

TAKING A BREAK FROM SELF-DEFENSE

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ABSTRACT

Legal theory has failed to acknowledge how central a concept self-defense is for the construction of American identities. Across demographic and ideological divides and throughout American history, self-defense has functioned as a mechanism to assert self-worth. This Article argues that this is an insidious baggage for self-defense to carry and that we would be better to jettison rather than reclaim it. The argument is grounded in an analysis of various manifestations of the American culture of self-defense. In law, these manifestations include developments in penal codes, constitutional criminal law, gun laws, procedural rules, the law of police, and prison law and policy. This compound proactively incites persons under all colors of law to seize opportunities to exercise self-defense, assigns virtuousness to self-defensive achievements, and augments their effectiveness. Thus, the contemporary ubiquity of self-defense serves to articulate, distribute, and breed aggression, re-legitimizing violence through the back door. In this light, this Article suggests a moratorium on the idea that self-defense is a justification for violence.

Analytic criminal jurisprudence generally takes justification to be a category that applies across time and place. Although all the elements of a crime are satisfied, when a justification defense applies the act is morally permissible and, for this reason, exoneration is due. But the idea that self-defense justifies violence is culturally, historically, and politically loaded. These conditions ought to inform its jurisprudential analysis. This Article suggests incorporating a cultural receptivity criterion into the justification-excuse calculus, making meaningful the fact that criminal law is public law. As a public institution, self-defense is detrimental to material welfare, equality, democracy, and ethics of cooperation and care, such that the social roles of self-defense corrupt whatever justifiable moral core it ideally has. We should not want to give individual self-defenders the powers that this justification confers, nor vindicate the values that justificatory self-defense stands for, nor accept the socio-political conditions that self-defense laws

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create or perpetuate. Hence, we can hold that the functions that self-defense regimes serve in contemporary society render them unjustifiable, while remaining agnostic on the question of whether morality permits self-defense.

This Article proposes to understand self-defense as an excuse, which negates the doer's punishability but not the unlawfulness of the act. Self-defenders would still be relieved of criminal liability, but for reasons anchored in social conditions and public values rather than private morality. Instead of celebrating self-defense as a vindication of natural justice, the normative question ought to shift to the communal failures that give rise to violence and that make it seem inevitable.

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I. INTRODUCTION

The violent assault on the United States Capitol on January 6, 2021, created safety concerns for the inauguration event of President Biden. A large number of National Guard troops were consequently deployed to Washington, D.C., and one of the questions that arose was whether these troops should be armed during the event. The Chief of the National Guard Bureau explained the rationale guiding the decision, saying: "We want our individuals to have the right to self-defense."¹ At first glance, this reasoning

¹ Dave Philipps & Helene Cooper, *The National Guard Plans to Deploy up to 15,000 Troops for the Inauguration*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/live/2021/01/11/us/capitol-riot->

might seem perfectly logical, the soldiers should be able to protect themselves from violence, yet it is nonetheless peculiar and telling. One can hardly think of an event more public in nature than a presidential inauguration. It is the cornerstone of the process of peaceful transition of power, a point of pride in American history and a foundational principle of its political and constitutional culture. It is a process whose publicness and peacefulness are of the essence. Yet the Chief believed that it was the soldiers' private rights to use violence that ought to guide his decision-making. The most important thing for the troops' commander was not that they keep public order and public safety but that they retain their rights as individuals and the ability to effectively exercise them. Specifically, the right to self-defense—the same right that guided the organizers of the January 6 Capitol attack.²

The Chief's statement illustrates the absence of any robust political ethos guiding the operation of American law-and-order agencies, whose members are deemed to be mere private agents operating according to private interests and reasons. Alternatively, there may be a coherent ideological orientation of law enforcement, but one we would not wish for ourselves.³ In the months prior to the Capitol insurrection, Black Lives Matter ("BLM") demonstrations, held at an adjacent location, met a very different response than that which greeted the rioters of January 6. The white mob was allowed inside the Capitol, while the black crowds, who had posed no such threat, were fiercely controlled by immediate legal and physical actions.⁴ This contrast is ironic not only because law enforcement agencies treated the just cause violently and the wrongful cause complacently,⁵ but also due to the nature of the BLM cause itself—precisely that law enforcement officials cease utilizing self-defense in lieu of an ethos of public service.

It seems that little differentiates state officials from armed suburban residents who use force, or threats thereof, against the BLM challenge to the legal order safeguarding their bourgeois-vigilante lifestyle. *Bourgeois*, because this group is concerned with warding off threats to their hard-earned, precarious (as well as racialized) social status and social capital;⁶ *vigilante*, because they use physical force for that purpose, as a response to a perceived

police-building/the-national-guard-plans-to-deploy-up-to-15000-troops-for-the-inauguration [https://perma.cc/5RSU-ABU4].

² Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, D.C., Leader of Proud Boys and Four Other Members Indicted in Federal Court For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), <https://www.justice.gov/usao-dc/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-an-0> [https://perma.cc/W6XV-RA27] (charging that the defendants' chat group in preparation for the January 6 events was called "Ministry of Self Defense").

³ Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1815–25 (2020) (surveying historical, material, and ideological arguments that policing in the United States is a white supremacist institution).

⁴ Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison> [https://perma.cc/BW48-V94V].

⁵ Indeed, many of the rioters were veterans themselves. See Tom Dreisbach & Meg Anderson, *Nearly 1 in 5 Defendants in Capitol Riot Cases Served in the Military*, NPR (Jan. 21, 2021), <https://www.npr.org/2021/01/21/958915267/nearly-one-in-five-defendants-in-capitol-riot-cases-served-in-the-military> [https://perma.cc/9XP4-92VE].

⁶ See JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* (2015) (describing how owning and carrying guns can be a means for positioning oneself in the middle class or compensating for exclusion therefrom).

failure of the state to do so, by actively promoting lower groups or by sitting aside while they elevate themselves;⁷ *lifestyle*, because the existing order is justified by appeal to a particular notion of personal responsibility, according to which one's place in society is a product of one's own free choices, and therefore deserved.⁸ Collective action and systemic critique undermine this framework and hence instinctively register as "against the rules." Thus, following their historical precursors who used private violence to conserve a political and economic order that put them atop the social hierarchy, contemporary vigilantes can claim both self-defense and "law and order" on their side.⁹ Too often, then as now, this view is corroborated by officials' interpretation of the law.¹⁰

Telling, but hardly surprising. Historians have noticed that self-defense has been a principal mechanism for the distribution of legitimate violence among actors under all shades of the law for generations. Far from an axiomatic moral principle, self-defense is a public institution that conveys grave social meanings and sets key terms of collective life.¹¹ It fills vacuums in the sphere of civic consciousness in a way that seemingly tracks natural justice but is in fact pernicious. In the United States today, self-defense serves to articulate, breed, and distribute aggression. Defense is the best offense.

⁷ See Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019); Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931 (2019); Lisa Guenther, *Seeing Like a Cop: A Critical Phenomenology of Whiteness as Property*, in RACE AS PHENOMENA: BETWEEN PHENOMENOLOGY AND PHILOSOPHY OF RACE 189 (Emily S. Lee ed., 2019).

⁸ See MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 60–71 (2020) (discussing the growing role of a rhetoric of personal responsibility and deservedness in the political mainstream since the 1980s); LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* (1990) (describing the transition of the concept of personal choice from a nineteenth-century one that is socially situated and infused by civic responsibility to a twentieth-century one centered around the idea of a freely chosen "lifestyle"); ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 72 (1985) (defining lifestyle, in contrast to community, as a product of free choice: "[L]ifestyle is fundamentally segmental and celebrates the narcissism of similarity.");

⁹ See Trevor George Gardner, *Law and Order as the Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. ONLINE 141 (2021) (discussing "law and order" rhetoric as entrenching a view of racial minorities as criminals despite pervasive criminality within the Trump administration); Richard Maxwell Brown, *Historical Patterns of American Violence*, in VIOLENCE IN AMERICA: HISTORICAL & COMPARATIVE PERSPECTIVES 19, 32 (Hugh Davis Graham & Ted Robert Gurr eds., rev. ed. 1979) (discussing violence serving the elite).

¹⁰ Two noteworthy examples of the 2020 racial justice protests are the cases of Kyle Rittenhouse, who shot three protesters, two of them fatally, and was treated by police as one of their own before being acquitted at trial, Zack Beauchamp, *Why Police Encouraged a Teenager with a Gun to Patrol Kenosha's Streets*, VOX (Aug. 27, 2020), <https://www.vox.com/2020/8/27/21404117/kenosha-kyle-rittenhouse-police-gun-populism> [<https://perma.cc/Y4NE-YMF4>], and Mark and Patricia McCloskey, who were convicted of assault and harassment after pointing guns at protesters, yet the Missouri Attorney General stated that their acts vindicated "one of Missouri's most fundamental freedoms," Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1196–97 (2021), and the Missouri governor ultimately pardoned them, Jim Salter, *Missouri Governor Pardons Gun-Waving St. Louis Lawyer Couple*, ASSOCIATED PRESS (Aug. 3, 2021), <https://apnews.com/article/michael-brown-st-louis-20062ccc6593bd91757ad1ea4a190db5> [<https://perma.cc/AZU6-YYKS>].

¹¹ See Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 106 (2016) ("[T]he idea that self-defense is natural and reflexive, that it is somehow beyond the law, unshaped by convention, habit, or custom, is one feature of an institution that conceals itself 'through reference to natural or spiritual law.'" (quoting Ronald L. Jepperson, *Institutions, Institutional Effect, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 143, 152 (Walter W. Powell & Paul J. DiMaggio eds., 1991))).

Self-defense emerges when violence per se is no longer acceptable as a legitimate means for achieving ethical ends: global, national, or personal. Whether violence has declined empirically is a contested question.¹² However, as a matter of public discourse, intentional infliction of harm is universally discouraged as a dispute resolution mechanism. We can no longer callously go to war, start a revolution, or strike a subordinate at work, school, or home, just to achieve some end we desire.¹³ Our ideal of progress enjoys a near-consensus on this issue, if on little else. “Forward,” if such a historical direction exists, runs unequivocally away from violence (notwithstanding that we might be skeptical of our chances to achieve this ideal).¹⁴

Does the 2021 Capitol insurrection challenge this assertion, or perhaps provide an exception that proves the rule? I think it rather plainly makes the same point. Yes, it was a blatantly violent affair, and the violence was probably a product of incitement. But it then turned into a source of shame. Even as the tide turned in the following months and it became more common to valorize the event, speakers still distanced themselves, at least on some rhetorical level, from overt displays of violence.¹⁵ President Trump and other right-wing leaders either ignored the violence, denied that it was their followers who had perpetrated it, or condemned it.¹⁶ No political leader or pundit, outside of markedly dubious fringes, attempted to own it. At the opposite pole, in terms of both ideology and sophistication, we can look at interpretations of Frantz Fanon in postcolonial scholarly literature. It is hard to find a more explicit endorsement of violence than Fanon’s,¹⁷ yet many who apply these portions of his thought to contemporary contexts qualify

¹² Compare STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011) with THE DARKER ANGELS OF OUR NATURE: REFUTING THE PINKER THEORY OF HISTORY & VIOLENCE (Philip Dwyer & Mark Micale eds., 2022).

¹³ See José Luis Martí, *The Right to Protest and Contestation in a Deliberative Democracy*, in PEACE, DISCONTENT AND CONSTITUTIONAL LAW: CHALLENGES TO CONSTITUTIONAL ORDER AND DEMOCRACY 30, 30–31 (Martin Belov ed., 2021) (arguing that the empirical debate notwithstanding, a cultural shift from violence toward peace occurred over the last centuries). Instead of using violence as legitimate means for whatever end, we must now at least explain such behavior, if not refrain from it: they deserved it, it was consensual, I defended myself, etc. But to say “this is the easiest way to get what I want” will not be accepted as a justification today, on global, national, or personal levels.

¹⁴ On progress skepticism generally, see MATTHEW W. SLABOCH, *A ROAD TO NOWHERE: THE IDEA OF PROGRESS AND ITS CRITICS* (2017); WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 253, 257–58 (Hannah Arendt ed., Harry Zohn trans., 1968) (depicting “the angel of history” as observing the catastrophes of the past when a “storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.”). In the current context, see John T. Parry, *Progress and Justification in American Criminal Law*, 40 TULSA L. REV. 639, 641, 647–48 (2005) (“[J]ustification arguments pull against and undermine the ideal of a rational and progressive criminal law . . . [P]rogress is almost always about exercising power on people we have defined to need our help—that is, as objects of surveillance, understanding, and control. . . . The need to question ‘progress’ and its close relative, ‘reform,’ is particularly salient when discussing state power and violence . . .”).

¹⁵ David Leonhardt & Ian Prasad Philbrick, *Valorizing Jan. 6*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/09/17/briefing/january-6-capitol-riot-rally.html> [<https://perma.cc/LHE4-CX8U>]; Astead W. Herndon, *How Republicans Are Warping Reality Around the Capitol Attack*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/us/politics/Capitol-conspiracy-theories-blm-antifa.html> [<https://perma.cc/VV9A-4BJN>].

¹⁶ THE WHITE HOUSE, STATEMENT FROM THE PRESIDENT (Jan. 13, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-from-the-president-011321/> [<https://perma.cc/E5V8-NL6W>] (“In light of reports of more demonstrations, I urge that there must be NO violence, NO lawbreaking and NO vandalism of any kind. That is not what I stand for, and it is not what America stands for.”).

¹⁷ FRANZ FANON, *THE WRETCHED OF THE EARTH* ch. 1 (Richard Philcox trans., 2004).

that when he writes “violence” we should read something akin to “uncompromising action.”¹⁸

Alas, as the reader suspects, an end to violence has yet to arrive. There are exceptions to our proclaimed rejection of the use of force. In scholarship and in public discourse, violence is referred to as *that which ought not be done*, except when *justified*. And as every lawyer knows, rules are always at risk of being subsumed by their exceptions. Chief among these exceptional justifications is self-defense. Laws that legitimize violence are considered detrimental to enlightenment values such as progress and peace, but when one is attacked one is justified in defending oneself. Laws that stretch what counts as an attack, and the ease with which one can respond to it, abound. These laws reintroduce violence through the back door by employing broad interpretations of “defense,” “self,” or both.

This Article questions the merits of self-defense as a vehicle for articulating a robust sense of personhood, especially civic personhood. Legal theorists have yet to contemplate how the richness of meaning assigned to self-defense bears on criminal jurisprudence. Taking a step in that direction, this Article cuts to the legal core: the status of self-defense as a justification for violence. This topic has been at the center of considerable debate among legal philosophers, yet the scope of the debate is narrow, generally confined to the methodology and subject matter of morality. Instead of entering the weeds of moral reasoning about what justifies self-defense under the assumption that the law should track it, we might take a step back, broaden the scope of discussion, and ask how cultural, social, and political circumstances bear on the kinds of normative onuses we assign to self-defense. Whether self-defense can be morally permissible is a different question from whether it is socially valuable, though too often we conflate the two. This Article suggests that contingent questions surrounding the social valuableness of self-defense, or lack thereof, bear on the legal category of justification. Thus, the role self-defense plays in American culture calls for a moratorium on the view that it justifies violence for socio-political reasons rather than moral reasons. Namely, self-defense cannot be justified here and now, even if such a moratorium need not apply always and everywhere. This does not mean, however, that self-defenders should be punished. Viewing self-defense as a (rational) excuse rather than a justification better addresses the cultural pathologies surrounding this doctrine. This view allows the relief of criminal liability for reasons anchored in social conditions and public values rather than private morality.

Part II surveys the prominent answers in the legal philosophy literature to the question of what the law means when it says that self-defense justifies violence. It is argued that the dominating framework—that legal justifications track or ought to track moral justifications—is lacking. I introduce a criterion of “cultural receptivity” to the justification-excuse spectrum, asserting that defenses must be analyzed with sensitivity to cultural contingencies. Part III focuses on self-defense in the United States.

¹⁸ BARBARA DEMING, *On Revolution and Equilibrium*, in *REVOLUTION & EQUILIBRIUM* 194, 197 (1971); see also RICHARD J. BERNSTEIN, *Violence: Thinking Without Banisters* 106 (2013) (reading Fanon as presenting a critique of violence).

Developments in law, history, and rhetoric reveal that self-defense has become a tool of aggression. In a legal culture where a justification is misunderstood, abused, or otherwise unsuited, de-justification may provide a jurisprudential remedy. Part IV explains why that is the case in the United States today, focusing on three sets of functions that self-defense fulfills. Materially, self-defense incurs costs in life and limb and exacerbates inequality. Democratically, self-defense obstructs long-term collaborative projects. Ethically, self-defense vindicates and encourages an atomistic and moralistic view of the American as an individual assigner and enforcer of desert. Part V stresses that this argument does not support an expansionist vision of the criminal law, because although self-defenders should not be justified they can still be excused. This Article concludes with the hope that the suggested framework may advance a vision of criminal law that promotes a nonviolent ethos.

II. SELF-DEFENSE AS JUSTIFICATION FOR VIOLENCE

Self-defense has drawn extensive philosophical and legal interest over the last half-century. Puzzles surrounding this doctrine include: (1) Is self-defense morally permissible, or does it otherwise legitimize violence? (2) If so, why? (3) Under what conditions is self-defense legitimate or permissible? And (4) what is the nature of this permission?

Generally speaking, the philosophical working assumption has been that the answer to question (1) is affirmative—morality permits self-defense¹⁹—and the debate is focused on questions (2) and (3): why is that so and, relatedly, when? Alongside these discussions, question (4) has also received considerable attention. The question itself might seem cryptic to those unfamiliar with the literature: if self-defense is morally okay under certain conditions, why does it matter which philosophical label we attach to this permission? Yet such labels turn out to be important because they provide analytical clarity and, more controversially, carry meaningful normative weight—for theory, for law, and for public discourse. The main categories in use, as we shall see, are justification and excuse. Virtually all agree that self-defense is a justificatory defense,²⁰ and hence this status will be the focus of scrutiny.

A vast body of literature attempts to explain what distinguishes justification defenses from other reasons for relief of criminal liability—for example, that offense elements have not materialized, that an excuse defense applies, or that law enforcement priorities or statutory limitations prevent or

¹⁹ See Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 383 (2005) (“[T]he content and scope of norms are [often] assumed to correspond to common intuitive judgments and their justification is explored in the hope of supporting them. This reasoning is especially prevalent in the analysis of self-defense. . . .”).

²⁰ See, e.g., *id.* at 384 (“[S]elf-defense is typically considered the archetype justification for harming individuals and the yardstick for the validity of other stated justifications for harmful conduct.”); WHITLEY R.P. KAUFMAN, *JUSTIFIED KILLING: THE PARADOX OF SELF-DEFENSE* 32 (2009) (“[S]elf-defense is widely taken as the paradigm example of justification”); Daniel M. Farrell, *The Justification of Deterrent Violence*, 100 ETHICS 301, 302 (1990) (“[M]ost of us are inclined to think that under the right circumstances, violence aimed at direct self-defense is a paradigm of whatever violence might be morally justifiable.”). For contrary views, see *infra* Part V (discussing self-defense as excuse).

advise against prosecution.²¹ Explanations of justifications can be sorted into three categories. The moral view, the first one discussed herein, takes up the largest part of the scholarly discussion; indeed, I will argue too large a part. My contention will be that non-moral normative considerations are no less important for understanding justifications. Below, I explain briefly what it means to think of justifications in moral, institutional, and instrumental terms, both generally and with particular regard to self-defense. I then explain why cultural considerations should bear on question (4).

A. THE MORAL VIEW

There are deep disagreements among legal theorists as to why self-defense is justified and what follows from the different rationales. However, most agree on where to look for answers: moral theory. That is also where most scholars turn to understand what it means that self-defense is *justified*—that is, what it shares with all justification defenses as distinguished from other exemptions. According to this broadly shared assumption, justifications are about the wrongfulness of actions or the lack thereof. The basic idea, to oversimplify a nuanced debate, is that if a justification applies, the wrongfulness of the act is negated. Even though the elements of a given offense are satisfied, the law welcomes the conduct for moral reasons.²² An example perhaps less controversial than self-defense is necessity (or “choice of evils”). When an actor is faced with a choice between two evils, performing the lesser one is not wrong at all; on the contrary, it is morally desirable. For that reason, the law does not punish stealing a boat to save a drowning person. Under normal circumstances, stealing is wrong and therefore punishable, but it is *the right thing to do* when the alternative is letting someone drown. Some thinkers, and the Model Penal Code (“MPC”), adopt this utilitarian rationale to undergird all justifications. Thus, in self-defense, it is better, all things considered, that the aggressor, rather than the defender, is the one to get hurt.²³ Others believe wrongfulness is negated owing to the logic of moral rights: the aggressor forfeits their right to life by mounting an attack, or the defender asserts their right to autonomy in resisting submission to another’s attempted violation of their freedom.²⁴ And there are other theories aplenty.²⁵ The point is that over the last several decades the justifications debate, in tandem with the general character of criminal law theory, has played out on moral universalism grounds. That is true for theories of self-defense as well as for theories of justifications

²¹ Different taxonomies of defenses have been suggested. See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 24–25 (2003) (claiming that all defenses fall under one of two categories: conduct not prohibited or defendant not punishable); Paul H. Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199, 242–43 (1982) (identifying five categories: failure of proof; offense modification; justification; excuse; and nonexculpatory public policy defense).

²² MARK DSOUZA, RATIONALE-BASED DEFENCES IN CRIMINAL LAW 3 (2017) (listing “a large majority of theorists” who agree on the “wrongness hypothesis”); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 759 (2000) (“Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful. . .”).

²³ MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 146 (2d. ed. 2015).

²⁴ Whitley Kaufman, *Is There a “Right” to Self-Defense?*, 23 CRIM. JUST. ETHICS 20 (2004) (examining and rejecting different proposals for moral rights that might justify self-defense).

²⁵ See KAUFMAN, *supra* note 20, at ch. 3 (summarizing the leading theories); FIONA LEVERICK, KILLING IN SELF-DEFENSE ch. 3 (2006) (same).

generally. Each theory attempts to show why its proposed moral vision governs criminal law justifications. In other words, these theories attempt to explain why when the conditions of a given justification doctrine are satisfied, despite the fulfillment of all the elements of an offense, the act incurs no moral harm and for this reason is permissible under the law.

Justification is usually contrasted with excuse, together comprising the two families of defenses that lead to acquittal, as opposed to mitigation of punishment or refraining from pressing charges. Justification is considered logically prior to excuse: if an act is justified, no further inquiry is needed as the offense is nullified.²⁶ However, even absent a justification, an actor may still be relieved of liability. Instead of negating the wrongfulness of the act, excuses, under the moral view, negate the blameworthiness of the actor. The paradigmatic example is insanity. A person who claims insanity does not deny the wrongfulness of their action; rather, they claim that it would be unfair to blame them for it. The concern here is not with the moral attributes of the act, whose negative value is not questioned, but rather with the cognitive responsibility of the actor. Attributing such responsibility would not serve established goals of criminal law, such as condemnation and deterrence.

Again, this is hardly a summary of the voluminous body of scholarship addressing justifications and excuses from the viewpoint of moral theory, let alone highly sophisticated accounts.²⁷ Setting the stage in broad strokes here, I will complexify the concept of excuse in Part V of this Article, and add layers to justification throughout.²⁸

B. THE INSTITUTIONAL VIEW

Not all agree that the right way to think about *legal* justifications is to look at *moral* theory. Malcolm Thorburn argues that while there is a conceptual structure to justifications, it is institutional, not moral. Thorburn identifies the distinctive features of justifications, which a convincing account would need to explain, as the following three: (1) justifications are concerned with the ends that actors pursue—that is, the reasons they present for their conduct, rather than the means used alone; (2) the fault standard of justifications is reasonable belief, based on the data the actor honestly acted upon in real time, rather than a bird’s eye view, ex post correctness standard;

²⁶ R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 270 (2007); JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 108–13 (2007); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 958–62 (1985); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1899 n.6 (1984).

²⁷ See ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE chs. 6–7 (2009); DUFF, *supra* note 26, at ch. 11; VICTOR TADROS, CRIMINAL RESPONSIBILITY chs. 10–11 (2005).

²⁸ In what follows, I will refer mostly to John Gardner’s writing on justifications, partly because he engaged directly with competing views to the moral one, and partly because his nuanced view concedes that justified acts may still be wrongful. Gardner is a qualified defender of the moral view, since his account permits non-moral reasons to bear on the determination of justifiability. However, he never details under what circumstances they might defeat a moral one. More importantly, Gardner does not diverge from the point of view of the individual agent and the substantive reasons that apply to her as controlling the analysis of legal justifications, and therefore his account fits well under the moral view vis-à-vis its alternatives. See John Gardner, *In Defence of Offences and Defences*, 4 JRSLM. REV. LEGAL STUD. 110, 118–23 (2012) (responding to Leora Dahan-Katz, *Justification, Rationality and Morality in John Gardner’s Offences and Defences*, 4 JRSLM. REV. LEGAL STUD. 93, 98–102 (2012)).

and (3) justifications give legal effect to an individual's decision that their own conduct is permissible.²⁹ The moral view in all its variants fails to explain these features, primarily due to the fault standard it requires, yet which no court applies, which requires considering all the relevant facts known at the time of the trial to determine the moral merits of the act.³⁰ This failure is no wonder, Thorburn submits, since all of the moral view's adherents ask the wrong question: why certain acts are wrongful or not, instead of who gets to decide. Thus, it is the decision-making element that is key: "[T]he most important aspect of justifications is the discretion wielded by certain individuals to decide what conduct is justified and what is not."³¹ Justifications fall into place once they are understood as a family of regimes concerned with the arrangement and distribution of power and authority instead of the substance of norms.

Private fiduciaries, public officials, and ordinary citizens all make decisions over others' basic interests in life, liberty, security, and property, without their consent. Under regular circumstances, that would be criminal. But these decisions are nonetheless legally justified owing to how the relevant regime allocates decision-making powers. The category of laypersons consists mainly of self-defenders, whom Thorburn calls "ordinary citizens with public powers."³² When state actors are present, private persons must defer to their resolution of incendiary situations. When the state is absent, justifications kick in and allow the very participants in the situation to become "the lowest ranks of officialdom," collapsing the regular division of labor and undertaking the double role of decider and actor.³³ Justification doctrines such as lesser evil, self-defense, and citizen's arrest, are a mechanism by which criminal law recognizes a third category of decision-makers beyond legislatures and courts who are entitled to determine what conduct is justified.³⁴ This allocation of authority likens self-defenders to officials who carry out a public function such as arrest and differentiates them from vigilantes.³⁵ What courts scrutinize is the discretion used in exercising authority, making sure the actor was guided by the right reasons—the first distinctive feature of justifications. Hence the ex-ante fault standard of reasonableness rather than correctness.

C. THE INSTRUMENTAL VIEW

The moral view and the institutional view share the conviction that justifications comprise a conceptually coherent category whose parameters are established by an extra-legal theory. What if these views are wrong about that and there is no such theory? Although some toy with an eliminativist approach, all theorists ultimately agree that justification and excuse are

²⁹ Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1080–84 (2008).

³⁰ This is a general methodological problem of contemporary analytic philosophy of law. See JETHRO K. LIEBERMAN, FIGHT THE HYPO: FAKE ARGUMENTS, TROLLEYOLOGY, AND THE LIMITS OF HYPOTHETICALS 14 (2014) (discussing "FAKE" arguments: "Facts Are Known Exactly").

³¹ Thorburn, *supra* note 29, at 1075.

³² *Id.* at 1107.

³³ *Id.* at 1108–09.

³⁴ *Id.* at 1111.

³⁵ *Id.* at 1084.

useful concepts.³⁶ However, there are suggestions to use this vocabulary without attempting to track a pre-existing moral or political structure. Such suggestions urge that these concepts should be used instrumentally to further desired policy goals in terms of “justice, fairness, efficiency, administrability, and the like—not in terms of conceptual or logical truths.”³⁷ Mitchell Berman arrives at this conclusion following his skepticism that the law of justifications can or should be aligned with any one moral view.³⁸ Rather than marking certain acts as *wrongful* or not, Berman argues that legal justifications only pertain to *lawfulness*: “[C]onduct which appears at first blush to be criminal does not, all things considered, violate the law.”³⁹ Accordingly, excuses are just non-punishable, rather than non-blameworthy acts. These distinctions matter. Using moral concepts as analogues to legal ones, rather than the substance of law, calls for a “sociological jurisprudence,” and opens up a space for democratic interrogation into substantive law.⁴⁰ It does not follow, however, that justifications should not be rendered coherent and distinct. In Berman’s opinion, their uniqueness lies in the fact that such defenses speak directly to individuals. Justifications are conduct rules (guiding decisions on whether to break the law or not), whereas excuses, whose audience is judges, are decision rules (guiding decisions on whether to punish or not).⁴¹ The circumstances in which a defense should be classified as a justification are up for political deliberation. Nothing but our will determines when individual conduct, which seems like *prima facie* law-breaking, should in fact be tolerated.

In a related vein, and focusing specifically on self-defense, T. Markus Funk seeks to recenter this particular justification doctrine around the neglected question of values.⁴² Funk argues that the challenge in self-defense cases is not so much to identify who has the trumping moral right but rather what public values need to be balanced. He lists seven competing values: vindicating the state’s monopoly on the use of force to reduce private violence; ensuring the primacy of the legal process and the legitimacy of the legal order; protecting the attacker’s right to life and the defender’s autonomy; maintaining equal standing between individuals; and deterrence.⁴³ A value-centric analysis is less concerned with binary logical conclusions as with a multi-faceted analysis of ethical and public policy factors. Under this view, justifying self-defense aims to provide members of

³⁶ Eliminativism is the idea that ending the use of a certain philosophical concept would help us better understand the ideas and practices that the concept supposedly defines. See John Gardner, *The Logic of Excuses and the Rationality of Emotions*, 43 J. VALUE INQUIRY 315, 316 (2009); DUFF, *supra* note 26, at 265–66 (considering and rejecting an eliminativist approach to excuse and/or justification).

³⁷ Berman, *supra* note 21, at 77. I call this view “instrumentalism” following Thorburn, *supra* note 29, at 1078. See also Re’em Segev, *Should Law Track Morality?*, 36 CRIM. JUST. ETHICS 205, 214–19 (2017) (favoring an instrumental view of law over the view that it ought to track morality).

³⁸ Berman demonstrates this by considering acts that are morally but not legally justified (e.g., civil disobedience), and acts that are legally but not morally justified (e.g., self-defense without retreat). Berman, *supra* note 21, at 11–17.

³⁹ *Id.* at 18.

⁴⁰ *Id.* at 31, 47.

⁴¹ *Id.* at 33 (using the distinction developed in Meir Dan-Cohen, *Decision Rule and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984)).

⁴² T. MARKUS FUNK, *RETHINKING SELF-DEFENCE: THE ‘ANCIENT RIGHT’S’ RATIONALE* DISENTANGLED (2021).

⁴³ *Id.* at 18–60.

the public with ex-ante behavioral directives that would accommodate society's preferred values.⁴⁴

Unfortunately, Funk thinks that self-defense only promotes important public values, and our task is to reach a proper balance between them. He fails to consider whether there are also public values that self-defense hinders, and that therefore count against justifying it altogether.

D. INTRODUCING THE CULTURAL RECEPTIVITY CRITERION

This Article does not purport to choose among the different approaches and defend one view as true and mutually exclusive with the others as false. Rather, the simple but crucial takeaway from the preceding discussion is that the institutional and the instrumental views are convincing enough to render moralism inexhaustive of how we should understand and design justifications.

Many of the efforts to properly construe justification and excuse pay special attention to the relations between the philosophical, the legal, and the folk understandings of these terms.⁴⁵ To illustrate, Claire Finkelstein posits that in both ordinary language and in philosophy, the term “justification” encompasses all permissible acts, whereas in law it entails encouragement. Therefore, the law should exercise extra caution in assigning the justificatory label.⁴⁶ Conversely, Whitley Kaufman believes that theoretical uses of justification are “slightly pejorative,” while in ordinary usage it means that what a person has done “is right *tout court*.”⁴⁷ With regard to excuse, Douglas Husak is inclined to think that our ordinary usage of the term “excuse me” does not imply a concession of doing anything unjustified or wrongful.⁴⁸ Marcia Baron retorts that such linguistic conventions are contingent and fluid, and can mean different things in different English-speaking countries.⁴⁹

The very existence of these debates warrants skepticism about the possibility of a socially independent structure of the justification-excuse spectrum, whether such structure is attempted in linguistic or in logical terms, and suggests instead that we should be attentive to the social dependency of these concepts.⁵⁰ The same is true for related terms, such as “felon” and “victim,”⁵¹ or the designation of the criminal system as one of

⁴⁴ *Id.* at 93–96 (showing Funk falling back into a moral conception of justifications, since “moral blameworthiness must be inherent in criminal punishment for it to maintain its stigmatic effect,” but it is unclear why his approach shouldn’t allow for other public values to trump).

⁴⁵ Indeed, one of the catalysts of the entire debate was a philosopher of language. J.L. Austin, *A Plea for Excuses*, 57 *PROC. ARISTOTELIAN SOC’Y* 1 (1957).

⁴⁶ Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 *U. PITT. L. REV.* 621, 624 (1996).

⁴⁷ KAUFMAN, *supra* note 20, at 34 (italics in original).

⁴⁸ Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 *L. & PHIL.* 557, 566 (2005).

⁴⁹ Marcia Baron, *Excuses, Excuses*, 1 *CRIM. L. & PHIL.* 21, 24 n.7 (2007) (“[S]aying ‘Excuse me’ in Britain (in circumstances where in the US it is quite appropriate) can suggest that one thinks the addressee is (slightly) in the wrong . . .”).

⁵⁰ *Cf.* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 5–6, 205–08 (2020) (defending a “pragmatic conceptualism” that embraces pragmatic philosophy without downplaying the significance of normative concepts, which are distinct in law and in morality).

⁵¹ Anna Roberts, *Victims, Right?*, 42 *CARDOZO L. REV.* 1449 (2021) (critiquing the use of the label “victims” for persons alleging crime before the allegation is adjudicated); Alice Ristroph, *Farewell to the Felonry*, 53 *HARV. C.R.-C.L. L. REV.* 563 (2018) (calling to jettison the label “felon”).

“justice.”⁵² Although the rationale for avoiding the term “justice” may be descriptive—the system’s failures are so massive that they preclude the provision of justice, however envisioned—the impetus is also clearly normative: the omission should provoke questions and catalyze change. It may seem like an overemphasis on the power of words to shape reality, diverting attention from material conditions to their cultural representation. Yet it responds to a real phenomenon, whereby the scholarly community has been intently focused for decades on the question of what justifies punitive practices,⁵³ such that it has plausibly contributed to their exacerbation and helped entrench the view that criminal law *is* justice.⁵⁴ The intellectual history of self-defense is not the same (and has yet to be written), but it may view the story of punishment scholarship as a cautionary tale. This history may consider James Whitman’s call for retributivists “to ask whether the philosophy of blame, however philosophically compelling it may seem, is not the wrong philosophy for our time and place.”⁵⁵ Let us substitute deserved punishment for justified self-defense. The latter mirrors the former as a positive rather than a negative moral appraisal stemming from natural law.

Under this light, I suggest taking seriously both Thorburn’s plea that we turn our attention to the political legitimacy aspect of justification doctrines,⁵⁶ and the instrumental view proponents’ plea to consider the reciprocal relations between justifications, social reality, and public values. Justifiability invites a variety of normative frames and encompasses questions that reside outside of private morality. Conversely, the law should be more modest than attempting to assimilate the entirety of a given area of morality.⁵⁷ These premises require that we incorporate them into the justification-excuse calculus and thus complement moral thinking with an understanding of the reality in which the self-defensive imaginary actually takes place. In turn, this understanding ought to lead to a critical stance toward the role that self-defense plays in shaping that reality.

Call the new criterion proposed here the “cultural receptivity” criterion. This criterion inserts cultural factors into the analytic status of a given defense, thereby hinging the classification process to the particular society at hand, such that all defenses are cultural defenses.⁵⁸ The implication is not

⁵² See Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 56 (2018) (describing scholarly and activist attempts to offer alternatives to the term “criminal justice system,” before going on to doubt in what sense it is a *system* at all).

⁵³ Notwithstanding that the American criminal law system fails to meet the conditions for legitimacy set forth by any plausible retributive theory.

⁵⁴ See Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019); LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW 188–92 (2016).

⁵⁵ James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 89 (2003).

⁵⁶ Thorburn, *supra* note 29, at 1074–75.

⁵⁷ See ERIN I. KELLY, THE LIMITS OF BLAME chs. 3–4 (2018) (arguing that the morality of wrongdoing and blameworthiness is too complex for the criminal law to track).

⁵⁸ One view of cultural defenses accommodates them because it recognizes that all defenses are products of culture, and so the difference between codified defenses and cultural ones is that the latter are not our own, though not necessarily more egregious. An alternative view treats cultural defenses as a multicultural concession: minority defenses are moral aberrations that a person was indoctrinated into, and they are only accommodated due to a sense of unfairness. Under traditional conceptualization, the former approach would likely lead to a view of cultural defense as justification while the latter to excuse. See Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006) (advocating a shift in the understanding of the cultural defense from excuse to justification). If all defenses are viewed

that moral concerns should be eschewed but only that the continuity between private morality and public values, policies, and power structures, is not a simple, linear one.⁵⁹ Instead, these relations are highly complex in ways that analytic criminal jurisprudence might lack the tools to fully process.

Certain societies at certain times may better accommodate a particular understanding of a defense while others may require a different conception. The relevant factors can be, for example, economic gaps (regarding “rotten social background” or, conversely, “influenza”), sexual norms (regarding instances of provocation, such as gay/trans “panic”), or trust in medical science (regarding insanity). The most pertinent factor in the current context is the attribution and distribution of responsibility for public safety (and by proxy all that public safety facilitates). Perhaps this element of collective life has run askew and hence demands rethinking, or perhaps it was never well.⁶⁰ Perhaps, to return to the terminology of progress, the American criminal justice system should be analyzed in terms of a developing country.⁶¹ Whatever other pathologies afflict this legal culture,⁶² we need to understand the magnitude of the self-defensive one before we can prescribe the proper remedy.

The next Part outlines noteworthy uses American law and culture make of self-defense. I then proceed to explain the costs of these uses. The remainder of this Article argues that the United States today lacks cultural receptivity for self-defense as justification for violence.

III. AGGRESSIVE SELF-DEFENSE

That self-defense is legally justified resonates widely and deeply in American society. This resonance indicates that physical safety may play a merely deistic role in the cultural and legal life of self-defense, creating it

as cultural defenses, however, the latter view disappears, and we can begin to think about the former in new ways.

⁵⁹ See Segev, *supra* note 37, at 214–17; VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 27–31 (2018):

For too long, the philosophy of criminal law has been dominated by a conception of criminal law as the vindication of private rights—the rights people would have in the state of nature. Consequently, philosophers have treated the morality of the criminal law as derived from, or otherwise closely related to, the morality of punishment in private life, ignoring the institutional and political character of the criminal law . . . [and] suggest[ing] a conception of coercive state power as simply larger-scale manifestation of private moral relationships

⁶⁰ Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under Heller*, 116 NW. U. L. REV. 139 (2021) (arguing that we have lost a robust conception of public safety that encompasses ideas of a thriving public sphere, which the presence of guns impedes even when bullets are not shot into people); cf. Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725 (2022) (arguing for a capacious understanding of public safety that obliges governments to provide basic social needs on an equal footing with physical protection).

⁶¹ Malcolm M. Feeley, *How to Think about Criminal Court Reform*, 98 B.U. L. REV. 673, 730 (2018) (“I invite us to think of the Unite[d] States as a developing country, one whose weak governmental structure constitutes a major reason for our failure to administer criminal justice.”); see also Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1373 (2017) (“America has a high crime rate relative to most advanced nations and, in some neighborhoods, daily life is statistically as dangerous as life in a failed state—and has the look and feel of life in a failed state.”).

⁶² Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 CRIM. L. & CRIMINOLOGY 491, 528 (2019) (describing hurdles in the way of imagining and implementing mens rea reform as systemic pathologies); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (describing the political incentives to broaden American criminal law as pathological).

but then letting it loose, while hovering above it for all to continuously reference. Self-defense stands as a proxy for a variety of ideas about justice, which can potentially conflict or even be diametrically opposed, such as breaking social hierarchies and maintaining them. This Part shows how across ideological orientations and social positions, the very employment of self-defense is considered a good. If the reason you have used violence is self-defense, then you will emerge from the confrontation into a better world. Justifying self-defense can thus amount to an encouragement or even an imperative. This presents fundamental and pressing, though as yet unacknowledged, challenges to the jurisprudence of justifications.

A. SELF-DEFENSE CULTURE IN LAW

Thorburn's account hinges on the assumption that criminal law justification defenses apply only when private individuals are "caught" in "extremely unusual circumstances."⁶³ The extremity of the circumstances and the fact that they "catch" people in them are related: to the extent that individuals can engineer the circumstances or leverage any spark thereof, they become less extraordinary and less independent of the agent. In reality, most self-defense cases involve very ordinary activities—riding the subway, jogging, going to the grocery store, living with a spouse—that take a dangerous or lethal turn owing to the self-defender's own actions. Perhaps a person responsible for creating the situation, particularly by culpable conduct, should not be granted the defense, in part or in full.⁶⁴ For this reason, the law generally (though not always) prohibits an initial aggressor from standing their ground,⁶⁵ or a provocateur from claiming self-defensive rights.⁶⁶ Hence, many instances are simply mistakes, whether on the part of legislatures, prosecutors, judges, or juries.

And yet, myriad legal regimes—mostly outside of penal codes—lead to the conclusion that aggressive self-defense is anything but a mistake. Criminal law theorists, however, have failed to examine this broader picture. Take Gardner's response to Thorburn, contending that allocation of discretion is not the governing logic of self-defense. Gardner insists that "the self-defender's own assessments of the necessity and proportionality of her actions are irrelevant to the law"⁶⁷ because that substantive judgment is the court's burden. According to Gardner, Thorburn errs when he confuses determinations about whether the relevant legal conditions apply to one's case with one's discretion to choose whether to exercise self-defense. Only the latter is at the hands of the individual because the law of justification "permits, but does not require, the defendant to act for reasons that would

⁶³ Thorburn, *supra* note 29, at 1107, 1126.

⁶⁴ Re'em Segev, *Responsibility and Justificatory Defenses*, 11 CRIM. L. & PHIL. 97 (2017) (arguing that responsibility for a conflict counts against protecting the responsible person at the expense of a non-responsible one, among other considerations); Russell L. Christopher, *Exculpation as Inculpation*, 49 ARIZ. ST. L.J. 1141 (2017) (arguing for barring defenses from persons who contrive the conditions for their own defense). *See generally*, LEVERICK, *supra* note 25, at ch. 6 (categorizing and discussing various forms of self-generated self-defense).

⁶⁵ Cynthia V. Ward, "Stand Your Ground" and Self-Defense, 42 AM. J. CRIM. L. 89, 95 (2015).

⁶⁶ Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597 (2013).

⁶⁷ John Gardner, *Justification Under Authority*, 23 CAN. J.L. & JURIS. 71, 85 (2010) [hereinafter Gardner, *Justification*].

otherwise be excluded from consideration.”⁶⁸ This kind of discretion does not amount to legal authority like the one an arresting officer has, says Gardner, because it does not entail a power to alter the normative position of another—that is, to impose the self-defender’s own judgment on other officials.

It is true that individuals can choose whether to exercise self-defense. But neither Thorburn, who is Canadian, nor Gardner, who was British, know what do to with a legal culture that incites proactive self-defensive action, as American legal culture does. This incitement is manifold. Three prongs of constitutional law are salient. First, the Constitution puts no duty on public authorities to protect the citizenry.⁶⁹ Second, it provides individuals with a private right to the means that would give self-defense utmost efficiency and finality of outcomes: guns.⁷⁰ As matters of positive constitutional law, both propositions are products of fairly recent interpretations rather than text or history,⁷¹ and as such are indicative primarily of the present moment. The third prong goes farther back, at least to the Warren Court. Expansive interpretation of the Fourth Amendment allows police officers to first create situations of potential friction, and then to engage in aggressive behavior in lieu of de-escalation or public safety measures, out of concern for their own safety. This pattern recurs in various Fourth Amendment contexts, such as when police conduct a “stop and frisk” upon suspecting that the wrong people exercise the “law abiding citizen’s” right to hold guns.⁷² In statutory law, the last several decades have seen a proliferation of Stand Your Ground (“SYG”) laws.⁷³ These provisions vary, but overall they are designed to change two core principles of self-defense doctrine⁷⁴: necessity and

⁶⁸ *Id.*

⁶⁹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that due process provides no cause of action for persons whom the police failed to protect); see Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1758, 1768 (2006) (critiquing the decision). To be clear, the word “citizenry” here does not denote any particular citizenship status but refers to all the subjects within a polity.

⁷⁰ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that individual Americans have a right to own and use guns for self-defense).

⁷¹ There are numerous critiques asserting that the Fourteenth Amendment—with its Equal Protection Clause complementing the Due Process Clause which was at issue in *Gonzales*, 545 U.S. 748—requires active protection, e.g., Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 *DUKE L.J.* 507 (1991), and that the Second Amendment requires robust regulation, e.g., Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487 (2004).

⁷² *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (holding that a police officer may “frisk” persons if there is reasonable suspicion that they carry a firearm and therefore pose an immediate threat to the same police officer who had conducted the “stop” preceding the “frisk”). This reasoning was then stretched to further allow “protective searches” by police of personal spaces beyond the person. *Michigan v. Long*, 463 U.S. 1032, 1035 (1983) (allowing protective searches of cars). The dangers of an expansive legal regime accommodating a self-protective police ethos combined with an individual right to guns were illustrated by the case of Philando Castile, who was fatally shot at a traffic stop by a police officer after Castile had informed the officer that he had a licensed gun in the car. See Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 *WASH. L. REV.* 1675, 1681 n.30 (2018). See further discussion on police use of force at *infra* notes 185–197 and accompanying text.

⁷³ The first modern SYG law was enacted in Florida in 2005. Today, most U.S. jurisdictions have similar provisions. Ward, *supra* note 65, at 108.

⁷⁴ These provisions did not necessarily diverge from self-defense doctrine as already established in case law. See *id.* at 99 (“In the mid-to-late nineteenth century, however, the American approach changed as homegrown legal commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine . . .”). However, they do diverge from the self-defense of moral philosophers, as well as of the MPC. See DUBBER, *supra* note 23, at 165–67 (discussing the duty to retreat enumerated in MODEL PENAL CODE § 3.04(2)(b)(ii)).

proportionality. Necessity is construed to allow for the meeting of force with force even when a safe retreat is feasible, expanding the traditional “Castle Doctrine” to any place where a person “has a right to be.” Proportionality is construed to allow for the use of deadly force in response to less than fatal threats (or even ones that are subjectively perceived as fatal), including threats to property and to the commitment of “a forcible felony.”⁷⁵ Thorburn’s account, which directly requires and builds on a duty to retreat,⁷⁶ is incongruent with such a legal reality.

This compound, resting entirely on the legal and cultural resonance of the idea that self-defense is a justification for violence, is powerful. It invites persons to seize opportunities to exercise self-defense, facilitates the effectiveness and the smoothness of self-defensive acts, and enshrines self-defense as both an expression of American identity and the law of nature. This combination manifests especially in Second Amendment jurisprudence, as no source is more fundamental for constructing American political subjectivity than the Bill of Rights. Reading into it an individual right to firearms for self-defense purposes, unparalleled in comparative law,⁷⁷ conveys the message that a good American is a self-defender. This message amounts not just to an encouragement but to an imperative. To (a) be American, (b) act virtuously, and (c) nudge forward a naturally just order, one must find threats and defend oneself against them, positioning oneself in a status opposite to that of a “criminal.”⁷⁸

This message changes the meaning of justificatory self-defense. Such change can be intra- or extra-doctrinal. Thus, aside from the intra-doctrinal SYG laws, another statutory option most states offer their citizens—which, again, they can choose to exercise but are under no obligation to do so—is citizen’s arrest.⁷⁹ This is a distinct justification regime that can facilitate a proactive seizure of self-defensive opportunities.⁸⁰ Gardner claims that citizen’s arrest demonstrates how legal authority is kept out of the hands of ordinary citizens because acting upon a suspicion that turns out to be

⁷⁵ FLA. STAT. ANN. §§ 776.012–13 (2020). See Jacob D. Charles, *Securing Gun Rights by Statutes: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 609–11 (2022). But see Kimberly Kessler Ferzan, *Stand Your Ground*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 731, 735–42 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019) [hereinafter Ferzan, *Stand Your Ground*] (arguing that SYG laws do not depart from the principles of proportionality and necessity as radically as is often claimed).

⁷⁶ Malcolm Thorburn, *Policing and Public Office*, 70 U. TORONTO L.J., Supp. 2, 2020, at 248, 257 (“If the concern were simply with the moral justification of the act—in a case of self-defence, using force to repel deadly and unjustified force—the obligation to retreat and find officials to take over the situation would not play any obvious role.”).

⁷⁷ A handful of other nations have constitutional individual rights to firearms, which are either not enforced or much narrower. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 1625–26 (3d. ed. 2022) (online chapter, available at http://firearmsregulation.com/www/FRRP3d_Ch19.pdf).

⁷⁸ See also Rafi Reznik, *On the Place of Self-Defense in Public Life: A Hobbesian Critique of the Supreme Court’s Second Amendment*, 37 BYU J. PUB. L. (forthcoming 2023) (critiquing the use of the label “law-abiding citizen” in Second Amendment law).

⁷⁹ Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J.L. & PUB. POL’Y 557, 558–59 (2016).

⁸⁰ *Id.* at 572 (“[P]eople are currently allowed to roam the streets looking for wrongdoers to arrest, thus increasing the potential for abuse.”); Joseph Margulies, *How the Law Killed Ahmaud Arbery*, BOS. REV. (July 7, 2020), <http://bostonreview.net/race-law-justice/joseph-margulies-how-law-killed-ahmaud-arbery> [<https://perma.cc/C2JY-TVBE>] (explaining how this abuse can join hands with a SYG claim to justify unnecessary homicide).

unfounded will make one potentially liable to tort action by the arrestee.⁸¹ In the U.S., however, some jurisdictions do not require an actual offense and suffice with reasonable suspicion thereof.⁸² Moreover, many states allow citizen's arrest for misdemeanors or "breaches of the peace,"⁸³ and in any case, "the law on the books makes everyone a felon."⁸⁴ Hence, the justifiability of civilian initiatives turns on the arrestee's wielding of discretion rather than the arrestee's actions. Here two persistent characteristics of American violence are exhibited: "[T]he mixture of the private, the semiofficial, and the official," and "the almost invariable application to violence of a patina of moral justification."⁸⁵ This patina is colored not by moral philosophers but by views about justice held by generations of Americans and their representatives. The resulting laws bring citizens to regard an array of actions "in the self-defense category" as properly authorized, making them "eager to use lethal force in crime prevention."⁸⁶

The burgeoning problem of pointing guns can help make concrete the extent and implications of legally sponsored aggressive self-defense. In their analysis of this phenomenon, Joseph Blocher and co-authors write that often "mistaken apprehension of a threat . . . [leads] the gun owner to brandish his weapon and the other person to flee. The gun owner leaves the scene thinking that he has successfully defended himself, but the *other* person may have been the victim of a crime."⁸⁷ Since self-defense is a *justification*, it is not unlawful conduct, and any claim to the contrary must be proven beyond a reasonable doubt.⁸⁸ Ergo, in many states the burden is on the state to disprove a self-defense claim provided the defendant introduced some evidence to support it.⁸⁹ This privileging of the self-defender's perspective provides the self-defender with legal authority, via substantive law (SYG), investigative procedure (citizen's arrest), and adjudicatory procedure (burden of proof). It is thus unsurprising that "citizens are no longer thinking that they may just defend themselves. Instead, they intend to take the fight to the 'criminals.'"⁹⁰

⁸¹ Gardner, *Justification*, *supra* note 67, at 92 (citing U.K. cases); *see also* BRUDNER, *supra* note 27, at 207 n.36 ("A private actor can make a citizen's arrest, but he can defend himself only as a private agent. His justification comes from his own individual right, not from the political sovereign. Thorburn's view obliterates the self in self-defense while corrupting the public in public authority.")

⁸² Robbins, *supra* note 79, at 570.

⁸³ *Id.* at 569–70; Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground*, 100 TEX. L. REV. ONLINE 1, 9 (2021) [hereinafter Ferzan, *Taking Aim*] (responding to Blocher et al., *supra* note 10) (noting that in Missouri, breaches of the peace can include calling someone a "son-of-a-bitch").

⁸⁴ Stuntz, *supra* note 62, at 511; *see also* HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011) (arguing that the average American commits three felonies a day).

⁸⁵ Henry Steele Commager, *The History of American Violence: An Interpretation*, in *VIOLENCE: THE CRISIS OF AMERICAN CONFIDENCE* 3, 10 (Hugh Davis Graham ed., 1971).

⁸⁶ FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 168 (1997).

⁸⁷ Blocher et al., *supra* note 10, at 1178–79 (italics in original; parenthesis removed).

⁸⁸ Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1172 (1987) [hereinafter Dressler, *Justifications*] (arguing that the burden of proof should fall on the defendant when excuse defenses are at issue, and on the state when justification defenses are at issue. The MPC does not make this distinction and imposes the burden on the prosecution in both cases).

⁸⁹ Blocher et al., *supra* note 10, at 1188.

⁹⁰ Ferzan, *Taking Aim*, *supra* note 83, at 11.

More accurately though, citizens are encouraged to merge the two into one. At the extreme, some local laws *require* people to possess or carry a firearm.⁹¹ On a broader scale, the lack of a duty to retreat is interpreted as an affirmative duty to not retreat,⁹² and likewise to not heed other social obligations such as the duty to communicate.

In this discursive space, separating law from language and culture would obscure more than it clarifies.⁹³ As complex conduct rules, justifications speak to individuals.⁹⁴ It should give us pause that they do so in the imperative mood. Alongside the self-defensive imperative of the private person, law enforcement officials specifically are socialized into “the danger imperative:” a cultural frame that mediates officers’ perception of social facts in a way that skews toward the fear of violence and the need to provide for officer safety.⁹⁵ These cultural imperatives are supplemented by literal imperatives, like “stand your ground.” The precursor to these laws was the double imperative of Colorado’s “Make My Day” law⁹⁶: an explicit imperative directed at the designated aggressor, and an implicit imperative directed at the designator-utterer of the title law, who mantles the Clint Eastwood attitude.⁹⁷ On the spectrum between violence and communication, the imperative is on the side of violence; the imperative is a dare, not a truth. Marianne Constable explains that imperatives are non-dialogical forms of legal utterance, “not strictly in the second person.” Rather, it is said “to whom it may concern”:

[T]he hearer who responds to an imperative *will* turn out, in the future in relation to the present of the utterance, to *have been* its addressee. . . . In responding to the ostensible imperative of a legal enactment, for instance, one becomes the “whom” concerned. . . . Insofar as this “I”

⁹¹ JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 162–63 (2018).

⁹² Ferzan, *Stand Your Ground*, *supra* note 75, at 742–46.

⁹³ See Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALA. L. REV. 1777 (2012) [hereinafter Levin, *De-Naturalizing*] (discussing the relationship between criminal law doctrine and cultural discourse). I use “culture” here in a broad sense of a set of shared practices “by which meaning is produced, performed, contested, or transformed.” Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS. 35, 42 (2001).

⁹⁴ Compare Berman, *supra* note 21, at 34 (“[T]he distinction between justification defenses and excuse defenses *just is* the distinction between those defenses that reside among the conduct rules and those that are part of the decision rules.” (italics in original; parenthesis removed)), with Thorburn, *supra* note 29, at 1097 (“[J]ustification defenses seem to crystallize at some point in the middle” between conduct rules and decision rules: “[T]he court (1) follows a decision rule instructing it to (2) evaluate the decision of another decision maker concerning (3) what conduct was justified in the circumstances.”). *But cf.* NICOLA LACEY, *IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS* 20 (2016) (arguing that defenses generally deal with “the *form* of criminal law and not with its *substance*; that is, with the rules addressed to judges in relation to what must be proven, and how it must be proven, to convict someone of a crime, and not with the duty rules addressed primarily to citizens.” (italics in original)).

⁹⁵ Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, 55 L. & SOC’Y REV. 70, 76 (2021). This is not to say that the warrior attitude and its institutional bases represent policing always and everywhere, but it does reflect common institutional and cultural burdens that police shoulder. See generally LUKE WILLIAM HUNT, *THE POLICE IDENTITY CRISIS: HERO, WARRIOR, GUARDIAN, ALGORITHM* (2021) (exploring various conceptions of the role of police).

⁹⁶ See WILLIAM WILBANKS, *THE MAKE MY DAY LAW: COLORADO’S EXPERIMENT IN HOME PROTECTION* 1–2 (1990). Similar imperatives that have been used as titles for such laws are “Shoot the Burglar” and “Shoot the Carjacker.” Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 4. Yet another oft-used double imperative of the gun culture is “come and take it.”

⁹⁷ SUDDEN IMPACT (Clint Eastwood dir., 1983).

unites with other subjects, a collective of “I”s becomes possible [T]his collective “I” is not the “we” whose “word is bond,” however. . . . Two “I”s speaking at once without any “you” make neither dialogue nor law. At best, they resemble, when speaking as one, a choral or royal “We.”⁹⁸

The “whom” concerned in the case of the explicit imperative—the person at the receiving end of “make my day”—is not part of the royal “we.” That person does not respond to an imperative but is acted upon by the respondent (notwithstanding an initial aggressor is neither passive nor innocent); that person is the subject of the governance of “we” who is entitled to “their” ground. The self-defense of all-against-all realm of American law is both atomistic and hierarchical. It burdens individuals with the imperative to prove themselves worthy by performing self-defense and, as a corollary, denies them benefits and entitlements if they fail. To demonstrate how heavy this burden can be, prison authorities have either refused to protect inmates who were continually raped or conditioned the provision of such protection on demonstration of the inmate’s ability to protect himself.⁹⁹ Successfully perform self-defense or else the state will not consider you a full subject deserving of basic security and welfare.

The instrumental view of justifications seems to have subsumed the institutional view. Deputization is a public value we have chosen to advance by justifying self-defense. The particular vision of justice extant in the culture requires allocating decision-making and effectuating powers over life and death to individuals, empowering them to make determinations on the merits of justificatory circumstances and then to act on these determinations. This political choice, gleaned from penal codes, constitutional criminal law, gun laws, procedural rules, the law of police, and prison law and policy, engenders and augments aggressive self-defense. For self-defense is at the same time a doctrine of criminal law and a public institution, controlling spheres much larger than the space between one man’s club and his friend’s head. It extends to the arrangement of social power relations and the molding of public values. I now turn to consider these functions by zooming out from particular legal arrangements to the broader culture of self-defense in which they operate.

B. SELF-DEFENSE LAW IN CULTURE

To start, patterns of political rhetoric, persisting from the early days of the American republic to our own, are fundamentally adversarial.¹⁰⁰ The

⁹⁸ MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* 93 (2014) (italics in original); see also Chad Kautzer, *Good Guys with Guns: From Popular Sovereignty to Self-Defensive Subjectivity*, 26 L. CRITIQUE 173, 185 (2015) (“[S]elf-defensive subjects have difficulty shifting out of a strategic and rights-centric attitude toward others. The right to bear arms becomes an imperative to bear arms, for there is no alternative, normative framework from which to adjudicate the need to exercise one’s right.”).

⁹⁹ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLAL. REV. 1156, 1181 (2015); Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 12-17 (2011).

¹⁰⁰ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* ch. 1 (1991) (lamenting the adversarial language of the American public sphere and examining its roots). Institutionally, the American system of political representation marginalizes compromise due to its winner-take-all model, based on power alternation rather than sharing.

underlying logic is a dichotomy between liberty and tyranny: no matter the political side, all claim “aggrieved liberty” when the other is on top. American notions of citizenship are shaped by a perpetual vulnerability to threat, interference, and injury, giving rise to a “negative liberty [as] less a fixed state than the protagonist in a drama of protection, a father defending his home from invasion, or a fugitive in search of asylum.”¹⁰¹ The insecurity of boundaries and the volatility it implies are of paramount political significance, such that political disagreements are always portrayed as “heroic resistance to an ongoing threat of violation.”¹⁰² As a political subject, the American is constantly under siege and must, first, ward off trespass, and second, break free. The same applies when that citizen encounters interpersonal aggression, seamlessly translating political attitude into criminal doctrine: the duty to retreat, a staple of common law self-defense doctrine, has been abandoned in American jurisprudence.¹⁰³

The dominance of siege mentality over the political imagination was demonstrated as clearly as can be in the Capitol insurrection, rendering the metaphor literal. The same holds for other manifestations of the current political moment, such as Trump’s suggestion to build a moat at the U.S.-Mexico border,¹⁰⁴ or the anti-vaccination movement. Prior to the COVID-19 pandemic, Alexis Shotwell commented on parents who refuse to vaccinate their children: “The belief that vaccinations introduce toxins that would make a child no longer pure is here closely allied with a species of defensive individualism, the sense in which the self is imagined as a fortress, separable from the world and requiring defense against the world.”¹⁰⁵ Self-defense resonates in individual resistance to imposed measures against the spread of disease, on the one hand, and in collective efforts of protection against those who oppose a coerced assumption of responsibility, on the other hand. Already over a century ago, the Supreme Court framed the government’s legitimate interest in compulsory vaccination as one of collective self-defense.¹⁰⁶ But enlisting the defensive state of mind for a collectivist agenda

¹⁰¹ KATHERINE HENRY, *LIBERALISM AND THE CULTURE OF SECURITY: THE NINETEENTH CENTURY RHETORIC OF REFORM* 5 (2011).

¹⁰² *Id.* at 8; see also ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 109 (2018) (noting how people in positions of power often respond to complaints about unjust policies in their institutions by “invok[ing] the discourse of self-defense.” Namely, that the complaint is taken as a personal insult to one’s moral character, which they rise to defend and so escape substantively engaging the concern, “blam[ing] others with less social power for their discomfort and falsely describ[ing] that discomfort as dangerous.”); RICHARD HOFSTADTER, *The Paranoid Style in American Politics, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3, 4–6 (1979) (discussing recurring modes of political rhetoric centered around persecution, righteousness, and indignation, culminating in conspiracy theories).

¹⁰³ RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* 17 (1991).

¹⁰⁴ Michael Crowley, *Trump Denies Considering a Border Moat*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/us/politics/trump-alligator-snakes-moat.html> [https://perma.cc/4JZ9-LFP7] (expressing confidence, despite Trump’s denial, in the report that he “privately discussed fortifying barriers along the Mexican border with a reptile-filled moat”).

¹⁰⁵ ALEXIS SHOTWELL, *AGAINST PURITY: LIVING ETHICALLY IN COMPROMISED TIMES* 11 (2016) (analyzing an Arizona parent’s response to a local measles outbreak in 2015, saying: “I’m not going to sacrifice the well-being of my child. My child is pure. . . . It’s an unfortunate thing that people die, but people die. And I’m not going to put my child at risk to save another child.”). In a similar vein, former First Lady Laura Bush has commented: “I think we have to protect our children from society, rather than raise them to fit into society.” HENRY, *supra* note 101, at ix.

¹⁰⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

is very hard to maintain.¹⁰⁷ Self-defense is not a good framework through which to think about social welfare. It is the individualistic understanding of self-defense that has gained overwhelming traction in American society because looking at social and ethical issues through the self-defensive lens cannot but lead to such an understanding.

We begin to see how the idea that self-defense justifies violence plays a crucial role, unique among the nations, in Americans' self-understanding as national and global subjects.¹⁰⁸ Caroline Light offers the label "DIY-security citizenship" to describe a principal facet of the American conception of political subjectivity, which "equates good citizenship with the capacity to stand one's ground against criminal strangers."¹⁰⁹ The law-abiding citizen and the criminal are imagined as dichotomous categories. Belonging to the latter category is a matter of irrevocable status,¹¹⁰ which justifies exclusion from a political community ostensibly predicated on civic virtue. Covertly, such designation justifies an exclusion from the human community too, since criminals are by definition dangerous: they pose threats, and threats permit, indeed demand, of the threatened person to defend himself against, lest the threats materialize. Light focuses on racial as well as other demographic undertones of this designation, which have historically served to exclude from the group of right-to-self-defense-holders anyone who is not a propertied white man. Nevertheless, she stresses that the self-defensive mindset transcends ideological and demographic boundaries, and registers in all kinds of communities.¹¹¹ Most political identities today are shaped to some degree around real or perceived grievances, yet nobody wants to be a victim; instead, all want to be survivors.¹¹² Survivalism as a core feature of

¹⁰⁷ Consider the National Guard Chief's quote discussed in this Article's Introduction (*supra* note 1 and accompanying text). Under the individualized approach he expressed, it should not be surprising that about a third of active duty and National Guard troops rejected the COVID-19 vaccine while the decision was up to them, seizing the "opportunity to exercise free will." Jennifer Steinhauer, *Younger Military Personnel Reject Vaccine, in Warning for Commanders and the Nation*, N.Y. TIMES (Feb. 27, 2021), <https://www.nytimes.com/2021/02/27/us/politics/coronavirus-vaccine-refusal-military.html> [<https://perma.cc/8PBG-9VNA>]. Vaccinations were subsequently mandated. Emily Eslinger & Michel Paradis, *Federalism and Coronavirus Vaccination Mandates for Military Personnel*, LAWFARE (Dec. 9, 2021), <https://www.lawfareblog.com/federalism-and-coronavirus-vaccination-mandates-military-personnel> [<https://perma.cc/98LP-CSBC>]. Similar attitudes were exhibited among other groups of public officials, such as police. Fran Spielman, *Lightfoot Forges Ahead with Oct. 15 Vaccine Mandate for City Employees, Despite Opposition from All Four Police Unions*, CHI. SUN-TIMES (Aug. 25, 2021), <https://chicago.suntimes.com/city-hall/2021/8/25/22641495/chicago-coronavirus-vaccine-mandate-october-15-city-employees-police-unions-lightfoot-catanzara> [<https://perma.cc/76CQ-RAUG>] (quoting a police union leader: "We're in America, G-ddamn it. We don't want to be forced to do anything. Period.").

¹⁰⁸ This Article focuses on the national level. On the global level, consider that one of the limitations the United States suggested for an international covenant enumerating the right to life was killing in self-defense (alongside related circumstances, including killing in defense of other, for violation of honor, for persons caught in the commission of a felony, and more). COMM'N ON HUM. RIGHTS, UNITED STATES: PROPOSALS RELATING TO THE DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS, U.N. DOC E/CN.4/170 pt.2 article 5 (1949). These suggestions were rejected. See G.A. RES. 2200A (XXI) pt.3 article 6 (1966), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf) [<https://perma.cc/E5ZY-FLGW>].

¹⁰⁹ CAROLINE E. LIGHT, STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE ix (2017).

¹¹⁰ See Jonathan Simon, "The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice, 100 B.U. L. REV. 787 (2020); Ristroph, *supra* note 51; Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016).

¹¹¹ LIGHT, *supra* note 109, at 4; see also Reznik, *supra* note 78 (providing examples across various social divides such as gender, sexuality, religion, race, class, geography, and ideology).

¹¹² ALYSON COLE, THE CULT OF TRUE VICTIMHOOD 2 (2007).

identity is prevalent across the American ideological spectrum—although, to some extent, it is infused with different content by different groups.¹¹³ This terminology aims to help persons who suffered a wrong to frame their role in that experience as a sort of achievement, and thus revitalize their sense of agency through the idea that they are active resisters, if not in real time than at least in retrospect.

To be a self-defender, actually or potentially, can be empowering in profound ways. It can signify and amplify one's recognition of oneself as a full person worthy of a full life. For example, one of the defining moments of Frederick Douglass's quest for self-liberation was an act of self-defense. Narrating "how a slave became a man,"¹¹⁴ Douglass describes his resolution to fight back against a cruel master as what "rekindled the few expiring embers of freedom" in him.¹¹⁵ Thereby the self also demands recognition of the other as an equal.¹¹⁶ These positive functions of self-defense were part of the struggle for the abolition of slavery on personal and on national levels. On a broader scale, as Kellie Carter Jackson argues, counter-violence overcame the limits of moral suasion on the road to emancipation: "[T]he politics of violence helped prepare the nation to view black people as equal Americans with inalienable rights."¹¹⁷

These liberating and equalizing effects of self-defense apply for people in dire modern circumstances, too. A pertinent set of cases that will be discussed later on involves battered intimate partners—usually women—who strike back at their abusers—usually men.¹¹⁸ Sticking with the racial thread for the moment, advocates of Black Power varieties from Malcolm X through Stokely Carmichael to the Black Panther Party rooted their ideas in self-defense.¹¹⁹ It was for them "an essential part of the struggle for citizenship itself."¹²⁰ Life-threatening white-supremacist realities, they argued, were tied to woefully lacking social welfare and political equality

¹¹³ See Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 TUL. L. REV. 95 (2020) (critically exploring the new language of social justice advocacy in sexual, racial, and environmental contexts as centered around surviving ongoing trauma); KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* (2018) (describing the pervasive sense of threat that extreme right-wing groups are living in, often leading to an emphasis on learning to survive by oneself in the wild). One major difference between the left and the right uses of survivalism is that in the latter case it leads to an appreciation of competition, and hence violence, while in the former it leads to an appreciation of community. One common feature left- and right-leaning survivalisms share is distrust in traditional authority structures and deep skepticism toward institutional politics as an avenue for grievance redress and for articulation of the common good.

¹¹⁴ FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 65–66 (1845).

¹¹⁵ *Id.* at 72.

¹¹⁶ Chad Kautzer, *Notes for a Critical Theory of Community Self-Defense*, in *SETTING SIGHTS: HISTORIES AND REFLECTIONS ON COMMUNITY ARMED SELF-DEFENSE* 35, 38 (Scott Crow ed., 2018):

'Since the Other was reluctant to recognize me,' writes Fanon, 'there was only one answer: to make myself known.' On the *Amistad*, rebellion was the only way to make known the selves of the enslaved, meaning that their actions were simultaneously a defense of their lives and a political claim to recognition.

¹¹⁷ KELLIE CARTER JACKSON, *FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE* 2 (2019). Like countless violence apologists throughout history, one abolitionist reasoned: "Our white brethren cannot understand us unless we speak to them in their own language; they recognize only the philosophy of force." *Id.*

¹¹⁸ *Infra* notes 266–87 and accompanying text.

¹¹⁹ CHRISTOPHER B. STRAIN, *PURE FIRE: SELF-DEFENSE AS ACTIVISM IN THE CIVIL RIGHTS ERA* 85, 150, 154 (2005) (respectively); see also LIGHT, *supra* note 109, at ch. 5.

¹²⁰ STRAIN, *supra* note 119, at 3.

policies. If unfair social conditions fall under the definition of violence,¹²¹ then, correspondingly, the activists' own agendas blended together physical self-defense and political demands as, in the words of Panthers co-founder Huey Newton, "one and the same."¹²² The Panthers distilled the idea that when every injustice is conceptualized as violence, every step toward justice is conceptualized as self-defense, and any ethical distinction between violent and non-violent resistance is denied. Through self-defensive practices these activists would claim their humanity, masculinity, and, perhaps counter-intuitively, political belonging in the mainstream.¹²³ For despite their radical aspirations, the notion that self-defense emblemizes self-affirmation, self-reliance, and self-respect, in fact taps into a time-honored American tradition.¹²⁴

We have seen that state authorities view self-defense as an imperative;¹²⁵ rich white people have invoked it "as a civic obligation as much as a right,"¹²⁶ and poor black people too have viewed self-defense as a "civic duty."¹²⁷ It might be the case that in a violent society, self-defense is a logical avenue for asserting one's worth and advancing one's interests, as well as for challenging structures of violence.¹²⁸ But it might also be the case that putting substantial cultural weight on self-defense perpetuates a violent ethos. The origin of law is a resolution to end cycles of revenge;¹²⁹ we are not doing much if we substitute them with cycles of self-defense. There is a fine line between framing a social struggle as self-defensive and valorizing aggression, and this line is sure to be crossed when the conception of the "self" being defended is broadened to include such elements of identity as dignity, honor, or status.¹³⁰ The perils of centering self-defense in articulating political subjectivity are numerous, ethically as well as strategically. In the majority of cases, violence in America has furthered conservative agendas, entrenching the status quo or advancing reactionary causes.¹³¹ For instance,

¹²¹ *Id.* at 159.

¹²² *Id.* at 155. Such notions still echo today. See Kautzer, *supra* note 116, at 36 ("Because communities of color defend themselves as much against a culture of white supremacy as they do against bodily harm, their self-defense also undermines existing social hierarchies, ideologies, and identities.")

¹²³ Brandon M. Terry, *Requiem for a Dream: The Problem-Space of Black Power*, in *TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.* 290, 295–97 (Tommie Shelby & Brandon M. Terry eds., 2020) (describing the public correspondence between Martin Luther King and NAACP activist Robert Williams, an icon of Black Power who advocated taking up arms for black self-protection "as a constitutive practice of dignity and manhood" that would enable "our leaders [to] be able to sit at the conference table as equals").

¹²⁴ STRAIN, *supra* note 119, at 178–79. Perhaps the clearest illustration of this merger of Black Power with American traditionalism is Justice Thomas's opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 804–58 (2010) (Thomas, J., concurring); see COREY ROBIN, *THE ENIGMA OF CLARENCE THOMAS* 176–85 (2019).

¹²⁵ *Supra* note 99 and accompanying text.

¹²⁶ LIGHT, *supra* note 109, at 3.

¹²⁷ STRAIN, *supra* note 119, at 162–63.

¹²⁸ Kautzer, *supra* note 116, at 44–45 ("If we accept a social, historical, and materialist account of group and subject formation, and understand that groups are reproduced with the help of violence, both mundane and spectacular, then we can see why self-defense functions as more than protection from bodily harm.")

¹²⁹ AESCHYLUS, *The Eumenides*, in *THE ORESTEIA* 227 (Robert Fagles trans., 1979) (fifth century BC).

¹³⁰ In the context of Black Power, see STRAIN, *supra* note 119, at 93 (Malcolm X "could blur the distinctions between true self-defense and aggressive, retaliatory violence."). See generally James Gilligan, *Shame, Guilt, and Violence*, 70 SOC. RES. 1149 (2003).

¹³¹ Brown, *supra* note 9, at 20.

the Panthers' vanguard interpretation of the Second Amendment as an individual right, in order to curtail police brutality, contributed to the legitimacy of the gun rights movement that would follow. Additionally, the Panthers' use of guns may have served "not to deter conflict but to heighten tensions and feed violence . . . the security gained from carrying guns was quite possibly more illusory than real."¹³² Both conceptually and historically, self-defense resists relational and communal subversions and instead co-opts such attempts into atomism.

Of course, voices skeptical of self-defense were also present in the Civil Rights Movement. Martin Luther King Jr.'s approach was that successful nonviolence "made self-defense obsolete."¹³³ King did not challenge the moral permissibility of using force to ward off an attack and he even conceded that self-defense reflects self-respect.¹³⁴ But he thought that this question was beside the point, and that focusing on it does more harm than good. Collective struggle for change and progress, King insisted, cannot emerge from the moral right to self-defense.¹³⁵ In assigning a detrimental social role to self-defense, King posed a much more profound challenge to American values and ethos than the more "radical" voices in black leadership at the time. His approach to self-defense followed Mahatma Gandhi, who emphasized that nonviolence by no means connotes passivity or cowardice.¹³⁶ Cowardice is the reason American courts and later legislatures have characterized the duty to retreat as "un-American."¹³⁷ Nonviolent responses do not necessarily entail retreat, and may rather audaciously compel the assailant to reassess his or her values and through this process challenge the existing order. King charged this notion with Christian sensibilities, arguing that nonviolence was redemptive, "created peace and spread love;"¹³⁸ Gandhi stressed the egoism that self-defense promotes and "a tendency of the 'I' of the self to bleed into an amorphous 'we' and thereby extend the pretexts for violence."¹³⁹

¹³² STRAIN, *supra* note 119, at 177–78. To be clear, there are important differences between the Black Panthers' approach to the Second Amendment and the one advocated by the NRA and other right-wing groups. First, the physical threats the Panthers faced were much more potent. Second, they had more explicit collectivist aspirations: "In defending oneself, one was helping to uplift the race." *Id.* at 179. Third, they used the Second Amendment instrumentally, and hence diverge from contemporary Second Amendment advocates who practice "constitutional fundamentalism." MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* ch. 2 (2019).

¹³³ STRAIN, *supra* note 119, at 44; *see also* Terry, *supra* note 123, at 297 ("King argued that a debate over self-defense was 'unnecessary.'").

¹³⁴ MARTIN LUTHER KING, JR., *The Social Organization of Nonviolence*, in *THE PAPERS OF MARTIN LUTHER KING, JR., VOL. V: THRESHOLD OF A NEW DECADE, JANUARY 1959–DECEMBER 1960*, at 299, 302 (Clayborne Carson et al. eds., 2005).

¹³⁵ *Id.* at 302–04; *see* Karuna Mantena, *Showdown for Nonviolence: The Theory and Practice of Nonviolent Politics*, in *TO SHAPE A NEW WORLD* 78, 84; Terry, *supra* note 123, at 298–99; LIGHT, *supra* note 109, at 115.

¹³⁶ Mantena, *supra* note 135, at 84; STRAIN, *supra* note 119, at 40; *see also* JUDITH BUTLER, *THE FORCE OF NONVIOLENCE: AN ETHICO-POLITICAL BIND* 21, 181 (2020) (discussing "aggressive nonviolence" and "militant pacifism," respectively).

¹³⁷ Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 *HARV. J.L. & GENDER* 237, 240–46 (2008); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *HARV. L. REV.* 413, 429 (1999).

¹³⁸ STRAIN, *supra* note 119, at 43; *see also* Terry, *supra* note 123, at 300–01.

¹³⁹ Mantena, *supra* note 135, at 84; *see also* BUTLER, *supra* note 136, at 15 (arguing for nonviolence as a political and ethical critique of individualism rather than as a timeless moral position).

As in the cases of struggles against colonialism and racial subjugation, in the case of gender violence, too, some advocates call for using counter-violence to combat the masculine version governing private instances as well as socio-political structures. Empowering women is here achieved by instilling in them the ability and the confidence to strike back, learning self-defense in order to, paradoxically, “*seize the offensive*.”¹⁴⁰ Feminist nonviolence, on the other hand, refuses to meet force with force. It thus puts the cultural script conveyed in the attack up for grabs, transforming “a cut and dried, automatic confrontation script to an open-ended process of interaction where nothing would be pre-defined.”¹⁴¹ Feminist forms of nonviolence are perhaps premised on a pacifistic moral stance and on beliefs in gendered epistemology, but also on the strategic insight that training to be equal players in the men’s game precludes the ability to change its rules. The same insights apply analogously to struggles against racial and colonizing oppressors.

Self-defense is necessarily reactive and unimaginative, and is therefore by definition a limited and in this sense, boring, ethical outlook. Mirroring a carceral tactic of governance by fear, the reduction of complex socio-political and even intellectual problems to violence facilitates, in turn, the reduction of the solutions to those problems to either justified violence or preventive technologies. Once the attack is justifiably warded off, we proceed to find another; no further envisioning is required for our political future. Regaining a “sense of security” thus comes at the expense of justice, welfare, and human flourishing, as well as robust critical inquiry.¹⁴² More pertinently, what lies underneath the cultural pathology of self-righteous self-defense in the United States is really a misplaced valuation of violence. Not because any and every affirmation of self-defense necessarily provides the

¹⁴⁰ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 397 (1975) (italics added) (adding that thanks to self-defense classes, “I learned how to fight dirty, and I learned that I loved it. . . . Fighting back. On a multiplicity of levels, that is the activity we must engage in, together, if we—women—are to redress the imbalance and rid ourselves and men of the ideology of rape.” *Id.* at 403–04). The same paradoxical use of self-defense to own one’s aggressiveness is also apparent in the use of self-defense to own one’s anger, although in doctrinal terms self-defense must be motivated by fear rather than anger. See SUSAN J. BRISON, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* 74 (2002) (noting the therapeutic value of the fact that “after I had taken a self-defense course . . . I was able to get angry with the man who had almost killed me.”). For a critical account of the feminist turn to self-defense, see LIGHT, *supra* note 109, at 139–42.

¹⁴¹ Pam McAllister, *Tentative Steps Toward Nonviolent Self-Defense*, in *REWEAVING THE WEB OF LIFE: FEMINISM AND NONVIOLENCE* 391, 392 (Pam McAllister ed., 1982). Art works have explored such techniques. See Deborah Copaken, *Shooting Back* (1988) (B.A. thesis, Harvard University), available at <https://www.deborahcopaken.com/shootingback> [<https://perma.cc/MS4Q-XU7Y>] (photography project depicting catcallers who had harassed the photographer on the street, and taking whose picture shifted power dynamics and opened up conversations); *PROMISING YOUNG WOMAN* (Emerald Fennell dir., 2020) (fictional movie depicting a woman who pretends to be very drunk at nightclubs, and when men pick her up, take her home, and are about to rape her, she educates them on the subject).

¹⁴² JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 6 (2007) (“Governing through crime is making America less democratic and more racially polarized; it is exhausting our social capital and repressing our capacity for innovation. For all that, governing through crime does not, and I believe, cannot make us more secure”); Jennifer A. Frey (@jennfrey), TWITTER (Sept. 3, 2021, 11:54 AM), <https://twitter.com/jennfrey/status/1433820590838792202> [<https://perma.cc/H736-SA9C>]:

I am informed by my university DEI office today that every student has a fundamental right to ‘feel safe.’ . . . Nobody opens up Homer, Toni Morrison, or Darwin to ‘feel safe.’ . . . One of the beautiful things about the life of the mind is that it requires that we get over ourselves and our need to protect ourselves from reality.

same social legitimation to violence but because the contemporary cultural uses of self-defense imply that by practicing self-defense one vindicates some grand scheme of justice, perceived to be naturally right.¹⁴³ This is an insidious baggage for self-defense to carry, and we would be better to jettison rather than reclaim it.

IV. RELEASING THE EAGLE'S GRIP: THE CASE FOR DE-JUSTIFYING SELF-DEFENSE

Justice Ginsburg used to say that “the true symbol of the United States is not the bald eagle—it is the pendulum.”¹⁴⁴ She probably had in mind areas of the law that are routinely subjected to public debate over what progress entails. Substantive criminal law is usually not one of those areas. It is usually thought of as ideally constant and based in universal moral theory. This view is itself, of course, historically situated. More specifically, our notion of criminal responsibility, on which the criminal law enterprise stands, is reactive to social and political developments.¹⁴⁵ That is, to pendulum swings.

Criminal responsibility theorists negotiate between truth-seeking and prescription.¹⁴⁶ Usually, the truth being sought is about the nature of free will. This is a product of a shift in the understanding of responsibility that occurred over the course of the nineteenth and twentieth centuries, “from social responsibility to identifying the conditions of individual punishability.”¹⁴⁷ If culpability is a precondition to punishment, and if punishability is a precondition for coercion, then sovereign power is constrained. While stemming from liberal commitments to free will and to rule of law, this shift expanded the scope of the criminal law and diverted the locus of responsibility from social institutions to self-governing individual agents, ironically “displac[ing] political questions of state power or criminal justice, onto questions of individual fairness.”¹⁴⁸

It is not a given that the truth criminal responsibility should seek begins and ends with free will, and hence translates into *mens rea* rather than, say, motive.¹⁴⁹ We might ask not only *what is* criminal responsibility, but also *what is it for*, namely what functions of the criminal law enterprise

¹⁴³ This approach has its roots, I believe, in the adoption of a Lockean instead of a Hobbesian understanding of self-defense. See Reznik, *supra* note 78; Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 230–35 (2021).

¹⁴⁴ Louis Nelson, *Ruth Bader Ginsburg: I Have ‘At Least Five More Years’ on the Bench*, POLITICO (July 30, 2018), <https://www.politico.com/story/2018/07/30/ruth-bader-ginsburg-five-more-years-747722> [<https://perma.cc/ND9R-X9V2>] (attributing the idea to her husband, Martin Ginsburg).

¹⁴⁵ FARMER, *supra* note 54, at 164–70; LACEY, *supra* note 94, at 7–9.

¹⁴⁶ THOMAS ANDREW GREEN, *FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT* 3 (2014).

¹⁴⁷ FARMER, *supra* note 54, at 188.

¹⁴⁸ *Id.* at 195 (italics in original). Farmer positions the scholarly emphasis on the justification-excuse distinction within the turn toward a subjective approach to liability “as a moral property of the agent.” *Id.* at 175, 188–90. However, this does not diminish the potential of constructing a wider vocabulary around justifications that takes into account the reasons and functions of defendants’ actions rather than just their cognitive state.

¹⁴⁹ Cf. DSOUZA, *supra* note 22 (exploring rationale-based defenses); Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 289–94 (2008) (arguing that motive should be taken into account in self-defense).

responsibility facilitates.¹⁵⁰ This formulation of the question shrinks the gap between truth-seeking and prescription, because responsibility is understood from the get-go as a context-sensitive concept. In Nicola Lacey's words, responsibility relies on "institutional conditions of existence" and hence its analysis "must, accordingly, be historically and system specific."¹⁵¹ Writ large, the legitimacy of the criminal law in its entirety might rest on our reasons to support public institutions rather than on the moral evaluation that the criminal process delivers.¹⁵² Functional reasoning allows us to remain agnostic on the question of whether a moral theory that justifies any given doctrine can be defended, and at the same time to recognize reasons for reinterpreting that doctrine, placing a temporary moratorium on it, or abolishing it. These reasons would be anchored in the kinds of social practices said doctrine facilitates, which are out of line with the ways we want our public institutions to arrange our shared life. Tommie Shelby forcefully makes this point in his analysis of incarceration. Despite favoring reform over abolition, finding plausible justifications for prisons generally, he thinks we ought to seriously consider *taking a break* from penal incarceration:

Racial and other visible minorities are feared, despised, maligned, and routinely scapegoated. The general ethos is one of unbridled ambition, ruthless competition, and indifference to the suffering of the most vulnerable. . . . In such an environment, prisons, like guns, are a menace. . . . It is not that prisons are *inherently* dangerous or prone to abuse no matter the social environment. . . . [A] moratorium is not tantamount to abolition, because it wouldn't rule out prisons for all time and in all places.¹⁵³

Prisons are a central component of governance through crime¹⁵⁴: social problems are brushed off by attributing individual blame, imposing criminal

¹⁵⁰ FARMER, *supra* note 54, at 192; LACEY, *supra* note 94, at 2–3; *see also* Vincent Chiao, *What Is the Criminal Law For?*, 35 L. & PHIL. 137 (2016) (expounding a functional view of criminal law); ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 72–73 (2d. ed. 1992) (explaining the distinction between function and purpose in law generally).

¹⁵¹ LACEY, *supra* note 94, at 6, 21 (adding: "[T]he concept of responsibility has been carved in stone by analytic philosophy, to the extent that practices such as strict liability and corporate responsibility can simply be assumed to be mistaken rather than being capable of generating revised interpretations of the concept.").

¹⁵² CHIAO, *supra* note 59, at 51.

¹⁵³ TOMMIE SHELBY, *THE IDEA OF PRISON ABOLITION* 112–13 (2022) (italics in original). Similar suggestions have been made regarding other criminal law institutions as well. For instance, that we ought to take a break from the death penalty due to indigent defendants' lack of access to competent legal representation. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994) ("So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death."). Arguments in the same spirit can also be advanced with regard to non-formal structures of social governance. Resting on the idea that "[i]t would be a mistake to think that governance issues only from that combination of courts, legislatures, and police which constitutes the everyday image of 'the state,'" we might want to take a break from feminist governance and consider non-feminist ways of arranging and critiquing sexual power relations. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006); *see also* Jorge L. Esquirol, *Making the Critical Move: A Top Ten in Progressive Legal Scholarship*, 92 U. COLO. L. REV. 1079, 1115–16 (2021) (describing "taking a break" from one's preexisting commitments, on a personal rather than a societal level, as an established method of critical legal scholarship).

¹⁵⁴ SIMON, *supra* note 142.

liability, warehousing persons in custodial facilities, and burdening them with “collateral consequences” if and when they get out. The public’s sense of security is first compromised and then regained. Shelby correctly positions prisons—a means of punishment that overshadows its ends—alongside guns, which do the same with self-defense. The trajectory of individualized *condemnation* is concomitant with one of individualized *commendation*. The latter distributes or withholds symbolic and material goods not by assigning liability and designing the form that liability takes, but by relieving it. Justification defenses are the flip side of the moral force of punishment—celebrating moral rights rather than sanctioning moral wrongs—and likewise their moral appraisal carries grave repercussions, which supplement those of the carceral paradigm.

Justice Ginsburg’s pendulum metaphor implies a recognition of the fluidity of social functions and public values that the law brings to fruition. She went on to add that when the pendulum “goes very far in one direction, you can count on its swinging back.”¹⁵⁵ As she knew all too well, counting on it does not mean sitting aside and patiently waiting. The hand that moves it is not invisible; it takes proactive efforts to move the pendulum and thereby to prove the argument. Otherwise, that symbol of self-righteous violence gloriously exhibited—the bald eagle, which Ginsburg contrasts with the pendulum—prevails. The eagle is enshrined by federal law as an emblem featured on the Great Seal of the United States.¹⁵⁶ Since ancient times, peoples have viewed the eagle as an emblem of regal qualities such as divinity, authority, might, and masculinity. The eagle of our imagination is unwieldy and free from constraints as well as virtuous, “in constant conflict with underworld powers,” whose victims are “sacrifice[s] of lower beings.”¹⁵⁷ Raptor comes from the Latin verb to seize (*rāpĭo*); the eagle is aggressive and hence does not retreat. Alarming, the qualities we attribute to the symbolic eagle and those of the paradigmatic self-defender are the same. Both exercise a god-given moral right while exhibiting liberty without constraints, virtuousness, self-sufficiency, and deserved material superiority.¹⁵⁸

If Justice Ginsburg was right, there is reason to be hopeful: our ability to swing the pendulum in the other direction is even stronger than our attachment to the latent aggression of the eagle’s freedom. Yet if the eagle is problematic, doesn’t that problematize the pendulum, too? The pendulum is forever centered on a fixed spot and will eventually return to it. If the central spot to which it returns is the eagle’s nest of arrogant aggression and consumption of the weak as a law of nature, then we’re back at futile, now

¹⁵⁵ Nelson, *supra* note 144.

¹⁵⁶ 18 U.S.C. § 713.

¹⁵⁷ Elizabeth Atwood Lawrence, *Symbol of a Nation: The Bald Eagle in American Culture*, 13 J. AM. CULTURE 63, 65 (1990).

¹⁵⁸ The eagle is the finest example of a frequently recurring link between the birds we cherish, the patterns of violence we choose to justify, and our ideological worldviews. To give another example, former NRA president Marion Hammer led a successful campaign to reject the scrub jay from becoming Florida’s state bird, accusing it of “welfare mentality” and therefore of criminality: “They eat the eggs of other birds. . . [t]hat’s robbery and murder.” Jo Becker, *After Fuss and Feathers, Mockingbird Still Our Bird*, TAMPA BAY TIMES (Sept. 28, 2005), <https://www.tampabay.com/archive/1999/04/09/after-fuss-and-feathers-mockingbird-still-our-bird/> [<https://perma.cc/KQU6-7B33>].

also sinister, cycles.¹⁵⁹ Viewed in this way, the pendulum is a tool of unflinching moderation that flies in the face of the ideal of progress. Presumably, however, Justice Ginsburg believed that the center can be shifted, and that such shifting should be the goal. Similarly, taking a break from self-defense implies a hope that we will not return from that break to the same spot. Moreover, the pendulum is a helpful metaphor for clarifying how scholarly methodology and substantive goals complement each other.

Swinging the pendulum is a matter of collective will, not of individual right. As a scientific device, the pendulum follows the laws of nature. But it does not ascribe to them any normative force nor does it necessarily share their determinism. We should understand the Ginsburg pendulum as opposite to the appeals to natural science of either Langdellian “mechanical jurisprudence”¹⁶⁰ or social Darwinism.¹⁶¹ This understanding should help us think of substantive criminal law as public law. As such, our answer to the question *what is criminal responsibility for* is not dictated by what we take our nature to be. Rather than requiring deference to cognitive psychologists, criminologists, or ornithologists, attribution of responsibility and what follows from it are political choices. Likewise, the kind of nonviolence advocated here is not a timeless principled stance of the “one should never hurt a fly” pacifist variety, which denies self-defense’s moral permissibility. Instead, this kind of nonviolence is a necessity of particular historical circumstances. These circumstances call on us to try to imagine a center of gravity for criminal law that is suspicious of justifications for violence.

A sure sign that such suspicion is warranted is that a given justification purports to track natural rights while in effect causing systemic harms to the communal structures of our shared life. Here and now, self-defense should be de-justified, due to the problematic functions it fulfills. What follows are three salient sets of such functions.

A. MATERIAL

Justifying self-defense costs lives and exacerbates material inequality by deepening demographic disparities surrounding whose lives get lost.

Self-defense does not necessarily result in death. But the rates of lethal violence in the United States are markedly higher than those of all other affluent democracies as well as many countries with weak economic and democratic systems.¹⁶² While historians and social scientists debate various hypotheses to explain why America stands out in its attraction to lethality,¹⁶³ much of this aggression is self-explained, culturally registered, and legally justified in self-defensive terms. Robert Weisberg has commented that “our exceptional sense of self can become a very brutal thing [that] . . . allows us

¹⁵⁹ AESCHYLUS, *supra* note 129 and accompanying text.

¹⁶⁰ Dennis Patterson, *Langdell's Legacy*, 90 NW. U.L. REV. 196, 196 (1995).

¹⁶¹ See *infra* notes 238–39 and accompanying text.

¹⁶² RANDOLPH ROTH, AMERICAN HOMICIDE 3–8 (2009); ZIMRING & HAWKINS, *supra* note 86, at 7–8. In tandem, the United States also punishes much more severely than its counterparts, and so inasmuch as self-defense is a justification or a motivation for punishment, well-known mass incarceration data are part of this story as well. My focus, however, is on interpersonal conduct.

¹⁶³ ROTH, *supra* note 162, 8–26; Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 21–37 (2002).

to accept or justify violence by a claim that in our secular theology violence can and must have a high moral purpose to be redeemed.”¹⁶⁴ A central component of that high moral purpose is robust and unyielding individual freedom, as well as other rationalizations for the fortification of selfhood. Ergo, defense of the self is the justification of choice for Americans of all stripes.

Just like with vigilantism,¹⁶⁵ fear of criminals,¹⁶⁶ retributive moralism,¹⁶⁷ and the frontier mentality,¹⁶⁸ American violence is inextricably bound with self-defense. As with these other formative ideas, self-defense is also popularly conceptualized broadly, encompassing much more than just warding off mortal threats.¹⁶⁹ Thus, one form of self-engineered self-defense that was popular prior to the Civil War was dueling. After the Civil War, people became reluctant to defend their honor with their lives.¹⁷⁰ Rather than disappearing, however, the logic of the duel transformed, morphing into practices that usually pose less immediate dangers to oneself. But it is still a major psychological drive of aggression that “the individual perceives himself as not having sufficient nonviolent means by which to save or restore his self-esteem.”¹⁷¹ This self-defensive logic is elevated by laws,

¹⁶⁴ Weisberg, *supra* note 163, at 9; *see also* MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER* ch. 7 (2017) (discussing the linkage between righteousness and violence in the U.S.); FRIEDMAN, *supra* note 8, at ch. 8 (discussing the relationship between criminal justice and the cultivation of individual personality in twentieth century U.S.).

¹⁶⁵ *See* PAUL H. ROBINSON & SARAH M. ROBINSON, *SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS* (2018); Richard Maxwell Brown, *The American Vigilante Tradition*, in *VIOLENCE IN AMERICA*, *supra* note 9, at 153; WILLIAM E. BURROWS, *VIGILANTE!* (1976).

¹⁶⁶ SIMON, *supra* note 142.

¹⁶⁷ *See* DANIEL LACHANCE, *EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (2016); TERRY K. ALADJEM, *THE CULTURE OF VENGEANCE AND THE FATE OF AMERICAN JUSTICE* (2008).

¹⁶⁸ There are multiple interpretations to the idea of the frontier. *See* JONATHAN OBERT, *THE SIX-SHOOTER STATE: PUBLIC AND PRIVATE VIOLENCE IN AMERICAN POLITICS* 35–39 (2018) (defining frontier as a non-geographic “class of settings in which the links between rules and relations become particularly fraught,” which is still unusual in the U.S. “because of its institutional history, the way in which a well-defined set of republicans rules allowed public security to be the responsibility of a wide swath of private individuals connected through day-to-day network relations.”); Commager, *supra* note 85, at 18 (“[W]hat the frontier contributed to violence was not in these occasional and dramatic displays of lawlessness so dear to the imagination of the film and television mongers, but the deeper and more pervasive violence of isolation. . . .”); RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* (1992) (tracing the ways in which a set of imaginaries associated in the collective memory with the frontier recurs and reshapes with the development of twentieth-century American popular culture).

¹⁶⁹ Kaufman, *supra* note 24, at 22:

[A] mere right to life would not give one any right to respond with defensive force in the vast majority of self-defense cases. . . . [T]he right to self-defense so obviously extends beyond merely the right to protect one’s life (for example, one’s freedom, one’s bodily integrity, one’s sexual integrity are all bases for the right to kill in self-defense. . . .)

Some instances that culturally register as self-defense may be legally classified as another defense, such as necessity or mistake of fact.

¹⁷⁰ Brown, *supra* note 9, at 23–25 (qualifying that there was a surge in violent family feuds in parts of the South following the Civil War).

¹⁷¹ Gilligan, *supra* note 130, at 1166. Nonviolent sources for self-esteem that Gilligan mentions include personal achievements, standing in the community, and material status symbols. From a socio-historical perspective, such achievements of social status might be best described as internalized modes of social control and stratification, which “civilizes” aggression but does not eliminate it. *See* NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Eric Dunning, Johan Goudsblom & Stephen Mennell eds., Edmund Jephcott trans., 1994).

interpretation and enforcement policies, and social governance norms,¹⁷² to incur high material tolls.

Most conspicuously, the argument for broad gun distribution among the population rests on the idea of a “marketplace of violence.” Similar to the “marketplace of ideas” justification of the First Amendment, which assumes that open discourse yields truth, the Second Amendment version assumes that wide carry and use of firearms ensures that justified violence prevails over crime.¹⁷³ To wit, the argument for more guns is not so much an argument for less violence but rather an argument for more justified violence, primarily because it is defensive—of self, others, property, or freedom. Under the “good guy with a gun” hypothesis, guns make us safer thanks to the possibility of “good violence” directed at “bad guys”—that is, deserving aggressors. A plethora of harms are thereby inflicted on persons, from death through nonfatal injuries to emotional and mental tolls, and increasingly so over the last five decades.¹⁷⁴ This is the same period in which self-defense became the main reason why people acquire guns.¹⁷⁵ Although most scholars agree that quantitative associations between gun availability and rates of lethal violence are well established in the United States and abroad,¹⁷⁶ such empirical claims are still disputed among experts¹⁷⁷ and are hard to measure.¹⁷⁸ But the empirical picture becomes less contested when considering gun laws together with other expansive self-defense regimes, primarily SYG laws. Multiple studies have found that these clusters of regimes correlate with increases in rates of violence generally, as well as homicides and suicides specifically.¹⁷⁹

Studies further show that the victims of this violence belong disproportionately to groups that already suffer from material disadvantages,

¹⁷² Dueling was prevalent in spite of laws forbidding the practice, but which were not duly enforced. C. A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 *VAND. L. REV.* 1805, 1831 (2001).

¹⁷³ BLOCHER & MILLER, *supra* note 91, at 155; *see also* Weisberg, *supra* note 163, at 36–37 (discussing “violence optimality”).

¹⁷⁴ Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 *HASTINGS L.J.* 1053, 1086–90 (2020).

¹⁷⁵ David Yamane, Sebastian L. Ivory & Paul Yamane, *The Rise of Self-Defense in Gun Advertising: The American Rifleman, 1918–2017*, in *GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE* 9, 17–22 (Jennifer Carlson, Kristin A. Goss & Harel Shapira eds., 2018).

¹⁷⁶ Wolfgang Stroebe, *Firearm Possession and Violent Death: A Critical Review*, 18 *AGGRESSION & VIOLENT BEHAV.* 709 (2013).

¹⁷⁷ BLOCHER & MILLER, *supra* note 91, at 156.

¹⁷⁸ For example, there is no consensus on what ought to count as homicide. ROTH, *supra* note 162, at xii (“Some reporting agencies rule out certain kinds of homicides, such as those committed in self-defense, in the line of duty by law enforcement officers, or during civil disturbances; and some classify deaths caused by criminal negligence as homicides, including automobile-related fatalities.”).

¹⁷⁹ Alexa R. Yakubovich, Michelle Degli Esposti, Brittany C. L. Lange, G. J. Melendez-Torres, Alpa Parmar, Douglas J. Wiebe & David K. Humphreys, *Effects of Laws Expanding Civilian Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, *AM. J. PUB. HEALTH* 10–11 (forthcoming, published online Mar. 10, 2021), available at <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2020.306101> [<https://perma.cc/A2F3-GY77>] (synthesizing the results of 25 different studies on expansions of civilian rights to use deadly force in self-defense, concluding that in most places there was a modest increase in violent crime and in some places a robust increase); RAND CORP., *Effects of Stand-Your-Ground Laws on Violent Crime* (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime.html> [<https://perma.cc/D7S2-NG46>] (scrutinizing various studies to conclude that SYG laws have increased the numbers of homicides generally, and of firearms homicides specifically); Stroebe, *supra* note 176, at 714 (“[S]tudies on gun ownership and suicide provide strong evidence that these two variables are associated. . .”).

especially women and racial minorities.¹⁸⁰ Members of vulnerable groups are positioned at the receiving end of self-defense-inspired arrangements—like violence generally—and they are also more often deprived of self-defensive privileges when they try to occupy the giving end.¹⁸¹ Indeed, critical race and feminist studies have continuously emphasized how self-defense doctrines seem color- and gender-blind while in practice further entrench existing inequalities.¹⁸² This entrenchment of existing inequalities manifests, *inter alia*, through the requirement of imminent threat, which battered women self-defenders can rarely meet,¹⁸³ and through the stereotypical equation of black men with criminality, which informs interpretations of reasonableness such that killing black men out of fear is accepted regardless of their culpability.¹⁸⁴

The latter becomes crystal clear when police kill, with fatality rates among African-Americans more than double their share in the general population.¹⁸⁵ Overall, the number of people killed by police in the U.S. is several times higher than those of otherwise comparable developed nations.¹⁸⁶ The main reason why police use this kind of force is self-defense: “The overwhelming majority of all killings by police were responses by police to threats to the safety of police. And this provides a clear path to the reason why police in the US kill so often and also are killed so much more often than police in other nations.”¹⁸⁷ In a country with more guns than people, police face greater risks than elsewhere, even if less and less so over time.¹⁸⁸ Hence, the resort to preemptive violence, which in turn feeds back to the need felt by citizens to protect themselves against fearful officers, as well as potentially dangerous neighbors and strangers. The self-perpetuating logic of this cycle results in escalation of violence to no end.

This abundance of latent and overt threats to life itself still does not satisfy our desires to secure self-protection. It rather nourishes self-defense

¹⁸⁰ Yakubovich et al., *supra* note 179; Ulrich, *supra* note 174, at 1089.

¹⁸¹ Charles, *supra* note 75, at 621–29. This might largely depend on the identity of the victim. Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-go-to-protect-themselves> [https://perma.cc/PMR6-MMTC] (according to F.B.I. homicide data, “the likelihood of this ruling [that a homicide was justified] in cases in which men killed other men was ten per cent greater than when women killed men. (Cases in which men kill women or women kill women are almost never found to be justified.)”).

¹⁸² See, e.g., Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014) (arguing that SYG laws exacerbate the denial of women’s ability to protect themselves against violence); Bennett Capers, *Critical Race Theory*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 25, 30–31 (Markus D. Dubber & Tatjana Hörnle eds., 2014) (noting that critical race scholars have shed light on biases in self-defense doctrine and application).

¹⁸³ See, e.g., Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 679 (1996) (arguing that domination should substitute imminence). *But see* Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342 (2007) (defending the imminence requirement). See further discussion of battered women and imminence at *infra* notes 266–87 and accompanying text.

¹⁸⁴ See, e.g., CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 137–48 (2003).

¹⁸⁵ FRANKLIN E. ZIMRING, WHEN POLICE KILL 45–46 (2017).

¹⁸⁶ *Id.* at 75–77.

¹⁸⁷ Franklin Zimring, *When Police Do Not Need to Kill*, in THE ETHICS OF POLICING: NEW PERSPECTIVES ON LAW ENFORCEMENT 107, 108–09 (Ben Jones & Eduardo Mendietta eds., 2021).

¹⁸⁸ Sierra-Arévalo, *supra* note 95, at 70 (“[T]rends in violence against police suggest that policing is growing *safer* over time. Felonious officer deaths have decreased for half a century and recent analyses find no significant change in patterns of fatal or nonfatal assault on police officers.” (italics in original; citations omitted)).

to grow and take much more under its wings. The evolution of the law of police use of force illustrates the point. In 1985, the Supreme Court ruled that the Fourth Amendment allows an officer to use deadly force to prevent escape only where the suspect poses a threat of “serious physical harm.”¹⁸⁹ The following two decades of case law saw the Court eroding this bright-line rule in favor of a laxer reasonableness standard that balances myriad circumstances like the severity of the suspected crime and the behavior of the suspect.¹⁹⁰

The trend for what kinds of threats justify the use of lethal force is one of expansion, as is the space that this justification takes in how officers understand their job. Self-defense—including when the self is a group, as intra-group solidarity encourages taking action to secure fellow officers’ safety—dominates police rationalizations of and training for various types of conduct beyond direct use of force.¹⁹¹ It consumes other social interests and poses dangers not only for people who come into contact with police, but also for the officers themselves. For instance, officers who fear a colleague could be under threat tend to flout restrictions on dangerous driving and speed to the scene even though public interests, per police policy, were not sufficiently at risk.¹⁹² They thereby pose new dangers to themselves and to others.

In federal and state law, the conditions for police use of force are less demanding than for civilian self-defense.¹⁹³ Despite the moral view of justifications, the identity of the actors is always present in self-defense law, due to the element of discretion. Discretion is inherent in the Fourth Amendment’s reasonableness standard, and the Court has stressed that reasonableness is not correctness: “[U]se of force must be judged from the perspective of a reasonable officer on the scene, rather than with the twenty-twenty vision of hindsight.”¹⁹⁴ This is true for any self-defender,¹⁹⁵ but in the case of police it leads to bestowing on them self-defensive benefits, like lower doctrinal bars or qualified immunity from civil action. This is a politically-driven construction of a hierarchy of the worthiness of lives, which in an unequal society will manifest in demographic terms, yet it is just a private case of a more general truth about justification doctrines. We are

¹⁸⁹ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

¹⁹⁰ Cynthia Lee, *Reforming the Law on Police Use of Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 642–51 (discussing *Graham v. Connor*, 490 U.S. 386 (1989), and *Scott v. Harris*, 550 U.S. 372 (2007)).

¹⁹¹ Sierra-Arévalo, *supra* note 95, at 75–76, 81–82.

¹⁹² *Id.* at 87–88. While the underlying motivation of such acts is self-defense, their operation constitutes a sort of vigilantism, since the safety of police may be understood as fundamental for the political order and hence formal rules can be flouted to maintain it. Kanti C. Kotecha & James L. Walker, *Vigilantism and the American Police*, in *VIGILANTE POLITICS* 158, 159 (H. Jon Rosenbaum & Peter C. Sederberg eds., 1976) (“Police vigilantism can be defined as acts or threats by police which are intended to protect the established socio-political order from subversion but which violate some generally perceived norms for police behavior.”).

¹⁹³ Lee, *supra* note 190, at 656.

¹⁹⁴ *Graham*, 490 U.S. at 396.

¹⁹⁵ *See, e.g., Brown v. United States*, 256 U.S. 335, 343 (1921) (“Detached reflection cannot be demanded in the presence of an uplifted knife.”).

fine with a life lost justifiably, including those in the delta between the reasonably believed and the correct.¹⁹⁶

Every self-defense argument is a particularized “good guy with a gun” argument. Could shifting away from this view as our default position, a maxim that can be refined but never fundamentally challenged, improve our lives? Perhaps if we did not justify self-defense we would save some people’s lives but sacrifice the lives of others, which would not only be the wrong ones to lose but would also be more numerous. Whether this is true, we do not know—we have never tried—but even if it is, it does not mean we may disregard the costs of self-defense and not try to reduce them. Self-defense is not a binary, and some measures have worked. For instance, when greater legal restrictions were imposed on police use of force, police violence decreased.¹⁹⁷ But we also have reasons to doubt that the more radical solution of de-justifying self-defense would cost more lives than it would save.

As opposed to specific policies, it is questionable whether empirical research can isolate and measure the effects of a principle as pervasive and reshaping as self-defense. Nevertheless, Randolph Roth found in a comprehensive study that the strongest correlations with homicide rates throughout American history have been with four factors: the levels of confidence in judicial institutions, the trust in government, the sense of belonging to the national or other prominent identity groups, and the belief in the legitimacy of social hierarchies.¹⁹⁸ When each of these criteria falls, self-defense rises either as a rationalization of aggression or as a legitimizing principle for the circumstances that yield it.¹⁹⁹ When you feel that courts will not redress your grievance, that government officials do not represent your interests, that you do not share strong bonds with your fellow citizens, and that the people who enjoy greater power than you do not deserve it—you feel unsafe and insecure, not taken care of, highly sensitive to threats and in need to fortify whatever positions you hold. In short, you are unprotected, and you must therefore protect yourself.²⁰⁰ It does not follow that de-justifying self-defense would causally contribute to alleviating these widespread concerns, but we do have reasons to believe that downgrades in the social status of self-defense, in which law plays a role, tend to go together with a decrease in lethal violence. Hence, our material welfare advocates that we wish self-defense to become obsolete.

¹⁹⁶ Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 31 (1986) (“Most American jurisdictions treat a reasonable but mistaken belief that the circumstances necessary for self-defense existed as justified self-defense.”). George Fletcher has termed these cases “putative self-defense,” arguing that they should only amount to an excuse. FLETCHER, *supra* note 22, at 762–69.

¹⁹⁷ Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241 (1994).

¹⁹⁸ ROTH, *supra* note 162, at 18.

¹⁹⁹ This is most readily apparent regarding trust in government. CARLSON, *supra* note 6, at 92 (“[S]upport for armed civilian self-defense is particularly high in contexts where confidence in police is low.”); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 73 (2017) (explaining that popular support for gun control grew in the DC black community in the 1970s because local government “promised to provide police protection to a community so long denied it” thereby promising to obviate the need for armed self-defense, “what you did when you had no other recourse.”).

²⁰⁰ These conditions are not necessarily undesirable. Commager, *supra* note 85, at 21 (suggesting that there is “a premium on aggressiveness . . . where government was weak and was expected to be weak—where, indeed, it was often looked upon as the enemy of freedom . . .”).

B. DEMOCRATIC

Justifying self-defense impedes our ability to work together to build a better future and is therefore an anti-democratic public institution. This is so because self-defense blocks long-term normative thinking; isolates self from other; equates political power with the ability to use violence; undercuts the role of public institutions in facilitating a cooperative, deliberative, participatory public sphere; and limits the legitimacy of the people to design the norms of collective life by exercising collective will. I will briefly explain each point.

First, when perceived through a self-defensive lens, the horizons of our normative vision draw near. When one is concerned with combating an approaching danger, one can hardly look past short-term goals. And the more pervasive the sense of threat, the more our mental resources are devoted to warding it off. This process comes at the expense of careful deliberating on what would be best down the road,²⁰¹ while cultivating a preoccupation with worst-case scenarios.²⁰² Thus, we might look ahead in preparation for those situations that we would not like to occur, but we might neglect the potential reality that we would like to sustain. In this way, self-defense debilitates our democratic imagination.

Relatedly, self-defense makes us suspicious of people with whom we interact. Cognitive psychiatrist Aaron Beck explains:

“When we are confronted with a threat, we have to be able to label the circumstances quickly so that an appropriate strategy (fight or flight) can be put into effect. The thought processes activated by threats compress complex information into a simplified, unambiguous category as rapidly as possible. These processes produce dichotomous evaluations, such as harmful/harmless, friendly/unfriendly.”²⁰³

Self-defense is geared toward isolating the self from the other, since the kind of security it envisions sets up boundaries between what is me, mine, or like me, and what is a foreign interference. It eschews a recognition of interdependency between persons as constitutive of the self, and of care by the other as essential for safety. Such key insights of psychoanalysis and cultural feminism lead, in turn, to a view of violence done to the other, regardless of justifiability, as an affront to rather than a fortification of oneself.²⁰⁴ In a multicultural society, a strong sense of hierarchy between self and other, and by extension like selves and foreign selves, quickly translates into demographic terms, and makes it harder to imagine shared goals. The

²⁰¹ This problem is as old as modern political philosophy. Claire Finkelstein, *A Puzzle about Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332 (2001) (analyzing Hobbes’s argument for the inalienability of self-defense as relying on a view of short-term, welfare-maximization rationality, whereas his argument for the social contract relies on a pragmatic view of rationality that takes into account complex, long-term schemes). For Hobbes, we set up a commonwealth because we want to move away from self-defense, not because we want to collapse the social contract into it. Reznik, *supra* note 78.

²⁰² See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* ch. 3 (2005) (explaining how a focus on feared even if improbable scenarios distorts individual and social thinking).

²⁰³ AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE* 72 (1999).

²⁰⁴ See BUTLER, *supra* note 136, at ch. 2.

citizen, as poignantly captured by Tocqueville, becomes confined “in the solitude of his own heart.”²⁰⁵

Third, building on the aforementioned, self-defense leads to an equation of power with violence and therefore stifles cooperative projects. One way to conceptualize a distinction between political power and the organization of violence comes from Hannah Arendt. Arendt defines power as the ability “to act in concert.”²⁰⁶ Power is the stuff of politics because the political arena is animated by the dynamics of collective action and mutual engagement. Violence, in contrast, is “antipolitical.”²⁰⁷ A mere instrument, violence lacks any intrinsic essence and therefore cannot create something new, which is what political freedom strives for, and presents the peril that means will overwhelm ends.²⁰⁸ Arendt recognizes that violence may have a hand in shaping the norms of the public sphere and articulating public values,²⁰⁹ but she contends that when this happens, the political is eroded. Even when justified, violence is the product of impotence and atomization, operating through obedience to threat rather than through dialogue.²¹⁰ Arendt highlights the role of self-preservation within the private sphere, but warns against its extension to the public one, where self-interest must not be the governing norm.²¹¹ Violence, including threat of it and dread of it, destroys the interpersonal bonds of trust that power—a nonviolent force—builds on and cultivates.²¹² Behavioral studies affirm that fear spreads among persons as if virally, creating polarization and hence impeding collective action.²¹³ My point here is not that once self-defense is permissible, physical force

²⁰⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 484 (Harvey C. Mansfield & Delba Winthrop trans. & eds., 2000) (1859) (claiming this is a peril of democratic citizenship generally).

²⁰⁶ HANNAH ARENDT, *On Violence*, in *CRISES OF THE REPUBLIC* 103, 143 (1972).

²⁰⁷ *Id.* at 161.

²⁰⁸ Thus, when participants in public demonstrations are armed, the chances that the demonstration will become violent grow significantly. ACLED & EVERYTOWN, *Armed Assembly: Guns, Demonstrations, and Political Violence in America* (Aug. 2021), https://acleddata.com/acleddatanew/wp-content/uploads/2021/08/Report_Armed-Assembly_ACLED_Everytown_August2021.pdf [<https://perma.cc/F4TS-A8NT>]. Granting that the armed participants rationalize their gun carrying as strictly defensive, this shows that the difference between using guns to defend against a threat and using them to create one can be very elusive. The introduction of artifacts of violence into democratic activity is thus, while perhaps conducive to short-term political goals, fundamentally anti-political in that it is toxic for the body politic. Hence, bringing weapons to key democratic institutions like polling stations and legislation halls is usually restricted. Blocher & Siegel, *supra* note 60, at 146–61; Henry Grabar, *You Can't Have an Open-Carry Democracy*, SLATE (Jan. 13, 2021), <https://slate.com/news-and-politics/2021/01/guns-capitol-riot-trump-crisis.html> [<https://perma.cc/QP4T-DJWD>]; Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 472–75 (2019); Firmin DeBrabander, *The Freedom of an Armed Society*, N.Y. TIMES (Dec. 16, 2012), <https://opinionator.blogs.nytimes.com/2012/12/16/the-freedom-of-an-armed-society> [<https://perma.cc/G56C-4ZL9>].

²⁰⁹ ARENDT, *supra* note 206, at 179.

²¹⁰ *Id.* at 135–37, 148, 182.

²¹¹ Hannah Arendt, *Freedom and Politics*, 14 CHI. REV. 28, 35 (1960):

[T]he public realm stands in the sharpest possible contrast to our private domain where in the protection of family and home everything serves and must serve the security of the life process. It requires courage even to leave the protective security of our four walls and enter the public realm . . . where the concern for life has lost its validity.

²¹² BUTLER, *supra* note 136, at 82; JONATHAN SCHELL, *THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE* 221, 226–27, 231 (2003) (building on Arendt’s dichotomy between violence and power and on Gandhi’s dichotomy between power based on fear and power based on love, Schell offers his own dichotomy between coercive power and cooperative power: the former “flows downward from the state by virtue of its command of the instruments of force” while the latter “flows upward from the consent, support, and nonviolent activity of the people.”).

²¹³ SUNSTEIN, *supra* note 202, at 94–102.

becomes a legitimate element of social interaction, and cooperative power is lost until a pure pacifistic society is erected. Rather, my point is that the desire to vindicate the justifiability of self-defense has engendered fear of crime, understood as synonymous with unjustified violence, to loom large over interactions between strangers in the American public space. This fear creates an opposite vector to a healthy body politic, adding layers to the armor that persons must shed when they enter democratic deliberation.

This leads directly to the fourth reason. The justifiability of self-defense coupled with its meaningfulness affects individuals interacting with each other, and it also affects collective institutions under whose auspices this interaction takes place. For, when justified, self-defense deserves room, and shrinking this room inhibits the right. A freedom to exercise self-defense is a freedom from being protected by the state and thus denied the opportunity to protect oneself. This conception of the right culminates in such phenomena as private militias, neighborhood watches, and ubiquitous gun carrying, which provide security in service of private interests.²¹⁴ Whether a response to a vacuum in official policing or an intent to push it away from particular quarters, the upshot is that policing itself loses its public commitment and becomes a complementary or a competitive service.²¹⁵ The privatization and stratification of responsibility for public safety, by act or by omission, is a democratic failure, as it allows the strong to set the terms by which the weak need to abide. The polity can no longer claim to provide equal concern and respect when both groups become less involved in public life—the strong due to self-segregation,²¹⁶ the weak due to a need to self-protect from under- and over-enforcement.²¹⁷

Finally, when we take criminal law to track natural morality, we take away the people's power to shape the norms of their lives as they see fit. Justification defenses generally, and self-defense specifically, orient our thinking toward the vindication of private natural rights and thereby obscure the fact that such an orientation is a political choice. Understanding criminal law as public law means that its primary interest is not in responding to individual failures of the will but rather in broader notions of justice. Living in a society as we do, we care about much more than aligning our law with moral intuitions, and we want to critically reflect on these intuitions rather than treat them as a given natural order that we passively implement.²¹⁸ Thus,

²¹⁴ Alon Harel, *Outsourcing Violence?*, 5 L. & ETHICS HUM. RTS. 395 (2011) (arguing that when private parties perform core government functions they distort the societal choices that legitimize these responsibilities); Malcolm Thorburn, *Reinventing the Night-Watchman State*, 60 U. TORONTO L.J. 425 (2010) (arguing that policing functions involving use of force or invasion of privacy are legitimate only when performed by those acting in the name of the polity).

²¹⁵ See Wilbur R. Miller, *A State within 'The States': Private Policing and Delegation of Power in America*, 17 CRIME, HIST. & SOC'YS 125 (2013) (surveying various manifestations of privatization of coercive powers, including expansive self-defense regimes); OBERT, *supra* note 168, at 11 (focusing on the nineteenth century historical origins of fragmental distribution of power to a variety of institutions along the public-private axis, rendering self-defense compatible with deputized, for-profit order-keeping: "Participation in violence through vigilantism and marketized private security continued to be quite defensible for Americans who viewed both vigilance and making money as virtues of citizenship.").

²¹⁶ See Lisa Guenther, *Dwelling in Carceral Space*, 12 LEVINAS STUD. 61 (2018); SIMON, *supra* note 142, at 7, 19–20 (analyzing gated communities as self-segregation driven by fear of crime).

²¹⁷ Natapoff, *supra* note 69, at 1718–19.

²¹⁸ Levin, *De-Naturalizing*, *supra* note 93, at 1801–03; Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1169 (2010).

we might decide that considerations relating to distributive justice, rule of law, civil peace, efficiency, hedonic pleasure, democratic legitimacy of decision-making, or the conditions for individual and collective flourishing or for stable cooperation, ought to take precedence over, or at least inform the texture of our moral intuitions. These considerations draw away from the binary categories generated by criminal law moralism.²¹⁹

In what follows, I will scrutinize ethical attitudes dearly held by many members of the population. Is there not a tension between arguing that criminal justifications should be understood as political choices, which leads to respecting whatever norms people elect to uphold, and arguing for a radical change in self-defense law, which criticizes conventional beliefs and advises against following them? After all, “part of what collective self-determination means is that a political community can see its norms reflected in its laws.”²²⁰ But we should not infer that ethical life is an extra-legal fact that emerges organically, leaving the law to choose between acquiescence and condescension.²²¹ Imagining ourselves differently already belongs in our intellectual tradition, too. The relationship of law and culture is one of dynamic reciprocity;²²² law cannot usher societal change on its own, but it can be put to use in service of cultural self-criticism. It is part of who we are that we can recognize moments in which we ought to take a step back and rethink our practices and ideologies.²²³ I submit that we have reached such a moment with self-defense, and if law is a language used to articulate the meanings of this moment, it should also serve to move us to the next.

C. ETHICAL

Justifying self-defense distills problematic features of entrenched public values. These ethical implications are distinct from moral ones, in the sense that they are about who we are rather than what we ought to do.²²⁴ I argue that self-defense brings out the worst in us.

As discussed above in Part III, to hail self-defense as a valuable social mechanism is really to hail violence, thinly veiled as the exception to its

²¹⁹ CHIAO, *supra* note 59, *passim*; Levin, *De-Naturalizing*, *supra* note 93, at 1782.

²²⁰ Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1456 (2017).

²²¹ See Kleinfeld, *supra* note 61, at 1398 (criticizing criminal justice scholars for viewing the American public as the source of the problems plaguing this system and suggesting that privileging laity over expertise is rather the key to solving these problems. Hence, the criminal law’s job is to “protect and repair” (Kleinfeld, *supra* note 220, at 1456)—as opposed to dictate and impose—ethical values).

²²² Mezey, *supra* note 93, at 55.

²²³ JEDEDIAH PURDY, A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM 225 (2009) (“American freedom has always involved the ability to discern a better—more realistic and dignifying—set of limits and reimagine ourselves within their confines.”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1284 (1999) (“[O]nce we understand that law can express cultural values, we can encourage courts to use it to help reshape those values, at least in cultures like that of the United States, where constitutional law plays a significant role in defining national character.”); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 589 (1989) (“[T]o congratulate oneself on following ‘the norms of my community’ is already to take a point of view external to those norms, rather than to subscribe to the commitments they embody . . . it is part of the particular heritage of our community to think critically and abstractly on moral matters.”).

²²⁴ RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 485 n.1 (2000) (defining ethics as a set of “convictions about which kinds of lives are good or bad for a person to lead” while morality “includes principles about how a person should treat other people”).

prohibition. While American rhetoric denounces violence, American ethos does not: “Violence is clearly rejected by us as a part of the American value system, but so great has been our involvement with violence over the long sweep of our history that violence has truly become part of our unacknowledged (or underground) value structure.”²²⁵ But violence is not an end in itself; we learn about it by studying how we execute it and how we justify it. Self-defense is a moral argument persons present to themselves and others to justify violent actions.²²⁶ At the same time, self-defense is a social phenomenon that needs to be understood by positioning actors within grand narratives of societal forces that reside in the collective unconscious. Understanding self-defense as a “historically and system specific”²²⁷ concept offers a unique prism into what we do as well as what we value and therefore who we are.

The ethical implications of justifying self-defense in America today are different than they were during seventeenth-century civil wars; within a pre-modern shame culture; under colonial rule; or in Switzerland. In our case, the implication is an affirmation and dissemination of a multi-layered ethic of individual desert and individual desert-assignment. This implication becomes clear when the developments buttressing today’s American self-defense culture, which began unfolding in the 1960s and accrued greater force since the 1980s, are situated within the broader cultural and intellectual contexts that inform our ethical life. During this period, gun rights advocacy emerged as a warning against the erosion of traditional white masculinity, and self-defense began to be touted as the reason for owning guns. Hence, self-defense became a proxy for a particular gendered and racialized idea of citizenship.²²⁸ This rise of self-defense, culminating in the legal developments identified above,²²⁹ took shape alongside parallel rises of desert, self-interest, and meritocracy—all growing from already strong roots—and reinforced them.

1. Desert

Retributivism took over rehabilitative penal welfarism in the 1970s as the dominant approach to state punishment in political, professional, and academic circles.²³⁰ Coupled with renewed academic interest in interpersonal self-defense and just war theory²³¹—let alone collective self-defense with the

²²⁵ Brown, *supra* note 9, at 41. *See also* Richard Hofstadter, *Reflections on Violence in the United States*, in *AMERICAN VIOLENCE: A DOCUMENTARY HISTORY* 3, 5 (Richard Hofstadter & Michael Wallace eds., 1970) (“[T]here is far more violence in our national heritage than our proud, sometimes smug, national self-image admits of.”).

²²⁶ *See* LUC BOLTANSKI & LAURENT THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* 37 (Catherine Porter trans., 2006) (“[People] seek to carry out their actions in such a way that these can withstand the test of justification. How can social science hope to succeed if it deliberately neglects a fundamental property of its object and ignores the fact that persons face an obligation to answer for their behavior[?]”).

²²⁷ LACEY, *supra* note 94, at 21.

²²⁸ Yamane et al., *supra* note 175; CARLSON, *supra* note 6, at 12–13, 19–28; Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191, 231–36 (2008).

²²⁹ *See supra* Part III.A.

²³⁰ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 55–63 (2001).

²³¹ The surge in self-defense scholarship started with George Fletcher’s work in the 1970s, while the surge in just war theory owes to the publication of MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

war on terror—varied attentions became directed at the conditions under which one deserves to be punished and killed, which assumed the corresponding legitimacy of the party inflicting punishment and death. Indeed, the notion underlying most theories of self-defense is that “the attacker somehow *deserves* it.”²³² The paradigm of “governance through crime” arose in tandem, providing a utilitarian complement. It positioned the provision of security against criminality—omnipresent yet othered²³³—as the ultimate political imperative in a post-civil rights age, overshadowing other notions of welfare by amassing unparalleled political consensus.²³⁴

2. Self-Interest

Meanwhile, in other academic corners, rational choice theories suggested that politics is necessarily based on competitive self-interest.²³⁵ The dominion of this view of rationality stretched far beyond the political realm as these theories gained traction across the intellectual world. The view of personal worth as necessarily established by winning over others in a competition is inescapable under the order of neoliberalism. As opposed to previous versions of capitalism, now “competition replaces exchange as the market’s root principle and basic good,”²³⁶ and this logic is disseminated “to all domains and activities—even where money is not at issue.”²³⁷ Further, neo-Darwinians insist that in all spheres of life competition is inevitable because it is natural: “[A] *fact* backed by the tremendous authority of science . . . something permanent and incurable, a basic pattern in the cosmos.”²³⁸ The corollary is that what is natural is also valuable and ought to be preserved. Communication, sociability, good will, or any other-regarding conduct cannot be more than instruments in such an ethical environment, since the mere existence of other people is a threat to be defended against and whose elimination is a deliverance of natural justice.²³⁹ These theories seek to establish the naturalness of an order in which pursuing an exclusive hold of limited resources is not only good but *the good*.

3. Meritocracy

Freedom is one form of ethical glue holding together self-interest and desert. Among the various conceptions of freedom that resonate in American

²³² KAUFMAN, *supra* note 20, at 2 (italics in original).

²³³ GARLAND, *supra* note 230, at 137 (discussing the “contradictory” criminologies “of the self” and “of the other,” the former invoking the sense that crime looms everywhere and the second demonizes the criminal).

²³⁴ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 7–14 (2015); SIMON, *supra* note 142, at 15–16, 22–32.

²³⁵ Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life*, in BEYOND SELF-INTEREST 3 (Jane J. Mansbridge ed., 1990) (surveying rational choice theories and critiques).

²³⁶ WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 36 (2015).

²³⁷ *Id.* at 31.

²³⁸ MARY MIDGELY, THE SOLITARY SELF: DARWIN AND THE SELFISH GENE 3–5 (2010) (going on to explain how Darwin’s own writings do not support such neo-Darwinian claims) (italics in original).

²³⁹ The figure who perhaps best captured the connection between capitalism and violence is Ayn Rand, who “finds in nature, in man’s struggle for survival, a ‘logical foundation’ for capitalism” and for whom life “is a conditional, a choice we must make. . . . Death, in short, makes life dramatic. It makes our choices—not just the big ones but the little ones we make every day, every second—matter. In the Randian universe, it’s high noon all the time.” COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN 87–89 (2011).

culture,²⁴⁰ the most dominant are freedom as lack of restraint, specifically governmental restraint, and freedom as self-governance. It doesn't take much to interpret the two together into individual self-assertion of standing to deliver criminal justice, thus rendering desert attribution a civic virtue. A related concept binding this mixture together is meritocracy. As stemming from the Protestant tradition, meritocracy "promotes an ethic of self-help," shifting "the responsibility for evil from God to us."²⁴¹ One's character is gauged by how virtuously one interprets and masters the story of one's own life, exercising control over a divine, evolutionary, or managerial plan. In secularized providentialism, prosperity hinges on individual responsibility and is realized via the market. "Provided they operate within a fair system of equal opportunity, markets give people what they deserve."²⁴²

The American articulation of meritocracy has both backward- and forward-looking aspects: if you work hard, you can achieve anything you set your mind to; and, accordingly, what you have in fact achieved, or what has befallen you, is what you must have deserved.²⁴³ This articulation applies in the marketplace of material goods, predicating the provision of welfare only to those whose misfortune is not their fault, as well as in the marketplace of violence.²⁴⁴ Self-defensive activities, recall, now belong in the group of entitlements we ought to be free to enjoy without state intervention.²⁴⁵

4. Self-Defense Against Tragedy

Justifying self-defense legitimates this ethical compound and takes these values to their ugliest conclusion, which is an infrastructure for violence. Against this backdrop, self-defense becomes a mechanism for person-on-person assignment and enforcement of desert, backed by both natural and positive law. This state of affairs poses a fundamental challenge to some sophisticated versions of the moral view of justification. Thus, Gardner argues that criminal jurisprudence should accommodate the possibility of tragedy, in the ancient sense that circumstances beyond our control bear on the moral value of our actions. Gardner laments the enlightenment stance that justification and wrongfulness are mutually exclusive, such that if an act is justified that means that it is not prohibited conduct—for example, killing in self-defense is not justified homicide but rather an exception to the rule prohibiting homicide.²⁴⁶ Accepting the tragic means accepting that choices

²⁴⁰ See PURDY, *supra* note 223; J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499 (2004); ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998).

²⁴¹ SANDEL, *supra* note 8, at 37, 41.

²⁴² *Id.* at 62; see also DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019); LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (2016). Lamentably, these critiques of the rule of merit all neglect to connect the damages that this idea brought upon American society with the ideas and practices of deserved punishment.

²⁴³ See FRIEDMAN, *supra* note 8, at 96.

²⁴⁴ See *supra* note 173 and accompanying text.

²⁴⁵ See *supra* notes 70–78 and accompanying text (discussing the Second Amendment).

²⁴⁶ GARDNER, *supra* note 26, at 77–79. The MPC takes this view of defenses (justifications as well as excuses), as "invisible attachments to any offense definition." DUBBER, *supra* note 23, at 144. Most theorists, however, believe this applies to justifications but not to excuses. See, e.g., FLETCHER, *supra* note 22, at 810–11 (defining justification as "an implicit exception to the prohibitory norm" whereas an

we have no control over will nonetheless diminish our moral stature, regardless of how we respond to them. Thus, an act can be justified yet still be wrongful—killing in self-defense is still homicidal despite being justified.²⁴⁷

Though appealing in its sensitivity, this view of justification does not fit. Embracing the tragic requires the development and instillation of an ethic of luck and arbitrariness. Other societies have done this,²⁴⁸ but our own society has moved steadily away from it.²⁴⁹ American ideological structures have continuously favored ethics of mastery and control over ethics of chance, fortune, and grace.²⁵⁰ Although entrepreneurialism involves risk-taking, neither Protestantism nor neoliberalism can live side by side with a belief in luck.²⁵¹ Similarly, they preclude a belief that grand plans are sinister. On social and personal levels, the arc of the moral universe surely bends toward justice.²⁵²

Gardner's questioning of these ideas draws on Martha Nussbaum,²⁵³ who demonstrates her analysis of tragedy using the conflict that the Greek gods imposed on Agamemnon. Agamemnon *needed* to sacrifice his daughter, Iphigenia, to win the Trojan war, and yet deserved *blame* for this act.²⁵⁴ He is blamed, though, not for merely committing the act but for doing so with eagerness instead of remorse, under the false assumption that necessity implies rightness.²⁵⁵ While this lesson is crucially important for us to learn in thinking about self-defense,²⁵⁶ it matters greatly that the justificatory focal point here is not self-defense but necessity.²⁵⁷ Agamemnon's glory was inseparable from the wellbeing of the city and the appeasement of the gods; it was not self-interest but the greater good that justified his wrongdoing. The

excuse is "a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm.")

²⁴⁷ See also Dana K. Nelkin, *Moral Luck*, STAN. ENCYCLOPEDIA PHIL. (Apr. 19, 2019), <https://plato.stanford.edu/entries/moral-luck> [<https://perma.cc/YF5P-3E64>] (summarizing the debate on moral luck).

²⁴⁸ A modern example might be *hüzün*: the communal melancholy that Istanbul effects on its residents, which they believe to defeat their will and explain their failures, as described in ORHAN PAMUK, *ISTANBUL: MEMORIES AND THE CITY* ch. 10 (2006).

²⁴⁹ JACKSON LEARS, *SOMETHING FOR NOTHING: LUCK IN AMERICA* 17 (2004) ("[The] modern culture of control has shaped our public discourse for more than two hundred years—leading most educated Americans to dismiss the culture of chance as little more than a superstitious muddle."); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 26 (rev. ed. 2001) ("[I]nfluential modern ethical views have denied that tragic conflict exists. . ."); FRIEDMAN, *supra* note 8, *passim* (describing modern legal culture as centered around the capacity and entitlement of the individual to freely choose how to express a unique self).

²⁵⁰ LEARS, *supra* note 249, at 19–22; see also William J. Stuntz, *Law and Grace*, 98 VA. L. REV. 367 (2012) (lamenting the turn away from grace among American Christians, which exacerbated tough-on-crime policies).

²⁵¹ LEARS, *supra* note 249, at 2 (on Protestantism); BROWN, *supra* note 236, at 34 (on neoliberalism).

²⁵² See SANDEL, *supra* note 8, at 54–58 (discussing the contemporary resonance of this proverb); see also WILLIAM IAN MILLER, *OUTRAGEOUS FORTUNE: GLOOMY REFLECTIONS ON LUCK AND LIFE* 16–18 (2021) (suggesting that we have traded luck for hope: "You are feeling anything but lucky when hoping. Christianity made hope a theological virtue because it is hard to keep believing in a beneficent God when you are poor, sick, hungry, lame, and miserable. . . . Luck has the allure of the primitive and the pagan lurking about it.")

²⁵³ GARDNER, *supra* note 26, at 81 n.9.

²⁵⁴ NUSSBAUM, *supra* note 249, at 33–34.

²⁵⁵ *Id.* at 36–39.

²⁵⁶ James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 855 (2014) ("Gun rights advocates seem to equate rights with rightness.")

²⁵⁷ On the necessity defense, see *supra* note 23 and accompanying text.

corrosive epistemological lens of self-defense is at the other end of the telescope: our paradigmatic instance of justified violence takes for granted that individual rights swallow all other interests and that taking care of oneself is the gateway to political belonging. The American tragedy is distinct from the Greek one, requiring an analysis that will foreground the social costs of a legal justification for violence that drowns the common good in self-interest.

Gardner's analysis fails *because* of its sensitivity. His account of justification is ultimately about fine-tuning individual rationality and excellence of character, requiring the law to gauge persons' virtues and vices and predicate justifiability on the exploration of their innermost qualities.²⁵⁸ That a decision-maker needs to make these determinations within the contours of particular institutional rules, power relations, social psychology, and the cultural zeitgeist is absent from the analysis. Where self-defense regimes serve to articulate atomistic and moralistic ethical norms, authorizing decision-makers to attempt to reach such depths of human agency only lends moral authority to reductive and biased judgments of character.

The American legal culture lacks receptivity to highly nuanced conceptions of justification that stretch the meaning of this term to encompass emotionally and socially intricate wrongful deeds. In a sense, to propose de-justification goes even further against the current, but all it asks for is epistemological modesty. On both the level of interpersonal interaction and the level of legal categories, the default ought to be that violence is not welcomed, condoned, and sanctified. If so, then justifying it requires epistemological certainty that we cannot presume to have.

V. SELF-DEFENSE IN A VIOLENT WORLD

But, you might say, the criminal law still deals at bottom with individual actions. The individuals who plead self-defense have found themselves in impossible situations, where, at least on some level of perception, "it was either them or me." It is perhaps problematic that self-defense is a justification for violence in our society, but violence still occurs. Putting the weight of social criticism on individuals' shoulders is unfair,²⁵⁹ and doubly so since they often find themselves in these situations due in large part to social disadvantages. Surely, it would be unjust to ask people to turn the other cheek when under attack or to punish them if and when they do not, sacrificing the innocent for the benefit of aggressors. The last thing we need—here and now, in our carceral society—is more blame and punishment to go around. Moreover, we have witnessed too many anti-violence campaigns that mix well-meaning, limited imaginations with punitive

²⁵⁸ Dahan-Katz, *supra* note 28, at 99; NUSSBAUM, *supra* note 249, at 334–36.

²⁵⁹ See Dan-Cohen, *supra* note 41, at 675 (discussing the tension "between the desirability of using the criminal law to instill new, enlightened standards of behavior in the community and the unfairness of punishing persons whose conduct comports with existing community standards that have not yet been affected by the educational efforts of the criminal law"); Greenawalt, *supra* note 26, at 1905 ("The criminal law does not demand ideal behavior from people" and must "make concessions to the realities of human nature.").

impulses, and ultimately result in excessive control.²⁶⁰ I answer this objection as follows.

The result of de-justifying self-defense ought not entail an expansion of state coercion. I do not think that self-defenders should be punished. The concern as articulated above is already carceraly biased in that it assumes that more responsibility immediately translates into more coercion, or even, more specifically, into more custodial confinement. The history of American criminal justice indeed sounds such a warning,²⁶¹ but the culture now contains a salutary multitude of interpretations of responsibility, including from extra-moral perspectives. In contrast to the broad consensus around the justifiability of self-defense, it is no longer settled that legal responsibility tracks individual moral failures and therefore leads to blame and then to hard treatment.²⁶²

Recall that supporters of justificatory self-defense do not claim that self-defenders are not responsible for their actions. On the contrary, for moralists, justification means one is fully responsible, but not blameworthy, because one did no wrong.²⁶³ The focus is on the responsibility of the defender and offender as actors in an interpersonal, temporally limited, pre-political situation. Inasmuch as the law tracks this kind of morality, its task is to figure out whose moral case is stronger—for example, by determining who has the trumping right—and then attribute blame to the other. However, earlier we saw how a functional approach to self-defense leads to a different focus—on the defender and offender as participants in a public arena geared toward creation, cooperation, and flourishing.²⁶⁴ This kind of focus is inclined to broaden in scope and in timeframe. It moves from *ex post* individual punishability to *ex-ante* distribution of political accountability,²⁶⁵ thereby addressing the unfairness in the very positioning of a person in a situation of “it was either them or me.” Refusing to replicate the reduction of all criminal jurisprudence to questions of punishment, the question of placing

²⁶⁰ See Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 *BUFF. L. REV.* 199 (2020) (analyzing contemporary social movements); FORMAN, *supra* note 199, at 74–77 (analyzing gun crime in DC); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 *U. MIAMI L. REV.* 961 (2014) (analyzing sites of racial injustice in the criminal legal system); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* ch. 6 (2006) (analyzing domestic violence).

²⁶¹ GARLAND, *supra* note 230, at 124–27 (discussing the neo-liberal utilization of certain conceptions of responsibility in the context of crime control).

²⁶² See, e.g., Nicola Lacey & Hanna Pickard, *Why Standing to Blame May Be Lost But Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution*, 104 *MONIST* 265 (2021); CHIAO, *supra* note 59, at ch. 7; KELLY, *supra* note 57, at ch. 4 (offering accounts of responsibility that do not hinge on institutional assignment of blame); GARDNER, *supra* note 26, at 82 (noting that even when blame is due, there are “many types of normative consequences apart from liability to punishment, including a duty to show regret, to apologize, to make restitution, to provide reparation, and so on.”); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 129–34 (2002) (discussing “active responsibility” in the context of restorative justice); Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 *AM. CRIM. L. REV.* 191, 194–98 (1998) (discussing community accountability for criminal behavior).

²⁶³ See, e.g., Hibi A. Pendleton, *A Critique of the Rational Excuse Defense: A Reply to Finkelstein*, 57 *U. PITT. L. REV.* 651, 656 (1996) (characterizing justification defenses as applying when “defendant is responsible for an act that is not wrongful.”).

²⁶⁴ See *supra* notes 146–51 and accompanying text.

²⁶⁵ CHIAO, *supra* note 59, at 32.

responsibility that this approach formulates is not *who is to blame* but rather *who should take care*.

It is an essential task to imagine doctrinal avenues for vindicating these commitments. Here is one preliminary thought for how to go about it. Connected to the growth of the justification-excuse literature since the 1970s, another scholarly debate emerged on the phenomenon of battered spouses, mostly wives, who kill their batterers. One case that has captured the attention of scholars is that of Judy Norman, who suffered severe abuse on multiple levels from her husband and ultimately killed him in his sleep. She was denied self-defense because a sleeping person does not pose an imminent threat.²⁶⁶ If Norman and women like her are under grave but not imminent threat, why don't they just up and leave? And why is it that even if they kill, our sense of justice usually advocates their exoneration? The answer that initially gained most traction in theory and in law is the "battered woman syndrome." According to this theory, battered women are *psychologically* captive; the patterns of abuse they suffer, often consisting of cycles of violence followed by repentance and reconciliation, incur a mental toll of dependency that prevents them from leaving and makes it seem like violence is the only way to break the cycle.²⁶⁷ This explanation has been heavily disputed. First, by conservatives, who decried the disregard for personal responsibility that lets evildoers off the hook, pejoratively terming it "abuse excuse."²⁶⁸ Second, by feminists, who resented framing the problem as one of irrational feminine mentality.²⁶⁹ With regard to Norman, feminists have highlighted that she had *practically* nowhere safe to go—she pleaded to the authorities for help without avail; tried to commit suicide; had every reason to believe her husband's threats that he would harm her and other members of her family if she tried to leave; and had no control over what resources they had.²⁷⁰

Norman is a particularly egregious case, but the broader point is that violence in the home and violence on the street are not unrelated. Social turbulences of our current and past times channel violence into the home, reproduce and vent broader anxieties on the familial scale, and project domestic troubles outward.²⁷¹ The debate surrounding battered women who kill is worth revisiting and extrapolating for a new self-defense age. It

²⁶⁶ See Marina Angel, *Why Judy Norman Acted in Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65 (2008) [hereinafter Angel, *Judy Norman*]; Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457 (2006) [hereinafter Dressler, *Battered Women*].

²⁶⁷ LENORE WALKER, *THE BATTERED WOMAN* (1979).

²⁶⁸ JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* (1997); ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994).

²⁶⁹ See, e.g., Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002). Despite its rejection by professional mental health experts, many states establish the validity of this doctrine by legislative fiat. Marina Angel, *The Myth of the Battered Woman Syndrome*, 24 TEMP. POL. & CIV. RTS. L. REV. 301, 310 (2015). In the United Kingdom, domestic violence-related conduct is also regulated within the broader framework of "coercive control." See Erin Sheley, *Criminalizing Coercive Control Within the Limits of Due Process*, 70 DUKE L.J. 1321 (2021) (explaining the idea of coercive control and suggesting how American jurisdictions should adopt it).

²⁷⁰ Angel, *Judy Norman*, *supra* note 266, at 69–71.

²⁷¹ See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 453–54 (1993).

overlaps with the justification-excuse debate in discussions of self-defense and duress.²⁷² More importantly, however, it highlights the virtues of an analysis based in socio-political conditions rather than in private rights. The motivation of many in that debate was to justify acquitting battered women who kill their abusers, yet this did not lead all of them to justify self-defense. Some believed that correcting the unfairness of convicting battered women required amending self-defense law to fully cover such situations—that is, deeming them justified.²⁷³ Others, however, developed accounts of self-defense as excuse, expanding the concept beyond the pathological paradigm. Domestic violence, like general violence, is not confined to the interpersonal situation nor to the temporal boundaries of a single event or even a series of events. Rather, domestic violence implicates social and political structures. Excusing self-defenders instead of justifying them shifts the normative question to these structures.

At early English common law, stretching back to medieval times, self-defense and criminal culpability for homicide were compatible. Since self-help and political authority were considered antithetical, keeping the peace necessitated government to implement a strict liability regime for intentional acts of fatal consequences. Justifiability was a matter of acting “towards executions of justice,” which meant public order viewed from the perspective of the state as controlled by a ruling class. Thus, the killing of lawbreakers such as trespassers who resisted arrest, and thereby rendered themselves liable, was justified.²⁷⁴ Yet no homicide performed for an individual’s own private reasons, however grave, could be justifiable. It could only be excused when the particular circumstances indicated that punishment would be unfair. Excuse took the form of a pardon from the monarch, as a matter of mercy rather than of right, and which did not reverse forfeiture of the defendants’ goods. Gradually over the modern period, this regime was discarded, moving through the granting of pardons as mere formality to full exculpation, such that self-defense negated conviction. By the nineteenth century, justified and excused were equally opposite to felonious,²⁷⁵ and jurisprudential polemics migrated to the question of reasonableness.²⁷⁶ Today, juries and benches do not proclaim, indeed need not even consider, whether acquittal was due to justification or excuse or any other label beyond *not guilty*.²⁷⁷

²⁷² My focus here is on self-defense, which vindicates autonomy, as opposed to duress, which comes to terms with a loss of autonomy. It is therefore fitting that duress has not garnered any special cultural or rhetorical resonance in the United States. For discussions of duress in the context of battered women, see Dressler, *Battered Women*, *supra* note 266, at 470–71; Burke, *supra* note 269, at 308–13.

²⁷³ See Dressler, *Battered Women*, *supra* note 266, at 457–58; Rosen, *supra* note 196, at 36–43.

²⁷⁴ Bernard Brown, *Self-Defence in Homicide from Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583, 584.

²⁷⁵ *Id.* at 587–90; Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85, 87–92 (2017); Finkelstein, *supra* note 46, at 636–39; Dressler, *Justifications*, *supra* note 88, at 1157–58; Rosen, *supra* note 196, at 25–27; Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 539–41 (1934).

²⁷⁶ Fletcher, *supra* note 26, at 954. Reasonableness is subject to critiques anchored in cultural analysis more than justifications, although in the context on self-defense they are rather narrow still, revolving mostly around demographic biases. See LEE, *supra* note 184; Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 28–30 (2014).

²⁷⁷ See Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J. L. REFORM 79, 93 (2009) (arguing that “the traditional opacity of ‘not guilty’ verdicts is both functional and virtuous.”); see also Miriam Gur-Arye, *Should a Criminal Code Distinguish between*

Cathryn Rosen and Claire Finkelstein have separately sought to reclaim this history on behalf of battered women who have killed their abusers.²⁷⁸ Rosen stresses that the battered women cases that raise difficult questions are ones that do not fit the framework of justificatory self-defense, since the reason why they should not be blamed is that particular circumstances imposed impossible choices on them, rather than objectively identifiable and universally applicable conditions.²⁷⁹ Revitalizing the distinction between justification and excuse as doctrinally meaningful would allow acquittal while obviating a “qualitative balancing act” between the batterer’s life and that of his spouse.²⁸⁰ Unlike justification, excuse does not require a determination that the batterer’s death incurs no moral or social harm—for example, by explaining why his attacks amount to a forfeiture of his right to life. Rosen insists that “[i]f we sympathize with the women as being victims of their social reality, we must sympathize with the batterers as well.”²⁸¹

The question of whether agents are responsible for excused conduct is contested among theorists, but the traditional answer is negative.²⁸² Finkelstein agrees with Rosen on the necessity of an account of self-defense that will heed defendants’ subjective reasons for action “over and above the objective elements of their situations,”²⁸³ yet without suggesting a psychological impairment. She develops a conceptualization of excuse as *rational*, rendering excuse consistent with responsibility without it leading to liability to punishment. Finkelstein focuses on cases of “*near self-defense*” such as Judy Norman’s,²⁸⁴ where the traditional elements of self-defense—necessity, proportionality, imminence—do not apply, and the defendant does not even have a “putative” self-defense claim, namely that they reasonably but mistakenly believed that these elements apply.²⁸⁵ Justification, per Finkelstein, applies only to acts that are both harm-minimizing and done for that reason—that is, to promote social welfare and the public good.²⁸⁶ The self-preservation motivation, on the other hand, is self- rather than other-regarding. This motivation is a reason for action we should not endorse and deem admirable, but which we should understand

Justification and Excuse?, 5 CAN. J.L. & JURIS. 215 (1992) (noting that the distinction has little legal effect across common law jurisdictions).

²⁷⁸ Another excusatory account in the same spirit was developed with inspiration from German law. Sunny Graff, *Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law*, 10 LOYOLA L.A. INT’L & COMP. L.J. 1 (1988). German law has generally served as a rich source for comparative investigations in the contexts of self-defense and the justification/excuse debate. See Fletcher, *supra* note 26. The self-defense regime in Germany is very permissive, guided by the idea that “the right need not yield to the wrong;” however, in contrast to the U.S., it does not enjoy wide resonance with the general public. FUNK, *supra* note 42, at 136–43.

²⁷⁹ Rosen, *supra* note 196, at 43.

²⁸⁰ *Id.* at 46.

²⁸¹ *Id.* at 51.

²⁸² Pendleton, *supra* note 263, at 656 (characterizing excuse defenses as applying when “defendant is not responsible for an act that is wrongful.”). But see DUFF, *supra* note 26, at 284–91; GARDNER, *supra* note 26, at 83–86 (conceptualizing excuses as compatible with responsibility).

²⁸³ Finkelstein, *supra* note 46, at 623.

²⁸⁴ *Id.* at 628 (italics in original).

²⁸⁵ See *supra* note 196.

²⁸⁶ Finkelstein, *supra* note 46, at 627.

and tolerate, inasmuch as a reasonable person would regard the conditions as threatening.²⁸⁷

Although Finkelstein is primarily concerned with morality, she alludes to an institutional view of justifications as well, noting that “[w]here an individual’s reason for violating a prohibitory norm is self-interested, the judge of the necessity for the violation and the beneficiary of that act are one.”²⁸⁸ And in reverse, the weaker the “acoustic” and actual separation between laypersons and officials, the more suspicious self-interested defenses get, even if doctrinal elements are satisfied.²⁸⁹ Rosen is also worried about persons becoming the judges of their own deeds, since broadening justificatory self-defense would encourage self-help and raise levels of violence “in an all too violent society.”²⁹⁰

Unfortunately, the horse is out of the barn. American self-defense law underwent a swifter transition than its English counterpart. In the beginning of the nineteenth century, justifiability was a matter of preventing a felony and hence acting on behalf of the sovereign rather than out of self-preservation.²⁹¹ The two were harmonized with the broadening of self-defensive rights, “paradoxically, from a desire to empower or deputize Americans to combat violence.”²⁹² Darrell Miller reads this history to mean that “faultlessness of a homicide turned on notions of crime prevention, public order, and punishment, rather than on notions of human autonomy.”²⁹³ But this is a history of synthesis, not of incommensurable paradigms.²⁹⁴ The institutional history of law enforcement in the U.S. is characterized by wide dissemination of authority, and its governance ideology blurs the boundaries

²⁸⁷ *Id.* at 647–49. Finkelstein also makes a descriptive argument, according to which existing law is ambivalent about killing from self-interest rather than promotion of social welfare, because “killing in self-defense could never be an obligation” and warrants “no special accolades” (*id.* at 642–43). As this Article shows, I doubt that this is an accurate description of American law today (*see supra* notes 125–27 and accompanying text). Finkelstein’s article was published before some of the phenomena discussed here reached full bloom (1996), but it may also have missed them due to a common methodological fault: the thought that substantive provisions of penal codes and their interpretation by the courts exhaust the relevant sources of criminal jurisprudence.

²⁸⁸ *Id.* at 643.

²⁸⁹ Thorburn, *supra* note 29, at 1122; Dan-Cohen, *supra* note 41, at 639.

²⁹⁰ Rosen, *supra* note 196, at 55.

²⁹¹ Miller, *supra* note 275, at 92–94.

²⁹² Joshua Stein, *Privatizing Violence: A Transformation in the Jurisprudence of Assault*, 30 L. & HIST. REV. 424, 425 (2012). Residues of the approach that justifiability is a predicate of promoting the common good remain in case law. Thorburn, *supra* note 29, at 1127 (providing examples from late twentieth century American and Canadian court decisions).

²⁹³ Miller, *supra* note 275, at 95. This is true not only for Anglo-American law but for the common law more generally, including other former British colonies, such as India. *See* Cheah Wui Ling, *Private Defence*, in CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM 185 (Wing-Cheong, Barry Wright & Stanley Yeo eds., 2016) (arguing that the private defense provisions in the Indian Penal Code reflect the interests of the nineteenth century British colonial authorities who drafted them rather than a theory of individual rights); Dan-Cohen, *supra* note 41, at 640 n.35 (noting that the colonial regime in India feared that exculpation for self-interested purposes would have pernicious social effects and hence eliminated defenses of necessity and duress from the penal code, opting instead for a discretionary option to relieve of punishment in particular cases).

²⁹⁴ Finkelstein, *supra* note 46, at 639–41 (suggesting that current Anglo-American law of justification is situated “midway” between a pre-political view of self-defense and the view that it is subsumed in social welfare).

between private and public violence.²⁹⁵ The upshot is that combating crime is in itself a means for securing autonomy.²⁹⁶

The blurry lines between private and public violence and between aggressive and defensive violence are a feature, not a bug. In this climate, we should not want to tell self-defenders that they have done the right thing, nor provide them with the powers that justification confers, vindicate the values that justificatory self-defense stands for, or accept the socio-political conditions that self-defense laws create or perpetuate. Miller is still on point that “our law of self-defense is not natural or neutral; it is a choice.”²⁹⁷ This Article has argued that that choice ought to be a reimagining of self-defense under the light of cultural and political rather than psychological pathologies. Instead of leveling battered women up, we should level all self-defenders down. No American escapes the cultural resonance of justificatory self-defense regimes, writ large. This cultural resonance implicates the state’s standing to justify,²⁹⁸ because it pollutes the entire socio-legal environment.²⁹⁹

This argument does not preclude that self-defense can establish a (rational) excuse. In contrast to justification, excuse does not settle the matter. Rather, it opens up further normative inquiry into the communal failures that leave self-defenders no other recourse but violence and that make such recourse seem inevitable. It also opens up doctrinal puzzles that cannot be resolved here. Some of these are internal to criminal law, such as: whether self-defense should be available to a person who is at fault or who does not retreat; third-party liability for assisting self-defense; the right to resist a self-defensive act; which party ought to carry the burdens of production and of proof; and the availability of civil action against self-defenders. Appreciating the problem of self-defense as an institution also invites us to broaden the normative horizons of criminal jurisprudence beyond the traditional terms of substantive criminal law. Thus, we might also ask such questions as: whether the rules for police use of force should be different than those applying to private citizens;³⁰⁰ whether persons should be mandated to show “proper cause” for acquiring a license to carry firearms in public;³⁰¹ and more broadly, what de-justifying self-defense implies for

²⁹⁵ See, e.g., *supra* notes 9–10, 75, 85, 165, 215 and accompanying texts.

²⁹⁶ See CARLSON, *supra* note 6, at ch. 4 (explaining that many gun owners subscribe to an intertwined conception of self-defense and duty to protect).

²⁹⁷ Miller, *supra* note 275, at 97.

²⁹⁸ The question of the state’s standing to justify mirrors the more frequently asked one regarding the state’s standing to blame. See Lacey & Pickard, *supra* note 262 (discussing standing to blame); DSOUZA, *supra* note 22, at 112 (“[A] system of rationale-based excuses that is sensitive to the society’s standing to criticise the defendant is logically coherent and intuitively plausible.”).

²⁹⁹ Cf. Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 254–55 (2021) (framing criminality as “socio-legal pollution”); Lori L. Heise, *Violence Against Women: An Integrated Ecological Framework*, 4 VIOLENCE AGAINST WOMEN 262 (1998) (expounding an “ecological” approach for gender-based violence).

³⁰⁰ See Thornburn, *supra* note 29, at 1123–24 (doubting whether such differences should persist, since self-defenders operate in a fiduciary capacity as well when claiming a justification; public versus private force hinges not on the person who exercises it but on the interests they represent. This problematizes the distinction of “private defences” as ones carried out by the individual as opposed to state authorities. BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 1–2 (2006)).

³⁰¹ The Supreme Court struck such a gun licensing regime down for infringing on Second Amendment rights in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022).

the justification of state coercion and the Second Amendment.³⁰² As a cultural alternative to justificatory self-defense regimes, which venture to resolve our discomfort about violence, excusatory self-defense sustains this discomfort and fleshes out its social effects.

VI. CONCLUSION

This Article hopes to have fruitfully provoked two uber-doctrinal ways of thinking about criminal law whose mutual engagement is disappointingly scarce. One is a “law, culture, and the humanities” approach, associated mostly with critical thinking, and the other is an analytic philosophy approach, associated mostly with normative thinking. Interestingly, there is a vast literature about self-defense in analytic thought,³⁰³ yet there is very little discussion on the nature and meaning of violence.³⁰⁴ Conversely, while critical thought offers a robust body of literature about violence,³⁰⁵ it offers scant discussion on self-defense.³⁰⁶

Perhaps what accounts for these gaps is that the framework in which analytical thinkers work is generally that of liberalism, which leads to a view of the basic unit of analysis as the rational individual agent. This working assumption, in turn, renders violence a rather simple notion, for it can sidestep complex social, emotional, and hedonic structures. Critical thinkers, although not necessarily illiberal in normative terms,³⁰⁷ highlight the ways in which that is too simple a notion, owing to the fact that the relevant selves are embodied, on the one hand, and social, on the other hand. Harms and wrongs to the self must therefore be analyzed with sociality and embodiment in mind, which makes violence much harder to understand and much more interesting to explore. These same scholars, however, have possibly neglected self-defense due to their own captivity to the liberal logic. The critics focus of inculpatory mechanisms that bring people under the umbrella of state coercion, leaving exculpatory mechanisms unexplored. This neglect might also stem from the sheer complexity assigned to the phenomenon of violence as an amorphous social structure that no individual’s reasoning can

³⁰² Cf. Farrell, *supra* note 20 (arguing that self-defense justifies punishment); Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63 (2020) (arguing that self-defense sets the doctrinal limits of the Second Amendment).

³⁰³ See Helen Frowe, *Self-Defense*, STAN. ENCYCLOPEDIA PHIL. (June 29, 2021), <https://plato.stanford.edu/entries/self-defense> [<https://perma.cc/E6MX-WAN4>], and the sources cited therein.

³⁰⁴ To illustrate, in contrast to self-defense, there is no entry on violence in the Stanford Encyclopedia of Philosophy. *Id.* Analytic philosophy’s approach to violence can perhaps be described as eliminativist (see *supra* note 36), finding no use in this term and instead speaking of harms and wrongs. A notable exception is MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* ch. 6 (2009).

³⁰⁵ Think books edited by Austin Sarat (see, for example, *infra* note 314), and think interpretations of WALTER BENJAMIN, *Critique of Violence*, in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS* 277 (Peter Demetz ed., Edmund Jephcott trans., 1986).

³⁰⁶ This has recently started to change. See BUTLER, *supra* note 136; LIGHT, *supra* note 109; Kautzer, *supra* note 98. Note that none of these authors is a legal academic.

³⁰⁷ See Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM/LEFT CRITIQUE* 1, 5–11 (Wendy Brown & Janet Halley eds., 2002) (describing Left legalism as critical of but not necessarily opposed to liberal legalism).

capture. Under this logic, self-defense, as a justification one gives for one's own actions, tells us little about the social phenomenon that is violence.³⁰⁸

Whereas critical theorists tend to expand what counts as violence—usually to shift attention to hegemonic and stealthy forms of violence for which people who wear suits and sit in offices are responsible³⁰⁹—lawyers are wary. They warn that defining violence is a task that demands great care, because when violence gets codified into criminal law, those who do it get severely punished. Unfortunately, legislatures sometimes use violence as little more than a bombastic term for “all we find repulsive, transgressive, or simply sufficiently annoying.”³¹⁰ Moreover, legislative definitions of violence are highly prone to racial and other biases.³¹¹ For such prudential reasons, on top of analytic ones,³¹² we might think twice before categorizing every injustice as violence.

The insight this Article offers for these groups to ponder—the philosophers, the critics, and the lawyers—is that self-defense is not the last, but the first problem of violence.³¹³ This proposition might seem puzzling since there is no instance more widely accepted for using violence than self-defense, and so it appears as the least urgent. The first piece of this puzzle is realizing that self-defense is not only a matter of private violence that has no bearing beyond inter-personal situations; on the contrary, self-defense not only expresses, but also shapes structures of governance, cultural scripts, and social power relations. The second, related piece of this puzzle is that self-defense uses physical force to assert core elements of identity, including demographic attributes such as gender, race, and class; reactive attitudes such as fear, anger, and resentment; values such as liberty, civility, and honor; political affiliations such as membership in an interest group, ideological party, or body politic; and social roles, such as being a father and breadwinner or a freedman. This richer view of self-defense directly implicates violence in uncomfortable ways, for the universal approval of self-defense allows it to smuggle violence toward and triumph over the other as a legitimate means for fortification of an autonomous, authentic self.

³⁰⁸ See BOLTANSKI & THÉVENOT, *supra* note 226, at 345 (critiquing interpretive social scientists for arguing that “[o]rder is maintained by some form of deception (alienation, belief) that, without being imposed by the force of arms, nevertheless stems from violence. . . . The general explanation by way of ‘power relations,’ an eminently ambiguous expression because it associates recourse to violence with a reference to a principle of equivalence that is necessary to establish ‘relations,’ no longer leaves room for the justifications people give for their actions.”).

³⁰⁹ See, e.g., JACQUELINE ROSE, ON VIOLENCE AND ON VIOLENCE AGAINST WOMEN 6 (2021) (“Who decides what is called out as violence? Who determines the forms of violence we are allowed, and permit ourselves, to see? Not naming violence . . . is one of the ways that capitalism has always preserved and perpetuated itself.”); JAMES A. TYNER, VIOLENCE IN CAPITALISM: DEVALUING LIFE IN AN AGE OF RESPONSIBILITY 4–7 (2016) (discussing structural violence).

³¹⁰ Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011).

³¹¹ DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 15 (2021).

³¹² DEMPSEY, *supra* note 304, at 107–09 (favoring a narrow account of violence as physical rather than structural for reasons of analytic clarity).

³¹³ I have noted elsewhere that Judith Butler makes a similar point. Rafi Reznik, *Judith Butler, The Force of Nonviolence: An Ethico-Political Bind*, 17 L. CULTURE & HUMANS. 382 (2021) (reviewing BUTLER, *supra* note 136).

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Taking a Break from Self-Defense

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Can criminal law promote nonviolence?³¹⁴ After all, like self-defense, criminal law deals with violence by doing more of it. One direction nonviolence leads in, however, is the direction this Article has pursued: deep suspicion toward any justification for violence.

³¹⁴ If an answer exists, surely it resides in Robert Cover's grave, and attempts to dig it up from there have indeed been made. Peter Fitzpatrick, *Why the Law Is Also Nonviolent*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 142 (Austin Sarat ed., 2001). *But see* BUTLER, *supra* note 136, at 181 ("Whatever 'law' imposes itself against violence is not a law that can be codified or applied.").