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**SELF-DEFENSE AND THE SUSPICION HEURISTIC**

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# Self-Defense and the Suspicion Heuristic

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*ABSTRACT: The doctrine of self-defense evaluates the reasonableness of criminality judgments. Yet, it fails to account for how non-conscious cognitions place those who are stereotyped as criminal at greater risk of mistaken judgments of criminality—sometimes with deadly consequences. Studies reveal, for example, that people are more likely to see weapons in the hands of unarmed black men than unarmed white men, and to more quickly shoot them as a result. Because self-defense doctrine does not attend to these judgment errors, it fails to interrogate how, if at all, these mistakes should affect assessments of reasonableness. Drawing from powerful and well-established mind sciences research, this Essay introduces a concept that we term the “suspicion heuristic.” This concept explains how non-conscious processes can lead to systematic and predictable errors in judgments of criminality—and influence subsequent behaviors—regardless of conscious racial attitudes. This Essay argues that in order to provide more equal protection, security, and liberty to all victims of violence, the law of self-defense should account for the suspicion heuristic in its assessments of reasonableness. This Essay traces the broad outlines of a theoretical and legal framework for doing so.*

INTRODUCTION..... 295

I. THE SUSPICION HEURISTIC..... 296

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A.	<i>HEURISTICS AND BIASES</i> .....	298
B.	<i>IMPLICIT RACIAL BIAS</i> .....	301
C.	<i>THE CONSTRUCT</i> .....	307
1.	In General.....	307
2.	Judgments of Criminality.....	309
II.	SELF-DEFENSE AND THE SUSPICION HEURISTIC .....	314
A.	<i>THE REASONABLENESS DETERMINATION</i> .....	318
B.	<i>CLASSIFYING MISTAKEN SELF-DEFENSE</i> .....	321
1.	Justification v. Excuse.....	321
2.	A Partial Excuse.....	324
3.	Operationalizing the Reasonableness Standard .....	325
III.	THE DUTY TO RETREAT .....	326
A.	<i>HISTORY</i> .....	327
1.	English Common Law.....	327
2.	United States Doctrine.....	328
3.	Stand Your Ground Laws.....	329
B.	<i>THE ROLE OF MISTAKE</i> .....	331
C.	<i>A PROPHYLACTIC MEASURE</i> .....	332
	CONCLUSION .....	334

## INTRODUCTION

The Trayvon Martin killing has caused our nation, again, to confront both our vicious legacy of racial violence and the long road towards racial equity that we still have to travel. Regardless of what specific facts emerge in the case, the killing of this black teen sparked outrage and resentment along familiar racial lines. Not surprisingly, it also devolved quickly into discussions about George Zimmerman—Martin’s killer—and the content of his character. Is he a bigot?<sup>1</sup> If so, was that bigotry responsible for Martin’s death? While it is tempting to fixate on this possibility, there is significant scientific evidence that a host of subtler mental processes can conspire to produce racially discriminatory behaviors—even absent conscious racial bias. These psychological processes are both predictable and pervasive, warping the perceptions of even the most egalitarian of individuals.

This Essay argues that scholars, lawyers, and policymakers should attend to the ways that normal psychological processes can bias judgments of criminality in a manner inconsistent with the values of liberty, safety, and security. Doing so is important because, sadly, killings of innocent non-white individuals are not aberrational.<sup>2</sup> What is required is a new legal and theoretical framework that can account for these biases—one that does not rely upon the fiction of the objective decision-maker or the scapegoat of the consciously biased actor. This Essay is the first in a series of articles that develops this framework.

In this Essay, we draw from mind sciences research to introduce a concept that we term the “suspicion heuristic.” We use this concept to explain how normal psychological processes that operate below the level of conscious awareness can lead to systematic errors in judgments of criminality. This concept provides an important new lens for scrutinizing legal doctrines that rely upon the reasonableness of criminality judgments—primarily self-defense and stop-and-frisks. Both doctrines use reasonableness in an attempt to delicately balance security and liberty. In the self-defense context, individuals are entitled to defend themselves, but only if their actions are necessary and proportionate from the perspective of the reasonable person. In the proactive-policing setting, law enforcement

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1. See Ashley Hayes, *Witnesses Tell FBI that George Zimmerman Is No Racist*, CNN.COM (July 13, 2012, 7:44 AM), <http://www.cnn.com/2012/07/12/justice/florida-teen-shooting/index.html>.

2. See *infra* notes 122–52 and accompanying text (discussing the shooting deaths of Yoshihiro Hattori and Trayvon Martin). See generally CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (discussing cases). Many of the reported cases involve police shootings of innocent non-Whites. For instance, on February 4, 1999, four white NYPD officers shot Amadou Diallo, an unarmed West African immigrant, forty-one times while he was standing in his doorway. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>. Nineteen bullets hit Diallo, killing him. *Id.*

officers are entitled to briefly detain, question, and cursorily search individuals, but only if an individual's actions give rise to a reasonable suspicion of criminality. Yet, neither doctrine attends to the systematic errors caused by racial stereotypes that can affect judgments of criminality nor determines how these mistakes should affect assessments of reasonableness. As a result, these doctrines often fail to protect those individuals who have the misfortune to be stereotyped<sup>3</sup> as criminal—sometimes with deadly consequences.

This Essay scrutinizes the doctrine of self-defense<sup>4</sup> and proceeds in three parts. Part I introduces the “suspicion heuristic” and discusses the scientific research that supports it. Part II contemplates the implications of the suspicion heuristic for the law of self-defense. Finally, Part III considers the duty to retreat and argues that, in light of the suspicion heuristic, it should be a non-discretionary component of self-defense doctrine.

### I. THE SUSPICION HEURISTIC

This Part introduces the “suspicion heuristic,” a concept we develop to explain the predictable errors in perception, decision-making, and action that can occur when individuals make judgments of criminality. The suspicion heuristic links lessons from two distinct, but related, bodies of research in the mind sciences—the study of heuristics and biases on the one hand and the study of implicit (non-conscious) racial bias on the other. We make this connection to explain how merely perceiving race—even absent racial animus—can bias judgments of criminality. While both areas of research concern themselves with how people think and process information, they are rarely coupled in legal literature.<sup>5</sup>

Over four decades of research in both fields reveals that many of our conscious thoughts, behaviors, and judgments are affected by mental

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3. In this Essay, we define stereotypes as “the general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality or occupation, and then to attribute to him qualities believed to be typical of members of that category.” Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976) (quoting Renato Taguiri, *Person Perception*, in 3 THE HANDBOOK OF SOCIAL PSYCHOLOGY 395, 423 (Gardner Lindzey & Elliot Aronson eds., 2d ed. 1969)) (internal quotation marks omitted); see also Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 369 n.2 (1996) (defining stereotypes as “well-internalized associations regarding groups of people that result in habitually automatic, gut-level responses” (emphasis omitted)).

4. An analysis of the suspicion heuristic and its relevance to the proactive policing context will be forthcoming in an article tentatively titled “Suspicion Cascades.”

5. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973 (2006) (noting that implicit racial bias “has not generally been grouped with the ‘heuristics and biases’ uncovered by research in cognitive psychology and behavioral economics”). The first article to link these distinct bodies of research in the legal literature was written by Christine Jolls and Cass Sunstein. *Id.*

processes beyond our ability to control volitionally. The term “suspicion heuristic” is a gesture towards the work of Daniel Kahneman, Amos Tversky, and others on heuristics and biases. This literature, recently summarized by the Nobel Prize-winning Kahneman in his book, *Thinking, Fast and Slow*, refers to the human tendency to use decision-making shortcuts (heuristics).<sup>6</sup> While these mental shortcuts allow us to understand our social worlds quickly and accurately most of the time, they can also lead to systematic errors in judgment.<sup>7</sup> Because of the popularity of Kahneman’s recent work, it seems appropriate to use the term “suspicion heuristic” to translate the science of thinking about decisions in general to the process of assessing suspicion. The “suspicion heuristic” can be understood as a mental shortcut that often leads to systematic errors in determining who is and is not suspicious.

The heuristic shortcuts that have been the subject of study in the field of cognitive psychology are themselves vulnerable to other non-conscious (i.e., implicit) human biases.<sup>8</sup> In the field of social psychology, researchers have found that implicit biases tend to disadvantage stigmatized social groups such as Blacks,<sup>9</sup> women,<sup>10</sup> and the poor.<sup>11</sup> Consequently, in order to engage the full consequences of a “suspicion heuristic,” we review the relevant literature on heuristics in Subpart A and the relevant literature on implicit racial biases in Subpart B.<sup>12</sup> Finally, in Subpart C, we intertwine the lessons from these two bodies of research to develop the “suspicion heuristic.”

6. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

7. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1124–31 (1974).

8. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. PERSONALITY & SOC. PSYCHOL.* 876, 877, 889–91 (2004).

9. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot*, 92 *J. PERSONALITY & SOC. PSYCHOL.* 1006, 1015–22 (2007); Eberhardt, *supra* note 8, at 876, 888–91; Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 292, 302–05 (2008).

10. Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 *ANN. REV. PSYCHOL.* 393, 396, 400, 407–08 (2005).

11. Heather E. Bullock, *Class Acts: Middle-Class Responses to the Poor*, in *THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION* 118, 118–59 (Bernice Lott & Diane Maluso eds., 1995).

12. We conclude these Subparts with a discussion of how non-conscious and/or automatic decisions and associations can provoke troubling behaviors. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, in *CHOICES, VALUES, AND FRAMES* 1–16 (Daniel Kahneman & Amos Tversky eds., 2000); Correll et al., *supra* note 9, at 1006–23 (discussing how mental processes can lead to consequential behaviors); Eberhardt et al., *supra* note 8, at 876–93 (same); Goff et al., *supra* note 9, at 292–306 (same); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 *J. EXPERIMENTAL SOC. PSYCHOL.* 435 (2001) (same); Tversky & Kahneman, *supra* note 7, at 1124–31 (same).

A. *HEURISTICS AND BIASES*

Heuristics are mental shortcuts or rules of thumb whereby people reduce complex decisions to simpler assessments.<sup>13</sup> People often utilize heuristics to make decisions and predictions without any conscious awareness that they are doing so.<sup>14</sup> While heuristics are efficient given the limitations of the human mind to process information, they can also produce systematic errors of judgment that predictably recur in certain situations, known as biases.<sup>15</sup>

Many of the heuristics studied by psychologists are connected to “dual process” theories in cognitive psychology.<sup>16</sup> According to these theories, people use two mental processes to make judgments and process information. System 1 refers to the fast, intuitive, and typically non-conscious mental processes that influence most conscious thought and action—we might think of these as our “gut” feelings or intuitions. System 2 refers to processes that are slower, conscious, and deliberate. As Kahneman writes, “The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration. . . . When we think of ourselves, we identify with System 2, the conscious, reasoning self that has beliefs, makes choices, and decides what to think about and what to do.”<sup>17</sup> While most of us believe that we have conscious access to, and control over, our thoughts, feelings, and judgments,<sup>18</sup> in truth, the automatic and

13. Tversky & Kahneman, *supra* note 7, at 1124; *see also* KAHNEMAN, *supra* note 6, at 98 (explaining that a heuristic is a “simple procedure that helps [people] find adequate, though often imperfect, answers to difficult questions”). Heuristics have received significant attention in the field of cognitive psychology. For a general discussion of heuristics, *see* Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49–50 (Thomas Gilovich et al. eds., 2002). For a summary of the over four decades of research in heuristic reasoning, *see* KAHNEMAN, *supra* note 6.

14. KAHNEMAN, *supra* note 6, at 97.

15. *Id.* at 3–4, 130; Tversky & Kahneman, *supra* note 7, at 1124, 1131.

16. *See generally* Kahneman & Frederick, *supra* note 13, at 51; *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* (Shelly Chaiken & Yaacov Trope eds., 1999).

17. KAHNEMAN, *supra* note 6, at 21. System 1 and System 2 are not actual systems that exist within our brains. Kahneman & Frederick, *supra* note 13, at 51. Rather, psychologists employ these terms as “label[s] for collections of processes that are distinguished by their speed, controllability, and the contents on which they operate.” *Id.* Intriguingly, however, there is some neuroscience evidence that System 1 and System 2 thinking utilize different areas of the brain. Jonathan St. B.T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 *TRENDS COGNITIVE SCI.* 454, 456 (2003).

18. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 187–96 (1991); Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self Is Seen as an Other*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 197, 197 (2006); Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 *PERSONALITY SOC. PSYCHOL. BULL.* 369, 369 (2002); Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 404, 404, 414–15 (1995).

unconscious processes of System 1 are often the primary source of our conscious impressions, beliefs, feelings, intuitions, and choices.<sup>19</sup> System 1 processes operate almost instantaneously, guiding and influencing our judgments and behaviors much more than we are consciously aware.<sup>20</sup>

Many of the characteristics of System 1 are crucial to our survival. As psychologists note, our ability to function in the world would be greatly reduced without mental shortcuts that process information quickly and without conscious effort.<sup>21</sup> In plain language, if an individual had to exert effort to remember the way to work every day, there would be no mental energy left to do any work by the time the individual arrived. Furthermore, System 1 features facilitate our ability to act quickly—without the need for conscious thought—when confronted with an unexpected emergency. For instance, if an armed individual were rapidly approaching, it would be essential to determine whether the individual poses a threat. System 1 can provide a “gut” response to the “friend or foe” question.

Luckily for most of us, System 1 often gets things right. Our intuitions, instincts, and gut reactions are frequently accurate, and using non-conscious processes to achieve that accuracy saves us valuable cognitive resources.<sup>22</sup> As a result, our minds are freed from the tedium of smaller considerations (e.g., what route must I take to get home again?) to ponder more important considerations (e.g., what do I want for dinner?).

The biggest problem with System 1 thinking is that, despite being able to reach decisions quickly and conserve cognitive resources,<sup>23</sup> it is prone to systematic errors (i.e., biases). As an example, think of the first word that comes to mind in response to the following questions:

What type of music did Peter, Paul & Mary play?

Folk.

What does a comedian tell that makes people laugh?

A joke.

What is a wire in the middle of a bicycle?

A spoke.

What billows out of the top of a campfire?

Smoke.

What sound does a frog make?

19. ROSS & NISBETT, *supra* note 18.

20. KAHNEMAN, *supra* note 6, at 13, 20, 29; Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 15 (1989); Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464, 1477 (1998).

21. See David H. Ebenbach & Dacher Keltner, *Power, Emotion, and Judgmental Accuracy in Social Conflict: Motivating the Cognitive Miser*, 20 BASIC & APPLIED SOC. PSYCHOL. 7, 7 (1998).

22. Tversky & Kahnemen, *supra* note 7, at 1124.

23. KAHNEMAN, *supra* note 6, at 51, 70.



Croak.

What is the white part of an egg?

Well . . . it is the white part of an egg. An egg white.<sup>24</sup> If, in your mind, you said “yolk,” however, you are not alone. System 1 processed a set of answers that fit a pattern—words that rhyme with “folk”—and provided an answer that was associated with “part of an egg” that fit that pattern: “yolk.” So, while System 1 likely helped you to figure out what sound a frog makes without thinking too hard, it hindered your attempt to identify the white part of an egg (even if you got the answer right). The reason is that System 1 uses so-called associative activation networks to do a lot of the work for it.<sup>25</sup> Hence, associative activation networks are one explanation for why System 1 is prone to systematic errors.

A second source of error is that many of the mental processes System 1 performs are beyond our ability to volitionally control.<sup>26</sup> For instance, people cannot stop themselves from comprehending sentences in their own language assuming, of course, that the sentences are not gobbledygook.<sup>27</sup> Thus, while System 1 is efficient, skilled, and often accurate, the inability to suppress its operations can lead to systematic and predictable errors of judgment.

The final source of System 1 errors stems from the fact that we will often adopt the intuitions of System 1 unquestioningly, unless something activates System 2. One situation in which the deliberate and slow-thinking System 2 will override System 1 is if we encounter an individual (or an object) that is surprising or does not conform to our expectations. System 2 will be mobilized in an attempt to resolve the disparity.<sup>28</sup> For instance, System 2 would take over if you saw a pregnant man<sup>29</sup> or a barking cat.<sup>30</sup> Attempting to reconcile the event with your understanding of the world by becoming consciously engaged and analytical is a System 2 mental process.<sup>31</sup> However, this process will never be engaged when you are not consciously aware of any uncertainty.

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24. Of course, the egg white is also known as the albumen.

25. KAHNEMAN, *supra* note 6, at 51. “Associative activation networks” are also referred to as spreading activation, associative networks, and other names. See, e.g., John R. Anderson, *A Spreading Activation Theory of Memory*, 22 J. VERBAL LEARNING & VERBAL BEHAV. 261 (1983); Allan M. Collins & Elizabeth F. Loftus, *A Spreading-Activation Theory of Semantic Processing*, 82 PSYCHOL. REV. 407 (1975); Elliot R. Smith, *Mental Representation and Memory*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 391, 391–445 (Daniel Gilbert, Susan Fiske & Lindsay Gardner eds., 4th ed. 1998).

26. KAHNEMAN, *supra* note 6, at 25.

27. *Id.* at 22.

28. *Id.* at 24, 25.

29. *Id.* at 74.

30. *Id.* at 24.

31. *Id.* at 60, 80; see also Evans, *supra* note 17, at 454.

Errors in System 1 reasoning are difficult to eliminate or even recognize. We take them as natural, and often treat them as correct unless they are scrutinized later. Many would say that this is the benefit of System 2—the self-reflective and deliberative process the mind uses for more difficult, less-rehearsed problems. When an unexpected piece of information causes a disruption in System 1 thinking (e.g., the word “yolk” does not sound right after you say it), System 2 processes take control to deduce the correct answer.<sup>32</sup> “System 1 provides snap judgments and offers a form of rough-and-ready, bias-prone thinking that leans heavily on factual context and previously held beliefs. System 2 kicks in after a time delay and corrects errors . . . .”<sup>33</sup>

Understood in this way, System 1 and System 2 processes provide a nearly ideal model of mental functioning. All things being equal, we rely on our intuitions, which saves us valuable cognitive resources. However, when confronted with a novel or surprising situation, we have the capacity to engage in more effortful processing. Unfortunately, there are often occasions when we rely on System 1 when System 2 would produce more accurate assessments, and vice versa. In other words, no matter how often our minds get it right, there are times when we should not trust ourselves to produce objective and accurate assessments of the world around us.

Of particular concern in this Essay are the errors we tend to make in the realm of race and suspicion. In the social-cognitive tradition of Kahneman and Tversky,<sup>34</sup> psychologists have exploited System 1’s use of automatic associative activation networks to explore the ways in which our minds perceive race. These networks provide a pathway towards a particular kind of System 1 error: implicit racial bias. For the most part, the research studying these implicit racial biases has developed separately from the research we just discussed on heuristics and biases in general. We discuss the research on implicit racial biases next.

### B. IMPLICIT RACIAL BIAS

We can think of implicit biases as System 1 mental shortcuts that help us make meaning of persons and/or social groups.<sup>35</sup> Put another way, implicit biases are the automatic associations connected with a social group. For instance, one might associate “elderly” with “wise,” “women” with “nurturing,” and “lawyers” with “expensive.” Possessing automatic associations is not, in and of itself, problematic. However, a significant body

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32. Importantly, System 2 does not always get it right, either. Kahneman & Frederick, *supra* note 13, at 52.

33. Kevin Emerson Collins, *Constructive Nonvolition in Patent Law and the Problem of Insufficient Thought Control*, 2007 WISC. L. REV. 759, 796 n.124 (2007).

34. Kahneman & Tversky, *supra* note 12; Tversky & Kahneman, *supra* note 7.

35. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing a similar framework that he terms “racial mechanics”).

of literature now demonstrates that these automatic associations can influence perceptions and subsequent behaviors.<sup>36</sup> Consequently, the automatic association of “Blacks” with “criminal,” for instance, may cause someone to interpret ambiguous behavior by a black target as more criminal than identical behavior by a white target. Much like “folk” calls to mind things that rhyme with it, and can lead a reader to substitute “yolk” for “egg whites,” “Black” calls to mind stereotypes associated with it, and can lead an observer to perceive behaviors in line with those stereotypes.

Importantly, these racially biased judgments do not require traditional bigotry. Rather, for individuals who associate “Black” with “criminal” unconsciously in their minds, it is possible that the mere mention of the category “Black” can activate the trait “criminal,” causing them to interpret behaviors in line with the activated concept—even if they are committed anti-racists and even if they are Black themselves. This is, again, because of associative activation networks.<sup>37</sup>

In the field of psychology, ideas can be thought of as “nodes in a vast network, called associative memory, in which each idea is linked to many others.”<sup>38</sup> Associative activation is not a linear process, with each idea only being linked to one other idea. Rather, one idea activates many different ideas all at once, and these activated ideas, then, activate others.<sup>39</sup> The majority of this activity occurs outside of conscious awareness.<sup>40</sup>

What causes the mind to link ideas of circumstances, events, and actions, among others, is that these ideas regularly occur at the same time or within a relatively short interval.<sup>41</sup> Because of this co-occurrence, the mind learns to associate these ideas.<sup>42</sup> Once these links or associations are made, they are kept in memory and accessed unintentionally and without effort the next time any of these ideas are activated.<sup>43</sup>

Once associations are linked and strengthened through practice, this pattern of associated ideas constructs a mental model for what is normal or typical.<sup>44</sup> Objects are associated with their properties, and people are associated with their groups.<sup>45</sup> Once these models are built, people’s

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36. See, e.g., L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043–56 (2011) (citing sources).

37. Devine, *supra* note 20, at 6–7, 15–16.

38. KAHNEMAN, *supra* note 6, at 52.

39. *Id.* at 51–52.

40. *Id.* at 52; John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462 (1999); Devine, *supra* note 20, at 6.

41. Bargh & Chartrand, *supra* note 40, at 468.

42. *Id.* at 468–70.

43. *Id.*

44. KAHNEMAN, *supra* note 6, at 72, 74, 168; Bargh & Chartrand, *supra* note 40, at 467–68; Devine, *supra* note 20, at 5–6.

45. KAHNEMAN, *supra* note 6, at 52; Marilyn B. Brewer, *A Dual Process Model of Impression Formation*, in *ADVANCES IN SOCIAL COGNITION* 1 (Thomas K. Srull & Robert S. Wyer, Jr. eds.,

memories hold an image of prototypical members of these categories.<sup>46</sup> And when the “groups” are people, and the “categories” are races, our minds tend to use stereotypes as a kind of mental shorthand for group categories—saving us time, but often applying traits to individuals that are neither accurate nor fair.<sup>47</sup>

Jennifer Eberhardt and one of the authors of this Essay recently published work designed to investigate this automatic association between racial groups and the stereotypes attached to them.<sup>48</sup> Specifically, in a series of studies, these psychologists investigated whether the automatic association of Blacks with crime also influenced what individuals saw and how they directed their attention.<sup>49</sup> In one study, participants were brought into the lab and subliminally primed (i.e., shown pictures so quickly on a computer screen that participants were unaware they had seen anything) with pictures of black or white male faces.<sup>50</sup> Participants then watched a series of movies that displayed images progressing from “snow” on an old television to a clear picture of an object.<sup>51</sup> Participants were instructed to press a button when they were able to identify the object.<sup>52</sup> They saw two kinds of objects: crime-related objects (e.g., guns, badges, fingerprints, etc.) and crime-unrelated objects (e.g., staplers, tea cups, keys, etc.).<sup>53</sup>

Reaction-time analyses demonstrated that when participants had been exposed to white male faces, they found both crime-related and crime-unrelated objects equally fast.<sup>54</sup> However, when participants had been exposed to black male faces, they saw crime-related objects faster than crime-unrelated objects.<sup>55</sup> In this case, the mere presence of Blackness made it easier to *see* crime than when Blackness was absent.

In a parallel study, participants were brought into the lab and subliminally exposed to words related to crime (e.g., arrest, felony, etc.) or nonsense letter strings (e.g., xvslpe).<sup>56</sup> They were then presented with a

1988); Devine, *supra* note 20, at 5–6; Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, 23 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 1, 1 (1990).

46. KAHNEMAN, *supra* note 6, at 168; Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY*, *supra* note 16, at 232–34.

47. Bargh & Chartrand, *supra* note 40, at 466–67; Devine, *supra* note 20, at 5–6; Greenwald, McGhee & Schwartz, *supra* note 20, at 1464–65.

48. *See generally* Eberhardt et al., *supra* note 8; Goff et al., *supra* note 9.

49. *See* Eberhardt et al., *supra* note 8.

50. *Id.* at 880.

51. *Id.* at 879.

52. *Id.* at 878.

53. *Id.* at 878–79.

54. *Id.* at 880–81.

55. *Id.*

56. *Id.* at 885–88.

black male and white male face, equidistant from the mid-point of the screen.<sup>57</sup> After a few seconds, these faces disappeared and a faint dot appeared where one of the two faces had been.<sup>58</sup> Participants were told to indicate whether the dot appeared on the left- or right-hand side of the screen.<sup>59</sup>

In this research paradigm, a participant's reaction time was a proxy for their attentional bias. That is, if they were faster to indicate where the dot was when it appeared behind the white face as opposed to the black face, then they were likely looking more closely at the white face, and vice versa. The research demonstrated that when participants (who were mostly White) saw nonsense words, they tended to stare at the white face more than the black face—a kind of “in-group” bias.<sup>60</sup> However, when participants were first exposed to words related to crime, they were far faster to find the dot behind the black face than the white face.<sup>61</sup> In other words, thinking of crime made participants look towards black faces.

These two studies provide evidence of a reciprocal relationship between race and crime. That is, as “Black” activates thoughts of criminality, so too does criminality activate thoughts of Blackness, each strengthening the association between the two.

Again, while conscious effort can mobilize System 2, allowing us to perceive individuals more deliberately, there are a host of contexts that make this more difficult.<sup>62</sup> For instance, when individuals are cognitively depleted—say, they are tired after a long drive—they are more likely to rely on automatic processes (e.g., stereotypes) regardless of how dedicated they may be to non-racist values.<sup>63</sup> Similarly, if one is distracted,<sup>64</sup> anxious,<sup>65</sup> or

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57. Importantly, these faces were pre-tested to be equally attractive and equally stereotypical of their respective races. *Id.* at 886.

58. *Id.*

59. *Id.*

60. *Id.* at 887.

61. *Id.*

62. Brewer, *supra* note 45, at 1–36; Devine, *supra* note 20, at 15–16; Fiske et al., *supra* note 46, at 236; Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991).

63. Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCHOL. SCI. 319, 319 (1990); Devine, *supra* note 20, at 16; C. Neil Macrae, Galen V. Bodenhausen & Alan B. Milne, *Saying No to Unwanted Thoughts: Self-Focus and the Regulation of Mental Life*, 74 J. PERSONALITY & SOC. PSYCHOL. 578, 587 (1998); Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. BULL. 247, 247–48 (2000); William von Hippel, Lisa A. Silver & Molly E. Lynch, *Stereotyping Against Your Will: The Role of Inhibitory Ability in Stereotyping and Prejudice Among the Elderly*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 523, 523–24, 530 (2000).

64. See Gilbert & Hixon, *supra* note 62, at 512.

65. Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 318 (2007).

just feeling badly about one's self,<sup>66</sup> one is more likely to rely on automatic associations, thus increasing reliance on stereotypes. Perhaps most distressing in the case of stereotypes regarding race and crime is that simply engaging in cross-race interactions can be sufficiently anxiety-provoking—particularly among well-meaning individuals—to prevent them from using System 2 processes.<sup>67</sup> Consequently, though our minds come equipped with the capacity to interrogate our thoughts, they can fail to function optimally where issues of identity and stereotypes are concerned.

Obviously, this is relevant to issues of determining guilt and “dangerousness,” as perceptions of even law enforcement professionals can be influenced by these implicit biases. However, these biases can influence more than just perceptions—they can directly influence behaviors as well. When implicit associations influence behavior beneath awareness (i.e., behaviors that happen either too quickly to be controlled, or behaviors motivated by unconscious processes), this is called an ideomotor effect, to which we will now turn our attentions.

When criminal stereotypes are activated, they can result in people acting more aggressively than they might otherwise. This ideomotor effect often occurs without any conscious awareness that one is behaving in this way. For instance, in one study demonstrating this effect, researchers had subjects complete an extremely long and tedious computer task consisting of 130 trials.<sup>68</sup> Before each one, the participants were primed below the level of conscious awareness with photos depicting the face of either a black or white individual.

Researchers rigged the computers so that, on the last trial, the computer program would crash and the subjects would be told to begin the entire task again.<sup>69</sup> Their reactions to this news were videotaped and later coded for hostility. The results demonstrated that those primed with pictures of black faces reacted with more hostility to the news, regardless of their racial attitudes.<sup>70</sup> The researchers concluded that the prime activated associations linked to aggression, which then tipped the balance in favor of a more aggressive response to the unwelcome news.<sup>71</sup>

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66. Steven Fein & Steven J. Spencer, *Prejudice as Self-Image Maintenance: Affirming the Self Through Derogating Others*, 73 J. PERSONALITY & SOC. PSYCHOL. 31, 31 (1997).

67. Phillip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008); Richeson & Shelton, *supra* note 65, at 318; Jacquie D. Vorauer, Kelley J. Main & Gordon B. O'Connell, *How Do Individuals Expect To Be Viewed by Members of Lower Status Groups? Content and Implications of Meta-stereotypes*, 75 J. PERSONALITY & SOC. PSYCHOL. 917, 933–34 (1998).

68. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238 (1996).

69. *Id.*

70. *Id.* at 238–39.

71. *Id.* at 239.

Ideomotor effects generated by racial stereotypes are also implicated in the work of several researchers who study reactions to simulated shooter tasks.<sup>72</sup> In one study, researchers asked both civilians and officers to shoot armed individuals and to refrain from shooting unarmed individuals using buttons labeled “shoot” and “don’t shoot.”<sup>73</sup> This design permitted researchers to test two alternative forms of bias. On the one hand, individuals might accidentally shoot more unarmed black than unarmed white suspects. On the other hand, individuals could simply be faster to shoot armed black than armed white suspects.

Results of this research revealed that both civilians and officers demonstrated a similar degree of racial bias when it came to the speed of their decision-making. That is, both shot armed black suspects faster than armed white suspects.<sup>74</sup> However, unlike civilians, who also shot more unarmed black than unarmed white suspects, officers were able to inhibit a racial bias in favor of shooting undeserving black targets—evidence that training can reduce automatic racial biases in some cases.

However, in other research conducted by one of the authors of this Essay, training was not as helpful. In a study on the role of implicit dehumanization—the automatic association between Blacks and apes—researchers found that the degree to which officers associated Blacks with apes predicted both the degree to which they misperceived black children as adults and justified violence against them.<sup>75</sup> In this study, officers were brought into a laboratory and took an implicit association test,<sup>76</sup> a test of how strongly an individual associates two concepts—in this case, Blacks and apes. Afterwards, they were shown a photo array of black, white, and latino juveniles who were suspected of various crimes. Officers were asked to guess how old each juvenile was. This research revealed that not only did officers perceive black children as significantly older than they actually were, but an officer’s implicit association of Blacks with apes was a significant predictor of that over-estimation.<sup>77</sup> In other words, the more officers implicitly associated Blacks with apes, the more likely they were to see a black child as a black adult. However, the officers’ implicit associations did not affect perceptions of the age of either latino or white youths.<sup>78</sup>

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72. Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1317–18 (2002).

73. *Id.* at 1316; see also B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 288 (2006) (noting that split-second decisions limit individual ability to control for racial bias caused by racial stereotypes).

74. Correll et al., *supra* note 9, at 1020.

75. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (Aug. 15, 2012) (unpublished manuscript) (on file with authors).

76. Greenwald, McGhee & Schwartz, *supra* note 20, at 1464–65.

77. Goff et al., *supra* note 75, at 46–47.

78. *Id.* at 22–23.

After completing the study, the research team was granted access to each officer's use-of-force history with juveniles. These data led to the most disturbing finding of all—that an officer's implicit association between Blacks and apes led to higher rates of racial disparity in the use of force against black juveniles. That is, the more an officer associated Blacks with apes, the more they used force against black (but not white or latino) suspects.<sup>79</sup>

These data suggest that implicit bias can sometimes prove resistant to the gentling effects of introspection (i.e., System 2). Though using guidelines, such as “stop and think” or “use a checklist,” to safeguard against predictable System 1 errors does tend to reduce those errors,<sup>80</sup> and encouraging introspection also curbs important and predictable System 1 biases,<sup>81</sup> that should not be taken as evidence that the “silver bullet” for fixing these errors is simply slowing down. Rather, we suggest that “stopping and thinking” is merely one tool in the arsenal that we can use to reduce systematic errors caused by fast-thinking and intuitive mental processes.

### C. THE CONSTRUCT

The suspicion heuristic is a construct that relies upon the mind science of heuristics and biases on the one hand,<sup>82</sup> and implicit racial associations on the other,<sup>83</sup> to explain how merely perceiving race—even absent racial animus—can influence judgments of criminality beyond conscious awareness. Before developing the suspicion heuristic, we will first discuss the mental shortcuts people use when called upon to make difficult assessments in general. Then, we will apply these lessons to situations in which people are asked to make judgments in the context of suspicion.

#### 1. In General

As previously mentioned, individuals typically resort to heuristics when faced with a difficult judgment.<sup>84</sup> Because the judgment is complex, System 1 substitutes an easier, but related, assessment instead.<sup>85</sup> Substitution of easier questions occurs non-consciously. And, because the answer to the

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79. *Id.* at 23–27.

80. Kahneman & Tversky, *supra* note 12, at 15; *see also* Tversky & Kahneman, *supra* note 7, at 1124–31.

81. *See* Margo J. Monteith et al., *Putting the Brakes on Prejudice: On the Development and Operation of Cues for Control*, 83 J. PERSONALITY & SOC. PSYCHOL. 1029, 1032, 1038–39 (2002).

82. *See supra* Part I.A.

83. *See supra* Part I.B.

84. *See supra* note 13 and accompanying text; *see also* Kahneman & Frederick, *supra* note 13, at 53.

85. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163–64 (Daniel Kahneman et al. eds., 1982); *see also* Kahneman & Frederick, *supra* note 13, at 53.



heuristic question comes to mind quickly and easily, people are unaware that they answered a question that was not asked. Indeed, people likely will not even realize that the initial judgment was difficult because an intuitive answer readily came to mind.<sup>86</sup>

In their work, Tversky and Kahneman discovered that the use of heuristics is common when individuals make assessments of probability.<sup>87</sup> They found that both lay people and statistical experts often rest these judgments on their intuitions rather than on the laws of probability.<sup>88</sup> For instance, consideration of base rates (the pervasiveness of an item or phenomenon in the world) is important when determining the likelihood of uncertain events.<sup>89</sup> But, instead of considering base rates, people asked to assess the likelihood of uncertain events may substitute a judgment of similarity instead.<sup>90</sup> For example, when asked to judge the likelihood that a certain person is a lawyer, people may rest their predictions on how similar the person is to their stereotype of lawyers.<sup>91</sup> This substitution of the similarity or prototypicality question for the probability question is known as the representativeness heuristic.<sup>92</sup> The representativeness heuristic can cause significant errors because people fail to account for factors that should influence their probability judgments.<sup>93</sup>

Another heuristic that can affect probability judgments is known as the availability heuristic.<sup>94</sup> When people utilize the availability heuristic, their judgments of probability are influenced by how easily and quickly similar instances to the one at issue come to mind (i.e., how “available” or salient a

86. KAHNEMAN, *supra* note 6, at 99. Kahneman gives some examples of substitution. If you are asked, “How happy are you with your life these days?” The question you will likely answer instead is, “What is my mood right now.” *Id.* at 98. If asked, “How popular will the president be six months from now?” The easier question you will answer instead is, “How popular is the president right now?” *Id.* at 98.

87. Tversky & Kahneman, *supra* note 7, at 1124.

88. For an extended discussion, see *id.* at 1130.

89. *Id.* at 1124–25. Another factor people may fail to consider is predictability, which refers to the degree to which accurate predictions are possible. *Id.* at 1126.

90. Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430, 432–33 (1972).

91. Kahneman & Tversky, *supra* note 90, at 451 (“The likelihood that a particular 12-year-old boy will become a scientist, for example, may be evaluated by the degree to which the role of a scientist is representative of our image of the boy.”); Tversky & Kahneman, *supra* note 7, at 1124 (“In the representative heuristic, the probability that [a certain person] is a librarian, for example, is assessed by the degree to which he is representative of, or similar to, the stereotype of a librarian.”).

92. Kahneman & Tversky, *supra* note 90, at 433. For an extended discussion of representativeness, see generally Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 85, at 84.

93. See Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 85, at 49–51.

94. Tversky & Kahneman, *supra* note 7, at 1127.

prior event is).<sup>95</sup> For example, people's judgments of the probability that they will be involved in a serious car accident may be affected by how recently they witnessed or read about an automobile fatality. Substitution of availability for probability can also result in serious errors because, again, people using the availability heuristic ignore the laws of chance.

People likely utilize the availability heuristic in social situations because they often do not have "complete, reliable, [and] predictive information" about the individuals they encounter.<sup>96</sup> The availability heuristic, then, helps people to make judgments and predictions about others when full information is absent.<sup>97</sup> However, because people's pre-existing "beliefs and values foster preconceptions that heighten the availability of certain evidence," the availability heuristic can lead to errors in judgment.<sup>98</sup>

An example can help one distinguish between availability and representativeness:

[W]hen asked to evaluate the relative frequency of cocaine use in Hollywood actors, one may assess how easy it is to retrieve examples of celebrity drug-users—the availability heuristic piggybacks on highly efficient memory retrieval processes. When evaluating the likelihood that a given comic actor is a cocaine user, one may assess the similarity between that actor and the prototypical cocaine user (the representativeness heuristic piggybacks on automatic pattern-matching processes).<sup>99</sup>

People are generally unaware that they have substituted representativeness and availability judgments for probability judgments because System 1 makes these heuristic substitutions quickly and automatically.<sup>100</sup> Furthermore, the use of heuristics and the errors associated with them occur even when individuals are asked to be as accurate as possible or are given rewards for correct answers.<sup>101</sup>

## 2. Judgments of Criminality

Like other probability judgments, predicting the likelihood that a person is dangerous is extremely difficult—especially when the other is a

95. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207, 208 (1973). As Tversky and Kahneman wrote, "A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind." *Id.* at 208.

96. Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 85, at 190–91.

97. *Id.* at 191.

98. *Id.* at 191–92.

99. Thomas Gilovich & Dale Griffin, *Introduction—Heuristics and Biases: Then and Now*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 13, at 3.

100. KAHNEMAN, *supra* note 6, at 159.

101. *Id.*

stranger. The difficulty is compounded by the fact that people do not have the luxury of time to gather as much information as possible about the person being assessed and to engage in the deliberate, systematic processing of the evidence since hesitating may create a risk of injury or death. Faced with a potentially life-threatening situation, people are unlikely to take the time necessary for deductive reasoning. Rather, they will make their judgments of criminality quickly, based upon only small slices of behavior, under highly stressful circumstances. In this context, it would not be surprising if people made their assessments of criminality using the representativeness and availability heuristics. This substitution of representativeness and availability in the context of judgments of criminality (we use the phrase “judgments of criminality” to refer to the assessment that another is engaged in criminal activity or poses a threat) is what we term the “suspicion heuristic.”

Use of the suspicion heuristic cannot help but disadvantage Blacks. This is because Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal.<sup>102</sup> Furthermore, the tendency for black suspects to be over-represented in media portrayals of violent street crime<sup>103</sup> makes the Black-as-criminal stereotype readily available.

However, heuristic errors in determinations of suspicion can also burden other groups stereotyped as criminal in certain situations because what triggers the suspicion heuristic is the existence of the stereotype. For instance, Latinos (or those appearing to be) are stereotyped as drug dealers, gang members, and undocumented immigrants;<sup>104</sup> people believed to be

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102. Correll et al., *supra* note 72, at 1314–15; Danny Osborne, Perceived Stereotypicality and Eyewitness Memory: Does the Type of Crime Affect Eyewitness Identifications? 62–63 (May 27, 2009) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with authors); see also Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1139–44 (1995); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) (“There is overwhelming evidence that young Black men are stereotyped as violent, criminal, and dangerous . . . both implicitly as well as explicitly.”) (citations omitted).

103. See Gregg Hoffmann, *Racial Stereotyping in the News: Some General Semantics Alternatives*, 48 ETC: REV. GEN. SEMANTICS 22, 23 (1991), available at <http://www.generalsemantics.org/wp-content/uploads/2011/05/articles/etc/48-1-hoffmann.pdf>; Kang, *supra* note 35, at 1556–57 (noting that media violent crime stories can exacerbate implicit biases). See generally Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. COMM. 229, 229 (2007); Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547, 548 (2000).

104. Lee, *supra* note 3, at 441–44.

Muslim are stereotyped as terrorists;<sup>105</sup> and Whites are stereotyped as drug buyers when they are in nonwhite neighborhoods.<sup>106</sup>

Although it is easy and familiar to resort to conscious racial bias to explain racial errors in judgments of criminality, the suspicion heuristic can explain how these mistakes occur even in the absence of a consciously biased actor. Imagine egalitarian-minded individuals walking down a dark street at night. It would not be surprising for them to think about the possibility of being mugged or attacked. Although they are not aware of it, simply thinking about crime may automatically trigger the link between non-Whites and criminality below the level of conscious awareness.<sup>107</sup> As a result, their attention is more likely to be drawn to non-Whites present in the environment—a type of unconscious racial profiling.<sup>108</sup> Notice, then, that even before individuals make a judgment of criminality, they may subject non-Whites to greater scrutiny. This can occur regardless of whether individuals intend it.<sup>109</sup>

Once their attention is captured, they will make a judgment about the likelihood that the stranger is engaged in criminal activity. However, they may substitute a judgment of how closely this person resembles a criminal stereotype instead. Hence, if the person being judged is non-White, individuals are more likely to make a mistaken judgment of criminality.

The suspicion heuristic can bias individuals' judgments even if they consciously reject the stereotype. The decisions of the best-intentioned individuals may be affected by the mere existence of the stereotype because of the associative networks our minds use to process information. That is, merely being aware of the stereotype is sufficient to be influenced by it in ways that disadvantage those stereotyped as criminal, regardless of the perceiver's intentions or character. Even worse, people's heuristic-criminality judgment will feel easy, familiar, and true because they cannot evaluate information processes that proceed beneath awareness.

Importantly, we do not dispute the existence of bad actors. Yet, the precipitous decline in explicit racial bias over the past quarter century<sup>110</sup> suggests that errors in judgments of criminality that disproportionately affect

105. Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 922–23, 969–70 (2010).

106. I. Bennett Capers, *Developments in the Law—Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68–69 (2009); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1517 (1988).

107. See Eberhardt et al., *supra* note 8, at 876 *passim*.

108. See *id.* (discussing attentional bias).

109. See *id.*

110. Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1196 (1983); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 834 (2001); Goff, Steele & Davies, *supra* note 67, at 91; see, e.g., Philip Perlmutter, *The Decline of Bigotry in America*, 46 SOC. 517 (2009).

non-Whites may resist explanations that reduce to “people are racist.” The suspicion heuristic, in contrast, provides an equally compelling explanation for these patterns without relying on a theory of dwindling racial bigotry. The suspicion heuristic provides a more nuanced explanation for the racial disparities that continue to plague judgments of criminality—and does so without the preoccupation with bigotry that obscures the pervasive problem of non-conscious bias. The explanation is one that does not rely upon the fiction of the objective decision-maker or the scapegoat of the consciously biased actor. The suspicion heuristic can account for the reproduction of disparities of all types, even in the absence of culpable motives on the part of the decision-maker.

No doubt this explanation is more troubling than one that relies upon the bad-actor model because it means that even well-intentioned people can make these erroneous judgments. Nevertheless, the suspicion heuristic framework is consistent with over four decades of research into how humans think, process information, and make judgments. Thus, we should contend with its effects on judgments of criminality rather than remaining mired in antiquated lay theories of human nature.<sup>111</sup>

Now, one might imagine that if people encounter individuals who do not fit the criminal stereotype more often than individuals who do, this will affect the availability heuristic. However, this conclusion is based on the assumption that our memories are pristine—an assumption that finds contradictory evidence in literature on memory generally, and implicit biases in particular. This research provides evidence that people are more likely to remember events that are consistent with their pre-existing beliefs and expectations.<sup>112</sup> Given the social construction of crime as racially Black,<sup>113</sup> people are more likely to both consciously and non-consciously associate Blacks with criminality. What this means is that people are more likely to recall evidence of Black criminality than instances when that stereotype was proven false.

Worse still, the representativeness heuristic may bias individuals in favor of remembering more stereotypical members of a group (e.g., dark-skinned Blacks) as suspects—even when they were not.<sup>114</sup> For instance, in work conducted by Eberhardt and one of this Essay’s authors, police officers

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111. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1062 (2006).

112. Myron Rothbart et al., *Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 343, 344 (1979); see also ZIVA KUNDA, *SOCIAL COGNITION* 130 (1999) (“Much of what we ‘learn’ from experience may reflect our prior theories about reality rather than the actual nature of reality.”); Claudia E. Cohen, *Person Categories and Social Perception: Testing Some Boundaries of the Processing Effects of Prior Knowledge*, 40 J. PERSONALITY & SOC. PSYCHOL. 441, 441 (1981) (describing a study in which subjects were more likely to remember stereotype-consistent information).

113. See *supra* notes 102–03 and accompanying text.

114. Eberhardt et al., *supra* note 8, at 888–89.

reliably remembered a more racially stereotypically black suspect and a less racially stereotypical white suspect as having committed a crime.<sup>115</sup> Officers in this study were presented with the picture of an alleged criminal, and read about the crime he committed. Half of the officers saw a white criminal and the other half a black criminal. After a brief period, officers were given a surprise recall task and asked to pick the suspect out of a lineup. The lineup consisted of five faces, each pre-tested as equally attractive, but varying in racial stereotypicality. Two of the faces were more racially stereotypical than the target suspect, and two were less racially stereotypical. The results confirmed that, though officer recall was generally high (that is, they usually picked the right suspect), to the degree that they “got it wrong” and misidentified the suspect, they tended to pick out more racially stereotypical black suspects and less racially stereotypical white suspects.

Imagine, then, that two men—one obviously Black, the other racially ambiguous—are seen running from a convenience store after a robbery. Both are wearing stereotypically “black” clothes (e.g., sagged jeans, an oversized white t-shirt, and a sports jersey). Not only is an officer arriving to the scene likely to pay more attention to the unambiguously black suspect,<sup>116</sup> but that officer is also likely to remember that black suspect as the person of greatest interest after the fact—regardless of whether or not he was the culprit.

The suspicion heuristic gives us a basis for believing that non-Whites will be judged as criminal more often, regardless of whether they are actually engaged in criminal activity. This judgment will be consistent with System 1’s default intuitive position where non-Whites are concerned. For those not stereotyped as criminal, it will take more unambiguous evidence of criminality before that judgment will be made.<sup>117</sup> Stated another way, linking non-Whites with criminality is cognitively easy, while linking Whites with criminality is cognitively more taxing.<sup>118</sup>

In sum, the suspicion heuristic posits that, when attempting to predict the likelihood that a person poses a threat, individuals may rely upon the availability and representativeness heuristics to make that determination. Because an intuitive answer to these much easier questions comes to mind quickly, most individuals will not even be aware of the substitution. In these cases, System 1 heuristic errors combine with implicit racial associations to help the perceiver make a decision about ambiguous actors or behaviors. And, these quick, non-conscious processes also determine split-second decisions about behaviors (e.g., to shout “halt,” call for backup, or discharge

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115. *Id.* at 886–88.

116. *Id.*

117. See Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002).

118. Of course, this general statement has exceptions. For instance, it is likely cognitively easier to link Whites with white-collar crimes than non-Whites.

a weapon). Furthermore, the suspicion heuristic explains how mere knowledge of ubiquitous criminal stereotypes can cause pernicious errors in judgment and perception, regardless of whether the individuals involved believe or subscribe to the stereotype.

Considering the implications of the suspicion heuristic on judgments of criminality provides important insights into the law of self-defense—one doctrine that relies upon the reasonableness of these criminality judgments. The doctrine rests in large part upon judging whether an actor's belief that s/he faces an imminent threat of unlawful force is reasonable.<sup>119</sup> In Part II, we consider the implications of the suspicion heuristic for the doctrine of self-defense. The intent of this Essay is to begin thinking about how the suspicion heuristic should influence thinking about that doctrine and to trace the broad outlines of a new approach.

## II. SELF-DEFENSE AND THE SUSPICION HEURISTIC

The typical self-defense statute allows non-aggressors to use deadly force to protect themselves from the imminent use of deadly and unlawful force by another.<sup>120</sup> A majority of jurisdictions require that a person's belief regarding the necessity of using force be both honest and reasonable.<sup>121</sup> Stated differently, the defense is recognized even if a person uses deadly force against an innocent victim, as long as the individual actually believed deadly force was necessary and the mistake was reasonable.

The suspicion heuristic demonstrates how easily honest—but mistaken—beliefs can occur when the person being judged fits a criminal stereotype. That is because an individual deciding whether or not self-defensive actions are necessary must make a quick judgment of criminality (i.e., an intuitive assessment about whether the use of deadly force against her/him is imminent). This is precisely the situation likely to trigger the suspicion heuristic. In other words, the actor may well substitute representativeness and availability questions for the probability-of-criminality question. When the person being judged fits a criminal stereotype, the suspicion heuristic can cause the actor more easily to believe honestly—but mistakenly—that the person poses a threat and that deadly force is necessary

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119. See *infra* Part II.A.

120. See *People v. Brown*, 952 N.E.2d 32, 43 (Ill. App. Ct. 2011). The Model Penal Code does not require imminence. Rather, it requires that the use of force be “immediately necessary.” MODEL PENAL CODE § 3.04(1) (2012).

121. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 225 (5th ed. 2009) [hereinafter DRESSLER, UNDERSTANDING]; John F. Wagner Jr., *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, that Physical Force Is Necessary—Modern Cases*, 73 A.L.R. 4th 993, 996 (1989). Only four jurisdictions utilize a purely subjective test. Caroline Forell, *What's Reasonable: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1404 (2010).

and appropriate to repel it. These erroneous judgments can occur regardless of the actor's conscious racial attitudes and beliefs.

Consider, as an example, the tragic shooting death of Yoshihiro Hattori. Hattori was a sixteen-year-old Japanese exchange student living with a white family in Louisiana.<sup>122</sup> One night in October, he and Webb Haymaker, a member of his host family, were on their way to a Halloween party.<sup>123</sup> Hattori was dressed as John Travolta (à la Saturday Night Fever), wearing a white tuxedo jacket and carrying a small black camera.<sup>124</sup> Haymaker was dressed as a car-accident victim.<sup>125</sup>

The two got lost and mistook the home of Rodney and Bonnie Peairs as the location of the party.<sup>126</sup> They rang the doorbell, but when no one answered, the boys walked around to the carport.<sup>127</sup> At that moment, Mrs. Peairs opened the door.<sup>128</sup> She saw Haymaker first, but when Hattori rounded the corner, she screamed, slammed the door shut, and yelled out to her husband to “[g]et the gun.”<sup>129</sup>

The boys began to walk away, still in search of the Halloween party.<sup>130</sup> They were on the sidewalk, approximately ten yards away from the home,<sup>131</sup> when Mr. Peairs ran outside with his laser-scoped .44 Smith & Wesson Magnum.<sup>132</sup> Hattori, who spoke broken English, turned around and began to walk back towards Mr. Peairs, saying that they were there for the party.<sup>133</sup> Mr. Peairs yelled “Freeze!” but Hattori did not understand what that word meant.<sup>134</sup> When Hattori continued to approach, Mr. Peairs fired one shot, killing Hattori.<sup>135</sup> The entire event, from the time Mr. Peairs opened his door, lasted about three seconds.<sup>136</sup> A jury found Mr. Peairs's belief that he was in imminent danger reasonable and acquitted him.<sup>137</sup>

People can speculate about whether racism played a role in Hattori's tragic and needless death. But while it is tempting to fixate on the spectacle of Mr. Peairs's potentially racist intentions, the operation of the suspicion heuristic suggests that using race as a proxy for suspicion is not unusual or

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122. See *Hattori v. Peairs*, 662 So. 2d 509, 511–13 (La. Ct. App. 1995).

123. *Id.* at 511.

124. *Id.*

125. *Id.*

126. *Id.* at 511–12.

127. *Id.* at 511.

128. *Id.* at 512.

129. *Id.*

130. *Id.*

131. LEE, *supra* note 2, at 167.

132. *Hattori*, 662 So. 2d at 512.

133. LEE, *supra* note 2, at 168.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*



unexpected, and can happen both consciously and non-consciously. Even if Mr. Peairs was a well-intentioned man, under time pressure, the suspicion heuristic could cause him to see Hattori's camera as a gun and to interpret Hattori's failure to stop as evidence of aggression.

The suspicion heuristic can also provide insights into the shooting death of Trayvon Martin, a seventeen-year-old black teen.<sup>138</sup> Based upon the undisputed evidence, Martin was on his way back to the home of his father's fiancée on the evening of February 26th after purchasing items at a convenience store.<sup>139</sup> He was unarmed, carrying Skittles and an iced tea.<sup>140</sup> George Zimmerman, a Neighborhood Watch volunteer, spotted him and became immediately suspicious.<sup>141</sup>

Zimmerman called the local police department and reported seeing "a real suspicious guy."<sup>142</sup> He indicated that the individual was "just walking around looking about" and "looks like he's up to no good or he's on drugs or something."<sup>143</sup> Zimmerman then reported that the individual was staring and coming towards him.<sup>144</sup> Next, he described the individual running "down toward the other entrance of the neighborhood."<sup>145</sup> At this point, the dispatcher asked Zimmerman if he was in pursuit and Zimmerman responded that he was.<sup>146</sup> The dispatcher replied, "We don't need you to do that," to which Zimmerman answered, "OK."<sup>147</sup> There is some dispute about

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138. Karen McVeigh, *Trayvon Martin's Death: The Story So Far*, GUARDIAN (Mar. 20, 2012, 5:53 PM), <http://www.guardian.co.uk/world/2012/mar/20/trayvon-martin-death-story-so-far>.

139. Amy Goodman & Denis Moynihan, *Walking While Black: The Killing of Trayvon Martin*, DEMOCRACY NOW! (Mar. 22, 2012), [http://www.democracynow.org/blog/2012/3/22/walking\\_while\\_black\\_the\\_killing\\_of\\_trayvon\\_martin](http://www.democracynow.org/blog/2012/3/22/walking_while_black_the_killing_of_trayvon_martin); Matt Gutman & Seni Tienabeso, *Trayvon Martin's Last Phone Call Triggers Demand for Arrest*, ABC NEWS (Mar. 20, 2012), <http://abcnews.go.com/US/trayvon-martin-arrest-now-abc-reveals-crucial-phone/story?id=15959017#.UEJqcUI8F-U>.

140. Charles M. Blow, Op-Ed, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html>.

141. Rene Stutzman, *Police: Zimmerman Says Trayvon Deckerd Him with One Blow then Began Hammering His Head*, ORLANDO SENTINEL (Mar. 26, 2012), [http://articles.orlandosentinel.com/2012-03-26/news/os-trayvon-martin-zimmerman-account-20120326\\_1\\_miami-schools-punch-unarmed-black-teenager](http://articles.orlandosentinel.com/2012-03-26/news/os-trayvon-martin-zimmerman-account-20120326_1_miami-schools-punch-unarmed-black-teenager).

142. Isabelle Zehnder, *George Zimmerman's 911 Call Transcribed*, EXAMINER.COM (Mar. 24, 2012), [www.examiner.com/article/george-zimmerman-s-911-call-transcribed](http://www.examiner.com/article/george-zimmerman-s-911-call-transcribed).

143. *Id.*

144. *Id.* Zimmerman also said that the individual had "his hands in his waist band," was going "to check [Zimmerman] out," and had "something in his hands." *Id.* Shortly after, Zimmerman exclaimed, "These assholes. They always get away." *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

whether Zimmerman continued to follow the person we now know to be Martin, or if Martin approached Zimmerman.<sup>148</sup>

Zimmerman's conversation with police dispatch lasted approximately four minutes.<sup>149</sup> Then, four minutes after he ended his conversation,<sup>150</sup> Martin was dead and Zimmerman admitted to killing him<sup>151</sup> with the "black Kel Tek gmm" semi-automatic handgun he had in his possession.<sup>152</sup>

People will inevitably disagree on the question of whether Zimmerman is a racist. The answer to this question may help us determine just how morally blameworthy Zimmerman is. What should be clear, however, is that the suspicion heuristic could have affected his judgment that Martin posed a threat—regardless of Zimmerman's conscious racial beliefs. Martin certainly fit the stereotype of a dangerous thug—an unknown, young black male, dressed in a hoodie, walking down a street at night. And this insight is profoundly more disturbing than believing that only consciously biased actors would make this mistaken judgment.

The Subparts that follow trace the broad outlines of an approach to mistakes in self-defense cases that implicate the suspicion heuristic. These are cases where there is reason to believe that the actor's mistaken judgment was influenced by his or her non-conscious criminal stereotypes of the victim.<sup>153</sup> This analysis is important because the current doctrine's treatment of mistake would lead to anomalous results in suspicion heuristic cases.

Subpart A considers whether mistakes facilitated by the suspicion heuristic should be considered reasonable or unreasonable. This inquiry is critical because in a majority of jurisdictions the defense is unavailable if the

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148. According to the Affidavit of Probable Cause, Zimmerman did continue to follow Martin. Affidavit of Probable Cause—Second Degree Murder at 2, State v. Zimmerman, SA No. 1712Fo4573 (Fla. Cir. Ct. Apr. 11, 2012), available at <http://www.nytimes.com/interactive/2012/04/12/us/13shooter-document.html>. However, in a recent interview, Zimmerman says that he did move to a different location, but then Martin approached him "with 'confrontational' body language." Marylynn Ryan & Michael Martinez, *George Zimmerman, Trayvon Martin Case Update: Recent Interview Could Backfire in Court for Zimmerman*, NEWS CHANNEL 5 (July 26, 2012), <http://www.wptv.com/dpp/news/national/george-zimmerman-trayvon-martin-case-update-recent-interview-could-backfire-in-court-for-zimmerman>. Even if we credit Zimmerman's version, which prosecutors say contradicts the statements of witnesses, it still does not address the question of why Zimmerman did not simply drive away.

149. Eric Zorn, *Trayvon Martin and the Problematic Timeline*, CHI. TRIB. (Apr. 18, 2012), [http://blogs.chicagotribune.com/news\\_columnists\\_ezorn/2012/04/trayvon-martin-and-the-problematic-timeline.html](http://blogs.chicagotribune.com/news_columnists_ezorn/2012/04/trayvon-martin-and-the-problematic-timeline.html) (noting that the call ended at approximately 7:13 PM); Zehnder, *supra*, note 142.

150. RICARDO AYALA, SANFORD POLICE DEPARTMENT REPORT (2012), available at <http://www.wagist.com/wp-content/uploads/2012/04/Twin-Lakes-Shooting-Initial-Report.pdf> (noting that the first officers arrived at the scene at 7:17 PM).

151. Affidavit of Probable Cause, *supra* note 148, at 2.

152. AYALA, *supra* note 150, at 3.

153. The suspicion heuristic will not always result in mistaken judgments, i.e. outcome error. However, in this Essay, we only concern ourselves with cases in which a mistaken judgment of criminality is made.

mistake was unreasonable. This Subpart concludes that mistakes based upon the suspicion heuristic should always be considered unreasonable. However, as Subpart B explains, unreasonable mistakes in suspicion heuristic cases should not preclude the defense. Rather, the defendant should be convicted of manslaughter instead of murder under the doctrine of imperfect self-defense.

#### A. THE REASONABLENESS DETERMINATION

In most jurisdictions, the reasonableness of an actor's honest belief about the necessity of using deadly force is judged from the standpoint of the objectively reasonable person.<sup>154</sup> But, this begs the question: who is this fictional reasonable person to whom the defendant should be compared?<sup>155</sup> Within criminal law scholarship, this question has engendered a lively debate<sup>156</sup>—one that is not simply academic. For if the reasonable person is the typical, average and ordinary person, then in suspicion heuristic cases, individuals whose honest but mistaken judgments were influenced by the heuristic would be acquitted. As will be discussed next, this conception of reasonableness is inappropriate in cases implicating the heuristic.

There are two alternative conceptions of reasonableness that self-defense doctrine could employ—the positivist and the normative.<sup>157</sup> The positivist model eschews normative questions. It equates the reasonable person with the typical, average, or ordinary person and simply asks, “What would the ordinary person do in this situation?”<sup>158</sup> The normative conception adds a value judgment to the inquiry. Under this model, the reasonableness question is not only whether the typical person would have believed and acted the way the defendant did, but also whether those beliefs and actions are appropriate and just. The question answered is “[W]hat *should* the reasonable person do?”<sup>159</sup> The normative conception equates the

154. See *supra* note 121 and accompanying text.

155. But see Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 34 (2008) (arguing that “scholars have made an analytic mistake in believing that the reasonable man is a person”; rather, “[t]he reasonable man is an institutional heuristic” (emphasis omitted)).

156. See, e.g., *Symposium on the Reasonable Person in Criminal Law*, 11 NEW CRIM. L. REV. 1 (2008); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

157. Professor Cynthia Kwei Yung Lee developed this formulation in her groundbreaking article, *Race and Self-Defense*, *supra* note 3.

158. *Id.* at 495; see also *id.* at 387 (comparing the defendant to the “hypothetical reasonable person of ‘ordinary intelligence, temperament, and physical and mental attributes’”) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.05, at 202 (2d ed. 1995)). This positivist conception is the most common model used in the law. Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1236 (2010).

159. Lee, *supra* note 3, at 390 (emphasis added).

reasonable person with the ideal person—someone who does not act on his or her conscious or non-conscious biases.

Which is the appropriate model where the suspicion heuristic is concerned? The answer likely depends in part on whether one subscribes to the instrumentalist or non-instrumentalist view of criminal liability.<sup>160</sup> In very general terms, a non-instrumentalist considers the moral blameworthiness or culpability of the actor as the criminal law's primary concern, while an instrumentalist focuses on using the law to promote desirable social norms.<sup>161</sup>

The non-instrumentalist argument for using the positivist conception of reasonableness is that punishment should be reserved for those who make mistakes that the average person could have avoided.<sup>162</sup> Since the typical person cannot avoid operation of the heuristic in circumstances where it is likely to be activated, an actor whose mistaken belief was influenced by the heuristic is not morally blameworthy and should not be punished. This argument for complete exoneration has some appeal, especially given the traditional goals of the criminal law to punish only the blameworthy.

In our view, however, the reasonableness inquiry should encompass more than typicality when the suspicion heuristic might influence judgments; it should consider normative questions as well. This is appropriate for a number of reasons.<sup>163</sup> First, typical beliefs are not

160. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 815 (1994) ("The conflict between instrumental and noninstrumental conceptions of the law stems from the fact that the law has two rather antithetical tasks with respect to human behavior: (1) that of adjusting its rules to the expectations and intentions [including tacit assumptions] of reasonable persons, and (2) that of disciplining behavior and guiding it into proper channels." (quoting LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 700, 702 (5th ed. 1990)) (internal quotation marks omitted)).

161. Lee, *supra* note 3, at 381–82. As Jody Armour writes:

Under the noninstrumental model, the law must take the human animal as he is conditioned and simply ask whether society can fairly expect individuals to overcome their conditioning under the circumstances. According to the instrumentalist view, the law should seek to alter the maze and retrain individuals by formulating rules that prevent the stigmatization of blacks, reflect the community's moral aspirations of racial equality, and help eradicate racial discrimination.

Armour, *supra* note 160, at 815 (footnote omitted); see also *id.* at 785 n.12 ("Essentially, noninstrumentalist conceptions of legal liability focus on the past actions of specific parties, while instrumentalist ones focus on the future welfare of society in general.").

162. See Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 30 (1994).

163. Joshua Dressler, in the provocation context, has argued that the positivist conception of reasonableness can include features of the normative model. He writes:

If the Ordinary Man standard is to maintain a normative component, it is also important that the law assume this person to be devoid of other extreme character flaws relevant to the defense. . . . This means that, for purposes of determining whether a person is justified in becoming indignant by an otherwise harmless act,

necessarily morally correct or just.<sup>164</sup> Cynthia Lee makes this point powerfully using the examples of slavery and the Japanese internment.<sup>165</sup> While most today consider the institution of slavery and the internment of the Japanese unjust, this was not the case at the time.

Second, characterizing mistakes facilitated by the heuristic as reasonable represents a judgment that the mistake is acceptable. However, the fact that the average person is at risk of making these erroneous judgments does not make it something that society should countenance. On the contrary, society should be working towards eliminating racial bias, whether conscious or not, rather than determining that it is reasonable simply because it is ubiquitous.

Third, applying the positivist model to cases implicating the suspicion heuristic is problematic because the heuristic is pervasive. Thus, people who kill innocent, stereotyped individuals based upon the honest but mistaken belief that they posed a threat would never be punished. This result would reduce the criminal justice system's legitimacy, especially in the eyes of those most likely to bear the brunt of these mistaken judgments. These legitimacy problems can have unintended and negative ripple effects throughout the entire criminal justice system.<sup>166</sup>

In sum, using the positivist conception of reasonableness in suspicion heuristic cases would send inappropriate messages about the value of the victim's life and the importance of curbing and eliminating racial biases, whether consciously held or not. Rather, the normative conception is more appropriate. Under it, mistakes based upon the suspicion heuristic would be unreasonable because the ideal person would not have or act on these mistaken judgments. The next Subpart considers whether individuals making these unreasonable mistakes should be punished, and if so, to what extent.

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the Ordinary Man is not racist, anti-Semitic, or prejudiced against any class of persons.

Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 757 (1995).

164. Armour, *supra* note 160, at 790 ("Although in most cases the beliefs and reactions of typical people reflect what may fairly be expected of a particular actor, this rule of thumb should not be transformed into or confused with a normative or legal principle."); *see also* LEE, *supra* note 2, at 235-36.

165. LEE, *supra* note 2, at 236.

166. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Capers, *supra* note 106, at 68-69; *Developments in the Law—Race and the Criminal Process*, *supra* note 106, at 1517.

B. CLASSIFYING MISTAKEN SELF-DEFENSE<sup>167</sup>

In a majority of jurisdictions, self-defense is unavailable for unreasonable mistakes, and as a result, the actor is convicted of murder. This Subpart considers whether unreasonable mistakes precipitated by the suspicion heuristic should be treated similarly. We conclude that they should not. Rather, these mistakes should be classified as partial excuses that result in reduced punishment.

## 1. Justification v. Excuse

Self-defense is usually considered a justification defense because, although using deadly force against another is customarily a crime, in the context of self-defense, the act is considered the right thing to do, deserving of neither censure nor punishment.<sup>168</sup> As H.L.A. Hart writes, “Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (e.g., protection of human life) do not include cases such as this.”<sup>169</sup>

Much has been written about the difference between justifications and excuses in the criminal law.<sup>170</sup> In very general terms, a justified act is one that “the law does not condemn.”<sup>171</sup> Some scholars define these actions as encompassing only those that are morally right, and not those that are merely “tolerable.”<sup>172</sup> Other scholars are more forgiving, including within this category acts that are simply permissible.<sup>173</sup> The gist of this latter view is

167. This is a term coined by Reid Fontaine to distinguish between self-defense, where an actor is both reasonable and accurate (and thus justified), and those situations in which the actor is incorrect in his assessment. Fontaine suggests that “the doctrine of self-defense be reframed such that cases in which there is no real *defense*—such as in the case of a reasonable but erroneous belief of a mortal threat—be excluded and handled under a separate excuse-based doctrine of *mistaken self-defense*.” Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 61 (2010).

168. Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 84 (1984); Fontaine, *supra* note 167, at 58.

169. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 13 (1968).

170. See, e.g., GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978); Dressler, *supra* note 168; R. Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437 (1983); Paul H. Robinson, *A Theory of Justification: Society Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). Unfortunately, the constraints of this Essay do not allow a full discussion.

171. HART, *supra* note 169, at 13–14.

172. George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1358–59 (1979).

173. Donald Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109, 122 (1986) (writing that justifications are not necessarily “a good thing, but merely . . . a tolerable outcome in view of the alternative outcome”).

that “what you did was really all right,” even if not ideal.<sup>174</sup> The main idea behind justifications is that the actor has done the right thing under the circumstances; in context, the act is not wrongful, and thus the actor should not be punished for engaging in it.

An excuse, on the other hand, focuses on the actor’s moral blameworthiness, and not on the act.<sup>175</sup>

When behavior is excused, the law recognizes the behavior as wrongful, but does not assign blame to the actor because he is considered nonculpable. In recognizing excuse defenses, the law recognizes that people may act in socially undesirable ways, yet not deserve punishment. The law accepts the inevitable shortcomings of human beings who cannot always act in ideal ways.<sup>176</sup>

Excuses, then, acknowledge the social harm of the act, but also recognize that the actor did not have a “conscious will to do evil.”<sup>177</sup> Because the actor is not fully responsible for his or her actions based upon some psychological or situational characteristic unique to him or her, the actor receives either reduced punishment (a partial excuse) or no punishment at all (a full excuse).<sup>178</sup>

While self-defense is typically considered a justification defense, difficult classification issues arise when an actor makes an unreasonable mistake of fact regarding the need to use deadly force.<sup>179</sup> Is mistaken self-defense still

174. Greenawalt, *supra* note 170, at 442–44 (internal quotation marks omitted). Elsewhere, Greenawalt has written that justified acts are those that are “warranted” and “morally appropriate.” Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89, 91 (1986); see also Fontaine, *supra* note 167, at 62 (describing justified acts as acceptable or permissible).

175. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163 (1987) (“Whereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm.”); Horowitz, *supra* note 173, at 111 (“[Excuses] go, in short, to the mental element in criminal liability.”).

176. Lee, *supra* note 3, at 390 (citation omitted).

177. Horowitz, *supra* note 173, at 111 (noting that an excuse “belongs to that part of the criminal law that removes from punishment defendants who have intended no wrong.”). As Professor Reid Fontaine writes, “an excuse is the combination of an admission that one has engaged in wrongdoing that has produced social harm and an exonerating explanation as to why he has so acted.” Fontaine, *supra* note 167, at 66.

178. Dressler, *supra* note 168, at 66 (“[A]n excuse concedes the wrongfulness of the act, but asserts that the actor should not be punished for her wrongful behavior, primarily because of psychological or situational involuntariness.” (citations omitted)); HART, *supra* note 169, at 13–14 (noting that the excusable act “is deplored, but the psychological state of the agent . . . rule[s] out the public condemnation and punishment”).

179. Some commentators argue that both reasonable and unreasonable mistakes are fully excusable. One commentator put it thus:

If . . . moral stigma is not merely relevant but indeed the only distinguishing factor of the criminal law from civil law, it follows that any mistake of fact, no matter how unreasonable, should exculpate. Since, by definition, a person who makes even an

justifiable when facilitated by the suspicion heuristic? One answer is to conclude that these mistakes are neither justifiable nor excusable. The problem with this is it would treat individuals whose mistakes are facilitated by the heuristic identically to actors who kill with malice. However, the former are not as culpable as those “who act while they are not mistaken, who know precisely what they are doing, and understand precisely the implications and potential results of their acts.”<sup>180</sup> Thus, these two groups should not receive equal punishment.

Another option is to treat these mistakes as justifiable. However, this is also problematic because

the perceived offender has acted in no way that would adequately change the moral balance of the relationship between the victim and killer. As such, the victim has not acted such that he deserves to die or in a way that entitles the killer to take his life. . . . [T]here exists no characteristic—related to the victim or otherwise—of such a scenario that gives rise to entitlement on the part of the killer.<sup>181</sup>

Hence, classifying mistaken self-defense as justifiable is inappropriate because using deadly force against an innocent victim is not “objectively right conduct,”<sup>182</sup> even if the mistake was influenced by the heuristic. It is not socially desirable or even tolerable to kill, maim, or otherwise mistakenly use deadly force against innocent stereotyped individuals simply because most people have non-conscious biases against them.<sup>183</sup> If these mistaken judgments were categorized as justifiable, it would suggest that people are privileged to—and should—act in similar ways in analogous situations.<sup>184</sup>

unreasonable mistake of fact is not as culpable as one who makes no mistake of fact but who understands precisely what he is doing, the criminal law should visit upon the unreasonably mistaken actor a penalty less severe than that visited upon the knowing actor and, indeed, should visit upon him no criminal penalty at all.

Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 513 (1987); see also Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84–85 (1908) (“If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust. . . . If the mistake, whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction.”).

180. Singer, *supra* note 1179, at 513.

181. Fontaine, *supra* note 167, at 61.

182. Dressler, *supra* note 168, at 63 (citing GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978)). In Dressler’s view, justifications need not always involve “objectively right conduct.” *Id.* at 64. He writes, “Sometimes mistaken conduct can be justified, not merely excused.” *Id.*

183. See *infra* notes 164–66 and accompanying text.

184. Horowitz, *supra* note 173, at 119 (“To recognize a justification defense is effectively to change the law and, at least in some cases, to weaken the prohibitions of the criminal law. For if a person in a given situation is justified in doing an act that would otherwise be denominated criminal, then all others similarly situated are likewise privileged to do the same act.”).



Yet, there is no normatively defensible reason to approve the killing of innocents simply because they have the misfortune to be stereotyped as criminal<sup>185</sup> and the average person likely has non-conscious biases against them.<sup>186</sup>

Finally, the doctrine could excuse the actor who makes a mistake based upon the suspicion heuristic. We conclude that this is the appropriate way to handle these honest but unreasonable mistakes of fact. This taxonomy recognizes that while the act of using deadly force against innocent victims who fit a criminal stereotype is not morally appropriate, the actor's mistake is understandable. The excuse classification acknowledges that these actors did not have the conscious intent to engage in wrongful conduct. Rather, their mistake was influenced by non-conscious and automatic mental processes over which they had little control.<sup>187</sup>

Categorizing mistaken self-defense as an excuse does not end the inquiry, however. We must still determine whether, in the suspicion heuristic context, the excuse should exonerate the actor (a full excuse) or simply reduce punishment (a partial excuse). The next Subpart considers this question.

## 2. A Partial Excuse

While mistaken judgments in the suspicion heuristic context are excusable, the pervasiveness of the heuristic makes it materially different from situations where actors are fully excused because of infancy, insanity, or some other unique characteristic. These traits are peculiar to the individual and thus, “[t]he mental quality of [these] excuse defenses prevents their recognition in individual cases from effectively changing the law.”<sup>188</sup> Not so with the suspicion heuristic. As discussed previously, the suspicion heuristic likely affects most individuals, regardless of their conscious racial beliefs.

Because the heuristic is ubiquitous, fully excusing mistaken judgments of criminality precipitated by it would essentially immunize the mistaken killing of innocent, but stereotyped-as-criminal, individuals from punishment. This would tacitly turn mistaken self-defense into a justification

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185. Fontaine, *supra* note 167, at 62 (noting that it is generally argued that a justified act is one that is encouraged and not prohibited).

186. See *infra* notes 164–66 and accompanying text.

187. See *supra* notes 26–27, 80–81 and accompanying text. This also suggests that if individuals place themselves in situations where the suspicion heuristic is likely to affect them, they might be culpable. There is also evidence that with sufficient motivation and long-term practice, individuals can reduce the effects of automatic implicit biases. See Richardson, *supra* note 36, at 2054 (citing studies); *id.* 2088–97 (discussing possible methods that might reduce implicit bias, but noting that, at present, these efforts may not produce long-lasting effects); see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009).

188. Horowitz, *supra* note 173, at 120.

defense. So, while we can understand why mistakes based upon the suspicion heuristic might occur, full exoneration of everyone who erroneously uses deadly force against those stereotyped as criminal does not comport with our common intuitions.

A partial excuse provides a way to balance the concerns raised by punishing the non-culpable actor with a murder conviction on the one hand and condoning the use of deadly force precipitated by racial stereotypes through complete exoneration on the other.<sup>189</sup> A partial excuse recognizes that it is not only undesirable to completely forgive the use of deadly force against innocents based upon the suspicion heuristic, but also that these actors do not deserve full punishment. Rather, some punishment is defensible because the law should not condone the taking of an innocent life based upon racial stereotypes—consciously held or not. Reduced punishment recognizes that using deadly force under these circumstances is wrong while also acknowledging the actor's lack of malicious intent.

Under current law, the doctrine of imperfect self-defense provides the mechanism for treating mistaken self-defense as a partial excuse. Imperfect self-defense mitigates murder to voluntary or involuntary manslaughter when an actor's belief is honest but unreasonable.<sup>190</sup> However, only a minority of jurisdictions recognize the doctrine of imperfect self-defense, although this number is growing.<sup>191</sup> Based on the analysis in this Essay, we believe that the option of imperfect self-defense should be available in all jurisdictions.

### 3. Operationalizing the Reasonableness Standard

The discussion thus far has been theoretical. In this Subpart, we consider how to apply the normative standard of reasonableness in actual cases involving mistaken judgments of criminality.

First, just like in cases that do not involve mistaken judgments, the initial question jurors would have to answer is whether the actor's belief in the necessity of using deadly force was honest. If the jury decides the actor's belief was not honest, then the defendant's actions are neither justifiable nor excusable, and he or she should be convicted of murder.

However, if the jury finds that the mistaken belief was honest, then it must consider whether the actor's belief was reasonable. How can courts operationalize the normative conception of reasonableness? One way would be for courts to adopt a modified version of the jury instruction that Lee proposes. Her suggested instruction reads, in part, "If the defendant was

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189. Some commentators argue that unreasonable mistakes should not be excused. *See, e.g.*, Fontaine, *supra* note 167 (expressing the view that only reasonable mistakes are excusable with one limited exception).

190. Dressler, *supra* note 168, at 85.

191. *See* DRESSLER, UNDERSTANDING, *supra* note 121, at 234–35.

influenced by racial stereotypes, this fact may be considered to support the honesty, but not the reasonableness, of the defendant's beliefs. Reliance on racial stereotypes to inform one's beliefs in a self-defense situation is not reasonable as a matter of law.<sup>192</sup> We would add to this instruction language to the effect that racial stereotypes can be both conscious and non-conscious, and that reliance on either type of stereotype is unreasonable as a matter of law.<sup>193</sup>

Of course, juror decision-making itself may be affected by conscious and non-conscious biases. In other words, a juror's own implicit or explicit stereotypes may affect his or her determination of normative reasonableness. To help reduce this possibility, we adopt Lee's suggestion of giving jurors a race-switching instruction.<sup>194</sup> The instruction would tell jurors:

Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. . . . If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.<sup>195</sup>

This supplemental jury instruction would reinforce to jurors that reliance on stereotypes when determining whether the defendant's mistaken belief was normatively reasonable is inappropriate. It might also provide an effective means for jurors to evaluate whether their own decisions were influenced by racial stereotypes, either conscious or not. The race-switching instruction should be given whenever a party requests it or the judge determines that it is appropriate.<sup>196</sup> If the jury finds that the actor's mistake was unreasonable, then it can find the actor guilty of manslaughter instead of murder under the doctrine of imperfect self-defense.

### III. THE DUTY TO RETREAT

The suspicion heuristic reveals that the right to act in self-defense can place those stereotyped as criminal at greater risk of death or serious bodily injury at the hands of those who honestly, but mistakenly, fear them. In the Subparts that follow, we consider whether the law of self-defense can help insulate against these tragic outcomes by imposing a duty to retreat. First, we

192. Lee, *supra* note 3, at 479.

193. Some might bristle at the idea of judges giving instructions such as this one. Some might even argue that it is inappropriate. However, U.S. District Court Judge for the Northern District of Iowa Mark Bennett already gives jurors supplemental instructions that address the effects of racial stereotypes on judgments. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169 (2010).

194. Lee, *supra* note 3, at 481–82.

195. *Id.* at 482.

196. *Id.* at 468.

discuss the history of the duty to retreat from the English common law to the modern “Stand Your Ground” laws. Then, we suggest that the trend in most American jurisdictions to abandon the retreat requirement pays insufficient attention to the role of mistake. Finally, we argue that the duty to retreat should be a requirement of all self-defense laws.<sup>197</sup>

## A. HISTORY

### 1. English Common Law

The English common law required a person attacked in a public place to make every attempt to retreat to a place of safety before using deadly force to protect himself. The reason for this was that killings done solely to protect oneself (*se defendendo* killings) were considered excusable, not justifiable.<sup>198</sup> Thus, if the actor failed to retreat when he could have before using deadly force, he would be convicted of murder. Justifiable homicides, on the other hand, did not impose a duty to retreat.<sup>199</sup> However, these homicides were limited to those executed in furtherance of the law,<sup>200</sup> such as killing a felon who had escaped capture, committed a capital crime, or already been sentenced to death.<sup>201</sup>

Distinguishing between justifiable and excusable homicides at common law could become complicated when a person was defending himself against an attack by a felon. In these cases, only if the felon was engaged in a capital crime against the actor was the killing considered justifiable.<sup>202</sup> Surprisingly, however, only the killing of would-be robbers was justifiable.<sup>203</sup> All other homicides, including those in which the actor was defending himself against an attempted murderer who did not intend to rob him, were classified as *se*

197. We do not consider whether the duty should extend to one’s home because no jurisdiction requires this.

198. Garrett Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American “Retreat Rule,”* 55 LAW & CONTEMP. PROBS. 303, 307–08 (1992). A *se defendendo* killing was one where “a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him.” *Id.* at 308–09 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*184).

199. *See id.* at 309.

200. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 568 (1903). Or, as Blackstone put it, for a homicide to be justifiable “the law must require [the killing].” Epps, *supra* note 198, at 308 (citing BLACKSTONE, *supra* note 198, at \*178) (alteration in Epps).

201. Epps, *supra* note 198, at 307–08; *see also* Beale, *supra* note 200, at 568.

202. Epps, *supra* note 198, at 309; Singer, *supra* note 179, at 471–72.

“[I]ndeed, because he or she was carrying out a public duty by preventing a felony, one could almost argue . . . that the slayer had a duty not to retreat. Rather than seeking to *excuse* the slayer’s behavior—as with the slayer *se defendendo*—the slayer in a ‘felony prevention’ situation was attempting to *justify* his or her act, claiming that he or she was right in so acting.”

*Id.* at 472.

203. Beale, *supra* note 200, at 572 (providing explanatory sources).

*defendendo* homicides, requiring the actor to retreat before using deadly force.<sup>204</sup>

## 2. United States Doctrine

Across the ocean, the law developed differently.<sup>205</sup> Some American jurisdictions followed the common law approach, imposing a duty to retreat in *se defendendo* homicides.<sup>206</sup> The majority of jurisdictions, however, departed from the English common law rule.<sup>207</sup> In these jurisdictions, no retreat was required as long as the individual was “without fault” and “in a place where he has a right to be.”<sup>208</sup>

For instance, in *Erwin v. Ohio*, the defendant and his son-in-law were involved in a dispute concerning the right to use a shed that was not in the curtilage of either’s property.<sup>209</sup> Days before the homicide, the son-in-law removed all the defendant’s tools from the shed and put a new lock on the door.<sup>210</sup> On the day of the homicide, the defendant had removed the locks and was storing his tools in the shed when the two argued. The son-in-law approached the shed with an axe on his shoulders and the defendant warned him not to enter.<sup>211</sup> When the victim got to the door, the defendant shot him dead.<sup>212</sup>

At trial, the court instructed the jury on the duty to retreat over the defendant’s objection.<sup>213</sup> On appeal, the court held that when a defendant is not at fault, there is no duty to retreat, writing:

The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.<sup>214</sup>

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204. *See id.* at 572–73.

205. For a general history of the duty to retreat in the U.S., see RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* (1991).

206. *See, e.g.*, *Pond v. People*, 8 Mich. 150, 175–77 (1860).

207. *See* DRESSLER, *UNDERSTANDING*, *supra* note 123, at 229.

208. *Runyan v. State*, 57 Ind. 80, 84 (1877).

209. *Id.* at 192.

210. *Id.* at 192–93.

211. *Id.* at 193.

212. *Id.*

213. *Id.* at 193–94.

214. *Id.* at 199–200.

The *Erwin* court decided that this rule was “the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims.”<sup>215</sup>

Other courts that rejected a duty to retreat in the same time period reasoned similarly. For instance, the Indiana Supreme Court wrote:

The tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.<sup>216</sup>

In a line of cases replete with inconsistencies and confusion,<sup>217</sup> culminating in *Brown v. United States*,<sup>218</sup> the Supreme Court held that there was no duty to retreat. *Brown* involved a fight between employees at the site of a new post office that resulted in death. At trial, the court instructed the jury on the duty to retreat.<sup>219</sup> The Supreme Court reversed the conviction, with Justice Holmes writing in a now famous passage:

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.<sup>220</sup>

Today, only a minority of jurisdictions recognize a duty to retreat.

### 3. Stand Your Ground Laws

Recently, states have replaced the duty to retreat with “Stand Your Ground” laws. Florida was one of the first states to pass such a law, so we will consider that statute specifically here.<sup>221</sup> However, many states have since passed statutes modeled on Florida’s law.<sup>222</sup>

215. *Id.* at 200.

216. *Runyan v. State*, 57 Ind. 80, 84 (1877).

217. *See Epps, supra* note 198, at 316–22 (discussing the Court’s “acrobatics”).

218. *Brown v. United States*, 256 U.S. 335 (1921).

219. *Id.* at 342.

220. *Id.* at 343 (citing *Rowe v. United States*, 164 U.S. 546, 558 (1896)).

221. FLA. STAT. ANN. § 776.013(3) (West 2010 & Supp. 2012). *See generally* Anthony J. Sebok, *Florida’s New “Stand Your Ground” Law: Why It’s More Extreme than Other States’ Self-Defense*

Prior to its passage in 2005, Florida's self-defense statute justified the use of deadly force only when the actor "reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm . . . or to prevent the imminent commission of a forcible felony."<sup>223</sup> The state recognized the common-law duty to retreat, which provided that the use of deadly force was justified only after the actor "use[d] every reasonable means to avoid . . . danger," unless the actor was in his or her own home.<sup>224</sup> Florida's "Stand Your Ground" law made major changes to existing law. Among other things, it eliminated the duty to retreat when the actor was in a "place where he or she has a right to be."<sup>225</sup> The intent of the law was "to restore [the] absolute rights of law-abiding people to protect themselves . . . from intruders and attackers without fear of prosecution or civil action"<sup>226</sup>

*Measures, and How It Got That Way*, FINDLAW (May 2, 2005), <http://writ.news.findlaw.com/sebok/20050502.html>.

222. Alabama (ALA. CODE § 13A-3-23 (LexisNexis 2005 & Supp. 2011)); Arizona (ARIZ. REV. STAT. ANN. § 13-411 (2010 & Supp. 2011-2012)); Georgia (GA. CODE ANN. § 16-3-23.1 (West Supp. 2011)); Indiana (IND. CODE ANN. § 35-41-3-2 (West 2012)); Kansas (KANS. STAT. ANN. § 21-5-230 (2011)); Kentucky (KY. REV. STAT. ANN. § 503.055(3) (West Supp. 2011)); Louisiana (LA. REV. STAT. ANN. § 14:20 (2007 & Supp. 2012)); Michigan (MICH. COMP. LAWS § 780.972 (2007)); Mississippi (MISS. CODE ANN. § 97-3-15 (2006)); Missouri (MO. ANN. STAT. §§ 563.031(3), 563.074 (West 1999 & Supp. 2012)); Montana (MONT. CODE ANN. § 45-3-110 (Supp. 2009)); Nevada (NEV. REV. STAT. § 200.120 (Supp. 2009)); New Hampshire (N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2011)); North Carolina (N.C. GEN. STAT. § 14-51.3 (2011)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 1289.25 (2002 & Supp. 2012)); Pennsylvania (18 PA. CONS. STAT. § 505 (1998 & Supp. 2012)); South Carolina (S.C. CODE ANN. § 16-11-440 (Supp. 2011)); South Dakota (S.D. CODIFIED LAWS § 22-18-4 (2006)); Tennessee (TENN. CODE ANN. § 39-11-611 (2010)); Texas (TEX. PENAL CODE ANN. § 9.32 (2011)); Utah (UTAH CODE ANN. § 76-2-402 (2008 & Supp. 2011)); Washington (WASH. REV. CODE ANN. § 9A.16.050 (West 2009 & Supp. 2012)); West Virginia (W. VA. CODE ANN. § 55-7-22 (LexisNexis 2008)).

223. FLA. STAT. ANN. § 776.012.

224. *State v. James*, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003).

225. FLA. STAT. ANN. § 776.013(3). Section 776.013(3) provides:

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

*Id.* Today, the majority of American jurisdictions have abandoned the retreat requirement. Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty To Retreat and Encourages Citizens To Stand Their Ground*, 38 CUMB. L. REV. 339, 339 (2008); Epps, *supra* note 198, at 311-14.

226. S.B. 436, 107th Leg., 37th Reg. Sess. (Fla. 2005). As Representative Dennis K. Baxley declared, the statute stakes out "a clear position that we will stand with victims of violent attacks when the law is in their favor." Abby Goodnough, *Florida Expands Right To Use Deadly Force in Self Defense*, N.Y. TIMES (Apr. 27, 2005), <http://www.nytimes.com/2005/04/27/national/27shoot.html>.

and to “abrogate[] the common law duty to retreat when attacked before using deadly force.”<sup>227</sup>

### B. THE ROLE OF MISTAKE

Neither the English common law nor “Stand Your Ground” laws consider the role that mistake should play in the context of the duty to retreat.<sup>228</sup> Under the English common law, this failure can be attributed to the fact that “the primary weapons were knives, swords, poles and the like” and not guns.<sup>229</sup> Because these weapons required close contact, mistakes about the victim’s deadly intent likely were rare.<sup>230</sup>

Today, however, the ready availability of guns increases the likelihood of mistakes since a person can no longer rely upon close physical proximity to deduce the victim’s intent. Yet, in almost every jurisdiction abrogating the duty to retreat in the U.S., the rationale centers on the rights of innocent people to defend themselves against dangerous individuals.<sup>231</sup> There is no recognition of the reality of mistaken judgments. Perhaps this absence is related to the fact that the ready availability of guns may make retreat dangerous. However, the duty to retreat has never required individuals to retreat when it is not completely safe to do so.

Failing to impose a duty to retreat, when it can be accomplished with complete safety, privileges the life and autonomy interests of law-abiding actors over potential victims. Perhaps this balance is appropriate when one imagines the culpable victim who is the initiator of a deadly conflict.<sup>232</sup> After all, it could be said that these culpable victims assumed the risk of death, or perhaps even forfeited their right to life, based upon their wrongful conduct.<sup>233</sup> The same obviously cannot be said about the law-abiding, but stereotyped-as-criminal, victim. Hence, the failure to impose a duty to retreat either rests on the faulty premise that individuals do not make mistaken judgments, and thus, a duty to retreat is unnecessary, or that it simply does not matter that mistaken judgments occur. Both premises are problematic.

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227. FLA. S. JUDICIARY COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 19-CS/CS/SB 436, 1st Reg. Sess., at 5 (2005), available at <http://archive.flssenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf>.

228. Singer, *supra* note 179, at 474 (“[W]riters did not even discuss the effect of mistake in either justifiable or excusable self defense . . .”).

229. *Id.*

230. *Id.*

231. See *supra* notes 214–27 and accompanying text.

232. But see Beale, *supra* note 200, at 581 (“It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.”).

233. Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 883 (1976) (“Starting with a general right to life possessed by all human beings, the argument is that the aggressor, by his culpable act, forfeits his right to life. This analysis, however, is unsatisfactory on a number of counts.”).



Given that mistaken judgments occur, and are even more likely when the victim fits a criminal stereotype, the choice to privilege the autonomy interests of law-abiding actors over law-abiding victims is not an obvious one. In order to recognize and potentially protect the liberty and security interests of those stereotyped as criminal, as well as other victims of mistaken judgments, the law should require a duty to retreat. This is discussed next.

*C. A PROPHYLACTIC MEASURE*

The elimination of the duty to retreat is premised on concern for the safety and autonomy interests of law-abiding actors and a failure to recognize the heightened risk of mistaken judgments against those innocent individuals who are stereotyped as criminal. Imposing a duty to retreat would more appropriately balance the interests of both mistaken actors and innocent victims. Requiring retreat is especially important because the actors include civilians. If the only people entitled to act in self-defense were police officers, there might be a stronger argument against imposing a duty to retreat because officers could be required to engage in training aimed at reducing the effects of the suspicion heuristic on their judgments. However, it would be more difficult to require civilians to participate in such trainings, even if they were effective.<sup>234</sup> Thus, the best way to safeguard against mistaken judgments caused by the suspicion heuristic is to impose a duty to retreat when it is safe to do so.

We are not arguing that the duty to retreat would always accomplish the goal of saving an innocent life. Citizens would need to learn about the duty to retreat before it might influence their behavior. Furthermore, in the heat of the moment, individuals may not be aware that a safe avenue of retreat is possible. However, there are certainly circumstances where imposing a duty to retreat could make the difference between life and death for the innocent victim. And without it, there is no mechanism to at least attempt to protect stereotyped individuals from the risk of death or serious injury due to mistaken judgments.

The retreat requirement also has the potential to serve a debiasing function in suspicion heuristic cases. Retreat would force individuals to take a “time out” before acting on their intuitions. Withdrawing to a place of safety, if possible, might release some anxiety and give people time to engage in more deliberate, conscious, and effortful thinking. The duty might allow individuals an opportunity to consider alternatives, rather than jumping to conclusions on the basis of limited information.

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<sup>234</sup> We could imagine requiring such trainings as a requirement for obtaining a gun license. However, without consistent practice, the requirement would be ineffective. See Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 57–59 (2010) (arguing that gun owners be required to engage in mandatory ongoing training).

Furthermore, requiring retreat would help to clarify the intent of the victim. If, upon retreat, the victim continues to pursue, this decreases the likelihood of a mistaken judgment. Thus, the duty to retreat could reduce the ambiguity often inherent in cases of self-defense.

Finally, imposing a duty is also consistent with the classification of mistaken self-defense as excusable. An excuse, as discussed above, focuses on the moral blameworthiness of the actor. If a defendant knows he can retreat safely before using deadly force, but chooses not to, he is no longer morally innocent.

The duty to retreat should be a mandatory requirement of all self-defense laws. The Model Penal Code (“MPC”)<sup>235</sup> and some states<sup>236</sup> already impose such a duty. Given the national attention the shooting death of Martin has received, the time is ripe for change. Already, many prosecutors and law enforcement officials oppose “Stand Your Ground” laws<sup>237</sup> and some states are considering proposals to repeal or amend them.<sup>238</sup>

If a duty to retreat becomes a mandatory component of self-defense laws, how would it affect the analysis of mistake in suspicion heuristic cases? In cases where no safe avenue of retreat exists, no change in analysis is necessary. The actor should be partially excused for the reasons discussed previously.<sup>239</sup> However, what should happen in situations where a safe avenue of retreat does exist? The answer depends on whether the actor is aware of it. If the actor is unaware that retreat is possible, we would treat this situation as analogous to the case where no safe avenue exists. The actor should be partially excused.<sup>240</sup> But, if the actor is aware of the safe avenue of

235. The MPC provides that “[t]he use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating.” MODEL PENAL CODE § 3.04(2)(b)(ii) (Official Draft 1985).

236. See, e.g., N.Y. PENAL LAW § 35.15 (McKinney 2004).

237. Goodnough, *supra* note 226; Adam Liptak, *15 States Expand Right To Shoot in Self-Defense*, N.Y. TIMES (Aug. 7, 2006), <http://www.nytimes.com/2006/08/07/us/07shoot.html>.

238. See, e.g., Kate Abbey-Lambertz, *Stand Your Ground: Michigan Act Similar to Florida Law Used in Trayvon Martin Case Provokes Repeal Effort*, HUFFINGTON POST (May 18, 2012), [http://www.huffingtonpost.com/2012/05/18/stand-your-ground-michigan-law-florida-trayvon-martin-self-defense-act\\_n\\_1527349.html](http://www.huffingtonpost.com/2012/05/18/stand-your-ground-michigan-law-florida-trayvon-martin-self-defense-act_n_1527349.html); Hayes Hunt, “Stand Your Ground” Laws—The Trayvon Martin Case & Neighborhood Watch Groups, FROM THE SIDEBAR (Apr. 9, 2012), <http://practiceview.muzeview.com/links/index.php?id=3670757> (reporting that a group of Florida legislators has created a task force to consider whether the Stand Your Ground law should be amended or repealed); see also Adam Cohen, *The Growing Movement To Repeal “Stand Your Ground” Laws*, TIME IDEAS (Apr. 16, 2012), <http://ideas.time.com/2012/04/16/the-growing-movement-to-repeal-stand-your-ground-laws>.

239. See *supra* Part II.B.

240. In jurisdictions that currently recognize the duty to retreat, the defendant must be aware that a safe escape exists before the duty applies. DRESSLER, UNDERSTANDING, *supra* note 121, at 230, 255; see also *Redcross v. State*, 708 A.2d 1154, 1158 (Md. Ct. Spec. App. 1998). We believe that subjective awareness of the duty to retreat is important because due to the stress of the encounter, individuals may not be able to think clearly enough to recognize that a safe avenue of escape exists. As Kenneth Simons observes, based on scientific evidence, “[i]n the

retreat, then the actor is no longer entitled to an excuse because his or her failure to avoid the use of deadly force by retreating makes him or her culpable and a murder conviction would be appropriate.

### CONCLUSION

Scholars, lawyers, and policymakers should attend to the ways that normal psychological processes can bias decisions and outcomes in ways inconsistent with the values our society treasures. The stakes to liberty, safety, and security are too important to ignore. What is required is a new language that can account for these biases—one that does not rely upon the fiction of the rational decision-maker or the scapegoat of the consciously biased actor. Because the suspicion heuristic invokes implicit biases that are collectively created and reinforced, ameliorating it suggests a kind of shared responsibility. Put another way, because there is shared responsibility with regards to creating implicit biases,<sup>241</sup> there is a moral argument to be made in favor of a shared responsibility for their consequences. This is consistent with the principles of community policing<sup>242</sup> and procedural justice,<sup>243</sup> now championed by much of progressive law enforcement.

The suspicion heuristic begins to provide a broader language for engaging notions of bias in criminal justice without requiring a discussion of an individual's character. If the declining pervasiveness and severity of racial bigotry is to be taken seriously,<sup>244</sup> then it is exactly this sort of language that will become increasingly necessary in order to make sense of persistent inequalities. More importantly, the consensus among mind scientists is that malicious intent is not a necessary condition of discrimination or inequality. Yet, without a language with which to engage contexts in which racial

fast-moving context of a violent attack, it is often unrealistic to expect the person attacked to consciously and carefully evaluate the precise extent of a threat, the likely effect of his response on the aggressor, and the availability of alternatives." Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 78 (2008).

241. See, e.g., Bargh & Chartrand, *supra* note 40, at 476; Devine, *supra* note 20, at 5–6; Greenwald, McGhee & Schwartz, *supra* note 20, at 1464–65 (supporting existence of implicit biases).

242. See generally WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE (1997) (discussing the importance of police departments working with the community to solve problems); ROBERT TROJANOWICZ & BONNIE BUCQUEROUX, COMMUNITY POLICING: HOW TO GET STARTED (2d ed. 1998) (same).

243. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 49–57 (2002) (discussing the importance of community involvement to effective law enforcement); Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 SOC. PSYCHOL. Q. 153 (2003) (demonstrating that people are more likely to work with the police when they believe the police share their moral values); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003) (exploring the relationship between procedural justice and the public's views of the police).

244. Bobo, *supra* note 110, at 1196; Goff, Steele & Davies, *supra* note 67, at 91.

inequality is produced and maintained in the absence of racial bigotry, the law is severely limited in its ability to apply a remedy to objectionable racial discrimination.

This Essay outlined the psychological mechanisms that frequently result in racially biased perceptions and judgments of suspicion, and some attendant behaviors that follow these initial perceptions.<sup>245</sup> While this represents a first step towards a necessary expansion of the legal reasoning and doctrine around suspicion, our review was limited to a discrete analysis of the perceiver. Psychological processes, however, exist in a much wider and more dynamic network of agents and contexts, all of which can influence a given perceiver and, more importantly, the outcomes of a given encounter.

For instance, some contexts may provoke non-Whites to behave more suspiciously—in actuality—than Whites behave.<sup>246</sup> In fact, one's concern with being perceived as criminal may literally *cause* one to behave more anxiously, which can in turn lead to perceptions of “suspicious” behavior. These types of situational cues can accumulate, leading to what, in our upcoming work, we refer to as suspicion cascades<sup>247</sup>—the waves of social and psychological factors that can literally produce a social reality of suspicion where one did not exist before. And, of course, these waves tend to crash harder on stigmatized group members than on dominant ones.

Similarly, beyond the domain of self-defense concerns regarding racial bias in criminal suspicion, there are a host of legal domains in which pervasive and unintentional psychological biases could play a key role. Given the fundamental role that human psychological processes play in perceptions, emotions, and behaviors, it must follow that the biases influencing suspicion would also affect policing decisions, employment decisions, decisions about allocating political goods (e.g., voting rights), and jury deliberations. Consequently, legal scholars should understand the ways in which these nearly universal “traps of the mind” influence our ability to treat individuals from different groups fairly. The need for a broader language to address these “traps” therefore becomes clear.

In sum, fixating on whether or not individuals harbor bigoted beliefs can make it difficult to see the larger context in which the socio-political

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245. This Essay used the lens of behavioral realism, an approach to the law that calls upon courts and legislature to base legal rules on the best available evidence that exists on how people behave rather than on common sense assumptions. See generally *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006).

246. Cynthia J. Najdowski & Phillip A. Goff, Presentation at the Fourth Int'l Cong. on Psychol. & Law, *Stereotype Threat in Police Encounters: Why Innocent African Americans Are at Risk of Being Targeted as Suspects* (Mar. 4, 2011).

247. See Phillip Atiba Goff & L. Song Richardson, *No Bigots Required: What the Science of Racial Bias Reveals in the Wake of Trayvon Martin*, in *PURSUEING TRAYVON MARTIN: HISTORICAL CONTEXTS AND CONTEMPORARY MANIFESTATIONS OF RACIAL DYNAMICS* (George Yancy & Janine Jones eds.) (forthcoming fall 2012) (discussing suspicion cascades).

construction of race shapes our very perceptions and behaviors that operate beneath conscious awareness.<sup>248</sup> Though overt racism continues to plague American hearts and minds, the path towards racial justice requires a broader lens than one that telescopes conscious intentions to the exclusion of other factors. Those who have lost their lives in the shadow of racially suspect behaviors deserve better than a legacy of distraction and inquisitions about character. In other words, in addition to combating the individual overt bigotry that inhabits our hearts and minds, it is time for us to take equally seriously the shared unconscious biases that lurk beneath the surface. Because, if we are concerned with the targets of racism—and not just racist actors—then we must acknowledge that bigotry is not a necessary condition for the reproduction of racial disparities of all types.

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<sup>248</sup> See Thomas C. Holt, *Marking: Race, Race-Making, and the Writing of History*, 100 AM. HIST. REV. 1, 1 (1995) (noting that “‘race’ inheres neither in biology nor in culture but must be summoned to consciousness by their encounters in social space and historical time”).