A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression

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I. ABSTRACT

Some two and a half years before the fatal shooting of Michael Brown by a Ferguson, Missouri Police Officer, the Indiana State Legislature enacted Indiana Code § 35-41-3-2 authorizing the use of force, including deadly force against public servants acting unlawfully against the persons or property of Indiana citizens.[1] The statute, passed in March of 2012, is

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1. *See* IND. CODE § 35-41-3-2 (2013).

the first of its kind.[2] It was passed in reaction to the Indiana Supreme Court's decision in *Barnes v. State*, which abolished the common law right to resist an unlawful arrest.[3] Gun rights groups, most notably the National Rifle Association (NRA), responded in force, rallying against the abolition of the right to resist an unlawful arrest and exhorting the Indiana State Legislature to expand gun-related rights.[4] The result is a statute that not only re-instates the common law right to resist an unlawful arrest, but also expands gun-related defensive rights to an unprecedented degree. This expansion includes the right to use deadly force against public servants in some situations that do not involve unlawful police violence. As a result, many commentators argue that Indiana Code § 35-41-3-2 incentivizes violence against public servants.

A Reason to Resist posits that, although Indiana Code § 35-41-3-2 is problematic for several reasons, it nonetheless, finds compelling constitutional support in terms of its core principals. The Article also suggests that the use or threatened use of defensive force against rogue police officials may also serve as a check on the type of police misconduct prevalent in many minority communities; the type of police misconduct alleged most recently in the fatal shooting of teenager Michael Brown in Ferguson, Missouri, for example.

Furthermore, state laws, like Indiana Code § 35-41-3-2, that authorize the use of force, including deadly force against public servants, find compelling support in the United States Supreme Court's most recent interpretations of the Second Amendment in *District of Columbia v. Heller*[5] and *McDonald v. City of Chicago*.[6] This Article warns, however, that some aspects of the *Heller* and *McDonald* opinions, as evidenced by the Indiana statute, invite a dangerous degree of chaos into our system of "ordered liberty and . . . justice."[7]

In *District of Columbia v. Heller*, the Court determined that self-defense lies at the core of the Second Amendment.[8] In *McDonald v. City of Chicago*, the Court established the Second Amendment right to bear arms

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2. *The Indiana Law That Lets Citizens Shoot Cops,* THE WEEK (June 13, 2012), http://theweek.com/article/index/229167/the-indiana-law-that-lets-citizens-shoot-cops [http://perma.cc/7EQV-36MX].

3. Barnes v. State, 946 N.E.2d 572, 576 (Ind. 2011).

4. Mark Niquette, *NRA-Backed Law Spells Out When Indianans May Open Fire on Police*, BLOOMBERG BUS. (June 4, 2012, 9:01 PM), http://www.bloomberg.com/news/2012-06-05/nra-backed-law-spells-out-when-indianans-may-open-fire-on-police.html [http://perma.cc/8ARJ-9EKX].

5. District of Columbia v. Heller, 554 U.S. 570 (2008).

6. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

7. *Id.* at 3034 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

8. *Heller*, 554 U.S. at 571–73.

as a fundamental right applicable to the states.[9] In doing so, the Court relied almost exclusively on the fundamental nature of self-defense itself.[10] The Court reasoned that since self-defense is a natural right, then it is a fundamental right.[11] The Court further reasoned that self-defense lies at the core of the right to bear arms and that, as such, the right to bear arms is also a fundamental right applicable to the states.[12] The *Heller* and *McDonald* opinions give cannon fire to gun rights groups to push for the "constitutionally mandated" expansion of defensive rights to a level that rivals or even exceeds the statutory defensive rights found in Indiana Code § 35-41-3-2.[13] The Court, however, failed to address the scope and limits of the right to self-defense as well as whether it would extend to third party defense.

The constitutional right to defend third parties from unlawful government force may have some redeeming social value. That is, the Supreme Court's decision in *McDonald* suggests that the primary reason why the Second Amendment was ratified was to ensure that citizens were armed to resist potential government tyranny. Said differently, the Second Amendment was ratified in part to address the exact brand of governmental tyranny alleged in the killing of unarmed Michael Brown in Ferguson, Missouri. So if the Second Amendment is to remain true to its roots and if it is indeed justified by its purpose, then the threat of civilian force or the use of such force in response to unlawful police violence and oppression, should also work to check police misconduct in minority communities.

A Reason to Resist attempts to remedy the gap left by the Supreme Court's interpretation of the Second Amendment as well as illustrates the applicability of the Second Amendment to minority communities. In so doing, this Article offers a statutory model that secures a Second Amendment right to use force against public servants in defense of others and, thus, maintains a check on unlawful government aggression while limiting the circumstances under which defensive force may be used against police officials. Additionally, *A Reason to Resist* explores Indiana Code § 35-41-3-2 and other state laws permitting the use of defensive force against public servants. As such, it focuses on statutes and case law involving an

9. *McDonald*, 130 S. Ct. at 3023.
10. *Id.* at 3036.
11. *Id.* at 3036–37.
12. *Id.* at 3036 (citing *Heller*, 554 U.S. at 598–600).
13. IND. CODE § 35-41-3-2 (2013).

intervener's use of deadly force against a public servant to defend an unrelated third-party.

Heller and *McDonald* establish a fundamental right to defend oneself against the unlawful use of force by anyone, including public servants. However, neither the Court's decision in *Heller* nor *McDonald* address the situation where a third party uses force against a public servant in defense of a stranger. This Article, thus, proposes the concept of "defense-in-resistance" to describe the right to use deadly force in defense of a stranger. This concept of defense-in-resistance relies both on the self-defense component of the Second Amendment and the Amendment's implied right to rebel, in a manner consistent with the Supreme Court's interpretation of these issues.

II. INTRODUCTION

On May 2, 1967, members of the Black Panther Party, a revolutionary socialist organization, stormed the California State Capital with loaded rifles and shotguns.[14] At the time, in the State of California, it was legal to openly carry firearms in public places.[15] However, the activities of the Panthers were one reason the California State Legislature was considering a bill to eradicate this right.[16] The Panthers entered the California State Capital in armed protest of the bill.[17]

The Panthers originally started as a para-military organization created to defend the African-American community from what the organization characterized as hostile police forces.[18] The teachings of Malcolm X had inspired the Panthers, who described the use of arms in constitutional terms, suggesting that the Second Amendment gave black nationalists the right to defend their communities.[19] The Panthers would routinely listen

14. Adam Winkler, *The Secret History of Guns*, ATLANTIC (July 24, 2011, 8:20 PM), http://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/ [http://perma.cc/4JWE-PLNW].

15. *See Eyes on the Prize II: America at the Racial Crossroads–1965 to 1985* (PBS television broadcast Jan. 29, 1990) [hereinafter *Eyes on the Prize II*]; Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Blank Panthers*, 36 SAN DIEGO L. REV. 947, 969 (1999).

16. Winkler, *supra* note 14.

17. BOBBY SEALE, SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON 161–62 (1991).

18. *See* Bridgette Baldwin, *In the Shadow of the Gun: The Black Panther Party, the Ninth Amendment, and Discourses of Self-Defense*, *in* IN SEARCH OF THE BLACK PANTHER PARTY: NEW PERSPECTIVES ON A REVOLUTIONARY MOVEMENT 67, 68, 73 (Jama Lazerow & Yohuru Williams eds., 2006); Leonardatos, *supra* note 15, at 957–59.

19. Malcolm X, The Ballot or the Bullet (Apr. 3, 1964) (transcript available at http://malcolmxfiles.blogspot.ca/2013/07/the-ballot-or-bullet-april-3-1964.html [http://perma.cc/BF9F-2PDF]).

to police scanners to gather intelligence about police activity in the community.[20] They would then show up—armed with loaded rifles and their criminal codebooks—at places where police officials were conducting arrests and other investigations.[21] The Panthers were essentially policing the police.[22] This practice prompted California legislator, Don Mulford, to introduce a bill calling for the repeal of the Act that allowed California citizens to openly carry arms in public.[23] The bill was passed and signed into law by then-governor Ronald Reagan.[24] The passage of the bill took the heart out of the Panthers' police patrols and thus effectively ended them.[25]

One of the questions presented by the Panthers' police patrols is whether there is a Second Amendment right to defend strangers from unlawful government force. If there is such a right, then what is the origin, nature, and scope of the right? Under what circumstances would a third-party's use of deadly force against a police official provide a valid defense to a charge of assault with a deadly weapon or murder?

Although the context involving the Black Panther Party now seems remote, issues persist related to the third-party use of deadly force against police officials. Two recent incidents in particular drive home the importance of addressing these issues. On September 4, 2014, Levar Edward Jones pulled into a Circle K in Columbia, South Carolina. Prior to this, as Levar closed in on the store lot, he removed his seatbelt in anticipation of alighting from his vehicle.[26] As South Carolina Lance Corporal Sean Groupert passed Levar he apparently peered into Levar's window. As a result, Groupert pulled Levar over for a seatbelt violation.[27] While Levar is standing outside of his vehicle in the Circle K parking lot, Groupert approaches and asks for Levar's license. Levar touches his back pocket, apparently

20. Charles P. Pierce, *The Ghost of Ronald Reagan*, ESQUIRE POL. BLOG (Aug. 18, 2014, 1:20 PM), http://www.esquire.com/blogs/politics/Don_Mulford_Makes_History_Again [http://perma.cc/4F7Z-8NQP].

21. *See, e.g.*, JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 45–46, 55, 65 (2013); DAVID FARBER, THE AGE OF GREAT DREAMS: AMERICA IN THE 1960s 206–07 (1994).

22. BLOOM & MARTIN, *supra* note 21, at 14, 55; Winkler, *supra* note 14.

23. Leonardatos, *supra* note 15, at 970.

24. *See* Act of July 28, 1967, ch. 960, 1967 Cal. Stat. 2459–63 (repealed 2012).

25. *See, e.g.*, Leonardatos, *supra* note 15, at 987.

26. Ed Mazza, *Sean Groubert, South Carolina State Trooper, Fired & Arrested After Shooting Unarmed Man*, HUFFINGTON POST (Sept. 25, 2014, 4:11 AM), http://www.huffingtonpost.com/2014/09/25/sean-groubert-fired-arrested_n_5879694.html [http://perma.cc/3QNZ-54UK].

27. *Id.*

looking for his wallet.[28] Levar then reaches into the car to grab his wallet.[29] Groupert responds "Get out of the car!" Levar quickly complies and begins backing away from the car.[30] Groupert then opens fire on Levar, spending several rounds as Levar walks backwards with his hands raised high. Groupert eventually hits Levar in the hip.[31] As Levar lay wounded on the ground, he entreats, "What did I do, sir?" Moments later Levar exclaims "I don't know what happened, I just grabbed my license."[32] The entire incident was caught on Groupert's dashcam.[33] Judging by the video, the force used by the police was completely unwarranted. So, what if, instead, a bystander comes to Levar's defense? Imagine that in doing so, the third party shoots and wounds Groupert. In the alternative, consider that the bystander kills Groupert. What is the bystander's criminal liability?

The case of John Crawford III is also illustrative of these issues. On August 5, 2014, John visited a Dayton, Ohio Wal-Mart.[34] As he talked on his cellphone to his mother and two children, he noticed a BB Gun, a children's air rifle that shoots small pellets or miniscule BBs.[35] John picks up the BB gun, which is out of the package and sitting on a shelf.[36] He continues to walk around the store passing several customers who don't seem to react at all to the BB gun.[37] He eventually, however, passes one Ronald Ritchie who calls 911 and alleges that John is walking around the store with a gun.[38] When the police arrive, John is standing in front of a shelf, talking on his cell phone, and fiddling with the BB gun. The BB gun is pointed straight down at the floor.[39] All of a sudden, police officers rush towards John shouting. In a matter of a second or so, they open fire.[40] John was pronounced dead at the hospital shortly after the shooting.[41] The entire incident was caught on store cameras.[42] Imagine, as with the first incident, that a bystander pulls out a weapon and fires on the police officers

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III,* WASH. POST (Sept. 25, 2004), http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii [http://perma.cc/B4ZJ-5RPN].
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

killing them and saving John's life in the process. Does the Second Amendment allow for this brand of defense? Indeed the Supreme Court and some states have recently extended the Second Amendment analyses to possibly include a viable defense under these circumstances. These recent developments, however, raise more questions than they solve.

The Second Amendment reads, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[43] The United States Supreme Court, in *District of Columbia v. Heller*, interpreted this language to include the natural right of self-defense.[44] However, the Supreme Court failed to address the question of whether and to what extent the Second Amendment embraces the right to act in defense of others, particularly in defense of others who share no familial relationship with the intervener. This question turns more on the rationale behind the ratification of the Second Amendment than it does on the doctrine of self-defense, which historically does not embrace a right to defend strangers.[45]

According to the *Heller* Court, one of the purposes behind the ratification of the Second Amendment was the protection of citizens from government tyranny.[46] In other words, the ratifiers believed that the citizenry needed weapons to defend against potential government oppression. In *McDonald v. City of Chicago*, the Supreme Court further highlighted the role of the Second Amendment in protecting citizens from government tyranny.[47] In deeming the Second Amendment a fundamental right, the Court accentuated the Amendment's role in ensuring that newly freed slaves were able to bear arms for defense against rogue southern law enforcement agents seeking to disarm them.[48]

The Second Amendment, thus, arguably encompasses a right to rebel against tyrannical government action.[49] Therefore, whether there is a constitutional right to defend others depends on whether one is acting in self-defense—by protecting a family member, an extension of oneself–

43. U.S. CONST. amend. II.
44. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).
45. Marco F. Bendinelli & James T. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 REGENT U. L. REV. 153, 153 (1995).
46. *Heller*, 554 U.S. at 596–98.
47. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036–38 (2010).
48. *Id.* at 3038–42.
49. *Heller*, 554 U.S. at 596–99; David C. Williams, *Death to Tyrants:* District of Columbia v. Heller *and the Uses of Guns*, 69 OHIO ST. L.J. 641, 648 (2008) (citing Heller, 554 U.S. at 598).

–or whether one is acting in dual defense by defending a stranger from unlawful force while simultaneously rebelling against individual acts of government tyranny, namely when a police officer uses unlawful force, in clear violation of his office, on a party unrelated to the intervener.[50]

Under the theory of defense in resistance, the Second Amendment only guarantees an intervener the right to act in defense of a stranger if that stranger was suffering from unlawful government force and had the right of self-defense.

Assuming a right to defend in resistance exists, what minimum statutory provisions would suffice to insure the right? In April 2012, then Governor of Indiana, Mitch Daniels, signed into law a bill that explicitly authorizes the use of force, including deadly force, against public servants.[51] The statute, Indiana Code § 35-41-3-2 is the only one of its kind. It is controversial to say the least. The provisions of Indiana Code § 35-41-3-2 far exceed what would be necessary to ensure the constitutional right to use deadly force in defense against police officials. In fact, it could be argued, as many opponents of the statute have, that the statute, as written, encourages violence against public servants. For instance, one provision of the statute permits an intervener to use deadly force against a police official, even when a police official acts lawfully.[52] This is the case where the intervener reasonably, but wrongfully, believes that deadly force is necessary to protect the stranger from serious bodily injury.[53]

While the Supreme Court's interpretation of the Second Amendment establishes that there is a right to use defensive force against public servants, the Supreme Court has failed to provide any guidance regarding the contours of such a right. The Supreme Court has, thus, opened the door for laws such as § 35-41-3-2 of the Indiana Code. This Article attempts to tighten the door, leaving it cracked enough only to admit the light of the Constitution. The Article does so by (1) providing a limiting principle regarding the right to rebel and (2) offering a statutory model that limits the circumstances under which individuals can use defensive force against public servants.

In summary, this Article discusses the controversial right of third-party intervention in situations involving citizens being subjected to deadly police force. The Article focuses on the use of deadly force to protect

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50. Tim George, *Indiana First State To Allow Citizens To Use Force Against Law Enforcement Officers*, OFF THE GRID NEWS (June 13, 2012, 7:14 AM), http://www.offthegridnews.com/2012/06/13/indiana-first-state-to-allow-citizens-to-use-force-against-law-enforcement-officers [http://perma.cc/9FKN-FDGJ].

51. Niquette, *supra* note 4.

52. IND. CODE § 35-41-3-2(i) (2013).

53. *Id.*

strangers. It posits that the defense-of-strangers is protected by the Second Amendment, but suggests that the standard to be applied in evaluating the legality of the intervener's actions should be based on actuality, rather than reasonability. In other words, the Article suggests, contrary to the Indiana statute, that in order for a valid defense to exist, the intervener must be correct in his or her belief that the assaulted citizen had the right to use deadly force in his or her own defense.

The Article is broken down into eleven parts. As background, Part II will briefly outline the relevant portions of common law self-defense and defense of others doctrines. To introduce the constitutional basis for the theory of defense in resistance, Part III will discuss self-defense as a constitutional right and examine the Supreme Court's decisions in *Heller* and *McDonald*.[54] In examining the extent to which the Second Amendment embraces a right to defend others, Part IV will examine the legal theory behind the common law defense of others doctrine and the modern-day evolution of the doctrine. Part V will discuss defense of relatives as a constitutional right. Part VI will discuss the use of force against police officials, including a discussion of the Indiana statute authorizing the use of force against police officials. Part VII will discuss the contours of the right to rebel and its current constitutional status as well as the theory of defense-in-resistance. Part VIII will discuss the phenomenon of unlawful police violence in minority communities and the need for defense-in-resistance to help address the problem of police brutality. Part IX will outline a statutory model for defense-in-resistance and discuss the policy implications of the right to defend in resistance.

III. BACKGROUND ON DEFENSIVE FORCE

Generally, person may use reasonable force to defend themselves or herself against an unlawful attack, if he or she is without fault in provoking the violence. Both the use of force and the degree of force used must be necessary.[55] That is, the force has to be proportionate to the threat, and the threat has to be immediate.[56] Thus, shooting an assailant who threatens to "punch you in the face" if you do not "stop looking at him" is unnecessary,

54. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); *Heller*, 554 U.S. 570.
55. Cynthia Kwei Yung Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 MINN. L. REV. 367, 377 (1996).
56. *Id.*

because shooting surpasses a punch.[57] Shooting the assailant is also unnecessary because the threat is not immediate; it has a condition precedent, continued staring.[58] A defender can only use deadly force when it reasonably appears to the defender that an assailant has threatened them with the imminent use of unlawful, deadly force.[59]

In addition to the right of self-defense, an individual may, under certain circumstances, use force on behalf of another person.[60] The defense of others doctrine reflects the notion that the right to defend oneself is, at least partially, transferrable to a third party.[61] The defense of others doctrine holds that a citizen may use physical force in defense of another, if it reasonably appears that the assaulted citizen has a right of self-defense.[62] Thus, if Jill is attacking Jack and Rebecca walks by, observes the assault, and kicks Jill in the chest to stop Jill from attacking Jack, Rebecca may have a legitimate defense, irrespective of whether Jack actually had the right to defend himself. That is, if Jill was, in fact, using force lawfully against Jack when Rebecca intervened—Jack had attacked Jill first—Rebecca would still be innocent of assault if her intervention was reasonable under the circumstances.

The doctrines of self-defense and defense of others have entrenched roots in the common law; courts have historically considered them either common law or statutory defenses.[63] Because every state has a self-defense doctrine and, to a much more limited extent, a defense of others doctrine, the issue has never been broached regarding what would happen if a state abrogated the law of self-defense or defense of others and a citizen of that hypothetical state acted in self-defense but was nevertheless convicted. The issue on appeal would turn on whether or not self-defense is a constitutional right irrevocable by the state.

IV. SELF-DEFENSE AS A CONSTITUTIONAL RIGHT

Since the constitutional right to use deadly force to defend a stranger from unlawful police violence relates in great part to individuals' constitutional rights to defend themselves, the Article will discuss the constitutional basis for the right of self-defense. The Second Amendment to the Constitution states, "A well regulated militia, being necessary to the

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57. WAYNE R. LAFAVE, CRIMINAL LAW § 10.4 (5th ed. 2010).
58. *Id.*
59. Lee, *supra* note 55, at 380–81.
60. Shelby A.D. Moore, *Doing Another's Bidding Under a Theory of Defense of Others: Shall We Protect the Unborn with Murder?*, 86 KY. L.J. 257, 288–89 (1998).
61. *Id.* at 271.
62. *Id.* at 273.
63. LAFAVE, *supra* note 57, at 5.

security of a free state, the right of the people to keep and bear arms, shall not be infringed."[64] Courts have read this language as embracing two distinguishable rights: the right to self-defense and the right to rebel.[65] The right to self-defense, of course, is a broad-based right to protect oneself and one's family from unlawful force, irrespective of the identity of the aggressor. The right to rebel, on the other hand, only contemplates the use of force to resist tyrannical government action.

The United States Supreme Court, in *District of Columbia v. Heller*, established the individual's right to self-defense as the core of the Second Amendment.[66] *Heller* involved a District of Columbia law that effectively banned the ownership of handguns.[67] The law not only made it a crime to carry an unregistered handgun, but it also prohibited the registration of handguns.[68] The law also prohibited the carrying of a handgun without a license, but authorized the chief of police to issue one-year licenses.[69] In addition, the law required the functional incapacitation of non-prohibited firearms, such as rifles and shotguns, through disassembly or trigger lock, if kept in the home for non-recreational activities.[70]

The respondent in *Heller*, a special police officer, attempted to register a handgun that he planned to keep at home.[71] The District of Columbia denied his registration.[72] Heller filed a lawsuit, asserting that the registration requirement, the licensing requirement, and the trigger-lock requirement as they related to the maintenance of firearms within the home violated his Second Amendment rights.[73] The D.C. Circuit held that the handgun ban and the trigger-lock requirement violated the Second Amendment because these provisions undermined the right to self-defense.[74]

The Supreme Court in *Heller* interpreted the Second Amendment as conferring an individual right to bear arms for self-defense as opposed to a collective right to bear arms in connection with the military.[75] This

64. U.S. CONST. amend. II.
65. *See* District of Columbia v. Heller, 554 U.S. 570, 582–85 (2008).
66. *Id.* at 628.
67. *Id.* at 574–75.
68. *Id.*
69. *Id.* at 575.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 575–76.
74. *Id.* at 576.
75. *Id.* at 584–85.

interpretation is crucial to understanding the right to rebel as an individual right, exercisable by individuals against individual government agents.[76]

The *Heller* Court reached its conclusion that the Second Amendment conferred an individual right by conducting a textual analysis of the Second Amendment and by examining various historical sources interpreting the Second Amendment, including legislatures, scholars, and courts.[77] With reference to the text of the Second Amendment, the Court reasoned that the Second Amendment language, "the right of the people," was always associated with individual rights,[78] and it concluded that at the time of the founding to "bear arms" meant to carry firearms in anticipation of confrontation.[79] The Court noted that state constitutions using the phrase "bear arms" also included language suggesting that the right to bear arms was for the purpose of self-preservation as well as for the common defense of the state's sovereignty.[80] In the Court's words, "These provisions demonstrate—again, in the most analogous linguistic context—that 'bear arms' was not limited to the carrying of arms in a militia."[81]

The Court, next, turned to the historical background of the Second Amendment.[82] It began with the premise that the Second Amendment codified a "pre-existing" right of self-defense.[83] The Court explained that the English common law right providing the basis for the Second Amendment was understood at the time to be "an individual right protecting against both public and private violence."[84]

The Court supported its interpretation of the Second Amendment by citing historical episodes in England leading to the right to bear arms.[85] Two similar episodes occurred during the reigns of King Charles II and James II.[86] Both monarchs quelled political dissent by disarming their political adversaries.[87] As a result of such episodes, Englishmen became extremely suspicious of any government efforts to regulate firearms.[88] The English Bill of Rights, thus, included a provision both prohibiting the disarming of English Protestants and allowing the bearing of arms for

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76. *Id.* at 594.
77. *See id.* at 576–628.
78. *Id.* at 593–94 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136, *139–40).
79. *Id.* at 592.
80. *Id.* at 585.
81. *Id.* at 585–86.
82. *Id.* at 592.
83. *Id.*
84. *Id.* at 594.
85. *Id.* at 592–95.
86. *Id.*
87. *Id.*
88. *Id.*

purposes of self-defense against the English Crown.[89] The Framers of the Bill intended to protect an individual's right to bear arms in the event of confrontation.[90] The natural right to preserve and defend the self, a right disconnected from military service, lay beneath this English right.[91]

The Court's historical analysis also focused on the experience of early American colonists with the British Crown.[92] During the period between 1760 and 1770, the British Crown began to confiscate colonists' arms in the most intransigent regions of the country.[93] At the time of the ratification of the Second Amendment, antifederalist members of Congress feared that the federal government would duplicate the tyranny of the British Crown by disarming the citizenry, in order to further a particularized world-view enforced by military rule.[94] Because of these and other experiences, Americans historically perceived the right to bear arms as an individual right to keep arms for purposes of self-defense.[95] Ultimately, the Supreme Court in *Heller* determined that the framers ratified the Second Amendment to stop the federal government from disarming the citizens.[96] The framers deemed an armed citizenry necessary as a check on oppressive government action—and to overthrow the federal government itself if necessary to protect state sovereignty.[97] More particularly, the Court held that the right to bear arms to defend against government oppression revolved around the natural right of self-defense.[98] Thus, the Court determined that the right of self-defense is a "central component" of the right to bear arms.[99]

While *Heller* established self-defense as a constitutional right, the Supreme Court of the United States in *McDonald v. City of Chicago*[100] established self-defense as a constitutional right, fundamental to the nation's notions of liberty and justice, and, thus, applicable to the states as well as to the federal government.[101] In *McDonald*, a group of Chicago residents brought suit

89. *Id.* at 593 (citing Declaration of Right 1689, 1 W. & M. c. 2, § 7 (Eng.)).
90. *Id.* at 594.
91. *Id.* at 593–94 (citing BLACKSTONE, *supra* note 78, at *139–40).
92. *Id.* at 594–95.
93. *Id.* at 594.
94. *Id.* at 598.
95. *Id.* at 603.
96. *Id.* at 599.
97. *Id.*
98. *Id.*
99. *Id*.
100. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).
101. *Id.* at 3042, 3046.

challenging city ordinances that effectively banned the possession of handguns by demanding registration of handguns and then prohibiting the registration of most handguns.[102] The Court found that the right to self-defense provided the basis for the Second Amendment and reasoned that since self-defense is a fundamental right, the right to bear arms for the purposes of self-defense was fundamental as well and, thus, applicable to the states.[103]

At the time of the ratification of the Constitution, the Second Amendment, as well as the entire Bill of Rights, applied only to the Federal government.[104] Eventually, beginning in the late 1800s, the Supreme Court began to view certain rights enumerated in the Bill of Rights as so important, so much a part of the American legal fabric, that these rights also protected citizens from state action.[105]

The Supreme Court decreed that a right contained in the Bill of Rights is fundamental if it forms an essential part of our nation's particular "scheme of ordered liberty" and system of justice or if it has deep roots "in this Nation's history and tradition."[106] Applicability to the states relies on three factors: (1) the composition and breadth of the right, (2) the types of activity that constitutes a violation of the right, and (3) the justification for the right.[107]

In holding that the right of self-defense, and by extension the right to bear arms, was a fundamental right, the Court in *McDonald* focused on the natural right of self-defense.[108] The Court found that self-defense is a fundamental right because it is a natural, basic right, highly regarded at the time of the ratification of the Second Amendment.[109] Based on this, the Court rationalized that the *right to bear arms* is a fundamental right because Americans consider the gun to be "the quintessential self-defense weapon."[110] In examining the historical record, the Court determined that the country's "system of ordered liberty" demanded the rights bestowed under the Second Amendment.[111]

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102. *Id.* at 3026.
103. *Id.* at 3042–3046.
104. *Id.* at 3028.
105. *Id.* at 3031, 3034.
106. *Id.* at 3036 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).
107. Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1207 (2009).
108. *McDonald*, 130 S. Ct. at 3042, 3046.
109. *Id.* at 3036–37.
110. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).
111. *Id.* at 3042.

The Court recapped the history of the right to bears arms starting with the 1689 English Bill of Rights, which clearly sets forth a right to maintain arms for self-defense.[112] The Court also discussed the reaction of the American colonists to King George III disarming particular rebellious colonies in the mid to late 1700s.[113] The Court further cited the ratification debates of 1788, where antifederalist legislators expressed a pervasive fear that the federal government would disarm the people in order to impose military rule.[114] In those debates, the federalists essentially agreed that the right to bear arms was fundamental, but argued that limiting the power of the federal government adequately protects it.[115]

The Court in *McDonald* also highlighted that several states had adopted provisions analogous to the Second Amendment around the time of ratification.[116] Additionally, the Court quoted Blackstone, who declared that the right to bear arms was one of the quintessential English rights.[117]

The Court further noted that,

> By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.[118]

The Court offers several historical anecdotes in support of the proposition that the self-defense rationale underlying the Second Amendment continued to hold sway in the public imagination after initial fears prompting the Amendment abated.[119]

One anecdote the Court offered involved freed slaves. The Court cited legislation passed in the wake of the Civil War to protect the rights of freed slaves.[120] Tens of thousands of African-Americans who had served in the Union Army returned to the South after the war. As a result, several

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112. *Id.* at 3036 (citing *Heller*, 554 U.S. at 592–94).
113. *Id.* at 3037 (citing *Heller*, 554 U.S. at 594–95).
114. *Id.* (citing *Heller*, 554 U.S. at 598).
115. *Id.* (citing *Heller*, 554 U.S. at 598–99).
116. *Id.* (citing *Heller*, 554 U.S. at 600–03).
117. *Id.* at 3036 (citing *Heller*, 554 U.S. at 593–94).
118. *Id.* at 3038.
119. *Id.* (citing EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 33, 40 (1871) (describing laws of Alabama and Florida)).
120. *Id.* at 3039–40 (citing Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27–30); *see* Stephen P. Halbrook, *The Freedmen's Bureau Act and the Conundrum over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. KY. L. REV. 683 (2002).

states took organized efforts to disarm them under the cover of law.[121] Some states passed statutes explicitly prohibiting African-Americans from possessing firearms.[122]

In response, Congress included provisions re-asserting the right to bear arms in two notable pieces of legislation. The first, Section 14 of the Freedmen's Bureau Act of 1866—an Act passed to assist the transition of African-Americans from slaves to free citizens—explicitly states that the "the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens."[123] Congress also enacted the Civil Rights Act of 1866 bestowing on all citizens the benefit of the laws enjoyed by white citizens.[124] While the Act made no explicit mention of the right to bear arms, the Court in *McDonald* found that Congress clearly intended to include that right.[125]

The Court also cited the congressional debates surrounding the adoption of the Fourteenth Amendment as evidence of the continued relevance of the right to bear arms for personal defense.[126] In those debates, Senator Samuel Pomeroy declared that the freedom of Americans requires the right to bear arms, proclaiming that every man "should have the right to bear arms for the defense of himself and family and his homestead."[127]

Lastly, the Court cited congressional debates surrounding the Civil Rights Act of 1871 wherein "Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South."[128] Furthermore, at the time of the ratification of the Fourteenth Amendment, most states had adopted constitutional provisions protecting the right to bear arms.[129] The Court summed up its discussion of the fundamental nature of the right to bear arms by stating that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[130] While the Supreme Court in in *McDonald* and *Heller* clearly established the constitutional right of self-defense, the Court did not address the question as to whether an individual has a constitutional right to act in defense of another, particularly in the absence of a familial connection.

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121. *Id.* at 3040 n.23.
122. *Id.* at 3040.
123. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866).
124. *McDonald*, 130 S. Ct. at 3041–42.
125. *Id.* at 3040–41.
126. *Id.* at 3041–42.
127. *Id.* at 3041.
128. *Id.* at 3041–42.
129. *Id.*
130. *Id.*

V. DEFENSE OF OTHERS

The United States Supreme Court in *Heller* and *McDonald* clearly established self-defense as a fundamental right. The Court, in those cases, determined that the scope of the self-defense doctrine at common law strongly suggests that Americans also have a constitutional right to use force in defense of family members. However, the Court has not determined whether the Second Amendment also covers acting in the defense-of-strangers. The defense of others doctrine as a constitutional right has received little, if any, attention from courts and scholars. The defense of others doctrine has its origins in the common law.[131] Most states recognize the defense in some form or fashion.[132]

The Maryland Court of Appeals provided the best summary of the American common law defense of others doctrine in *Guerriero v. State.*[133] The court commented

> A third person, closely related to or associated with one attacked in such a manner that he could properly have defended himself by the use of force, has a right to go to the defense of the person attacked and to use the same degree and character of force that the one attacked could have used.[134]

The American common law defense of others doctrine evolved from the English common law. However, early English common law provides no discernible right to act in defense of others. The right to defend family members evolved in the English common law over time.[135] Initially American common law also limited the defense of others doctrine to family members.[136] Gradually, however, states began to expand the doctrine to include strangers.[137] The change began in the 1960s with the adoption of the Model Penal Code.[138] The drafters stressed the importance of mens rea in imposing criminal liability.[139] Thus, doctrines that would hold a

131. Moore, *supra* note 60, at 270–73.
132. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 133 (1984 & Supp. 2011).
133. Guerriero v. State, 132 A.2d 466, 466 (Md. 1957).
134. *Id.* at 468.
135. Alexander v. State, 447 A.2d 880, 882 (Md. Ct. Spec. App. 1982), *aff'd*, 451 A.2d 664 (Md. 1982) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *3; ROLLINS M. PERKINS, PERKINS ON CRIMINAL LAW 1018–19 (2d ed. 1969)).
136. Bendinelli & Edsall, *supra* note 45, at 155 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *3).
137. *Id.* at 156.
138. *Id.* at 154, 160.
139. *Id.* at 160.

person who lacked moral blameworthiness criminally responsible fell into disfavor.[140]

According to some sources, most notably William Blackstone, the privilege of using force in defense of family members was not an extension of the doctrine of self-defense; rather, it arose out of the right to defend property.[141] According to Blackstone, the privilege of using force rested on the vested interest in the defended party.[142] However, most American case law frames the doctrine in terms of self-defense.

Most states currently have defense of others statutes similar to the Model Penal Code's approach.[143] The Model Penal Code (MPC) provides in Section 3.05 on the "Use of Force for the Protection of Other Persons:"

> 1. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
>   a. the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
>   b. under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
>   c. the actor believes that his intervention is necessary for the protection of such other person.[144]

Under the MPC's defense of others doctrine, the intervener's criminal liability depends on his or her perception of the events giving rise to the intervention.[145] The MPC also limits the intervener's criminal liability to their degree of mental culpability.[146] For example, a jury may not convict an intervener of murder if he or she negligently intervenes and causes the death of the perceived assailant. The death could only be criminally negligent homicide or reckless homicide. However, if the intervener reasonably believed that the perceived victim had the right to use deadly force in self-defense, then they would be justified in using deadly force, even if they

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140. *Id.*
141. *Id.* at 155.
142. *Id.* at 156–57.
143. *Id.* at 198.
144. *Id.* at 160–61 (citing MODEL PENAL CODE § 3.05 (AM. LAW INST., Proposed Official Draft 1962 with Revised Commentary 1985).
145. Danny R. Veilleux, *Annotation, Construction and Application of Statutes Justifying the Use of Force To Prevent the Use of Force Against Another*, 71 A.L.R.4th 940, § 2[a] (1989).
146. *Id.* § 7.

were wrong in their belief and the perceived victim did not in fact possess the right to act in self-defense.[147]

Most modern jurisdictions follow, more or less, the standards of the MPC in determining the circumstances under which an intervener may use physical force for the protection of another.[148] These state codes assess the intervener's actions in terms of reasonability.[149] Under most modern criminal codes, an intervener must be reasonable in the belief that the use of force was necessary, and that the force used was proportionate to the threat. The intervener must also reasonably believe that the danger to the perceived victim is imminent. Two parts comprise the reasonability standard: the intervener must actually believe that force is necessary and proportionate and that the threat is immediate, and this subjective belief must be objectively reasonable based on the intervener's point of view.[150]

A minority of states require that deadly force be actually necessary in the defense of others, not merely reasonably necessary.[151] These state statutes would hold the intervener criminally liable if they wrongly believed that deadly force were necessary, even if reasonable people would have drawn the same conclusion. This doctrine is called the "alter ego rule."

The alter ego rule, provides that an intervener who acts in defense of another acts at his or her own legal risk.[152] That is, if the intervener is wrong in his or her belief that the defended party has the right of self-defense, then the intervener stands to be convicted.[153]

The common law alter ego rule currently makes up the minority view of the defense-of-strangers doctrine.[154] The majority view provides only that the intervener's sincere belief that the perceived victim has the right of self-defense be reasonable.[155] In other words, under the majority view, the intervener can be wrong, and still use the defense.

The alter ego rule began to draw criticism because it allowed courts to convict interveners without guilt of mind or mens rea and discouraged

147. *Id.*
148. *Id.* §§ 2–5.
149. *Id.* § 2.
150. Moore, *supra* note 60, at 278, 284–86.
151. *Id.* at 273–74, 281.
152. *Id.* at 273–74.
153. Bendinelli & Edsall, *supra* note 45, at 159–60.
154. *Id.* at 159.
155. *Id.* at 159–60.

citizens from coming to the aid of victims of crime.[156] Now, nearly all states have statutes vindicating interveners who act reasonably even if incorrectly.[157]

The Maryland Court of Appeals in *Alexander v. State*,[158] appropriately framed the problem with the "alter ego rule" in the following passage:

> In the decade that commenced with the assassination of President Kennedy, climaxed with the creation of this Court, and concluded with the marriage of Tiny Tim, violence proliferated, partly because police were constitutionally hobbled in controlling a rebellious reaction and partly because citizens were reluctant-or afraid-to become "involved" in deterring that violence. This reticence seemed to emanate less from fear of physical harm than from the potential consequences of a legal aftermath.
>
> Representative was the 1964 New York homicide of Catherine "Kitty" Genovese, who was viciously ravaged and repeatedly stabbed while onlookers turned their backs to avoid witnessing the butchery, and neighbors closed their doors and windows to shut out her screams of anguish until her suffering was finally ended by the murderer. Witnesses who were interviewed excused their indifference by noting that the law did not protect a protector from criminal assault charges if the one he aids was initially in the wrong, however misleading appearances may have been. . . . The onlookers hesitated to become involved in the fracas at their legal peril. Even if their hearts had been stout enough to enter the fray in defense of a stranger being violently assaulted, the fear of legal consequences chilled their better instincts.[159]

The alter ego rule is nearly extinct.[160] However, the alter ego rule remains a valuable option when citizen intervention is discouraged. This may be the case when a public servant is the object of the defensive force. Here, as will be discussed, legal policy should encourage hesitance, both because of the potential danger to the intervener and the necessary presumption that the officer is operating within the law.

The majority of states that currently have statutes codifying the defense of others doctrine do not distinguish between defense-of-strangers and defense of relatives. A few states however distinguish the two doctrines. The Vermont defense of others statute, for example, reads as follows:

> If a person kills or wounds another under any of the circumstances enumerated below, he or she shall be guiltless: (1) In the just and necessary defense of his or her own life or the life of his or her husband, wife, parent, child, brother, sister, master, mistress, servant, guardian or ward.[161]

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156. *Id.*
157. *See* People v. Young, 183 N.E.2d 319, 319 (N.Y. 1962).
158. Alexander v. State, 447 A.2d 880, 880 (Md. Ct. Spec. App. 1982).
159. *Id.* at 881.
160. Bendinelli & Edsall, *supra* note 45, at 159.
161. 13 VT. STAT. ANN. tit. 13, § 2305(1) (2014).

This Vermont statute retains the common law limitation that the defended party must be a close relation.

VI. DEFENSE OF RELATIVES AS A CONSTITUTIONAL RIGHT

The Supreme Court has not squarely addressed the question of whether the Second Amendment guarantees the right to act in defense of others. It has, however, implied that the Amendment guarantees the right of persons to act in defense of family.[162] In discussing Washington, D.C.'s band on handguns, the Court in *Heller* asserted:

> The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelming choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, *family*, and property is most acute—would fail constitutional muster.[163]

The Court implies, of course, that inhibiting the defense of family—and, for that matter, property—violates the Second Amendment.

A review of the text of the Second Amendment and the common law defense of relative's doctrine, combined with a historical examination of the doctrine of self-defense reflects a limited constitutional right to act in defense of one's householders, but not in defense-of-strangers.

The notion that self-defense is a natural right preceding the existence of positive law underlies the Supreme Court's holding that the Second Amendment reflects the right to self-defense.[164] It follows that whether defense of family is also a natural pre-existing right bears on whether the Second Amendment guarantees it. Early English common law did not speak of a right to defend the family, which suggests that it is not a pre-existing right. However, parents have a natural instinct to protect their children and spouses may have a similar instinct to protect one another.

As a historical matter, many of the sources on which the Court relies to treat self-defense as a quintessential right make no distinction between defense of family and defense of self. For example, the Court in *Heller* implied citizens have a right to act in defense of family members by quoting an 1866 editorial, in the Loyal Georgian which reads: "All men,

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162. MODEL PENAL CODE § 3.09 (AM. LAW INST., Proposed Official Draft 1962 with Revised Commentary 1985).
163. District of Columbia v. Heller, 554 U.S. 570, 571 (2008).
164. *Id.* at 632.

without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves."[165] The *McDonald* Court also cited congressional debates around the passage of the Civil Rights Act of 1866 and a statement from Senator Pomeroy describing as "indispensable" an individual's "right to bear arms for the defense of himself and family and his homestead."[166]

The *Heller* Court also implicated a constitutional right to act in defense of family in response to a dissenting opinion by Justice Breyer. Justice Breyer argued the District of Columbia could restrict firearms under the constitution because of various founding-era restrictions on gun possession that, in Justice Breyer's words, "impose a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted."[167] In response, the majority stated that

> . . . we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him.[168]

VII. THE USE OF DEADLY FORCE AGAINST POLICE OFFICIALS

Professor Darrell A. H. Miller, in his groundbreaking article, *Retail Rebellion and the Second Amendment*, poses the question of whether a civilian has a constitutional right to take the life of a public servant in self-defense.[169] The common law treated a public servant acting unlawfully no differently from any other law-breaker. Thus, the doctrine of self-defense and defense of others applied equally to civilians and police officials.[170] State courts have since abridged some common law uses of force against public servants but all states permit citizens to use force to combat unlawful police force in some instances.[171] States have, to some extent, correlated the type and range of defensive force they allow to the type and range of police aggression exerted.

Three broad categories of unlawful police aggression exist: limited force used to complete an arrest, excessive force in conducting an arrest, and gratuitous police force or extrajudicial assault.

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165. *Id*. at 615.
166. McDonald v. City of Chicago, 130 S. Ct. 3020, 3041–42 (2010).
167. *Heller*, 554 U.S. at 714 (Breyer, J., dissenting).
168. *Id.* at 633–34.
169. Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 939 (2011).
170. *Id.* at 947–48.
171. *Id.* at 952.

The first type of police aggression occurs when a police official arrests a citizen. This type of police force consists of the minimum amount of force necessary to make the arrest, including but not limited to handcuffing the suspect. This type of force puts a suspect at no real risk of physical injury; it primarily affects the arrestee's liberty interest. The second category of force, excessive force, occurs when the police use more force than necessary to accomplish an end within the scope of his authority. These ends include making arrests, both lawful and unlawful. The reasonableness standard of the Fourth Amendment applies to claims of excessive force.[172] Courts examine the totality of the circumstances of a given situation to assess the reasonableness of police force. Factors include the severity of the alleged crime, whether the suspect posed an immediate danger to either the officers or the members of the public, and whether the suspect actively resisted arrest or attempted to flee.[173]

The third category of police force, gratuitous police force or extrajudicial assault, occurs when a police officer wholly abdicates his or her role as a public servant. This happens when a police officer attacks a citizen for no lawful reason, such as when a police officer gets angry with a citizen for an unquestionably lawful act such as staring, and attacks the citizen as a result.[174]

The common law allowed a person to use whatever force was necessary to resist an unlawful arrest.[175] The justification for the use of force under these circumstances revolved around the doctrine of provocation as well as the notion that one had a right to use physical force to defend against encroachment on liberty interests and certain dignity interests. English common law deemed unlawful arrests an offense to the Magna Carta itself.[176] As such, unlawful arrests understandably provoked the passions of the arrestee as well as any onlookers. In other words, under English common law, a suspect could resist an unlawful arrest solely due to its injustice.

The Queen v. Tooley, an English common law case, first established the provocation justification.[177] In *Tooley*, a constable arrested Anne Dekins

172. Graham v. Connor, 490 U.S. 386, 388 (1989).
173. *Id.* at 396.
174. Miller, *supra* note 169, at 947–48.
175. *Id.* at 948.
176. *Id.* at 950.
177. The Queen v. Tooley (1710) 92 Eng. Rep. 349, 352; 2 Ld. Raym. 1296, 1301.

for incontinency—unchaste behavior, lewdness, and promiscuity.[178] The constable, however, had no warrant for Dekins' arrest.[179] While he escorted Dekins back to the prison, three men approached the constable, who drew their swords and demanded Dekins' release.[180] Interestingly, the unlawfulness of the arrest alone motivated the men's intervention; they did not know Dekins.[181] The constable escaped and got Dekins to prison.[182] However, the same sword-bearers accosted the constable later, demanding Dekins' release.[183] When the constable called out for help, a civilian, James Dent, came to his aid.[184] Tooley, one of the sword-bearers, killed Mr. Dent in the struggle.[185] A lower court convicted Tooley of murder, the King's Bench overturned on appeal.[186] The court held that under the circumstances, Tooley could have at most committed manslaughter because Dent's death resulted from provocation by the unlawful arrest of Dekins.[187] The court explained that "if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a color of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England."[188]

The U.S. Supreme Court reaffirmed the English common law right to resist an unlawful arrest in 1900 in *John Bad Elk v. United States*.[189] In *John Bad Elk*, law enforcement officials attempted to arrest John Bad Elk, a Native American law enforcement agent, for allegedly shooting his gun in the air.[190] The incident began when Captain Gleason, the ranking reservation law enforcement officer, heard a gunshot.[191] Gleason confronted Bad Elk to determine whether he had fired the shot, and Bad Elk admitted to shooting his gun in the air for fun.[192] Captain Gleason then asked Bad Elk to come to his office to discuss the matter. When Bad Elk did not show up, Gleason ordered three reservation police officers to go and arrest him.[193] However, the attempted arrest was unlawful because Bad Elk's

178. *Id.* at 349.
179. *Id.* at 349–50.
180. *Id.* at 350.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 349, 352–53.
187. *Id.* at 352–53.
188. *Id.* at 352.
189. John Bad Elk v. United States, 177 U.S. 529, 534–35 (1900).
190. *Id.* at 530–32.
191. *Id.* at 530–31.
192. *Id.* at 531.
193. *Id.*

alleged offense of shooting in the air was not a crime.[194] Furthermore, even if it was a crime it amounted only to a misdemeanor and the law at the time required a warrant to arrest a person for a misdemeanor not committed in the presence of the police.[195]

The officers found Bad Elk at his place of residence, and he refused to return with them to the office.[196] The officers left but returned the next morning to convince Bad Elk to come to the agency.[197] According to Bad Elk, he eventually asked the officers why they were "bothering" him. One officer responded "You are a policeman, and know what the rules are." Bad Elk replied "Yes, I know what the rules are, but I told you that I would go to the Pine Ridge agency in the morning."[198] At this point, the officer nudged forward and made a gesture towards his weapon.[199] When Bad Elk saw the officer's gun he shot him down.[200] The officer died within minutes.[201]

A jury convicted Bad Elk of murder in the Circuit Court of the United States for the District of South Dakota.[202] The trial court had instructed the jury that Bad Elk had no right to resist an unlawful arrest and that the arresting officers could use all force necessary to secure the arrest.[203]

In reversing, the U.S. Supreme Court took issue with the jury instruction, holding that the unlawful arrest mitigated Bad Elk's action and downgraded his offense to manslaughter.[204] The Court also implied that Bad Elk would be innocent of any crime, if he reasonably believed the officer was going to shoot him.[205]

Despite the Supreme Court's ruling in *John Bad Elk* and dicta in another opinion positing that "[o]ne has an undoubted right to resist an unlawful arrest,"[206] most states moved away from the common law right to resist an unlawful arrest following the adoption of the MPC in 1961. The MPC

194. *Id.* at 536–37.
195. *Id.* at 535.
196. *Id.* at 531.
197. *Id.*
198. *Id.* at 531–32.
199. *Id.* at 533
200. *Id.* at 532–33.
201. *Id.*
202. *Id.* at 530.
203. *Id.* at 533–34.
204. *Id.* at 534.
205. *Id.* at 537–38.
206. United States v. Di Re, 332 U.S. 581, 594 (1947).

treats force in resistance to unlawful arrests by providing that actors may not use such force:

> (i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful.[207]

The drafters of the MPC reasoned that resisting an unlawful arrest was unjustifiably dangerous and that various alternatives existed to remedy the injustice.[208] As Craig Hemmers, in his article *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend*, points out, "Eventually courts took cognizance of the academic assaults on the right, and began to adopt the position of the critics of the right."[209]

The case of *State v. Valentine* illustrates the modern trend abrogating the common law right to resist and explains the popular concern behind the right's abrogation.[210] The defendant, Valentine, was standing on a corner in downtown Spokane, Washington.[211] Police Officer Rick Robinson saw him wearing a black coat and believed him to be suspicious, so Robinson called another officer, Moore, to help identify Valentine.[212] Valentine got in an automobile and drove off.[213] According to Officer Moore, he followed Valentine in an unmarked vehicle, until Valentine committed the traffic infraction of failing to signal.[214] Officer Moore then attempted to pull Valentine over by flashing his headlights and honking his horn.[215] Valentine eventually pulled over and Officer Moore, along with several other police cruisers, pulled behind Valentine.[216] The versions of events differ markedly from this point on.[217] According to Moore, when he asked Valentine for license and registration, Valentine asked why and commented "'you . . . cops are just harassing me. I'm Black, and I'm tired of the harassment.'"[218] Valentine eventually provided his license and registration, and Moore allegedly wrote a citation for failure to signal, which Valentine refused to sign.[219] At some point, as Valentine attempted to retrieve something from

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207. MODEL PENAL CODE § 3.04 (AM. LAW INST., Proposed Official Draft 1962 with Revised Commentary 1985).
208. *Id.*, note at 42–43.
209. Craig Hemmens, *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend*, 2 CAL. CRIM. L. REV. 2, ¶ 21 (2000).
210. State v. Valentine, 935 P.2d 1294, 1294 (Wash. 1997).
211. *Id.* at 1295.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*

his car, Officer Moore and another officer grabbed him.[220] The police officers allege Valentine punched Officer Moore in the side of the head.[221] The officers engaged Valentine, forced him to the ground, and handcuffed him.[222] At the jail, the nurse supervisor refused to admit Valentine because of the severity of his injuries, and Valentine was taken to the hospital.[223]

At trial, Valentine contested the legality of the arrest, arguing that he did in fact signal his turn by using hand signals.[224] Valentine also contended that the officer punched him first and he only used force in self-defense and as a reasonable means to prevent his unlawful arrest.[225] Valentine was convicted of assaulting a police officer.[226] On appeal, Valentine took issue with the trial court's jury instruction on the use of force in resisting an unlawful arrest.[227] The instruction reads as follows:

> A person unlawfully arrested by an officer may resist the arrest; the means used to resist an unlawful arrest must be reasonable and proportioned to the injury attempted upon the party sought to be arrested. The use of force to prevent an unlawful arrest which threatens only a loss of freedom, if you so find, is not reasonable.[228]

Valentine argued on appeal that the jury instruction was wrong because it suggested that one could not use force in resisting an arrest that only threatens a loss of freedom.[229] Valentine argued that, contrary to the instruction, the state allowed reasonable and proportionate force to repel an unlawful arrest even without a threat of physical injury to the arrestee.[230]

In holding that a suspect could not resist an arrest that only threatens their freedom, the Washington Supreme Court cited arguments made by the drafters of the Model Penal Code and other scholars who favored the abrogation of the right.[231] The court cited scholarship that pointed to the conditions of English prisons and the lack of procedural safeguards as a

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 1296.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* (emphasis added).
229. *Id.*
230. *Id.*
231. *Id.* at 1300–01, 1303.

justification of the English common law right to resist an unlawful arrest.[232] The court cited the vast improvement of prison conditions in America and the addition of procedural safeguards as reasons to abridge the common law right.[233] When the *Tooley* ruling was issued in 1710, arrestees faced inordinately long terms of confinement in awaiting trial, often shackled.[234] Unsanitary prison conditions, including the lack of sewage facilities, meant the heightened chance of contracting deadly diseases and the lack of in-prison medical facilities meant the festering of illnesses.[235] Physical torture and the lack of nourishment also added to the chances that any extended incarceration in Tooley, England was a death sentence.[236]

The court in *Valentine,* in overturning the common law right to resist an unlawful arrest, also relied on the argument that technological advances in weaponry make it difficult to successfully resist an unlawful arrest and increase the chances that resistance will result in the injury of the arrestee.[237] Due to these types of rationales only a minority of states retain the common law right to resist an unlawful arrest.[238] A majority of states actually make it statutorily illegal to resist.[239]

While most jurisdictions have abrogated the common law right to resist an unlawful arrest, most jurisdictions, it seems, have retained the common law privilege of an individual to use force in defending against excessive police force.[240] Dag Ytreberg describes when a citizen may defend against excessive police force:

> One who, after being attacked by [an officer], "has reasonable ground to believe, and in good faith does believe, that his life is in danger, or that he is likely to suffer great bodily harm, has a right to meet any attack being made upon him, or which he has reasonable ground to believe is being made upon him, in such a way and with such force as under the circumstances he at the moment honestly believes, and has reasonable ground to believe, is necessary to save his own life or protect himself from great bodily harm."[241]

This conception of defending against excessive police aggression applies almost universally. However, only one state specifically authorizes the

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232. *Id.* at 1300–01.
233. *Id.* at 1301.
234. *Id.* at 1300.
235. *Id.* at 1301.
236. *Id.* at 1300–01.
237. *Id.* at 1304.
238. Dag E. Ytreberg, *Annotation, Right To Resist Excessive Force in Accomplishing Lawful Arrest*, 77 A.L.R.3d 281, § 2[a] (1977).
239. *Id.*
240. Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383, 387–88 (1997); Ytreberg, *supra* note 238, § 2[a].
241. Ytreberg, *supra* note 238, § 2[b].

use of force against public servants.[242] The State of Indiana enacted a statute in June of 2012 allowing citizens to use defensive force, including deadly force, against police officials.[243] The statute provides as follows:

> A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
>
> (1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
>
> (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
>
> (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.[244]

The statute further notes that

> (k) A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless:
>
> (1) the person reasonably believes that the public servant is:
>
> (A) acting unlawfully; or
>
> (B) not engaged in the execution of the public servant's official duties; and
>
> (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person.[245]

The Indiana statute seems to authorize the use of force against police officials in all circumstances wherein the law permits an individual to use force against a civilian.[246] In this way, the statute essentially reverts back to the common law's treatment of defensive claims against police officials, whereby police officials who acted unlawfully were treated no differently from any other assailant.[247] Indiana made the statute law in June of 2012

242. Mark Niquette, *Indiana Law Lets Citizens Shoot at Police*, SFGATE (June 6, 2012, 4:00 AM), http://www.sfgate.com/nation/article/Indiana-law-lets-citizens-shoot-at-police-3612347.php [http://perma.cc/JD48-ZDXM].
243. IND. CODE § 35-41-3-2(k) (2013).
244. IND. CODE § 35-41-3-2(i) (2013).
245. *Id.* § 2(k).
246. *Id.*
247. *Id.*; John Bad Elk v. United States, 177 U.S. 529, 534–35 (1900); Stephen Michael Ian Kunen, Comment, *Superhuman in the Octagon, Imperfect in the Court Room:*

and it met with considerable criticism.[248] Much of the criticism claimed that the law would lead to the intentional targeting of public servants and would increase the risk of danger in an already perilous profession.[249] The state's prior abrogation of the common law right to resist an unlawful arrest, which many believed left citizens vulnerable to police tyranny, made the law passable.[250]

As mentioned above, all states allow citizens to use reasonable force against police officials to stave off the threat of death or severe bodily injury. The common law permitted a citizen to use reasonable force against a police officer who was employing force only when the police officer was threatening basic bodily injury.[251] The common law, however, limited the amount of force employable against police officials to the amount of force required to inhibit the excessiveness of the police force.[252]

A few states, in addition to Indiana, maintain the common law rule allowing defensive force to repel police force when that force only threatens minor bodily injury.[253] For the most part, these are the states that have not abrogated the common law right to resist an unlawful arrest. The District of Columbia, for instance, permits self-defense against a police officer if the officer used excessive force and the defendant responded with force that was "reasonably necessary" for self-protection considering the surrounding facts.[254]

Indiana courts, even before the 2012 statute, permitted individuals to use force against excessive police force that only threatened basic bodily injury. The Indiana Court of Appeals, in *Shoultz v. State*, held that although unlawful arrest did not mitigate Shoultz's actions, excessive police force did.[255]

In *Shoultz*, an Indiana police officer, Officer Mayhew, followed the motorcyclist to the Grim Reaper motorcycle club.[256] Shoultz, the manager of the establishment, came out of the clubhouse and reprimanded the officer for following the motorcyclist onto club property.[257] Officer Mayhew

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Assessing the Culpability of Martial Artists Who Kill During Street Fights, 60 EMORY L. J. 1389, 1395 (2011).

248. IND. CODE § 35-41-3-2 (2013); Niquette, *supra* note 242.

249. Niquette, *supra* note 242; *The Indiana Law That Lets Citizens Shoot Cops*, *supra* note 2.

250. Niquette, *supra* note 242.

251. John Bad Elk v. United States, 177 U.S. 529, 534–35 (1900).

252. *Id.*

253. *See, e.g.*, TEX. PENAL CODE ANN. § 9.31 (West 2011).

254. Nelson v. United States, 580 A.2d 114, 117 (D.C. 1990).

255. Shoultz v. State, 735 N.E.2d 818, 822 (Ind. Ct. App. 2000).

256. *Id.* at 821.

257. *Id.*

then ordered Shoultz to be quiet and return to the clubhouse.[258] When Shoultz refused to go back into the clubhouse and continued to yell at Mayhew, Mayhew attempted to place Shoultz under arrest by asking him to put his hands on the wall.[259]

Shoultz temporarily complied but when he did not keep his hands on the wall, Mayhew sprayed him with pepper spray.[260] Shoultz still refused to keep his hands on the wall, at which point Mayhew threatened to hit him with his long metal flashlight.[261] When Shoultz again refused to follow orders, Mayhew hit Shoultz twice with the flashlight—once in the back of the leg and once in the head—causing Shoultz to fall to the ground and bleed excessively from the head.[262] Mayhew then called an ambulance and for back-up officers.[263] The back-up officers arrived and assisted Mayhew in placing Shoultz in handcuffs and leg shackles.[264] While under restraint, Shoultz kicked Mayhew once in the shin.[265] Among other offenses, Shoultz was charged and convicted of battery of a law enforcement officer and resisting arrest.[266]

On appeal, Shoultz argued that Mayhew's use of excessive force against him justified his use of force in resistance.[267] The Indiana Court of Appeals first noted that Indiana did not retain the common law right to resist an unlawful arrest.[268] However, the court instead assessed the lawfulness of Shoultz' conduct using the law of resisting excessive force as opposed to the law of resisting an unlawful arrest.[269] The court then went on to find that the officer had used excessive force under the Fourth Amendment's reasonableness standard.[270]

The Indiana Court of Appeals highlighted the fact that Shoultz never threatened the officer with force or violence; that no other persons created a potential threat to Mayhew, which might have triggered in him reasonable

258. *Id.* at 822.
259. *See id.*
260. *Id.*
261. *Id.*
262. *See id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 823–25.
270. *Id.*

apprehension; that Mayhew used the pepper spray and flashlight without being physically threatened; that Mayhew never told Shoultz that he was under arrest and had not tried to handcuff Shoultz before resorting to force; that the crime for which Mayhew was attempting to arrest Shoultz was a misdemeanor offense.[271] The court also reviewed the police department's standard operating procedures, noting that Eighth Circuit precedent made police department guidelines relevant to the analysis of unconstitutionally excessive force.[272] The guidelines authorized the use of force in situations where civilians resist, but limited the use of force to the amount necessary to overcome physical resistance.[273] The guidelines specifically cautioned against blows to the head using a metal flashlight unless such force was necessary.[274]

The Indiana Court of Appeals overturned Shoultz's conviction, concluding that because Mayhew had used excessive force in the prior affray, then Shoultz's response in kicking Mayhew in the shin was reasonable.[275] The court noted that Shoultz could use force so long as the force was not disproportionate under the circumstances.[276] The court's analysis did not turn whatsoever on the type of injury the excessive police force caused or threatened.[277]

Conversely, other jurisdictions, such as the state of Washington, only allow defensive force if excessive police force threatens serious bodily injury. In *State v. Westlund*, the defendant, Westlund, and others were charged with second degree assault following a battle royal of sorts with police officials.[278] Westlund argued that he acted in self-defense when officers used excessive force in attempting his arrest.[279]

Westlund was having a party at his home that included minors drinking beer.[280] Officers were called to the scene.[281] When they arrived they advised Westlund that he was under arrest for contributing to the delinquency of a minor.[282] One of the officers then pulled Westlund's arm down and placed a handcuff on it.[283] Westlund responded by stating that he would go

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271. *Id.* at 824.
272. *Id.*
273. *Id.*
274. *Id.* at 824–25.
275. *Id.* at 825.
276. *See id.*
277. *See id.* at 824–25.
278. *See* State v. Westlund, 536 P.2d 20, 22 (Wash. Ct. App. 1975).
279. *Id.* at 22.
280. *Id.*
281. *See id.* at 22–23.
282. *Id.* at 23.
283. *Id.*

peacefully.[284] A defense witness testified that at this point Westlund was not putting up a fight.[285] She said, "[H]e was dropping his hands and trying to keep them from trying to grab a hold of him."[286] One officer, then, struck Westlund's hand with a hard blow, and Westlund, along with the arresting officers, fell to the ground.[287]

A witness testified that at one point three or four officers were on top of Westlund.[288] A co-defendant, Vonhof, testified that he and another person pulled two of the officers off of Westlund whom had been "beating him up for maybe 10, 15 seconds."[289] After the affray, one witness described Westlund's face as looking like hamburger, adding that he was spitting up large amounts of blood.[290] Westlund was convicted but appealed his conviction, arguing that the trial court improperly instructed the jury on self-defense.[291]

The Washington Court of Appeals upheld the conviction finding that "an arrestee's resistance of excessive force by a known police officer, effecting a lawful arrest, is justified only if he was actually about to be seriously injured."[292] The court also added that a party using defensive force to combat excessive police force acts at his own peril.[293] That is, if it is later determined that the arrestee was not, in fact, facing serious injury, then his use of force is deemed unjustifiable.[294]

The Washington Court of Appeals in *Westlund* summed up the general policy concern underlying limiting defensive force to situations where excessive force threatens death or serious bodily injury:

> We emphatically do not countenance a use of force by police which exceeds that essential to effect an arrest, but the arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom.[295]

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284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 24.
291. *Id.*
292. *Id.* at 24–25.
293. *Id.* at 25.
294. *Id.*
295. *Id.*

The court went on to add that:

> [I]n the vast majority of cases, as illustrated by the one at bar, resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat. Police today are sometimes required to use lethal weapons for self-protection. If there is resistance on behalf of the person lawfully arrested and others go to his aid, the situation can degenerate to the point that what should have been a simple lawful arrest leads to serious injury or death to the arrestee, the police or innocent bystanders.[296]

So the rationale behind limiting defensive force in these types of cases approximates the reasoning underlying the abridgment of the common law right to resist an unlawful arrest. Many jurisdictions also place additional qualifications on the use of defensive force against police officials.[297] The most important restrictions are as follows: once an officer ceases to employ excessive force any defensive force must also cease.[298] Also, a person subjected to a lawful arrest must "desist from the continued use of force against the arresting officer if the arrestee knows or has reason to know that the use of excessive force on the part of the officer will cease if the arrestee desists from resisting."[299] In some instances, if the defendant's actions provoked the use of excessive force, then he or she may not forcibly resist.[300]

The U.S. Supreme Court has not directly considered the question of whether citizens can use deadly force in defending against unlawful police force. However, in *John Bad Elk,* the Court implied that the defendant could have used deadly force against police officers who were about to use deadly force against him.[301] At common law, a citizen had the right to use deadly force against a police official using unnecessary, deadly force in effecting a lawful arrest.[302] Most states have not abridged this common law rule.[303]

For example, the Georgia Supreme Court, in *Mullis v. State*, reaffirmed the common law tradition of permitting citizens to use deadly force when

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296. *Id.*

297. *See* WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 10.4(h), at 159 nn.89–90 (2d ed. 2003 & Supp. 2014–2015).

298. *See, e.g.*, Ortega v. State, 207 S.W.3d 911, 919 (Tex. Ct. App. 2006); People v. Perez, 90 Cal. Rptr. 521, 523 (Ct. App. 1970).

299. State v. Mulvihill, 270 A.2d 277, 280 (N.J. 1970); *see also* Commonwealth v. Moreira, 447 N.E.2d 1224, 1228 (Mass. 1983).

300. *See e.g.*, State v. Robinson, 253 S.E.2d 311, 315 (N.C. Ct. App. 1979).

301. John Bad Elk v. United States, 177 U.S. 529, 534 (1900).

302. *See, e.g.*, State v. Bowen, 234 P. 46, 47 (Kan. 1925); Hughes v. Commonwealth, 41 S.W. 294, 297 (Ky. 1897).

303. *See, e.g.*, State v. Sims, 2002-2208, p. 10 (La. 6/27/03), 851 So. 2d 1039, 1046; State v. Wiegmann, 714 A.2d 841, 851–52 (Md. 1998).

an officer attempts an arrest in a manner that unjustifiably threatens the arrestee's life, even where the arrest is lawful.[304] In *Mullis*, a police officer used his service weapon to affect a misdemeanor arrest, and the defendant responded with deadly force.[305] The court observed that

> If an officer making a lawful arrest merely for a misdemeanor committed in his presence did so in an unlawful manner by making an unprovoked assault with a weapon likely to produce death, and with intent to kill the offender, such as would constitute a felony under statute, or if the circumstances were sufficient to excite the fears of a reasonable man that such a felony was intended, and the offender killed the officer, not in a spirit of revenge or for the purpose of preventing the lawful arrest, but to protect himself from what was or what reasonably appeared to be such a felonious assault, then, in either of such events, the killing would be justifiable homicide.[306]

In *Vann v. State*, the defendant shot a police officer after the officer attempted to affect an arrest by firing at the defendant with his sidearm, and the Texas Court of Criminal Appeals ruled her use of deadly force in defense justified.[307]

Furthermore, a 1974 Texas Court of Criminal Appeals case, *Rodriguez v. State,* also illustrates the continuity of the common law rule regarding the use of force in defending against excessive police force.[308] Luis Fuentes was driving a car occupied by Rodriguez and other passengers when the car was pulled over by a police cruiser.[309] Officers Cullar and Lee made the stop alleging a defective taillight.[310] The officers then asked the occupants to alight from the vehicle.[311] According to Rodriguez, after he got out of the car, he saw Officer Lee push the driver, Fuentes, and reach for his pistol.[312] Rodriguez, then, afraid that Officer Lee would shoot both he and Fuentes, took the gun from Officer Lee.[313] Seeing this, Officer Cullar, shot at Rodriguez twice, wounding him with the second shot.[314] Rodriguez fired in response, wounding Officer Cullar.[315] Rodriguez was convicted

304. Mullis v. State, 27 S.E.2d 91, 98 (Ga. 1943).
305. *Id.* at 98.
306. *Id.*
307. Vann v. State, 77 S.W. 813, 817 (Tex. Crim. App. 1903).
308. Rodriguez v. State, 544 S.W.2d 382, 383–84 (Tex. Crim. App. 1976).
309. *Id.* at 383.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*

of deadly assault on a police officer after the trial court refused his request for a jury instruction on self-defense.[316] The Texas Court of Criminal Appeals reversed the convictions essentially holding that Rodriguez' version of events supported an acquittal on the grounds of self-defense.[317]

The Massachusetts Appeals Court describes the least legally problematic case for using deadly force which arises when "a police officer's on-duty conduct has become so flagrantly divorced from any legitimate law enforcement function that she no longer may be deemed to be acting within the scope of her appointed office."[318]

One of the most renowned cases falling into this category began on the evening of November 19, 1986.[319] Twenty-seven New York City police officers went to the apartment building of Larry Davis, a twenty-year old reputed drug dealer living in the Bronx.[320] The officers purportedly wanted to question Davis regarding the execution-style murder of four drug dealers, and the search led to his sister's apartment.[321] The officers had no arrest warrant, and Davis had not officially been named as a suspect in any crime.[322] The police officers entered the apartment wearing bulletproof vests and armed with shotguns and handguns.[323]

The police entered the apartment and Davis sought refuge in a dark bedroom along with his sister's two children.[324] At some point, one or more of the officers fired into the bedroom.[325] Davis then returned fire, alternating between a sixteen-gauge sawed off shotgun and a .45-caliber semi-automatic pistol, ultimately wounding six of the seven officers.[326] As a result, the officers went for cover, taking several shots as they retreated.[327] Davis managed to slip out of a back window unscathed.[328]

Police officials tracked Davis down seventeen days later following a city-wide manhunt and an anonymous tip placing Davis at his mother's

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316. *Id.*
317. *Id.* at 384.
318. Commonwealth v. Montes, 733 N.E.2d 1068, 1072 (Mass. App. Ct. 2000).
319. People v. Davis, 537 N.Y.S.2d 430, 430 (1988).
320. Robert D. McFadden, *New York Police in Citywide Hunt for Gunman Who Shot 6 Officers*, N.Y. TIMES (Nov. 21, 1986), http://www.nytimes.com/1986/11/21/nyregion/new-york-police-in-citywide-hunt-for-gunman-who-shot-6-officers.html [http://perma.cc/88MU-EDSV].
321. Howard W. French, *New Picture Emerges in Case of Larry Davis*, N.Y. TIMES (Oct. 18, 1987), http://www.nytimes.com/1987/10/18/nyregion/new-picture-emerges-in-case-of-larry-davis.html [http://perma.cc/9XD4-4HT3].
322. *Id.*
323. McFadden, *supra* note 320.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*

apartment in the Bronx.[329] The scene of the arrest was a media spectacle replete with reporters and crowds of onlookers.[330] As the police approached, Davis took several hostages but eventually surrendered because he believed the presence of reporters assured his safety.[331] Davis was charged with several counts of attempted murder.[332] At trial, he argued that he shot the officers in self-defense and that the police raid was really an assassination attempt.[333] According to the Defense, Davis had knowledge of extensive police involvement in the distribution of drugs, and those involved wanted him permanently silenced.[334] The mostly black jury acquitted Davis of all of the attempted murder charges as actions taken in self-defense.[335] One of the jurors interviewed reported that the jury believed the defense's version of the events, including the suggestion that the officers had come to assassinate Davis.[336]

The African-American community hailed Davis as a folk hero of sorts.[337] Many African-Americans regarded him as "a symbol of resistance" because "he fought back at a time when African-Americans were being killed by white police officers."[338] This attitude is shared by many in the African-American community concerning the police in general. As will be discussed, unlawful police violence has historically been more pronounced in the African American community. As argued below, members of

329. Todd S. Purdum, *Friends Helped Davis To Stay in Shadow*, N.Y. TIMES (Dec. 7, 1986), http://www.nytimes.com/1986/12/07/nyregion/friends-helped-davis-to-stay-in-shadow.html [http://perma.cc/UL2U-2M7J].

330. Robert D. McFadden, *Cornered in Manhunt, Davis Surrenders in Bronx*, N.Y. TIMES (Dec. 7, 1986), http://www.nytimes.com/1986/12/07/nyregion/cornered-in-manhunt-davis-surrenders-in-bronx.html [http://perma.cc/AJ5R-8NDV].

331. *Id.*

332. *Id.*

333. William G. Blair, *Jury in Bronx Acquits Larry Davis in Shooting of Six Police Officers*, N.Y. TIMES (Nov. 21, 1988), http://www.nytimes.com/1988/11/21/nyregion/jury-in-bronx-acquits-larry-davis-in-shooting-of-six-police-officers.html [http://perma.cc/A2HS-L7L3].

334. *Id.*

335. *Id.*

336. *Id.*

337. Samuel G. Freedman, *To Some, Davis Is 'Hero' Amid Attacks on Blacks*, N.Y. TIMES (Jan. 2, 1987), http://www.nytimes.com/1987/01/02/nyregion/to-some-davis-is-hero-amid-attacks-on-blacks.html [http://perma.cc/ZP4K-S8S6].

338. Robert D. McFadden, *Slain in Prison, but Once Celebrated as a Fugitive*, N.Y. TIMES (Feb. 22, 2008), http://www.nytimes.com/2008/02/22/nyregion/22davis.html?pagewanted=all&_r=0 [http://perma.cc/7EVK-TN7H].

minority communities are in greater need of the defense of self-defense and by extension defense-in-resistance.

While the law concerning the use of deadly force against police officials in self-defense is relatively developed, the law regarding the third party use of force against police officials is slim. *The Queen v. Tooley* provides the historical foundation for the third-party use of force.[339] *Tooley* involved three strangers using deadly force to liberate a woman wrongfully arrested for sexual impropriety.[340] The King's Bench held that the unlawful arrest "provoked" the killing and thus mitigated the interveners' murder charge to manslaughter.[341] The *Tooley* court also provided the historical precedent for the common law alter ego rule when it held that the strangers intervened in the situation at their own risk, that if they had been wrong and the arrest was lawful, then they could not have used the defense of provocation.[342]

Section 35-41-32 of the Indiana Penal Code provides the clearest and, simultaneously the most controversial legal pronouncement regarding the use of force against public servants in defense of others. Section 35-41-32 provides, in essence, that an intervener may come to the aid of the perceived victim of unlawful police aggression and may, under certain circumstances, use deadly force to protect a third party, even a stranger, from excessive police force.[343] The Indiana law does not embrace the common law alter ego rule. In Indiana, an intervener can kill a police officer who lawfully uses deadly force against a third party and go free, if the intervener reasonably believes that the third party had the right to use deadly force!

The states are split in terms of the circumstances under which an intervener may use force in defending another from excessive police force. The case law on this issue is sparse. In 1997, the Supreme Court of Nevada, in *Batson v. State*, in an issue of first impression, held as a matter of state law that an intervener can use force against a police officer in defense of another party when the intervener witnessed the excessive use of police force.[344] The court stated that:

> [A] person may defend another only where that person has witnessed a police officer's unlawful and excessive use of force, and only where the individual being "rescued" is facing imminent and serious bodily harm at the hands of the police officer. Furthermore, an individual acting in defense of another against a police

339. The Queen v. Tooley (1710) 92 Eng. Rep. 349; 2 Ld. Raym. 1296.
340. *Id.* at 349–50.
341. *Id.* at 350.
342. *Id.* at 353.
343. IND. CODE § 35-41-3-2 (2013).
344. Batson v. State, 941 P.2d 478, 483 (Nev. 1997).

> officer may only use that force reasonably necessary to remove the threat of imminent serious bodily harm to that other person.[345]

The Batson court essentially adopted a more stringent version of the alter ego common law rule. So in Nevada, an intervener's actions must meet four criteria to exonerate him or her under the state's defense of others doctrine:

1. The intervener must be a first hand witness to excessive police aggression;
2. The police aggression must threaten imminent and serious bodily harm to the defended party;
3. The intervener can only use the degree of force necessary to stop the threat of serious bodily harm;
4. The defended party must have in fact had the right to defend himself or herself.

The Supreme Court of Pennsylvania in *Commonwealth v. French* articulated a similar standard.[346] Police arrested French for aggravated assault following an altercation on a street corner in the Frankford section of Pennsylvania.[347] According to the prosecution's evidence, when Officer Welsh arrived on the scene he saw four white individuals beating an African-American male, who was pinned to the ground.[348] Officer Welsh pulled Defendant French and three others off the man.[349] French told the officer that the man had attacked her and her companions first.[350] She stated that the man had been with a group of people who were harassing a couple at a nearby bus stop.[351] She further remarked that the man assailed them when her companions demanded that the group cease the harassment.[352] Conversely, the man who had been pinned to the ground stated that he was walking down the street to go catch a bus when French and her companions attacked him without provocation.[353] The man reported that he did not want to file charges and the officer allowed him to leave.[354]

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345. *Id.* (citations omitted).
346. Commonwealth v. French, 611 A.2d 175 (Pa. 1992).
347. *Id.* at 176.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*

Officer Welsh then commanded French and the others to leave, but they refused and began to shout profanities at him.[355] The boyfriend of French's sister called the officer a "nigger lover."[356] According to the officer, after the boyfriend of French's sister made this remark, the boyfriend punched him in the face.[357] Officer Welsh responded by punching the boyfriend, at which point French's boyfriend punched Welsh.[358] Officer Welsh placed French's boyfriend and the other male present under arrest.[359] According to French, one of the officers had his foot on her boyfriend's throat and was choking him to the point that she thought he was going to die.[360] French punched Officer Welsh in the face; he then placed her under arrest.[361] French was tried and convicted for aggravated assault and resisting arrest.[362]

French appealed the conviction, arguing, in part, that the trial court's jury instruction regarding the use of force against police officials was erroneous.[363] The instruction stated:

> [I]n this case justification is a defense if the defendant French reasonably believed that her intervention was necessary to protect Moran [appellee's boyfriend] from death or serious bodily injury and that the force used was immediately necessary to protect Moran against the force used by Officer Welsh on the same occasion as Miss French used force. Because the Commonwealth has the burden of disproving the defense of justification, you may find Miss French guilty only if you are satisfied beyond a reasonable doubt either that French did not reasonably believe that her intervention was necessary to protect Moran or that she did not reasonably believe that the force she used was immediately necessary to protect Moran then and there against the force used by Officer Welsh.[364]

French took issue with the statement that she could only defend her boyfriend if she reasonably believed that he was facing serious bodily injury or death.[365] French argued that her reasonable belief that her boyfriend was facing bodily injury justified her action.[366] In other words, she argued that "the use of force by an arresting officer which exceeds the force required to effectuate the arrest amounts to an assault on the arrestee which triggers the right of self defense."[367] The Supreme Court of Pennsylvania rejected French's argument, holding that "[a]n arresting officer's use of

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355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 177.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.* at 178.

excessive force capable of causing less than serious bodily injury or death can be vindicated by recourse to subsequent legal remedies."[368]

Although most states have no statutory provisions specifically permitting the use of deadly force on public servants, the case law permits the force under certain circumstances. It is less clear under the law of these states the circumstances under which an intervener can use deadly force against a police official to aid a third party. The Second Amendment provides a degree of uncomfortable clarity.

VIII. THE RIGHT TO REBEL AND DEFENSE IN REBELLION

Many commentators argue that applying the historical rationale underlying the Second Amendment to modern day times is a license for anarchy.[369] A reasonable inference from this approach suggests that "the people have a right to bear arms, in public, specifically to intimidate the police, and to use those weapons against the police in circumstances where they perceive their constitutional rights or the constitutional rights of others to have been violated, subject only to post-confrontation resolution by a court."[370]

A historical as well as a textual approach to the Second Amendment clearly suggests that an intervener has the right to use deadly force in the defense of a stranger.[371] The defense, however, does not derive exclusively from the right to self-defense. That is, the defense-of-strangers doctrine is a recent addition to American criminal jurisprudence. As such, the doctrine has slim historical roots in the Second Amendment. However, the rationale behind the American common law right to resist an unlawful arrest provides a foundation for the argument that the Second Amendment embraces the defense-of-strangers doctrine.

The English common law right to resist an unlawful arrest seems to be based on a doctrine quite discernible from the historical doctrine of self-defense, although justifications for the right to resist an unlawful arrest have changed over time. The justification for the right began with the doctrine of provocation in *Tooley*, but changed to one of defense of liberty as the right developed in America.[372] In *Tooley*, three strangers came to

368. *Id.* at 179.
369. Miller, *supra* note 169, at 966.
370. *Id.*
371. *See* U.S. Const. amend. II; People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914).
372. The Queen v. Tooley (1710) 92 Eng. Rep. 349; 2 Ld. Raym. 1296.

the aid of a woman who had been unlawfully arrested.[373] One of the strangers, Tooley, ended up killing a man who came to the aid of the arresting officer.[374] The King's Bench held that the unlawful arrest served as sufficient provocation to mitigate Tooley's offense from murder to manslaughter.[375] The court considered the unlawful arrest an affront to the Magna Carta and, thus, an affront to all Englishmen, and considered Tooley's passion understandable.[376] The King's Bench's conception of provocation resembled the doctrine of heat-of-passion manslaughter codified in many state laws.[377]

The rationale of provocation began to shift in American courts due to the obvious dangers in the provocation doctrine which, if left unaltered, would tend to suggest that any affronts to the American constitution—for example, racial discrimination or violations of the right of free speech—could mitigate murders and, in some cases, excuse dangerous assaults. As such, American common law developed another justification for the right.

Under American common law, a person's right to be free from unconstitutional physical restraint justified resistance to an unlawful arrest.[378] Many courts and scholars have interpreted such resistance as a form of self-defense.[379] This characterization prompts strong arguments that the modern trend abrogating the right to resist an unlawful arrest flies in the face of our Constitution.[380] Such an interpretation would require the repeal of many state statutes that make it unlawful to resist an unlawful arrest. American law up until recently has always allowed for the use of physical force to ward off threats of criminal deprivations of freedom, whether those deprivations be kidnapping or unlawful arrest.[381]

The best case supporting the proposition that the Second Amendment embraces a right to use deadly force to defend strangers against unlawful police violence involves a conceptual marriage between the self-defense component of the Second Amendment and the right to rebel, which is

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373. *Id.* at 349–50.
374. *Id.* at 350.
375. *Id.* at 352–53.
376. *Id.* at 353.
377. *See, e.g.*, CAL. PENAL CODE § 192(a) (West 2015).
378. *See* John Bad Elk v. United States, 177 U.S. 529, 537–38 (1900) (holding that the defendant had the right to use such force as was absolutely necessary to resist an attempted illegal arrest).
379. *See* Michael P. O'Shea, *Modeling the Second Amendment Right To Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 591 (2012).
380. *See* Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 902–03 (1984).
381. *Bad Elk*, 177 U.S. at 537–38.

implied by the plain language of the Second Amendment and evidenced by the original justification for the ratification of the Second Amendment right to bear arms.

The right to bear arms rests on two foundational rights within the Second Amendment. These two rights, the right of self-defense and the right to rebel, are distinguishable. The right of self-defense, of course, involves a physical response to immediate physical threats to the safety of the party invoking the right and his or her family.[382] This right encompasses defense against common assailants and burglars as well as police officials using excessive force.[383] The right to self-defense is practical and fully functional. The right to rebel, on the other hand, is necessarily a quasi-abstract right that theoretically permits organized violence against the government should the government use or threaten constitutionally prohibited government force to impose its will on the citizenry.[384] The right to rebel further differs from the right of self-defense because it does not justify violence against private citizens, only agents of federal, state, or local governments.

Understanding the nature and limitations of the right to rebel requires understanding the circumstances surrounding its ratification. The Second Amendment was partially inspired by Eighteenth Century colonists' pervasive fear of being defenseless in the face of potential government tyranny.[385] The history aback the Second Amendment indicates that the Framers sought to "deter tyranny and allow popular revolution to unseat a tyrant."[386] Joseph Story stated that

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[387]

382. O'Shea, *supra* note 379, at 594.

383. *Id.*

384. *See* Tom Ginsburg et al., *When To Overthrow Your Government: The Right To Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1203 (2013).

385. *See* Alan Bedenko, *The Second Amendment and Tyranny*, ARTVOICE (Jan. 16, 2013, 7:30 AM), http://blogs.artvoice.com/avdaily/2013/01/16/the-second-amendment-and-tyranny [http://perma.cc/24H3-DZ86].

386. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1390 (1998).

387. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (Fred B. Rothman & Co. 1991) (1833).

The Supreme Court in *Heller* observed with reference to the founders, "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[388] Additionally, the English created the English right to bear arms in part because a number of English monarchs had quashed dissent by disarming the English people. Furthermore, in early American history, prior to the American Revolution, George III disarmed certain areas in the American colonies that posed a threat to English rule.[389] This greatly influenced the founders' ratification of the Second Amendment.

The Second Amendment seems on its face to create a collective right as opposed to an individual right, the primary purpose of which is to provide for the common defense of the citizenry against government oppression. That is, the Second Amendment seems to only secure the right of citizens to bears arms in connection to their service in a militia organized for the common defense. The plain language of the Second Amendment seems to support this interpretation. The amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[390] The Supreme Court in *Heller*, however, determined that individuals had a right to bear arms for individual defense.[391] Several scholars support this interpretation. For example, William Blackstone commented that the right to bear arms in English common law rights was rooted in "the natural rights of resistance and self-preservation" available to people "when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[392] Similarly, David B. Kopel argues that

> [t]he Framers of the Constitution and the Second Amendment saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal; the theme was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail.[393]

Since the Second Amendment protects the rights of individuals acting in their own interests, the right to rebel is also an individual right, exercisable against individual government agents.

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388. District of Columbia v. Heller, 554 U.S. 570, 598 (2008).

389. *People & Events: Events Leading to the American Revolution*, PBS (Mar. 30, 2004), http://www.pbs.org/wgbh/amex/patriotsday/peopleevents/e_conditions.html [http://perma.cc/ 8LS7-Q2NC] (last visited July 15, 2015).

390. U.S. CONST. amend. II.

391. *Heller*, 554 U.S. at 598.

392. BLACKSTONE, *supra* note 78, at *139.

393. Kopel, *supra* note 386, at 1454 n.358.

Professor Darrell Miller argues that the Second Amendment protects an individual's use of deadly force to combat unlawful, deadly police force because the use of defensive force under these circumstances amounts to a response to representative acts of government tyranny.[394] He argues, "Individuals—not just communities—have the right to protect themselves from public violence. Individuals—not just the militia—have the right to defend themselves against tyranny."[395] Professor Miller also seems to suggest that the Second Amendment also contains a right to defend others as an extension of the doctrine of self-defense.[396] He does not parse the question of whether a relationship with the defended party matters for constitutional purposes.[397] Professor Miller also doesn't distinguish the right to rebel from self-defense.[398] As discussed, however, the two doctrines are not completely compatible.[399] That is, based on the historical methodology the Supreme Court used in *Heller* and *McDonald* to determine that the Second-Amendment codified the natural right of self-defense, the Second Amendment contains no right to defend strangers.[400] Said differently, the lawful defense of a stranger from civilian violence is a relatively new invention in the Anglo-American legal tradition. It is thus not a part of the "history and traditions" of American jurisprudence. That said, if the Second Amendment does in fact sanction the use of physical force in defense of a stranger, such a finding has no roots in the doctrine of self-defense, but instead in the right to rebel.

If the right to rebel retained its original implications, the result would be socially disastrous, particularly when the court's individualization of the Second Amendment rights in *Heller* and *McDonald* are taken into account.[401] That is, the reconciliation of the Court's most recent interpretations of the Second Amendment with the Framers' original vision would essentially provide that individuals have a right to attack government agencies and/or officials if those agencies or officials use military or police force to suspend, abridge, or remove the citizens' rights. Because of this obvious impracticality courts should view the right to rebel as a dormant right that

394. Miller, *supra* note 169, at 940.
395. *Id.*; Williams, *supra* note 49, at 648.
396. Miller, *supra* note 169, at 940.
397. *Id.*
398. *Id.*
399. *See supra* Part II.
400. *See supra* Part III.
401. *See supra* notes 66, 103 and accompanying text.

only becomes active when combined with a tangible right, such as self-defense, that defines and limits its scope.

The right to rebel should be viewed as a right of last resort. That is, the right to rebel should only allow citizens to take the law into their own hands against the government or against government agents when the government cannot fully protect a fundamental constitutional right or make citizens whole after its violation. In other words, only the violation of a clearly defined constitutional right can activate the right to rebel, and only when subsequent judicial action could not fully redress such a violation. The activation of the right to rebel by the doctrine of self-defense provides the bases for the doctrine of defense-in-resistance.

IX. UNLAWFUL POLICE VIOLENCE IN MINORITY COMMUNITIES

The minority community may be most in need of Second Amendment protections, including defense-in-resistance. That is, if the Second-Amendment right of self-defense and third-party defense against police officers truly was created as a check on government tyranny and oppression, then communities with the highest rate of unlawful police violence might be most in need of that check.[402] Many members of these communities as well as scholars and commentators view the police not as an organization of public servants but as an occupying force present primarily to control the community through fear, intimidation, and incarceration.[403]

This view is influenced by disproportionate instances of the abuse of police authority in communities of color.[404] The abuse of police authority can be defined as "any action by a police officer without regard to motive, intent, or malice that tends to injure, insult, trespass upon human dignity, manifest feelings of inferiority, and/or violate an inherent legal right of a member of the police constituency in the course of performing 'police work.'"[405] The police physically abuse their authority when they use unprovoked force, unnecessary force in controlling a situation, or excessive force in conducting an arrest.[406] Psychological police abuse consists of verbal attacks, discrimination, intimidation, or harassment used to control

402. *See generally* VICTOR E. KAPPELER ET AL., FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING (2d ed. 1998) (citing research showing that minorities view police negatively).

403. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER, RACE & JUST. 381, 391–92, 404, 407 (2002).

404. Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality,* 47 HASTINGS L.J. 677, 690, 693–98 (1996).

405. Thomas Barker & David L. Carter, *Typology of Police Deviance*, *in* POLICE DEVIANCE 3, 7 (Thomas Barker & David L. Carter eds., 3d ed. 1991).

406. *Id.*

or diminish the victim.[407] Legal abuse consists of a violation of an individual's rights under the U.S. Constitution, federal law, or state law.[408]

In 2001, the United States Department of Justice found that around four hundred and twenty two thousand people 16 years old and older were estimated to have contact with the police in which the police used physical force or threatened the use of physical force.[409] A disproportionate amount of civil complaints filed against the police from these encounters were filed by African-Americans and Latinos.[410] Moreover, most instances of unlawful police violence go unreported.[411] Whatever the case, it seems clear that Blacks are "disproportionately harassed, beaten and killed by police."[412]

The phenomenon of physical police abuse, commonly referred to as police brutality, did not begin with the brutal beating of Rodney King by several officers on a Los Angeles road way in 1991.[413] As pointed out by Alexa P. Freeman,

> Police brutality is not a new phenomenon—rather, its setting has shifted. Many scholars analogize police brutality today to lynchings in the past. The analogy is apt. For nearly a century following the Emancipation of slaves in the United States, law enforcement officials not only condoned lynchings, but in many instances participated in them.[414]

Additionally, as discussed, after the Civil War, law makers had to invoke the Second Amendment in order to make an effort to stop rogue southern police officers from disarming and then abusing black union soldiers returning home from the war.[415]

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407. *Id.* at 7–8.
408. *Id.* at 8.
409. PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 1999 NATIONAL SURVEY 2 (2001), http://www.bjs.gov/index.cfm?tv=pbdetail&iid=659 [http://perma.cc/TMW6-DHCB].
410. Malcom D. Holmes, *Minority Threat and Police Brutality: Determinants of Civil Rights Criminal Complaints in U.S. Municipalities*, 38 CRIMINOLOGY 343, 347 (2000).
411. *Fighting Police Abuse: A Community Action Manual*, AM. CIVIL LIBERTIES UNION (Dec. 1, 1997), https://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/fighting-police-abuse-community-ac [http://perma.cc/M3P2-VJPX].
412. Freeman, *supra* note 404, at 696.
413. *Id.* at 690; *see* Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES (Mar. 7, 1991), http://www.nytimes.com/1991/03/07/us/tape-of-beating-by-police-revives-charges-of-racism.html [http://perma.cc/MZ99-3PMR].
414. Freeman, *supra* note 404, at 690.
415. *See supra* notes 120–24 and accompanying notes.

Police brutality, as is the case with lynchings, must be assessed through the context of race, if it is to be understood and ameliorated. Historically, the police have enforced white supremacy[416] through fear, intimidation, physical attack, and incapacitation.[417] In fact, the police have been compared by at least one scholar to the slave-time overseers, who used various forms of abuse to control the slave population.[418]

The racial stereotyping of black and Latino men helps to perpetuate police violence in communities of color.[419] There exists a widely-held belief in society that blacks, in particular, are more prone to crime and are generally more dangerous than any other race.[420] This is evidenced most starkly by the phenomenon of mass incarceration. Mass incarceration, as discussed most cogently by Professor Michele Alexander in *The New Jim Crow* is an "evolved" method of containing young Latino and African-American males, replacing the more "primitive" tactics used during slavery and Jim Crow.[421] In fact, there are more African-Americans involved in the criminal justice system today than there were slaves in 1850.[422]

Prior to 1973, there were approximately 100 inmates per 100,000 American Citizens.[423] However, the rate increased to an exponential five multiples of that by 2005.[424] There are now over 500 inmates per 100,000 citizens.[425] Between 1980 and 2011, the number of those imprisoned for drug offenses

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416. *See generally* Jared Sexton, *Race, Nation, and Empire in a Blackened World*, 95 RADICAL HIST. REV. 250 (2006).

417. Freeman, *supra* note 404, at 692–93.

418. Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the "War on" Paradigm*, 15 J. GENDER, RACE & JUST. 47, 74–75 (2012).

419. Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 623–25 (1993).

420. Jody D. Armour, *Race Ipsa Loquitor: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–89 (1994); *see also* Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 571–74 (1993) (arguing that the jury in the Rodney King case viewed King as dangerous because they believed he possessed superhuman strength which needed to be brought under control).

421. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012). As Alexander plainly states, "[r]ather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind [during the era of Jim Crow]. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans." *Id.* at 2.

422. *Id.* at 180.

423. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 5 (2007).

424. *Id.*

425. *Id.*

has increased from about 40,000 to approximately 500,000.[426] On average, the United States incarcerates people at a rate more than seven times the combined rate of England, France, Germany, Japan, Italy and Canada.[427]

Furthermore, as pointed out by professor Dorothy Roberts, "On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole."[428] African-Americans make up only about thirteen percent of the population but represent forty percent of the incarcerated.[429] The vast majority of imprisoned blacks have been incarcerated for drug offenses.[430] In 1998, African-Americans represented seventy-four percent of all Americans imprisoned for drug-related offenses.[431] In fact, in several states, African-American males make up to ninety percent of the entire prison population convicted on drug offenses.[432]

What's more is that there is little evidence to suggest that blacks are more likely to commit drug offenses than their white counterparts.[433] In fact, the U.S. Public Health Service Substance Abuse and Mental Health Services Administration found that in 1992, fourteen percent of all drug users were African-Americans, eight percent Latino and an astounding seventy-six percent white.[434] Similarly, there is no real evidence to suggest that African-Americans are more likely to be drug-dealers, as it is a fact that most users buy drugs from individuals who share their race and socio-

426. *See* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 3 (2014), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf [http://perma.cc/TLF5-A4U4].

427. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2–3 (2006).

428. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

429. Jennifer R. Wynn, *Inside Rikers: The Social Impact of Mass Incarceration in the Twenty-First Century*, 51 JUDGES' J., no. 4, 2012, at 23, 25.

430. Nunn, *supra* note 403.

431. Dan Pens, *Federal Prisons Erupt*, *in* THE CELLING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY 246–47 (Daniel Burton-Rose et. al. eds., 1998) ("[P]ossession of 500 grams of powdered cocaine—100 times the amount of crack—carries a five year mandatory minimum [sentence] . . . in reality a racist war being waged against poor Blacks.").

432. Wynn, *supra* note 429, at 4.

433. Nunn, *supra* note 403, at 395.

434. Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 845–46 (2002).

economic status.[435] In the face of this reality, in 1989, an astonishing four African-American males were arrested as compared to one of their white counterparts.[436] A 2013 study by the American Civil Liberties Union found that African-Americans were 3.73 times more likely to be arrested on marijuana possession than their white counterparts, despite the fact that both races use the drug in roughly the same amounts.[437]

It would seem that the African-American community's perception of the police is not unwarranted. That is, the evidence suggests that the mass incarceration of blacks is explained by discriminating law enforcement.[438] In addition to the disparities mentioned above, African-Americans are more likely to be investigated.[439] Police officials, like much of America, buy into racial stereotypes and are thus more likely to find African-Americans criminally suspicious than other groups.[440] As such, law enforcement officials focus a disproportionate amount of attention on African-Americans and are more likely to use excessive force, including deadly force, on African-American men.[441] An uneven use of excessive police force in minority communities tends to suggest that these communities are in greater need of Second Amendment protections than other American communities.[442] Maybe Black Panther Party-type police patrols are needed, particularly in the African-American community, to check unlawful police violence.[443] If so, the Second Amendment makes even the extreme ends of these types of patrols potentially lawful.

Many will argue that community patrols and defense-in-resistance will only result in the death of more black males. It is more likely that these patrols combined with a widespread understanding of Second Amendment defensive rights will decrease black deaths. It should do so in two ways.

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435. K. JACK RILEY, NAT'L INST. OF JUSTICE & OFFICE OF NAT'L DRUG CONTROL POLICY, CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 15–16 (1997), https://www.ncjrs.gov/pdffiles/167265.pdf [https://perma.cc/N747-5JLR].

436. *Id.*; *see also* HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 6 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf [http://perma.cc/V6JQ-VK47] ("[B]etween 1988 and 1993, blacks were arrested at rates more than five (between 5.1 and 5.5) times the rate of whites.").

437. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013), http://www.aclu.org/files/assets/061413-mj-report-rfs-rel4.pdf [http://perma.cc/2PA8-ARUZ].

438. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1489–91 (2000).

439. *Id.*

440. Gaynes, *supra* note 419, at 623–25.

441. *Id.* at 625.

442. KAPPELER ET AL., *supra* note 402, at 6–8.

443. Mary D. Powers, *Civilian Oversight Is Necessary To Prevent Police Brutality*, *in* POLICING THE POLICE 56, 57 (Paul A. Winters ed., 1995).

Firstly, it will decrease police violence for reasons mentioned above. It also might indirectly decrease the incidents of black-on-black killings by increasing a sense of community empowerment. Such a sense of community empowerment prevailed in the late Sixties and early Seventies through what is known as the Black Power Movement. The Black Power Movement was a response to the integrationist approach to racial injustice, an approach that dominated the mid to late Sixties. This approach was symbolized most cogently by Dr. Martin Luther King, Jr. In the late sixties, however, the African-American community began to evolve its response to white supremacy. The prevailing ethos became one of self-determination as opposed to assimilation. An ideology developed that championed the development of black political, social, cultural and economic institutions to secure black interests.[444] The slogans "Black Pride" and "Black Power" defined the day. This burgeoning community cohesiveness gave purpose to many young African Americans, who began to focus their attention on the larger issues that faced their communities and away from the differences that divided the community. The Black Power Movement, however, waned with the targeted and strategic disruption of Black Power organizations by the FBI.[445] As one scholar notes, "there is much fallout from the war on Black Power, namely the over-incarceration of young Black men, police brutality, unconstitutional searches and seizures, and racial profiling . . . ."[446] Thus, a return to a more overt form of community empowerment, such as community police patrols and intervention, should help to re-focus the angst of minority youth to issues of greater moment than the internecine rivalries that beget the bulk of black-on-black violence.

The Second Amendment as recently interpreted in *McDonald* and *Heller* provides the vehicle for the effective use of community patrols and

444. JOSEPH W. SCOTT, THE BLACK REVOLTS: RACIAL STRATIFICATION IN THE U.S.A.: THE POLITICS OF ESTATE, CASTE, AND CLASS IN THE AMERICAN SOCIETY 152–53 (1976).

445. S. REP. NO. 94-755, pt. 2, at 11–12 (1976), http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf [http://perma.cc/3VSE-BCVG]. The gang culture that has created so much black-on-black violence is partially the result of the government's organized and strategic efforts to dismantle African-American groups and neutralize African-American leaders who threatened the status quo. *Id.* This effort was led by J.Edgar Hoover and was employed as early as the 1920's against Marcus Garvey and his Universal Negro Improvement Association. UNIV. PUBL'NS OF AM., FEDERAL SURVEILLANCE OF AFRO-AMERICANS (1917-1925): THE FIRST WORLD WAR, THE RED SCARE, AND THE GARVEY MOVEMENT, at ix–x (Theodore Kornweibel, Jr. ed., 1985), http://cisupa.proquest.com/ksc_assets/catalog/1359_FedSurveillAfroAms.pdf [http://perma.cc/6EER-WS2F].

446. Tibbs, *supra* note 418, at 79.

intervention. State statutes that describe the right to defend in resistance will provide further clarity and thus will help empower citizens to challenge individualized government tyranny in their communities.

X. STATUTORY MODEL

The Second Amendment affords a right to use deadly force against police officials under limited circumstances.[447] The right's scope, however, is unclear. This Article proposes a statutory model that approximates the constitutional floor regarding the right. In a modern society, any statutory model should balance the constitutional right to defend in resistance with the necessity of having an effective police force. Society has a great interest in discouraging the use of force against public servants. Without the modern police force, society would almost certainly be in shambles. It would be anarchy. A statutory model that encourages violence against the police, as the statute adopted by the state of Indiana does arguably, while certainly holding true to this nation's founding traditions, may not serve its current needs.[448] However, codifying the right to act with defensive force against public servants does in some instances outweigh its detriments.

Excessive police force is as prevalent as ever. The abuse of police power not only harms the direct victims of the abuse, but also delegitimizes the government's authority in the eyes of many citizens. Codifying the right to use deadly force against public servants acts as a check on police abuse. Public servants are less likely to use excessive force, particularly deadly force, if it is clear that citizens can defend against such force. Furthermore, the codification of the right to defend in resistance encourages community monitoring of law enforcement. Community monitoring is more likely to curb the use of excessive force. The police may be more hesitant to use unlawful force in front of a group of bystanders if it is clear that those bystanders can intervene.

The codification of the right to defend in resistance has clear benefits. On the other hand, an undiluted right to defend in resistance may serve to hamper law enforcement and expose officers to unjustified attacks. Additionally, the codification of the right may, similar to the common law right to resist an unlawful arrest, increase the danger to both the perceived victim and the intervener. That is, intervention may escalate the use of police force instead of abating it. However, this is a cost many are willing to risk in defense of themselves and their communities. Furthermore, the history of the Second Amendment suggests that the net result of defense-

447. U.S. CONST. amend. II.
448. IND. CODE § 35-41-3-2 (2013).

in-resistance would be a decrease in police brutality and other forms of police violence in the African-American community.

Any statutory model circumscribing the right to defend in resistance must also take into account the Supreme Court's decisions allowing police officials to use deadly force on fleeing suspects and other constitutionally sanctioned uses of deadly force. That is, the question of whether a constitutional right, grounded in the common law, exists to use deadly force against a police official must reckon with the Supreme Court's more recent holdings regarding the constitutionality of using deadly police force on fleeing suspects. These decisions seem to signal a departure from the common law in that they elevate the station of law enforcement, and generally tolerate law enforcement's use of extreme force more than common law does. So any analysis of how the Supreme Court will interpret the right of defense-in-resistance must take into account the Court's current regard for police force.

The Supreme Court in *Tennessee v. Garner* held that police officials could use deadly force on a fleeing suspect if the police reasonably believed that the suspect posed a danger to officers or the public at large.[449] As such, the use of deadly force could be factually in error, thus possibly triggering defensive rights under the Second Amendment, and lawful at the same time under *Garner*. Thus, a statute, like the Indiana statute, that contains no alter ego rule may encourage interveners to use deadly force even when law enforcement uses deadly force lawfully but wrongly.

Consider a scenario where a robber, in the process of robbing a bank, has shot three people. Then he conceals his gun in his waistband and flees the bank on foot. A description of the culprit is sent across police radio and a uniformed police officer sees a man running who reasonably matches the description of the robber. He knows the robber is armed and dangerous and has shot three people. The officer gives chase on foot with his weapon un-holstered. He commands the suspect to stop and threatens to fire his weapon if he does not. The suspect, who is actually not the robber, is deaf and cannot hear the officer. Another individual, coming out of a convenience store, sees what he perceives to be an unarmed man running and smiling as if he is unaware that he is being chased by the officer. The officer fires a shot and misses. The suspect continues running as he cannot hear the gun firing. The officer shoots again and misses. At this point, the onlooker pulls his gun and shoots the officer, who he believes

449. Tennessee v. Garner, 471 U.S. 1, 4 (1985).

is acting unlawfully by firing at an unarmed man. The onlooker hits and mortally wounds the officer. In this scenario, the officer arguably used a constitutionally acceptable degree of force under the circumstances. What will be intervener's fate? He sincerely believed the officer was acting unlawfully and that he had to act to save the life of a citizen. Indiana would not hold him criminally responsible. However, by statutorily mandating that the intervener has to witness the police force and that the intervener acts at his or her own risk, the statutory model decreases the likelihood that an intervener would act in error.

What if a state refuses to recognize defense-in-resistance? The argument should be anticipated that some states will argue that issues of crimes and criminal defenses are the exclusive province of the states. In fact, there are several Supreme Court decisions that seem to enforce this view.[450] However, all of these decisions preceded the Supreme Court's holdings in *McDonald* and *Heller*. In prior cases, the Supreme Court analyzed issues concerning state criminal defenses under the Fourteenth Amendment due process clause.[451] The Supreme Court in those cases tends to suggest that a state can allow or disallow any defense it likes.[452] However, the Supreme Court has not heard a case involving whether a state can eradicate completely, self-defense as a defense. Even prior to *Heller* it goes without question that the Supreme Court would have deemed such an abridgment to be unconstitutional. Furthermore, as discussed by the Supreme Court in *Graham v. Conner*, the Court only uses the substantive due process clause when no other constitutional amendment speaks to the issue.[453] Here, the Second Amendment clearly speaks to the issue of self-defense proclaiming it to be the central component of the Second Amendment. As such, the floor of the Second Amendment governs self-defense and defense-in-resistance by way of the latent right to rebel.

The statutory model for defense-in-resistance is as follows:

> A person is justified in using force, including deadly force, in defending a third-party against the unlawful assault of a public servant, if that person is a witness to the circumstances giving rise to the unlawful use of police force and if such force is necessary to protect the third-party from immediate and serious bodily injury or death.

The proposed statue has five important aspects:

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450. *See* Lawrence v. Texas, 539 U.S. 558, 584 (2003); Washington v. Glucksberg, 521 U.S. 702, 722 (1997); Martin v. Ohio, 480 U.S. 228, 233 (1987).

451. *Lawrence*, 539 U.S. at 564; *Glucksberg*, 521 U.S. at 710; *Martin*, 480 U.S. at 233.

452. *Lawrence*, 539 U.S. at 564; *Glucksberg*, 521 U.S. at 710; *Martin*, 480 U.S. at 233.

453. Graham v. Conner, 490 U.S. 386, 395 (1989).

1. The public servant must actually be in the process of using force before the intervener can act;
2. The intervener must be correct in his or her belief that the public servant is using unlawful force;
3. The intervener must have witnessed the circumstances giving rise to the use of police force;
4. The defended party has to be facing immediate injury; and
5. The threatened physical injury must be serious.

The above model would help fill in the gap left by the Supreme Court decisions in *Heller* and *McDonald,* provide guidance to state legislatures in developing similar statutes, and empower minority communities in particular to take a more active role in the protection of their communities.

XI. CONCLUSION

Heller established self-defense as a core component of the Second Amendment.[454] However, the existence of the Second Amendment right to defend in resistance hinges not on the doctrine of self-defense, but on the implicit right to rebel.

This Article posited that the Second Amendment encompasses a right to rebel against tyrannical government action. However, this right, if extended to its logical extreme, would undermine social order. Therefore, the right has to be limited. Limiting the right to rebel to situations where it would vindicate clearly defined constitutional rights that are not fully redressable by judicial action provides an appropriate boundary. This Article proposed that the right of self-defense limits the intervener's right to rebel. An individual can only use defensive force against a public servant in defense of a stranger when the use of defensive force constitutes resistance to individuated acts of government tyranny. This type of defense is not self-defense but defense-in-resistance.

Furthermore, while the Supreme Court's interpretation of the Second Amendment establishes the right to defend in resistance, it has not defined the scope of this right. The statutory model provided above limits the circumstances under which defensive force can be used against public servants while safeguarding the right to defend in resistance.

Due to the history of police violence and abuse in minority communities, particularly the African-American community which has little political recourse, the constitutional right to form community police patrols and to

454. District of Columbia v. Heller, 564 U.S. 570, 635 (2008).

use physical force to defend members of the community against disproportionate, unlawful police violence, may be these communities' final hope of resisting a society that has historically sought to control and diminish them.