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**THE COLOR OF FEAR: A COGNITIVE-RHETORICAL ANALYSIS
OF HOW FLORIDA’S SUBJECTIVE FEAR STANDARD IN STAND
YOUR GROUND CASES RATIFIES RACISM**

ELIZABETH ESTHER BERENGUER*

*It must be remembered that the visibility of race was used as a tool to consolidate domination, to seize land, and to recruit and extract mass labor. All this is still going on today. The racism of the past is still active in the present.*¹

INTRODUCTION

Alicia Garza, Opal Tometi, and Patrisse Cullors created #BlackLivesMatter movement as “a response to the anti-Black racism that permeates our society.”² They established this movement at a moment in time when “Trayvon Martin was [posthumously] placed on trial for his own murder and the killer, George Zimmerman, was not held accountable for the crime he committed.”³ This Essay analyzes the statutory structure that legalized, legitimized, and ratified Martin’s murder.

When Trayvon Martin was shot and killed, Florida’s Stand Your Ground laws took center stage on the national scene.⁴ Many decried Zimmerman’s killing of Martin as outright murder, but Zimmerman was not convicted because this type of homicide in Florida is not only justified—it is legal.⁵ The Stand Your Ground statutory scheme was enacted to permit just

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1. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 249 (2015).

2. Alicia Garza, *A HerStory of the #BlackLivesMatter Movement*, BLACKLIVESMATTER, <http://blacklivesmatter.com/herstory/> (last visited Apr. 2, 2017).

3. *Id.*

4. See FLA. STAT. §§ 776.012, 776.013, 776.031, 776.032 (2016).

5. See Michael H. Cottman, *Commentary: Zimmerman Acquittal Says It’s Open Season on Black Males*, BLACK AM. WEB (July 14, 2013), <http://blackamericaweb.com/2013/07/14/zimmerman-acquittal-black-teens/>; Richard Thompson Ford, *The Law that Acquitted Zimmerman Isn’t Racist: But That Doesn’t Mean the Outcome Wasn’t*, NEW REPUBLIC (July 16, 2013), <https://newrepublic.com/article/113873/zimmerman-trial-racist-laws>. Cottman noted:

The acquittal of George Zimmerman, who shot and killed unarmed black teenager Trayvon Martin, has led many to indict the jury that delivered the verdict as racists. But because of Florida’s lax laws on self-defense and problems with the prosecution’s case, the verdict was probably justified. The real injustice is that what Zimmerman did was

this sort of killing.⁶ In 2005, Florida's legislature abolished the duty to retreat so that anyone who feared an attack could meet force with force and kill with impunity; in essence, the state legalized homicide.⁷

The impact of legalizing homicide extends far beyond the death count. As the founders of the #BlackLivesMatter movement have aptly recognized, acquittal and non-prosecution of homicides are deeply infected by endemic, long-standing racism.⁸ Florida's Stand Your Ground laws employ a subjective fear standard coupled with immunity from prosecution, which perpetuates racism in that it ratifies and propagates the implicit biases that cause us to fear "the Other," especially Black male "Others," however irrational that fear may be.⁹

Part I of this Essay explores cognitive theory as it relates to race and fear, and more particularly why the brain perceives the Other (especially Black Male Others) as a threat. It utilizes the "suspicion heuristic"¹⁰ to analyze how the subjective fear standard ratifies implicit bias and racism.¹¹ Some scholars have studied Stand Your Ground laws through the lens of the suspicion heuristic to analyze how application of the reasonable person standard absolves racially biased acts.¹² This Essay takes that analysis a step further by analyzing the impact of a subjective fear standard. This Part concludes that subjective standards not only absolve negative race-based behaviors but actually ratify, condone, and perpetuate implicit biases and racist beliefs.

Part II explains Florida's Stand Your Ground statutory scheme and the legislature's intent in enacting it. Since the scheme's enactment, Florida

lawful, and the real racial issue here is that thousands of black people are in prison for far less serious offenses.

Id.

6. Elizabeth Berenguer Megale, *A Call for Change: A Contextual-Configurative Analysis of Florida's "Stand Your Ground" Laws*, 68 U. MIAMI L. REV. 1051, 1093 (2014).

7. Elizabeth Berenguer Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 255-56, 286-87, 299 (2013).

8. See Garza, *supra* note 2.

9. SETHA LOW, BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA 137 (2003); Megale, *supra* note 7, at 288.

10. See L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296 (2013) (developing the concept of the "suspicion heuristic" to "explain the predictable errors in perception, decision-making, and action that can occur when individuals make judgments of criminality").

11. The statutory scheme itself explicitly provides for a subjective standard of fear in determining whether someone is entitled to claim immunity. FLA. STAT. §§ 776.012, 776.013, 776.031, 776.032 (2016); Megale, *supra* note 7, at 293.

12. Richardson & Goff, *supra* note 10, at 332-34.

courts have wrestled with applying the subjective intent standard.¹³ Recently, the Florida Supreme Court utilized a reasonable person standard in interpreting Stand Your Ground¹⁴; in response, the legislature proposed a number of bills evidencing its original intent to create a subjective fear standard to protect *innocent* people from prosecution.¹⁵ Although these most recent bills have not yet successfully passed the legislature, the rhetoric that supports these proposed bills mirrors the original debates and conversations that led to the 2005 enactment of Stand Your Ground.¹⁶

This Essay concludes by applying cognitive theory to Florida's Stand Your Ground laws to explore how implicit bias and outright racism played a role in its creation. It further posits that the law ratifies endemic racism because it encourages individuals to rely on their instinctive reactions to perceived threats when those instinctive reactions are inextricably intertwined with any combination of long-standing historical racism, overt discrimination, and implicit bias.

13. The statutory scheme is silent as to procedure and burden of proof. As a result, Florida courts were faced with interpreting the legislature's intent, thereby causing confusion and inconsistency until such matters were decided on appeal to the State's highest court. *See, e.g., Bretherick v. Florida*, 170 So. 3d 766, 768, 770 (Fla. 2015) (upholding the intermediate court's holding that the issue of whether the defendant's subjective fear was reasonable must be resolved at a pretrial hearing in which the defendant must prove entitlement to immunity from prosecution by a preponderance of the evidence and rejecting placement of the prosecution's burden at less than a "beyond a reasonable doubt" standard); *Dennis v. State*, 51 So. 3d 456, 460 (Fla. 2010) (approving the procedure of a pretrial evidentiary hearing); *Peterson v. State*, 983 So. 2d 27, 29 (Fla. Dist. Ct. App. 2008) (stating that the defendant would bear the burden of proving, by a preponderance of the evidence, entitlement to immunity from prosecution at the pretrial evidentiary hearing); *Dennis v. State*, 17 So. 3d 305, 306 (Fla. Dist. Ct. App. 2009) (holding that the mere existence of disputed issues of material fact require the denial of a defendant's motion to dismiss). The propriety of the Florida Supreme Court's statutory interpretation is the subject of a forthcoming article by the Author. This Essay confines its analysis to the plain language of the statutory scheme.

14. *Bretherick*, 170 So. 3d at 770.

15. The Florida Supreme Court's ruling in *Bretherick* led to a number of bills proposing to enact different standards. *See, e.g., S. 344*, 2015 Leg., Reg. Sess. (Fla. 2015) (proposing to shift the burden of proof to the prosecution to disprove a defendant's immunity claim beyond a reasonable doubt); *S. 1100*, 2015 Leg., Reg. Sess. (Fla. 2015) (proposing to require an overt act from the attacker before reasonable force may be used); *S. 228*, 2015 Leg., Reg. Sess. (Fla. 2015) (as filed) (proposing to prohibit courts from imposing minimum mandatory sentences on defendants that committed certain acts using a firearm if they find that the defendants subjectively believes the use of force was justified); *S. 228*, 2015 Leg., Reg. Sess. (Fla. 2015) (as substituted by S. Comm. on Criminal Justice) (proposing to eliminate aggravated assault from the list of crimes mandating courts to impose a minimum sentence). Most recently, on March 15, 2017, the Florida Senate voted to approve CS/SB 128, which requires a court to grant a defendant pretrial immunity unless the State proves beyond a reasonable doubt that the defendant is not immune. *S. 128*, 2017 Leg., Reg. Sess. (Fla. 2017). As of the date of this publication, the Florida House is considering the measure. *CS/SB 128: Self-Defense Immunity Bill History*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2017/00128> (last visited Apr. 2, 2017).

16. Megale, *supra* note 6, at 1074–76; Megale, *supra* note 7, at 271–72.

I. COGNITIVE THEORY

The theory of embodied rationality posits that the human brain cannot process new and abstract information without first connecting it to an existing experience.¹⁷ Existing life experience provides a framework for understanding the meaning of new information. Importantly, we do not just *discover* the meaning of new information—we *construct* it.

Metaphors, stereotypes, heuristics, and biases are the building blocks for constructing reality. Metaphors create neural shortcuts that imply broad meanings when mere words or shorter phrases are expressed.¹⁸ For example, the phrase “welfare queen” is a metaphor that carries with it certain implications regarding race, gender, social status, and value.¹⁹ Metaphor is one of the devices by which culturally salient concepts are constructed.²⁰ Stereotypes often arise from metaphors to provide organized pictures of the world that offer information about entities, relations, objects, and acts.²¹ Stereotypes do not just provide information about these groups; rather, they provide the basis for evaluating the value, status, and position of the groups.²² Heuristics are the devices by which the brain utilizes neural shortcuts such as metaphors and stereotypes to “reduce complex decisions to simpler assessments.”²³ At times, the ultimate assessment produces an incorrect or wrong conclusion or decision. A bias exists when those wrong conclusions or decisions are predictable.²⁴

Cognitive science offers insight as to why systemic and covert racism is so entrenched in modern society. Because the brain filters every new experience through prior life experiences, perception of events in real time is affected not only by the event itself but also by prior individual and collective experience. Research confirms that the brain is “influenced by race, culture,

17. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 259 (2002); see also Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 280–82 (2011); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 136 (2008); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259 (2009).

18. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 BOSTON C.J.L. & SOC. JUST. 233, 240 (2014) (“[H]uman thought is defined by metaphors.”).

19. *Id.* at 242–43.

20. Jörg Zinken, *Metaphors, Stereotypes, and the Linguistic Picture of the World: Impulses from the Ethnolinguistic School of Lublin*, METAPHORIK.DE, no. 7, 2004, at 115, 120, <http://www.metaphorik.de/en/journal/07/metaphors-stereotypes-and-linguistic-picture-world-impulses-ethnolinguistic-school-lublin.html>.

21. *Id.* at 116.

22. *Id.*

23. Richardson & Goff, *supra* note 10, at 298.

24. *Id.*

and the culture of race.”²⁵ In the context of race, the collective modern experience has created neural frameworks under which, as a society, certain beliefs regarding the value of various groups within our society are commonly held.²⁶ These beliefs have fostered explicit and implicit racial biases, and this Part analyzes how racial bias evokes false fear.

A. *Race as a Social Construct*

Though some would argue that we live in a post-racial era and society is arguably mostly colorblind, numerous social, political, and cultural institutions are sustained by structurally racist ideologies and practices. Undoubtedly, race is a relevant factor in nearly every facet of modern life.

But race is not a biological truth; rather, it is a social construct.²⁷ Although race may often be represented through innate physical characteristics like skin color or face shape, the implications and associated beliefs about what race means are determined by ever-shifting social constructs that both influence the meaning of race and are also influenced by race itself.²⁸

Race matters because we as a society have for centuries said it matters. It has been the principal tool of social control wielded by dominant White males since the inception of the American nation.²⁹ Historically, we have relied on observable racial characteristics, namely skin color, hair texture, and facial features, to create artificial distinctions and hierarchies designed to preserve power among wealthy White male elites while systematically barring vast numbers of minority voices from meaningful participation in

25. Christian M. Halliburton, *Race, Brain Science, and Critical Decision-Making in the Context of Constitutional Criminal Procedure*, 47 GONZ. L. REV. 319, 320 (2012). To support this conclusion, Halliburton relies on the following studies: William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806 (2004) [hereinafter Cunningham et al., *Separable Neural Components*]; William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2004) [hereinafter Cunningham et al., *Implicit and Explicit Ethnocentrism*]; Bernd Wittenbrink et al., *Evidence for Racial Prejudice at the Implicit Level and Its Relationship with Questionnaire Measures*, 72 J. PERSONALITY & SOC. PSYCHOL. 262 (1997); Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, 11 NEUROREPORT 2351, 2353–54 (2000); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1326 (2008); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 732 (2000). Professors Richardson and Goff reach a similar conclusion that “merely perceiving race—even absent racial animus—can bias judgments of criminality.” Richardson & Goff, *supra* note 10, at 296.

26. Cammett, *supra* note 18, at 242.

27. OMI & WINANT, *supra* note 1, at 247–49.

28. *Id.*

29. *Id.* at 246.

society.³⁰ Through this process, racial stereotypes have emerged as “carriers of cultural elements” that inform societal perceptions as to worthiness and stigma.³¹ As Michael Omi and Howard Winant explain,

Racialization involved the promotion of certain corporeal characteristics such as skin color and hair texture to a greater degree of importance than other presumably “normal” human variations, such as, say, physical height or eye color. These phenomic traits, initially associated with African bodies or with indigenous bodies in the Americas, were soon elevated to the status of a “fundamental” (and later biological) difference. The attachment of this process of “othering” to immediately visible corporeal characteristics facilitated the recognition, surveillance, and coercion of these people, these “others.” This phenomic differentiation helped render certain human bodies exploitable and submissible. It not only distinguished Native Americans and Africans from Europeans by immediately observable, “ocular” means; it also occupied the souls and minds that inhabited these bodies, stripping away not only people’s origins, traditions, and histories, but also their individuality and differences. In response to these outrages and assaults, resistance developed from individual to collective forms, “groupness” or “fusion” grew, and soon enough also took on a racial framework, if only to face the white oppressors.³²

Prior to Emancipation, the value of Black men was simply that of “laborers under the supervision of White men.”³³ After Emancipation, however, racial constructs became more complicated as White landowners navigated the devastating collapse of the plantation economy.³⁴ No longer property to be controlled by blatant and direct force, Black men and women were subjected to social control through the construction of negative racial stereotypes, most of which persist in some form today.

One pervasive belief was that Black men and women lacked the moral capacity to adequately parent their children. Prior to Emancipation, the slave owner was in a position to guide and discipline young Black children; post-Emancipation, however, the power of the state had to be leveraged “to step

30. OMI & WINANT, *supra* note 1, at 247; *see also* Teri A. McMurtry-Chubb, #SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body, 67 MERCER L. REV. 651, 654–55 (2016).

31. Cammett, *supra* note 18, at 242 (quoting Silvia Gherardi, *Where Learning Is: Metaphors and Situated Learning in a Planning Group*, 53 HUM. REL. 1057, 1062 (2000)).

32. OMI & WINANT, *supra* note 1, at 247.

33. McMurtry-Chubb, *supra* note 30, at 662.

34. *Id.* at 655.

in and discipline [Black] children for [the] benefit” of the state.³⁵ Thus, the construct of the Black child as unruly and disobedient rooted itself in shared cultural norms. Other constructed labels appeared during this time as well. For example, Black women and girls were considered sexually immoral and rebellious individuals who incited disobedience in Black men.³⁶ As to Black men, myths perpetuated the belief that “left to their own devices, Black men were criminals with a predilection to rape White women, burn down their former masters’ homes and farms (arson), and murder to cover up robbery.”³⁷ The impact of Emancipation on the Black man was to construct him as a criminal.³⁸ This construct led to the incarceration of Black individuals at an alarming rate, and as prisons became disproportionately black they became the principle vehicle for “funneling Black labor back to the State.”³⁹

Although the current system of policing and incarceration “functions exactly as intended”⁴⁰—to create a ready supply of forced labor post-slavery—the cognitive impact on society has extended far beyond this model. The average person does not necessarily think of prisons as holding a ready labor market. On the contrary, the common belief is that prisons are filled with “the dregs of society,” the worst monsters who harm society rather than contributing meaningfully to our social compact.⁴¹ What is more, society generally believes that people who are arrested deserve to be arrested and are in fact bad people.⁴²

In short, the post-slavery myth of the Black man as a danger to society, which was perpetuated to create a ready labor source for the newly-bankrupt White landowners, has created salient and widely-accepted cultural elements that Black men are in fact dangerous criminals. Code words and phrases

35. *Id.* at 659 (citing DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 26–30 (1997)).

36. *Id.* at 660–62.

37. *Id.* at 662 (citing PHILLIP A. BRUCE, *THE PLANTATION NEGRO AS A FREEMAN* 57, 92 (1889)).

38. “The Negro element is the most criminal in our population The Negro is much more criminal as a free man than he was as a slave.” W.E. BURGHARDT DU BOIS, *SOME NOTES ON NEGRO CRIME PARTICULARLY IN GEORGIA* 9 (1904).

39. McMurtry-Chubb, *supra* note 30, at 665–66.

40. *Id.* at 701.

41. Christopher O’Connor, *The Inmate I Can’t Forget: I Thought Prison Inmates Were the Dregs of Society, Until I Became One of Them*, SALON (Dec. 29, 2015, 6:00 PM), http://www.salon.com/2015/12/29/the_inmate_i_cant_forget_i_thought_prison_inmates_were_the_dregs_of_society_until_i_became_one_of_them/.

42. For example, one contributor to *The Federalist* stated, “Every time I hear of a black man being killed by the cops, he’s almost always a criminal thug I have no desire to defend.” John Gibbs, *If You Don’t Want Police to Shoot You, Don’t Resist Arrest*, FEDERALIST (July 11, 2016), <http://thefederalist.com/2016/07/11/if-you-dont-want-police-to-shoot-you-dont-resist-arrest/>. *But see* Virginia Hughes, *How Many People Are Wrongly Convicted? Researchers Do the Math*, NAT’L GEOGRAPHIC (Apr. 28, 2014), <http://phenomena.nationalgeographic.com/2014/04/28/how-many-people-are-wrongly-convicted-researchers-do-the-math/>.

often reveal the suspicion heuristic at work. Words like “thug” and “felon” readily call to mind images of a menacing Black man while words like “innocent” and “victim” conjure images of White people.⁴³ Notably, the word “criminal” has become synonymous with Black man, and, by the same token, the Black man is one and the same as Criminal.⁴⁴

B. Race and Fear

Certainly, society has made substantial progress in snuffing out the blight of overt racism. In the modern era, explicit racial discrimination is far less rampant than it was at the time of Emancipation, but implicit biases continue to infiltrate nearly every aspect of life. The problem is that “race bias, at least as it can be suggested by or measured in brain activity, is extremely elusive, being both implicit and unconscious.”⁴⁵

The suspicion heuristic explains how these biases result from “the predictable errors in perception, decision-making, and action that can occur when individuals make judgments of criminality.”⁴⁶ A “judgment of criminality” is “the assessment that another is engaged in criminal activity or poses a threat.”⁴⁷ Studies reveal that the mere perception of race can bias judgments in criminality despite the absence of racial animus or overt racism.⁴⁸ The centuries-old message has been consistent: people of color, especially Black men, ought to be feared. As a result, “[B]lack individuals are both more likely to be perceived as threatening, and more difficult to perceive as non-threatening, than white individuals.”⁴⁹

43. OMI & WINANT, *supra* note 1, at 256. In 2014, Seattle Seahawks cornerback Richard Sherman explicitly addressed the use of “thug” as a code word for the “N-word.” Ryan Wilson, *Richard Sherman: ‘Thug’ Is Accepted Way of Calling Someone the N-word*, CBS SPORTS (Jan. 22, 2014), <http://www.cbssports.com/nfl/news/richard-sherman-thug-is-accepted-way-of-calling-someone-n-word/>. He “was asked if ‘thug,’ a word that was used often on message boards and social media to describe the Seahawks cornerback, bothers him more than any other term.” *Id.* Sherman responded, “The reason it bothers me is because it seems like it’s an accepted way of calling somebody the N-word now.” *Id.* He continued, “It’s like everybody else said the N-word and then they say ‘thug’ and that’s fine. It kind of takes me aback and it’s kind of disappointing because they know.” *Id.*

44. Richardson & Goff, *supra* note 10, at 304 (“That is, as ‘Black’ activates thoughts of criminality, so too does criminality activate thoughts of Blackness, each strengthening the association between the two.”).

45. Halliburton, *supra* note 25, at 329.

46. Richardson & Goff, *supra* note 10, at 296.

47. *Id.* at 310.

48. *Id.* at 296.

49. Halliburton, *supra* note 25, at 328 (citing Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120 (2006); Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15 (2002)).

In one study, scientists analyzed amygdala responses to race and discovered that “race, as perceived by the subject brain, produces high rates of amygdala arousal, just as if that brain were dealing with an emotionally charged experience.”⁵⁰ This perception of race activates the amygdala, triggering an emotional response and affecting trust determinations. Furthermore, “amygdala activity can reinforce implicit bias and . . . implicit bias and trust determinations are likewise directly correlated.”⁵¹ Thus, “[w]hen subjects make decisions that heavily depend on amygdala and striatum inputs—such as whether to ‘shoot’ or ‘not shoot’ a particular target—the outcomes clearly correlate with the race of that target.”⁵²

The suspicion heuristic reveals the disturbing truth that, to a large extent, human beings are so affected by the existence of bias that it is impossible to escape its influence. The suspicion heuristic provides:

The decisions of the best-intentioned individuals may be affected by the mere existence of the stereotype because of the associative networks our minds use to process information. That is, merely being aware of the stereotype is sufficient to be influenced by it in ways that disadvantage those stereotyped as criminal, regardless of the perceiver’s intentions or character. Even worse, people’s heuristic-criminality judgment will feel *easy, familiar, and true* because they cannot evaluate information processes that proceed beneath awareness.⁵³

Even police officers, who are trained to objectively assess danger, cannot readily escape the influence of implicit bias and the suspicion heuristic. Police officers rely on their ability to accurately predict whatever threat a suspect may pose, but race inevitably distorts their perception even when they are well-trained and consciously unbiased. One reason is that “[t]here is a persistent and irrational expectation and perception of heightened propensity for violence and criminality in black men, and these expectations operate on the brain’s information processing mechanisms to instantly, but invisibly, color our judgment.”⁵⁴ Second, race perceptions trigger the

50. *Id.* at 326 (footnote omitted) (citing Hart et al., *supra* note 25, at 2351, 2353; Phelps et al., *supra* note 25, at 732).

51. *Id.* at 327 (citing Damian A. Stanley et al., *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 PROC. NAT’L ACAD. SCI. 7710, 7711–12 (2011); M. van’t Wout & A.G. Sanfey, *Friend or Foe: The Effect of Implicit Trustworthiness Judgments in Social Decision-Making*, 108 COGNITION 796, 801–02 (2008)).

52. *Id.* at 328 (Phelps et al., *supra* note 25, at 733).

53. Richardson & Goff, *supra* note 10, at 311 (emphasis added).

54. Halliburton, *supra* note 25, at 333 (footnote omitted) (first citing Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 950 (1984); and then citing E. Ashby Plant et al., *Selective Responses to Threat: The Roles of Race and Gender in Decisions to Shoot*, 37 PERSONALTY & SOC. PSYCHOL. BULL. 1274, 1274–79 (2011); E. Ashby

amygdala to initiate an emotional response “resulting in the increased role of negative emotion in generating meaning and choosing responsive action.”⁵⁵ Thus, even a highly-trained, seemingly unbiased officer likely will unavoidably perceive a suspect of color as a greater threat, less trustworthy, and more fearsome than a White suspect.

Although not all implicit biases are problematic, the effect of the suspicion heuristic necessarily harms minorities, and especially Black men.⁵⁶ Specifically, Black men “serve as our mental prototype (i.e., stereotype) for the violent street criminal.”⁵⁷ The ready availability of this stereotype is due both to society’s historical portrayal of the Black man as Criminal and the continued exaggerated media portrayals of Black men as Thugs perpetuating violent street crime.⁵⁸ The very existence of the stereotype inevitably triggers the suspicion heuristic.⁵⁹ Examples of this pervasive bias are ubiquitous. Consider the following non-exhaustive exemplary list:

1. Tamir Rice, a twelve-year-old Black boy, was shot and killed in November 2014, by Officer Timothy Loehmann.⁶⁰ Rice was playing with a toy gun in the park.⁶¹ Officers responded to a report that a boy was playing with a gun.⁶² Loehmann shot and killed Rice, claiming that he believed Rice had a real gun.⁶³ After shooting him, Loehmann did not seek medical attention for Rice.⁶⁴

2. Trayvon Martin, a seventeen-year-old Black boy, was shot and killed on February 26, 2012, by George Zimmerman, a self-appointed vigilante neighborhood watchman.⁶⁵ Zimmerman claimed Martin was suspicious because he was a young Black male, dressed in a hoodie, and walking in his neighborhood.⁶⁶ Martin was temporarily visiting his father and his father’s

Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers’ Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 180–84 (2005)).

55. *Id.* at 334 (citing R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCIENCE 1192, 1191 (2002)).

56. Richardson & Goff, *supra* note 10, at 301, 310.

57. *Id.* at 310 (citing Correll et al., *supra* note 49, at 1314–15; Danny Osborne, *Perceived Stereotypicality and Eyewitness Memory: Does the Type of Crime Affect Eyewitness Identifications?* 62–63 (May 27, 2009) (unpublished Ph.D. dissertation, University of California, Los Angeles)).

58. *Id.*

59. *Id.*

60. Michael Pearson, *Tamir Rice Shooting: Cleveland to Pay \$6 Million to Settle Family’s Lawsuit*, CNN (Apr. 25, 2016, 10:56 PM), <http://www.cnn.com/2016/04/25/us/tamir-rice-settlement/>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html?_r=0.

66. *Id.*

girlfriend who lived in that community.⁶⁷ He had every right to be walking there.⁶⁸

3. Jordan Davis, a seventeen-year-old Black boy, was shot and killed in September 2012, by Michael Dunn.⁶⁹ Dunn had ordered Davis and his friends to lower the music in their SUV.⁷⁰ They refused and Dunn fired multiple shots at the SUV as it drove away.⁷¹ Dunn claimed he was scared of the Black teenagers even though they had no weapons and were driving away.⁷²

4. Michael Brown, an eighteen-year-old Black man, was shot and killed on August 9, 2014, by Officer Darren Wilson.⁷³ Brown was walking down the street when Wilson ordered him to move onto the sidewalk.⁷⁴ When Brown walked away from Wilson, Wilson fired multiple shots at Brown who had retreated to the ground with his hands up.⁷⁵

5. Philando Castile, a thirty-two-year-old Black man, was shot and killed on July 16, 2016, by Officer Jeronimo Yanez.⁷⁶ Yanez pulled over Castile under the auspices of citing him for a broken taillight.⁷⁷ As Castile attempted to produce his ID as Yanez had requested, Yanez feared Castile was reaching for his gun and shot Castile multiple times.⁷⁸ Castile's girlfriend and her young daughter were in the car, witnessed the entire incident, and were prevented from providing aid to Castile.⁷⁹ Castile died later that night.⁸⁰

67. *Id.*

68. *Id.*

69. Paul Solotaroff, *A Most American Way to Die*, ROLLING STONE (Apr. 25, 2013), <http://www.rollingstone.com/culture/news/jordan-davis-stand-your-grounds-latest-victim-20130425>.

70. *Id.*

71. *Id.*

72. *Id.*

73. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

74. *Id.*

75. *Id.*

76. Mitch Smith & Timothy Williams, *Minnesota Police Officer's 'Bulletproof Warrior' Training Is Questioned*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/15/us/minnesota-police-officers-bulletproof-warrior-training-is-questioned.html>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

6. Alton Sterling, a thirty-seven-year-old Black man, was shot and killed on July 5, 2016, by police officers in Baton Rouge, Louisiana.⁸¹ Officers responded to a report that he had a gun and was outside a Louisiana store selling CDs.⁸² Upon arrival, they pushed him onto the hood of a car and then to the ground.⁸³ After restraining him, officers shot him multiple times.⁸⁴

7. Eric Garner, a forty-three-year-old Black man, was killed on July 17, 2014, by police officers in Staten Island, New York.⁸⁵ Officers stopped him under suspicion that he was unlawfully selling cigarettes.⁸⁶ Five officers pushed him to the ground and physically restrained him.⁸⁷ Garner repeatedly told officers he could not breathe, but the officers did not loosen the neck hold.⁸⁸ He died one hour later due to the compression of the neck hold.⁸⁹

8. Mario Woods, a twenty-six-year-old Black man, was shot and killed on December 2, 2015, by police officers in San Francisco, California.⁹⁰ Officers stopped him under suspicion that he had been involved in a stabbing earlier that day.⁹¹ Woods was in possession of a knife, and officers ordered him to put it down. When he refused to put down his knife five officers surrounded him, fired their guns, and shot him twenty times, killing him.⁹²

9. Walter Scott, a fifty-year-old Black man, was shot and killed on April 4, 2015, by Officer Michael Slager.⁹³ Scott fled from officers after being

81. Joshua Berlinger et al., *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN (July 8, 2016, 7:24 AM), <http://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Medical Examiner Rules Eric Garner's Death a Homicide, Says He Was Killed by Chokehold*, NBC 4 N.Y. (Aug. 21, 2014, 7:20 AM), <http://www.nbcnewyork.com/news/local/Eric-Garner-Chokehold-Police-Custody-Cause-of-Death-Staten-Island-Medical-Examiner-269396151.html>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*; James Queally, *Man's Death After Apparent Chokehold by NYPD Officer to Be Probed*, L.A. TIMES (July 18, 2014, 11:16 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-nypd-choking-death-20140718-story.html>.

90. Julia Carrie Wong, *Mario Woods, Black Man Killed by Police, 'Had 20 Gunshot Wounds'*, GUARDIAN (Feb. 12, 2016, 6:08 PM), <https://www.theguardian.com/uk-news/2016/feb/12/mario-woods-autopsy-san-francisco-police-fatal-shooting>.

91. *Id.*

92. *Id.*

93. Bruce Smith, *Correction: Police Officer—Fatal Shooting Story*, A.P. (Apr. 10, 2015, 10:29 PM), <http://bigstory.ap.org/article/d67e289fc6a64c2896365719826a294b/white-sc-officer-charged-murder-shooting-black-man>.

pulled over on a traffic stop.⁹⁴ Slager pursued Scott, tased him, and then shot him in the back as Scott ran away.⁹⁵

10. Dontre Hamilton, a thirty-one-year-old Black man, was shot and killed on April 30, 2014, by Officer Christopher Manney.⁹⁶ Manney responded to a report that Hamilton was sleeping on a park bench.⁹⁷ Hamilton began to resist Manney's pat down, and Manney pulled out his baton to subdue Hamilton.⁹⁸ After Hamilton gained control of the baton, Manney pulled his gun and shot Hamilton fourteen times.⁹⁹

11. John Crawford, a twenty-two-year-old Black man, was shot and killed on August 5, 2014, by police officers in Dayton, Ohio.¹⁰⁰ Crawford was shopping in Wal-Mart when a customer called 911 to report him carrying a gun.¹⁰¹ Crawford had picked up a pellet gun that was out of its package and sitting on a shelf, and then continued to walk around the Wal-Mart.¹⁰² When police arrived, they shot Crawford dead in the store.¹⁰³

12. Romain Brisbon, a thirty-four-year-old Black man, was shot and killed on December 2, 2014, by Officer Mark Rine.¹⁰⁴ Officers stopped him under suspicion that he was involved in an illegal drug transaction.¹⁰⁵ Officers ordered Brisbon to put his hands in the air, but Brisbon put them in his waistband instead.¹⁰⁶ The officer engaged Brisbon in a physical scuffle, and after they fell into Brisbon's girlfriend's apartment, the officer shot Brisbon twice in the chest.¹⁰⁷

94. *Id.*

95. *Id.*

96. Aamer Madhani, *No Charges for Milwaukee Officer Who Shot Man 14 Times*, USA TODAY (Dec. 22, 2014, 3:15 PM), <http://www.usatoday.com/story/news/nation/2014/12/22/police-shooting-milwaukee/20760011/>.

97. *Id.*

98. *Id.*

99. *Id.*

100. Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/?utm_term=.555383b0addc.

101. *Id.*

102. *Id.*

103. *Id.*

104. *No Charges for Phoenix Policeman in Shooting of Unarmed Black Man*, AL JAZEERA AM. (Apr. 1, 2015, 10:40 PM), <http://america.aljazeera.com/articles/2015/4/1/no-charges-for-phoenix-policeman-in-shooting-unarmed-black-man.html>.

105. *Id.*

106. *Id.*

107. *Id.*; Megan Cassidy, *Unarmed Arizona Man Killed by Cop*, USA TODAY (Dec. 4 2014, 11:34 PM), <http://www.usatoday.com/story/news/nation/2014/12/04/phoenix-police-unarmed-man-killed-by-officer/19878931/>; Terrence McCoy, *The Story of How a White Phoenix Cop Killed an Unarmed Black Man*, WASH. POST (Dec. 5, 2014),

13. Jerame Reid, a thirty-six-year-old Black male was shot and killed on December 30, 2014, by Officer Braheme Days.¹⁰⁸ He was traveling as a passenger in a car pulled over for allegedly running a stop sign.¹⁰⁹ Reid exited the car with his hands in the air when Officer Days shot seven rounds, all of which hit Reid.¹¹⁰

14. Charles Kinsey, a forty-seven-year-old Black male, was shot on July 18, 2016, by Officer Jonathan Aledda.¹¹¹ Kinsey was working as a behavioral therapist attempting to retrieve one of his patients who had run away from the group home.¹¹² Police received a report that someone was walking around with a gun, but when they arrived, they observed Kinsey standing over his patient trying to get him to return to the nearby group home.¹¹³ Officers pointed their guns and fired at Kinsey after he laid on the ground with his hands in the air.¹¹⁴ Kinsey required medical attention for his gunshot wounds.¹¹⁵

Compare these examples to that of William Bruce Ray, a sixty-two-year-old White male.¹¹⁶ An officer observed Ray on the side of the road pointing a shotgun at passing cars.¹¹⁷ The officer approached Ray and managed to remove the shotgun as well as a handgun from him.¹¹⁸ Although Ray fired a shot at the officer, the officer did not shoot Ray.¹¹⁹

These examples evidence a disturbing phenomenon: Black men and boys are killed at alarmingly high rates compared to White men, even under circumstances where Black men are unarmed and exhibiting submissive

<https://www.washingtonpost.com/news/morning-mix/wp/2014/12/05/how-a-white-phoenix-cop-killed-an-unarmed-black-man/>.

108. Thomas Barlas, *Police Video Shows Details of Fatal Bridgeton Shooting*, PRESS ATLANTIC CITY (Jan. 21, 2015), http://www.pressofatlanticcity.com/news/police-video-shows-details-of-fatal-bridgeton-shooting/article_ea83a22a-a106-11e4-bb55-1be3f9fb51cf.html.

109. *Id.*; Andy Polhamus, *Bridgeton Cops Won't Be Charged in Fatal Shooting, Grand Jury Decides*, NJ.COM (Aug. 20, 2015, 11:10 AM), http://www.nj.com/cumberland/index.ssf/2015/08/no_charges_for_bridgeton_cops_involved_in_fatal_sh.html.

110. Barlas, *supra* note 108; Polhamus, *supra* note 109.

111. Charles Rabin, *Cop Shoots Caretaker of Autistic Man Playing in the Street with Toy Truck*, MIAMI HERALD (July 20, 2016, 7:34 PM) [hereinafter Rabin, *Cop Shoots Caretaker*], <http://www.miamiherald.com/news/local/crime/article90905442.html>; Charles Rabin, *Charles Kinsey Was Shot Less than Six Minutes After Police Arrived*, MIAMI HERALD (Aug. 5, 2016, 5:22 PM) [hereinafter Rabin, *Six Minutes*], <http://www.miamiherald.com/news/local/crime/article94009242.html>.

112. Rabin, *Cop Shoots Caretaker*, *supra* note 111; Rabin, *Six Minutes*, *supra* note 111.

113. Rabin, *Cop Shoots Caretaker*, *supra* note 111; Rabin, *Six Minutes*, *supra* note 111.

114. Rabin, *Cop Shoots Caretaker*, *supra* note 111; Rabin, *Six Minutes*, *supra* note 111.

115. Rabin, *Cop Shoots Caretaker*, *supra* note 111.

116. *Raleigh Man Fires Handgun at Wake County Deputy*, CBS N.C. (July 6, 2016, 1:58 PM), <http://wncn.com/2016/07/06/raleigh-man-fires-handgun-at-wake-county-deputy/>.

117. *Id.*

118. *Id.*

119. *Id.*

behavior. The suspicion heuristic¹²⁰ explains why this phenomenon repeatedly occurs despite decreased explicit racism and increased awareness of implicit bias, and how even individuals who consciously reject stereotypes make racially-biased judgments.¹²¹

Presently, “linking non-Whites with criminality is cognitively easy”¹²² because, as a society, we have spent centuries accepting myths that people of color are dangerous and ought to be feared. That mode of thinking has created deeply embedded neural pathways that influence the picture we create of others and how we evaluate their value, position, and status. This canalization cannot be easily undone.¹²³ Even when we are aware of the potential bias, we cannot escape being influenced and acting in response to that bias because it functions beneath awareness.¹²⁴ In short, our brains tell us that being afraid of a person of color is more reasonable, on the whole, than being afraid of a White person.¹²⁵

II. FLORIDA’S STAND YOUR GROUND LAWS REQUIRE SUBJECTIVE INTERPRETATION OF FEAR THAT NECESSARILY PERPETUATES DEEPLY-ENTRENCHED RACIAL BIAS

The suspicion heuristic has been used to analyze self-defense statutes that employ a reasonable person standard for evaluating the legality of the use of force.¹²⁶ To summarize, the suspicion heuristic “suggests that using race as a proxy for suspicion is not unusual or unexpected.”¹²⁷ Therefore, even in hindsight, the use of force seems more reasonable when the victim is a person of color, especially a Black man, than when the victim is White. Under a reasonable person analysis, courts excuse or justify behavior consistent with these kinds of typical mistakes that the average person could make.¹²⁸ The positivist model suggests that it would be unfair to punish individuals for acting consistently with commonly held beliefs and “that punishment should be reserved for those who make mistakes that the average person could have avoided.”¹²⁹

The failure to punish behavior consistent with the suspicion heuristic, however, is problematic for at least three reasons. “First, typical beliefs are

120. Richardson & Goff, *supra* note 10, at 296.

121. *Id.* at 311–12.

122. *Id.* at 313.

123. Megale, *supra* note 7, at 262 n.35.

124. Richardson & Goff, *supra* note 10, at 311.

125. *Id.* at 313–14.

126. *See, e.g., id.* at 314.

127. *Id.* at 315–16.

128. *Id.* at 318 n.158.

129. *Id.* at 319 (citing Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 30 (1994)).

not necessarily morally correct or just. . . . Second, characterizing mistakes facilitated by the heuristic as reasonable represents a judgment that the mistake is acceptable. . . . Third, applying the positivist model to cases implicating the suspicion heuristic is problematic because the heuristic is pervasive.”¹³⁰ This Section demonstrates that these problems are magnified in jurisdictions that employ a subjective standard to evaluate the legality of use of force.

Although the reasonable person standard is the majority rule for most Stand Your Ground laws, Florida’s codified Stand Your Ground laws call for a subjective analysis.¹³¹ The three relevant statutes are Sections 776.012, 776.013, and 776.032. Section 776.012 codifies “Stand Your Ground” in that it permits the use of force, without imposing a duty to retreat, when “the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful [or deadly] force.”¹³² Section 776.012 codifies the “Castle Doctrine” and creates a presumption that an individual “held a reasonable fear of imminent peril of death or great bodily harm” when acting in self-defense in the person’s home or vehicle.¹³³ Section 776.032 codifies “Immunity” and prevents prosecution of anyone acting pursuant to Stand Your Ground or the Castle Doctrine.¹³⁴

130. *Id.* at 319–20 (footnote omitted) (citing Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 815 (1994)).

131. *See* *Martin v. State*, 110 So. 3d 936, 939 (Fla. Dist. Ct. App. 2013) (acknowledging that “[e]vidence that [defend]ant’s delirium arguably caused him to believe his life was in danger” was relevant to self-defense claim); *see also supra* notes 13–15 (discussing the Florida Supreme Court’s decision in *Bretherick v. Florida*, 170 So. 3d 766, 768 (Fla. 2015), and the legislature’s response).

132. FLA. STAT. §§ 776.012(1)–(2) (2016). That statute provides:

Use or threatened use of force in defense of person

(1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Id.

133. *Id.* § 776.013.

134. *Id.* § 776.032. The text of the statute provides:

Immunity from criminal prosecution and civil action for justifiable use or threatened use of force

Prior to 2005, Florida's self-defense statutory scheme imposed a duty to retreat on individuals who reasonably feared the threat of violence outside the castle, and reasonable fear was measured by the reasonable person yardstick. Since 2005, however, a person who experiences a threat is no longer required to retreat when threatened, and the question is no longer whether a reasonable person would have felt afraid under the circumstances. Rather, the question is whether this person's subjective fear was reasonable based on that person's individual perceptions and experience.¹³⁵ This conclusion becomes obvious when the Stand Your Ground statute is read *en pari materia* with the immunity statute.¹³⁶

Although Section 776.012 utilizes the phrase "reasonably believes," immunity would have no operative effect if the person using force were required to justify the act under a reasonable person standard. In Stand Your Ground, the legislature intended to create broad protections for individuals who believe it necessary to use force against another.¹³⁷ In lobbying for its passage, Marion Hammer (then president of the NRA and author of the legislative scheme) told Florida lawmakers that "[y]ou can't expect a victim to wait before taking action to protect herself, and say: 'Excuse me, Mr. Criminal, did you drag me into this alley to rape and kill me or do you just want to beat me up and steal my purse?'"¹³⁸

(1) A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use or threatened use of force as described in subsection (1), but the agency may not arrest the person for using or threatening to use force unless it determines that there is probable cause that the force that was used or threatened was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

Id.

135. Megale, *supra* note 7, at 299.

136. *See id.* at 267 (explaining the effect of coupling Sections 776.012 and 776.032).

137. *See id.* at 260 (quoting Representative Baxely on the law's purpose).

138. Ann O'Neill, *NRA's Marion Hammer Stands Her Ground*, CNN (Apr. 15, 2012, 9:20 AM), <http://www.cnn.com/2012/04/15/us/marion-hammer-profile/index.html>.

The whole purpose of immunity is to ensure that a *victim* is not required to justify the belief that the Other is a Criminal who intends to harm.¹³⁹ The immunity statute reflects this intent that people claiming self-defense ought not be prosecuted at all.¹⁴⁰ As recently as October 2015, the legislature proposed legislation that would clarify that “[i]mmunity from prosecution is different than the defense of justifiable use of force. Essentially, immunity *absolves* a person from criminal liability and the person has no risk of conviction of the crime for which immunity has been granted.”¹⁴¹

In essence, the reasonable person standard renders the immunity statute entirely meaningless in Florida because every *victim* would have to satisfactorily explain to some authoritative body, presumably a court, the circumstances surrounding the belief so that a determination could be made as to its reasonableness.¹⁴² In other words, figuring out whether a fear is objectively reasonable necessarily requires prosecution, which wholly circumvents and effectively nullifies the immunity statute.¹⁴³ On the other hand, applying a subjective standard would not demand that a prosecution occur in every case because law enforcement would be required to accept the victim’s assertion of fear absent evidence that the fear did not in fact exist.

The subjective fear standard, however, when viewed through the lens of the suspicion heuristic, still suffers from the three previously identified problems: (1) it allows cases to be decided based on beliefs that “are not necessarily morally correct or just”; (2) it condones “mistakes facilitated by the heuristic as reasonable”; and (3) allows the underlying biases to continue permeating society.¹⁴⁴ What is more, these problems were salient at the creation of the law and persist now in its operation.

Florida’s Stand Your Ground was designed to protect “innocent people” from prosecution when they protected themselves from Criminals.¹⁴⁵ The research and debate leading to the laws’ enactment reveal the pervasiveness of the suspicion heuristic. The legislature advanced an exaggerated story about James Workman who had shot and killed someone he believed was

139. See Megale, *supra* note 7, at 271 (discussing how the preponderance of evidence burden for a pretrial assertion of immunity “undermines the very purpose of immunity”).

140. See *Bretherick v. Florida*, 170 So. 3d 766, 775 (Fla. 2015) (recognizing that the goal of a defendant asserting pretrial immunity seeks “to avoid criminal prosecution”).

141. S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS AND FISCAL IMPACT STATEMENT FOR S.B. 344, 2016 Leg., 118th Sess., at 2 (Fla. 2015), <https://www.flsenate.gov/Session/Bill/2016/0344/Analyses/2016s0344.rc.PDF>.

142. See S.B. 344, 2016 Leg., 118th Sess. (Fla. 2015) (describing the evidentiary burden on defendants as “substantially curtail[ing] the benefit” of immunity).

143. See Megale, *supra* note 7, at 267 (discussing barriers to prosecution created by immunity).

144. Richardson & Goff, *supra* note 10, at 319–20.

145. Megale, *supra* note 7, at 258 (statement of Florida State House Representative Dennis Baxley); Megale, *supra* note 6, at 1076–77.

attempting to break into his camper.¹⁴⁶ Although Mr. Workman was never charged, proponents of the bill employed code words to generate fear that Innocent (read: White) People live in perpetual danger of attack by Criminals (read: Blacks).¹⁴⁷ The solution to this danger, they said, was twofold: (1) arm “ourselves” (Us=Whites) against “them” (Other=Black); and (2) protect Us from prosecution when we kill the Other.¹⁴⁸ This narrative took root because the pervasiveness of the suspicion heuristic made the story “*easy, familiar, and true*.”¹⁴⁹

Furthermore, the legislature sought to normalize and cast as reasonable the notion that Innocent People should be able to kill Criminals without consequence. Though not morally correct or just, Criminal is synonymous with Black Man.¹⁵⁰ Regardless of whether members of the legislature consciously rejected the stereotype, they must have been unavoidably affected by it. The fear response triggered by the code words and narrative would have been a very real experience to the legislators as they digested the Workman/Innocent vs. Criminal narrative. Furthermore, the desire to completely absolve the Innocent of criminal liability communicates acceptance of the suspicion heuristic and the Black Man as Criminal.

As applied, the very existence of the law condones and perpetuates bias. By immunizing the Innocent from prosecution, the law ratifies violent behavior triggered by irrational yet uncontrollable fear of the Other. Numerous studies show that when confronted by a Black man, most human beings experience a strong negative emotional reaction in the amygdala.¹⁵¹ This biological response reveals deeply entrenched beliefs about Black men that have been perpetuated over centuries. The suspicion heuristic is pervasive and inescapable even by those who consciously reject racism and bias. If even well-trained officers are unable to stop the biological implicit bias response, certainly lay individuals who are not trained at all will be even more susceptible to the fear, however irrational, automatically generated by the amygdala.

Additionally, Florida’s Stand Your Ground signals to the public that the suspicion heuristic is acceptable. The law seeks to absolve Innocent People of criminal liability when they kill Criminals. The immunity statute communicates that behavior consistent with the suspicion heuristic ought not be punished, effectively condoning the suspicion heuristic itself. The law

146. Megale, *supra* note 7, at 259–60; Megale, *supra* note 6, at 1076.

147. Megale, *supra* note 7, at 258–60.

148. *Id.*; O’Neill, *supra* note 138.

149. Richardson & Goff, *supra* note 10, at 311 (emphasis added).

150. *See supra* Part I.A.

151. *See, e.g.,* Cunningham et al., *Separable Neural Components*, *supra* note 25; Cunningham et al., *Implicit and Explicit Ethnocentrism*, *supra* note 25; Hart et al., *supra* note 25, at 2353–54; Trawalter et al., *supra* note 25, at 1326; Phelps et al., *supra* note 25, at 732.

assumes Innocent People possess beliefs that are moral, just, and correct, but the suspicion heuristic informs us that beliefs about Criminals are not necessarily moral, just, or correct. In fact, stereotypes about Criminals have created dangerous collective cultural beliefs that Blacks are less worthy than Whites.¹⁵²

Moreover, Florida's Stand Your Ground perpetuates implicit bias in the most insidious of ways. Implicit bias operates silently and below the surface. Most individuals are unaware of their own biases, and the theory of embodied rationality informs that even those who are aware of their biases cannot help but be impacted by them. In the absence of immunity, individuals are at least forced to question the rationality of their behavior. Knowing that prosecution is a risk when you kill someone tempers your behavior. It forces you to more carefully assess whether the fear even exists. In Florida, though, the law now protects individuals from being questioned about the reasonableness of their claimed fear, so their need to self-assess the rationality of the fear itself is diminished. The result is that the suspicion heuristic is not being questioned either externally or internally. Racism is therefore perpetuated because the silent, below-the-surface implicit bias is further hidden from consciousness because there is no reason to question its very existence.

III. CONCLUSION

Law often functions as a mirror of societal values at a given point in time, but it is also a tool of social construction operating to either reinforce generally acceptable norms or to redefine norms that are no longer generally accepted.¹⁵³ Through its use of the subjective fear standard, Florida's Stand Your Ground functions as a tool of social construction in that it reinforces deeply entrenched racial bias and perpetuates racism by condoning and ratifying behavior consistent with the suspicion heuristic. In this way, it not only declares as acceptable those behaviors that are influenced by racial bias, but it also perpetuates racial bias by further burying individual awareness that the bias even exists.

Study after study confirms that Black men, by virtue of their race, are the most feared individuals in society.¹⁵⁴ The theory of embodied rationality

152. See *supra* Part I.A.

153. Megale, *supra* note 6, at 1065.

154. See Alison Hewitt, *A 'Black'-Sounding Name Makes People Imagine a Larger, More Dangerous Person, UCLA Study Shows*, UCLA NEWSROOM (Oct. 7, 2015), <http://newsroom.ucla.edu/releases/a-black-sounding-name-makes-people-imagine-a-larger-more-dangerous-person-ucla-study-shows>; Michel Martin, *Fear of the Black Man: How Racial Bias Could Affect Crime, Labor Rates*, NPR (Mar. 30, 2015, 5:38 PM), <http://www.npr.org/2015/03/30/396405061/fear-of-the-black-man-how-racial-bias-could-affect-crime-labor-rates>; see also Cunningham et al., *Separable Neural Components*, *supra* note 25;

confirms that Americans experience a fear response based on race, a germane, innate biological characteristic that cannot possibly accurately communicate whether the other person is a threat. The suspicion heuristic explains the negative decisions and behaviors that result from the irrational fear created by deep-seated, largely invisible, racial bias.

Viewed through the lens of embodied rationality and particularly the suspicion heuristic, Florida's Stand Your Ground statutory scheme condones, ratifies, reinforces, and perpetuates both overt and implicit racial bias. American culture is long overdue for major shifts in how it views and perceives race. Until law forces individuals to face the realities of racial bias, however, deep-seated beliefs about the value of Black lives, and the lives of other minorities, will continue to breed in the dark recesses of our minds.

Cunningham et al., *Implicit and Explicit Ethnocentrism*, *supra* note 25; Hart et al., *supra* note 25, at 2353–54; Trawalter et al., *supra* note 25, at 1326; Phelps et al., *supra* note 25, at 732.