

2024

## Self-Defense and Political Rage

Erin L. Sheley  
*California Western School of Law, ESheley@cwsl.edu*

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/fs>



Part of the [Courts Commons](#), and the [Law and Politics Commons](#)

---

### Recommended Citation

Erin L. Sheley, *Self-Defense and Political Rage*, 11 Tex. A&M L. Rev. 591 (2024).  
Available at: <https://scholarlycommons.law.cwsl.edu/fs/448>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu), [chirsch@cwsl.edu](mailto:chirsch@cwsl.edu).

# SELF-DEFENSE AND POLITICAL RAGE

by: Erin Sheley\*

## ABSTRACT

*This Article considers how American political polarization and the substantive issues driving it raise unique challenges for adjudicating self-defense claims in contexts of political protest. We live in an age where roughly a quarter of the population believes it is at least sometimes justifiable to use violence in defense of political positions, making political partisans somewhat more likely to pose a genuine threat of bodily harm to opponents. Furthermore, the psychological literature shows that people are more likely to perceive threats from people with whom they politically disagree and that juries tend to evaluate reasonableness claims according to their own political positions. All three of these phenomena create challenges for the rule of law due to the increased risk that factually similar cases will turn out differently and that the justice system will merely recreate the monomaniacal, us-versus-them polarization of society at large. This Article surveys the relevant political science and psychological literature on partisanship and reasoning and proposes two interrelated solutions: one pragmatic, at the level of individual trials, and the other cultural, at the level of social discourse. It suggests that judges import what we know about the distortive effects of partisanship into the courtroom through the use of court-appointed psychological experts and jury instructions. Both have shown some success—if tailored precisely to the facts of a specific case—in correcting some forms of juror bias and reasoning errors. This Article further argues that incorporating these processes into the adjudication of politicized self-defense claims will have a broader, expressive value for society as a whole. Trials provide a model for truth-finding, which, for better or for worse, impacts how private citizens evaluate culpability in their day-to-day lives. If trials draw even some people's attention to the ways in which partisan thinking can generate or justify acts of violence, they may be a force for moderation in how people deal with their political disagreements, which will have benefits far beyond the courtroom.*

## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	592
II. THE DOCTRINE OF SELF-DEFENSE . . . . .	598
A. <i>The Core Elements of Self-Defense</i> . . . . .	599
B. <i>Limitations on the Use of Self-Defense</i> . . . . .	601
1. Initial Aggressors . . . . .	602
2. Duty to Retreat . . . . .	603
C. <i>The Theoretical Basis for Self-Defense</i> . . . . .	603
1. Self-Defense as Justification. . . . .	604

---

DOI: <https://doi.org/10.37419/LR.V11.I3.4>

\* Professor, California Western School of Law. Many thanks to Susan Bisom-Rapp, Miranda Fleischer, Paul Gudel, Kenneth Klein, Rafi Reznik, Sam Savage, Moin Yahya, and Daniel Yeager for their very helpful feedback on this project, as well as to the faculty of California Western School of Law for their valuable comments during a paper workshop.

2. Self-Defense as Excuse . . . . .	606
D. <i>Doctrinal Controversies in Self-Defense</i> . . . . .	608
1. The Imminence Requirement . . . . .	608
2. Honesty Versus Reasonableness of Belief . . . . .	611
3. Availability to Aggressors . . . . .	614
4. “Stand Your Ground” Laws . . . . .	615
E. <i>A Choice of Frameworks</i> . . . . .	616
III. POLITICAL POLARIZATION AND THE PUBLIC . . . . .	617
A. <i>Trends in Partisanship</i> . . . . .	617
B. <i>Partisanship and the Threat of Violence Around Political Discourse</i> . . . . .	621
C. <i>Bodily Violence as Political Discourse</i> . . . . .	623
IV. POLITICAL DECISION-MAKING AND THE MIND . . . . .	628
A. <i>The Negative Effects of Partisanship on Decision-Making</i> . . . . .	628
B. <i>Reason and Emotionality</i> . . . . .	631
C. <i>Emotion and Political Movements</i> . . . . .	633
V. POLITICIZED SELF-DEFENSE LAW . . . . .	635
A. <i>The Victim’s Likelihood of Posing a Legitimate Threat to the Defender and the Defender’s Likelihood of Overestimating that Threat</i> . . . . .	635
B. <i>Whether and When the Defender’s Own Conduct Should Exclude Him as an Initial Aggressor</i> . . . . .	637
C. <i>The Jurors’ Political Views Distorting Their Determinations of Reasonableness</i> . . . . .	639
VI. MODEST PROPOSALS FOR THE PATH FORWARD . . . . .	640
A. <i>Shedding Light on Political Partisanship in the Courtroom</i> . . . . .	642
1. Expert Testimony . . . . .	643
2. Jury Instructions . . . . .	645
B. <i>The Expressive Benefits of Legal Practice</i> . . . . .	651
VII. CONCLUSION . . . . .	652

## I. INTRODUCTION

On September 26, 2020, a group of Black Lives Matter (“BLM”) activists gathered in the parking lot of the Yorba Linda, California, public library to protest against police violence.<sup>1</sup> Directly across Imperial Highway, a group of counter-protestors gathered in the parking lot of a Mimi’s Cafe.<sup>2</sup> They carried large Trump banners, American flags, and at

1. See Sean Emery, *Black Lives Matter Activist from Long Beach Once Again Ordered to Face Trial for Driving Through Yorba Linda Crowd*, ORANGE CNTY. REG., <https://www.ocregister.com/2022/01/12/black-lives-matter-activist-from-long-beach-once-again-ordered-to-face-trial-for-driving-through-yorba-linda-crowd/> [https://perma.cc/C2EE-SHYQ] (Jan. 13, 2022, 12:31 PM).

2. *Id.*

least one handwritten sign with the slogan “Black Behavior Matters.”<sup>3</sup> Eventually, the Trump supporters crossed the highway to confront the BLM supporters, resulting in a clash of pushing and shoving, which deputies were unable to quickly break up.<sup>4</sup> Amidst the chaos, BLM activist Tatiana Turner, president of the organization Caravan 4 Justice, got into her Nissan Sentra, which was surrounded by a crowd of more than 12 screaming Trump supporters.<sup>5</sup> She accelerated, slammed on her breaks, and accelerated again, running over a woman’s head and a man’s leg.<sup>6</sup> Turner will stand trial for attempted murder, mayhem, and assault with a deadly weapon and is expected to argue self-defense.<sup>7</sup>

Just the day before, about an hour away on the I-5, a similar but inverted scene played out in Hollywood.<sup>8</sup> A group of BLM protestors gathered on Sunset Boulevard to protest the dismissal of charges against the Louisville police officers who had shot 26-year-old Breonna Taylor dead in her home after executing an erroneous warrant.<sup>9</sup> In this case, it was a BLM supporter who was struck: after crowds of protestors surrounded a pickup truck, the driver suddenly accelerated and rammed her, sending her flying through the air and landing on her back.<sup>10</sup> The impact fractured the woman’s skull.<sup>11</sup> The driver, who was not arrested at the time, told police he feared for his life, and some witnesses reported that protestors “began beating his vehicle with sticks and tried to open the door to his vehicle.”<sup>12</sup> It does not appear, from the absence of further media reports, that he faced legal consequences for his actions.

While less deadly than the more infamous episode of Kyle Rittenhouse, who shot two Wisconsin BLM protestors to death with an illegal assault rifle in August 2020,<sup>13</sup> these vehicular protest clashes are more common and appear to be on the rise.<sup>14</sup> Like the Rittenhouse

---

3. See KCAL News, *Driver Arrested After 2 People Were Struck by Vehicle During Yorba Linda Protests*, YOUTUBE (Sept. 27, 2020), [https://www.youtube.com/watch?v=Tud6sbGKN9w&ab\\_channel=CBSLosAngeles/](https://www.youtube.com/watch?v=Tud6sbGKN9w&ab_channel=CBSLosAngeles/) [https://perma.cc/T78E-L7XG].

4. Emery, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. See Kevin Rector & Leila Miller, *Protestors Recount Moment Hollywood Driver ‘Floored It,’ Striking Woman*, L.A. TIMES (Sept. 25, 2020, 4:32 PM), <https://www.latimes.com/california/story/2020-09-25/protesters-recount-harrowing-moment> [https://perma.cc/MLS4-HPBW].

9. *Id.*

10. See KCAL News, *supra* note 3.

11. See *id.*

12. See Rector & Miller, *supra* note 8.

13. Becky Sullivan, *Kyle Rittenhouse Is Acquitted of All Charges in the Trial over Killing 2 in Kenosha*, NAT’L PUB. RADIO (Nov. 19, 2021, 5:53 PM), <https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict> [https://perma.cc/LGB2-78RA].

14. See Hannah Allam, *Vehicle Attacks Rise as Extremists Target Protestors*, NAT’L PUB. RADIO (June 21, 2020, 7:01 AM), <https://www.npr.org/2020/06/21/880963592/vehicle-attacks-rise-as-extremists-target-protesters> [https://perma.cc/CG5P-76F5].

case, which ended in a not-guilty verdict, they raise a challenging question: under what circumstances should self-defense claims be successful in the heated crucible of political protest? Along with a shared legal significance, these vehicular episodes both arose within a political context that is strangely self-referential: the protests are at least in part *about* self-defense in the first place. BLM activists protest the devaluation of human life on the part of police officers who claim self-defense in shooting unarmed black citizens.<sup>15</sup> Counter-protestors focus, in some cases, on the danger to police officers' lives presented by criminal violence, and in others, such as Rittenhouse's, on the dangers to human life and autonomy posed by protests themselves.<sup>16</sup>

It is important to note at the outset that, fortunately, episodes of violence amidst political protest remain relatively rare, even in the current national mood of escalation. The Armed Conflict Location and Event Data Project ("ACLED"), which collects global data on protest and political violence, has found that 93% of BLM protests in 2020 were peaceful.<sup>17</sup> In a study of right-wing political protests during a similar period of time, ACLED found that where no armed militias were present, 97% of protests were peaceful, and even where such militias were present, 88% were peaceful.<sup>18</sup> While those numbers urge against over-catastrophizing the situation, the increase in automobile violence and, in particular, the events of January 6, 2021, well-illustrate the problem in the violent minority of cases. Perhaps even more alarmingly, some states appear officially to be *encouraging* some forms of political violence: Florida, Iowa, and Oklahoma have made it legal to run over protestors whose behavior meets some (oft-vague) definition of "rioting."<sup>19</sup>

This Article considers how American political polarization and the substantive issues driving it raise unique challenges for adjudicating self-defense claims. It also argues that while legal rules and trial

---

15. See *infra* Section III.C and supporting notes.

16. *Id.*

17. Roudabeh Kishi & Sam Jones, *Demonstrations and Political Violence in America: New Data for Summer 2020*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT (Sept. 3, 2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/> [<https://perma.cc/P48X-PWCN>].

18. Roudabeh Kishi et al., *The Future of 'Stop the Steal': Post-Election Trajectories for Right-Wing Mobilization in the United States*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT (Dec. 10, 2020), <https://acleddata.com/2020/12/10/the-future-of-stop-the-steal-post-election-trajectories-for-right-wing-mobilization-in-the-us/> [<https://perma.cc/PCQ3-CJYM>]. It should be noted that, despite the apparently comparable levels of violence as between left- and right-wing protests, police were three times as likely during that time to break up a left-wing protest versus a right-wing one. See Lois Beckett, *U.S. Police Three Times as Likely to Use Force Against Leftwing Protestors, Data Finds*, GUARDIAN (Jan. 14, 2021, 1:00 PM), <https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right> [<https://perma.cc/5VNB-XGE6>].

19. See Nancy C. Marcus, *When "Riot" Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws*, 60 AM. CRIM. L. REV. 281, 300 (2023).

outcomes can only play one small part in a vast political landscape, jurists and lawmakers have an obligation to attend to the messages the law sends in self-defense cases. It may be tempting, at a time when the nation remains divided over issues of such intense importance, for activists, jurors, and even lawyers to blur the purported moral justification for holding or opposing a particular substantive belief with the question of whether physical force is justifiable while expressing it. This would be a very dangerous slippage—the legal system treating like cases differently constitutes a failure of the rule of law. When the law loses moral credibility in the eyes of the governed, the result is a widespread refusal to obey its dictates altogether.<sup>20</sup>

The judicial system's success or failure at neutrally processing politicized self-defense claims sends a message to regular citizens as they participate in the intractable narratives of political conflict that have left us rhetorically and, in many cases, literally armed against one another. At the same time, however, the content and emotional effects of political messages can, in fact, be objectively relevant to whether a particular speaker presents a physical danger to a listener (and vice versa). It would, therefore, be a mistake to ignore the potential legal relevance of political emotion in violent conflicts to juries' evaluation of them. This Article attempts to balance these competing concerns.

The elements of self-defense vary across jurisdictions, but most versions share some in common. Generally, a defender must show that they reasonably feared imminent death or bodily harm due to the victim's threat of unlawful force and that their responsive force was reasonably necessary to defend against it.<sup>21</sup> The task of determining what constitutes a "reasonable" belief in the existence of a threat and the degree of force necessary to respond to it is famously contingent on the personal perspectives of the factfinder.<sup>22</sup> While this is true of all reasonable person standards where they appear across the law,<sup>23</sup> self-defense claims have always raised particular problems of ideological bias.<sup>24</sup>

In the first place, even jurists and criminal law scholars cannot agree on the theoretical basis for self-defense—whether it is a justification or an excuse<sup>25</sup> or whether it should rest on consequentialist grounds or on

---

20. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 484–85 (1997).

21. *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973).

22. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–88 (1994).

23. See Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 769 (2001).

24. See Mark Kelman, *Reasonable Evidence of Reasonableness*, in *QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES* 169–70 (James Chandler et al. eds., 1994).

25. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 235–36 (1982); see also Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999–1000 (2005).

the respective rights of the defender and the victim.<sup>26</sup> Those core disagreements may render it nearly epistemologically impossible ever to identify universally “correct” answers to specific fact patterns. Beyond that, research shows that the political perspectives of lay decision-makers heavily impact their views of what is reasonable. Using a typical classroom debate about the notorious Bernie Goetz (who claimed self-defense after shooting a group of unarmed black teens on the New York subway) or about a so-called “battered woman” case, Mark Kelman shows how the purportedly factual issues raised (such as the risk of danger posed by the victim, the adequacy of relying on alternatives to force, etc.) can never be “uncontroversially verified nor falsified.”<sup>27</sup> As a result, he concludes, the position a factfinder takes on the self-defense claim must reflect their own distinct social understanding.<sup>28</sup>

In 2008, Dan Kahan and Donald Braman conducted a study that empirically supported Kelman’s claim.<sup>29</sup> Using vignettes based on the Goetz case and a “battered woman” scenario in which a defendant shoots her sleeping abuser, they posed to their subjects a battery of questions intended to assess the relationship between their perceptions of key facts, their positions on the appropriate results in the cases, and their values, political leanings, and other individual characteristics.<sup>30</sup> The results proved their hypothesis: subjects who identified themselves as “conservatives” or “Republicans” were significantly more likely to convict the battered woman defendant and to acquit in the Goetz scenario than those subjects who identified as “liberals” or “Democrats.”<sup>31</sup> Furthermore, white subjects were significantly more likely to acquit in the Goetz hypo than were black respondents, and men were more likely than women to convict in the battered woman hypo.<sup>32</sup> Kahan and Braman’s data also suggests that jurors, as well as the citizens who react to their decisions, engage in a form of “psychic self-defense” to interpret the facts of a particular case in a way that affirms their group norms.<sup>33</sup> Despite labeling this phenomenon “self-defensive cognition,” Kahan and Braman argue that citizens aren’t actively *ignoring* facts that contravene their group commitments but, rather, “*deriving* the facts from their commitments.”<sup>34</sup> The result is cultural polarization about the outcomes of self-defense cases despite factfinders’ “good-faith intentions to judge them in a nonpartisan fashion.”<sup>35</sup>

---

26. Kelman, *supra* note 24, at 186.

27. *Id.* at 188.

28. *Id.*

29. Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*,

45 AM. CRIM. L. REV. 1, 4 (2008).

30. *Id.* at 21–22.

31. *Id.* at 34.

32. *Id.* at 35.

33. *Id.* at 4.

34. *Id.*

35. *Id.*

This Article argues that today's political landscape creates a risk that, in ideologically charged protest environments, decision-making about self-defense—by both the defenders engaging in it and the jurors convicting or acquitting—may no longer even be possible in “good faith.” Rather, the new social science data on polarization suggests that partisan decision-makers may actively perceive violence against political opponents as an objective good,<sup>36</sup> rendering perceptions about reasonableness consciously rather than unconsciously content-based. To some extent, this problem may be intractable, requiring solutions beyond the sphere of law and procedure. Indeed, “reasonable” minds may even disagree as to whether this new state of affairs is, in fact, a problem or whether overt political decision-making is in some ways preferable to unconscious bias masquerading as impartial justice. Nonetheless, in a system that aspires to treat parties as equal under the laws, it is crucially important to begin the conversation about how our system should acknowledge the cultural reality of the day.

Part II of this Article lays out the history and structure of self-defense, including its theoretical justifications and the most common doctrinal disputes about its individual elements and statutory variations. It argues that rather than debating whether self-defense should be understood as a justification or an excuse, we should focus on the complex relationship between the individual and public goods at stake in any episode of violent conflict. Part III focuses on the contemporary public at large, surveying the literature on our current moment of political polarization in the United States. It shows how, more than ever in the past half-century, Americans are not only more ideologically divided but also more willing to actively support physical violence to achieve political goals against perceived ideological enemies. The Article then provides a brief narrative analysis of our most divisive current political debates to show how both sides consider them to implicate the threat of bodily assault. Part IV turns to the internal relationship between politics and the individual thinking mind. First, it reviews the psychological literature on how partisanship creates cognitive biases that may distort decision-making. Then, it describes what we know about how emotionality impacts moral decision-making in both positive and negative ways, with implications for emotionally laden political sentiments. This Part also shows the generative effect of individual human emotionality in creating positive political change, which makes clear the risk of oversimplifying the effects of partisanship on justice.

Part V applies the literature discussed in Parts III and IV to the specific legal context of politicized self-defense. This Part explains the potential for partisan thinking to complicate the already-thorny decisions individual actors must make in choosing to use force to defend themselves, and juries must make in determining whether such force is

---

36. See sources cited *infra* notes 191–205.



“reasonable.” It argues that, beyond the age-old problems of ideological bias affecting such decisions at the subconscious level, people are now more prone to *consciously* view ideological disagreement as both actively dangerous and potentially justificatory. This Part discusses the challenges these biases create for even-handedly adjudicating various self-defense problems arising in the context of political rage.

Part VI proposes some modest solutions both at the level of the individual trial and at the broader level of cultural debate. It suggests that we import what we know about the distortive effects of partisanship into the courtroom through the use of court-appointed psychological experts and well-tailored jury instructions. Borrowing from other evidentiary contexts in which such measures have had success in achieving greater jury accuracy, this Part also provides some model instructions and examples of expert testimony. Finally, it argues that incorporating these processes into the adjudication of politicized self-defense claims will have a broader, expressive value for society as a whole. Trials provide a model for truth-finding, which, for better or for worse, may impact how private citizens evaluate culpability in their day-to-day lives. If trials draw even some people’s attention to the ways in which partisan thinking can generate or justify acts of violence, they may be a force for moderation in how people deal with their political disagreements.

## II. THE DOCTRINE OF SELF-DEFENSE

According to Pollock and Maitland in their *History of English Law*, thirteenth-century law allowed only a very narrow affirmative self-defense claim, generally in cases where the defender was actually assisting in a lawful arrest.<sup>37</sup> They note that influential thirteenth-century treatise writer Henry de Bracton “would allow a man to slay a house-breaker, if to do so was a necessary act of self-defence,” but that the only case he cited for that principle involved a pardon by the king after a guilty verdict.<sup>38</sup> It seems, indeed, that the law of self-defense developed initially through royal pardon; the patent rolls of Henry III contain many instances of parties lawfully convicted for homicide but then pardoned on the grounds of having acted in self-defense.<sup>39</sup> It is difficult to discern exactly what sorts of acts constituted self-defense under this pardon system because, as Pollock and Maitland note, “all depended

---

37. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 501 (Liberty Fund 2010) (1898) (noting that “[o]ne such case is the execution of a lawful sentence of death” and that another “is the slaying of an outlaw or a hand-having thief or other manifest felon who resists capture”).

38. *Id.*

39. For example, one pardon noted that “William King killed Ralph de le Grave in self-defence and not of malice aforethought, for that the said Ralph ran upon a lance that William was holding . . .” *Id.* at 503.

upon the king's 'grace.'"<sup>40</sup> Based on their review of the patent rolls, they guess that the limits of the claim "were somewhat wide and that a man might 'without felony' slay in defence of his own life or that of his wife or of his lord or of any member of his household . . . ."<sup>41</sup>

By the eighteenth century, self-defense had moved out of the discretionary sphere of royal pardon into the common law itself. Blackstone characterized eighteenth-century English law as allowing the defense based on the following principles:

[I]f the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another.<sup>42</sup>

Of the two theoretical bases Blackstone notes, the second—the consequentialist goal of preventing unlawful violence against the defender—tracks with a major modern utilitarian basis for self-defense as a justification, to be discussed in Section I.C below. The first, however—the "passions of the human mind" in the face of aggression—sounds more like the basis for an excuse defense like provocation insofar as it highlights, instead of the desirability of the killing, the relativity of the defender.<sup>43</sup> This thread in the theoretical history of the defense will become relevant later as we consider it in its contemporary sociological context.<sup>44</sup> For now, we turn to its formal elements as they have developed in the modern era.

### A. *The Core Elements of Self-Defense*

There is a fairly wide variation between common law self-defense, the versions adopted by the penal codes of the various states, and the version embodied in Model Penal Code ("MPC") § 3.04. This Section presents these variations and highlights their key differences,

---

40. *Id.* at 508.

41. *Id.* at 507–08.

42. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Oxford Univ. Press 2016) (1765–69, 1783).

43. At common law, the provocation defense reduces murder to manslaughter in cases where the killing occurred "in the heat of passion" and "before there had been a reasonable opportunity for the passion to cool." *Girouard v. State*, 583 A.2d 718, 721 (Md. 1991).

44. See *infra* Section V.C.

leaving nuanced normative comparisons to Section II.D. At common law, self-defense required the following:

- that the victim threatens to use *unlawful* force against the defender;<sup>45</sup>
- that the defender faces *imminent* peril of death;<sup>46</sup>
- that the defender's responsive force is *necessary*<sup>47</sup> (construed to require *proportionality* between the harm threatened and the degree of responsive force<sup>48</sup>); and
- that the defendant's *belief* in the necessity of the responsive force is both *honest* and *reasonable*.<sup>49</sup>

The drafters of the MPC have altered the common law of self-defense in several ways. Under the MPC, self-defense requires the following:

- that the defendant believes the victim threatens to use *unlawful force* against the defender;<sup>50</sup>
- that the defender believes their responsive force is *immediately necessary* to protect themselves;<sup>51</sup>
- that the defender may only use *deadly force* to defend against *death, serious bodily harm, kidnapping, or involuntary sexual intercourse*;<sup>52</sup> and
- that the defender's belief in the necessity of the responsive force is *honest*.<sup>53</sup>

Both versions require that the victim have threatened unlawful force against the defender, yet differ in several other key respects. In the first place, the MPC does not require that a defender's belief in the necessity of the responsive force be reasonable, only that it be honest (a loosening rejected by most U.S. jurisdictions).<sup>54</sup> Furthermore, while both approaches require "necessity," implicating some form of proportionality requirement, the common law seems to require that the defender show a pure eye-for-an-eye equivalence between the harm threatened and the responsive deadly force applied (meaning, for example, that A could not use deadly force against B, even if B was threatening to

---

45. *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

46. *Id.* at 1230.

47. *Id.*

48. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 535 (9th ed. 2022) (explaining proportionality as a requirement of self-defense in addition to the general principles stated in *United States v. Peterson*).

49. *Peterson*, 483 F.2d at 1230.

50. MODEL PENAL CODE § 3.04(1) (AM. L. INST. 1985).

51. *Id.*

52. *Id.* § 3.04(2)(b).

53. *Id.* § 3.04 cmt. 2(b).

54. *Id.* Most U.S. jurisdictions, unlike England, have a reasonableness requirement as well as an honesty requirement. See T. Markus Funk & Eugene Volokh, *U.S. Self-Defense Law—'Harsh' by International Standards?*, BLOOMBERG L. (Mar. 10, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/u-s-self-defense-law-harsh-by-international-standards> [<https://perma.cc/GJ5Q-DZ32>].

blind A).<sup>55</sup> The MPC, along with most U.S. jurisdictions, has softened this requirement while nonetheless specifying that a defender may only use *deadly force* in cases where they are being threatened with some sort of *serious* bodily harm<sup>56</sup> or, in the rare jurisdiction, a serious felony.<sup>57</sup> Finally, where the common law requires that a threatened harm be “imminent”—or soon-to-happen—the MPC requires instead that the harm be “immediately necessary.”<sup>58</sup>

We will discuss the interpretive problems raised by the imminence requirement in Section II.D below, but for now it is worth noting that the comments to the MPC describe this last change from the common law as allowing self-defense in cases where an actor believes that his defensive action is, itself, “immediately necessary,” and that “the unlawful force against which he defends [is] force that he apprehends will be used on the present occasion, but he need not apprehend that it will be used immediately.”<sup>59</sup> The comments clarify, for example, that:

There would . . . be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given a belief that it is necessary to disable him to prevent an attack by overwhelming numbers—so long as the attack is apprehended on the “present occasion.” The latter words are used in preference to “imminent” or “immediate” to introduce the necessary latitude for the attainment of a just result in cases of this kind.<sup>60</sup>

A few jurisdictions have used the MPC approach,<sup>61</sup> but most states retain something like the common law imminence requirement, distinct from the necessity requirement.<sup>62</sup>

### B. *Limitations on the Use of Self-Defense*

Some of the most controversial aspects of self-defense law involve the circumstances under which it is available to initial aggressors and

---

55. See DRESSLER & GARVEY, *supra* note 48, at 532, 535.

56. *Id.* at 532.

57. See OR. REV. STAT. § 161.219(2) (2021) (including burglary); N.Y. PENAL LAW § 35.15(2)(b) (McKinney 2004) (including kidnapping, forcible rape, forcible criminal sexual acts, and robbery); N.H. REV. STAT. ANN. § 627:4(II)(b)–(c) (2011) (including burglary, kidnapping, and forcible sex offenses); TEX. PENAL CODE ANN. § 9.32(a)(2)(B) (including aggravated kidnapping, sexual assault, aggravated sexual assault, robbery, and aggravated robbery).

58. *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973); MODEL PENAL CODE § 3.04(1).

59. MODEL PENAL CODE § 3.04 cmt. 2(c).

60. *Id.*

61. See, e.g., ARIZ. REV. STAT. ANN. § 13-404 (1978); DEL. CODE ANN. tit. 11, § 464 (West 2021); HAW. REV. STAT. ANN. § 703-304 (West 2001); NEB. REV. STAT. § 28-1409 (1972); N.J. STAT. ANN. § 2C:3-4 (West 1999); 18 PA. CONS. STAT. § 505(a) (2011); TEX. PENAL CODE ANN. § 9.31(a).

62. See Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1530 n.12 (2019) (collecting statutory authority showing that the majority of the 50 states eschew the MPC approach to imminence).

whether there is a duty to retreat before applying force. This Part will, like the last, simply summarize the most common doctrinal variations on these two questions, leaving the most analytical comparison to Section II.D.

### 1. Initial Aggressors

At common law, aggressors could not use self-defense unless they explicitly called off hostilities, even if their victim had increased the amount of responsive force above that which the aggressor originally threatened.<sup>63</sup> In other words, a disproportionate use of responsive force by a victim could not convert an aggressor into a lawful defender. While all U.S. states observe some version of the initial aggressor rule, the form it takes varies, and many states are generally less harsh than the common law.<sup>64</sup> Some states, for example, do not actually preclude initial aggressors from claiming self-defense but instead simply impose on them a duty to retreat, which a nonaggressor would not have had.<sup>65</sup> Others bar aggressors from claiming self-defense but make initial aggressor status hard to prove (for example, “many states require proof that the defendant intended to provoke the victim into attacking the defendant so the defendant could counterattack and claim self-defense,” while “[o]thers require proof that the defendant was engaging in unlawful conduct before the defendant forfeits the right to claim self-defense”).<sup>66</sup> Furthermore, as Cynthia Lee notes, “there are no clear rules regarding whether and when an initial aggressor instruction must be given to the jury” because it is not a standard part of the self-defense instruction.<sup>67</sup> A judge may simply not give the instruction even when the facts support that the defendant was the one who started the hostilities.<sup>68</sup>

The MPC has a more nuanced approach to the initial aggressor rule. Aggressors may use self-defense if their victim responds to their non-deadly force with deadly force.<sup>69</sup> (This is the consequence of the initial victim’s responsive force having itself become “unlawful” under § 3.04(1) due to being excessive relative to the aggressor’s force.)<sup>70</sup> However, aggressors who have, themselves, threatened death or serious bodily harm remain barred from claiming self-defense.<sup>71</sup>

---

63. *United States v. Peterson*, 483 F.2d 1222, 1237 (D.C. Cir. 1973) (“The right of self-defense, we have said, cannot be claimed by the aggressor in an affray so long as he retains that unmitigated role.”).

64. See Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1, 7–8 (2022) (stating that all states have an initial aggressor rule).

65. *Id.*

66. *Id.* at 8.

67. *Id.* at 9.

68. *Id.*

69. MODEL PENAL CODE § 3.04(4) (AM. L. INST. 1985).

70. *Id.*

71. *Id.* § 3.04(2)(b)(i).

## 2. Duty to Retreat

At common law, a putative defender's failure to retreat from a conflict barred the self-defense claim unless: (1) there was no possibility of safely retreating or (2) the conflict occurred in the defender's own home.<sup>72</sup> (The latter exception has famously become referred to as the "castle doctrine," premised on the maxim that "a man's home is his castle."<sup>73</sup>) The majority of states have departed significantly from the common law on this point adopting some form of what has become known as a "Stand Your Ground" law.<sup>74</sup> In the 36 states with such laws, a defender has no duty to retreat if they are not the aggressor and if they are in a place in which they have a legal right to be.<sup>75</sup> A minority of states—and the MPC—follow some version of the common law.<sup>76</sup> The MPC, for example, provides that a failure to retreat bars a self-defense claim unless: (1) there is no possibility of safely retreating or (2) the conflict occurs in the defender's own home *or* place of work.<sup>77</sup>

### C. *The Theoretical Basis for Self-Defense*

Given both the ancient roots and conflicting doctrinal offshoots of self-defense, legal theorists and philosophers have, unsurprisingly, developed a rich literature around the moral justifications for the defense. Some of that discourse has been directed at the question of whether self-defense is a *justification* for violence against an aggressor or whether it simply *excuses* such violence. Other scholars ask *how* and *under what circumstances* self-defense justifies or excuses. While this Article does not attempt to advance or dismantle any comprehensive moral theory of self-defense, the sociological and enforcement questions the Article raises look different depending on what purposes the law wants self-defense to serve. This Part will, therefore, briefly review the literature on the nature of self-defense and its moral underpinnings, revealing a persistently fractured, contested understanding of the doctrine among experts.

To start at the beginning, the standard account of common law defenses typically considers both excuses and justifications to be grounded in some sort of moral logic, as distinct from policy-based

---

72. See *United States v. Peterson*, 483 F.2d 1222, 1235–36 (D.C. Cir. 1973). *But see* *State v. Abbott*, 174 A.2d 881, 885 (N.J. 1961) (holding that the issue of retreat "arises only if the defendant resorted to a deadly force" and emphasizing that "[o]ne who is wrongfully attacked need not risk injury by retreating, even though he could escape with something less than serious bodily injury" because "[i]t would be unreal to require nice calculations as to the amount of hurt, or to ask him to endure any at all").

73. *Peterson*, 483 F.2d at 1236.

74. DRESSLER & GARVEY, *supra* note 48, at 534.

75. *Id.*

76. See *id.*; MODEL PENAL CODE § 3.04(2)(b).

77. *Id.* § 3.04(2)(b)(ii)(A).

defenses such as statutes of limitations.<sup>78</sup> At the level of ethics, the standard philosophical account holds that a justified action is not in and of itself morally wrongful, whereas an excused action is wrongful conduct for which the individual actor is not morally “blameworthy.”<sup>79</sup> Correspondingly, in legal theory, the standard account holds that “[a] defense is a justification if it renders the actor’s conduct not morally wrongful, whereas it is an excuse if it renders morally wrongful conduct not blameworthy.”<sup>80</sup> Because justifications are based on the rightness of the act, some describe them as universal, whereas excuses, based on the situation of the actor, are “personal.”<sup>81</sup>

Mitchell Berman has shown that legal justifications and excuses need not and do not always track with their moral counterparts, asserting that what legal theory mistakes for conceptual analysis may simply be a debate over policy broadly conceived.<sup>82</sup> Because of its direct implications for self-defense in political contexts, we will return to this powerful critique of the standard theoretical taxonomy at the end of this Part. It is worth noting that Berman’s dichotomy supports the idea that substantive political disagreements between parties might form part of a purported defender’s *moral* justification for an act of violence while failing to provide a *legal* justification. For now, however, the justification/excuse dichotomy provides a useful organizational framework within which to consider the various motivations for self-defense doctrine.

### 1. Self-Defense as Justification

In one familiar formulation, a justification defense arises in cases where, while “[t]he harm caused by the justified behavior remains a legally recognized harm which is to be avoided whenever possible,” nonetheless, due to particular circumstances, “that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.”<sup>83</sup> The majority position in modern jurisprudence holds self-defense to be “a necessary specialized subclass of general justification that properly accounts for the aggressive conduct of the attacker when weighing the propriety of taking the attacker’s life for the protection of the defendant.”<sup>84</sup> It is clear from this description that there

---

78. Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 7 (2003).

79. *Id.*

80. *Id.* at 8.

81. Kimberly Kessler Ferzan, *Justification and Excuse*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 239, 241 (John Deigh & David Dolinko eds., 2011).

82. Berman, *supra* note 78, at 47; *see also* Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 263 (2008) (arguing, due to the uncertain moral underpinning of self-defense, for a more political understanding of the claim accounting for its narrative role in our society).

83. *See* Robinson, *supra* note 25, at 213; *see also* WHITLEY R. P. KAUFMAN, JUSTIFIED KILLING: THE PARADOX OF SELF-DEFENSE 32 (2009).

84. Robinson, *supra* note 25, at 236.

are both utilitarian and desert-based reasons to consider self-defense a justification, rather than a mere excuse. It is not that the defender's life "outweighs" the attacker's life in a purely utilitarian sense, but that the value of the attacker's life is reduced in some way by the moral culpability of his conduct as the aggressor, or else by his own forfeiture of his right to life.

The search for an adequate moral theory to justify self-defense has been so problematic as to have been described as a "holy grail."<sup>85</sup> Joshua Dressler breaks out the three most significant theories of justification advanced so far: (1) moral forfeiture, (2) moral rights, and (3) lesser harm.<sup>86</sup> Under the moral forfeiture theory, a person who wrongfully threatens the life of another can be said to forfeit her own right to life, and, therefore, her death does not constitute a legally recognized societal harm.<sup>87</sup> The moral rights theory justifies defensive action through the affirmative rights of the innocent person, including the right to protect bodily integrity and autonomy from wrongful attack.<sup>88</sup> The lesser harm theory is the most common<sup>89</sup>—and the theory adopted by the MPC.<sup>90</sup> Under the lesser harm theory of self-defense:

[W]hen A is threatened by imminent wrongful aggression by B, A's choices are stark—kill or be killed—so B's death is a lesser harm or evil than the alternative. One can reach that conclusion on the ground that the aggressor, but not the innocent person, forfeited her right to life; that the person attacked was asserting her moral right of autonomy but the aggressor was not; or that we want to deter aggression and that this is promoted by encouraging self-defense.<sup>91</sup>

While the lesser harm theory clearly takes a consequentialist approach as its structuring principle, the concepts of wrongfulness and innocence on either side of the utilitarian scales reveal the inescapable presence of desert in the calculus.<sup>92</sup>

In any case, theorists have pointed out the difficulty of neatly squaring the moral intuitions triggered by certain cases of self-defense with any particular theory. As noted above, for example, no U.S. jurisdiction nor the MPC imposes a pure proportionality requirement, meaning

---

85. Arlette Grabczynska & Kimberly Kessler Ferzan, *Justifying Killing in Self-Defence*, 99 J. CRIM. L. & CRIMINOLOGY 235, 238 (2009) (reviewing FIONA LEVERICK, *KILLING IN SELF-DEFENCE* (2006)).

86. Joshua Dressler, *Duress*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 269, 275 (John Deigh & David Dolinko eds., 2011).

87. *Id.* at 276. Jeff McMahan suggests that forfeiture can be better described as "the forfeiture of the right not to be attacked *for certain reasons*, by certain persons, in certain conditions." JEFF MCMAHAN, *KILLING IN WAR* 10 (Julian Savulescu ed., 2009).

88. Dressler, *supra* note 86, at 276.

89. *Id.*

90. MODEL PENAL CODE § 3.02(1)(a) (AM. L. INST. 1985).

91. Dressler, *supra* note 86, at 276.

92. For a defense of the right to use deadly force against the threat of rape premised on the victim's right to autonomy, see Don B. Kates, Jr. & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 879–85 (1982).



that a defender may use deadly force against an attacker to prevent serious injuries short of death. Kimberly Kessler Ferzan argues that in such cases, in addition to the attacker's forfeiture of the right not to be dealt *proportionate* harm, "there need to be positive reasons" to impose the additional portion of harm.<sup>93</sup> She argues that positive reason is punishment: the defender's need for defense and the attacker's desert "can aggregate when they are both necessary and only jointly sufficient to justify the rights forfeiture or harm imposition."<sup>94</sup> In this formulation, individual moral desert plays a particularly central role in the cost/benefit analysis suggested by the standard view of justification.

The balancing test of self-defense also implicates a range of other values, many of them extrinsic. Some scholars point to the social values of interdependency and respect for life to urge against the potential violence resulting from an overly individualistic model of self-defense.<sup>95</sup> For example, George Fletcher asserts that a purely individualistic theory "ignores our interdependence, both in shaping our sense of self and in cooperating in society for mutual advantage."<sup>96</sup> T. Markus Funk has identified no fewer than seven relevant values, some consequentialist and some rights-based, including systemic values such as maintaining the legitimacy of the legal order and maintaining equal standing between people.<sup>97</sup>

In summary, while justification may be the most common understanding of self-defense, there is no scholarly consensus on whether that justification involves balancing the moral rights of the parties or some broader lesser-evil calculus. Nor is there consensus, in either case, on exactly how the preferred balancing test should be applied.<sup>98</sup> Some of the practical doctrinal consequences of these uncertainties will be discussed in Section II.D below.

## 2. Self-Defense as Excuse

Given its origins as a ground for pardon rather than as an affirmative defense, discussed above in Section II.A, it is not difficult to see why

---

93. Kimberly Kessler Ferzan, *Defense and Desert: When Reasons Don't Share*, 55 SAN DIEGO L. REV. 265, 269 (2018).

94. *Id.* at 266.

95. See FIONA LEVERICK, *KILLING IN SELF-DEFENCE* 126 (2006); A.J. Ashworth, *Self-Defence and the Right to Life*, 34 CAMBRIDGE L.J. 282, 289–91 (1975) (U.K.), <https://doi.org/10.1017/S0008197300086128>.

96. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 33 (1988).

97. T. Markus Funk, *Understanding the Role Values Play (and Should Play) in Self-Defense Law*, 58 AM. CRIM. L. REV. 331, 333 (2021), <https://doi.org/10.13140/RG.2.2.13209.75360>. The other five are: (1) reducing overall societal violence by protecting the state's collective monopoly on force; (2) protecting the attacker's individual right to life; (3) protecting the defender's autonomy; (4) ensuring the primacy of the legal process; and (5) deterring potential attackers. *Id.*

98. Ferzan, *supra* note 81, at 251–52.

some scholars argue that self-defense should be considered an excuse rather than a justification. An excuse, recall, focuses on the reduced moral blameworthiness of the actor and, therefore, fits more cleanly into a desert-based theory of punishment than into a consequentialist, “lesser-evil” calculus used in justification.<sup>99</sup> The cases that best illuminate this view of self-defense are those of “innocent aggressors”—cases where a blameless party threatens the lives of others, as in a case where a child or mentally disabled person unintentionally fires a weapon into a crowd.<sup>100</sup> Relatedly, cases involving “passive aggressors” (such as a person hurtling off a mountain toward another climber and thus threatening the latter’s life) fall into this general category.<sup>101</sup> Theorists split around the question of whether it is permissible to kill such a blameless aggressor.<sup>102</sup>

Of those who think such killings are permissible, some describe the situation as a form of “forced choice,” where “a person is backed up against a wall,” and “the instinctive human response is to use force in self-defense.”<sup>103</sup> Under this conception, the *act of* self-preservation is not considered justified as the “right thing to do,” but the human *instinct for* self-preservation is an excuse for the killing.<sup>104</sup> While this excuse conception could apply to *any* self-defense claim—as a response to the argument that self-defense cannot be a justification due to the value of the aggressor’s life—it is of particular use to theorists trying to account for self-defense in cases of innocent aggressors.<sup>105</sup>

A rather different argument for treating self-defense as an excuse rather than a justification could be described as consequentialist. Rafi Reznik has recently argued for the excuse classification on the grounds of “cultural receptivity.”<sup>106</sup> Noting that “[l]aws that legitimize violence are considered detrimental to enlightenment values such as progress and peace,”<sup>107</sup> he then surveys the cultural role self-defense has played as

---

99. *Id.* at 255.

100. Grabczynska & Ferzan, *supra* note 85, at 241.

101. *Id.*

102. Compare SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 177 (Jules Coleman ed., 1994) (arguing that “[t]he positive right to use lethal force in self-defence . . . does not derive from culpability on the part of the aggressor”), with Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1385 (1999) (noting it “odd to think that the strength of the right varies with the characteristics of the attacker, rather than with the magnitude of the threat to the relevant interest”), and Wallerstein, *supra* note 25, at 1009–10 (arguing that “[d]rawing this line between culpable and nonculpable aggressors is counterintuitive”).

103. Wallerstein, *supra* note 25, at 1006.

104. *Id.*

105. See Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUD. 207, 211–213 (1981), <https://doi.org/10.1007/BF00353792>.

106. Rafi Reznik, *Taking a Break from Self-Defense*, 32 S. CAL. INTERDISC. L.J. 19, 19 (2022), <https://doi.org/10.2139/ssrn.3986418>.

107. *Id.* at 24.

a tool of aggression in American society.<sup>108</sup> On that basis, he argues that self-defense is so “detrimental to material welfare, equality, democracy, and ethics of cooperation and care” that “social roles of self-defense corrupt whatever justifiable moral core it ideally has.”<sup>109</sup> Reznik’s argument highlights the expressive function of self-defense law in American society at large, which will be important to this Article’s proposals for dealing with the unique problems of politicized self-defense claims.

#### D. *Doctrinal Controversies in Self-Defense*

In light of the core controversies as to the very nature of self-defense, it is unsurprising that its individual elements have generated many controversial interpretive problems. This Part will briefly survey some of the most significant doctrinal debates as to the proper formulation of the defense, most of which become even more thorny in a context involving heated political discourse.

##### 1. The Imminence Requirement

The imminence requirement has traditionally been understood to limit a defender’s use of violence to cases when the danger posed by the aggressor is immediately at hand.<sup>110</sup> Yet, as evident in the MPC’s choice of “immediately necessary” over the common law “imminence” language, occasions may obviously arise during which the actual violence threatened by an aggressor is not close at hand, and yet the sole means to defend against the certainty of it happening at some point in the future are presently *necessary*.<sup>111</sup> The MPC comments give the example of a defender who kills a future aggressor before he can seek reinforcements.<sup>112</sup> Dressler and Garvey present the hypo of the desert marathon hiker told by her rival that she will be poisoning the sole water supply once she reaches it first.<sup>113</sup> In both thought experiments, the only way for a defender to prevent seemingly certain future death is to take action in the present, which would technically run afoul of a pure “imminence” standard. Nonetheless, “imminence” persists in most jurisdictions.<sup>114</sup>

Imminence has created particularly famous problems in the context of domestic abuse, giving rise to the so-called “battered spouse” defense—once known as Battered Woman Syndrome (“BWS”).<sup>115</sup>

---

108. *Id.* at 21–22, 24.

109. *Id.* at 19.

110. MODEL PENAL CODE AND COMMENTS § 3.04 cmt. 2(c) (Am. L. Inst., Official Draft and Revised Comments 1985).

111. *Id.*

112. *Id.*

113. DRESSLER & GARVEY, *supra* note 48, at 532.

114. MODEL PENAL CODE AND COMMENTS § 3.04 cmt. 2(c).

115. The term “Battered Woman Syndrome” has fallen out of favor due to the potential stigma it attaches to domestic violence survivors and the immutable role of

In 1984, psychologist Lenore Walker published *The Battered Woman Syndrome*, inaugurating a line of psychological research identifying unique characteristics of domestic abuse victims.<sup>116</sup> The literature on BWS explains how the “cyclical” nature of domestic violence is relevant to whether the “imminence” requirement of self-defense is met.<sup>117</sup> A long-term victim of domestic violence gains experience predicting when the next violent phase of her abuser’s cycle is about to commence, thus reasonably perceiving it as imminent when someone without her experience would not.<sup>118</sup>

The famous 1988 case of *State v. Norman* presents one of the earliest attempts at a BWS defense.<sup>119</sup> Defendant Judy Norman had suffered 20 years of physical abuse by her husband, including being kicked down a flight of stairs, losing her unborn baby.<sup>120</sup> At the time of her trial, the defendant showed scars from having been beaten with fists, a baseball bat, shoes, and bottles, as well as having been burned with cigarettes.<sup>121</sup> On the day of Norman’s death, he had beaten the defendant all day long and threatened to cut her throat, kill her, and cut off her breast.<sup>122</sup> That afternoon, while Norman was sleeping, the defendant took her child to her mother’s house, returned with a gun, and shot him in his sleep.<sup>123</sup>

At her trial, psychologists testified about the effects of domestic abuse rendering a victim unable to appreciate the possibility of escape, analogizing the defendant’s situation with that of prisoners-of-war.<sup>124</sup> A doctor, asked if the defendant thought it reasonably necessary to kill her husband, replied, “I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family.”<sup>125</sup> A North Carolina Court of Appeals ordered a new trial on the grounds that Norman should have received a self-defense instruction.<sup>126</sup> The Supreme Court of North Carolina overturned, holding that the battered spouse evidence would not support a finding that Norman “killed her husband

---

victimhood it seems categorically to ascribe to them. See Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 4–5 (1994), <https://doi.org/10.2307/3480849>; Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 193 (1991), <https://doi.org/10.5070/L311017550>; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN’S L.J. 121, 137 (1985).

116. See generally LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1st ed. 1984).

117. See *id.* at 95–96.

118. See *id.*

119. See *State v. Norman*, 366 S.E.2d 586, 589 (N.C. Ct. App. 1988), *overruled* 378 S.E.2d 8 (N.C. 1989).

120. *Id.* at 587.

121. *Id.*

122. *Id.* at 588.

123. *Id.* at 588–89.

124. *Id.* at 589.

125. *Id.*

126. *Id.* at 592.

due to a reasonable fear of imminent death or great bodily harm . . . .”<sup>127</sup> Because her husband was asleep at the time of the shooting, the defendant was not “faced with an instantaneous choice between killing her husband or being killed or seriously injured.”<sup>128</sup>

In other more recent cases, however, the battered spouse defense has seen some success. For example, in 2004, a Maryland appellate court ordered a new trial for a defendant who shot and killed her abusive husband while he was watching television.<sup>129</sup> The court noted that the husband had been “threatening to kill the [defendant] on a daily basis, and taunting her with details about how he would carry it out.”<sup>130</sup> Due to the chronic nature of the husband’s abuse, the court found that the evidence supported “a strong inference that the [defendant] was in fear of imminent harm . . . .”<sup>131</sup>

However, scholars such as George Fletcher resist these results on the grounds that they usurp the state’s monopoly on coercive force: “[W]hen an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state’s function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.”<sup>132</sup> Defenders who “engage in preemptive attacks against suspected future aggressors” therefore “exceed their authority as citizens . . . .”<sup>133</sup> Others go so far as to criticize the BWS defense as an “abuse excuse” to which decision-makers have been receptive to only as a showing of so-called political correctness.<sup>134</sup>

Yet some scholars have argued to the contrary that battered spouse cases demonstrate precisely why the imminence requirement is redundant and unnecessary in light of the necessity requirement.<sup>135</sup> Fritz Allhoff has pointed out that various rules, such as the lack of duty to retreat under certain circumstances and Stand Your Ground laws,

---

127. State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989).

128. *Id.* at 13.

129. State v. Peterson, 857 A.2d 1132, 1135 (Md. Ct. Spec. App. 2004).

130. *Id.* at 1151.

131. *Id.*

132. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996). Fletcher does, however, support allowing battered defendants, such as Norman, to have an excuse defense premised on the mistaken belief in the imminence of an attack. *Id.* at 576–78.

133. *Id.* at 570.

134. See ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 5 (1994); CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* 144–48 (George Witte ed., 1992). See generally JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM* 62–66, 101–04 (1997) (arguing that the Battered Woman Syndrome defense can be extended to justify indefensible conduct and that legislatures, not courts, should have been the ones to create such a defense).

135. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 375–76, 380, 391 (1993).

effectively allow claims of self-defense in cases where there is no necessity.<sup>136</sup> Perversely, he argues, the reverse would make more sense, as imminence typically serves as merely a proxy to capture necessity.<sup>137</sup> Yet, while the caselaw has often been ambiguous as to whether self-defense claims fail on imminence or necessity grounds, in most cases, “appeals to necessity could as appropriately defeat claims as appeals to imminence, and so the focus on imminence [is], at best, superfluous.”<sup>138</sup> The correct question in BWS cases would simply be whether the violence was *necessary* or not—itself a heavily contestable question depending on the facts of particular cases, but at least more flexible for domestic violence victims when uncoupled from imminence.

## 2. Honesty Versus Reasonableness of Belief

The battered spouse cases also raise a distinct interpretive question, which haunts all of self-defense law and the law of justifications more broadly. A central debate among legal philosophers is whether a justification should be based on an objective, “reasonable person” assessment of an actor’s deed alone or at least partially on an assessment of the act *from the actor’s perspective*.<sup>139</sup> Known respectively as the “objective” and “subjective” views of justification, they have at least a bit of overlap as some subjectivists require *both* that the actor honestly hold a relevant belief *and* that that belief be reasonable.<sup>140</sup>

As discussed in the prior Part, the MPC has adopted a purely subjective standard for self-defense, requiring only that a defender honestly believe that the degree of defensive force is imminently necessary.<sup>141</sup> Most jurisdictions, however, employ a reasonableness requirement.<sup>142</sup> In such jurisdictions, the jury must decide if a “reasonable person” in the defendant’s position would believe all the following things:

---

136. Allhoff, *supra* note 62, at 1531–35.

137. *Id.* at 1546.

138. *Id.* at 1551; *see also* V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1236 (2001) (surveying 20 years of caselaw and finding that most courts were using “imminence,” not as a measure of time between violence and potential threat, but as a proxy for other factors such as strength of threat, retreat, proportionality, and aggression). Nourse notes that, contrary to the “sleeping abuser” BWS stereotype, most battered women cases raised imminence most often in confrontational settings, such as when the victim perceives a gun. Nourse, *supra*, at 1237, 1246. She observes that “[w]e do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with a gun why she did not leave the relationship.” *Id.* at 1238.

139. *See* Ferzan, *supra* note 81, at 243.

140. *Id.*

141. *See supra* Section II.A.

142. *See* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 57 (1998) (identifying only four states with subjective standards).

*(a) an aggressor was threatening him with harm, (b) that harm would be of a particular level of gravity, (c) his use of force in response would prevent that harm, (d) the level of responsive force he expects to employ would be of a similar level of gravity, (e) if the force was not used, the threatened harm would occur immediately, and (f) no non-violent or less forceful alternatives were available whereby the threat could be avoided.*<sup>143</sup>

Generally, the reasonableness test is formulated to allow the jury to consider a reasonable person in the “specific circumstances” of the defender.<sup>144</sup>

The difficulty with “objective” standards is that they are famously susceptible to factfinders’ implicit biases. Some social science research has identified a clear pattern of implicit bias in self-defense decision-making “associated with stereotypes linking Blacks with the concept of danger.”<sup>145</sup> One FBI study found that, controlling for all other attributes, the odds that a white-on-black homicide is found justified is 281% greater than that of a white-on-white or black-on-black homicide.<sup>146</sup>

The most culturally notorious self-defense case of all time was, perhaps, the 1986 trial of Bernard Goetz.<sup>147</sup> Goetz shot and wounded four unarmed black teenagers on a New York City subway car, rendering one paraplegic, after one of them approached Goetz and asked for five dollars.<sup>148</sup> Goetz, who was carrying an illegal firearm, described to police with chilling detail his methodical assault on the teens despite also stating he was certain none of them had guns themselves.<sup>149</sup> In his defense, he cited his fear, based on recent experiences of being violently robbed, of “being ‘maimed.’”<sup>150</sup> The New York self-defense statute provided that “a person may . . . use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself . . . from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . .”<sup>151</sup>

143. Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self Control?*, 11 NEW CRIM. L. REV. 51, 51–52 (2008).

144. See DRESSLER & GARVEY, *supra* note 48, at 543.

145. Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCH. COMPASS 201, 201 (2014), <https://doi.org/10.1111/spc3.12099>. But see Caren M. Rotello et al., *The Shape of ROC Curves in Shooter Tasks: Implications for Best Practices in Analysis*, COLLABRA, 2018, at 1, <https://doi.org/10.1525/collabra.171>.

146. JOHN K. ROMAN, URB. INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 9 (2013), <https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF> [<https://perma.cc/M7BV-9YJH>].

147. See BILLY JOEL, *We Didn't Start the Fire*, on STORM FRONT, at 03:32–03:35 (CBS Records, Inc. 1989).

148. *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986).

149. *Id.* at 44.

150. *Id.*

151. N.Y. PENAL LAW § 35.15(1) (McKinney 2004).

A New York appellate court denied Goetz's request that the jury be instructed according to the subjective standard of the MPC, which allows self-defense claims in cases where the defender "honestly" believed force was necessary, even if that belief was not objectively reasonable.<sup>152</sup> It did, however, note that even New York's objective standard allowed the jury to consider the "actual circumstances of a particular incident," including "any relevant knowledge the defendant had about [his assailant]" and "any prior experiences [the defender] had which could provide a reasonable basis for a belief that another person's intentions were to injure . . . him . . . ."<sup>153</sup> Goetz was ultimately tried by a jury composed of ten white and two black jurors and acquitted of all charges in the indictment except for possession of a concealed weapon, for which he was sentenced to one year in jail.<sup>154</sup>

Scholars, such as Jody Armour, have illustrated the danger of allowing race-based evidence to impact a reasonableness calculation in self-defense cases. Describing cases like Goetz's as involving a "reasonable racist" standard, she argues, "[i]f we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is 'typical.'"<sup>155</sup> The difficulty, of course, is that even if courts exclude overt arguments about the commonplaceness of views that black people are particularly dangerous, these biases will persist subtextually and even subconsciously.<sup>156</sup>

Perhaps the most devastating failures of the reasonable person standard arise in cases involving the murder of unarmed black citizens by police officers. While some law enforcement officers, like George Floyd's murderer, Derek Chauvin, have been brought to justice, that has been a somewhat recent development.<sup>157</sup> Until the dawn of the Black Lives Matter movement, police were rarely prosecuted for shooting civilians in the line of duty.<sup>158</sup> Under the reasonableness test governing the use of force by police, however, juries need not determine the reasonableness of police officers' *actions*, merely the reasonableness of the officers' beliefs in a party's dangerousness.<sup>159</sup> This, as Cynthia Lee argues, creates

---

152. *Goetz*, 497 N.E.2d at 50, 52.

153. *Id.* at 52.

154. *DRESSLER & GARVEY*, *supra* note 48, at 542.

155. Armour, *supra* note 22, at 790.

156. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 224 (2003).

157. See Bill Chappell, *Derek Chauvin Is Sentenced to 22 1/2 Years for George Floyd's Murder*, NAT'L PUB. RADIO (June 25, 2021, 6:02 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder> [<https://perma.cc/C58X-WEVJ>].

158. See Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 633–635.

159. *Id.* at 655.



a risk of jurors ignoring the necessity and proportionality requirements of self-defense in cases of police violence.<sup>160</sup>

### 3. Availability to Aggressors

The two limitations on self-defense—the rule limiting availability to initial aggressors and the duty to retreat—are often discussed in the same breath, but they are distinct issues. As mentioned in Section II.A above, most states have some sort of rule on initial aggressors, but they vary in the degree to which they limit the defense, and there are no clear rules as to whether and when a court must instruct a jury on the rule.<sup>161</sup> Many self-defense statutes require the defendant to have *intentionally* provoked the victim into acting so the defendant can mount a counterattack.<sup>162</sup> Others define the category more broadly to include individuals who are simply the first to use or threaten physical force and/or individuals involved in mutual combat.<sup>163</sup>

At Kyle Rittenhouse's trial, the court did instruct the jury on Wisconsin's provocation limitation, as well as the duty to retreat, explaining:

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack. However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.<sup>164</sup>

As Cynthia Lee points out, these instructions actually make it perfectly legal for a provocateur to claim self-defense so long as he reasonably believed he was in imminent danger of death or great bodily harm.<sup>165</sup> She also notes that Wisconsin's provocation provision only kicks in if the defendant engaged in "*unlawful* conduct of a type likely to provoke others to attack,"<sup>166</sup> an element the prosecution had difficulty

---

160. *Id.*

161. *See supra* Section II.B.1.

162. *See* DEL. CODE ANN. tit. 11, § 464(e)(1) (2021); HAW. REV. STAT. § 703-304(5)(a) (2001); MONT. CODE ANN. § 45-3-105(2) (2009); NEB. REV. STAT. § 28-1409(4)(a) (1972); N.J. STAT. ANN. § 2C:3-4(b)(2)(a) (West 1999); 18 PA. CONS. STAT. § 505(b)(2)(i) (2011); TEX. PENAL CODE ANN. § 9.31(b)(4).

163. *See Lee, supra* note 64, at 21–23 nn.80–83 (collecting state authority on each of these three categories).

164. Instructions to the Jury at 3–4, *State v. Rittenhouse*, No. 20-CF-983 (Wis. Cir. Ct. Nov. 15, 2021).

165. *Lee, supra* note 64, at 39.

166. WISCONSIN CRIMINAL JURY INSTRUCTIONS § 815 (2020) (emphasis added).

proving due to the court's earlier dismissal of a weapons charge against Rittenhouse.<sup>167</sup>

Using the Rittenhouse case as an example, Lee argues that “individuals who claim self-defense after being charged with a crime should be considered initial aggressors as a *prima facie* matter if their words or acts first created a reasonable apprehension of physical harm” and that this instruction should be given whenever a defender brings a firearm outside the house and displays it in a threatening manner.<sup>168</sup> Such changes would seem to deny self-defense not only to Rittenhouse but also to George Zimmerman in the notorious slaying of black teenager Trayvon Martin, which we will discuss next.<sup>169</sup>

#### 4. “Stand Your Ground” Laws

There may be no single aspect of self-defense law more controversial than “Stand Your Ground” (“SYG”) laws, despite the growing legislative consensus around them among U.S. states.<sup>170</sup> As discussed above, such laws expand the “Castle Doctrine” and remove a defender's duty to retreat, so long as they are not engaged in a criminal activity and are in *any* place they have a legal right to be.<sup>171</sup> One of the primary justifications for such laws is given by the Supreme Court of New Jersey in *State v. Abbott*: “The law of course should not denounce conduct as criminal when it accords with the behavior of reasonable men . . . [T]he manly thing is to hold one's ground, and hence society should not demand what smacks of cowardice.”<sup>172</sup> SYG laws are, therefore, premised on a rights-based conception of self-defense—specifically, the right of the defender to autonomy and dignity. If viewed through the lens of excuse rather than justification, they appear to treat the defender as less blameworthy on the grounds that his desire to use force rather than to retreat is in some way more relatable and, thus, forgivable.

---

167. Lee, *supra* note 64, at 40.

168. *Id.* at 52–53.

169. Legal scholars disagree as to whether George Zimmerman's conduct—following Martin around at night and asking him questions—should have qualified as provocation under existing law. Lee, *supra* note 64, at 42–43 (summarizing the scholarly arguments for and against). The judge in that case, however, did not give an initial aggressor instruction at all, thereby preventing the jury even from considering whether Zimmerman's self-defense claim should be nullified due to his initial aggressor status. Marjorie Cohn, *Key Mistakes Sway Jury in Zimmerman Trial*, TRUTHOUT (July 17, 2013), <https://truthout.org/articles/zimmerman-vs-martin-racial-profiling-and-self-defense> [https://perma.cc/89WW-KLNH].

170. See *supra* Section II.B.2 (noting that 38 states currently have “Stand Your Ground” laws on their books).

171. See, e.g., FLA. STAT. § 776.013(1) (2017).

172. *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961); see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 329 (1996) (“The broader contours of the [castle] doctrine reflect the extent to which the law is prepared to endorse valuations of honor or dignity in circumstances in which these goods can be protected only by deadly force.”).

Critics of SYG laws point out that they subordinate the most fundamental right of human life to less important values.<sup>173</sup> The FBI study on justifiable homicide outcomes found that being in an SYG state increases the odds of a jury finding a killing was justifiable by 65%.<sup>174</sup> Furthermore, the presence of an SYG law was found to be associated with a statistically significant increase in a justifiable finding in cases of white-on-black, black-on-black, and white-on-white homicides, but not black-on-white homicides.<sup>175</sup> This would seem to suggest that SYG laws increase the risk of racial bias in jury determinations of the reasonableness of self-defense. That said, the common law “no retreat” rule may also, in some cases, create problems of its own. For example, there may well be tactical reasons why a defender might not want to retreat, even if it is technically plausibly safe to do so.<sup>176</sup>

#### E. *A Choice of Frameworks*

What the preceding discussion makes clear is that lawmakers and commentators disagree, first off, on whether self-defense is an objective good—a justification—or a wrong mitigated by the unfortunate circumstances of the defender—an excuse. Even more relevant to self-defense in political contexts, neither model establishes a clear hierarchy among societal goals (such as discouraging a culture of violence or promoting gender or racial equality) and private interests (such as the lives of aggressors, the lives and autonomy of defenders, and the emotional realities of both aggressors and defenders). Indeed, both the justification and excuse models involve both categories. It is easy to see how these many conflicting priorities will become amplified in contexts where self-defense not only inherently implicates them but actually arises in the midst of *explicit* clashes between competing public values.

Mitchell Berman has demonstrated that not all morally justified conduct is, as a matter of positive law, criminally justified and that, reciprocally, not all that is criminally justified is morally justified.<sup>177</sup> He cites, for example, civil rights sit-ins, medical use of marijuana by suffering cancer patients, and the distribution of clean needles to drug addicts to prevent the spread of HIV as conduct that can be justified as *moral* necessity but nonetheless has been intentionally criminalized by legislatures without a formal defense available.<sup>178</sup> Once the moral and legal questions are separated, Berman argues, the best that can be said about the legal categories of justification and excuse is that “a justification

---

173. See Ahmad Abuznaid et al., “Stand Your Ground” Laws: *International Human Rights Law Implications*, 68 U. MIA. L. REV. 1129, 1158–59 (2014).

174. ROMAN, *supra* note 146, at 9–10.

175. *Id.* at 9.

176. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 429 (1999).

177. Berman, *supra* note 78, at 17.

178. *Id.* at 11.

serves to qualify a norm of behavior by providing that one who is justified does not violate the governing norm; an excuse serves to release one who has violated a norm from some or all of the consequences that ordinarily attach to the norm violation.”<sup>179</sup> In short, the distinction between *legal* justification and excuse adds little to our attempts to resolve the great moral debates engendered by self-defense and other defenses.<sup>180</sup>

This Article takes this premise as a starting point for the remainder of its analysis. Rather than assuming the need for a unified legal theory of self-defense, it focuses instead on the relationship between the multiple goods, public and private, at stake in self-defense cases and examines what may happen when violent encounters arise within explicit discursive clashes about these very goods. As already stated, there is a distinct public good to be achieved when the law adjudicates ideologically fraught cases in an ideologically neutral way. Doing so does not require *moral* evaluation or condemnation of defenders’ substantive political positions but a legal analysis of whether their actions conformed with the legal norm of defensible conduct in the relevant jurisdiction. As we will see, however, even that determination may need to take into account the political context among the various circumstances specific to a defender’s situation under a reasonableness test.

### III. POLITICAL POLARIZATION AND THE PUBLIC

We appear to be at a moment in American history at which agreement on what constitutes the public good is at a particularly low ebb. This Part gives an overview of this uniquely polarized political environment and argues that one of its noteworthy characteristics is the increased tendency among many citizens both to support and to fear violence in one incarnation or another.

#### A. Trends in Partisanship

In 1990, Spanish political sociologist Juan Linz famously argued that presidential democracies are generally less successful than parliamentary democracies due in part to the function of political parties.<sup>181</sup> According to Linz, “the development of modern political parties, particularly in socially and ideologically polarized countries, generally exacerbates, rather than moderates, conflicts between the legislative and the executive.”<sup>182</sup> In most nations with split executives and legislatures, Linz noted, the armed forces often intervene to mediate these partisan

---

179. *Id.* at 5.

180. *Id.* at 77.

181. Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 51–52 (1990).

182. *Id.* at 53–54.

disputes.<sup>183</sup> Nonetheless, at the time he was writing, Linz considered the United States to be an exception to his thesis, deeming it to be, in fact, the “world’s most stable democracy . . . .”<sup>184</sup> He named as a reason for our relative success “the uniquely diffuse character of American political parties . . . .”<sup>185</sup>

As *New York Times* columnist Ezra Klein puts it: In the late twentieth century, “the ideological and demographic diversity of the Republican and Democratic coalitions lowered the stakes of partisan political disagreement considerably” because “[o]ur core cleavages played out *within* the two parties rather than just *between* them.”<sup>186</sup> Klein also observes that the now-familiar scorched-earth partisan tactics like forcing government shutdowns and refusing to increase the debt ceiling have always been rational as strategies for self-interested political actors, but they had somehow, prior to the twenty-first century, “never been done before because that just wasn’t how things were done in American politics.”<sup>187</sup>

This level of division is, of course, not unprecedented. Less than 200 years ago, the United States fought a Civil War, which left it both geographically and racially divided for decades, as the Federal Government tried and ultimately failed to squelch racial oppression in the South.<sup>188</sup> More recently, the 1960s saw a significant cultural revolution in large part in protest of the Vietnam War and in support of civil rights.<sup>189</sup> For the last 30 years of the twentieth century and the first 10 or so of the twenty-first, however, Linz’s evaluation seemed justified. Political parties clashed, but politicians worked across the aisle, and political identity did not pervade every aspect of daily American life. Yet now, the idea that norms of civility and the rule of law could have held back, for so many decades, the limitless, potentially violent, partisan warfare that has threatened so many other presidential democracies seems almost quaint. Even after a lame-duck Republican President urged his supporters to march violently upon the Capitol in an attempt to overturn the results of a lawfully-held election, only 10 House Republicans, out of 211, voted to impeach him.<sup>190</sup> As Klein puts it, “[n]orms of cooperation

---

183. *Id.* at 53.

184. *Id.* at 51–52, 68.

185. *Id.* at 53.

186. EZRA KLEIN, WHY WE’RE POLARIZED 204 (2020) (emphasis added).

187. *Id.* at 224.

188. Gary W. Gallagher, *Think the U.S. Is More Polarized than Ever? You Don’t Know History*, CONVERSATION (Feb. 14, 2020, 5:23 PM), <https://theconversation.com/think-the-us-is-more-polarized-than-ever-you-dont-know-history-131600> [<https://perma.cc/TT43-L7EQ>].

189. See *Revolutions: The Right to Protect Vs. the Right to Protest*, PBS, <https://www.pbs.org/opb/thesixties/topics/revolution/index.html> [<https://perma.cc/C7DJ-SYUF>]; see also 1960s, HISTORY, <https://www.history.com/topics/1960s> [<https://perma.cc/N7NM-XNNY>].

190. Domenico Montanaro, *These Are the 10 Republicans Who Voted to Impeach Trump*, NAT’L PUB. RADIO (Jan. 14, 2021, 5:01 AM), <https://www.npr>.

and deference are breaking down and crises, paralysis, and polarization are the result.”<sup>191</sup>

This twenty-first century partisan shift appears in the sphere of jurisprudence as well. Lee Epstein and Eric Posner have shown how, even into the 1990s, Supreme Court Justices historically voted in “ideologically unpredictable ways”—meaning ways that run counter to the political goals of the party of the president who appointed them.<sup>192</sup> By 2018, however, that had changed dramatically with only Justice Kennedy, a Reagan appointee, regularly voting against the ideology of the appointing president’s party.<sup>193</sup>

This polarization has, of course, not only arisen among political actors but between regular citizens as well. Even before the highly polarizing election of President Donald Trump, studies found that Republicans and Democrats have come to feel more negatively about one another during the twenty-first century, even when they do not disagree on particular substantive issues.<sup>194</sup> A 2014 Pew Research Center poll found that “[t]he overall share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%.<sup>195</sup> That same poll found that ideological thinking had become much more closely aligned with partisanship than in the past, meaning there was far less “ideological overlap” between the two parties.<sup>196</sup> (Ninety-two percent of Republicans were to the right of the median Democrat, and ninety-four percent of Democrats were to the left of the median Republican.<sup>197</sup>) And this, of course, was long before the Trump presidency was even on anyone’s radar screen.

This growing partisan polarization appears only to have intensified during the political climate of the Trump years. According to a CNN poll taken on the last day of the Congressional hearings on the January 6 attack on the U.S. Capitol, a full 79% of Americans generally believed that former President Trump acted unethically, with 45% also believing he acted illegally.<sup>198</sup> While those numbers remained steady relative to

---

org/2021/01/14/956621191/these-are-the-10-republicans-who-voted-to-impeach-trump#:~:text=Ten%20Republicans%20crossed%20President%20Trump,Ellipse%20outside%20the%20White%20House [https://perma.cc/DU56-LHTA].

191. KLEIN, *supra* note 186, at 224.

192. Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [https://perma.cc/MXL9-H3TY].

193. *Id.*

194. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 422–424 (2012), <https://doi.org/10.1093/poq/nfs038>.

195. PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [https://perma.cc/Q5LG-DRUL].

196. *Id.*

197. *Id.*

198. Jennifer Agiesta, *CNN Poll: January 6 Hearings Haven’t Changed Opinions Much, But Most Agree Trump Acted Unethically*, CNN (July 26, 2022, 7:50 PM), <https://>

another poll given earlier in 2022, polling respondents who identified as political partisans did appear to be changing positions—in opposite directions.<sup>199</sup> Over the course of 2022, Democrats became more likely to say that democracy was “under attack” (55% up from 46% earlier in the year) and that the January 6 attack was a major problem or a crisis (96% up from 91%).<sup>200</sup> Meanwhile, Republicans were less likely to feel that way *after* the January 6 hearings than they did earlier in the year.<sup>201</sup> In the post-hearing poll, only 36% of Republicans believed January 6 was a crisis or a major problem, down from 43%, and 54% believed democracy was under attack, down from 66% earlier in the year.<sup>202</sup> While correlation does not equal causation, these numbers at least suggest that more information about and coverage of the January 6 attacks resulted in a greater divide among Americans who consider themselves politically partisan.

Unsurprisingly, this polarization has become, in some ways, self-reinforcing because as politics becomes less civil, people increasingly fear exposure to and interaction with people who disagree with their political views.<sup>203</sup> Furthermore, the decline in traditional newspaper journalism as a means of access to current events has been much-decried and ideologically asymmetrical: the newspapers that have best survived the turn to Internet news are the large, well-funded ones located in liberal urban centers such as New York City and Washington, D.C.<sup>204</sup> In one recent study, Nikki Usher found that of the 2,051 U.S. counties that did not have “measurable newspaper employment” in any of the years under study, 95% became more Republican across two elections.<sup>205</sup> Finally, and maybe most significantly, the increasing role of social media—with its user-specific algorithms—in news dissemination has fueled the fires of partisanship and hatred even further, especially during the Trump administration.<sup>206</sup>

---

[www.cnn.com/2022/07/26/politics/cnn-poll-january-6-trump/index.html](https://www.cnn.com/2022/07/26/politics/cnn-poll-january-6-trump/index.html) [https://perma.cc/C8KJ-4ER7].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. See Ted Van Green, *Republicans and Democrats Alike Say It's Stressful to Talk Politics with People Who Disagree*, PEW RSCH. CTR. (Nov. 23, 2021), <https://www.pewresearch.org/fact-tank/2021/11/23/republicans-and-democrats-alike-say-its-stressful-to-talk-politics-with-people-who-disagree/> [https://perma.cc/BJ5L-PVU8].

204. NIKKI USHER, NEWS FOR THE RICH, WHITE, AND BLUE: HOW PLACE AND POWER DISTORT AMERICAN JOURNALISM 67 (2021).

205. *Id.* at 87.

206. See generally PAUL M. BARRETT ET AL., FUELING THE FIRE: HOW SOCIAL MEDIA INTENSIFIES U.S. POLITICAL POLARIZATION—AND WHAT CAN BE DONE ABOUT IT (2021), [https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/613a4d4cc86b9d3810eb35aa/1631210832122/NYU+CBHR+Fueling+The+Fire\\_FINAL+ONLINE+REVISED+Sep7.pdf](https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/613a4d4cc86b9d3810eb35aa/1631210832122/NYU+CBHR+Fueling+The+Fire_FINAL+ONLINE+REVISED+Sep7.pdf) [https://perma.cc/LX8G-DVR4].

### B. *Partisanship and the Threat of Violence Around Political Discourse*

This era of polarization manifests far beyond the ambit of explicit political discourse and debate. It appears, in fact, to be affecting most aspects of how human beings relate to one another. Evidence suggests, for example, that people are much more likely to discriminate against job candidates with different political viewpoints than on the basis of race.<sup>207</sup> Likewise, Cass Sunstein observes that in 1960, around four to five percent of Republicans and Democrats said they would be “displeased” if their children married members of the opposite party, but that number has increased to 49% of Republicans and 33% of Democrats.<sup>208</sup>

The last few years have seen an uptick in incivility and perceived incivility in the tone of political discourse. A 2017 Marist poll found that 70% of Americans felt like civility in public life had decreased between 2016, when Trump was elected, and 2017, while only 6% thought it had increased.<sup>209</sup> Furthermore, evidence suggests that perceptions of political incivility depend upon the ideological persuasion of the speaker and listener. Ashley Muddiman has found that people are much more likely to consider the same sorts of statements to be uncivil when made by someone with opposing political beliefs than by someone with beliefs similar to the listener’s own.<sup>210</sup> In fact, people seem to *prefer* uncivil to civil language when the speaker is someone they agree with politically.<sup>211</sup> In 2017, Muddiman and Natalie Stroud found that comments on the *New York Times* website were substantially more likely to be upvoted if they contained language that was *both* uncivil *and* partisan than if they were merely *either* uncivil *or* partisan.<sup>212</sup> Interestingly, another study of Twitter discourse in the wake of two school shootings found uncivil discourse most associated with polemic and misinformation, whereas civil discourse was most associated with personal stories

207. Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 695–96 (2015), <https://doi.org/10.1111/ajps.12152>.

208. Cass R. Sunstein, ‘Partyism’ Now Trumps Racism, BLOOMBERG (Sept. 22, 2014, 7:03 AM), <https://www.bloomberg.com/view/articles/2014-09-22/partyism-now-trumps-racism#xj4y7vzkg> [<https://perma.cc/XY2J-ZRL4>].

209. NAT’L PUB. RADIO ET AL., POLL OF 1,205 NATIONAL ADULTS 15 (2017), [https://maristpoll.marist.edu/wp-content/misc/usapolls/us170621\\_PBS\\_NPR/NPR\\_PBS%20NewsHour\\_Marist%20Poll\\_National%20Nature%20of%20the%20Sample%20and%20Tables\\_Democracy\\_Trust\\_July%202017.pdf#page=3](https://maristpoll.marist.edu/wp-content/misc/usapolls/us170621_PBS_NPR/NPR_PBS%20NewsHour_Marist%20Poll_National%20Nature%20of%20the%20Sample%20and%20Tables_Democracy_Trust_July%202017.pdf#page=3) [<https://perma.cc/F459-TAGH>].

210. See generally Ashley Muddiman, *Personal and Public Levels of Political Incivility*, 11 INT’L J. COMMUN 3182, 3183 (2017) (discussing “personal-level and public-level incivility perceptions . . . and whether the types of incivility are robust in the face of partisan reasoning”).

211. *Id.* at 3196.

212. Ashley Muddiman & Natalie Jomini Stroud, *News Values, Cognitive Biases, and Partisan Incivility in Comment Sections*, 67 J. COMMUN 586, 598 (2017), <https://doi.org/10.1111/jcom.12312>.



and factual information.<sup>213</sup> This suggests that a secondary casualty of incivility is accuracy.

Even more alarming—if also unsurprising—more and more evidence suggests that partisan people of both parties are increasingly willing to support the use of violence to advance their political beliefs. This certainly seems demonstrated by the increase in vehicular attacks on political protestors, with which this Article opened,<sup>214</sup> to say nothing of their apparent legalization by various states.<sup>215</sup> One recent poll found that about 25% of Americans of either political persuasion say that violent protest against the government is sometimes justified.<sup>216</sup> One in ten Americans polled say it is justified “right now,” with that belief more widely held by political conservatives.<sup>217</sup> Nearly one in five men identifying as Republican responded that it is justified “right now.”<sup>218</sup>

Furthermore, prior to the 2020 election (and, thus, the events of January 6, 2020), pollsters found that one in five Americans of “strong political affiliation” were willing to endorse violence if the other side won the presidency.<sup>219</sup> That same prescient study found that one in three Americans who explicitly identify as either Democrat or Republican believed that violence could be used to advance their party’s political goals—a figure that represented a substantial increase from prior years.<sup>220</sup> That poll, it should be noted, did not specify violence against the government, as opposed to violence in general, suggesting that the increasing turn toward political incivility may be accompanied by an increasing tolerance for violence against fellow citizens. The spectacle of the January 6 insurrection certainly involved examples of both kinds of violence against both government actors and private citizens.

Even more recently, and particularly relevant in the wake of the Supreme Court’s decision in *Dobbs v. Jackson*,<sup>221</sup> which overturned *Roe v. Wade*,<sup>222</sup> Julie Norman sought to evaluate Americans’ views on the question of whether violent actions were ever justified in contexts such

---

213. Deana A. Rohlinger & Cynthia Williams, *Crises and Civility: Twitter Discourse After School Shootings*, in *A CRISIS OF CIVILITY? POLITICAL DISCOURSE AND ITS DISCONTENTS* 96 (Robert G. Boatright et al. eds., 2019).

214. See *supra* Part I.

215. See Marcus, *supra* note 19, at 300–01.

216. Matthew S. Schwartz, *1 in 4 Americans Say Violence Against the Government Is Sometimes OK*, NAT’L PUB. RADIO (Jan. 31, 2022, 5:08 AM), <https://www.npr.org/2022/01/31/1076873172/one-in-four-americans-say-violence-against-the-government-is-sometimes-okay> [<https://perma.cc/Q8DZ-VH65>].

217. *Id.*

218. *Id.*

219. Larry Diamond et al., *Americans Increasingly Believe Violence Is Justified if the Other Side Wins*, POLITICO, <https://www.politico.com/news/magazine/2020/10/01/political-violence-424157> [<https://perma.cc/6U3Z-NEBH>] (Oct. 9, 2020, 6:00 PM).

220. *Id.*

221. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

222. *Roe v. Wade*, 410 U.S. 113 (1973).

as abortion and anti-abortion activism.<sup>223</sup> She conducted an online survey in which each participant read about a hypothetical act of violence perpetrated to advance a traditionally “right-wing” or “left-wing” position on abortion, climate change, or immigration.<sup>224</sup> Participants were asked to rank, on a scale of 1 to 7, whether they considered a bombing against a particular target to be “morally justifiable,” “strategic,” and “constituting terrorism.”<sup>225</sup> The study found that “[r]espondents who identified as further to the right viewed violence against liberal targets as more morally justified and less terroristic than violence against conservative targets,” and “[r]espondents who identified as further to the left viewed violence against conservative targets as more morally justified and less terroristic than violence against liberal targets.”<sup>226</sup> Liberals and conservatives “were about equally likely to see ‘their’ side’s violence as morally justifiable”; however, “liberals saw less justification for far-right violence than conservatives did for far-left violence.”<sup>227</sup> Norman notes that such an outcome is counter to the post-January 6 intuition that “conservatives are more susceptible to partisan bias or more likely to have double standards than liberals.”<sup>228</sup>

Fortunately, at least for the goal of reducing violence overall, the Norman study contained a note of hope. She found that 77% of respondents across *all* political ideologies viewed the hypothetical bombing as terrorism regardless of the target, and 72% viewed it as not morally justifiable.<sup>229</sup> A majority of respondents further found violence to be strategically *ineffective*, even for causes they agreed with.<sup>230</sup> This would seem to suggest a remaining societal preference against violent political change, which will become useful in considering whether it is even possible for the justice system to fairly adjudicate self-defense claims in politicized settings.

### C. Bodily Violence as Political Discourse

The discussion so far has described the nature of today’s political polarization and the increasingly important relationship between the *manner* of discourse and the potential for physical violence. It is important to note now that much of the *substance* of political discourse involves divisive issues that both sides of critical debates frame as being specifically *about* bodily violence. The perceived life-or-death stakes

---

223. Julie M. Norman, *Violence Against Antiabortion Groups Is Rising. Here’s What We Know.*, WASH. POST (June 29, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/06/29/dobbs-roe-violence-protests-supreme-court-clinics/> [<https://perma.cc/2TRQ-8KRJ>].

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

of political disagreement may, in fact, have something to do with the increased willingness of partisans to support violence to defend their positions. This Section will present a brief narrative analysis of several of the most prominent contemporary debates.

To take perhaps the most obvious and most divisive issue of the day, abortion rights have long been seen, by both opponents and proponents, as centering around bodily violence. Proponents of the right to abortion describe an unwanted pregnancy in the language of bodily assault, implicating, as it does, a woman's basic control not only of her life trajectory but of her physical autonomy.<sup>231</sup> The assaultive narrative against abortion restrictions becomes even more powerful when a pregnancy has itself been the product of a sexual assault or when it threatens the life of the mother or the unborn fetus.<sup>232</sup> On the other side, opponents of the right to abortion, believing that a human life begins either at conception or at least some point before delivery, describe abortion itself as a murderous assault on a human being.<sup>233</sup> Perhaps the unique intractability of this particular policy debate comes from the fact that it truly is zero-sum: it is impossible for the law to fully protect against the first category of perceived assault on life at the same time as it fully protects against the second.

More unique to our particular times, the debate over the appropriate level of government restrictions in the face of the COVID-19 pandemic frequently adopts the language of bodily violence. Proponents of greater restrictions point to the enormous loss of life caused by a historic, highly contagious disease and the unpredictable pathways of transmission that make each individual a potential agent of destruction to another, more vulnerable, party.<sup>234</sup> Opponents point to the assaultive nature of COVID restrictions themselves, especially during the early days of the pandemic, where many states told people who lived alone that they could have no human contact of any kind, resulting in a large uptick in suicidal depression, and patients with

---

231. See Press Release, Int'l Fed'n for Hum. Rts., *The Prohibition on Abortion Constitutes Violence Against Women* (Nov. 24, 2014), <https://www.fidh.org/en/issues/women-s-rights/16526-the-prohibition-on-abortion-constitutes-violence-against-women> [<https://perma.cc/5VZ7-2P59>].

232. See Andrew Solomon, *The Legitimate Children of Rape*, *NEW YORKER* (Aug. 29, 2012), <https://www.newyorker.com/news/news-desk/the-legitimate-children-of-rape> [<https://perma.cc/7XZN-MZLE>] (quoting Catherine MacKinnon for the proposition that “[f]orced pregnancy is familiar, beginning in rape and proceeding through the denial of abortions; this occurred during slavery and still happens to women who cannot afford abortions”).

233. Kaylee Cameron, *Is Abortion Murder?*, *FOCUS ON THE FAM.* (Feb. 8, 2022), <https://www.focusonthefamily.com/pro-life/is-abortion-murder/> [<https://perma.cc/T6BK-EPPZ>].

234. See Apoorva Mandavilli, *The Price for Not Wearing Masks: Perhaps 130,000 Lives*, *N.Y. TIMES* (Nov. 24, 2020), <https://www.nytimes.com/2020/10/23/health/covid-deaths.html> [<https://perma.cc/5PG5-LL8P>].

other diseases were discouraged from or denied diagnostic or other life-saving care.<sup>235</sup>

Certainly most relevant to the self-defense context, the nationwide protests in the summer of 2020 over the police murders of George Floyd, Breonna Taylor, and other unarmed black civilians represented an inflection point in the BLM movement.<sup>236</sup> Pre-dating the Floyd murder, BLM is a grassroots movement that initially associated with the earlier shootings of Trayvon Martin (by white civilian vigilante George Zimmerman) and Michael Brown (by Ferguson, Missouri, Police Officer Darren Wilson), while fighting other forms of structural racism and discrimination as well.<sup>237</sup> As activist DeRay McKesson has put it, BLM “encompasses all who publicly declare that black lives matter and devote their time and energy accordingly.”<sup>238</sup> The very name reifies the link between racism and physical violence against black bodies—in ways that police shootings illuminate in the present day but which also echo down from the nation’s history of enslaving black people.

The narratives spinning out of the opposition to the BLM movement create a discursive conflict distinct from either of the prior two examples. If the abortion debate is a zero-sum conflict between two accounts of assault, the debates about COVID are more of a sliding scale: how *much* physical restriction of the body and how *many* risks of other physical and psychological damage are worth it to save how many COVID victims from assaultive transmission? The opposition to BLM has played out somewhat more obliquely, though yet again deploying the narrative of physical assault. Perhaps because, unlike in the case of abortion, no one is likely to straightforwardly declare on a public stage “Black Lives *Don’t* Matter,” the countermovement has adopted the slogan “Blue Lives Matter” (with “Blue Lives” representing police officers). According to the Blue Lives Matter Facebook page:

Due to the nature of the profession, law enforcement personnel are seen as easy targets and are consequently bullied by slander, illegitimate complaints, frivolous law suits, and physical threats. The echo of these negative highlights by the media and political figures have only further damaged community relations, which has greatly increased the inherent threat of the profession. We desire to change these wrongs to law enforcement and once again shed positive light

235. ADRIAN MOORE ET AL., COVID-19 LOCKDOWN PROBLEMS AND ALTERNATIVE STRATEGIES TO REOPENING THE ECONOMY 4 (2020), <https://reason.org/wp-content/uploads/coronavirus-response-1-strategies-reopen-economy.pdf> [<https://perma.cc/9NNV-68QD>].

236. Leah Asmelash, *How Black Lives Matter Went from a Hashtag to a Global Rallying Cry*, CNN (July 26, 2020, 2:00 PM), <https://www.cnn.com/2020/07/26/us/black-lives-matter-explainer-trnd/index.html> [<https://perma.cc/R2XL-Q5QS>].

237. See *id.*; see also Wesley Lowery, *Black Lives Matter: Birth of a Movement*, GUARDIAN (Jan. 17, 2017, 1:00 PM), <https://www.theguardian.com/us-news/2017/jan/17/black-lives-matter-birth-of-a-movement> [<https://perma.cc/GNK2-CWM>].

238. Exec. Serv. Corps, *Black Lives Matter: History and Media Recommendations* (June 2020), <https://www.execservicecorps.org/blacklivesmatter> [<https://perma.cc/N46N-2422>].

on America's heroes to help boost morale and gain society's much needed support.<sup>239</sup>

Clearly concerned with both psychological and physical violence against police officers, the Blue Lives Matter movement has drawn criticism for being a distraction from Black Lives Matter<sup>240</sup> and for creating a false equivalence between an aspect of identity as central as race and a chosen profession.<sup>241</sup>

More significantly, it has been criticized as potentially exacerbating the very police violence BLM seeks to eradicate.<sup>242</sup> One way of thinking about the problem is comparing the work assaultive narratives do in this rhetorical context. While there is nothing inherently racist or even violent about concern for protecting police from violence, the choice of the parallel language of "Blue Lives" versus "Black Lives" seems to invite the same kind of zero-sum reasoning that is unavoidable in the abortion context but inapplicable here. "Black Lives" do not pose an inherent threat to "Blue Lives," and the us-versus-them dichotomy implicit in the coopted slogan seems to array weaponized police interests directly against the interests of black civilians. The bodily threat implicit in anti-BLM rhetoric is particularly clear in the "Black Behavior Matters" sign mentioned in one of the vehicular assault cases described above.<sup>243</sup> Replacing "lives" with "behavior" sends a message that black people who fail to "behave" do not deserve to live. This message conjures images of the mob lynchings of the Jim Crow era, which were frequently a punishment for perceived "misbehavior" by black men.

In any case, the Blue Lives Matter movement's own rhetorical focus on assault becomes even more clear on its Facebook page, which is "[d]edicated to the warriors who stand on this line, to those who wage war in the streets, to those we have lost and will lose, to our brothers and sisters."<sup>244</sup> The use of battlefield imagery to describe the work of policing amplifies the zero-sum, black/blue dichotomy established by the slogan itself.

It is not surprising, in light of this rhetorical background, that a secondary debate emerged from the 2020 BLM protests concerning the expressive status of looters as either part of or separately motivated by the anti-racist political message of the protestors more broadly. President Donald Trump aligned himself rhetorically with the police, describing himself as the "president of law and order"<sup>245</sup> and emphasize-

---

239. Blue Lives Matter, *About Blue Lives Matter*, FACEBOOK, <https://www.facebook.com/bluematters/> [<https://perma.cc/4X3X-VM3M>].

240. See India Thusi, Essay, *Blue Lives & the Permanence of Racism*, 105 CORNELL L. REV. ONLINE 14, 25–26 (2020).

241. *Id.* at 27–28.

242. *Id.* at 24–25.

243. See KCAL News, *supra* note 3 and accompanying text.

244. Blue Lives Matter, *Intro*, FACEBOOK, <https://www.facebook.com/bluematters/> [<https://perma.cc/4X3X-VM3M>].

245. See Renuka Rayasam, 'I Am Your President of Law and Order,' POLITICO

ing the slippery continuity between protestors and criminals, a line he himself promised to police with violence: “[W]hen the looting starts, the shooting starts.”<sup>246</sup> Such rhetoric situates the protestor as potentially both criminal subject and criminal object, as both author of and justifiable recipient of violence. It, therefore, creates equivalence between the protestors and George Floyd himself through a presumption that police violence and death await at the moment a state actor identifies the body in question as criminal. At the same time, however, some of BLM’s own slogans do themselves, in fact, carry a latent threat of physical violence. The popular message “No Justice, No Peace” threatens a state of “war,” which explicitly conveys the likelihood of organized bodily assault. Even if war is understood to refer only to civil unrest or property violence, the relationship between those goals and bodily violence is, at best, fluid.<sup>247</sup>

The looting incidents during the summer of protest bring us back, full cycle, to the observation with which this Part opened: the boundary between rhetorical and literal political violence is more slippery than perhaps any time in recent memory. People seem genuinely to experience ideas and even words as violence in ways that, at a minimum, have not been articulated before and to weaponize those experiences as part of countervailing rhetorical strategies.<sup>248</sup> Furthermore, the most polarizing substantive political debates of the day explicitly center on violence of various sorts to the human body. Finally, everyday citizens appear increasingly willing to use violence to express and advance their political agendas. This dynamic is dangerous enough in the first place but is, as we will see, compounded by the adverse effects of partisan politics on human cognition.

---

(June 1, 2020, 9:04 PM), <https://www.politico.com/newsletters/politico-nightly-coronavirus-special-edition/2020/06/01/i-am-your-president-of-law-and-order-489390> [https://perma.cc/UWH4-3AKB].

246. Jill Colvin & Zeke Miller, *Trump Walks Back His Incendiary Minneapolis ‘Thugs’ Post*, AP News (May 29, 2020, 6:11 PM), <https://apnews.com/article/virus-outbreak-police-donald-trump-ap-top-news-mn-state-wire-f62ed59014cbf43fc1da21e3fcbfe904> [https://perma.cc/HSP3-KT23].

247. See Attorney General’s Reference on a Point of Law [2022] EWCA Crim 1259, [122]–[123] (appeal taken from Eng.) (concluding that a protestor toppling a public statue constituted a “violent” act under the European Convention on Human Rights); Rich Lowry, *Of Course Destruction of Property Is Violence*, POLITICO (June 3, 2020, 8:30 PM), <https://www.politico.com/news/magazine/2020/06/03/of-course-destruction-of-property-is-violence-299759> [https://perma.cc/8TGZ-PC7E]; Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 873 n.438 (1993) (citing research showing “[a]pproximately 80% of [domestic] batterers engage in violent behavior towards other targets, such as harming pets and destroying objects”).

248. See Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [https://perma.cc/V6GP-7LNU]. But see Jonathan Haidt & Greg Lukianoff, *Why It’s a Bad Idea to Tell Students Words Are Violence*, ATLANTIC (July 18, 2017, 7:10 AM), <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/> [https://perma.cc/YR5M-556J].

## IV. POLITICAL DECISION-MAKING AND THE MIND

The above discussion makes it clear that our society currently experiences a heightened level of political partisanship and that this has wide-ranging effects on the ways we interact with one another. In particular, the data suggests that political partisans may be more inclined than non-partisans to deal with one another uncivilly or even with violence. While this data has obvious implications for both subjective and objective evaluations of the risk of serious bodily injury in politically charged contexts, it paints only a fairly broad picture of societal trends.

This Part will consider the two-way relationship between individual cognition and political motivation and the ways in which it is both dangerous and generative. First, it will review the psychological literature that shows how political partisanship may contribute to a number of problematic cognitive biases that distort decision-making. It will argue that, therefore, political contexts may negatively affect subjective evaluations of physical risk—among the actual parties to an altercation and jurors alike. Second, it will discuss what we know about how emotions affect moral decision-making in both desirable and undesirable ways, with implications in both political and legal contexts. Third, it will examine the inverse relationship between the individual and the political, describing what we know about how human emotions contribute to political movements, many of which have had immensely positive social benefits. It will show that, therefore, there are risks to any attempt to categorically segregate an individual's political commitments from the exercise of reason.

A. *The Negative Effects of Partisanship on Decision-Making*

It is clear that political partisanship presents a wide range of macro-level pragmatic problems, which complicate our diverse population's attempt to coexist in civil society. But partisanship also poses problems at the micro-level by adversely affecting an individual's ability to make decisions. Psychologist Paul Slovic identifies an "affect heuristic," through which individuals allow their subjective likes and dislikes to determine their beliefs about the world.<sup>249</sup> As Daniel Kahneman puts it in *Thinking, Fast and Slow*, a person's forgone conclusions dominate over arguments particularly strongly when emotions are involved:

Your political preference determines the arguments that you find compelling. If you like the current health policy, you believe its benefits are substantial and its costs more manageable than the costs of alternatives. If you are a hawk in your attitude toward other nations, you probably think they are relatively weak and likely to submit to your country's will. If you are a dove, you probably think they are strong and will not be easily coerced. Your emotional attitude to such

---

249. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 103 (1st ed., 2011).

things as irradiated food, red meat, nuclear power, tattoos, or motor-cycles drives your beliefs about their benefits and their risks. If you dislike any of these things, you probably believe that its risks are high and its benefits negligible.<sup>250</sup>

Dan Kahan has described a similar effect based on culture generally rather than partisan politics specifically.<sup>251</sup> He uses the term “cognitive illiberalism” to refer to the “psychological tendency to impute harmful consequences (or to deny the same) to behavior that offends (or gratifies) one’s cultural norms.”<sup>252</sup> The psychological literature has also proposed a range of other heuristics that explain why political partisanship can adversely affect decision-making.

First is the well-known principle of confirmation and disconfirmation bias: people tend to reject or ignore evidence that disconfirms their preexisting views.<sup>253</sup> Indeed, some evidence shows that people may actually *increase* their confidence in their pre-existing beliefs when presented with evidence that they are wrong.<sup>254</sup> Next, the phenomenon of emotional contagion means that unrelated background emotions (i.e., having a “bad day”) may affect how people view the issues they are considering.<sup>255</sup> Finally, Henry Tajfel has identified the phenomenon of “ingroup bias,” which is the tendency of people irrationally to prefer members of their own cohort, whatever the context.<sup>256</sup> In one experiment, Tajfel randomly assigned subjects to groups and told the members that they had something random and fairly neutral in common with their group, such as similar tastes in music.<sup>257</sup> He then conducted experiments that found the subjects showed strong favoritism toward their own random group and distrust toward other groups.<sup>258</sup>

These phenomena are, rightfully, lamented. As Jason Brennan puts it after surveying much of this data: “[E]motion-driven politics does not just make us biased. Rather, it makes us dislike each other and

---

250. *Id.*

251. See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

252. Kahan & Braman, *supra* note 29, at 5.

253. See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2098–99 (1979); see also Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 755 (2006).

254. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307–08 (2010), <https://doi.org/10.1007/s11109-010-9112-2>; see John G. Bullock et al., *Partisan Bias in Factual Beliefs About Politics*, 10 Q.J. POL. SCI. 519, 539 (2015), <https://doi.org/10.1561/100.00014074>.

255. Carolina Herrando & Efthymios Constantinides, *Emotional Contagion: A Brief Overview and Future Directions*, FRONTIERS PSYCH., July 16, 2021, at 1, 2, <https://doi.org/10.3389/fpsyg.2021.712606>.

256. Henry Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCH. 1, 23–24 (1982), <https://doi.org/10.1146/annurev.ps.33.020182.000245>.

257. See *id.*

258. *Id.*



mistreat each other. It causes mutual distrust and diffidence.”<sup>259</sup> These are problems for a democracy insofar as they result in uninformed and narrow-minded approaches to solving large political problems within a heterogeneous society. But they also, to use Brennan’s term, quite simply make us “meaner” human beings.<sup>260</sup> And it is this quality of meanness that may be most relevant to considering both sides of a legal claim to self-defense.

That said, it is important to note more heartening evidence that the human mind is not completely closed and opinions can change in response to new information and sensible reasoning.<sup>261</sup> For example, one way to avoid judging a person based on an inaccurate stereotype of the group to which that person belongs is to seek out what psychologist Lee Jussim describes as “individuating information.”<sup>262</sup> Such information refers to a target person rather than his or her group memberships and includes such features as a person’s personality, preferences, tastes, attitudes, accomplishments, experiences, competencies, and behaviors.<sup>263</sup> The more individuating information about a target that a person has when making a judgment, Jussim suggests, the less likely it is that they will rely on a stereotype about the group to which that target belongs.<sup>264</sup> This is true even when some stereotypes are generally accurate (i.e., it is accurate to say that short people are less likely to be successful NBA players, but individuated information about the career of 5’7” NBA point guard Spud Webb is a more accurate basis for judging his own skills).<sup>265</sup> As to inaccurate stereotypes, such as those forming the basis for racism, much literature in social psychology shows that people can and do change them in the face of individuated information—even when the stereotypes are deeply ingrained and pernicious.<sup>266</sup>

---

259. Jason Brennan, *Politics Makes Us Mean and Dumb*, EMOTION RESEARCHER (Feb. 2017), <https://webcache.googleusercontent.com/search?q=cache:j8AA9WIUUh-8J:https://emotionresearcher.com/politics-makes-us-mean-and-dumb/+&c-d=1&hl=en&ct=clnk&gl=us> [https://perma.cc/JPU9-QZWH].

260. *Id.*

261. KAHNEMAN, *supra* note 249, at 103.

262. LEE JUSSIM, SOCIAL PERCEPTION AND SOCIAL REALITY: WHY ACCURACY DOMINATES BIAS AND SELF-FULFILLING PROPHECY 367 (2012).

263. *Id.* at 362.

264. *Id.* at 362–64.

265. *Id.* at 362–63.

266. See Milton Rokeach & Louis Mezei, *Race and Shared Belief as Factors in Social Choice*, 151 SCI. 167, 167–69 (1966) (finding that Whites in the 1960s American South held negative stereotypes of African Americans mainly because they assumed they held different beliefs and attitudes but, when faced with information about people’s specific beliefs, evaluated African Americans with attitudes similar to their own more positively than they evaluated Whites with different beliefs, and about the same as those of Whites holding attitudes similar to their own); Richard T. LaPiere, *Attitudes Vs. Actions*, 13 SOC. FORCES 230, 231–32 (1934), <https://doi.org/10.2307/2570339> (finding that racist employees at hotels and restaurants who claimed they would not provide service to Chinese people based on false stereotypes instead behaved politely to actual Chinese individuals).

## B. Reason and Emotionality

The relationship between partisanship and reason is further complicated by a third mental process: emotion. Particularly with sensitive interests at stake, political questions and conflict necessarily implicate the emotions of affected parties and observers.<sup>267</sup> It might, therefore, be tempting to suggest that emotions are the primary culprit for the cognitive biases described in the preceding Part. Indeed, over the last half of the twentieth century, the social sciences generally criticized emotion as antithetical to rationality.<sup>268</sup> Max Weber argued that emotional reactions increase the likelihood of empathy in a manner inconsistent with rational analysis and that, therefore, “[f]or the purposes of a typological scientific analysis it is convenient to treat all irrational, affectually determined elements of behavior as factors of deviation from a conceptually pure type of rational action.”<sup>269</sup> As a result of this manner of thinking, many social scientists considering the causes of political and social movements treated emotions as the product of crowds, as opposed to “individuals’ own lives and goals,” appearing and disappearing “in response to what was happening in one’s immediate surroundings, with little lasting resonance.”<sup>270</sup>

Common law jurisprudence likewise reflects a strong preference for reason over emotion.<sup>271</sup> The law has long treated emotion as the antithesis to the rule of law, including all that is “irrational, prejudicial, intangible, partial, and impervious to reason.”<sup>272</sup> The common law prejudice against “emotional” decision-making may have its origins in the Enlightenment materialist model associated with Descartes, in which emotions are sensations caused by objects<sup>273</sup> or, for Hume, “impressions” made by the outside world.<sup>274</sup> By contrast, in a “cognitive” model inaugurated by Aristotle, emotions flow from mental attitudes or judgments.<sup>275</sup>

267. See Jeff Goodwin et al., *Introduction: Why Emotions Matter*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 1, 10 (Jeff Goodwin et al. eds., 2001).

268. See *id.* at 2.

269. *Id.*

270. *Id.* at 4.

271. See, e.g., *California v. Brown*, 479 U.S. 538, 542–43 (1987) (holding that an instruction “that jurors not be swayed by ‘mere sentiment, conjecture, sympathy, passion, prejudice, or public opinion or public feeling’” in the penalty phase of a capital murder trial did not violate Eighth or Fourteenth Amendments).

272. Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. SOC. SCI. 161, 162 (2012), <https://doi.org/10.1146/annurev-lawsocsci-102811-173825>.

273. See Amy M. Schmitter, *17th and 18th Century Theories of Emotions*, STAN. ENCYCLOPEDIA PHIL. (Apr. 8, 2021), <https://plato.stanford.edu/entries/emotions-17th18th/> [<https://perma.cc/LP99-D3FE>].

274. *Id.*

275. Asli Yazici, *Aristotle’s Theory of Emotions*, 10 INT’L PERIODICAL FOR LANGUAGES LITERATURE & HIST. TURKISH OR TURKIC 901, 915 (2015), <http://doi.org/10.7827/TurkishStudies.7904>.

More recently, however, cognitive scientists such as Antonio Damasio, studying patients with impaired emotional functions, have shown how “rational” decision-making is actually, at least in part, *guided* by emotion.<sup>276</sup> Further research has shown that emotion “helps sort, evaluate, highlight, and prioritize information and provides an impetus to act upon it.”<sup>277</sup> In one study, researchers took fMRI images of participants’ brains while asking them to consider their choices in two versions of the famous trolley problem.<sup>278</sup> In one version of the dilemma, participants had to decide whether they would hit a switch to divert a runaway trolley onto another track, thereby saving five people but killing one.<sup>279</sup> In the other, they were asked to decide whether they would shove a large person into the tracks, thereby stopping the trolley and saving the five other people.<sup>280</sup> Researchers found participants had a longer reaction time in making the second decision, which was correlated with a higher degree of activity in the regions of the brain associated with emotion.<sup>281</sup> They concluded that the moral decision involving a more “personal” hypothetical intervention by the participant systematically triggered a greater emotional involvement than the less personal moral decision.<sup>282</sup>

The burgeoning, interdisciplinary field of law and emotion is only beginning to illuminate the complex relationships between emotion and legal decision-making, and scholars disagree about the appropriate role of “moral” emotions such as empathy, disgust, indignation, and compassion among legal factfinders.<sup>283</sup> Martha Nussbaum, for example, warns that resorting to the emotion of disgust as a basis for legal decision-making is likely to result in ill-treatment of marginalized groups.<sup>284</sup> In contrast, Dan Kahan has argued that, for those who value equality and solidarity, “[t]here are indeed situations in which properly directed disgust is indispensable to a morally accurate perception of what’s at stake in the law.”<sup>285</sup> Of particular importance to the task of evaluating legal claims in a politicized context, emotions are formed, interpreted, and communicated within a social and cultural context.<sup>286</sup> Given the

---

276. See generally ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994); see also ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 35 (1999).

277. Bandes & Blumenthal, *supra* note 272, at 166.

278. Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *Sci.* 2105, 2106 (2001), <https://doi.org/10.1126/science.1062872>.

279. *Id.* at 2105.

280. *Id.*

281. *Id.* at 2107.

282. *Id.*

283. See Bandes & Blumenthal, *supra* note 272, at 168.

284. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 125 (2004).

285. Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW* 63, 63 (Susan Bandes ed., 1999).

286. SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 11 (2d ed. 2014) (arguing that emotion circulates through the objects of emotion, which become “saturated with affect, as sites of personal and social tension”); see also Bandes & Blumenthal, *supra*

importance of context, it is not surprising that studies have shown emotions can be educated.<sup>287</sup> And, of course, culturally shared emotions can, therefore, play a significant role in social change.

### C. *Emotion and Political Movements*

While partisan thinking poses specific, significant impediments to reasoning, the function of political emotion more broadly is substantially more nuanced. Sharon R. Krause has made a study of the role of moral emotions in the process of democratic deliberations, acknowledging, on the one hand, that civility and impartiality are crucial to legitimate political decision-making and, on the other, the inevitable role emotion plays in moral decision-making.<sup>288</sup> She advances a theory for how to achieve impartial, passion-driven deliberation, which turns on the function of what she calls emotional “concerns”: affective states that involve reflective valuing and caring and that dispose us to decision and action.<sup>289</sup> She suggests that “civil passions” take two forms: individual moral sentiments represented by different perspectives within a deliberation (for example, a particular person’s view on the importance of marriage equality) and the more diffuse “attachments citizens have to their shared public values.”<sup>290</sup> For this second category, she uses Hume’s term of “calm passion”—emotional attachments to concepts of fair play, such as the desire to be consistent.<sup>291</sup> Krause’s work provides a useful framework for thinking about how to reduce the cognitive distortions caused by political partisanship without abandoning the salutary effects of emotion in effecting beneficial political change.

Indeed, numerous case studies reveal the important roles emotions have played in social movements by way of cultural structures such as interpretive “frames”<sup>292</sup> and “collective identity” (kinship to a

note 272, at 163; Peggy A. Thoits, *The Sociology of Emotions*, 15 ANN. REV. SOCIO. 317, 319–21 (1989), <https://doi.org/10.1146/annurev.so.15.080189.001533>.

287. See Norma Deitch Feshbach & Seymour Feshbach, *Empathy and Education*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 85, 85 (Jean Decety & William Ickes eds., 2009); Jean Decety & Philip L. Jackson, *A Social-Neuroscience Perspective on Empathy*, 15 CURRENT DIRECTIONS PSYCH. SCI. 54, 57 (2006), <https://doi.org/10.1111/j.0963-7214.2006.00406.x> (showing evidence that individuals use the same neural circuits for emotion processing for themselves and for others and that “[t]hese circuits provide a functional bridge between first-person and third-person information, which paves the way for intersubjective transactions between self and others”).

288. SHARON R. KRAUSE, CIVIL PASSIONS: MORAL SENTIMENT AND DEMOCRATIC DELIBERATIONS 3 (2008).

289. *Id.* at 6–7.

290. *Id.* at 20.

291. *Id.* at 10.

292. See David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest* (defining a “frame” as “an interpretive schemata that simplifies and condenses the ‘world out there’ by selectively punctuating and encoding objects, situations, events, experiences, and sequences of actions within one’s present or past environment”), in FRONTIERS IN SOCIAL MOVEMENT THEORY 133, 137 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

movement based on ascribed traits including race, gender, sexual orientation, class, and so forth).<sup>293</sup> Building on that work, scholars of emotion have begun to show how human emotion shapes these cultural phenomena and, therefore, must be considered a fundamental galvanizing force in political change.<sup>294</sup>

For example, one study of animal rights activists found that many participants framed their journey into activism as sparked by their emotional attachment to animals, after which they shifted toward a “rational” approach grounded in scientific and philosophical justifications for animal protection.<sup>295</sup> Similarly, a study of AIDS activist groups in the late 1980s showed how emotions, such as shame, fear, pride, grief, indignation, and anger, shaped LGBT responses to the AIDS pandemic, “sometimes encouraging lesbian and gay quiescence or community self-help, at other times animating militant political activism.”<sup>296</sup> Yet another study showed that the highly visible movement against child sexual abuse that started in the late 1970s heavily implicated the reconstruction and expression of emotions.<sup>297</sup> The study identified as important to the movement’s progress three types of emotional dynamics: “oppositional emotion[s]” internal to the movement (survivors’ trauma versus impulse toward resistance); “emotional labor” (public displays of emotion to external audiences); and “emotional opportunities” (the effect of context on individual survivors’ ability to express emotion).<sup>298</sup>

More recently, the Black Lives Matter movement has been a powerful example of how affect can drive social change through harnessing collective emotions. Research suggests that protest speech has been effective in bridging a “racial empathy gap” when it comes to white American views about the criminal justice system.<sup>299</sup> Aided by the prevalence of social media, activists have been able to use visual imagery to mobilize public support by generating emotion in their audiences.<sup>300</sup> And the BLM movement itself has created spaces for black activists to

---

293. Goodwin et al., *supra* note 267, at 8.

294. *Id.* at 24.

295. Julian McAllister Groves, *Animal Rights and the Politics of Emotion: Folk Constructs of Emotions in the Animal Rights Movement*, in *PASSIONATE POLITICS*, *supra* note 267, at 215–16.

296. Deborah Gould, *Rock the Boat, Don’t Rock the Boat, Baby: Ambivalence and the Emergence of Militant AIDS Activism*, in *PASSIONATE POLITICS*, *supra* note 267, at 135–36.

297. Nancy Whittier, *Emotional Strategies: The Collective Reconstruction and Display of Oppositional Emotions in the Movement Against Child Sexual Abuse*, in *PASSIONATE POLITICS*, *supra* note 267, at 235.

298. *Id.* at 237.

299. See Chris Barker, *Policing, Incarceration, Race, and Protest After Ferguson*, 32 *PUB. AFFAIRS Q.* 331, 332, 340 (2018), <https://doi.org/10.2307/26910003>.

300. See Andreu Casas & Nora Webb Williams, *Images that Matter: Online Protests and the Mobilizing Role of Pictures*, 72 *POL. RSCH. Q.* 360, 372 (2019), <https://doi.org/10.1177/1065912918786805> (showing that the use of images triggering the emotions of enthusiasm and fear is effective at mobilizing online protest).

center positive emotions of love and empowerment, which have, in turn, been sustaining for the movement.<sup>301</sup>

Regardless of one's personal opinion as to the specific views held by any particular individual within any of these political movements, the upshot of all of them, through the process of democratic expression and deliberation, is a body politic more inclusive of a wider range of subjective views. Emotionality has played a role in a world that is more attuned to injustice, particularly against political out-groups than we would otherwise have. And this has been possible in part due to citizens' emotional commitments, not only to specific causes but to broader values of democracy and the rule of law—the “calm passion[s].”<sup>302</sup> Thus, as we turn to the current question of adjudicating politicized self-defense, we must do so with an eye toward encouraging institutions to properly channel political emotion rather than eradicate it.

## V. POLITICIZED SELF-DEFENSE LAW

The data surveyed in Part III of this Article suggests that people who identify as strong political partisans are more likely than they have been in recent decades to see incivility in those they disagree with, to value incivility in those they do agree with, and to find violence justifiable to achieve political ends. While more empirical research in this area is needed, these facts—combined with what we already know about how political bias affects reasonableness determinations—suggest that violent events arising during political protests may pose unique challenges for adjudicating self-defense claims. This Part describes three distinct points at which partisanship may be relevant to the claim and its adjudication.

### A. *The Victim's Likelihood of Posing a Legitimate Threat to the Defender and the Defender's Likelihood of Overestimating that Threat*

In the study described in Section III.B, Julie Norman found that about 28% of respondents believed violence against a political entity they disagreed with to be at least somewhat justifiable.<sup>303</sup> Norman's study found this result using a hypothetical scenario—a bombing—which could be executed by an individual actor.<sup>304</sup> But a far more common setting for political violence would be a scene of initially peaceful protest, such as the ones with which this article opened, that turns violent after verbal clashes with counter-protestors. And unfortunately,

---

301. See Tabitha Jamie Mary Chester, *Movement for Black Love: The Building of Critical Communities Through the Relational Geography of Movement Spaces*, 41 BIOGRAPHY 741, 757 (2018), <https://doi.org/10.1353/bio.2018.0077>.

302. See KRAUSE, *supra* note 288, at 10.

303. See Norman, *supra* note 223.

304. *Id.*

such protests—while crucial to freedom of speech—can become particularly dangerous due to the fact that humans tend to be more violent in groups, possibly through some sort of network effect.<sup>305</sup>

Indeed, one of the several justifications for criminalizing conspiracy as an inchoate offense rests on this premise: “that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.”<sup>306</sup> The Supreme Court has said that “[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.”<sup>307</sup> Or, as Neal Katyal puts it: “[I]t is generally accepted that groups are more likely to polarize toward extremes, to take courses of action that advance the interests of the group even in the face of personal doubts, and to act with greater loyalty to each other.”<sup>308</sup>

In the context of self-defense, the very real, heightened potential violence of a political crowd is relevant both to the question of whether a defender honestly and reasonably believes a politically motivated victim poses a threat of serious harm *and* to the question of whether the force used by the defender is necessary. For example, in a non-political scenario—at, say, a crowded outdoor music festival—it would be difficult to argue it was ever reasonable for a motorist to run over a crowd member’s head, even if her car was surrounded by rowdy people. But when the motorist, a black woman, is faced with a crowd assembled to protest against the idea that “black lives matter,” bearing a sign that reads, “black behavior matters,” thereby implying that those who “misbehave” do not deserve to live, the situation looks significantly different (as it does if the roles are reversed and the encroaching crowd of counter-protestors have signs reading “no justice, no peace,” implying that the encounter is taking place in a state of war).

Under even an objective standard, the messages in those signs form part of the legally relevant circumstances in which the defender finds herself and with respect to which a jury must evaluate her reasonableness.

---

305. See, e.g., Gayook Wong, *The Psychology of Mob Mentality: Is This What Happened with the Infiltration of the Capitol on Jan. 6?*, PSYCH. TODAY CAN. (Jan. 24, 2021), <https://www.psychologytoday.com/ca/blog/facing-trauma-together/202101/the-psychology-mob-mentality> [<https://perma.cc/9SSQ-BVHN>]; Brendan Lantz, *Co-Offending Group Composition and Violence: The Impact of Sex, Age, and Group Size on Co-Offending Violence*, 66 CRIME & DELINQUENCY 93, 93 (2019), <https://doi.org/10.1177/0011128719834564>; Jean Marie McGloin & Alex R. Piquero, *‘I Wasn’t Alone’: Collective Behaviour and Violent Delinquency*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 336, 336 (2009), <https://doi.org/10.1375/acri.42.3.336>; Kevin P. Conway & Joan McCord, *A Longitudinal Examination of the Relation Between Co-Offending with Violent Accomplices and Violent Crime*, 28 AGGRESSIVE BEHAV. 97, 97 (2002), <https://doi.org/10.1002/ab.90011>.

306. Developments in the Law, *Criminal Conspiracy*, 72 HARV. L. REV. 920, 923–24 (1959), <https://doi.org/10.2307/1338326>.

307. *Callanan v. United States*, 364 U.S. 587, 593 (1961).

308. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1316 (2003).

This is not to say, as would be the consequence of a purely subjective standard, that because the defender in either of these cases personally subjectively fears white or black people, he or she is justified in committing the vehicular assault. (Jody Armour notes that the grotesqueness of the Bernie Goetz verdict was its apparent collapse of this subjective reasoning into an objective standard: the “Reasonable Racist”<sup>309</sup>). It is, however, to acknowledge that the explicit threat in certain political messages—particularly those that harness a history of racist violence—is relevant to a potential defender’s evaluation of their surroundings. The personal emotional impact of such signs is deeply intertwined with the very real physical threats they convey.

That said, the very same psychological biases that make political actors somewhat more likely to be violent also make a potential defender more likely to perceive the threat of violence where it does not exist, in the same manner that partisans are more likely to see incivility in the actions of someone they disagree with. The risk of mistake seems particularly high when the substance of the specific disagreement between the protestor and counter-protestor—be it black/blue lives matter, abortion, etc.—already causes one party to believe the other intends them violence from the start, on the basis of their ideas. We know that roughly 95% of protests—left- or right-wing—do *not* result in violence.<sup>310</sup> If a defender is allowed to argue that the use of force is more reasonable in light of a political setting, this creates an inherent risk of taxing free speech with the chance of death.<sup>311</sup> It becomes, therefore, particularly important to examine the role of a potential defender’s own biases in unjustifiably convincing himself that a political actor poses a true threat of bodily harm. This will be especially worrisome in cases where a defender is himself an initial aggressor.

#### B. *Whether and When the Defender’s Own Conduct Should Exclude Him as an Initial Aggressor*

As discussed in Section II.B.1, all U.S. states impose some limitations on initial aggressors claiming self-defense—either barring them from the defense entirely or at least imposing on them a duty to retreat.<sup>312</sup> Nonetheless, many states make it difficult for the prosecution to prove

---

309. Armour, *supra* note 22, at 790.

310. Kishi & Jones, *supra* note 17.

311. The prevention of politically motivated violence at the outset is, of course, the stated justification for various state criminal statutes that criminalize “unlawful assembly.” See, e.g., MO. REV. STAT. § 574.040(1) (2017) (making it a crime to “knowingly assemble[] with six or more other persons and agree[] . . . to violate . . . the criminal law[] . . . with force or violence”). However, in many states those statutes run rampant with vagueness and overbreadth problems, rendering them heavily prone to discretionary enforcement likely to chill valid exercises of free speech. See Marcus, *supra* note 19, at 323–24; see also John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 20–21 (2017).

312. See *supra* Section II.B.1 and accompanying notes.



initial aggressor status, and judges are inconsistent about providing an appropriate instruction to the jury.<sup>313</sup> The Kyle Rittenhouse case—in which arguably both Rittenhouse and his victims were engaging in aggressive behavior at various points in the altercation—exemplifies how challenging the rule can be to apply within the crucible of political conflict.<sup>314</sup>

Put simply, it may be difficult to discern whether or not an exercise of free speech involving heated political language qualifies as “aggression” under the various state statutes. Some states define initial aggression to include not only those who cause or threaten actual violence but also “provocateurs”—people who provoke another person into attacking them so that they can attack back and claim they did so in self-defense.<sup>315</sup> While initial aggressor laws for provocateurs require a showing of intent to provoke an attack, they seem particularly ripe for arbitrary application by courts deciding whether to give an instruction and juries deciding whether to apply it. Due to the fact that people are more likely to perceive incivility when they disagree with a speaker’s message and less likely to perceive it when they agree, there would seem to be a risk of courts and juries over-applying it against defendants with political views opposing their own and under-applying it against those with similar views.

The initial aggressor rule, as applied to provocateurs, already sits in tension with the right to free speech insofar as it limits a speaker’s right to defend himself on the basis of words that fall short of constituting true threats for First Amendment purposes. As Cynthia Lee has noted in a Second Amendment context, however, the right to engage in constitutionally protected behavior—such as gun possession—does not include the right not to be found an initial aggressor.<sup>316</sup> Words, like guns, can and do lead to violence and, as the arguments for hate crimes legislation show, can sometimes verge on violence themselves.<sup>317</sup> Thus, it is appropriate for juries to factor the content and manner of political expression into their evaluation of whether a victim has been an initial aggressor. That said, courts using jury instructions arbitrarily to enforce the initial aggressor rule against defenders of only certain political viewpoints would create a more significant First Amendment problem.

---

313. *Id.*

314. *Id.*

315. See *Scott v. Commonwealth*, 129 S.E. 360, 361–62 (Va. 1925) (barring a defendant’s self-defense claim because he had called the victim’s father a bootlegger and a gambler to provoke him into attacking); *People v. Santiago*, 515 N.E.2d 228, 234 (Ill. App. Ct. 1987) (finding the defendant to be the aggressor after evidence that he had shouted hostile gang slogans and made antagonistic gang signals at his victims).

316. See Lee, *supra* note 64, at 67 (arguing that courts should be required to give initial aggressor instructions in cases where a defendant claiming self-defense had been attacked after displaying a firearm in a threatening manner).

317. See *Wisconsin v. Mitchell*, 508 U.S. 476, 477–88, 490 (1993) (approving hate crime enhancements to existing crimes, so long as the government can show a predicate criminal act).

And juries should be deterred, to the extent possible, from letting their own substantive political positions dictate whether a defender's political speech constituted provocation.

C. *The Jurors' Political Views Distorting Their Determinations of Reasonableness*

We have seen in Part IV of this Article how emotion inextricably impacts the human process of moral reasoning. The literature also identifies four specific ways in which emotions influence legal judgments: (1) by affecting a factfinder's strategies for processing information; (2) by biasing perception, recall, or evaluation of facts in a particular direction; (3) by providing informational cues for the appropriate attribution of blame; and (4) by anticipating future emotions that might flow from a judgment.<sup>318</sup> Whether these influences are good or bad may depend on the eye of the beholder or at least the particular context at issue. We have seen how the emotions of fear, for example, may be the product of ingrained racism in exonerations like those of Bernard Goetz and George Zimmerman.<sup>319</sup> Yet, we have also seen how emotions have been instrumental in effecting positive change in politico-legal contexts precisely *by* galvanizing emotions. A prime example is how the emotion of empathy for victims of unjustified police violence has resulted in more prosecutions and convictions of their killers than would have been likely only a few years ago.

Regardless, the law plainly deems emotions severable from reason when it comes to the deliberations of factfinders. Courts instruct jurors that they must be in control of their emotions, invoking them only on the specific questions—for example, the heinousness of a particular act—to which they are relevant.<sup>320</sup> Yet ample evidence suggests that jurors' emotions—both integral (related to the case) and incidental (related to some external factor)—do impact decision-making.<sup>321</sup> Jurors who feel the emotions of anger and disgust are more likely to punish and, in a capital trial, more likely to impose the death penalty.<sup>322</sup> Furthermore,

318. Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, in *EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES* 45, 46–47 (Brian H. Bornstein & Richard L. Wiener eds., 2010).

319. See Mauricio T. Torres et al., *Trayvon Revisited: Race, Fear, and Affect in the Death of Trayvon Martin*, 32 *SOCIO. F.* 1112, 1112–13 (2017), <https://doi.org/10.1111/socf.12369>. For a balanced discussion on the role of fear in the context of self-defense killings by police officers, see Daniel Yeager, *Cop Killers*, 48 *CRIM. L. BULL.* 428, 450–55 (2012) (exploring the role of situational paranoia in police officers' overestimation of the physical risks posed by targets).

320. Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119, 120 (2006), <https://doi.org/10.1007/s10979-006-9029-9>.

321. BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 244–46 (2017).

322. See Hannah J. Phalen et al., *Emotional Evidence in Court*, in *RESEARCH HANDBOOK ON LAW AND EMOTION* 288, 291–93 (Susan Bandes et al. eds., 2021); Catherine

mock jurors experiencing anger are more likely to judge mitigation evidence to be weaker and to perceive a defendant's actions as more intentional.<sup>323</sup>

Like emotions—with which it is often deeply intertwined—political partisanship also appears to distort juror decision-making, especially in cases of self-defense. In their study of mock juries, discussed in the Introduction of this Article, Dan Kahan and Donald Braman posit the phenomenon of “defensive bias” or “identity-protective cognition.”<sup>324</sup> They argue that individuals presented with self-defense scenarios “don’t think they are siding one or another self-defense claimant based on their political ideologies,” and yet “what *causes* those individuals to find some defendants’ claims factually credible and others’ not is the psychic costs and benefits of such beliefs to persons who hold their defining commitments.”<sup>325</sup> Their study suggests, in short, that ideological values affect potential jurors’ outcome judgments through the mediation of fact perceptions.<sup>326</sup> They found that decision-makers’ values *indirectly* impact outcomes by “shaping what they perceive doctrinally relevant facts to be.”<sup>327</sup> Kahan and Braman found those effects to be statistically significant in 2008 in implicitly politicized mock scenarios such as the Goetz and “battered woman” scenarios.<sup>328</sup> The evidence presented by this article suggests this risk may be even greater in *explicitly* politicized scenarios, such as clashes between groups of protestors, or even politically motivated violence against controversial targets, such as those in Julie Norman’s study. In such cases, jurors with partisan affiliations may be more likely *consciously* to find a defender’s actions more or less justifiable depending on the ideology of the victim.

## VI. MODEST PROPOSALS FOR THE PATH FORWARD

It is clear that the challenges of political polarization for our society at large extend far beyond the law of self-defense and, indeed, the function of the legal system entirely. The law cannot mandate a polite space for public discourse or that citizens recall the basic humanity of

---

Molho et al., *Disgust and Anger Relate to Different Aggressive Responses to Moral Violations*, 28 PSYCH. SCI. 609, 609–10 (2017), <https://doi.org/10.1177/0956797617692000>; Leah C. Georges et al., *The Angry Juror: Sentencing Decisions in First-Degree Murder*, 27 APPLIED COGNITIVE PSYCH. 156, 156 (2013), <https://doi.org/10.1002/acp.2880>; Narina Nuñez et al., *Negative Emotions Felt During Trial: The Effect of Fear, Anger, and Sadness on Juror Decision Making*, 29 APPLIED COGNITIVE PSYCH. 200, 200 (2015), <https://doi.org/10.1002/acp.3094>.

323. See Phalen et al., *supra* note 322, at 292; see also Karl Ask & Afroditi Pina, *On Being Angry and Punitive: How Anger Alters Perception of Criminal Intent*, 2 SOC. PSYCH. & PERSONALITY SCI. 494, 495 (2011), <https://doi.org/10.1177/1948550611398415>.

324. See Kahan & Braman, *supra* note 29, at 3–4.

325. *Id.* at 17 (emphasis omitted).

326. *Id.*

327. *Id.*

328. See generally *id.*

those they disagree with while engaging in public debate about issues of deep importance. Such developments would require participation at almost all levels of society—politicians, journalists, content creators, and regular citizens—working together to build narratives for public debate that emphasize more than just the extreme worst qualities in opposing positions. As that seems unlikely to happen any time soon, we will likely remain in a situation where roughly 25% of the population, at least theoretically, condones violence against political opponents and where 5–10% of political protests, in fact, result in some kind of violence. Yet, the psychological literature shows us that emotions, even subconscious emotions and implicit biases, can be educated and that people can be educated to make subconscious operations accessible and regulated by higher-order cognitive processes.<sup>329</sup> This Part explores how the trial process itself might help to encourage these effects in cases of politicized self-defense.

Before we embark on this analysis, one obvious question arises. It might appear at first blush that parties' use of for-cause and peremptory strikes during the *voir dire* process would provide a means of excluding strongly partisan jurors from panels, thus muting the effects of societal, political polarization on trial outcomes. As a constitutional matter, jury venires must be selected in a manner that reflects a fair cross-section of society, which encompasses the entire political spectrum.<sup>330</sup> Yet, there is no such requirement for individual jury panels beyond the requirement that parties do not violate the equal protection rights of jurors based on protected characteristics such as race or gender.<sup>331</sup> Parties are thus constitutionally permitted to strike, for cause, potential jurors who evince ideological bias towards one side or another.

However, this right is limited to cases where the juror has given reason to believe that their party affiliation will cause them to decide a case impartially.<sup>332</sup> Indeed, the Supreme Court has said, albeit in dicta, that political affiliation, a First Amendment right, should not automatically be construed as giving grounds for a for-cause challenge.<sup>333</sup> Thus, for-cause challenges may be of limited use in eliminating politically biased jurors unless they openly announce themselves as unable to be impartial. As for peremptory challenges, while ostensibly more flexible tools for litigators to eliminate politically unfriendly jurors from a panel, they present a host of normative problems. While a full-bodied discussion on the appropriateness of peremptories is beyond the scope of this Article, they are fraught with the potential for abuse on racial and other inappropriate grounds.<sup>334</sup> Even when applied to perceived or stated political

---

329. See Bandes & Blumenthal, *supra* note 272, at 171.

330. Duren v. Missouri, 439 U.S. 357, 367–68 (1979).

331. Batson v. Kentucky, 476 U.S. 79, 86–87 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

332. Connors v. United States, 158 U.S. 408, 415 (1895).

333. *Id.*

334. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989).

ideology, they create the risk of parties relying on unhelpful stereotypes in determining the actual impartiality of jurors.<sup>335</sup> At a minimum, striking the most politically engaged members of a venire runs counter to the spirit of the First Amendment.

This Part, therefore, offers other suggestions for how courts should handle politicized self-defense claims at the trial, rather than the *voir dire*, phase. First, it urges that court-appointed expert testimony and jury instructions are the most plausible means of drawing juries' attention to the cognitive biases and emotional responses political contexts create. Second, it argues that introducing these forms of evidence into trials, particularly high-profile trials, will serve a useful expressive function in the world beyond the courtroom. To the extent that a legal proceeding generates a public narrative, it can serve an educative function—in this case, perhaps providing a reminder of the way our political beliefs can obscure our ability to see other sides of a particular situation.

#### A. *Shedding Light on Political Partisanship in the Courtroom*

This Article has not suggested at any stage that the current state of self-defense law is likely to be skewed in any particular direction—either overly punitive or overly permissive toward defenders as a whole or more biased toward either left- or right-wing political actors. As mentioned above, protests on both sides are predominantly peaceful and seem to turn violent in roughly the same proportion of cases. Data does show that police have been three times as likely to use force against left-wing protestors as they are against right-wing protestors, which could logically result in more arrests and, thus, more prosecution.<sup>336</sup> It seems noteworthy that, in the pair of Southern California anecdotes (separated by twenty-four hours) described in the Introduction, the BLM motorist was prosecuted while the anti-BLM motorist was allowed to leave the scene. This suggests the stakes of this problem may be greater for left-wing protestors, assuming more of them do, in fact, stand trial. Regardless, however, this Article concedes the basic epistemological problem at the heart of many, even run-of-the-mill, self-defense cases: there is not always a knowable “right” answer to whether force was reasonable or necessary in a given case. This common factual problem may even be part of why theorists have struggled so greatly in the conceptual attempt to classify self-defense as either a justification or an excuse. The following evidentiary suggestions are simply designed to reduce the role of political partisanship in jurors' factual determinations as much as possible, and thereby better promote the rule of law.

---

335. See Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535, 2538 (2016).

336. See Beckett, *supra* note 18.

### 1. Expert Testimony

One promising possibility would involve experts testifying about some of the very evidence on political partisanship described in this Article. Expert witnesses may be brought by either party to a litigation, or they may be appointed by the court itself.<sup>337</sup> In most jurisdictions, qualified expert witnesses may give opinion evidence if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>338</sup>

Psychological experts routinely provide what is known as “social framework” or “educative” testimony, which consists of empirical findings related to a fact in issue.<sup>339</sup> For example, such experts may testify about the reliability of eyewitness testimony and the factors that increase or reduce it.<sup>340</sup> They may also testify about the causes and conditions contributing to false confessions, the conditions giving rise to workplace discrimination, or the relationship between interpersonal coercion and elder financial abuse.<sup>341</sup>

In self-defense cases, experts could testify about the role of political partisanship in decision-making—both as relates to the parties in the case *and* to the evidentiary obstacles for jury decision-making. For example, the defense might bring in a psychologist to testify about the increased seriousness of a threat posed by a politically motivated antagonist, and the prosecution might bring in another to testify about the role of partisanship, causing a defender to exaggerate the threat posed by his victim. Even better, the court itself could appoint a neutral expert

---

337. See FED. R. EVID. 706(a).

338. See FED. R. EVID. 702. On the question of what qualify as reliable principles and methods, most jurisdictions follow the criteria mentioned by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which include: whether the theory or technique has been tested; whether it has been subject to peer review and publication; the technique's error rate; the existence of standards controlling the technique's application; and whether the theory or technique has been generally accepted in the relevant scientific community. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993).

339. See JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 362–63 (5th ed., 2001); Narina Nuñez et al., *Educative Expert Testimony: A One-Two Punch Can Affect Jurors' Decisions*, 42 J. APPLIED SOC. PSYCH. 535, 535 (2011), <https://doi.org/10.1111/j.1559-1816.2011.00782.x>.

340. BORNSTEIN & GREENE, *supra* note 321, at 143.

341. *Id.* at 145, 148–49.

to testify to all of these things and to the risk of political partisanship affecting the jurors' own evaluation of events.

Courts were once reluctant to admit social framework testimony on eyewitness reliability, but the recent trend has been toward admissibility.<sup>342</sup> Studies on the effectiveness of such evidence have been somewhat mixed, but on the whole, it appears beneficial insofar as it inculcates an appropriate skepticism of eyewitness testimony, which itself has many reliability problems.<sup>343</sup> There is evidence that jurors may view psychology as less trustworthy than some other forms of expert testimony.<sup>344</sup> Yet psychological testimony appears to "sensitize" jurors to the factors affecting eyewitnesses, enabling them to value more highly the testimony of "good" eyewitnesses, who saw events under conditions associated with higher accuracy.<sup>345</sup> The more detailed and specific such testimony is, and the more it addresses factors most specifically related to the case, the greater the impact on jurors.<sup>346</sup> Less research has been done on the effectiveness of expert testimony about false confessions, though what little is available suggests it raises skepticism among jurors about confessions, which is considered positive due to people's widespread failure to appreciate the risks of false confessions.<sup>347</sup>

The system's experience so far with social framework testimony is promising as a model for politicized self-defense cases. The most valuable expert testimony in these cases would likely be the court-appointed expert, to cast objective light on the inevitable "battle of the experts" that might ensue if such testimony were admitted. While experts appear to get a default presumption of credibility, jurors apparently pay close attention to experts' possible bias toward the side that hired them.<sup>348</sup> Presumably, for these reasons, they find court-appointed experts more credible.<sup>349</sup> The testimony should also be as specific as possible to the facts of the particular case and describe the ways in which political bias could increase the actual danger, distort the beliefs of the parties, or impact a neutral factfinder evaluating it all.

---

342. *Id.* at 146.

343. *Id.* at 147-48.

344. Michael J. Saks & Roselle L. Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors*, 2 BEHAV. SCIS. & LAW 435, 436 (1984), <https://doi.org/10.1002/bsl.2370020410>.

345. See Brian L. Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 2 BEHAV. SCIS. & LAW 215, 215 (1989), <https://doi.org/10.1002/bsl.2370070206>; R. Edward Geiselman et al., *Eyewitness Expert Testimony and Juror Decisions*, 20 AM. J. FORENSIC PSYCH. 21 (2002).

346. See BORNSTEIN & GREENE, *supra* note 321, at 147.

347. *Id.* at 148-49.

348. *Id.* at 135.

349. *Id.*

## 2. Jury Instructions

Another means of alerting jurors to the effects of partisan commitments on decision-making is through jury instructions. Courts always instruct juries on the elements of the law they must apply to the facts and the consequences of particular factual determinations for the ultimate verdict on a particular charge. For example, the Ninth Circuit's model jury instructions on self-defense provide as follows:

The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt . . . that the defendant did not act in reasonable self-defense.<sup>350</sup>

The Supreme Court has affirmatively endorsed jury instructions as a means of guarding against racial bias affecting jury decision-making.<sup>351</sup> In *Pena-Rodriguez v. Colorado*, the Court held that Colorado's so-called "no-impeachment" evidentiary rule could not, consistent with the Sixth Amendment, bar a court reviewing the validity of a conviction from considering evidence of a juror's clear statement indicating that they had relied on racial stereotypes or animus to convict a defendant.<sup>352</sup> In passing, the Court noted the potential utility of instructions to prevent such problems in the future, optimistically asserting that "[p]robing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise."<sup>353</sup> The Court cited, as an example, a model federal jury instruction admonishing the jury not to "let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way."<sup>354</sup> However, as Mikah Thompson has noted, many lower courts appear reluctant to allow instructions specifically mentioning racial bias or providing guidance to jurors on how to avoid making racially biased decisions.<sup>355</sup>

---

350. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 5.10 (2022). The Ninth Circuit approved this language in *United States v. Keiser*, 57 F.3d 847, 850–52 (9th Cir. 1995).

351. *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 228 (2017).

352. *Id.* at 225.

353. *Id.* at 229.

354. *Id.* at 228 (citing 1A K. O'MALLEY, J. GRENIG, & W. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 10:01 (6th ed. 2008)).

355. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1286–89.



He also notes that, curiously, the state courts and court-commissioned committees of some jurisdictions provide model civil jury instructions that address racial bias but not parallel instructions for criminal cases.<sup>356</sup>

Thompson argues in favor of courts consistently providing jury instructions specifically geared toward warning jurors about general racial bias and specific racial stereotypes that could affect their judgment.<sup>357</sup> In the specific self-defense context, Cynthia Lee has similarly urged that trial judges instruct jurors to “think about whether they would feel the defendant acted reasonably in self-defense if he was Black and his victim White, all other facts the same . . . .”<sup>358</sup> In cases of politicized self-defense, the court could, presumably, give similar instructions related to the risks of partisan bias and its potential role in distorting judgment. Such instructions could include thought experiments such as the one Lee suggests, urging jurors to consider how they would view the matter if the defendant’s and victim’s political messaging were reversed.

The difficulty with jury instructions, in general, is that they may not work very well. One early study on the effectiveness of judges’ instructions found that 80% of subjects did not understand the basic rules of evidence and burdens of proof, concluding that “although pattern instructions may be effective in reminding jurors of concepts with which they already are generally familiar, they do not improve comprehension of new, difficult, or counter-intuitive laws.”<sup>359</sup> Subsequent studies have shown that jury instructions may be particularly bad at explaining legal concepts, particularly when the instructions themselves are given in overly complicated, overly technical language by trial courts most concerned about reversal for misstating the law.<sup>360</sup>

---

356. *Id.* at 1290–91 nn. 368–73 (collecting various jurisdictions’ model instructions).

357. *Id.* at 1301–06.

358. See LEE, *supra* note 156, at 224.

359. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 79–80 (1990). For other early studies with similar results, see, e.g., Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 163 (1977), <https://doi.org/10.1007/BF01053437>; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1306–08 (1979), <https://doi.org/10.2307/1121842>; Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 433–34 (1982); AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 59 (1982) (finding that the average juror in a criminal case might understand only half of the instructions presented and that jurors with higher levels of education were more likely to answer questions correctly).

360. See, e.g., John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1216–19 (2002) (stating jury instructions are difficult to understand due to trial courts’ fear of reversal by appellate courts and the fact that appellate courts tend to only evaluate the accuracy of the law in jury instructions, as opposed to their clarity); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1099 n.75 (2001) (noting the trade-offs between legal accuracy and jury comprehension); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 506–07 (1997) (finding that

Despite their general failures, particularly when it comes to explaining legal standards, jury instructions may still prove useful in providing factual context for jury deliberations. For example, jury instructions may be used, as an alternative to expert testimony, as a means of educating jurors about the risks of eyewitness misidentifications.<sup>361</sup> Several studies have provided at least some evidence that a well-written instruction can improve juror appreciation of the factors affecting the reliability of eyewitness identification evidence.<sup>362</sup> Other studies, however, conclude that jury instructions do not create a useful safeguard against wrongful conviction through misidentification.<sup>363</sup> One major study on conviction through misidentification finds, specifically, that the use of expert witnesses is preferable to jury instructions as a means of effectively educating the jury on the science.<sup>364</sup> However, this literature on eyewitness instructions has been criticized as hampered by methodological problems.<sup>365</sup>

Courts may increase the effectiveness of an admonition “by adding an explanation of the reasons for the instruction, the ultimate outcome of various decisions, and the consequences for fair compensation if the instruction is not followed.”<sup>366</sup> For example, one study found that jury instructions could be useful in personal injury cases to prevent juries from fusing the questions of liability and compensatory damages by awarding more damages when the defendant’s liability was stronger.<sup>367</sup>

---

more educated jurors are better at understanding jury instructions); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 38–40 (1993) (discussing the California civil jury instructions criticized by Charrow & Charrow by reviewing linguistic characteristics that make instructions hard for jurors to understand, analyzing the progress made in the prior 15 years, and arguing that courts must inform jurors of their right to ask questions about instructions they do not understand); Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1725 n.83 (1990), <https://doi.org/10.2307/1122751> (“Judges are acutely aware of the fact that the presentation of legally inaccurate instructions is a very frequent cause for reversals by appellate courts. Thus, they often sacrifice comprehensibility and spend a great deal of time piecing together quotations from statutes and appellate court decisions in order to ensure legal accuracy.”).

361. See Christian Sheehan, *Making the Jurors the “Experts”: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 683 (2011); Lisa Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN’S L.J. 261, 325 (2008) (Can.).

362. Dufraimont, *supra* note 361, at 303–05.

363. See, e.g., BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 264 (1995); Kent Roach, *Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions*, 52 CRIM. L.Q. 210, 213–14 (2007).

364. Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 830–33 (2007).

365. See Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-evaluation*, 49 CREIGHTON L. REV. 555, 577 (2016).

366. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCH., PUB. POL’Y, & L. 712, 736 (2000), <https://doi.org/10.1037/1076-8971.6.3.712>.

367. *Id.* at 726.

Instructions were successful in eliminating this problem where they (1) “admonished jurors not to allow their feelings about the defendant’s actions or responsibility to influence their awards,” (2) explained that doing so “would defeat the law’s goal of providing appropriate loss compensation,” and (3) “specified that the jurors should not reduce their awards if they were uncertain about the defendant’s liability.”<sup>368</sup> On this basis, the authors concluded that it may be necessary for the court explicitly to instruct the jury “not only that the information is not supposed to affect [their] awards but how it typically does affect jurors’ decisions so that [they] will know the direction and extent of the bias they are trying to correct.”<sup>369</sup>

In one study of particular relevance to politicized self-defense, Kayo Matsuo and Yuji Itoh tried to discern the effectiveness of limiting instructions related to emotional evidence on mock jurors’ decision-making.<sup>370</sup> They tested a mock instruction that “statements and/or emotions conveyed by the victim’s family are not evidence that proves whether or not the defendant committed the crime; therefore, lay judges cannot employ these to make a verdict decision.”<sup>371</sup> The authors found that the effectiveness of the emotional evidence instruction varied by juror depending on the juror’s individual predisposition towards the enjoyment of cognitive activity, an attribute referred to as the “need for cognition” (“NFC”).<sup>372</sup> Specifically, they found that when jurors were high in NFC, “they were more likely to obey instructions to disregard emotional information when making a verdict decision; therefore, the limiting instructions were effective and practical for jurors who were high in NFC.”<sup>373</sup> However, for jurors low in NFC, the limiting instructions were not found to be functional—indeed, NFC jurors given instructions may have been even more likely to use emotional evidence to make a verdict decision.<sup>374</sup>

The available evidence thus suggests that jury instructions are not robustly effective and may have variable degrees of impact on individual jurors. Nonetheless, Matsuo and Itoh, at least, suggest that deliberate instructions about how outside information affects judgment may be effective if worded specifically. Unlike Matsuo and Itoh’s hypothetical cases, however, politicized self-defense involves not only fact-specific bias but bias intrinsic to politically committed jurors. People may be even *less* likely to respond to exhortations about their own personal political biases and irrationality. Indeed, even in their study

---

368. *Id.*

369. *Id.* at 736.

370. Kayo Matsuo & Yuji Itoh, *The Effects of Limiting Instructions About Emotional Evidence Depend on Need for Cognition*, 24 PSYCHIATRY, PSYCH. & L. 516, 516 (2017), <https://doi.org/10.1080/13218719.2016.1254588>.

371. *Id.* at 521.

372. *Id.* at 518.

373. *Id.* at 525.

374. *Id.* at 525–26.

revealing precisely these biases, Kahan and Braman argue that “moralizing exhortations” are likely only to entrench juror political bias due to the phenomenon of “naïve realism”—people’s tendency to recognize the influence of partisan values on the factual perceptions of people they disagree with, while remaining oblivious to the same influence of their own values on their own beliefs.<sup>375</sup>

Parallel problems arise in a rather different institutional context, which may be a useful point of comparison in thinking about jury instructions. Employers engage in diversity training programs with the goals of creating more healthy and inclusive workplaces and reducing explicit and implicit gender and racial bias among employees.<sup>376</sup> The sociology literature suggests that efforts to prevent managerial bias through mandatory training drawing managers’ attention to their own racial biases have been ineffective and, at times, even counterproductive.<sup>377</sup> By contrast, “managerial engagement” efforts—programs designed to help managers address diversity issues through problem-solving—appear to be useful in diversifying the workforce.<sup>378</sup> One theory for why this is so is that managers participating in such programs may come to see themselves as change agents.<sup>379</sup>

While juries are clearly different from managers—they exist temporarily to decide a single verdict, not to preside over an ongoing business unit—the diversity training literature suggests that people may respond better to being asked to help solve an existing problem rather than being labeled as its cause.<sup>380</sup> This is consistent with older studies that found mock juries to be *less* biased against black defendants when race was made salient to a case—not through the jury instructions but the facts of the case themselves. Samuel Sommers and Phoebe Ellsworth presented 156 white mock jurors with a summary of an interracial assault trial in which a defendant (identified as either white or black) was charged with assault on his girlfriend at a bar.<sup>381</sup> In one version of the trial summary, the defendant yelled, “You know better than to talk that way about a White (or Black) man in front of his friends,” which the authors

---

375. Kahan & Braman, *supra* note 29, at 6. They go so far as to argue that the best intervention possible may be for people to *stop* complaining about the bias of the law when they disagree with verdicts and to *stop* accusing political opponents of bad faith for viewing those verdicts differently. *Id.* at 7.

376. See Susan Bisom-Rapp, *The Role of Law and Myth in Creating a Workplace that ‘Looks like America,’* 43 BERKELEY J. EMP. & LAB L. 251, 287 (2022), <https://doi.org/10.15779/Z38VQ2SB6P>.

377. *Id.*; Alexandra Kalev & Frank Dobbin, *Companies Need to Think Bigger Than Diversity Training*, HARV. BUS. REV. (Oct. 20, 2020), <https://hbr.org/2020/10/companies-need-to-think-bigger-than-diversity-training> [<https://perma.cc/E86A-96RX>].

378. Bisom-Rapp, *supra* note 376, at 289.

379. *Id.*

380. See *id.*

381. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1014–15 (2003).

described as the “race-salient” version of the facts.<sup>382</sup> In the other, the defendant yelled, “You know better than to talk that way about a man in front of his friends.”<sup>383</sup> The authors found that in the race-salient version of the case, white jurors were equally likely to vote to convict the white and black defendants, whereas, in the non-racialized version, they gave higher guilt ratings and longer sentencing recommendations to the black defendant than to the white one.<sup>384</sup> Sommers and Ellsworth replicated those results a year later in a different hypo involving a fight among high school basketball teammates.<sup>385</sup> It has been suggested that these results can be explained by a desire among white people not to appear to be racist and that the race-salient fact pattern draws their attention to that risk.<sup>386</sup> In light of the data on diversity training, it seems significant that these effects did not involve jury instructions explicitly admonishing the jurors about their own potential racism.

Although race and politics often intertwine, we should not assume that these studies on race-salient facts would apply in a context involving political partisans. While people generally may not like to be seen as racist, they may mind less being seen as politically partisan—indeed, that appears to be a major theme of the social science discussed in Part III above. Nonetheless, perhaps cases of politicized self-defense carry an upside insofar as they are inherently “partisanship-salient.” The possibility of improper political motivation is implicit in the facts—jurors are being asked to evaluate the reasonableness of *other* people’s actions taken, at least in part in service of political positions. This creates the possibility of crafting jury instructions that draw jurors’ attention to the role of partisanship in both the reality and perceptions of danger.

Taking all of the above in mind, a potentially useful jury instruction for cases of politicized self-defense might contain the following language:

The defendant is alleged to have used unreasonable force against a party during a situation where political messages were being exchanged. Political conflict may make people more inclined to use violence against one another. It may also cause people to overestimate the immediate physical threat posed by someone they disagree with. People have a right to express differing political views and whether self-defense applies or not depends on the specific actions of the party, not on their internal political views.

Your job is to determine whether the defendant’s use of force was reasonable considering the circumstances. To the extent that political conflict formed part of the circumstances it may be relevant. But your

---

382. *Id.* at 1015.

383. *Id.*

384. *Id.*

385. *Id.* at 1016.

386. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1573 (2013).

job is to separate the merits of the parties' political disagreements from the question of whether the defendant's conduct was reasonably necessary under the circumstances to protect himself.

These instructions have the benefit of alerting the jury to the risk of cognitive bias while framing jurors as problem solvers rather than problem creators. Further, as Matsuo and Itoh found effective, they spell out the precise risk of the bias the law is attempting, as a policy matter, to prevent.<sup>387</sup> Even if eliminating political bias from jury decision-making is not fully possible, the specificity of these instructions at least draws attention to the precise way it might operate on the particular facts of the case at hand.

### B. *The Expressive Benefits of Legal Practice*

The suggestions described above are unlikely to eradicate the impact of a political environment on a jury's decision-making. The psychological evidence suggests that may be impossible and, indeed, the important role served by emotion in moral decision-making may even make it undesirable. Understanding the nature of a threat posed by a political actor, in fact, requires emotional input—the potentially real threat posed by a sign reading “Black Behavior Matters” is legible in the fear it is designed to spark in a black observer. This is relevant, morally and legally, to a determination of whether a defender's fear is reasonable. The same must also be fairly said of a sign reading “no justice, no peace.”

Nonetheless, a world of unlimited physical violence—where all determinations about force simply flowed from the political commitments of actors and factfinders—would be inimical to the rule of law. It would reduce faith in our institutions in a way likely to result in increased lawlessness among our citizenry.<sup>388</sup> It is, therefore, valuable for the legal system to reify, in the public eye, the potentially distortive effects of political partisanship on self-defense evaluations. For these reasons, incorporating, through formal evidentiary means, information about how political partisanship can fuel violence serves a useful expressive function. The relationship between an individual juror's personal moral decision-making and the jury as a fact-finding body is analogous to that of the individual citizen and the body politic. To the extent that the justice system can educate jurors about bias in ways relevant to the facts of a particular trial, it may indirectly encourage this learning in the public at large.

The law has the ability to change social norms and behavior through what has been called a “persuasive” and “acculturating” effect.<sup>389</sup> For

---

387. See generally Matsuo & Itoh, *supra* note 370.

388. See Robinson & Darley, *supra* note 20, at 499.

389. See generally Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in *SOCIAL NORMS* 35, 35–37 (Michael Hechter & Karl-Dieter Opp eds., 2001) (discussing how social norms are created, enforced, and changed).

example, by *communicating* condemnation of certain behavior, the law achieves a practical reduction in crime. The existence of a particular criminal law expresses that certain conduct is unacceptable and warrants official sanction; this message-sending function is frequently noted in the legislative debates over enacting particular statutes.<sup>390</sup> As Avlana Eisenberg has noted in her study of the expressive effects of hate crime prosecutions, enforcement decisions can also be expressive.<sup>391</sup> With only so much bandwidth, prosecutors necessarily wield a broad degree of discretion in deciding what cases to bring.<sup>392</sup> As Eisenberg puts it, “much of a law’s communicative impact is not felt until later and is bound up with whether and how the legislation is enforced.”<sup>393</sup>

These same principles should apply to criminal defenses and the lay juries that adjudicate them. The forms of evidence allowed and the content of jury instructions given sends a message to society as a whole about the extent to which political passions may foster violence in ways that cannot be tolerated. Yet the key is precision: both expert testimony and jury instructions are the most effective when tied closely to the specific facts of a particular case. This tracks with what the psychological literature tells us about how specific knowledge about an individual person can help disrupt the inaccurate conclusions another person may draw from stereotypes about the group to which they belong.<sup>394</sup> It may be hoped that introducing such evidence into the fact-specific context of a public trial may encourage observers to think more about opposing partisans as individuated human beings.

## VII. CONCLUSION

This Article has described a far bigger problem than that of politicized self-defense claims—bigger even than that of political bias affecting the justice system more generally. A reader can doubtless detect the Article’s implicit aspirations for a world in which people can debate serious political disputes over profoundly important questions while retaining a belief in the basic humanity and dignity of those who disagree with them, so long as such respect is reciprocal. What Krause has described as “civil passions”—emotional connections felt by many to concepts of fair play, equality, and the rule of law—may play an important moderating role in how society processes political disagreement.

---

390. See, e.g., 156 CONG. REC. 23252 (2010) (statement of Rep. George Miller) (arguing that Congress owes it to children to “send a strong message that people who abuse children or do not do their jobs to keep children safe will face serious consequences”).

391. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014).

392. See, e.g., *id.* at 862–64 (observing the perceived expressive impact of a prosecutor’s decision not to bring a hate crime charge notwithstanding that the burdens of bringing the charge substantially outweighed any benefits).

393. *Id.* at 860.

394. See JUSSIM, *supra* note 262, at 367.

They may facilitate people's attention to other subjectivities and create space for spirited political debate and evolution while preventing a general spiral into monomaniacal, polarized brinksmanship.

While falling far short of such aspirations, the Article has nonetheless attempted to provide some concrete suggestions for how the justice system may address the specific problem of self-defense claims in the context of political rage and, in so doing, serve a useful expressive function in educating the public about the zero-sum emotional dynamics of political partisanship in decision-making. We know from the literature that roughly a quarter of the population seems to endorse, at least in theory, violence in service of the political side they believe to be just.<sup>395</sup> Yet three-quarters of the population does not support such violence and, therefore, again, in theory, should be responsive to arguments that the distortive effects of partisanship on the will to do violence should be addressed. Courts allowing evidence of such effects into the specific factual contexts of criminal trials—if and only if they do so consistently, regardless of the political stripes of the defendant and victim—can both improve the quality of justice in individual cases and contribute to societal awareness of the reasoning distortions caused by un-examined partisanship.

---

395. See Norman, *supra* note 223.



