembly's Public Safety Committee, but was rejected by the full Assembly in January 1996. Eric Bailey, \textit{Panel OKs Graffiti-Vandal Paddling Bill}, L.A. TIMES, Jan. 10, 1996, at A3; Eric Bailey, \textit{Assembly Rejects Paddling as Punishment}, L.A. TIMES, Feb. 1, 1996, at A3. In 1995, the State of Mississippi considered legislation requiring judges to sentence adult misdemeanor property crime offenders to one to four lashes and felony property crime offenders to five to fifteen lashes with a cane. The bill passed the House of Representatives, but died in a Senate subcommittee. Reed Branson, \textit{Lawmakers Put Off Vote on Bill to Require Caning}, THE COMMERCIAL APPEAL, Mar. 15, 1995, at 13A.

\textsuperscript{340} Franki V. Ransom, "This is Brutal": \textit{Clinton, Hall Vow to Aid Dayton Team in Singapore}, DAYTON DAILY NEWS, Mar. 5, 1994, at 1A (emphasis added).
described her son as “a typical teen-ager” who played on the
described her son as “a typical teen-ager” who played on the American football team.\textsuperscript{341} U.S. Embassy officials and members of the American Chamber of Commerce responded to Fay’s mother’s request, condemning the severity of the sentence.\textsuperscript{342} Ralph Boyce, Charge d’Affaires of the American Embassy, stated “[W]e see a large discrepancy between the offence and the punishment. The cars were not permanently damaged. The paint was removed with paint thinner. Caning leaves permanent scars.”\textsuperscript{343} Even U.S. President Bill Clinton made a strong protest to the Singapore government, asking for reconsideration of the sentence.\textsuperscript{344}

In the \textit{Masters} case, a White American shot two Mexican Americans after catching them in the act of spray-painting columns supporting a public freeway, and was called a crime-fighting hero even though he killed one of the youths. In the Michael Fay case, the Singaporean government prosecuted a White American teenager for spray-painting eighteen cars and engaging in other acts of vandalism. Many Americans were outraged at the caning punishment the Singaporean government imposed on Fay. If a Singaporean citizen had shot and killed Fay after catching him in the act of spray-painting the Singaporean citizen’s car, it is unlikely that Americans would view the Singaporean as a hero, even if the Singaporean claimed, as Masters did, that he thought Fay was going to hurt him and shot Fay in self-defense. Stereotypes of Mexican American youths as criminal gang members likely influenced the general public’s reaction to the \textit{Masters} case.

Stereotypes play a more important role in our thinking and interactions with other people than we may be willing to admit.\textsuperscript{345} We all make assumptions about people. Often our assumptions are linked to perceived racial identities. Stereotyping, in and of itself, is not necessarily evil but can become

\begin{footnotes}
\item[341] \textit{Id.} (emphasis added).
\item[342] Karen Fawcett, \textit{Americans in Singapore Condemn Caning for Teen}, \textit{USA TODAY}, Mar. 9, 1994, at 8A.
\item[344] Shenon, \textit{supra} note 338, at A4.
\item[345] In confining the discussion in this paper to stereotypes about Blacks, Asian Americans, and Latinos, I do not intend to trivialize stereotypes about others, such as Native Americans, women, Jews, gays, and even Whites. Space and time considerations required that some choice be made, or that this paper become a book. It is hoped that the discussion provided here will be applied broadly.
\end{footnotes}
evil when it results in harmful consequences. Because one of the purposes of the law is to ensure fair and equal treatment, the law should discourage reliance on stereotypes, especially when such reliance results in harmful action such as the use of deadly force. Part III of this Article discusses ways in which the law of self-defense can be reformed to address this issue.

III. MINIMIZING THE INFLUENCE OF RACIAL STEREOTYPES IN SELF-DEFENSE CASES

It is widely agreed that legal decisionmaking should be as neutral and unbiased as possible.46 If there is some evidence that suggests jurors in self-defense cases are influenced by racial stereotypes, legislators and judges should make efforts to minimize such influence. The cases described in Part II suggest that racial stereotypes influence the reasonableness determination in at least some self-defense cases. Capital sentencing studies finding that killers of Whites are much more likely to receive the death penalty than killers of Blacks also suggest that the race of the victim makes a difference.47

346. Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 385 (noting, for example, that courts pay close attention to the eradication of gender stereotypes in employment discrimination cases).

347. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 149-88 (1990) (discussing statistical evidence that shows the race of the victim has a significant effect on the application of the death penalty in Georgia); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 69, 92 (1989) (finding in each of eight states studied that killers of Whites were more likely than killers of Blacks to receive the death penalty); David C. Baldus et al., Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 STETSON L. REV. 133, 195 (1986) (finding that death sentences are, on average, 4.6 times more likely in White victim cases than in Black victim cases); William G. Bowers & Glenn L. Pierce, Arbitrariness and Discrimination Under Post-\textit{Furman} Capital Statutes, 26 CRIME & DELINQ. 563, 595 (1980) (studying death sentences during the five years following the U.S. Supreme Court decision in \textit{Furman v. Georgia}, 408 U.S. 238 (1972), in Florida, Georgia, Ohio and Texas, which were responsible for roughly 70% of all death sentences imposed nationwide during this period, and finding in all four states that the race of the victim was an important determinant of sentence, with Black offender-White victim cases most likely to result in the death penalty); 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) (examining capital sentencing in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia between 1976 and 1980 and finding discrimination based on the race of the victim in each of these states); Thomas J. Keil & Gennaro F. Vito, Race and the Death Penalty in
Moreover, the appearance of racial bias decreases respect for
the legal system and erodes our ideals of racial equality. Pro-
phylactic measures should be taken, especially if the cost of
such measures is low.

Two objections to the idea that racial stereotypes might be
influencing jury verdicts in self-defense cases might be raised.
First, it might be argued that it is reasonable to fear a person
because of his race. If defendants and jurors are influenced by
the race of the victim, arguably this might be an appropriate
influence. I will call this argument the "race-is-relevant" ob-
jection. The statistical version of this argument was addressed
in Part II, but because the argument rests on more than just
statistics, I will briefly revisit the issue here. The second ob-
jection posits that one cannot know for certain whether the
race of the victim actually influences legal decisionmakers in
self-defense cases. Given the paucity of data from the case re-
porters (since acquittals are not generally appealed), this ob-
jection, which I will call the "epistemological" objection, ini-
tially appears persuasive. Ultimately, the argument is
unconvincing because it fails to take into account recent re-
search on human cognition that recognizes the human ten-
dency to categorize through stereotyping and the influence
stereotyping has on perception and judgment.

Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes, 7 JUST. Q. 189, 197 (1990) (finding that even after controlling for the heinousness of the mur-
der, prior criminal record, and the personal relationship between the victim
and the offender, Blacks accused of killing Whites had a higher than average
probability of being charged with capital murder and sentenced to death); Thomas J. Kell & Gennaro F. Vito, Race, Homicide Severity, and Application
of the Death Penalty: A Consideration of the Barnett Scale, 27 CRIMINOLOGY
511, 527 (1989) (finding that even after controlling for the seriousness of the
offense, the impact of race was still significant, with Blacks who killed Whites
still more likely to receive the death penalty in Kentucky); Cynthia Kwei
Yung Lee, Does the Race of the Victim Matter?: An Examination of Capital
Sentencing and Guilt Attribution Studies (work-in-progress) (unpublished
manuscript on file with author) (citing David C. Baldus et al., Comparative
Review of Death Sentences: An Empirical Study of the Georgia Experience, 74
J. CRM. L. & CRIMINOLOGY 661 (1983) ("[A]nalyses suggest that Georgia's
death-sentencing system is tainted by the influence of arbitrary and capri-
cious factors, notably the victim's race . . . ."); Michael L. Radelet, Racial
Characteristics and the Imposition of the Death Penalty, 46 AM. SOC. RSV.
918, 922-23 (1981) (studying over 600 homicides in twenty Florida counties
between 1976 and 1977 and finding that defendants who kill Whites are more
likely to be sentenced to death than defendants who kill Blacks); Jonathan R.
Sorensen & Donald H. Wallace, Capital Punishment in Missouri: Examining
the Issue of Racial Disparity, 13 BEHAV. SCI. & L. 61, 72 (1995) (finding that
Blacks who kill Whites are nearly four times as likely as Whites who kill
Whites to be charged and convicted of capital murder).
In this Part, I first address these two possible objections. I then offer some preliminary suggestions as to how the law might be reformed to reduce the risk of racial bias influencing the exercise of jury discretion in self-defense cases.

A. TWO POSSIBLE OBJECTIONS

1. The “Race-is-Relevant” Objection

One might object to reforms to minimize the influence of racial stereotypes in self-defense cases by arguing that race is, or more precisely, can be, relevant to the determination of whether a defendant’s belief in the need to use force in self-defense was reasonable. If race is relevant, then perhaps it is not improper racial bias, but appropriate consideration of race that influences the outcome in cases like the ones discussed above.

At a very basic level, the race-is-relevant argument appears to make sense because it is not possible for jurors to completely disregard race in cases involving people of color.\(^{348}\) In fact, in some cases, it might be desirable to pay attention to race. For example, the test for whether a seizure has taken place within the meaning of the Fourth Amendment is whether a reasonable person in the suspect’s shoes would have felt free to leave or terminate the encounter with the police.\(^{349}\) Given differences in experience, the average Black person living in South Central Los Angeles might feel less at liberty to leave or to terminate an encounter with two police officers in full uniform with guns in their holsters than the average White person living in Brentwood, an upper-class neighborhood in West Los Angeles, in a similar situation. This difference has led some scholars to call for a more inclusive reasonable person standard, one that considers the experiences of Black people in de-

\(^{348}\) As Neil Gotanda has pointed out in his critique of the color-blindness principle, in order to disregard race, one must first consider race and then try to ignore it. See Neil Gotanda, A Critique of “Our Constitution is Color-Blind,” 44 STAN. L. REV. 1, 18 (1991) (describing process of racial non-recognition). Legal decisionmakers cannot completely ignore race because color-blindness is not truly possible. Although people can never completely disregard race, we can at least attempt to minimize the influence of racial bias.

termining whether a Fourth Amendment seizure has occurred.  

In order to stop a person for brief questioning and investigation, police must have reasonable suspicion that the person has been or is involved in criminal activity. In California v. Hodari D., Justice Antonin Scalia suggested in dicta that flight at the sight of a police officer would be sufficient evidence of criminal activity to give a police officer reasonable suspicion to stop the person fleeing. The race of the person fleeing the officer might also influence whether that person’s flight from the police is a reasonable response. Tracey Maclin points out that while flight at the sight of a police officer might be an abnormal reaction from a White person living in a neighborhood in which the police have good relations with the residents, it might be the natural response of a Black person living in a neighborhood known for police brutality and police harassment of Blacks. The average Black person living in such a neighborhood might reasonably flee the police for reasons other than involvement in crime:

From a police perspective, Justice Scalia’s remarks may make sense. “Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not [run] away” as did Hodari. Of course, this viewpoint, never considers that Hodari, a black youth, may have had alternative reasons for wanting to avoid the cops. Many persons who have never committed a crime have ambivalent or negative attitudes about the police. Perhaps a youth like Hodari flees at the sight of police be-

350. See Greene, supra note 107, at 2045 (“One circumstance explicitly considered by the courts should be the race of the various actors.”); Johnson, supra note 155, at 663 (criticizing the reasonable person standard used to determine whether a seizure has occurred for ignoring the distinct experiences of racial minorities); Randall S. Susskind, Note, Race, Reasonable Articulable Suspicion, and Seizure, 31 AM. CRIM. L. REV. 327, 347-48 (1994) (advocating a “reasonable African-American” standard); see also Maclin, supra note 9, at 268-76 (advocating consideration of race in determining whether a Fourth Amendment seizure of the person is consensual); Robert V. Ward, Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person,” 36 HOW. L.J. 239, 253-58 (1993) (arguing that the court should take into account the defendant’s race, ethnicity, and socio-economic background as well as police-community relations in deciding whether a defendant’s consent to a Terry stop was voluntary).


352. 499 U.S. 621, 623 n.1 (1991) (“That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense.”).

353. Maclin, supra note 9, at 276.
cause he does not wish to drop his pants, as many black youths in Boston have been forced to do, just because the cops suspect he belongs to a gang or is selling drugs.\textsuperscript{354}

Maclin's argument is supported by studies indicating that police brutality disproportionately involves White police officers and minority victims. For example, Kim Lersch found that during the period between January 1990 and May 1992, White police officers were centrally involved in 93\% of the cases of serious police brutality; Black or Latino citizens were the victims in 97\% of those cases.\textsuperscript{355} Maclin suggests that courts determining whether police had reasonable suspicion to justify a \textit{Terry} stop "should consider the race of the citizen [stopped] and how the citizen's race might have influenced his attitude toward the encounter."\textsuperscript{356}

This issue recently came to the fore in New York. United States District Court Judge Harold Baer gained notoriety when he suppressed 34 kilograms of cocaine and 2 kilograms of heroin found in the trunk of a rental car driven by Carol Bayless, a middle-aged Black woman, because he based his ruling at least in part on the argument that it is not that unusual for people living in a neighborhood known for police brutality and corruption to run from the police.\textsuperscript{357} Four men loaded two duffel bags containing the drugs into Bayless's double-parked rental car at about 5:00 a.m. in the Washington Heights section of New York City.\textsuperscript{358} Judge Baer held that the fact that one of these men ran after noticing the police officers did not give the officers reasonable suspicion to stop Bayless.\textsuperscript{359} Judge Baer explained:

Moreover, even assuming that one or more of the males ran from the corner once they were aware of the officer's presence, it is hard to characterize this as evasive conduct. Police officers, even those travelling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above

\begin{itemize}
\item \textsuperscript{354} \textit{Id}.
\item \textsuperscript{355} \textit{FEAGIN & VERA, supra} note 138, at 69.
\item \textsuperscript{356} Maclin, \textit{supra} note 9, at 279.
\item \textsuperscript{358} \textit{Id.} at 234-35.
\item \textsuperscript{359} \textit{Id.} at 242.
\end{itemize}
events, had the men not run when the cops began to stare at them, it would have been unusual.\textsuperscript{360}

The problem with the argument that it may be reasonable for Blacks in certain neighborhoods to run from police is that the issue in a \textit{Terry} stop case is not whether it is reasonable or unreasonable for someone to run from police officers. The issue is whether running from police establishes reasonable suspicion of criminal activity. One might argue that it is both reasonable for a person to run from police in a particular neighborhood and reasonable for a police officer to suspect the individual fleeing is involved in criminal activity. On the other hand, consideration of the perspective of the person running may inform the latter inquiry.

Another way in which racial, as well as class and gender, differences matter is reflected in difficulties satisfying the requirements for invocation of the right to counsel prior to or during a police interrogation. In \textit{Davis v. United States}, the U.S. Supreme Court held that invocation of the right to counsel under \textit{Miranda} must be clear and unequivocal.\textsuperscript{361} A year before the Court issued its opinion in \textit{Davis}, Janet Ainsworth pointed out that women and minorities, attempting to assert the right to counsel, might sound more equivocal, hesitant, and deferential than White men.\textsuperscript{362} A rule that only clear and une-
quivocal requests for counsel will suffice to invoke the right to counsel does not adequately recognize differences in speech registers arising from race and gender differences.

Finally, race may be relevant to the presence or absence of a required mental state in the criminal law. The fact that a man accused of rape is from a country that practices marriage-by-capture, a ritual in which the wife-to-be is supposed to protest and pretend to struggle while the husband-to-be kidnaps and then forces the wife-to-be to have sex with him, may be relevant to whether the man intended sex by force or fear without the woman's consent. A man born and raised in America is expected to know that a woman's protest means lack of consent; arguably an immigrant Hmong man from Southeast Asia would not realize this.

Race, as these examples illustrate, can be relevant in many situations. The race-is-relevant objection to reform of self-defense law, however, does not rest solely on the claim that race is relevant. More precisely, the argument rests on the assumption that it is reasonable to believe that another person poses an imminent threat of death or serious bodily injury, at least in part, because of that person's race. One can agree that race may be relevant in some criminal cases without making these further specific claims about the relevance of race in self-defense cases.

The argument that the race of the victim is probative of reasonableness takes many different forms. One version of

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363. As mentioned earlier, I use the term "race" in this Article broadly to include culture and ethnicity.


365. Armour, supra note 12, at 786-801. In Race Ipsa Loquitur, Armour describes three types of defendants who might make the claim that it is reasonable to fear another person because of the color of that person's skin: (1) the Reasonable Racist; (2) the Intelligent Bayesian; and (3) the Involuntary Negrophobe. The Reasonable Racist claims that it is reasonable to fear Blacks because most Americans would fear Blacks. The Intelligent Bayesian claims it is reasonable to fear Blacks because of statistical evidence showing Blacks are more likely to be arrested for violent crimes. The Involuntary Negrophobe makes a subjective claim that because of a prior bad experience involving members of the victim's racial group, she personally had reason to fear the
the argument is the notion that a defendant's belief in the need for self-defense is reasonable if the typical or average American in the defendant's shoes would have also believed he was facing imminent death or serious bodily injury. Jody Armour describes the person who uses force against a Black person and then makes this argument as "The Reasonable Racist":

The Reasonable Racist asserts that, even if his belief that blacks are "prone to violence" stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well. For inasmuch as the criminal justice system operates on the assumption that "blame is reserved for the (statistically) deviant," an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism.\footnote{Wayte v. United States, 470 U.S. 598, 608 (1985).}

The problem with The Reasonable Racist's claim is that a "typical" belief is not necessarily a "reasonable" belief. Just because most or many people share the same bias does not mean that the shared bias is a reasonable bias. The average person is not necessarily reasonable. Moreover, we as a society have decided that, even if most people are susceptible to (or guilty of) racial prejudice, such prejudice is improper.\footnote{Edmonson v. Leesville Construction Co., 500 U.S. 614, 630 (1991) (extending Batson to civil cases); Powers v. Ohio, 499 U.S. 400, 409 (1991) (extending Batson to case in which White defendant objected to prosecutor's striking of prospective Black jurors); Batson v. Kentucky, 476 U.S. 79, 100 (1986). Recently, the Supreme Court extended the Batson rule to peremptory challenges based on gender. J.E.B. v. Alabama, 511 U.S. 127, 144-45 (1994).} For example, even though a prosecutor has extremely broad discretion in deciding whom to charge and what charges to file, the prosecutor may not base her charging decisions on race without violating the Equal Protection Clause of the Fourteenth Amendment.\footnote{Wayte v. United States, 470 U.S. 598, 608 (1985).}

Similarly, even though generally prosecutors may use the peremptory challenge to strike prospective jurors for any reason or no reason at all, prosecutors may not utilize their peremptory challenges in a racially discriminatory manner.\footnote{Id. at 787 (emphasis added).} The principle of equality is so much a part of our society that we have extended prohibitions against race-based decision-
making to private actors. For example, in 1992 the Supreme Court extended the prohibition against racially based peremptory challenges to defense attorneys, treating even private criminal defense attorneys as state actors for purposes of jury selection, even though defense attorneys are not usually considered state actors.  

Public and private employers have wide discretion in making hiring and promotion decisions, but generally neither may discriminate on the basis of race in making such decisions. Similarly, private landlords have broad discretion in deciding whom to select as tenants, but they may not base their rental decisions on race.  

Another version of the race-is-relevant argument relies on statistical evidence to show that the defendant's beliefs are reasonable. Michael Levin, for example, argues that a person jogging alone after dark is morally justified in being afraid of a young Black male ahead of him on the jogging track because of the statistical probability that the Black man will attack him:  

It is widely agreed that young black males are significantly more likely to commit crimes against persons than are members of any other racially identified group. Approximately one black male in four is incarcerated at some time for the commission of a felony, while the incarceration rate for white males is between 2 and 3.5%.  

... Suppose, jogging alone after dark, you see a young black male ahead of you on the running track, not attired in a jogging outfit and displaying no other information-bearing trait. Based on the statistics cited earlier, you must set the likelihood of his being a felon at .25. ... On the other hand it would be rational to trust a white male under identical circumstances, since the probability of his being a felon is less than .05. Since whatever factors affect the probability of the black attacking you—the isolation, your vulnerability—presumably affect the probability of a white attacking you as well, it remains more rational to be more fearful of the black than of the white.  

373. Michael Levin, Responses to Race Differences in Crime, 23 J. SOC. PHIL. 5, 7 (Spring 1992). Although Levin states that "[a]pproximately one black male in four is incarcerated at some time for the commission of a felony," the actual statistics at that time showed that 23% of Black men between the ages of twenty to twenty-nine were in prison, on probation or parole, or in some way connected with the criminal justice system. MAUER, supra note 145, at 2-3 (emphasis added).
Levin argues that it is reasonable (or in his words “more rational”) to be more fearful of a Black man than a White man because of the one-in-four statistical probability that the Black man will attack. The statistics relied on by Levin, however, merely show that approximately one Black male in four is associated with the criminal justice system at any given time for the commission of a felony. The statistics say nothing about whether the felony is a violent or nonviolent offense. As discussed earlier, many of the Blacks associated with the criminal justice system are not violent offenders. A great number are incarcerated for non-violent drug offenses. Moreover, Levin’s argument is flawed because he attributes a population characteristic to an individual. The fact that one in four Blacks on any given day is likely to be in prison, on probation or parole, or in some way connected with the criminal justice system does not mean that any given Black individual is more likely than not to be a felon. If one focuses on the three out of every four Blacks who, at any given time, are not associated with the criminal justice system, one might conclude that it is more likely than not that any given Black individual is a not a criminal.

As noted in Part II, statistical evidence can be used either to support or refute the claim that it is reasonable to fear Blacks. Eighty percent of all crimes of violence are intra-racial (e.g., White-on-White, Black-on-Black, Latino-on-Latino, or Asian-on-Asian). Only 20% of all crimes of violence are inter-racial and only 15% of these crimes, or 3% of all violent crimes, involve Black defendants and White victims. Government statistics indicate that a White person is more than four times as likely to be killed by another White person than by a Black person. From these statistics, one might conclude

374. MAUER, supra note 145, at 5 (noting the increased enforcement of drug crimes has fueled the increase in Blacks being associated with the criminal justice system).

375. Id. at 9; see also Sklansky, supra note 149, at 1289 (discussing the disparate impact of severe crack cocaine penalties on Black crack offenders).

376. See supra notes 145-161 and accompanying text (noting reliance on a given set of crime statistics can oversimplify or distort important details).

377. Kennedy, supra note 159, at 1255 n.2 (“About 80 percent of violence occurs among persons of the same race.”).

378. Id. at 1255.

379. UNIFORM CRIME REPORTS, supra note 151, at 17 (Table 2.8—Victim/Offender Relationship by Race and Sex, 1993 [Single Victim/Single Offender]).
that the chances of a White person being killed by a Black person are much lower than the chances of being killed by another White person and that it is, therefore, more reasonable for a White person to fear another White man over a Black man. Ultimately, however, reliance on statistics to support or refute arguments of reasonableness is misguided because people perceiving themselves to be in danger do not calculate the statistical probabilities of death before acting. They react automatically to the stereotypes that are deeply ingrained within.

Levin’s argument is further limited. Levin’s point is only that one is morally justified in being afraid of a young Black male. Even if one were morally justified in being afraid of a young Black male ahead of one on the jogging track, this might support the cessation of jogging and a return to one’s car, but should not give one legal license to shoot that young Black male absent any aggressive behavior on the young Black male’s part. Being apprehensive does not necessarily rise to the level of having a reasonable belief in an imminent attack which is required for self-defense. The fear that might lead a person to avoid a confrontation might not rise to the level of a reasonable belief in imminent death or serious bodily injury which would justify picking up a gun and shooting the other person.

2. The Epistemological Objection

A second objection that might be asserted is that it is impossible to know whether racial stereotypes about the victim actually influence the reasonableness determination in self-defense cases. I call this the “epistemological” objection because it rests on assumptions about what we can and cannot know.

The epistemological objection is logical and persuasive at an intuitive level. It is difficult to prove empirically that jurors in self-defense cases are influenced by racial stereotypes. Jurors are not required to give reasons for their verdicts.

380. As noted in Part II, these statistics do not factor out non-stranger homicides. Because the statistics do not indicate the probability of a White person being killed by a White stranger and the probability of that person being killed by a Black stranger, it is not possible to infer either that it is reasonable, or not reasonable, for a White person to fear a Black stranger over a White stranger.

381. In fact, Rule 606(b) of the Federal Rules of Evidence prohibits jurors from testifying about their verdicts except under limited circumstances:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the
individual jurors are influenced by an array of different factors. Even if jurors were to reveal the reasons that led to their verdicts, there would be no guarantee that the reasons disclosed were in fact the true reasons. Since racial bias is often unconscious, a juror might not know that stereotypes influenced her decisionmaking.\textsuperscript{382}

The epistemological objection, however, fails to take into account recent research on social cognition and commonsense.\textsuperscript{383} Such research indicates that the human brain relies on default assumptions to interpret ambiguous situations.\textsuperscript{384} Racial stereotypes can be understood as shortcuts which help the human mind make sense of reality.\textsuperscript{385} The Black-as-criminal stereotype, for example, increased the believability of Susan Smith's, Charles Stuart's, and Jesse Anderson's false claims.\textsuperscript{386} The Asian-as-martial artist stereotype made it easier for a jury to believe Mr. Simon's claim that he reasonably thought his Asian American neighbor knew martial arts and therefore posed a serious enough threat to Simon's life to justify shooting his neighbor as his neighbor was entering his own house.\textsuperscript{387} Fears of gang violence coupled with stereotypes about Latinos as gang members and illegal immigrants made it easier for people to rally to William Masters's defense when he
shot two young Mexican American males who were spray-painting under the freeway. Not only do existing racial stereotypes explain such situations, but the tremendous media attention given to these crimes refines and adds weight to the stereotypes, further entrenching them. Given the tendency for the human mind to rely on stereotypes, one can infer that stereotypes influence decisionmaking in general, and juror determinations of reasonableness in self-defense cases in particular.\footnote{389}

\footnote{388. See supra Part ILC (describing the Latino-as-foreigner and Latino-as-criminal stereotypes).

389. Given the lack of direct evidence supporting this inference, it would be useful if social scientists were to conduct methodologically valid simulations testing whether jurors in self-defense cases react differently when the victim's race is varied but all other facts stay constant. None of the social science studies that have been conducted on juror-victim racial similarity and guilt attribution have utilized a self-defense case. See, e.g., Robert W. Hymes et al., \textit{Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions}, 133 J. SOC. PSYCHOL. 627, 632 (1993) (finding that mock jurors were more likely to find the defendant guilty of rape when the defendant's race differed from the victim's race, i.e., in interracial cases, than when their races were the same); Kitty Klein & Blanche Creech, \textit{Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes}, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 28 (1982) (finding that jurors thought the defendant was more likely to be guilty when the victim was White than when the victim was Black in mock rape, murder, and burglary cases; no similar influence in mock drug cases); Marina Miller & Jay Hewitt, \textit{Conviction of a Defendant as a Function of Juror-Victim Racial Similarity}, 105 J. SOC. PSYCHOL. 159, 163-64 (1978) (finding juror-victim racial similarity influenced verdict in mock rape case with White jurors tending to convict more often when the victim was White, and Black jurors tending to convict more often when the victim was Black); Ronald L. Poulson, \textit{Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty but Mentally Ill (GBMI) Verdict Option}, 20 J. APPLIED SOC. PSYCHOL. 1586, 1585 (1990) (finding no race-of-the-victim effect in mock insanity defense case); Neil A. Rector et al., \textit{The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings}, 133 J. SOC. PSYCHOL. 651, 657 (1993) (finding that the race of the victim did not significantly affect juror decisionmaking in a mock rape case); Denis Chimaee E. Ugwuegbu, \textit{Racial and Evidential Factors in Juror Attribution of Legal Responsibility}, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 140-44 (1979) (finding juror-victim racial similarity influenced verdict in mock rape case with White students finding the defendant guilty more often when the victim was White than when the victim was Black, and Black students finding the defendant guilty more often when the victim was Black than when the victim was White).}
B. TENTATIVE PROPOSALS

Anyone who starts out with the conviction that the road to racial justice is only one lane wide will inevitably create a traffic jam and make the journey infinitely longer.

—Martin Luther King, Jr. 390

Assuming that racial stereotypes affect jury decisionmaking, it is worth exploring ways the law can be reformed to minimize the risk of this occurring. Several legal scholars have suggested ways to minimize racial bias in the criminal justice system. For example, recognizing that "White jurors may tend to view the victimization of nonwhites as less serious than the victimization of members of their own racial group," Albert Alschuler has proposed the use of racial quotas in jury selection to increase the number of minorities on juries. 391 Sheri Lynn Johnson supports giving minority defendants the right to three racially similar jurors on the petit jury. 392 Having more juries comprised of jurors with different perspectives on the significance of race would probably educate jurors about racial bias more effectively than limiting instructions. The Supreme Court, however, has resisted extending the Sixth Amendment right to a fair cross-section of the community beyond the venire to petit juries 393 and is unlikely to rule differently in the near future. If a jurisdiction were to adopt a racial quota for jury selection, the practice most likely would be subject to strict scrutiny given the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena. 394 Some academics have questioned

392. Johnson, supra note 9, at 1698-99 (arguing that a defendant of color should have the right to have at least three racially similar jurors on the jury).
393. The Supreme Court stated:
   It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . .
394. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112 (1995) (holding that all racial classifications imposed by federal, state, or local governmental actors must be analyzed by a reviewing court under a strict scrutiny standard).
whether such a scheme would survive a constitutional challenge.  

George Fletcher also supports the notion of increased diversity on the jury to ensure greater victim representation. In his recent book, *With Justice for Some: Protecting Victims’ Rights in Criminal Trials*, Fletcher notes:

> The great advantage of victim representation on the jury is not the resulting spin on the outcome but rather the inhibitory effect on the deliberations. With a gay, black, or Jew sitting in the jury room, the jurors are not likely to make comments that subtly reflect shared biases about these subcultures.

Sheri Lynn Johnson has also proposed a racial imagery shield law, which would preclude racially charged argument or testimony unless it fit within one of eight particularized exceptions, and a new ethics code provision prohibiting the use of racial imagery in argument and testimony. The detailed nature and number of exceptions may make Johnson’s racial imagery rule difficult to implement. Nonetheless, her proposals constitute positive thoughts toward eliminating the influence of racial stereotypes on legal decisionmakers.

In a more recent attempt to address the problem of racial bias against Black defendants in criminal cases, Paul Butler has proposed that Black jurors should exercise their power to nullify and acquit Black defendants accused of non-violent crimes even when the evidence demonstrates guilt beyond a reasonable doubt. While Butler addresses important ques-

395. Alschuler, supra note 391, at 716 n.58 (listing academics who question whether a racial quota system would pass constitutional muster).

396. Fletcher, supra note 10, at 251. But see Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 828-40 (1995) (pointing out that the purpose of the criminal trial is not to stand by the victim, but to adjudicate the factual and legal responsibility of the defendant for the alleged offense).

397. Johnson, supra note 1, at 1794-97, 1800-02.

398. One problem with Johnson’s racial imagery shield law proposal is that it specifically exempts “a racial attitude, including race-based fear” alleged to have contributed to the defendant’s belief that his actions were reasonable where the defendant’s good faith is both relevant and disputed, and the defendant’s racial attitude is not described in unnecessarily inflammatory terms. *Id.* The covert appeal to race by Bernhard Goetz’s criminal defense attorney arguably would fall within this exception because Goetz’s race-based fear allegedly contributed to Goetz’s belief that his actions were reasonable, Goetz’s good faith was both relevant and disputed, and the use of four Black youths to recreate the subway shooting scene arguably was not unnecessarily inflammatory. This problem, however, could be resolved by eliminating this particular exemption.

399. Butler, supra note 197, at 705.
tions in a novel and thought-provoking manner, his racially based jury nullification proposal raises a host of problems. Instructing Black jurors to acquit guilty Black defendants would compound the natural tendency all people have to favor members of their own social groups (in-group favoritism) over members of other groups (out-group antagonism). Additionally, giving nullification instructions to Black jurors might encourage White jurors to nullify in favor of White defendants and/or White victims, Latino jurors to nullify in favor of Latino defendants and/or Latino victims, and Asian American jurors to nullify in favor of Asian American defendants and/or Asian American victims. Non-Black jurors would feel justified in nullifying because they would only be doing what Black jurors were doing. Rather than minimizing the problem of racial bias, racially based jury nullification instructions might have the opposite effect.

To deal with the problem of racial stereotypes affecting juror determinations of reasonableness in self-defense cases, at least three options are available. First, we could maintain the status quo despite its flaws. Second, we could eliminate the reasonableness requirement and embrace a completely subjective standard for determining self-defense claims. Third, we could maintain the reasonableness requirement, but attempt to reform self-defense doctrine to minimize the influence of racial stereotypes. The first two possibilities contain serious drawbacks. Maintaining the status quo is not a desirable option if we truly want to reduce the risk of racial stereotypes influencing jurors and other legal decisionmakers. Eliminating the reasonableness requirement in favor of a completely subjective standard is a tempting alternative, but it would favor actors who act out their racial biases. A defendant who honestly believed another person posed an imminent threat of death or serious bodily injury solely because of that person’s race would be exculpated under a completely subjective standard.

400. A fourth option is also possible, but not likely. We could completely eliminate the belief requirement from self-defense doctrine and acquit only those defendants who are correct in their assessment of the danger. Under such a view, the use of defensive force would have to be necessary based on objective facts. The problem with such an approach is that the law has never required the defendant who claims self-defense to be correct. Acquitting defendants who reasonably believe in the need for self-defense strikes a balance between recognizing the infallibility of human nature and requiring defendants to be accountable for their actions.
Working within the current framework of self-defense law, I make two preliminary suggestions for reform: (1) clarification of the act-belief distinction through a revised jury instruction on self-defense that makes explicit the requirement that both the defendant's beliefs and acts must be reasonable, coupled with a new two-tiered framework for assessing criminal liability in recognition of the act-belief distinction, and (2) a supplemental limiting jury instruction, to be given at either party's request or by the judge *sua sponte* in any case in which self-defense is an issue, that reminds jurors not to rely on racial stereotypes in determining whether a defendant's acts or beliefs were reasonable.

Clarification of the act-belief distinction is a reform needed in all self-defense cases, not just self-defense cases in which race is an issue.\(^{401}\) Jurors deciding self-defense claims may conflate the reasonable act and reasonable belief requirements whether or not race is an issue in the case. This problem of conflation may be accentuated when the case involves race. Indeed, it was the close scrutiny of self-defense cases involving victims of color which illuminated the conflation of reasonable acts and reasonable beliefs and led to this proposal.

The second proposal, the supplemental limiting instruction on the impropriety of relying on stereotypes, is necessary because clarifying the act-belief distinction does not directly address the problem of racial stereotypes. At the least, this second reform will send a strong normative message that jurors in self-defense cases should not permit racial stereotypes to influence their decisionmaking. It is hoped that the instruction will also minimize the influence of racial stereotypes on jury decisionmaking in self-defense cases by making the inappropriateness of racial stereotyping explicit. Additionally, the instruction may have a socially transformative effect, following the example of changes in rape law which have affected societal attitudes about what constitutes a rape. Before those changes, many people believed that it was not rape if the woman did not immediately complain about the incident to the police or forci-

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401. It might be argued that racial stereotypes affect only beliefs, not actions. If racial stereotypes affect only beliefs, not actions, then one can further argue that clarifying the act-belief distinction in self-defense doctrine is a remedy that does not address the problem of racial stereotypes. Modern research, as well as common sense, demonstrates that stereotypes can affect both beliefs and actions. The Black-as-criminal stereotype might cause a person not only to *believe* that a particular innocent Black person is dangerous, but also to *act* on that belief by shooting the innocent Black.
bly resist her attacker. Jury instructions in most states now inform such jurors that resistance is not an element of the crime and the lack of a fresh complaint is not a defense. While it is difficult to discern whether such instructions have influenced actual outcomes in rape cases, such reforms have had a noticeable impact on societal attitudes about rape. Today, one is less likely to hear someone say that a woman claiming she was raped is lying because she didn’t resist or immediately call the police. It is hoped that attempts to reform self-defense law in ways that reflect this society’s commitment to racial justice will have similar transformative effects.

One might argue that it is unfair for jurors with the luxury of hindsight to hold people who have acted in situations of distress to objective standards. This argument might be persuasive if the law embraced subjective standards in all matters of criminal liability, but it does not. The criminal law utilizes objective standards like reasonableness in many doctrines other than self-defense, such as duress, necessity, and provocation. In doing so, the law presumes that people can be expected to conform their conduct to societal norms expressed in the reasonableness requirement.

1. Act-Belief Distinction

One can have as many racist thoughts and beliefs as one wants and society will not punish these racist thoughts and beliefs. If, however, a person acts upon racist thoughts and beliefs in a way that causes physical harm to another person, society not only can punish the actor for the harm caused, it can also increase the penalty based on the fact that racist thoughts motivated that person’s actions. In this society, one is free to think whatever thoughts one chooses, but must check oneself at the point at which one acts on those thoughts. This is why it is not a crime for a woman to refuse to enter an elevator because a man is on that elevator, even if the woman is avoiding the man because of a gender stereotype that views all men as potential rapists. If, however, the woman acts upon this stereotype by shooting the male elevator rider, the woman can and should be prosecuted for her actions.

In many states, the jury instructions on self-defense do not make clear that both the defendant’s beliefs and actions must

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For example, the standard jury instruction given in California in self-defense cases reads:

The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:

a. That there is imminent danger that the other person will either kill [him][her] or cause [him][her] great bodily injury; and

b. That it was necessary under the circumstances for [him][her] to use in self-defense, such force or means as might cause the death of the other person, for the purpose of avoiding death or great bodily injury to [himself][herself].

A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as to excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of such fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well founded belief that it is necessary to save one's self from death or great bodily harm.

California's standard self-defense jury instructions, like the self-defense jury instructions in many jurisdictions, are problematic for two reasons. First, they focus the jury's atten-

404. For a detailed discussion of the inherent requirement of reasonable action in self-defense claims, see infra Part III.B.1.b. Jury instructions on self-defense in many states focus on the reasonableness of the defendant's beliefs or fears, without mentioning the requirement that the defendant's actions also must have been reasonable. See, e.g., ALABAMA CRIMINAL CODE, PATTERN JURY INSTRUCTIONS § 13A-3-23 (1989); ALASKA PATTERN JURY INSTRUCTIONS-CRIMINAL §§ 81.330, 81.336(a) (1980); CALIFORNIA JURY INSTRUCTIONS-CRIMINAL No. 5.12 (West 1968) (revised 1994); CALIFORNIA JURY INSTRUCTIONS-CRIMINAL No. 5.30 (West 1988) (revised 1995); COLORADO JURY INSTRUCTIONS-CRIMINAL §§ 7:16, 7:17, 7:20.5 (West 1983 & Supp. 1993); FLORIDA JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(d) (West 1981) (revised 1985); FLORIDA JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(e) (West 1981) (revised 1992); ILLINOIS PATTERN JURY INSTRUCTIONS-CRIMINAL § 24-25.06 (3d ed. 1992); PATTERN INSTRUCTIONS FOR KANSAS-CRIMINAL §§ 54.17, 54.22 (3d ed. 1993 & Supp. 1995); MICHIGAN CRIMINAL JURY INSTRUCTIONS § 7.15 (2d ed. 1991); MISSISSIPPI MODEL JURY INSTRUCTIONS-CRIMINAL § 114.17 (West 1992); MISSOURI APPROVED INSTRUCTIONS-CRIMINAL § 306.06 (3d ed. 1987); MONTANA CRIMINAL JURY INSTRUCTIONS §§ 3-102, 3-115(a) (1990); NEBRASKA JURY INSTRUCTIONS-CRIMINAL §§ 7.1-7.3 (2d ed. 1995); CRIMINAL JURY INSTRUCTIONS, NEW YORK §§ 35.00, 35.15 (1983) (revised 1989); PENNSYLVANIA CRIMINAL SUGGESTED STANDARD JURY INSTRUCTIONS § 9.505E (1979); WISCONSIN JURY INSTRUCTIONS-CRIMINAL §§ 800, 801, 805, 815, 820 (1966) (revised 1994); WYOMING PATTERN JURY INSTRUCTIONS-CRIMINAL §§ 5.201-5.212 (1978).

405. CALIFORNIA JURY INSTRUCTIONS-CRIMINAL, supra note 404, No. 5.12 (emphasis added).
tion on the reasonableness of the defendant's beliefs and fail to make explicit the fact that both the defendant's beliefs and actions must be reasonable to constitute self-defense.\footnote{406} Second, in using the terms "beliefs" and "fears" interchangeably, the instructions fail to recognize the distinction between a fear grounded in emotion and a belief grounded in reason. One might genuinely fear another person yet lack the belief necessary for a self-defense acquittal if one's belief in the imminence of serious bodily harm and the necessity of using force to protect oneself is not reasonable. Of course, beliefs and fears are not completely separate notions. Fears may be grounded in reasonable or unreasonable beliefs. Nonetheless, the complexity of the distinction between fears and beliefs may be obscured when the two terms are conflated.

a. The Honest and Reasonable Belief Requirement

Racial stereotypes can operate at two different levels in self-defense cases. First, racial stereotypes may influence the beliefs and acts of the defendant who claims he acted in self-defense. Second, racial stereotypes may affect the jury (or other legal decisionmaker) deciding the reasonableness of the defendant's beliefs and actions.

Current self-defense doctrine requires that the defendant honestly and reasonably believed in the imminence of death or serious bodily injury and in the necessity of using force to avoid the threatened harm.\footnote{407} It is unclear whether, under current standards, a defendant's reliance on racial stereotypes should inform the jury's determinations regarding either the honesty or the reasonableness of the defendant's beliefs, or both.

With respect to the question whether the defendant honestly believed in the need to act in self-defense, it seems clear that if the defendant's subjective beliefs were influenced by racial stereotypes, this fact would be relevant to support the defendant's claim that his belief in the need to act in self-

\footnote{406. The act-belief distinction which this Part proposes is analogous to the distinction in substantive criminal law between the mens rea and actus reus. In general, criminal liability may be imposed only if the actor had the requisite mens rea and performed a voluntary act (or omission where there was a duty to act) causing social harm, constituting the actus reus. \textsc{dressler}, supra note 24, § 9.01[A], at 69. Bad thoughts alone are not sufficient. \textit{Id.} § 9.01[B], at 70.}

\footnote{407. \textit{See supra} Part I.A (discussing the various standards of reasonableness—objective, subjective, or a hybrid of the two—applied in traditional self-defense cases).}
defense was honest. Accordingly, it might be appropriate for the jury to consider evidence that the defendant was influenced by racial stereotypes in formulating his own subjective belief in the need to act in self-defense.

However, with respect to the question whether the defendant reasonably believed in the need to act in self-defense, it is not clear whether the fact that the defendant was subjectively influenced by racial stereotypes is relevant to the reasonableness of his beliefs. On the one hand, the jury should be able to determine on its own what constitutes a reasonable (or unreasonable) belief, without referring to what the defendant subjectively believed. On the other hand, in determining whether a reasonable person in the defendant's position would have believed and acted as the defendant did, a strong argument could be made that the jury should consider relevant facts as to what the defendant knew or believed. If the defendant's beliefs and actions were heavily influenced by racial stereotypes, this fact could be relevant to the reasonableness determination in two ways. First, the defendant's reliance on racial stereotypes could undercut the defendant's claim that he acted reasonably. For example, there was some evidence that Goetz held racist views about Blacks and may have reacted to stereotypes about Blacks as criminals when he shot the four Black youths on the subway; this fact arguably undermines Goetz's claim that his belief in the need to use deadly force against the youths was reasonable because the reasonable person is not supposed to be a racist.408 Likewise, there was some evidence that Masters held racist views about Mexican Americans and may have shot the two Mexican American youths in response to stereotypes about Mexican Americans rather than because he believed they posed an imminent threat to him.409 This fact would likely undermine Masters's claim that his beliefs were reasonable. Second, if the reasonable person is characterized as the ordinary person or average American and if the ordinary or average American would be similarly influenced by racial stereotypes, the fact that the defendant was influenced by racial

408. Goetz apparently made a racist comment at a neighborhood block meeting about ridding the neighborhood of "spics and niggers." FLETCHER, supra note 59, at 136. The judge kept this information from the jury presumably because he thought its risk of undue prejudice substantially outweighed its probative value.

409. Upon his release from prison, Masters called Arce and Hillo "skinhead Mexicans" and blamed Arce's mother for his death because she failed to raise Arce well. Dellios, supra note 325, at A7.
stereotypes might bolster his claim that he believed and acted reasonably.\(^{410}\)

Often, evidence that a defendant holds racist views, belongs to White supremacist organizations, or uses racial slurs is excluded from the jury's consideration on the ground that its probative value is outweighed by the potential for prejudice. Given the fact that reasonableness is generally considered to be an objective (or subjectivized-objective), rather than a purely subjective standard, evidence that racial stereotypes influenced the defendant should not inform the determination of whether the defendant's beliefs were reasonable. Accordingly, jurors should be instructed that while a defendant's reliance on racial stereotypes may be used to support a finding that the defendant's beliefs were sincere or honest, a defendant's reliance on racial stereotypes is not reasonable as a matter of law. Accordingly, the defendant's actual reliance on racial stereotypes may not be used to support a finding that the defendant's beliefs were reasonable.

In permitting the defendant's reliance on racial stereotypes to support a finding that the defendant's belief in the need to act in self-defense was honest, but prohibiting this factor from supporting a finding that the defendant's belief was reasonable, a racially biased defendant receives a mitigated conviction for manslaughter, rather than murder, as long as the jurisdiction recognizes the imperfect self-defense doctrine.\(^{411}\) In other words, the law partially excuses the racially biased defendant who sincerely but unreasonably believes Blacks, Asian Americans, and/or Latinos are more dangerous than others, but does not let him off the hook completely.

It is important to distinguish between the ways in which stereotypes may operate upon the defendant and the ways in which racial stereotypes may operate on jurors. With respect to racial stereotypes that may have influenced the defendant's beliefs and actions, jurors may utilize the defendant's reliance on racial stereotypes to support the honesty, but not the reasonableness, of the defendant's beliefs. The second proposal discussed in this Part, a supplemental limiting instruction on racial stereotypes, attempts to minimize the influence of racial

\(^{410}\) See infra Part III.C (calling into question the desirability of this positivist conception of reasonableness).

\(^{411}\) See supra Part I.B.2 (discussing the doctrine of imperfect self-defense and noting that the doctrine fails to resolve adequately the ambiguities inherent in the reasonableness requirement).
stereotypes on jurors in self-defense cases. As decisionmakers in the criminal justice system who act in the comfort of the courtroom, rather than in the hurried, emergency-like situation in which the defendant may have found himself, jurors should strive to act with as much fairness as possible. Juror reliance on racial stereotypes should play no part in the legal decisionmaking process.

b. The Reasonable Act Requirement

That there can be a distinction between reasonable beliefs and reasonable acts in self-defense contradicts intuition. It seems only logical to assume that if I reasonably believe that someone is about to kill me and that I have to use deadly force to stop that person from killing me, then my use of deadly force must also be reasonable. The distinction between reasonable beliefs and reasonable actions is subtle but important. The requirement of a reasonable act is embodied in both the imminence and necessity requirements and the proportionality principle in self-defense doctrine.

i. Necessity and Imminence: "No Less Drastic Alternatives"

When we say that a defendant must have honestly and reasonably believed in the imminence of death or serious bodily injury and in the necessity of using deadly force to combat this threat in order to have acted in self-defense, we necessarily see imminence and necessity as part of the reasonable belief requirement. Imminence and necessity, however, also relate to the reasonableness of the defendant's actions. The necessity and imminence requirements seek to ensure that people do not act with force against others unless and until it is reasonably necessary to use such force to protect against an imminent unlawful attack. If less drastic alternatives are available, then the use of deadly force cannot be deemed necessary.412 When jurors are given instructions that emphasize only the honesty and the reasonableness of the defendant's beliefs, they may conflate the reasonableness of the defendant's belief that his life was in danger with the reasonableness of the defendant's

412. See, e.g., Laurence A. Alexander, Justification and Innocent Aggressors, 33 WAYNE L. REV. 1177, 1180 (1987) (illustrating the difference between proportionality and necessity and explaining necessity in terms of no lesser force available).
choice to use the amount of force he used and the decision to use that force at that instant.

Perhaps a simpler way of understanding the act requirement embedded in the necessity and imminence requirements is to think of these requirements as embodying a "no less drastic alternatives" requirement. Bernhard Goetz might have honestly believed that the four youths he encountered on the subway posed an imminent threat of serious bodily injury and that it was thus necessary to shoot them. Moreover, (for the sake of argument) the hypothetical reasonable person might have had similar beliefs. Even if Goetz's beliefs were reasonable, however, it does not necessarily follow that Goetz's action of shooting the youths in response to a request for five dollars was reasonable. Many less drastic alternatives were available to Goetz, but he instead chose to shoot the youths. Goetz admitted that he knew none of the youths had a weapon. None of the youths did anything to Goetz that resembled a physical attack or threat of a physical attack. Goetz could have tried to move away from the youths by moving to another section of the subway. Goetz could have responded to the youths' request for money by saying, "No." Goetz could have displayed his weapon (which would have warned the youths not to mess with him any more). Or Goetz could have shot at the ground or aimed at the ceiling of the subway (which too would have warned the youths not to mess with him). Instead, Goetz began shooting at the youths with the intention of murdering the youths, hurting them, and making them suffer as much as possible. Goetz's use of deadly force was not reasonable in light of the threatened harm, and therefore his self-defense claim should have been rejected.

Similarly, Rodney Peairs might have genuinely believed that Yoshihiro Hattori posed an imminent threat to his family and that it was necessary to shoot Hattori. For the sake of argument, the reasonable person in Peairs's shoes might have held similar beliefs. Despite the purported reasonableness of Peairs's beliefs, it is questionable whether Peairs's conduct was

413. Supporters of Goetz argued that the youths carried screwdrivers in their jackets which they could have used to threaten Goetz. The screwdrivers, however, were concealed and Goetz was not aware of the screwdrivers at the time he started shooting. Therefore, the presence of concealed screwdrivers does not bolster Goetz's argument that he honestly and reasonably feared the youths. See supra note 179 and accompanying text (noting that the media and public's willingness to accept the rumor of "sharpened screwdrivers" recast Goetz as the victim and the Black youths as menacing criminals).
reasoned. Several less drastic alternatives were available to Peairs, but he chose to shoot the young Japanese boy in the chest. When his wife screamed for him to get his gun, Peairs did not stop to ask his wife what she was screaming about. Peairs did not check to see whether there was any real danger, but instead rushed to the carport door with his gun. Peairs could have stayed inside the house and called the police. Peairs could have looked outside to check on the situation, and upon seeing that the boys were leaving, he could have let them go. Peairs could have fired a warning shot in the air from the doorway of his house. Or Peairs, who was familiar with guns, could have aimed at a non-fatal part of Hattori’s body as opposed to Hattori’s chest. Under these circumstances, it was not reasonable for Peairs to use deadly force in the manner that he did on Yoshihiro Hattori. As the appellate court which affirmed the judgment in the civil wrongful death case against Rodney Peairs explained:

There was absolutely no need to resort to the use of a dangerous weapon to repel an attack, as in fact there would have been no fear of an attack if Rodney had summoned help or simply stayed within his home. . . . Further, Rodney saw Yoshi [Hattori] at the back of the Toyota. He had sufficient time to shut the door, which Bonnie had done earlier. . . . We know that when Rodney Peairs first saw Yoshi, he was further away than when Bonnie [Peairs] had seen him, and she was able to shut the door. Self-defense is not acceptable. There was no justification whatsoever that a killing was necessary for Rodney Peairs to save himself and/or to protect his family.

The Goetz and Peairs cases show that it is often easier to demonstrate that one’s belief in the need to use force in self-defense was reasonable than to demonstrate that one’s use of deadly force was reasonable.

ii. Proportionality

The requirement that the defendant’s acts must be reasonable is found not only in the necessity and imminence requirements, it is also found in the proportionality requirement. This requirement ensures that the amount of force used by the defendant (i.e., the defendant’s acts) must not be excessive in


During the Menendez trial, commentators found the brothers’ self-defense claim hard to believe because the brothers could have responded to their father’s abuse in many ways short of killing him. Burden of Proof (CNN television broadcast, Oct. 19, 1995) (questioning whether the Menendez brothers’ self-defense claim was legitimate when the brothers could have left the home).
relation to the threatened harm. This is an objective standard. The proportionality requirement is not satisfied if the evidence merely demonstrates that the defendant subjectively believed that the force he used was proportionate to the force threatened. The defendant's force is considered proportionate only if a reasonable person in the defendant's situation would have responded to the threatened force in a similar manner. If jurors confuse the belief and act requirements, they may import the subjective aspects of the belief requirement into the act requirement.

Some might argue that the distinction between beliefs and acts in self-defense is a distinction without a difference because the necessity requirement subsumes the proportionality requirement. If jurors find that the defendant reasonably believed it was necessary to use the amount of force used to protect himself, they implicitly will have also found that the defendant used a reasonable amount of force. This would be true if reasonable force were merely defined as that amount of force a reasonable person would have found necessary to use under the circumstances. The proportionality requirement, however, addresses concerns beyond mere necessity. The proportionality requirement aims to ensure that the defendant refrains from using force that exceeds the force threatened, even if it is the only force that can avoid the threatened harm (i.e., even if the force used was necessary to avoid the threatened harm).

A hypothetical will clarify the distinction between necessity and proportionality. V and D are standing next to the railroad tracks. V threatens to slap D. Because of the crowd surrounding them, the only way D can avoid V's slap is by pushing V into the path of an oncoming train. Even though pushing V onto the railroad tracks may be necessary to avoid the threatened harm of V's slap, if D does this, he cannot—or at least he should not be able to—claim self-defense, because his use of

415. In addition to the requirement that the defendant actually and reasonably believed his use of force was necessary to respond to an imminent threat, the common law rule requires that the defendant's use of force be proportional to the threatened force. DRESSLER, supra note 24, § 18.02, at 200.

416. As discussed in Part I, the belief requirement in self-defense doctrine requires that the defendant's beliefs be both honest and reasonable. Additionally, most jurisdictions utilize a hybrid subjectivized-objective reasonable person standard as opposed to a purely objective reasonable person standard. See supra Part I.A (discussing traditional self-defense doctrine and the objective-subjective debate).
force likely to cause death or serious bodily injury (pushing V into the path of the oncoming train) would be disproportionate to the force threatened (a slap). In balancing the respective interests of D and V, the harm threatened by V (a slap to D) is far less substantial than the harm which would result from D's act of pushing V onto the railroad tracks (V's death). Therefore, as between D and V, we expect D to endure a slap from V if killing V is the only way D can avoid that slap.

c. New Two-Tiered Framework and Model Jury Instruction

If the distinction between beliefs and acts is not made clear, jurors might mistakenly conclude that a defendant's use of deadly force is justified based solely on a finding that the defendant's belief in the need to use force in self-defense was reasonable. To recognize the reduced culpability of a defendant who reasonably believes in the need to use deadly force in self-defense, but whose actions are unreasonable either in terms of proportionality, imminence, or necessity, legislatures could implement a two-tiered framework for liability in self-defense cases similar to the two-tiered approach used in jurisdictions that recognize the imperfect self-defense doctrine.417 Under the proposed approach, if the defendant's beliefs and acts were reasonable, the defendant will be acquitted of murder. If, however, the defendant's beliefs were reasonable but his acts were unreasonable, the defendant may be convicted of manslaughter rather than murder.418 This two-tiered approach would allow the jury to recognize differing degrees of culpability rather than force the jury to make an all-or-nothing decision.

Jurisdictions should also revise their jury instructions on self-defense to better reflect the act-belief distinction. A sample jury instruction could look something like this:

Model Jury Instruction on Self-defense

A homicide is justifiable if the defendant was acting in self-defense. In order to find that the defendant acted in self-defense, all of the

417. See supra Part I.B.2 (discussing the merits of the imperfect self-defense doctrine).

418. Jurisdictions could decide whether to continue recognizing imperfect self-defense. Jurisdictions which adopt this new two-tiered approach and retain imperfect self-defense would need to consider the appropriateness of treating the killer who honestly and reasonably believes in the need to use defensive force, but acts unreasonably, the same as the killer who honestly but unreasonably believes in the need to use defensive force. The two killers may not be equally culpable.
1. Actual and Reasonable Belief Requirement

A. Actual Belief. The defendant must actually believe that s/he is in danger of [death or serious bodily injury][bodily harm] and that it was immediately necessary for her/him to use [deadly] force against the victim to prevent such [death or serious bodily injury][bodily harm].

B. Reasonable Belief. A reasonable person, in the defendant's circumstances, would have also believed that s/he was in danger of [death or serious bodily injury][bodily harm], and that it was immediately necessary for her/him to use [deadly] force against the victim to prevent such [death or serious bodily injury][bodily harm].

[If the defendant was influenced by racial stereotypes, this fact may be considered to support the honesty, but not the reasonableness, of the defendant's beliefs. Reliance on racial stereotypes to inform one's beliefs in a self-defense situation is not reasonable as a matter of law.]

2. Reasonable Act Requirement

A. No Less Drastic Alternatives Available. The kind and degree of force which a person may lawfully use in self-defense is limited by what a reasonable person in the same situation as the defendant would have used. Any use of force beyond this is unreasonable and unlawful. If less drastic alternatives were available, the reasonable person would have used such alternatives before resorting to the use of [deadly] force.

B. Proportionality. The defendant is not justified in using an amount of force clearly in excess of the threatened force.

While this model jury instruction employs an objective rather than a purely subjective standard of reasonableness, jurisdictions would still be free to subjectivize the reasonable person standard by incorporating the physical characteristics of the defendant, such as height, weight, physical disabilities, and other circumstances into the reasonable person standard. In this respect, the model jury instruction does not differ from most currently employed self-defense instructions. The instruction retains another important feature of currently employed self-defense instructions. Only apparent, not actual, danger is required.

The model jury instruction makes three notable changes to California's pattern self-defense instruction. First, the model instruction adopts the "immediately necessary" language used in the Model Penal Code, as opposed to relying solely on the

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419. For the text of the Model Penal Code § 3.04(1), see supra note 68.
“imminent danger” language currently utilized in California, to address the situation that one of my colleagues calls the James Bond hypothetical. Jaws (James Bond's nemesis) is chasing Bond. Bond escapes up a mountain. From the top of the mountain, Bond can see Jaws through his laser-scoped rifle. He has a clear shot and can kill Jaws if he shoots Jaws now. If he waits, Jaws will come up the mountain in fifteen minutes and Bond will be unable to defend against the threat of inevitable death or serious bodily injury. The critical question is whether Bond can shoot Jaws now, from the top of the mountain, while he has a clear shot. If Bond is in a jurisdiction that requires “imminent danger,” he must wait until Jaws has climbed the mountain and is about to attack before attempting to shoot Jaws. If he waits, he may not survive. If Bond is in a jurisdiction that requires that it was “immediately necessary” to use the force used to repel the threatened attack, Bond may shoot from the mountain top rather than wait for Jaws to arrive.

Second, the proposed instruction informs jurors that if the defendant was actually influenced by racial stereotypes, this fact may be relied upon to support the honesty, but not the reasonableness, of the defendant's beliefs. While drawing a distinction between honest and reasonable beliefs may seem cumbersome, courts have engaged in similar distinctions. For example, until recently, California courts followed the rule that in self-defense cases battered woman syndrome evidence is relevant to the honesty, but not the reasonableness, of the battered woman defendant's beliefs.

420. For the text of CALIFORNIA JURY INSTRUCTIONS-CRIMINAL No. 5.12, see supra text accompanying note 405.

421. My colleague, Larry Alexander, uses this hypothetical to illustrate the difference between an “imminence” requirement that focuses on the immediacy of the threatened harm and an “immediately necessary” requirement that focuses on the immediacy of the need to act to avoid the threatened harm.

422. Another hypothetical clarifies the difference between an “immediately necessary” standard and an “imminence” standard. V takes D hostage. V tells D that he plans to kill her in one week. One day, V falls asleep, leaving his loaded rifle unattended. If D waits until the threat of death is “imminent,” i.e., next week, she will likely die. If D takes the gun from V and shoots V now, D can justify her use of deadly force as “immediately necessary” under the circumstances.

Finally, the proposed instruction differs from self-defense instructions in California and other states in adding a requirement that the force used by the defendant (i.e., the defendant's acts) must have been reasonable in terms of proportionality, necessity, and imminence. This added requirement makes explicit the act-belief distinction, reminding the jury to focus on the reasonableness of the defendant's use of force as well as the reasonableness of her beliefs in deciding whether the defendant should be acquitted on the ground of self-defense.\textsuperscript{424}

2. Supplemental Limiting Instruction

Clarifying the act-belief distinction may make it more difficult for defendants who kill or maim Blacks, Asian Americans, and Latinos, and claim self-defense, to be acquitted. Nevertheless, because the proposed model self-defense instruction does not directly address the problem of racial stereotypes influencing juror determinations of reasonableness in self-defense cases, additional reforms are necessary. One possible reform would be to require judges to give jurors a supplemental limiting instruction addressing the impropriety of relying on stereotypes.\textsuperscript{425} This instruction would have to be

\begin{itemize}
  \item ableness of the battered woman defendant's beliefs. \textit{Humphrey}, 921 P.2d at 10. In other areas of the law, evidence may be considered by the jury for one purpose, but not another. \textit{See}, e.g., \textit{People v. Register}, 457 N.E.2d 704, 706, 709 (N.Y. 1983) (holding that jury consideration of evidence of the defendant's voluntary intoxication was proper on issue of whether defendant intended to kill or premeditated and deliberated, but improper on issue of whether defendant acted recklessly).

  \textsuperscript{424} Several jurisdictions distinguish between beliefs and acts in their model self-defense instructions, requiring both the defendant's beliefs and the force used by the defendant to have been reasonable. \textit{RECOMMENDED ARIZONA JURY INSTRUCTIONS (CRIMINAL)} § 4.04 (1989); \textit{IDAHO CRIMINAL JURY INSTRUCTIONS} §§ 1517, 1518 (1995); \textit{IOWA CRIMINAL JURY INSTRUCTIONS} §§ 400.1-400.6 (1990); \textit{MODEL JURY CHARGES-CRIMINAL, N.J.S.A.} 2C:3-4 (3d ed. 1990); \textit{NEW MEXICO UNIFORM JURY INSTRUCTIONS-CRIMINAL} §§ 14-5181 (1996); \textit{NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES} §§ 308.40, 308.45 (1986); \textit{OHIO JURY INSTRUCTIONS-CRIMINAL} §§ 11.31, 11.33 (1962); \textit{TENNESSEE PATTERN JURY INSTRUCTIONS-CRIMINAL} § 40.06 (3d. ed. 1992); \textit{VIRGINIA MODEL JURY INSTRUCTIONS-CRIMINAL} §§ 54.500, 54.510 (1979 & Supp. 1994); \textit{WASHINGTON PATTERN JURY INSTRUCTIONS, CRIMINAL} § 17.02 (2d ed. 1994).

  \textsuperscript{425} Currently, judges give jurors in non-capital cases generic instructions to resist the influence of bias or prejudice. These instructions avoid explicit references to race. \textit{See}, e.g. \textit{CALIFORNIA JURY INSTRUCTIONS-CRIMINAL} No. 1.00 (6th ed. 1994) ("You must not be influenced by . . . sympathy, passion, [or] prejudice."); \textit{HON. EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS} § 12.01 (4th ed. 1992) ("In deciding the issues presented to you
given whenever a party in a self-defense case requested such an instruction. If neither party requested this limiting instruction, the judge could give such an instruction on her own motion. This supplemental jury instruction would remind jurors that they should not rely upon stereotypes to support a finding that the defendant's use of force was reasonable. A model limiting jury instruction might look something like this:

Model Supplemental Limiting Instruction
on the Impropriety of Relying on Racial Stereotypes

It is natural to make assumptions about the parties and witnesses in any case based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group.

If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you could imagine a Latino defendant and a White victim. In intraracial cases in which both the defendant and the victim are persons of color, you may simply assign a different race to these actors. For example, if both the defendant and victim are Black, you may imagine that both are White. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

Some might argue that the judge should go further and tell jurors what types of things constitute stereotypes. Coming up with an exhaustive list of stereotypes that would cover every possible situation, however, would be difficult and counterproductive. Applicable stereotypes might be overlooked if a list of stereotypes were generated in the abstract. If a stereotype were inadvertently omitted, jurors might think it appropriate to rely on the omitted stereotype. In lieu of including a long list of stereotypes in the limiting instruction, attorneys could be encouraged to present argument and evidence to the jury,

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for decision in this trial you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion.

In contrast, judges provide jurors in federal capital cases with explicit instructions not to consider the race or color of the defendant or the victim. Judges further instruct federal capital jurors not to recommend a sentence of death unless they conclude that they would recommend death irrespective of the race or color of the defendant or victim. 21 U.S.C. § 848(o)(1) (1996).
giving examples of stereotypes and discussing how such stereotypes can influence perception and judgment.

This proposal makes a much-needed distinction between consideration of race (which is permissible and appropriate) and reliance on racial stereotypes (which is impermissible and inappropriate). The supplemental limiting instruction does not ask jurors to disregard race, a task that would be impractical and infeasible. The instruction simply reminds jurors that racial and other stereotypes should not act as a substitute for actual facts supporting a finding that the defendant's use of force against the victim was reasonable.

Several objections might be made to this proposal. First, telling jurors they should not be influenced by stereotypes in deciding whether the defendant's fear of the victim was reasonable might force jurors' true feelings under the rug. Jurors who are influenced by stereotypes to believe that it is reasonable to fear Blacks, Latinos, Asian Americans, or any person of color, might nod their heads and pretend to abide by the instruction while covertly relying on stereotypes to make up their minds. Alternatively, such reliance might occur at the unconscious or subconscious level without the jurors' awareness. Given the fact that jury deliberations are secret proceedings, and that jurors are not required to justify their verdicts except in limited circumstances, it would be impossible to determine whether jurors were in fact abiding by the instruction.

The same type of objection, however, could be made against several rules that, while not always successful in application, have been instrumental in raising social consciousness, such as the prohibition on race-based peremptory challenges and abolition of the fresh complaint and resistance

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426. *See supra* note 381 (discussing FED. R. EVID. 606(b) and the secrecy that attends jury deliberations).

427. In the usual criminal case, jurors return a general verdict of guilty or not guilty without revealing to anyone the grounds on which the verdict rests. WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.7, at 1050 (2d ed. 1992); United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) ("It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases ....") (quoting G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905)). In a few criminal cases, such as actions for criminal forfeiture, jurors are directed to fill out a special verdict form, answering "yes" or "no" to specific questions regarding the elements of the charged offense or offenses. FED. R. CRIM. P. 31(e).

428. This argument, however, holds true for all jury instructions.

While the law is clear that peremptory challenges may not be based on race, attorneys have no difficulty finding ways to manipulate this requirement by coming up with ostensibly race-neutral reasons for striking potential jurors. Last year, the United States Supreme Court...
held that the race-neutral explanation tendered by the proponent of a peremptory challenge need not be persuasive or even plausible. If the race-neutral explanation need not be persuasive nor even plausible, any explanation will likely survive a *Batson* challenge. Attorneys can nod their heads and pretend to abide by *Batson* while covertly relying on race to exercise their peremptory challenges. If this is so, then surely jurors, who are not subject to the same kind of scrutiny as attorneys, may do the same when instructed not to rely on racial stereotypes in deciding whether the defendant acted reasonably in self-defense.

A similar argument might be made with respect to the abolition of the resistance requirement and the fresh complaint requirement in rape law. Even though the requirements that the victim of a rape must have resisted and complained im-

whose occupations also began with a *P*: a production supervisor, a payroll clerk, and a part-time secretary. *Id.* Nonetheless, the court found the prosecutor's new reason sufficient to uphold the strike, and the trial court's decision was affirmed on appeal. *Id.* at 561-62.

In yet another case, both the district court judge and a three judge panel on the Fourth Circuit Court of Appeals found the prosecutor's explanation for striking a female Black juror—that the struck juror's name, Arlene Granderson, closely resembled the name of a defendant, Anthony Grandison, whom the prosecutor had once prosecuted for the murder of two government witnesses—to be a race-neutral and non-pretextual reason to challenge the juror. United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988).

Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (per curiam) (holding that the prosecutor's proffered explanation for peremptory challenge of a Black juror—that the juror had long, unkempt hair, a moustache, and a beard—was race-neutral and satisfied the prosecutor's burden of articulating a nondiscriminatory reason for the strike).

For example, former California Penal Code section 261, provided, "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here a person resists, but the person's resistance is overcome by force or violence." CAL. PENAL CODE § 261 (West 1988) (emphasis added). Under former California case law, this provision was interpreted to mean that resistance was a crucial and necessary element of rape. People v. Barnes, 721 P.2d 110, 113-14, 124 (Cal. 1986) (explaining former section 261 and holding that the legislature, in amending section 261, intended to eliminate the resistance requirement). In 1994, the California Supreme Court held that a victim need not demonstrate resistance in order to prove an act of sexual intercourse accomplished by force, violence, or fear of immediate bodily injury. People v. Iniguez, 872 P.2d 1183, 1190 (Cal. 1994) (affirming rape conviction in a case in which the victim froze and did not resist the defendant's sexual advances because she feared he might hurt her). *But cf.* Commonwealth v. Berkowitz, 641 A.2d 1161, 1164-65 (Pa. 1994) (holding, as an all male Supreme Court of Pennsylvania, that a victim must do more than say "no" (e.g., try to escape or fight back) in order for a defendant to be convicted of rape).
mediately to the police have been abolished in most jurisdictions, jurors continue to find lack of resistance and the lack of a fresh complaint relevant. Telling jurors that they need not

Similarly, New York once required proof of resistance in order to sustain a rape conviction.

Under the prior definition of "forcible compulsion," [N.Y. PENAL LAW § 2101 (McKinney 1909)] a woman could be raped only when "her resistance was forcibly overcome" or when "her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her." In 1965, this definition was amended to read "physical force that overcomes earnest resistance." N.Y. PENAL LAW § 130.00(8) (McKinney 1995).

Margaret A. Clemens, Note, Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience, 47 ALB. L. REV. 871, 872 n.4 (1983). In 1982, the New York legislature eliminated the "earnest resistance" requirement from section 130.00(8) and redefined "forcible compulsion" as "physical force or threat, express or implied, which force or threat places a person in fear of immediate death or serious physical injury to himself, herself, or another person." Id. at 874; see also N.Y. PENAL LAW § 130.00(8) (McKinney Supp. 1982-83); see also People v. Fransua, 522 N.Y.S.2d 684, 686 (N.Y. App. Div. 1987) ("Under the appropriate definition of forcible compulsion, the victim was not required to put up any resistance.").

434. For many years, California juries were allowed to hear that the victim of an alleged sexual assault reported the attack immediately after it occurred, based on the assumption that it was natural for a victim of a sexual assault to report promptly the sexual assault if it actually occurred. In 1994, the California Supreme Court discredited the theoretical underpinnings of the fresh complaint doctrine. In People v. Brown, 883 P.2d 949 (Cal. 1994), the court noted that the assumption that a true victim would promptly report a sexual assault was not supported by empirical studies showing that many victims of sex crimes are too embarrassed or afraid to report immediately the fact that they have been assaulted. Id. at 960. The court went on to hold that proof of an alleged victim's disclosure of the sexual assault to others, whether prompt or not, generally should be admitted as relevant evidence. Id. The promptness of the complaint, however, is not a prerequisite to the admissibility of such evidence. Id. at 950-51. But cf. People v. McDaniel, 611 N.E.2d 265, 269 (N.Y. 1993) (allowing only admission of prompt complaints).

435. See McDaniel, 611 N.E.2d at 269 (noting that "[t]he contemporary rationale for permitting prompt outcry evidence is that some jurors would inevitably doubt the veracity of a victim who failed to promptly complain of a sexual assault, such conduct being 'natural' for an 'outraged female'" and that "the admissibility of prompt outcry remains viable because 'our judicial process cannot remove from every juror all subtle biases or illogical views of the world . . . .'" (quoting People v. Rice, 554 N.E.2d 1265 (N.Y. 1990) and State v. Hill, 578 A.2d 370, 377 (N.J. 1990))); Diane M. Kottmyer & Martin F. Murphy, Developments in Criminal Law: The Changing Face of Rape Prosecutions, 36 BOSTON B.J. 31, 35 (1992) (noting that many jurors, in deciding rape cases, look for evidence of a complaint, and are dissatisfied if there is no such evidence); Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013, 1049 (1991) (discussing one rape study in which almost one-third of the potential jurors believed that a woman's resistance should be the major factor in determining whether a rape has taken place, and over half felt that a woman should do all
find that the victim resisted or that she immediately reported
the rape to the police does not guarantee that jurors deciding
whether or not a rape occurred will disregard a victim's failure
to resist or her failure to immediately report. Despite these objections, a rule that makes clear that
stereotypes should not be relied upon to support a finding that
the defendant's use of force was reasonable would be worth-
while for the same reason the prohibition on race-based per-
emptory challenges and the elimination of the resistance and
fresh complaint requirements in rape law have been useful.
These reforms have positively improved jury selection proce-
dures and rape law. In raising social consciousness about the
need to treat minorities and women fairly, these changes in the
law have not only helped defendants of color and rape victims,
but they have also been beneficial to society, increasing societal
awareness of and sensitivity to race and gender issues. Even
though some attorneys may have found ways to manipulate the
requirement that peremptory challenges not be based on race,
the overt use of race-based peremptory challenges is probably
less common than before the Batson rule was announced.

she can to resist while being raped (citing HUBERT S. FIELD & LEIGH B.
BIENEN, JURORS AND RAPE 3 (1980)). But cf. Sheila R. Deitz et al., Attribution
of Responsibility for Rape: The Influence of Observer Empathy, Victim Resis-
tance, and Victim Attractiveness, 10 SEX ROLES 261, 276 (1984) (observing
that male subjects in a rape study saw the defendant as less guilty when the
victim resisted actively).

436. During the fall of 1994, I had students in my criminal law class volun-
teer to conduct a mock rape trial using a six-minute scene from the movie
LAST TANGO IN PARIS (United Artist 1972). The idea for this class exercise
came from Robert Garcia, Rape, Lies and Videotape, 25 LOY. L.A. L. REV. 711,
711 (1992). The scene depicts a sexual encounter between a man and a
woman in an apartment. Six students watched the clip and played the role of
witnesses. Four students who did not see the film played the role of lawyers,
two as defense attorneys and two as prosecution attorneys. One student
acted as the judge, and the rest of the class pretended to be the jury. The
majority of the class found the defendant, played by Marlon Brando, not guilty
of rape. During our class discussion, I was surprised to hear that many of the
students who voted Brando not guilty of rape found significant the fact that
the young French woman in the movie failed to report immediately the sexual
encounter to the police. This was despite their knowledge that an immediate
complaint to the police was not an element of the crime of rape.

437. Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Per-
emptory Challenges, and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153,
172 (1989) (opining that Batson most likely has worked a significant change in
the way prosecutors use their peremptory challenges); see also Jean Montoya,
The Future of the Post-Batson Peremptory Challenge: Voir Dire by Question-
naire and the "Blind" Peremptory (forthcoming) (manuscript at 38, on file with
author).
Similarly, even though jurors may still believe the victim's failure to resist or her failure to complain immediately to the police are facts relevant to the question whether a rape has occurred, at least most people now realize that a woman can be raped even if she does not resist an unwanted sexual advance or immediately file a complaint with the police.

Having the judge instruct jurors to engage in race-switching if they are uncertain whether stereotypes have influenced their judgment might help to bring unconscious racial bias to the surface. Encouraging attorneys to explain the dangers of stereotyping in oral argument and through the introduction of evidence about how stereotyping influences perception and judgment is designed to accomplish similar objectives.

Second, some might object to a race-switching instruction on the ground that it introduces facts not in evidence and encourages jurors to speculate. If the instruction told jurors to

438. See supra note 436 (discussing Professor Cynthia Lee's experience that criminal law students continue to find prompt complaint significant despite changes in the law).

439. John Grisham illustrates the value of race-switching in his book A Time To Kill. John Grisham, A TIME TO KILL 503-04 (1989). In this story, a Black man kills two White men who brutally raped his daughter. Id. at 72. The Black father is charged with two counts of murder and tried before an all-White jury. Id. at 394. The jury is deadlocked until one woman juror persuades the other jurors to engage in a race-switching exercise. She tells her fellow jurors:

I have a proposal... that just might settle this thing... I thought of something last night when I couldn't sleep, and I want you to consider it. It may be painful. It may cause you to search your heart and take a long look at your soul. But I'll ask you to do it anyway. And if each of you will be honest with yourself, I think we can wrap this up before noon.

Id. at 503-04. After the jury reaches a verdict, we learn what this juror told her fellow jurors:

She told them to pretend that the little girl had blond hair and blue eyes, that the two rapists were black, that they tied her right foot to a tree and her left foot to a fence post, that they raped her repeatedly and cussed her because she was white. She told them to picture the little girl layin' there beggin' for her daddy while they kicked her in the mouth and knocked out her teeth, broke both jaws, broke her nose. She said to imagine two drunk blacks pouring beer on her and pissing in her face, and laughing like idiots. And then she told them to imagine that the little girl belonged to them—their daughter. She told them to be honest with themselves and to write on a piece of paper whether or not they would kill those black bastards if they got the chance. And they voted, by secret ballot. All twelve said they would do the killing.

Id. at 513.
decide the case as if the parties were of different races, this objection might be persuasive. The proposed instruction, however, does not direct jurors to decide the case on imagined facts. It merely permits jurors who are uncertain as to whether they have relied on racial stereotypes to check themselves by engaging in the exercise. If jurors find themselves reaching a different result after the exercise, this will indicate that racial stereotypes have had some influence on their deliberative processes. With this heightened awareness, the jurors should reconsider the actual, not imagined, facts of the case, trying this time to minimize reliance on racial stereotypes to reach their verdict.

Third, one might argue that the supplemental limiting instruction would be ineffective because "jurors do not attend to or are confused by jury instructions" in general. Marcus Gleisser characterizes the reading of the jury instructions as a hopeless exercise in futility:

Probably the most discouraging part of a trial is the time when the judge tries to cram into twelve non-legal minds all the law applicable to the case at hand. The blank expressions on the faces of the citizen-jurors is pitiful; it is matched only by the bleak look on the judge as he plods through the legal terminology that he knows is making little, if any, impression on his listeners.

This argument, however legitimate, could be made against any and all jury instructions. If jury instructions were truly useless, we would stop giving jury instructions altogether. The more reasoned approach is to strive for more clarity in jury instructions.

Several recent studies have found that jury instructions can have a significant impact on jurors, particularly in reducing the influence of racial bias. In one study, racial differences in guilt attribution between Black and White defendants occurred when no jury instructions were given; these racial differences disappeared when jury instructions were present. In another study, juror subjects treated Black and White defendants differently when they were not given any instructions.


441. MARCUS GLEISSER, JURIES AND JUSTICE 228 (1968).

or when they were given instructions strongly encouraging
them to exercise their power to nullify.\textsuperscript{443} These differences
were not present when jurors received standard jury instruc-
tions or jury instructions with a mild nullification statement.\textsuperscript{444}
Another study found that subjects tended to find a defendant
guilty when the defendant's testimony was presented in a for-
gn language and translated through an interpreter, but this
bias was eliminated by the judge's instructions to ignore the
fact that the testimony was translated.\textsuperscript{445}

Fourth, some might object to application of the supplemen-
tal limiting instruction in certain self-defense cases, arguing
that when a minority defendant kills a White person, he should
be able to argue that cultural factors made him do it.\textsuperscript{446} The
proposed instruction, however, would not preclude argument

\textsuperscript{443} The radical nullification instructions included the following state-
ment.

Members of the jury: Although you are part of a public body bound to
give respectful attention to the laws, you have the final authority to
decide whether or not to apply a given law to the acts of the defen-
dant on trial before you. It is important to remember that you repre-
sent the community and that it is appropriate to bring into your de-
liberation the feelings of the community and your own feelings based
on conscience. Despite any respect you hold toward the law, nothing
will bar you from determining the final verdict if you feel that the
law, as applied to this fact situation before you, will produce an in-
equitable or unjust result.

\textsuperscript{444} \textit{Id.}

\textsuperscript{445} Cookie White Stephan & Walter G. Stephan, \textit{Habla Ingles? The Ef-
facts of Language Translation on Simulated Juror Decisions}, 16 \textit{J. APPLIED
SOC. PSYCHOL.} 577, 581 (1986).

\textsuperscript{446} In \textit{People v. Croy}, 710 P.2d 392 (Cal. 1985), Patrick "Hooty" Croy, a
Native American, shot and killed a police officer in what he claimed was self-
defense. \textit{Id.} at 397. Initially, Croy was convicted of first degree murder, rob-
bbery, and other crimes, and was sentenced to death. \textit{Id.} at 393. The Califor-
nia Supreme Court reversed his conviction and ordered a new trial. \textit{Id.} At
Croy's second trial, Croy's attorney, Tony Serra, argued that because of anti-
Indian racism in Yreka County and a long history of Whites killing Indians,
Croy had been raised to fear Whites. Therefore, when confronted by a White
police officer, Croy honestly and reasonably believed he was faced with immi-
nent death. This time, the jury acquitted Croy on all counts. See Alison Dun-
des Rentelin, \textit{A Justification of the Cultural Defense as Partial Excuse}, 2 \textit{S.
CAL. REV. L. & WOMEN'S STUDIES} 437, 454-56 (1993) (describing Croy's attor-
ney's presentation of a cultural defense in the context of self-defense); David
16 (summarizing both the prosecution's story and the defense's version of the
facts); Henry Weinstein, \textit{Opening Statements Could Be Crucial in Simpson
ments to the jury in the Patrick "Hooty" Croy case).
RACE AND SELF-DEFENSE

regarding culture. It would merely warn jurors to be aware of the effect stereotyping has on perception and judgment and instruct them not to rely on stereotypes in deciding whether the defendant acted reasonably.\footnote{447} In order to comport with equal protection, a limiting jury instruction telling jurors not to rely on racial stereotypes in determining whether the defendant acted reasonably should apply in all self-defense cases in which race is relevant. Stereotypes about Whites exist in certain circles, and it would be just as inappropriate for minority jurors to rely on stereotypes about Whites as it would be for White jurors to rely on stereotypes about minorities.

Fifth, one might object to the supplemental limiting jury instruction on the ground that such an instruction increases the risk that jurors will focus on, rather than try to ignore, race.\footnote{448} This objection might be analogized to the unringing-the-bell problem, a problem endemic to criminal trials in general. Some attorneys will ask questions that they know are improper in order to plant ideas in the jurors’ minds.\footnote{449} Even if opposing counsel objects to the question and the judge sustains the objection and tells the jury to disregard the question, the jury is likely to remember the question and its implications. Worse yet, if opposing counsel does not object quickly enough, the witness may answer the question. In such instances, the judge’s admonition to the jury to disregard the question and answer is extremely unlikely to be effective. The bell has been rung and telling jurors to pretend they did not hear the bell cannot unring it.\footnote{450} A similar objection argues that having the

\footnote{447. In proposing a limiting jury instruction in the form of a directive from the judge to the jury, my proposal goes one step beyond Holly Maguigan’s proposal which relies on prosecutors to make the same types of arguments. Maguigan, \textit{supra} note 364, at 90-94.}

\footnote{448. Johnson, \textit{supra} note 9, at 1679 n.369 (noting “there is some evidence from mock jury studies that instructing jurors to disregard a fact results in greater emphasis being given to that fact”); Johnson, \textit{supra} note 1, at 1775-76 (pointing out that prosecutors in the first Rodney King trial did not object to the use of animal imagery by the defendants in describing Mr. King because an objection, even if sustained, would have called more attention to the testimony).}

\footnote{449. For example, in the Bernhard Goetz trial, Goetz’s attorney Barry Slotnick repeatedly asked questions which he knew were improper. See generally LESLY, \textit{supra} note 183.}

\footnote{450. When a criminal defendant chooses to exercise his Fifth Amendment privilege against self-incrimination by refusing to take the stand, the court may give the jury an instruction that they should not infer guilt from the defendant’s failure to testify. Carter v. Kentucky, 450 U.S. 288, 300-03 (1981). The court may give this jury instruction even over the defendant’s objection.
judge give the jurors an instruction on race legitimizes consideration of race when what we should be striving for is color-blindness, not color-consciousness.

It is true that a limiting instruction telling jurors not to consider stereotypes in determining whether the defendant acted reasonably, as well as oral argument and evidence on the dangers of stereotyping, might make jurors focus on the race of the parties more than they might otherwise. A race-conscious approach, however, would be a positive improvement over current self-defense law, which pretends a color-blindness that does not exist in reality.\textsuperscript{451} Jurors, like all people, notice race whether they are conscious of it or not. Addressing the influence of race by instructing jurors that racial stereotypes should not be relied upon deals head on with the issue of race.\textsuperscript{452}

\begin{quote}
Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978). The Lakeside decision has been criticized because a jury instruction telling the jury not to infer guilt from a defendant's silence at trial highlights the fact that the defendant did not testify which may work to the defendant's detriment. \textit{Id.} at 345 (Stevens, J., dissenting) ("For the judge or prosecutor to call [the defendant's] failure to take the stand] to the jury's attention has an undeniably adverse effect on the defendant. . . . When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear.").

The devastating effects of a jury instruction highlighting the fact that someone has asserted the Fifth Amendment privilege against self-incrimination became apparent during the O.J. Simpson trial when the defense asked Judge Lance Ito to call Detective Mark Fuhrman back to the witness stand so that he could claim the Fifth Amendment privilege against self-incrimination in front of the jury. Andrea Ford et al., \textit{Defense Nears End Without Putting Simpson on Stand}, \textit{L.A. Times}, Sept. 8, 1995, at A1. Judge Ito denied the defense request, but agreed to instruct the jury that Fuhrman was unavailable to rebut charges that he lied on the witness stand when he denied using the N-word and that the jury could draw inferences as to Fuhrman's credibility from his unavailability. Tim Rutten & Henry Weinstein, \textit{Legal, Tactical Reasons Cited for Risky Appeal}, \textit{L.A. Times}, Sept. 8, 1995, at A1. Even though Judge Ito agreed with prosecutors that the jury should not be informed that Fuhrman had taken the Fifth Amendment and refused to answer the question, "Did you plant evidence in this case?" in court outside the presence of the jury, the government appealed the ruling, on the ground that telling the jury that Fuhrman was unavailable would invite the jurors to speculate unfairly about Fuhrman's misconduct. \textit{Id.} Judge Ito's ruling was overturned on appeal. Jim Newton et al., \textit{Justices Overrule Ito on Reference to Fuhrman, L.A. Times}, Sept. 9, 1995, at A1 (reporting that the appellate court ruled that the proposed instruction regarding the unavailability of former Detective Fuhrman was not to be given).

451. Gotanda, \textit{supra} note 348, at 62-63 (arguing that "race cannot be easily isolated from lived social experience" and should not be divorced from judicial decisions).

452. Armour, \textit{supra} note 2, at 733 (arguing that under certain circumstances, attorneys should be permitted to make reference to race in arguments to the jury).
Finally, one might argue that because stereotypes based on socially constructed notions of race are so rooted in our psyches, telling jurors not to rely on such stereotypes is unlikely to work. 453 This is the strongest argument against the proposed supplemental jury instruction, and the reason why the limiting instruction should be supplemented with attorney argument and evidence regarding the way stereotypes influence perception and judgment. Recent research by social cognition psychologists indicates that the human brain naturally relies on default assumptions, such as racial and other stereotypes, to make sense of reality. 454 If this is true, stereotypes are likely to influence jurors no matter what they are told. Professor Sheri Lynn Johnson explains:

A second reason [to doubt the efficacy of racial bias jury instructions] is specific to the problem of race and guilt attribution: because the process involved is probably unconscious for most jurors, instructing them to put racial prejudice out of their minds or to ignore the defendant's race in assessing the evidence is unlikely to be productive. Jurors who believe they are fair will not be affected by even the sternest warnings that they must be fair. 455

Nonetheless, there is reason to be hopeful that a limiting instruction might minimize the influence that racial stereotypes might otherwise have on jurors. Recent social science research provides indirect support for the theory that low-prejudiced individuals can disassociate their stereotype-congruent responses from their stereotype-incongruent personal beliefs if race is made salient. These studies suggest that a limiting jury instruction may minimize a juror's reliance on stereotypes in deciding whether a defendant's beliefs and actions were reasonable. 456

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453. See Johnson, supra note 9, at 1679 (opining that Black defendants facing all-White juries would gain little help from such instructions); see also Lawrence, supra note 382, at 322 (arguing that racial discrimination results from, or is influenced by, unconscious racial motivation); Cole, supra note 384, at A1 (noting that wanting to be fair is not necessarily enough to enable one to be fair because of the makeup of the human mind).

454. See HOFSTADTER, supra note 384, at 137 (stating that the "ability to ignore what is very unlikely ... is part of our evolutionary heritage). 455. Johnson, supra note 9, at 1679.

456. In one study, Samuel Gaertner and John Dovidio tested high- and low-prejudiced college women's reactions to a female victim in distress whose race was varied. Samuel L. Gaertner & John F. Dovidio, The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 73-86 (Samuel L. Gaertner & John F. Dovidio eds., 1986). Gaertner and Dovidio found that when the subjects believed there were other people available to help the victim, they helped Black victims much less frequently than White victims. Id.
While these recent social science studies provide some promising indication that limiting instructions such as the proposed supplemental instruction may actually influence outcomes, they do not provide direct evidence that people can disassociate their automatic stereotype-congruent responses from their controlled stereotype-incongruent beliefs. Further social science research, directly testing whether low-prejudiced people can suppress their otherwise automatic stereotype-congruent responses when instructed to do so, is needed. In the meantime, giving jurors in self-defense cases a supplemental instruction informing them not to rely on racial stereotypes would still have symbolic value. Such an instruction would send a strong normative message that racial stereotypes are an inappropriate substitute for a finding of danger. Coming from the court, the instruction would remind jurors to adhere to the principles of fairness and equality which they are sworn to uphold. Jurors, newly cognizant of the ways in which racial stereotypes can influence perception and judgment, would at

at 77. Belief in the presence of a non-racial element differentially influenced the reactions of the women subjects. Id. at 76-77. Gaertner and Dovidio concluded that the results of this study supported the hypothesis that when a racially based response can be rationalized or attributed to factors other than race, even well-intentioned people will discriminate against Blacks. Id. at 85.

In another study, subjects were exposed to either high or low concentrations of Black stereotype-related words in a manner outside their conscious awareness. Patricia Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 7-8 (1989). In an ostensibly unrelated second experiment, subjects read a description of a person whose race was not specified engaging in ambiguously hostile behavior. Id. at 8-12. Both high- and low-prejudiced subjects rated the person’s hostility level higher when subliminally exposed to a high concentration of Black stereotype-related words than when they were exposed to a low concentration of such words. Id. at 10-12.

Devine also tested high- and low-prejudiced White subjects on their ability to inhibit negative stereotype-congruent information and replace such information with thoughts consistent with non-prejudiced values. Id. at 13. First, the subjects were asked to list as many alternate labels as they were aware of for Black Americans. Id. The experimenter told the subjects that she was interested in how people think and talk informally about social groups. Id. They then were asked to list any and all of their own thoughts, flattering or not, in response to the social group Black Americans. Id. Devine found that low-prejudiced subjects listed positive attributes consistent with equality, and high-prejudiced subjects listed negative traits consistent with stereotypes about Black Americans. Id. at 13-14. Devine concluded that when low-prejudiced persons are conscious of stereotypes, they will inhibit their negative stereotype-congruent responses and replace them with thoughts consistent with non-prejudiced values. Id. at 14-15. For a more detailed account of these studies, see generally Armour, supra note 2 (discussing this and other studies examining racial stereotyping).
least try to prevent such influence upon the decision-making process. A limiting instruction would also provide socially conscious jurors with tangible means to check the improper consideration of race by fellow jurors.

C. Toward a Normative Conception of Reasonableness

Jurisdictions utilizing an objective or hybrid subjectivized-objective standard of reasonableness currently employ what I call a positivist model of reasonableness. By positivist, I mean that the model is descriptive rather than normative. Applying a positivist model of reasonableness, legal decisionmakers evaluate the reasonableness of the defendant’s beliefs and actions by trying to determine whether the ordinary reasonable person would have believed and acted the way the defendant did. The reasonable person is a fictional character who is supposed to represent the average American. If most Americans would have had the same fears as the defendant and acted similarly, then the defendant’s use of force is considered reasonable and the defendant will be acquitted on the ground of self-defense or may not even be prosecuted.\textsuperscript{457}

The reasonable person, when defined by reference to the ordinary or average person, suggests a need to consider how most people would have felt or reacted. If the defendant’s beliefs and actions are typical of the beliefs and actions of the average American in the mind of the decisionmaker, the defendant will be acquitted on the ground of self-defense. Reasonableness under a positivist model means typical or common.

A typical or common belief, however, is not necessarily a reasonable belief.\textsuperscript{458} At one time, most Americans believed there was nothing wrong with slavery. The fact that slavery was not only accepted but approved of by most people did not mean that such a belief was reasonable. Reliance on a conception of reasonableness that focuses on what the average American thinks may be problematic in self-defense cases because socially constructed racial images of Blacks and other non-Whites may influence what the average American thinks. The average American might fear a Black man simply because of

\textsuperscript{457} In practice, jurors think of themselves as reasonable people. Therefore, if the jurors decide that they themselves would have believed and acted as the defendant did, they are likely to find that the defendant acted reasonably in self-defense.

\textsuperscript{458} Armour, supra note 12, at 789 (discussing “the fallacy of equating reasonableness with typicality”).
the Black man's race when it is not normatively justified to assume that another person is violent or dangerous based on race.

Interpreting reasonableness as a function of typicality is problematic because it permits racial stereotypes to have too great an influence on juror determinations in self-defense cases. The objective standard of reasonableness as currently constructed is insufficient to guard against such influence. In assessing reasonableness, perhaps something more than typicality ought to be required. To find that a defendant acted reasonably in self-defense, perhaps the jury should find not only that the defendant's beliefs and actions were those of the average person, but that the defendant's beliefs and actions were also normatively justified. Use of a normative standard seems particularly appropriate given the fact that self-defense is generally considered a justification defense rather than an excuse. A finding that the defendant acted in self-defense represents a normative conclusion that the defendant's conduct was the correct thing to do.459 This is not to suggest that the reasonableness standard currently lacks a normative content. When a jury in a self-defense case finds that a defendant acted unreasonably or held unreasonable beliefs, it is also sending a message that the defendant acted culpably. Use of a normative conception of reasonableness in self-defense cases would merely help make explicit the normative content of the reasonableness inquiry.

Use of a normative conception of reasonableness may be novel in the self-defense context, but it is not a radical concept. Courts have used a normative conception of reasonableness in other legal contexts. For example, under Fourth Amendment jurisprudence, a search has taken place if: "first [the defendant] exhibited an actual (or subjective) expectation of privacy, and, second, . . . the expectation [is] one that society is prepared to recognize as reasonable."460 In his concurring opinion,
Justice Harlan used the term “reasonable” to describe what was required for a search under his two-prong test. Justice Stewart, writing for the majority, used the word “justifiable” to describe the privacy Katz expected in the public telephone booth at issue. Subsequent Fourth Amendment opinions have used the terms “reasonable,” “legitimate,” and “justifiable” interchangeably. Joshua Dressler explains why the choice of terms is significant: “To say that a person’s belief is ‘reasonable’ ordinarily means that it is one that a reasonable person in D’s situation would hold. In the privacy context, this would mean that an expectation of privacy is ‘reasonable’ when a reasonable person would not expect her privacy to be invaded.” In other words, under a positivist model of reasonableness, the term “reasonable” is usually a referent for what the reasonable person would expect or believe. Dressler continues:

In contrast, to say that D has a “legitimate” or “justifiable” expectation of privacy is to draw a normative conclusion that she has a right to that expectation. Or, as one court has put it, the privacy protected by the Fourth Amendment under this view “is not the privacy that one reasonably expects but the privacy to which one has a right.”

Use of the terms “legitimate” and “justifiable” to describe the reasonableness of a defendant’s expectation of privacy exemplifies reliance on a normative conception of reasonableness. Dressler explains how the two conceptions of reasonableness (positivist vs. normative) are different in the following hypothetical:

For example, suppose that D commits a crime in a secluded spot in a park during the middle of the night after carefully ascertaining that the area is virtually never frequented at that hour. Based on this information, D expects that her actions will not be observed.

to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.” (citations omitted).

462. Id. at 363.
463. In 1987, twenty years after Katz was decided, Justice Brennan wrote, “Since Katz v. United States, 389 U.S. 347 (1967), this Court has applied the Fourth Amendment whenever ‘the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate’ expectation of privacy’ that has been invaded by government action.” United States v. Dunn, 480 U.S. 294, 315-16 (1987) (Brennan, J., dissenting) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)).
464. JOSHDRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 30[D][3], at 61 (1991).
465. Id. (citing State v. Campbell, 759 P.2d 1040, 1044 (Or. 1988)).
That expectation might be "reasonable" in the sense that a reasonable person would expect to be free from observation.

Nonetheless, if a police officer happens by and observes the criminal conduct, most commentators agree that D's subjective privacy expectation will not be protected. If this is so, it is because D's expectation, although perhaps "reasonable," was "unjustifiable" or "illegitimate." That is, as a normative matter, people have no right to expect privacy if they conduct crime in the open, no matter how unlikely it is that they will be discovered.66

When we say that the police officer’s observation of D’s criminal conduct did not constitute a search within the meaning of the Fourth Amendment, we are resting this legal conclusion upon a normative conception of reasonableness. Even though D may have had an actual (or subjective) expectation of privacy, and even though D's expectation of privacy may have been one that other reasonable people might have had, D's expectation is not one that society is prepared to accept as reasonable because it is not a justifiable or legitimate expectation of privacy.67

In the self-defense context, a positivist model of reasonableness might lead to the conclusion that a defendant's belief that a Black man posed an imminent threat is reasonable if the average American in the same circumstances would have also believed the Black man posed an imminent threat. If, however, the inquiry were shifted from the question whether most Americans would have believed and acted as the defendant did to the question should the defendant's beliefs and actions be regarded as reasonable, meaning legitimate or justifiable (i.e.,

466. Id. 467. Another hypothetical illustrates the difference between positivist and normative conceptions of reasonableness:

[Suppose that D lives in a high-crime area in which burglaries are very common. As a matter of foreseeability, it might be unreasonable for D to expect privacy in her home. As a normative matter, however, a court could readily conclude that a person living in such an environment may "legitimately" or "justifiably" expect privacy. Id. From a positivist standpoint, D's expectation of privacy in her home is not reasonable. Because burglaries are very common in D's neighborhood, D's expectation of privacy in her home is not truly likely to be shattered if her home is burglarized. Given the high rate of crime in the neighborhood, it is only a matter of time before D's home is burglarized. Arguably, an ordinary person in D's position would not expect privacy in her home because of the burglary statistics. Nonetheless, most of us would maintain that D's expectation of privacy in her home is reasonable from a normative standpoint because D should be able to have privacy in her home. In other words, to say D's expectation of privacy is reasonable from a normative standpoint is to say that D's expectation of privacy is legitimate or justifiable.
from a positivist to a normative model of reasonableness), jurors might conclude that the defendant did not act reasonably in self-defense.

One problem with replacing or supplementing the positivist model of reasonableness with a normative model is the potential conflation of the positive and normative standards. If jurors feel that the defendant acted as a typical person would have acted, they may also conclude that the defendant acted as she should have acted. While conflation is a troubling possibility, it highlights why perhaps a normative model of reasonableness should be employed. Unless jurors are explicitly instructed that they should consider whether the defendant's beliefs and actions were normatively justified, they may continue to equate reasonableness with typicality.

Another difficulty with a normative conception of reasonableness is that the scope of the normative standard is almost by definition amorphous. It is difficult to define ex ante what constitutes reasonableness from a normative perspective. Whether a defendant's actions are normatively reasonable will depend in part on where the crime occurred, who is deciding the question, and the facts of the specific case.

These problems suggest that while it is important to recognize the normative nature of the reasonableness inquiry, doing so by supplementing the positivist model of reasonableness with a normative model may not be advisable at this time. A full discussion of this idea is beyond the scope of this Article but provides fertile ground for future inquiry.

CONCLUSION

The ferreting out of racial bias in the criminal justice system whether willful or unintentional, occasional or routine, should be a priority in a civilized and just society. . . . The focus should be on how to discover and eliminate racial bias in the criminal justice system, wherever and whenever it exists.

— Angela Davis

This Article has examined how racial stereotypes about Blacks, Asian Americans, and Latinos might influence the reasonableness determination in self-defense cases, causing legal decisionmakers to perceive a defendant's use of force against a victim of color as reasonable when they might perceive the

same acts as unreasonable if the victim were White. The cases discussed in Part II provide some evidence suggesting that stereotypes about Blacks as criminals, Asians as foreigners and martial artists, and Latinos as immigrants and gang members, may affect the ability of legal decisionmakers, from prosecutors to jurors, to decide issues of reasonableness fairly and impartially.

Questions about the influence of race on self-defense cases constitute a microcosm of larger questions regarding race and the criminal justice system. Even if it cannot be conclusively proven that racial stereotyping influences jury decision-making, the appearance of racial bias undermines respect for the criminal justice system. Efforts to minimize the influence of racial stereotypes, especially if the costs of such efforts are low, can and should be made if we wish to remain true to our ideals of fairness and equality.