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## 'But I Thought He Had a Gun' - Race and Police Use of Deadly Force

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# “BUT I THOUGHT HE HAD A GUN”

## Race and Police Use of Deadly Force

CYNTHIA LEE\*

“In the old days, the cops simply shot their black victims and [planted] a weapon the officers carried for such emergencies. Nowadays, weapons need exist only in the mind of the policeman in firing position.”

-Les Payne, Journalist for *Newsday*<sup>1</sup>

*February 4, 1999. About midnight. Amadou Diallo, a 22-year-old immigrant from West Africa, had just come home to his South Bronx apartment at 1157 Wheeler Avenue after an evening of selling CDs, hats, gloves, and watches on Fourth Street. Lingered for just a moment in the vestibule of his apartment building, Diallo suddenly heard the screeching of tires and saw four white men with guns pointed straight at him come pouring out of a car. One of the men yelled something at Diallo. Diallo reached into his back pants pocket and pulled out his wallet, offering it to the men in a desperate effort to be left alone. Instead, he heard someone shout, “Gun!” and the next thing he knew, the men were firing at him. Stunned, Diallo tried to remain standing for as long as he could, but the rain of bullets kept coming. Forty-one bullets in all. Nineteen of the forty-one bullets entered his body, searing him with unbelievable pain. One bullet perforated his aorta. Another struck his spinal cord. Another his lungs. Another his liver. Another his spleen. Another his kidney.*

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\* Cynthia Lee is a Professor of Law at the George Washington University School of Law. This article is adapted from chapter seven in CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (NYU Press 2003) and is reprinted with the permission of the author and NYU Press. The author would like to thank Mike Selmi, Lisa Steele, and Lyn Bates for providing useful feedback on the material in this essay. The author would also like to thank Billy Santiso and Tom Moir for providing research assistance on this essay.

1. Les Payne, *Black Youths Have Good Reason to March*, *NEWSDAY*, Sept. 6, 1998, at B6.

*Another his intestines. More than ten bullets struck his legs. Finally, he couldn't stand any more and collapsed. Even then the shooting didn't stop. Only when it was apparent to all that Diallo would not be getting up again, the officers finally stopped shooting. But it was too late for apologies. Amadou Diallo was dead. And the men who killed him were not robbers, but "New York's finest" – police officers from the Street Crimes Unit.<sup>2</sup>*

Police officers are rarely prosecuted for murder because most fatal police shootings are deemed justified by prosecutors who decline to prosecute or by grand juries that decline to return indictments. The Diallo shooting, however, coming shortly on the heels of the brutal beating and sodomy of Abner Louima, a dark-skinned immigrant from Haiti, was too politically charged to be swept under the rug. The four officers who shot Amadou Diallo were initially charged with second-degree murder. The charges were later broadened to give the jury the option of returning a guilty verdict on lesser charges, including first-degree manslaughter, criminally negligent homicide, and reckless endangerment.

At trial, the officers claimed Diallo's death was a justifiable homicide.<sup>3</sup> The officers had been looking for a rape suspect. Diallo fit the description because he was Black<sup>4</sup> and in the neighborhood where the rape occurred. According to the officers, Diallo brought the shooting upon himself because of his suspicious movements—peering up and down the street, retreating into the dimly lit vestibule, and not responding to the officers' demands that he stop and show his hands.<sup>5</sup> When Diallo reached into his front pants pocket and pulled out a black object, the officers thought he had a gun. One officer started shooting. Hearing the bullets ricocheting around the vestibule, the other officers thought Diallo was shooting back. On February 25, 2000, the four officers were acquitted of all charges by a jury of seven White men, one White woman, and four Black women.<sup>6</sup>

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2. Narrative derived from Elizabeth Kolbert, *The Perils of Safety*, NEW YORKER, Mar. 22, 1999, at 50.

3. Amy Waldman, *4 Officers Enter Not-Guilty Pleas to Murder Counts in Diallo Case*, N.Y. TIMES, Apr. 1, 1999, at A1.

4. I purposely capitalize the words "Black" and "White" to highlight the fact that Blacks and Whites, like Asian Americans and Latinos, are members of socially constructed racial categories in American society.

5. Tom Puleo, *'Justice' or 'Shame': Jury Clears Police Officers in Killing*, HARTFORD COURANT, Feb. 26, 2000, at A1.

6. John J. Goldman, *4 White Officers Are Acquitted in Death of Diallo*, L.A. TIMES, Feb. 26, 2000, at A1.

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## Introduction

According to a report by the National Institute of Justice and the Bureau of Justice Statistics, police use force in encounters with the public in a very small percentage of cases.<sup>7</sup> When police do use force in such encounters, they typically use non-deadly force.<sup>8</sup> Even if police use force relatively infrequently in police-citizen encounters, police use of *deadly* force is still an important subject because of the risk of loss of life in such cases.

It is undisputed that Blacks are disproportionately represented among the victims of police shootings. In a comprehensive review of the literature on police use of deadly force, James Fyfe reports that "every study that has examined this issue [has] found that blacks are represented disproportionately among those at the wrong end of police guns."<sup>9</sup> Although Blacks represent approximately thirteen percent of the population in the United States, in parts of the country they constitute sixty percent to eight-five percent of the victims of police shootings.<sup>10</sup> On average, Blacks are more than six times as likely as Whites to be shot by police,<sup>11</sup> and in large cities are killed by police at least three times more often than Whites.<sup>12</sup> Latinos (or Hispanics) are about twice as likely as Whites, but only half as likely as Blacks, to be shot and killed by police.<sup>13</sup> There is a noticeable lack of data regarding police use of force against other non-Black minorities, such as Asian Americans, Arab Americans, South Asians, and Native Americans. However, reports by Amnesty International and Human Rights Watch suggest that, in relation to their representation in society at large, these other

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7. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 3 (1999).

8. *Id.* at 4-5.

9. James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 189 (1988).

10. *Id.*; see also CHARLES J. OGLETREE, JR. ET AL., CRIMINAL JUSTICE INST. AT HARVARD LAW SCH. FOR THE NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 14 (1995); James J. Fyfe, *Race and Extreme Police-Citizen Violence*, in READINGS ON POLICE USE OF DEADLY FORCE 173, 176 (James J. Fyfe ed., 1982).

11. Fyfe, *supra* note 9, at 189-90.

12. SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 85 (1996) (noting that minorities are "shot and killed three times as often as whites by police in the big cities . . ."); see also Paul Takagi, *A Garrison State in a "Democratic" Society*, in READINGS ON POLICE USE OF DEADLY FORCE, *supra* note 10, at 195, 201 ("Black men have been killed by police at a rate some nine to ten times higher than white men.").

13. WALKER ET AL., *supra* note 12, at 92 (citing studies of police shootings in Chicago, New York City, and Los Angeles).

minorities are also disproportionately on the receiving end of police force.<sup>14</sup>

While widespread consensus exists that racial minorities are disproportionately represented as victims of police shootings, the reason for this disproportion is hotly disputed. Most people who have an opinion on the subject fall within one of two camps which John Goldkamp, in his study of race and police shootings, calls "Belief Perspective I" and "Belief Perspective II."<sup>15</sup> Proponents of Belief Perspective I believe racism on the part of police officers and police departments results in one trigger finger for racial minorities and another for Whites.<sup>16</sup> According to this view, police officers intentionally single out racial minorities for harsher treatment.<sup>17</sup> Proponents of Belief Perspective II, in contrast, contend that race does not influence the average police officer's decision to use force.<sup>18</sup> According to this perspective, Blacks and other non-Whites are disproportionately represented as victims of police shootings because they disproportionately commit armed robberies, carry firearms, and engage in behavior that police officers are likely to find threatening, such as resisting arrest.<sup>19</sup>

The bulk of the social science research on race and police use of deadly force conducted in the 1980s supports the race-is-irrelevant position of Belief Perspective II.<sup>20</sup> According to this body of research, a police officer's decision to shoot a suspect is influenced by non-racial factors, such as whether the suspect appears to be armed and whether he or she complies with police orders.

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14. AMNESTY INTERNATIONAL, USA: RACE, RIGHTS AND POLICE BRUTALITY (1999); HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 39 (1998), available at <http://www.hrw.org/reports98/police/index.htm>.

15. John S. Goldkamp, *Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force*, 2 JUST. SYS. J. 169, 171-77 (1976).

16. Takagi, *supra* note 12, at 203.

17. Goldkamp, *supra* note 15, at 172.

18. *Id.* at 177.

19. *Id.* at 173.

20. See, e.g., Mark Blumberg, *Race and Police Shootings: An Analysis in Two Cities*, in CONTEMPORARY ISSUES IN LAW ENFORCEMENT 152 (James J. Fyfe ed., 1981) (finding that similarly situated Blacks and Whites receive the same types and amount of force from police); Michael F. Brown, *Use of Deadly Force by Patrol Officers: Training Implications*, 12 J. POLICE SCI. & ADMIN. 133 (1984); Fyfe, *supra* note 10, at 190 (finding that Blacks make up a disproportionate share of police shooting victims reportedly armed with guns or engaged in robberies); George A. Hayden, *Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decisionmaking*, 9 J. POLICE SCI. & ADMIN. 102 (1981); R. James Holzworth & Catherine B. Pipping, *Drawing a Weapon: An Analysis of Police Judgments*, 13 J. POLICE SCI. & ADMIN. 185 (1985). Several of the studies that reach this conclusion, however, involve self-reporting by police officers about whether the race of the suspect would influence their own decision to use force.

More recent studies which I discuss in Part I suggest the opposite. Moreover, the actual lived experiences of persons living in poor minority communities and the perception in these communities is that race not only matters, it matters significantly. In the foreword to *Race and Criminal Justice*, Daniel Georges-Abeyie, an African-Puerto Rican/Virgin Islander professor of criminology, remarks, "Through my own real life experiences I know that the differential treatment of minorities occurs. I also know [sic] that it is more widespread than official statistics might indicate."<sup>21</sup> A few older social science studies also support the view that race matters.<sup>22</sup>

Those who are inclined to support Belief Perspective II might ask why we as a society should care about the beliefs of a minority of citizens. We should care because actual and perceived unfairness and racial bias in law enforcement undermines police effectiveness. Simmering tensions between communities of color and the police, if unaddressed, can ignite into chaos like the rioting that erupted after the acquittals of the four Los Angeles police officers charged with the brutal beating of Rodney King. The post-verdict chaos was a wake-up call, serving as a reminder that just below the surface of apparent calm brews deep anger, resentment, and a feeling that the criminal justice system protects some segments of the population better than others. As Attorney General Janet Reno noted in an address at a conference on strengthening police-community relations in June 1999:

Tensions between police and minority residents affect all aspects of the criminal justice system. When citizens do not trust their local police officer, they are less willing to report crime, and less willing to be witnesses in criminal cases. Jurors are less willing to accept as truthful the testimony of officers, and recruitment of officers from minority communities becomes that much more difficult.<sup>23</sup>

The problem with Goldkamp's two belief perspectives theory is that it frames the problem in all-or-nothing terms. Either police officers are bigots who intentionally target racial minorities (Belief Perspective I) or they are completely unbiased and color-blind (Belief Perspective II). The truth more likely lies somewhere

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21. Daniel Georges-Abeyie, *Foreword* to RACE AND CRIMINAL JUSTICE, at ix (Michael J. Lynch & E. Britt Patterson eds., 1991).

22. See, e.g., James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707 (1982); Takagi, *supra* note 12, at 203.

23. Janet Reno, Speech at the Justice Department Police Integrity Conference (June 9, 1999) (transcript available at <http://www.usdoj.gov/archive/ag/speeches/1999/agpoliceinteg.htm>).

between these two extremes.

In this essay, I offer a third way to explain the disparate treatment respective segments of the population experience at the hands of police officers – an explanation that accommodates *both* the lived experiences of persons of color *and* the belief that police officers use force more often against persons of color because such individuals appear to be more threatening to the officer. I suggest that racial stereotypes operate at a subconscious level to influence the police officer's decision to use deadly force.<sup>24</sup> The police officer may not consciously decide to use deadly force because of the suspect's race, but the suspect's race nonetheless influences the officer. Racial stereotypes thus may alter the officer's perception of danger, threat, and resistance to authority. A simple question, "Officer, why am I being stopped?" may be perceived as behavior challenging the officer's authority when asked by someone who is Black. Police officers may also "see" danger more readily when dealing with a person of color. Just as racial and ethnic stereotypes influence private citizens' decisions to use force in self-defense, such stereotypes can also influence police officers' decisions to use force.

I should note at the outset that I am not making any empirical claims regarding the extent to which racial stereotypes influence the police officer's decision to use force. I leave this to the social scientists who are trained in the methodologies of empirical and quantitative research. My purpose in this essay is merely to challenge the conventional wisdom that race does not influence the police officer's decision to use deadly force. Conventional wisdom suggests that police officers use deadly force only when necessary to protect themselves or others from death or serious bodily injury. We know this is the conventional wisdom because most fatal police shootings do not result in the filing of criminal charges against the officer. In the rare case that is prosecuted, the officer is usually acquitted or, if convicted, given a sentence that is much lower than the penalty usually imposed when a private citizen shoots and kills another person.<sup>25</sup>

While cases involving clear acts of police brutality without even the slightest suggestion of justification, such as the beating and sodomy of Abner Louima on August 9, 1997, are similar to cases in

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24. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-90 (1995) (explaining the human tendency to categorize).

25. Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 703, 727 (1996).

which police assert self-defense, such as the case concerning the beating of Rodney King, this essay is *not* about clear acts of police brutality.<sup>26</sup> This essay deals only with the subject of police use of deadly force in claimed self-defense cases.

Claimed self-defense cases are complex, because officers who assert self-defense presumably believe sincerely that such force was necessary to protect against death or great bodily harm. It is hard to feel punitive toward someone who sincerely believes he is acting in self-defense. The law, however, requires that officers who claim self-defense must have more than just an honest belief in the need to act in self-defense. The officer's belief must also be reasonable or, as courts have held, one that a reasonably prudent officer in the same situation would have held.<sup>27</sup>

The reasonableness requirement can be helpful and problematic at the same time. On the one hand, the reasonableness requirement operates as a check on the officer's subjective beliefs. It ensures an objective standard against which the officer's personal beliefs are to be measured so that an officer's completely unfounded and irrational fears cannot justify actions that injure innocent citizens. On the other hand, the reasonableness requirement provides a way in which social attitudes and biases can influence the legal determination regarding the validity of police use of force. Racial stereotypes can make an officer's use of deadly force seem reasonable when without such stereotypes, the officer's actions would appear unjustified. If stereotypes encourage police officers to use deadly force against certain members of the community and not others, a critical examination of the reasonableness of the officer's belief in the need to use force is necessary.

Addressing the problem of racial stereotypes influencing a police officer's perception of criminality and danger is a difficult task for several reasons. First, all police work requires some amount of stereotyping or generalizing about people based on external characteristics. Police officers in the field must quickly size up a suspect and make decisions about how to handle a situation. In making split-second decisions, officers often must rely on external cues, such as dress, demeanor, location, and race. Because some stereotyping is necessary, it is easy to think that any and all stereotyping is permissible.

The second problem lies in the deeply ingrained belief that the use of force is part and parcel of good police work. Police officers often need to use force in order to do their jobs. Indeed, many

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26. For a discussion of such cases, see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275 (1999).

27. *Santana v. City of Hartford*, 283 F. Supp. 2d 720, 727 (D. Conn. 2003).



people feel police officers have a right to use force against uncooperative suspects. As Paul Chevigny notes, "We've all heard people say, 'Well, if the police have to kick a little butt in order to keep order, so be it.'"<sup>28</sup> Television shows like *NYPD Blue*, *America's Most Wanted*, *COPS*, and even *Law and Order* depict police officers as good guys who need to break the rules sometimes by roughing up suspects in order to get to the truth.

This essay seeks to challenge the standard color-blind view of police decisions to use deadly force. I argue that race norms or racial stereotypes often operate at a subconscious level to alter police officers' perceptions of threat. I start in Part I by discussing Charles Lawrence's theory of unconscious racism. Part I also examines recent social science research that supports my theory that racial stereotypes operate at a subconscious level to influence police officer decisions to use deadly force. Part II uses actual cases to illustrate ways in which stereotypes about Blacks can affect police officer decisions to shoot. Part III explains and critiques the existing mechanisms for holding police officers and other law enforcement officials accountable for fatal shootings of innocent individuals. Part III concludes with some tentative ideas on how we as a society, through our jury system, can help encourage police officers to overcome the inevitable influence of racial stereotypes on their decisions to use deadly force in the field.

### I. Unconscious Racism

At the start of the Museum of Tolerance in Los Angeles, California, one is presented with two doors. One door is labeled "prejudiced." The other is marked "unprejudiced." If one tries to enter the door marked "unprejudiced," one finds that the door is locked and one cannot enter the museum through that door. The following message is then projected onto the door:

THINK . . . NOW USE OTHER DOOR.

The message the museum is trying to send is that we are all prejudiced—some to a greater degree, others to a lesser degree. It is more precise, however, to say that racial stereotypes affect us all, influencing both the way we view others and the way we understand ourselves. Professor Charles Lawrence comments on this shared experience:

Americans share a common historical and cultural heritage in

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28. Paul G. Chevigny, *Police Violence: Causes and Cures*, 7 J.L. & POL'Y 85, 86 (1998).

which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.<sup>29</sup>

Americans attach significance to race. When a young Black male stranger approaches and starts talking to us, we may worry about getting robbed or conned. When we see an Asian woman, we may assume she is quiet and deferential to authority. When a Mexican man gets angry, we may attribute his anger to machismo, something we believe Mexican men have as part of their cultural upbringing. Most of us are not conscious of our assumptions based on race and ethnicity. We think of racism as the intentional acts and beliefs of a few, not something we all engage in. According to Lawrence, however, "[r]acism is in large part a product of the unconscious."<sup>30</sup> In other words, racism manifests itself not only in the intentional acts of bigots, but also in the actions of well-meaning individuals who are not conscious of the ways in which race influences their everyday decision-making.

Lawrence offers two possible explanations for our unconscious racism. One explanation rests on psychoanalytic theory, which suggests that the human mind defends against the discomfort of guilt by refusing to recognize beliefs that conflict with what the individual has learned is good or right. American society today embraces the principle of equality and rejects racism as immoral. When one experiences conflict between one's deeply ingrained personal beliefs, which may be inegalitarian, and the principle of equality, the mind excludes racism from consideration.<sup>31</sup> The second explanation rests on cognitive psychology. Cognitive psychologists theorize that racism is transmitted by tacit cultural understandings. The media, one's parents, one's peers, and authority figures all communicate certain beliefs and preferences. A child may never be told explicitly that Blacks are inferior, but learns this lesson by observing the behavior of others.<sup>32</sup>

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29. Lawrence, *supra* note 24, at 322.

30. *Id.* at 330 (defining racism as "a set of beliefs whereby we irrationally attach significance to something called race").

31. *Id.* at 331-36.

32. *Id.* at 323.

When police officers shoot unarmed Black citizens, they may be responding to racial cues that link Blacks to criminality and violence. All of us are influenced by such racial cues, but police officers, more than private citizens, often find themselves in situations in which they have to respond quickly without thinking. In the field, police officers may not have time to evaluate whether they are responding to actual danger or assumptions based on a person's race.

Recent social science studies provide support for the notion that police decisions to use deadly force are influenced by racial stereotypes. In one recent study, Anthony Greenwald, Mark Oakes, and Hunter Hoffman, psychology professors at the University of Washington in Seattle, sought to determine the extent to which police shootings of unarmed Black citizens "are due to reduced perceptual sensitivity (i.e., less ability to distinguish weapons from harmless objects when these objects are held by Blacks than by Whites) or increased response bias (i.e., increased tendency to respond to any object held by a Black as a weapon)."<sup>33</sup> Greenwald, Oakes, and Hoffman created a desktop virtual reality simulation in which subjects (University of Washington undergraduate students) were asked to play the role of a plainclothes police officer who has to rapidly respond to armed and unarmed persons. Subjects were given less than one second to respond to individuals from one of three categories of targets—criminals, fellow police officers, and citizens.<sup>34</sup> All the targets appeared in street clothes, but criminals and police officers held guns while citizens held harmless objects, such as cameras, flashlights, and beer bottles. The only variable that distinguished police officers from criminals was their race.<sup>35</sup>

Subjects played the simulation exercise twice. In one simulation, subjects were told all the criminals were White and all the police officers were Black.<sup>36</sup> In the second simulation, they were told all the criminals were Black and all the police officers were White.<sup>37</sup> Citizens could be either Black or White. Subjects were told to click the mouse button if they thought the target was a criminal with a gun, hit the space bar if they thought the target was a fellow officer with a gun, and do nothing if they thought the target was an innocent citizen with a harmless object in hand.<sup>38</sup>

The researchers found that subjects had greater difficulty

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33. Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 400 (2003).

34. *Id.* at 401.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

distinguishing weapons from harmless objects when dealing with Black targets as opposed to White targets.<sup>39</sup> Additionally, subjects shot at Black targets more often than White targets, "giving the weapon-appropriate response more readily to Black than to White targets."<sup>40</sup> In other words, the students exhibited both reduced perceptual sensitivity and increased response bias towards Blacks.

One might dispute the findings of the Greenwald study on the ground that untrained college students are likely to react differently than trained police officers to visual cues like the ones given in the above experiment. Police officers, unlike college students, receive special training in the use of deadly force, which presumably would diminish the likelihood of mistaken shootings. There is, however, reason to suspect that police officers would react similarly to the college students in Greenwald's study. Police officers are exposed to the same societal messages about race as ordinary citizens. Moreover, other studies have reached findings similar to the Greenwald study.<sup>41</sup>

In 2001, B. Keith Payne published the results of two experiments.<sup>42</sup> In Experiment 1, subjects were shown a photo of a Black or White male face (cropped so that his hair and clothing were not visible), followed by a photo of either a handgun or a tool (e.g., a pair of pliers, a socket wrench, or an electric drill). Subjects were told to identify the object in the second photo as either a gun or a tool by pressing one of two keys on a keypad. Subjects were told that the experiment required both speed and accuracy, but were given an unlimited amount of time to respond. Payne found that racial primes had a significant influence on the subjects' ability to accurately distinguish between weapons and harmless objects.<sup>43</sup> Subjects in Experiment 1 were quicker to accurately identify a

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39. *Id.* at 403.

40. *Id.*

41. See, e.g., B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERS. & SOC. PSYCHOL. 181 (2001) (finding that participants identified guns faster when primed with Black faces compared with White faces and misidentified tools as guns more often when primed with Black faces than with White faces) [hereinafter *Automatic and Controlled Processes*]; see also B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384 (2002) [hereinafter *Best Laid Plans*]. Joshua Correll has conducted similar research with similar results. Subjects in Correll's study were quicker to shoot an armed target when the target was African American than when he was White and more likely to shoot at an unarmed target when he was African American than when he was White. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERS. & SOC. PSYCHOL. 1314 (2002).

42. See generally *Automatic and Controlled Processes*, *supra* note 41; *Best Laid Plans*, *supra* note 41.

43. *Automatic and Controlled Processes*, *supra* note 41, at 190.

weapon when they were primed by a Black face as opposed to a White face.<sup>44</sup>

Experiment 2 replicated Experiment 1, except this time subjects were told that they had to respond quickly. Payne found that subjects in Experiment 2 were more likely to falsely identify a tool as a gun when primed by a Black face as opposed to a White face.<sup>45</sup>

Payne's research has important implications for law enforcement. When an officer confronts a Black suspect who is in fact armed, the officer may respond more quickly and arguably more effectively than when he confronts an armed White suspect. On the other hand, when the officer confronts an unarmed Black suspect, his quick resort to deadly force can result in the tragic death of an innocent person. As Payne explains:

These data suggest that, because the bias caused by race is largely automatic, it may be difficult to control directly, especially when cognitive resources are limited. Returning to the example of the police officer in a confrontation with a possibly armed suspect, we can draw several conclusions about the automatic and controlled processes that may serve as independent bases for responding. If the officer is like the average participant in our experiments, he or she will experience some degree of automatic bias when interacting with a Black suspect. That is, the officer will be more prone to respond as if a Black suspect is armed, compared to a White suspect. In situations where a Black suspect is actually armed, this bias will facilitate performance: The officer will be faster to respond, and less likely to make an error, compared to the case in which a White suspect is armed. However, in situations where a Black suspect is unarmed, the automatic bias may tragically interfere with performance.<sup>46</sup>

## II. Racial Stereotypes in Action: The Black-as-Criminal Stereotype

The results of the Greenwald and Payne studies are consistent with the theory that racial stereotypes influence behavior at a subconscious level. One of the stereotypes most often applied to African Americans, particularly young Black males, is what I call the Black-as-Criminal stereotype. Under this stereotype, Blacks are presumed more dangerous, more prone to violence, and more likely to be involved in criminal activity than other members of society.<sup>47</sup>

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44. *Id.* at 185.

45. *Id.* at 190.

46. *Id.* at 190-91.

47. This essay focuses on stereotypes about Blacks, not because stereotypes about Asian Americans, Latinos, and Native Americans do not exist, but because of the paucity of data on police use of deadly force against non-Black minorities. *But see* Cynthia Kwei

One reason why many people are fearful of Black men is because statistics show Blacks are arrested and convicted at rates that greatly exceed their numbers in the general population.<sup>48</sup> Relying upon such statistics, however, is problematic. When the total number of Blacks arrested for violent crime is compared to the total number of Blacks in society, the former comprise less than one percent of the total Black population.<sup>49</sup> To assume that any Black person one interacts with is likely to be a violent criminal attributes the criminality of a few Blacks to the entire Black population. Such generalization also overlooks the fact that most of the Blacks who are incarcerated are serving time for non-violent drug offenses.<sup>50</sup>

Despite the misleading nature of statistical information regarding Blacks and crime, the linkage between Blackness and criminality persists. As a number of social science studies have shown, people of all races tend to view Blacks as more dangerous and more threatening than Whites.<sup>51</sup>

Whites, in contrast, are not generally viewed as potential threats,<sup>52</sup> even though there is no shortage of evidence that White people, particularly White men, have been responsible for a great deal of violence in this country. Two White teenage boys were responsible for the deadly shooting at Columbine High School in Littleton, Colorado in April 1999 that left thirteen dead and many

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Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (discussing stereotypes about African Americans, Asian Americans and Latinos).

48. On any given day in 1994, nearly one out of every three Black men in their twenties was in prison or jail, or on probation or parole. MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995). Blacks are arrested for murder, robbery, and rape at a disproportionately high rate. In 1998, African Americans constituted 53.4 percent of those arrested for murder and non-negligent manslaughter, 55.3 percent of those arrested for robbery, and 37.5 percent of those arrested for forcible rape. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *CRIME IN THE UNITED STATES: 1998 UNIFORM CRIME REPORTS* 228 (1999) [hereinafter *CRIME IN THE UNITED STATES*].

49. Lee, *supra* note 47, at 411-12.

50. MAUER & HULING, *supra* note 48, at 14.

51. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590 (1976); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980); Charles F. Bond et al., *Responses to Violence in a Psychiatric Setting: The Role of Patient's Race*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 448 (1988).

52. There is some evidence of the existence of a White serial killer stereotype. In 2002, when the Washington, D.C. metropolitan area was the scene of numerous seemingly random sniper attacks, many believed the sniper was a White male because so many serial killers in the past have been White males. Darryl Fears & Avis Thomas-Lester, *Blacks Express Shock at Suspects' Identity: Most Say They Expect a Serial Killer to be White*, WASH. POST, Oct. 26, 2002, at A17.

more injured. A White man was responsible for the bombing of the Oklahoma City federal building. Whites constitute more than two-thirds of all individuals arrested for criminal activity, and more than half of the individuals arrested for *violent* criminal activity.<sup>53</sup> Nonetheless, Whites generally are not feared because of the color of their skin.

#### A. Candy Bars, Keys, and Sunglasses: Racialized Fear of the Young Black Male and the Imagined Gun

The fear of Black individuals is so powerful that law enforcement officers often “see” guns in the hands of unarmed Black men and women. For example, in 1997, a federal law enforcement officer shot a Black teenager because he thought the teen was carrying a gun. The teen was actually carrying a Three Musketeers candy bar.

On November 6, 1997, at approximately 7:00 p.m., in Queens, New York, Andre Burgess, a seventeen-year-old Black high school student, was walking to a friend’s house with a Three Musketeers candy bar in his right hand. Burgess was the goaltender and captain of the Hillcrest High School soccer team. At around 138th Avenue near 241st Street, Burgess passed an unmarked police car containing undercover officers looking for a fugitive in a federal narcotics case. After passing the car, Burgess started to open the wrapper of his candy bar. Deputy Marshal William Cannon, who was sitting in the unmarked car, thought Burgess’ silver foil-wrapped candy bar was a gun. Cannon jumped out of the car, pointed his gun at Burgess, and shouted at him.<sup>54</sup> Burgess started to turn around to see who was yelling at him. Before Burgess could complete his turn, Cannon shot Burgess in the back of his left thigh. Burgess fell to the ground, bleeding. Cannon quickly handcuffed Burgess, then shook hands with other officers who had arrived on the scene. While Burgess was lying on the ground, handcuffed and bleeding, he heard Deputy Marshal Cannon, completely oblivious to Burgess’ pain, remark to one of the officers, “Don’t I know you from some other

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53. CRIME IN THE UNITED STATES, *supra* note 48, at 210 (“Race distribution figures for the total number of national arrests during 1998 showed 68 percent of the arrestees were white, 30 percent were black, and the remainder were of other races. . . . Whites accounted for 63 percent of the Index crime arrestees, 65 percent of the property crime arrestees, and 58 percent of the violent crime arrestees.”).

54. Dennis Duggan, *Black, Unarmed - and Often a Target*, NEWSDAY, Feb. 9, 1999, at A6. There is some dispute as to the precise words that Deputy Marshal Cannon shouted before shooting Burgess. Cannon told prosecutors that he shouted, “U.S. Marshals. Drop the gun.” Burgess, however, told police that Cannon only yelled, “hey you,” or “hold it.” Selwyn Raab, *Marshal Who Shot Youth Faced '94 Beating Charge*, N.Y. TIMES, Nov. 11, 1997, at B3.

case?"<sup>55</sup>

A Queens grand jury refused to return an indictment against Deputy Marshal Cannon, finding that the law enforcement officer *reasonably* believed the Black teenager posed an imminent threat of death or serious bodily injury to the officer or others.<sup>56</sup> Responding to the grand jury's decision, Cannon's attorney, Lawrence Berger, said the grand jury did the right thing. "Our position is and has been that this was an unavoidable accident, one that Mr. Cannon felt horrible about. Nevertheless, if the matter occurred exactly the same way tomorrow, without the hindsight of knowing it was a candy bar in Mr. Burgess's hand, [Cannon] would have reacted the same way."<sup>57</sup>

There are several disturbing aspects to this case. First, it is disturbing that a federal law enforcement officer could mistake a Three Musketeers candy bar for a gun. If Deputy Marshal Cannon had watched Burgess a few seconds longer before initiating the confrontation, he might have realized the silver object in Burgess' right hand was a candy bar. Right before the shooting, Burgess had unwrapped the candy bar and was starting to take a bite out of it, hardly something he would do if the item in his hand was a gun. Second, from what is known about the case, it does not appear that Burgess made any threatening moves right before he was shot. Burgess had passed the unmarked police car and was walking away from it when Deputy Marshal Cannon jumped out of the car and shot him. Burgess started to turn towards the officer only after the officer yelled, "Hey you. Hold on." Third, Burgess was shot in the back of his leg, undermining Cannon's claim that he shot Burgess in self-defense.<sup>58</sup>

The most disturbing thing about this incident was Cannon's attorney's statement that if this same incident happened again tomorrow, Cannon would react the same way. Moreover, this was not the first time Deputy Marshal Cannon had been accused of using excessive force against a Black man. Three years before he shot Andre Burgess, Deputy Marshal Cannon was prosecuted for

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55. Peter Noel, 'I Thought He Had a Gun', VILLAGE VOICE, Jan. 13, 1998, at 40.

56. Kit R. Roane, *Deputy Marshal Is Cleared in Shooting of Queens Teen-ager*, N.Y. TIMES, Mar. 5, 1998, at B5.

57. *Id.*

58. The fact that a person has been shot in the back does not necessarily indicate that he did not pose a threat to the person who shot him. An attacker who is trying to avoid a counter-attack can quickly turn, resulting in a shot to the back. See Lisa Steele, *Defending the Self-Defense Case*, 39 CRIM. L. BULL. 659, 676 (2003) ("A moderately healthy person can turn his or her torso 180 [degrees] in .53 seconds and can turn his or her entire body 180 [degrees] in .667 seconds. This is very close [to] the amount of time it takes a trained police officer to fire a handgun.").



beating a handcuffed Black prisoner with a lead-filled leather pouch.<sup>59</sup> At Cannon's trial, two former deputy marshals testified that Cannon repeatedly struck the prisoner with an eight-inch leather pouch, known as a slapjack, after the prisoner broke Cannon's nose while resisting an arrest.<sup>60</sup> The two deputy marshals had firsthand knowledge of this attack because they held the prisoner down so that Cannon could beat him.<sup>61</sup> These two deputy marshals pled guilty to charges of conspiracy to obstruct justice, and were dismissed from their jobs.<sup>62</sup> Cannon, in contrast, was acquitted of all charges, and was never disciplined by the Marshal's Service for this beating.<sup>63</sup>

It would be easy to write off the shooting of Andre Burgess as an unfortunate but isolated incident caused by one bad cop. In fact, this is the reaction most people have when confronted with shocking examples of excessive force by the police. When the beating of Rodney King was captured on home video and broadcast all across the nation, many Whites were shocked that such a beating by police officers, sworn to uphold the law, could take place in America in the 1990s. The beating was seen as a horrible, tragic aberration. African Americans, by and large, were not shocked by the beating and saw it as just another example of the treatment they were used to receiving from the police. As others have noted, what was unique about the Rodney King case for Black America was not that the beating occurred, but that it was captured on home video.

With more and more consumers purchasing camcorders, the video recording of police misconduct may become more common. On July 6, 2002, at approximately 5:00 p.m., Inglewood police officer Jeremy Morse was caught on videotape slamming a handcuffed African American male teenager named Donovan Jackson against the hood of a patrol car, then punching the handcuffed Jackson in the face for no apparent reason. Officer Morse claimed the sixteen-year-old Jackson started the confrontation by grabbing his crotch after he was handcuffed. According to several news reports, however, before Jackson was handcuffed and before the video camera started recording, one of the five officers on the scene punched Jackson twice in the face.<sup>64</sup> Jackson was booked on suspicion of assaulting a police officer, and later released. Officer Morse was charged with felony assault under color of law and his

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59. Raab, *supra* note 54.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Kasmirah Joyner, *Enforcement Under Color of Authority Hurts All*, NORTHERN STAR (Northern Illinois University Wire), July 23, 2002.

partner was charged with filing a false police report regarding Jackson's arrest. Both men pled not guilty. Despite the videotape, in July 2003, Officer Morse's first jury deadlocked on whether to find him guilty of felony assault, forcing the judge presiding over Morse's trial to declare a mistrial.<sup>65</sup> Officer Morse was tried a second time. In February 2004, a second jury could not reach a unanimous verdict, leading to another mistrial. After two unsuccessful trials, the Los Angeles District Attorney's Office decided against prosecuting the case a third time.<sup>66</sup>

Because so many incidents of police force against Blacks and other minorities go unreported, it is easy for those living comfortable lives in middle- or upper-class neighborhoods to believe that police abuse of force is uncommon. The United States Supreme Court reflects this type of ostrich-with-its-head-in-the-sand mentality when it treats acts of police brutality as aberrations or as isolated incidents.<sup>67</sup> For example, in 1983, the Supreme Court in *City of Los Angeles v. Lyons*<sup>68</sup> reversed a preliminary injunction issued by a lower federal court prohibiting Los Angeles police officers from using the chokehold unless threatened with death or serious bodily injury. The Court vacated the injunction on the ground that Adolph Lyons, a Black man who was stopped by Los Angeles police officers for a traffic violation and without any provocation on his part was subjected to a chokehold that rendered him unconscious and damaged his larynx, lacked standing to sue since Lyons was not likely to be stopped again by the Los Angeles police and subjected to a chokehold.<sup>69</sup> The Court's refusal to see Lyons's case as part of a pattern and practice by the Los Angeles police department was particularly disturbing in light of the fact that between 1975 and 1980, more than a dozen people, a significant number of them Black, died after being subjected to chokeholds by Los Angeles police officers.<sup>70</sup>

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65. Anna Gorman, *Fired Officer to Face Retrial*, L.A. TIMES, Jan. 12, 2004, at B1.

66. Kimberly Edds, *Calif. Policeman Won't Be Tried Again*, WASH. POST, Feb. 7, 2004, at A11.

67. Banes, *supra* note 26 (noting the judicial tendency to view instances of police misconduct as isolated rather than systemic); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999) (arguing that authority narratives are used to justify acts of police brutality).

68. 461 U.S. 95 (1983).

69. *Id.* at 111.

70. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 162 (1999) ("By the time Lyons's case reached the Supreme Court, sixteen persons had been killed by police use of the chokehold; twelve of the victims were black men."). According to Human Rights Watch, the Los Angeles police department still permits its officers to use the chokehold. HUMAN RIGHTS WATCH, *supra*

Perhaps to the extent that a law enforcement officer mistook a candy bar for a gun, the Andre Burgess case is unique. However, to the extent that a law enforcement officer “saw” a weapon in an unarmed Black man’s hand, the case is not at all unique. Many unarmed Black men have been shot by law enforcement officers who thought, or claimed they thought, the Black male suspect had a gun. For example, two months after Andre Burgess was shot, another young Black man was shot and killed because a police officer thought he was armed. This Black man was “armed” with a set of keys.

On Christmas day in 1997, at approximately 1:00 p.m. in Brooklyn, New York, Officer Michael Davitt was among a team of four police officers from the Brooklyn South Task Force responding to a report of a domestic dispute at the Glenwood House, a housing project in Carnegie. As the officers neared the housing project, they heard what sounded like shots from the rooftop of one of the buildings and saw a Black man on a wall near the roof. As the police moved closer to the housing project, William Whitfield, a twenty-two-year-old Black man, was leaving one of the apartments where his fiancée, Candy Williams, lived. Because Williams did not have a phone, Whitfield was going to call his mother from a pay phone to tell her that he was bringing Williams and her children over for Christmas dinner. Whitfield had just given Williams a diamond ring and planned to marry her in 1998. As Whitfield came around the corner, he ran into Officers Davitt and Michael Dugan who ordered him to stop. Unbeknownst to the officers, Whitfield was wanted on three outstanding warrants for failing to appear in court on two misdemeanor assault charges and a marijuana possession charge. He also had some marijuana in his pocket. Whitfield knew that if he stopped, he would likely spend the rest of Christmas in jail rather than with his family, so he ran.

Officer Davitt shouted at Whitfield, “Stop!” to which Whitfield responded, “Not today.” Whitfield raced into the Milky Way Supermarket at 1669 Ralph Avenue, and ran to the back of the store to hide behind an aisle of groceries. The officers followed quickly on Whitfield’s heels with their guns drawn, ordering Whitfield to come out. When Whitfield did come out from behind the aisle with his hands up, Officer Davitt shot him once in the chest and killed him. Officer Davitt claimed that he saw a gleam of silver in Whitfield’s hand and assumed Whitfield had a gun.<sup>71</sup>

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note 14, at 29.

71. See Robert D. McFadden, *After Man Is Slain by Officer, Anger and Calls for Patience*, N.Y. TIMES, Dec. 27, 1997, at B1 [hereinafter *After Man Is Slain*]; Robert D. McFadden, *Panel Finds Officer Was Justified in Unarmed Man’s Fatal Shooting*, N.Y. TIMES, Jan. 31, 1998,

Despite an exhaustive search, no gun was found at or anywhere near the scene of the police shooting.<sup>72</sup> The only object found was a large ring of keys, which Whitfield might have been clutching when he tried to surrender to police.<sup>73</sup> Nonetheless, a grand jury found that Officer Davitt *reasonably* believed he or others were in imminent danger of death or serious bodily injury and refused to issue an indictment.<sup>74</sup> Prior to shooting and killing William Whitfield, Officer Davitt had been involved in numerous police shootings.<sup>75</sup> He was named in twelve civilian complaints, seven of which alleged excessive force.<sup>76</sup> None of these complaints, however, resulted in disciplinary action.<sup>77</sup> In his personnel file, Officer Davitt had thirteen commendations for exceptional, meritorious, and excellent police duty.<sup>78</sup>

In another case, police officers shot and killed a Black man because they thought he was carrying a gun and was about to use it on them. Actually, the man was carrying a pair of sunglasses and a set of keys.<sup>79</sup> On July 1, 1999, at approximately 9:40 p.m. in Salinas, California, San Jose Sergeant Thomas Murphy and Officer Anthony Mata were looking for a man named Odest Mitchell, who was wanted for a series of hotel and gas station robberies.<sup>80</sup> Mitchell was nicknamed "The Leaper" by police because of his reputation for leaping over counters, quickly overpowering hotel and gas station clerks, and robbing them.<sup>81</sup> Acting on a tip, the officers tracked Mitchell to a gas station in Salinas where he was buying gas. The officers ordered Mitchell to surrender, but instead he ran away from the officers towards a freeway off-ramp.<sup>82</sup> The officers followed after him with their guns drawn. Suddenly, Mitchell stopped and turned towards the officers. The officers fired twelve shots at

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at A1 [hereinafter *Panel Finds Officer Was Justified*]; Noel, *supra* note 55.

72. *After Man is Slain*, *supra* note 71.

73. *Panel Finds Officer Was Justified*, *supra* note 71.

74. *Id.*

75. *After Man is Slain*, *supra* note 71; see also AMNESTY INTERNATIONAL, POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT (1996), available at <http://web.amnesty.org/library/Index/engAMR510361996> (last visited Nov. 13, 2004) (detailing other incidents of excessive force and police brutality by the New York City police department).

76. *After Man is Slain*, *supra* note 71.

77. *Id.*

78. *Id.*

79. *Bush Backer Backtracks on Fund-Solicitation Letter*, SAN JOSE MERCURY NEWS, Sept. 26, 1999, at 2P.

80. Bill Romano et al., *Police Shoot, Kill Armed-Robbery Suspect: 2nd This Week, 7th This Year*, SAN JOSE MERCURY NEWS, July 3, 1999, at 1A.

81. *Id.*

82. *Id.*

Mitchell. Six of these shots hit Mitchell and killed him.<sup>83</sup>

The officers explained that they fired at Mitchell because they saw a metallic object in his hand and thought it was a gun.<sup>84</sup> A passing motorist who witnessed the shooting said he too thought Mitchell was carrying a metallic-looking object.<sup>85</sup> After an investigation into the shooting, the Monterey County District Attorney's Office concluded that the object in Mitchell's hand was a pair of sunglasses, but declined to file criminal charges against the officers.<sup>86</sup>

The Mitchell case is a difficult one to judge because the officers were chasing a man who apparently had an extensive history of violent criminal activity. At the time of the shooting, Mitchell was suspected of being involved in fifteen armed robberies in the San Francisco Bay Area.<sup>87</sup> The two officers chasing Mitchell did not know whether Mitchell was carrying a weapon, but when he stopped running and turned towards them, they thought they saw something metallic that could have been a gun.

It is always easy to criticize from the comfortable and safe position of an armchair long after an incident has taken place. Police officers on the street need to make quick decisions on a moment's notice. Many a police officer has been killed in the line of duty by a suspect who has not hesitated to shoot. The officers who shot and killed Odest Mitchell no doubt were worried that Mitchell might try to shoot them in order to escape arrest. Nonetheless, as the Greenwald and Payne studies suggest, the Black-as-Criminal stereotype may have primed the officers to "see" something metallic in Mitchell's hand, rather than the pair of sunglasses he was actually carrying.

### **B. Unprovoked Flight—Why an Unarmed Young Black Man Might Run From Authority**

On April 7, 2001, at approximately 2:00 a.m., nineteen-year-old Timothy Thomas was visiting his girlfriend, Monique Wilcox, and their three-month-old son in Over-the-Rhine, a high crime neighborhood near downtown Cincinnati. Thomas went out to get a pack of cigarettes at a nearby convenience store. On the way back, he passed a nightclub. One of the club's security guards, who happened to be a police officer working as a security guard on the

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83. Rodney Foo, *Disagreement over Necessity for Killing Police*, SAN JOSE MERCURY NEWS, Sept. 18, 1999, at 1A.

84. *Id.*

85. Romano, et al., *supra* note 80.

86. Foo, *supra* note 83.

87. *Id.*

side, recognized Thomas as the subject of fourteen arrest warrants. Most of these warrants were for minor traffic offenses, but it is not clear that the officer knew this. For no apparent reason, Thomas began running from the guard. During the ensuing minutes, Thomas sprinted through a parking lot, scaled two chain-link fences, and ended up in an L-shaped alley. Several officers, including Officer Stephen Roach, joined in the chase. Officer Roach entered the alley with his gun drawn. He called out, "Show me your hands!" but without waiting for Thomas to comply with his order, Roach fired, killing Thomas.<sup>88</sup>

Officer Roach's initial explanation for the fatal shooting was that it was an accident. When three fellow officers arrived on the scene, Roach told them, "It just went off. It just went off."<sup>89</sup> Later that day, when questioned by homicide investigators, Roach changed his story. Now his reason for shooting was self-defense. According to Roach, "Thomas had extended a clenched fist, he couldn't see what was in the fist, and he feared for his life."<sup>90</sup> Three days later, when homicide investigators confronted Roach with a videotape recorded by another police unit at the scene which indicated Roach fired his weapon less than four seconds after entering the alley, Roach returned to his initial explanation that the shooting was accidental.<sup>91</sup> In the ensuing weeks, Roach went back to his claim of self-defense, telling friends and co-workers that he shot Thomas because he thought Thomas was reaching for a gun in his waistband.<sup>92</sup>

It is possible that Officer Roach was suffering from memory distortion caused by the stress of being involved in a deadly shooting. Studies have shown that it is fairly common for police officers who are involved in fatal shootings to suffer from severe gaps in memory and even false memories.<sup>93</sup> Nonetheless, an accidental shooting is a far cry from a shooting in self-defense. If Roach shot Thomas because he believed Thomas posed an imminent threat of death or serious bodily injury, then the shooting most likely would have been intentional. An accidental shooting, in contrast, suggests no intention to either pull the trigger or hit the target.<sup>94</sup>

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88. Mark Singer, *A Year of Trouble: A City Subverts Itself*, THE NEW YORKER, May 20, 2002, at 42.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Alexis Artwohl, *Perceptual and Memory Distortion During Officer-Involved Shootings*, F.B.I. L. ENFORCEMENT BULL., Oct. 2002, at 18.

94. See Steele, *supra* note 58, at 663 ("Self-defense is all-or-nothing. In order to

Apparently, Thomas's flight prompted the ensuing police chase. While flight is viewed by many as a strong indicator of guilt, Thomas may have started running because he feared being roughed up by police. His mother told one reporter that about a year before his death, Timothy, his cousin, and a few other men were standing in front of the building where they lived when they were suddenly accosted by several policemen.<sup>95</sup> The officers slammed the young men against the wall and then threw them onto the ground.<sup>96</sup> The officers then jammed their knees into the backs of the young men, pulled their arms back, cuffed them, and searched them. Finding nothing, the officers let the men go.<sup>97</sup> A few months later, Timothy was walking to the grocery store when he, along with five or six other young men, was again accosted by police officers and forced to lie face down on the pavement.<sup>98</sup> Timothy's mother told reporter Mark Singer, "My son had a fear of police officers. His thing was, 'Mom, if they could do this to me in broad daylight with everybody watching, what would they do in the dark?'"<sup>99</sup> Thomas had fourteen outstanding arrest warrants, most of which were for traffic offenses, and he might have run because he was afraid of being taken into custody.<sup>100</sup>

The current Supreme Court is of the view that unprovoked flight from a police officer in a high crime area can give rise to a reasonable suspicion that the person fleeing is involved in criminal activity, justifying the officer's decision to stop the person.<sup>101</sup> There are, however, many reasons why an innocent person might flee from the police. Responding to Supreme Court Justice Antonin Scalia's suggestion in *California v. Hodari D.*<sup>102</sup> that only the guilty flee from police, Law Professor Tracey Maclin writes:

From a police perspective, Justice Scalia's remarks may make

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establish it, the client has to admit being at the crime scene, with a weapon, which he or she used to harm the aggressor. In one swoop, the client has given up alibi and mistaken identity defenses. He or she has given up the defense of accident.").

95. Singer, *supra* note 88, at 44.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. One problem with this theory is that Thomas started running upon seeing a nightclub security guard who was an off-duty police officer. We do not know whether Thomas knew the guard was an off-duty police officer, but it is possible that Thomas had previously encountered this officer during one of his prior run-ins with the police and therefore knew the guard was a police officer. Thomas's otherwise inexplicable decision to run right after seeing the guard supports this theory.

101. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

102. 499 U.S. 621 (1991).

sense. "Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not [run] away" as did Hodari. Of course, this viewpoint never considers that Hodari, a black youth, may have had alternative reasons for wanting to avoid the cops. Many persons who have never committed a crime have ambivalent or negative attitudes about the police. Perhaps, a youth like Hodari flees at the sight of police because he does not wish to drop his pants, as many black youths in Boston have been forced to do, just because the cops suspect he belongs to a gang or is selling drugs.

Or maybe Hodari has had an older sibling or friend roughed up by the police, and does not wish to undergo a similar experience with the approaching officers. Perhaps Hodari has seen the video-tape of the Los Angeles police beating and kicking Rodney King, or he has seen the NBC video of Don Jackson, a former police officer himself, being pushed through a store window by Long Beach, California police officers for no reason. Maybe Hodari believed that the officer who wants to ask him "What's going on here?" may engage in similar brutality in his case.<sup>103</sup>

Moreover, while flight from police in a high crime neighborhood might give rise to a reasonable suspicion of criminal activity, it does not necessarily support a reasonable belief that the suspect is armed and dangerous and poses an imminent threat of death or serious bodily injury. Flight would seem to suggest the opposite: one running away from a police officer is clearly not in the process of attacking the officer.

Thomas's death sparked three days and four nights of protests and violence in Cincinnati.<sup>104</sup> Many in the African American community saw the police shooting of Thomas as part of a pattern and practice of police brutality against African American males.<sup>105</sup> Thomas was the fifteenth Cincinnati police homicide victim in only six years. All fifteen of these Cincinnati police shooting victims were Black.<sup>106</sup>

On May 7, 2001, Roach was indicted and charged with two misdemeanors arising from his shooting of Thomas: negligent homicide (carrying a maximum possible sentence of six months in jail) and obstructing official business (carrying a maximum penalty

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103. Tracey Maclin, "Black and Blue Encounters" – Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 276 (1991).

104. Singer, *supra* note 88, at 43.

105. *Id.* at 45.

106. *Id.* Cincinnati police union spokesperson Keith Fangman defended the department, saying that most of the Blacks killed by Cincinnati police were armed. Fangman also stated that twelve of the last fourteen Cincinnati officers killed were shot by Black men. *Id.*



of ninety days in jail).<sup>107</sup> The case went to trial in September 2001. Roach waived his right to a jury trial, electing to have his fate determined by Municipal Judge Ralph Winkler. On September 26, 2001, Judge Winkler acquitted Roach of all charges, explaining that he believed the officer acted reasonably in self-defense.<sup>108</sup> As for Roach changing his explanation for the shooting, the judge said the discrepancies in his story were not substantial.<sup>109</sup>

### C. Racialized Fear of the Young Black Female

Young Black females have also been shot and killed by police officers who see them as a deadly threat. In June 1999, for example, a Chicago police officer shot and killed a young Black woman, thinking the woman was brandishing a gun. The woman was holding a cellular phone in her hand when she was shot.

On June 4, 1999, LaTanya Haggerty, a twenty-six-year-old computer analyst at a downtown Chicago encyclopedia company and a graduate of Southern Illinois University, was riding in the passenger seat of a 1986 Oldsmobile driven by her friend Raymond Smith.<sup>110</sup> Two officers noticed that the Oldsmobile was blocking traffic in the 8800 block of South Cottage Grove Avenue in Chicago, Illinois, and asked Smith to move on.<sup>111</sup> Smith backed up, almost hitting the officers, and then sped off. The officers fired shots at Smith's car and gave chase.<sup>112</sup> Using his cellular telephone, Smith called his mother to tell her that the police were chasing him.<sup>113</sup> The police finally succeeded in blocking Smith's car in the 6400 block of King Drive. The officers ordered Smith and Haggerty to come out.<sup>114</sup> Smith jumped out of the car and tried to run, while Haggerty, who was talking with Smith's mother on the cell phone, stayed in the vehicle.<sup>115</sup> Officer Serena Daniels, also African American, was standing on the driver's side of the car near the rear

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107. Francis X. Clines, *Officer Charged in Killing that Roiled Cincinnati*, N.Y. TIMES, May 8, 2001, at A16.

108. Robert E. Pierre, *Officer Is Acquitted in Killing that Led to Riots in Cincinnati*, WASH. POST, Sept. 27, 2001, at A2 (noting that Judge Winkler told a packed courtroom that Officer Roach made a split-second decision to shoot Timothy Thomas because the youth made a sudden movement that startled Roach during a chase through a dark alley in an "especially dangerous section of Cincinnati").

109. *Id.*

110. Jennifer Vigil & James Janega, *2 Killed in Run-Ins with City Police: Victims' Families Demanding Answers*, CHI. TRIB., June 6, 1999, at 1.

111. *Id.*

112. Todd Lighty, *Untold Story of Haggerty Shooting: Report Shows Witnesses Don't Back Cop's Account*, CHI. TRIB., Sept. 12, 1999, at 1.

113. *Id.*

114. *Id.*

115. *Id.*

door with her nine millimeter Smith & Wesson aimed at Haggerty.<sup>116</sup> Suddenly, without any apparent reason, Daniels fired at Haggerty.<sup>117</sup> Haggerty screamed and cried out, "They shot me, Raymond."<sup>118</sup> When officers opened the passenger side door, Haggerty tumbled face first onto the sidewalk, a cell phone falling from her left hand.<sup>119</sup> Officer Daniels knelt beside Haggerty, and said, "I'm sorry. I didn't mean to shoot you. I thought you had a gun."<sup>120</sup>

Officer Daniels told investigators that she fired her weapon because she saw a shiny, silvery object in Haggerty's hand and mistook it for a gun.<sup>121</sup> According to an internal police report of the shooting, however, not one eyewitness corroborated Officer Daniels' contention that Haggerty was holding a shiny, silvery object in her hand that might have been mistaken for a gun.<sup>122</sup> All of the eyewitnesses to the shooting, including a police officer standing on the passenger side of the car with his gun drawn and aimed at Haggerty, saw a black cell phone in Haggerty's hand, not a shiny object.<sup>123</sup> One eyewitness said Haggerty had both hands in the air and was saying, "I'm getting out; I'm getting out," just before she was shot and killed.<sup>124</sup> Police did find a four-inch silver padlock, the kind placed on a car's steering wheel to prevent theft, on the floor of the car on the passenger's side. However, no discernible fingerprints were on the padlock, calling into question whether Haggerty was holding the padlock when she was shot. It also seems unlikely that Haggerty would have grabbed a car steering wheel padlock while surrounded by police officers with guns drawn.

The Haggerty case is noteworthy for several reasons. First, it suggests that the image of the Black-as-Criminal stereotype is inscribed on Black women as well as Black men. Second, the case suggests that the stereotype can affect Black individuals' perceptions of other Blacks. Of course, just as in other cases, there is

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* In March 2000, Officer Daniels was fired after a civilian police board found that she shot Haggerty without justification. Gary Marx & Terry Wilson, 3 *Fired in Haggerty Case*, CHI. TRIB., Mar. 18, 2000, at 1. According to the civilian review board, "[the] use of deadly force here was not warranted because, in light of all the evidence, the Board does not find that Officer Daniels reasonably believed that deadly force was necessary." *Id.*

121. Lighty, *supra* note 112.

122. *Id.*

123. *Id.*

124. Todd Lighty & Steve Mills, *Witness Surfaces in Shooting by Cop*, CHI. TRIB., June 12, 1999, at 1.

no way to prove that the Black-as-Criminal stereotype influenced Officer Daniels' "seeing" a gun in LaTanya Haggerty's hand. As a Black woman herself, Officer Daniels should have been particularly sensitive to the fact that not all Black women are dangerous or violent.<sup>125</sup> Nonetheless, in the heat of the moment, Officer Daniels thought a cell phone looked like a gun. Would she have "seen" a gun if the girl in the car had been a blond or a redhead?

In another fatal police shooting, a young Black woman was shot and killed by Riverside police officers while she was lying semi-conscious in a car with a gun in her lap. On December 28, 1998, just after midnight, in Riverside, California, Tyisha Miller, a nineteen-year-old Black teenager, was returning home from a night out with friends when she discovered that the car she was driving, a White Nissan Sentra belonging to her aunt, had a flat tire.<sup>126</sup> Miller was in the car with her best friend, Bug. A man stopped to help the two girls change the flat tire, but they discovered that the spare tire was also flat. The man followed Tyisha and Bug to a nearby gas station, then drove Bug to a friend's house so she could call for help. Uncomfortable with being left alone at a gas station at such a late hour, Tyisha got back into her car, locked the doors, and waited with a possibly inoperable .38-caliber handgun on her lap to discourage potential attackers.<sup>127</sup> She felt cold and a little dizzy.

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125. The fact that Black police officers use force against Black suspects is used by some as support for the argument that the problem of police use of force against minorities is not a problem of racial discrimination or bias. Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 129, 142 (William A. Geller & Hans Toch eds., 1996). Hubert Locke rejects this proposition, explaining that "the studies suggest that residential and deployment patterns in many jurisdictions place officers of color in exceptionally dangerous places—where they are, more than fellow white officers, likely to have to use deadly force *legitimately*, both on and off duty." *Id.*; see also William A. Geller & Kevin J. Karales, *Shootings of and by Chicago Police*, 72 J. CRIM. L. & CRIMINOLOGY 1813 (1981) (theorizing that the reason Black officers are more likely than White officers to shoot Black citizens is because Black officers are more likely to be assigned to high crime minority neighborhoods); Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra*, at 23, 28. Alternatively, Locke suggests that "the overaggressive peer culture of policing in some agencies is so strong that it pressures Black officers, who might know better, into abusing minority-race citizens." Locke, *supra*, at 142.

126. Phil Pitchford, *No Charges in Miller Shooting: DA Cites Poor Judgment but Sees No Crime or Racism*, PRESS-ENTERPRISE (Riverside, Cal.), May 7, 1999, at A19.

127. *Id.* It should be noted that the gun Miller was holding was nonfunctional when examined by Philip Pelzel, a senior criminalist with the California Department of Justice. Pelzel could not ascertain when the gun became inoperable. The District Attorney's Report on the shooting of Tyisha Miller notes that the gun could have been operable at the time of the incident and could have become inoperable after being dropped. There is no evidence, however, that the gun was dropped during the incident. *Id.*

Tyisha turned on her emergency hazard blinkers and kept the engine running so she could keep the heater and radio on, then reclined the driver's seat and began to doze.<sup>128</sup>

In the meantime, Bug made it to a friend's house and called Tyisha's home. She spoke with Antonette Joiner, Tyisha's cousin, and told Antonette that Tyisha was at a gas station on Brockton Avenue with a flat tire and needed help. Antonette and her friend, Chilean King, rushed to the gas station. When they arrived, they found Tyisha lying unconscious in the front driver's seat of her car with a gun on her lap. Tyisha appeared to be in some kind of medical distress as she was shaking, rolling her eyes, and drooling at the mouth. The girls tried to get Tyisha's attention by knocking on the car window, but when Tyisha failed to respond, Antonette called Tyisha's aunt and asked her to send someone with an extra set of car keys. Chilean called 911, explaining to the dispatcher that Tyisha seemed in need of medical attention.<sup>129</sup>

Instead of sending an ambulance to the scene, the dispatcher sent four officers and a sergeant from the Riverside County Police Department. The officers arrived at the gas station shortly before 2:00 a.m. Less than seven minutes later, they had unleashed more than twenty bullets into the car, killing Tyisha Miller.<sup>130</sup>

It is unclear exactly what happened just before Tyisha Miller was shot and killed. Initially, the officers claimed they started shooting because Tyisha fired the first shot.<sup>131</sup> Later, when the evidence gathered at the scene of the crime failed to support this scenario, the officers backed down from this initial claim and instead maintained they shot Tyisha when she reached for the gun on her lap.<sup>132</sup>

The District Attorney's investigation into the shooting is very revealing. According to the District Attorney's report, after the officers' attempts to wake Tyisha by shouting at her and shaking her car failed, Officer Wayne Stuart tried to break the driver's side window by hitting it with his baton.<sup>133</sup> The sound of Officer Stuart's baton hitting the car window did rouse Tyisha who sat up in a daze, picked up her pager, and looked at it. One officer yelled at the others to hold their fire. The other officers backed away from the car. Tyisha then laid back down.<sup>134</sup>

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128. *Id.*

129. *Id.*

130. *Id.*

131. Ana A. Lima & Phil Pitchford, *Questions over Police Slaying*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 29, 1998, at A1.

132. *Id.*

133. Pitchford, *supra* note 126.

134. *Id.*

Next, Officer Daniel Hotard, who was standing next to the driver's window, used his baton to break the window, then reached into the car in an attempt to retrieve Tyisha's gun. Suddenly, Officer Hotard heard a shot close to his ear. Believing he had been shot, Officer Hotard threw himself to the ground. Seeing Hotard hit the ground, the other officers assumed Tyisha had shot Hotard. The other officers began firing at Tyisha. Hotard too began firing. Actually, Officer Paul Bugar had fired the first shot. Although he couldn't see the gun on Tyisha's lap because of the shattered glass, Officer Bugar said he fired because he saw Tyisha's arm move and thought she was reaching for her gun.<sup>135</sup>

It is not at all clear whether Tyisha Miller reached for her gun and then fired at Officer Hotard or any other officer. Yet, Officer Hotard heard a shot and assumed it was from Tyisha. Officer Hotard linked the shot from his fellow officer's gun with an imagined shot from the semi-conscious, but nevertheless fear-inspiring, nineteen-year-old Black teenager. Officer Hotard never actually *saw* Tyisha reach for her gun. He *heard* a loud noise, which he assumed was Tyisha shooting him. The other officers, responding to Hotard's fear, assumed the young Black woman with a gun had fired it at their colleague. This is why the initial police explanation for the shooting was that Tyisha shot first. When the evidence to support this claim did not turn up, the explanation shifted and two officers began to claim they started shooting because they saw Tyisha reach for her gun.

We will never know whether Tyisha Miller in fact reached for her gun that night. Antonette Joiner, Tyisha's cousin, who was present throughout the entire shooting, claims Tyisha never moved.<sup>136</sup> However, Joiner was thirty feet away from the car and if Tyisha was reclined in the driver's seat, it would have been difficult for Joiner to see movement below the driver's side window. Tyisha could have made a completely innocent move that the officers interpreted as a move for her gun. Tyisha's hair was cropped very short at the time of the shooting, and the officers could have mistaken her for a young Black man.

In some ways, it doesn't really matter whether Tyisha reached for her gun. The officers could have handled the situation with more care and with an eye toward avoiding the use of deadly force. The officers might have foreseen that shattering the driver's side window would startle an unconscious or sleeping person inside the car. The officers had seen how the first unsuccessful attempt to break the window had roused Tyisha. It is unfortunate that the

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135. *Id.*

136. Lima & Pitchford, *supra* note 131.

officers did not stop to consider other, less risky ways to handle the situation. They might have asked if anyone from Tyisha's family had an extra set of car keys and could bring them to the gas station. If they had done this, they would have learned that someone from the family was already on the way. One wonders why the officers did not attempt to use a coat hanger or other device to get into the car without frightening Tyisha.

In May 1999, the Riverside County District Attorney's Office announced that no criminal charges would be filed against any of the officers involved in the shooting death of Tyisha Miller.<sup>137</sup> In announcing the decision not to file charges, Riverside County District Attorney Grover Trask said the officers made a "mistake in judgment," but were not criminally liable for their actions.<sup>138</sup> Trask also stated, "There is no evidence whatsoever that these four officers killed Tyisha Miller because of her race."<sup>139</sup> The four officers involved in the shooting were all fired on July 12, 1999.<sup>140</sup>

Compare the way San Diego police and California Highway Patrol (CHP) officers handled a potentially dangerous situation involving a White woman with a gun just six months after the Tyisha Miller shooting. On July 1, 1999, at approximately 10:30 a.m. in San Diego County, California, Janet Lucero, a fifty-eight-year-old White woman, was in a long line of cars heading down Valley Grade in Valley Center near Escondido.<sup>141</sup> A truck in front of Lucero was moving very slowly, forcing Lucero to repeatedly hit the brakes on her 1983 Honda Civic coupe.<sup>142</sup> Lucero tried to pass the

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137. Jason W. Armstrong, *Riverside Police Shooting Results in No Charges*, L.A. DAILY J., May 7, 1999, at 1.

138. D.A. *Clears Riverside Officers in Fatal Shooting of Black Woman*, S.F. CHRON., May 7, 1999, at A7.

139. *Id.* While no one accused the four officers directly involved in the shooting of making racial comments or jokes, another officer and a police supervisor reportedly made racially insensitive remarks after the shooting, including some at the scene. One officer referred to expressions of grief by family members at the scene as "the Watts wail" and the supervisor commented that the gathering was like being at a Kwanzaa celebration. *Riverside Cops Probe Racial Remarks, Jokes*, SAN JOSE MERCURY NEWS, Apr. 20, 1999, at 3B.

140. *Sergeant at Fatal Shooting is Informed He'll Be Fired*, SAN DIEGO UNION-TRIB., July 28, 1999, at A4.

141. Jeff McDonald, *Standoff Snarls N. County*, SAN DIEGO UNION-TRIB., July 2, 1999, at A1; Greg Moran, *Woman Pleads Not Guilty in Chase, Standoff*, SAN DIEGO UNION-TRIB., July 8, 1999, at B1. It should be noted that Lucero's racial and ethnic identity is actually ambiguous. Given her last name, Lucero could be Hispanic. In all of the news reports that showed pictures of Lucero, however, Lucero appears to be white which is why the author describes her as such. Attempts by the author to verify Lucero's racial and ethnic identity were unsuccessful.

142. Alex Roth, *Road Rage, Chase Detailed as Route 78 Trial Begins*, SAN DIEGO UNION-TRIB., Mar. 14, 2000, at B1.

truck, and in the process, cut in front of motorist Roberta Nielsen.<sup>143</sup> The thirty-three-year-old Nielson followed Lucero until both cars pulled into the parking lot of a Burger King in Escondido.<sup>144</sup> Nielson got out of her car and walked to the driver's side of Lucero's car to demand an explanation for Lucero's almost causing an accident.<sup>145</sup> The women began shouting at each other with Nielsen backing off only after Lucero pulled out a .38 caliber revolver and pointed it at her.<sup>146</sup> Nielsen then called police to report the incident.

When Escondido police and CHP officers later caught up with Lucero, she refused to obey police orders to surrender.<sup>147</sup> Lucero then led officers on a slow-speed chase down Interstate 15 to the Kensington neighborhood of San Diego and then back up to the North County.<sup>148</sup> CHP officers tried to stop Lucero several times with a spike strip, hoping to deflate her tires, but each time she evaded the spiked strip.<sup>149</sup> Once she even swerved towards the officer laying the strip, but did not hit him.<sup>150</sup>

About noon, Lucero collided with a police car on Highway 78 in San Marcos.<sup>151</sup> A bomb squad robot dispatched by the San Diego County Sheriff's Office to stand beside Lucero's car confirmed that Lucero was armed.<sup>152</sup> Law enforcement officers surrounded Lucero.<sup>153</sup> From a safe distance behind their patrol cars and with their guns drawn, the officers attempted to negotiate Lucero's surrender.<sup>154</sup> Lucero, however, refused to leave her car.<sup>155</sup> Because Lucero came to a stop on a freeway which served to connect the two most well-traveled north-south freeways in San Diego, traffic on several major freeways was backed up and at a standstill for nearly six hours.<sup>156</sup> "At one point, Lucero lifted her handgun, without her finger on the trigger, to show the officers that she was armed. After

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*; Alex Roth, *Jury Mulls Case Involving Freeway Standoff*, SAN DIEGO UNION-TRIB., Mar. 21, 2000, at B2.

147. McDonald, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Standoff After Freeway Chase Snarls North San Diego County Highway Traffic*, ASSOCIATED PRESS NEWSWIRE, July 1, 1999.

152. McDonald, *supra* note 141.

153. *Id.*

154. Alex Roth, *Judge Rejects Request To Move Trial in Route 78 Standoff Case*, SAN DIEGO UNION-TRIB., Feb. 8, 2000, at B2.

155. Moran, *supra* note 141.

156. McDonald, *supra* note 141.

that, she alternately flashed her handgun at the officers, then laid it on her lap, then gripped it with her finger on the trigger."<sup>157</sup> Finally, Lucero came out of her car and walked towards authorities, first with one hand in her front shorts pocket, then with both hands in the air. She was then taken into custody.<sup>158</sup>

Lucero was charged with reckless driving, resisting arrest, evading police, assault on a peace officer, and brandishing a firearm.<sup>159</sup> On March 13, 2000, Lucero went to trial. The jury acquitted her of most of the criminal charges, but convicted her of refusing to surrender to police, a felony offense, and fleeing police during a chase, a misdemeanor. One juror expressed sympathy for Lucero by describing her as "this little grandmother type."<sup>160</sup> The judge was less sympathetic and sentenced Lucero to three years in prison.<sup>161</sup>

It turns out that Lucero was not simply a kind, elderly woman with a gun for self-protection. She had a history of threatening behavior. In 1995, she used her handgun to threaten another motorist in Ramona, California.<sup>162</sup> Several months later, Lucero got into an altercation with a CHP officer and threatened to "get a .357 Magnum and blow him away."<sup>163</sup> She had also threatened Ramona court officials, warning them that she would come after them with a .357 Magnum.<sup>164</sup> Even though Lucero had driven her car toward an officer laying a spike strip, endangering his life, then taunted officers by flashing her gun at them with her finger on the trigger, Lucero's jury did not view her as a deadly threat. Black men and women have been shot and killed for far less threatening behavior.

Because of the timing of the two incidents, it is difficult to know whether the San Diego officers held their fire when dealing with Janet Lucero because they did not want to receive the same kind of criticism leveled at the Riverside officers who shot Tyisha Miller or whether they held their fire because Lucero was a middle-aged White woman with a gun as opposed to a young Black woman with

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157. *Id.*

158. *Id.*; Moran, *supra* note 141; Alex Roth, *Road Rage Before 78 Standoff Described*, SAN DIEGO UNION-TRIB., Aug. 27, 1999, at B2; Alex Roth, *Tape-Recorded Message From Lucero's Father Ended 78 Standoff, Witness Says*, SAN DIEGO UNION-TRIB., Mar. 15, 2000, at B2; Alex Roth, *Woman in Long Route 78 Standoff is Ordered to Trial*, SAN DIEGO UNION-TRIB., Sept. 1, 1999, at B2 [hereinafter *Woman in Long Route 78 Standoff*].

159. Moran, *supra* note 141.

160. Onell R. Soto, *Woman in Standoff To Be Evaluated*, SAN DIEGO UNION-TRIB., June 9, 2000, at B1.

161. Alex Roth, *Woman in '99 Standoff on Freeway Gets Prison*, SAN DIEGO UNION-TRIB., Aug. 12, 2000, at B1.

162. *Woman in Long Route 78 Standoff*, *supra* note 158.

163. *Id.*

164. *Id.*



a gun. At least some people thought Lucero was treated differently because of her race. Recall that when Lucero came out of her car to surrender, she had one hand in her pocket. The officers held their fire rather than jumping to the conclusion that the hand in the pocket was a hand ready to pull out the gun the officers knew existed. Timothy Winters, a former San Diego police officer, now pastor of the Bayview Baptist Church, commented, "Did you see her put her hands in her pockets when she came out of the car? If [she] had been an African American, she would not have just been gently taken away. She would've either been ordered to hit the deck . . . or the guns would've been blazing."<sup>165</sup>

At one point during the standoff, Lucero leaned forward while sitting in her car and reached down. An officer might have interpreted this movement as Lucero reaching for the gun police officers knew she had. Rather than jumping to the conclusion that this forward and downward movement meant Lucero was reaching for her gun, the officers held their fire long enough to see that Lucero was merely rolling down the car window to get some air. Had Lucero been Black and male, the officers might have handled the situation quite differently.

For example, Aswon Watson, a Black man, reached down and below the driver's seat of his car while surrounded by Brooklyn police officers, and was not as fortunate as Lucero. Unlike the officers surrounding Lucero, who *knew* she had a gun, these officers did not know whether Watson had a gun in his car. But when they saw Watson lean forward, they assumed he was reaching for a gun and quickly started firing into the car. It turns out they were wrong.

On June 13, 1996, undercover officers Keith Tierney and James Gentile from the Brooklyn 67th Precinct's anti-crime unit saw a white Honda they thought had been carjacked.<sup>166</sup> The officers blocked the car with their unmarked patrol car and approached.<sup>167</sup> Aswon Watson, a Black man, was in the driver's seat of the car. According to one witness, one of the officers shouted, "Freeze, nigger. You're dead!"<sup>168</sup> Watson froze, both hands outstretched on his car steering wheel.<sup>169</sup> Another officer yelled at Watson to come

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165. Gregory Alan Gross, *Long Route 78 Standoff Still Rankles Some*, SAN DIEGO UNION-TRIB., July 10, 1999, at B1.

166. Noel, *supra* note 55, at 42. Police later admitted that Watson owned the car, which was registered under his name. *Continued Protests Against Police Murder of Aswon Watson*, N.Y. BEACON, Sept. 4, 1996, at 3.

167. Peter Noel, *Rough Justice: When Cops Get the Benefit of the Doubt*, VILLAGE VOICE, June 17, 1997, at 43.

168. *Id.*

169. *Id.*

out of the car with his hands up.<sup>170</sup> Instead, Watson started to reach down and under the driver's seat.<sup>171</sup> The officers responded by firing twenty-four rounds into Watson's car.<sup>172</sup> Eighteen of the twenty-four bullets hit Watson, killing him.<sup>173</sup>

A subsequent investigation revealed that a car steering wheel lock, not a gun, was under the driver's seat.<sup>174</sup> Nonetheless, a grand jury found that the officers were justified in shooting Watson because it was *reasonable* for the officers to believe their lives were in danger.<sup>175</sup>

### III. Internal and External Mechanisms To Hold Police Accountable

Whenever police are accused of excessive force, there is a natural tendency to defend their actions. Police officers have a difficult job to perform and often encounter individuals who would not hesitate to kill a cop if given a chance. Officers often must make split-second decisions and even a moment's hesitation can prove fatal. It is nevertheless a tragedy when even one person is shot because of a mistaken belief on the part of an officer that deadly force was necessary to avoid imminent harm. When an officer shoots and kills a suspect, someone who has not yet been tried or convicted of a crime, that officer assumes the role of judge, jury, and executioner without offering the suspect any of the protections normally accorded through the criminal justice system. Officers are entrusted with the power to use deadly force to enforce the law. They should use this power sparingly and with an eye to causing the least amount of harm.

It is imperative that we try to minimize the number of fatal police shootings. The key to reducing the loss of life and injury caused by police use of deadly force lies in changing police culture so that officers see the protection of human life as a priority, even if it means that a fleeing suspect may go free. It also means changing societal attitudes towards policing so that television and movie characters, such as the police officers in *Dirty Harry*<sup>176</sup> and *Lethal Weapon*<sup>177</sup>—cops who resort to force to resolve all conflicts—are not thought of as good guys when they use excessive force.

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170. *Id.*

171. *Id.*

172. *Id.*

173. Noel, *supra* note 55.

174. *Id.*

175. *Id.*

176. Played by Clint Eastwood.

177. Played by Mel Gibson and Danny Glover.

Any solution to the problem must be multi-faceted. Reform has to come both from within the police department as well as from external forces. In addition, we need to educate our children about the potentially tragic consequences of stereotyping. We also need to talk amongst ourselves about stereotypes and police use of force, and critically interrogate whether and when racialized fear is "reasonable." The first step towards reform involves recognition that race can influence police officer decisions to use force.

#### **A. Internal Mechanisms To Control Police Use of Force**

A thorough analysis of all the available internal mechanisms to control police use of force is beyond the scope of this essay and is better addressed by one who has worked in law enforcement. Therefore, I will just briefly mention a few important, but not necessarily novel, ways in which police departments might seek to minimize the use of deadly force against suspects of color and spend the bulk of time discussing external mechanisms to control police use of force.

Internally, police departments can work on at least three fronts to control the use of force: recruitment, training, and discipline. In recruiting new police officers, departments should conduct thorough background investigations, paying careful attention to the candidate's propensity towards violence and racial bias. Departments should also seek to diversify the workforce, increasing the number of women and minority officers. Having more women on the force is essential if we want to change the current culture within police departments in which the use of force to control a situation is taken as a given. Female officers are often able to resolve conflicts just as effectively as male officers without resorting to the use of force.<sup>178</sup> Officers of color on the force can help bridge the gap between residents of color in the community and the police department and can serve as a reminder to White officers that racial stereotyping of minorities is not appropriate. Increasing the number of women and minorities in police departments, however, is unlikely to significantly alter the fact that individuals of color are disproportionately on the receiving end of police decisions to use force because unconscious racism affects all of us, not just White male officers. Some studies suggest that Black officers use force

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178. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, at xiv (1991) (noting that LAPD female officers appear to utilize a style of policing that minimizes the use of excessive force as they are involved in use of excessive force at rates substantially below those of male officers, while performing equally as well as their male counterparts).

against Black suspects as much as, if not more than, White officers.<sup>179</sup>

Training in conflict resolution should be ongoing and should focus on alternative ways to resolve conflicts on the street, not simply on how to shoot a weapon. Ongoing and regular martial arts training would be one way to build the officer's self-confidence and ability to remain calm in the face of danger. Officers trained in the martial arts would learn to avoid situations of danger and use deadly force only when absolutely necessary. Surprisingly, very few police departments incorporate martial arts into their training regime. Simulations and realistic role plays with follow-up one-on-one conversations with a supervisory officer could be used to prepare officers for confrontations on the street. Racial and cultural sensitivity training should become an integral part of all training sessions, rather than simply a separate one- or two-hour workshop.

In addition to careful recruitment and training of officers, police departments must monitor and discipline errant officers.<sup>180</sup> Clear departmental guidelines on the use of force and early warning systems should be adopted. Officers who violate departmental policy should be sanctioned. In order to ensure enforcement of departmental policy, the internal affairs division must be adequately staffed. Additionally, short statutes of limitations should be lengthened to enable sufficient time to investigate allegations of misconduct.

## **B. External Mechanisms To Control Police Use of Force**

Many external mechanisms for the control of police misuse of force are already in place. These include criminal prosecution at the federal and state levels, civil lawsuits, civilian review, and federal pattern and practice investigations. Additionally, many jurisdictions have adopted community policing, increasing the level of community involvement in directing police resources and the interaction between officers and community residents. These external mechanisms, however, are not problem-free.

### *1. Criminal Prosecution*

Criminal prosecution of law enforcement officers who misuse force is one external method of controlling police misconduct.

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179. See, e.g., JOEL H. GARNER ET AL., UNDERSTANDING THE USE OF FORCE BY AND AGAINST THE POLICE IN SIX JURISDICTIONS 6-13 (2002); Geller & Karales, *supra* note 125, at 1853; Tim Roche & Brad Goldstein, *Forcible Arrests Are Few, Records Show*, ST. PETERSBURG TIMES (Fla.), Dec. 23, 1996, at 1B (review of 1,011 use-of-force reports filed by St. Petersburg, Florida police officers from June 1995 through September 1996).

180. CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 139-41 (1977).

However, this method of control is not terribly effective, because prosecutions of law enforcement officers are rare and convictions are even rarer. At the local level, district attorneys are often reluctant to prosecute police officers suspected of excessive force because such cases are difficult to win. It is easy for an officer to say, "I shot him because he made a threatening move," or "I fired because I thought he had a gun." There is also a credibility bias in favor of police officers. Except in predominantly low-income minority communities where residents may have experienced problems with local law enforcement firsthand, jurors tend to believe police officers over victims, particularly when the victim has a criminal record or has been charged with a crime.<sup>181</sup> The unwritten code of silence provides another obstacle to successful prosecution. Police officers who would otherwise be prosecution eyewitnesses are often reluctant to testify against their fellow officers. District attorneys may also be reluctant to file criminal charges against an officer accused of excessive force because of "the need to maintain good working relationships" with the officers in the local police department.<sup>182</sup> Prosecutors depend upon the cooperation and helpful testimony of police officers to obtain convictions in most of their cases. Police officers may view the filing of criminal charges against their own as a breach of this close working relationship and may be less than cooperative when needed in other cases.

Federal prosecution of law enforcement officials is also rare. Less than one percent of all complaints referred to the Department of Justice, alleging civil rights violations by law enforcement officers, lead to the filing of an indictment in federal court.<sup>183</sup> In large part, federal prosecution of law enforcement officers is rare because federal prosecutors do not view themselves as the primary overseers of police misconduct. As Assistant Attorney General John Dunne once explained in testimony before Congress, "We are not the 'front-line' troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with state and local prosecutors. The federal enforcement program is more like a 'back-stop' to these other resources."<sup>184</sup>

While federal prosecutors may not have the same conflict of

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181. Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER L.J. 67, 68 (1993).

182. Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra* note 125, at 247, 252.

183. HUMAN RIGHTS WATCH, *supra* note 14, at 90.

184. James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991, 1012 (1999).

interest problems as their state counterparts (because federal prosecutors generally do not rely upon the testimony of local police officers to make or break their other cases), federal prosecutors, like local district attorneys, do have to worry about credibility bias and the code of silence. Additionally, federal prosecutors lack the resources to prosecute every single case in which a law enforcement officer uses excessive force against an individual.

The biggest obstacle to federal criminal prosecution of errant officers, however, is the specific intent requirement. 18 U.S.C. § 242 punishes acts by anyone who, under color of law, "willfully" subjects any person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.<sup>185</sup> In *Screws v. United States*, the Supreme Court explained that it would be too easy to send a federal officer to the penitentiary if all that were required was the general intent normally required in criminal prosecutions.<sup>186</sup> In order to remedy this problem, the Court interpreted the word "willfully" in section 242 as requiring proof that the officer specifically intended to deprive a person of his or her civil rights.<sup>187</sup> Consequently, federal prosecutors trying to convict a law enforcement officer who has used excessive force against a civilian must prove not only that the officer unlawfully intended to shoot or beat the individual, but also, that in doing so, the officer had the specific intent to deprive the victim of his or her civil rights. Federal prosecutors often decline to bring charges against officers accused of excessive force because they feel they cannot prove beyond a reasonable doubt that the officer acted with the requisite specific intent to deprive the individual of his or her civil rights. If Congress wanted to make it easier for federal prosecutors to prosecute police misconduct cases, it could pass legislation clarifying that the term "willfully" means "intentionally" and does not require any further specific intent to deprive an individual of his or her civil rights or it could amend 18 U.S.C. § 242 by replacing the word "willfully" with the word "intentionally."

## 2. *Civil Lawsuits*

Another external method of checking police misuse of force is the civil lawsuit. An individual harmed by a police officer who uses excessive force (or a deceased individual's estate) may sue the officer, the police department, and the municipality<sup>188</sup> in federal

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185. 18 U.S.C. § 242 (2000).

186. 325 U.S. 91, 97 (1945).

187. *Id.* at 101.

188. Professor Mary Cheh points out that respondeat superior liability is not

court, alleging federal civil rights violations.<sup>189</sup> The individual may also sue the officer in state court, alleging that the officer violated the individual's civil rights.

The problem with suing the individual officer is that an officer may assert the defense of qualified immunity, which shields the officer from civil liability.<sup>190</sup> Under this defense, an officer "can defend against liability for denial of a constitutional right by showing he or she had an objectively reasonable good-faith belief that his or her actions were lawful."<sup>191</sup> Mary Cheh argues that one problem with the qualified immunity defense is that jurors often think use of the words "good faith" means they must give the officer the benefit of the doubt and let him off the hook as long as he believed he was acting lawfully.<sup>192</sup> Another problem with relying upon the civil lawsuit as a means of controlling police use of force is that the city or municipality typically ends up paying, either after a judgment in the plaintiff's favor or as a result of a settlement agreement. When this happens, the city usually insists upon a secret agreement with no admission of liability.<sup>193</sup> Such secrecy does little to encourage reform inside the police department. Additionally, when the police department is not named as a defendant in the suit, it may not even be aware that one of its officers has been named in a lawsuit.<sup>194</sup> The fact that a judgment has

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recognized in section 1983 actions. Cheh, *supra* note 182, at 264. Liability can be imposed on a municipality only if it "maintained a policy or custom that violated the plaintiff's constitutional rights." *Id.* at 265. Cheh argues that section 1983 should be reformed to allow plaintiffs to sue municipalities under a respondeat superior theory. *Id.* at 267.

189. See Carl B. Klockars, *A Theory of Excessive Force and Its Control, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE*, *supra* note 125, at 1, 4-6 (discussing possible civil actions against police for use of excessive force).

190. See *Saucier v. Katz*, 533 U.S. 194 (2001) (explaining that in a case in which an officer claims qualified immunity, the initial inquiry is whether the facts alleged show the officer's conduct violated a constitutional right and the second question is whether this constitutional right was clearly established).

191. Cheh, *supra* note 182, at 264.

192. *Id.*

193. Dianne L. Martin, *Organizing for Change: A Community Law Response to Police Misconduct*, 4 HASTINGS WOMEN'S L.J. 131, 155 (1993) (critiquing traditional legal responses to police misconduct).

194. For example, the Los Angeles Police Department does not have a complete list of officers who are current defendants in civil lawsuits nor does it have access to City Attorney civil lawsuit records identifying such officers. The City Attorney's Office notifies the department of an officer's involvement in a civil lawsuit only when an officer has been named and served in a lawsuit and requests legal representation. However, if the police officer is named but not formally served or if the officer requests legal representation from the Police Protective League or obtains private counsel, the police department may never become aware that a lawsuit naming the officer has been filed. KATHERINE MADER, LOS ANGELES POLICE COMMISSION, STATUS UPDATE: MANAGEMENT

been rendered against the officer (or that the city has paid the plaintiff millions of dollars to settle the lawsuit) may not even be noted in the officer's personnel file. Thus, while the civil lawsuit may benefit injured individuals and their families, it is not the most effective way to effect systemic change in police departments.

### 3. *Civilian Review Boards*

Another way to control police misconduct is through civilian oversight. Civilian review has become fairly common over the last twenty years. In 1980, only thirteen civilian review entities existed.<sup>195</sup> In 1994, that number had risen to sixty-six civilian review bodies.<sup>196</sup> Today, more than half of all major metropolitan U.S. cities have adopted some form of civilian review.<sup>197</sup>

Civilian review can take many different forms, ranging from a single ombudsman to a multi-member civilian review board.<sup>198</sup> Some civilian review boards conduct their own independent investigations, while others simply oversee internal police investigations.<sup>199</sup> A few review boards have the power to subpoena witnesses and compel the production of documents.<sup>200</sup> Others rely upon the voluntary cooperation of witnesses. Some civilian review bodies seek to ensure impartiality by prohibiting former police officers from sitting on the board.<sup>201</sup>

One thing common to many civilian review bodies is the inability to sanction law enforcement officers found to have engaged in misconduct. Most civilian review boards have only the power to *recommend* to the police chief or the police commission that an errant officer be disciplined.<sup>202</sup> The police chief or the police commission

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OF LAPD HIGH-RISK OFFICERS 5 (1997) (noting that the City Attorney's Office would not provide the Office of the Inspector General with either the names of officers involved in ongoing civil lawsuits or the names of officers involved in settled civil lawsuits).

195. SAMUEL WALKER, CITIZEN REVIEW RESOURCE MANUAL 3 (1995).

196. *Id.*

197. *Id.* at 5. See also CITIZENS AGAINST POLICE ABUSE, A CIVILIAN REVIEW BOARD: CREATING TRUST AND ACCOUNTABILITY THROUGH CITIZEN MONITORING OF POLICE ACTIVITIES, available at [http://www.louisvillepeace.org/CAPA/civilian\\_review.html](http://www.louisvillepeace.org/CAPA/civilian_review.html) (last visited Dec. 15, 2004) ("According to the American Civil Liberties Union or ACLU, already more than 60 percent of this nation's 50 largest cities have some type of civilian review system in place.").

198. "Of the 66 citizen review bodies that existed in 1995, 54 (82 percent) involved a multimember board, and 11 (17 percent) were agencies with a single director." *Id.* at 7.

199. *Id.* at 8-9.

200. *Id.* at 13.

201. The Office of Citizen Complaints in San Francisco, California, for example, is staffed by civilians who have never been police officers in San Francisco. For more information on San Francisco's Office of Citizen Complaints, see <http://www.ci.sf.ca.us/occ> (last visited Oct. 31, 2004).

202. Telephone Interview with Phil Eure, Executive Director, Office of Citizen



has final authority over what, if any, discipline shall be imposed. Clearly, such limited power reduces the effectiveness of civilian review as a means of controlling police misconduct.

It is important to recognize that civilian review, if inadequately funded and dependent upon political forces, can be used to appease public demands for police accountability without providing a meaningful check on police. For example, one city set up a civilian review board after voters demanded one.<sup>203</sup> For the first few years, the board aggressively investigated officers who had complaints lodged against them. The board litigated and won the right to subpoena accused officers and compel their testimony.

Then the good work started to unravel. A politically savvy individual was elected to head the law enforcement agency in question. This person was close to the politicians running city government. These politicians had the power to appoint and remove members of the civilian review board. Suddenly, members of the board who had been instrumental in leading the fight to compel officer testimony were let go. The composition of the board began to change. Soon, six of the eleven members, including the Executive Director, had law enforcement or military backgrounds or close family connections to law enforcement. The newly constituted board then entered into an agreement with the law enforcement agency it was supposed to monitor, giving up the right to compel officers to testify (a right won at the State Supreme Court level). The new board agreed to allow personnel from the law enforcement agency to conduct interviews on specific allegations of misconduct with minimal input from the civilian review board. Under this agreement, civilian review board members were allowed to attend the interviews but were not allowed to ask any direct questions of the officers under investigation. As a result of these changes, none of the sixty-three complaints filed by citizens against law enforcement officers in this particular jurisdiction in 1998 were sustained.

#### 4. *Federal Pattern and Practice Investigations*

The beating of Rodney King prompted Congress to think about other ways to check police misconduct. Prior to 1994, federal prosecutors could bring criminal charges only against an individual

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Complaint Review (OCCR) in Washington, D.C. (Mar. 9, 2004). The OCCR is an independent District of Columbia government agency which reviews and resolves complaints of misconduct filed by citizens against Metropolitan Police Department officers. Unlike other civilian review boards, the OCCR has the ability to make binding recommendations to the Chief of Police.

203. The following information comes from a confidential conversation with a former member of this civilian review board.

officer who used excessive force, not against the law enforcement agency that employed the officer.<sup>204</sup> As noted above, federal criminal prosecutions were (and still are) rare because of the specific intent requirement and lack of sufficient resources. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994. This Act gave the Department of Justice the authority to investigate and prosecute city governments and police departments engaged in a pattern or practice of civil rights violations.<sup>205</sup>

In 1996, the Department of Justice exercised its new authority by conducting a pattern and practice investigation of the police department in Pittsburgh, Pennsylvania. This investigation culminated in a forty-page consent decree between the Department of Justice and the Pittsburgh Police Department.<sup>206</sup>

The decree was approved by a federal court in April 1997.<sup>207</sup> Although the Pittsburgh Police Department denied any and all allegations regarding inadequate training, supervision, and discipline, it agreed, among other things, to develop a use-of-force policy in accordance with applicable laws, establish an early-warning system,<sup>208</sup> conduct regular audits of situations involving possible racial bias, appoint an independent auditor to enforce the consent decree, and require officers to file use-of-force reports.<sup>209</sup>

In August 1997, the Justice Department concluded its second pattern and practice investigation by entering into a consent decree with the city of Steubenville, Ohio, and its police force. Under this consent decree, the Steubenville Police Department agreed to improve training, implement use-of-force guidelines, create an internal affairs division, and establish an early warning system.<sup>210</sup>

The Department of Justice has conducted and is currently

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204. See Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999).

205. 42 U.S.C. § 14141 (2000); see also Livingston, *supra* note 204, at 815-16.

206. HUMAN RIGHTS WATCH, *supra* note 14, at 103-04.

207. *Id.*

208. Samuel Walker explains that:

An early warning system is a data-based police management tool designed to identify officers whose behavior is problematic and provide a form of intervention to correct that performance. As an early response, a department intervenes before such an officer is in a situation that warrants formal disciplinary action. The system alerts the department to these individuals and warns the officers while providing counseling or training to help them change their problematic behavior.

Samuel Walker et al., *Early Warning Systems: Responding to the Problem Officer*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, July 2001, at 1.

209. HUMAN RIGHTS WATCH, *supra* note 14, at 103-04.

210. *Id.* at 104-105.

conducting several other pattern and practice investigations. Its recent investigations have resulted in consent decrees involving the Los Angeles Police Department and the State Police of New Jersey as well as Memoranda of Understanding with the police departments in Montgomery County, Maryland, and the Metropolitan Police Department in the District of Columbia.<sup>211</sup>

#### 5. *Federal Data Collection on Police Use of Force*

In another attempt to address the problem of excessive force by police, Congress passed the Police Accountability Act, which was incorporated into the Violent Crime Control and Law Enforcement Act of 1994.<sup>212</sup> The Police Accountability Act directed the Attorney General to collect data on the use of excessive force by law enforcement officers throughout the nation and to publish an annual summary of this data.<sup>213</sup> Even though the Act was passed in 1994, it appears that not one of the attorneys general in office since then has issued an annual report.<sup>214</sup>

Even if Congress provides additional funds to enable the Attorney General to collect and analyze data on police excessive force, any information collected is likely to be incomplete. The Act does not require local law enforcement agencies to keep records on the use of force nor does it require such agencies to submit use-of-force data to the Attorney General. Federal data collection depends upon the voluntary cooperation of local law enforcement agencies. As long as some law enforcement agencies do not cooperate, any data that is collected will present an incomplete and inaccurate picture of police use of force.

#### 6. *Community Policing*

Recently, support for the concept of “community policing” has become popular.<sup>215</sup> However, before jumping to embrace

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211. See Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ's Pattern or Practice Authority is the Most Effective Tool To Control Racial Profiling*, 13 GEO. MASON U. CIV. RTS. L.J. 311, 325-33 (2003).

212. Violent Crime Control and Law Enforcement Act of 1994 § 210402, 42 U.S.C. § 14142 (1995).

213. *Id.*

214. HUMAN RIGHTS WATCH, *supra* note 14, at 108 (noting that nearly four years after passage of the Violent Crime Control and Law Enforcement Act of 1994, the Justice Department was still trying to fulfill its mandate and no annual report had been produced because of insufficient funding). A recent search for such an annual report was also unsuccessful.

215. See, e.g., Susan M. Hartnett & Wesley G. Skogan, *Community Policing: Chicago's Experience*, NAT'L INST. JUST. J., Apr. 1999, at 3; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Deborah A. Ramirez et al., *Rethinking the Culture of Professional*

community policing, it is important to note that the concept means different things to different people. Typically, community policing means increased interaction between police and the community. Under this model, police officers and residents of a community meet on a regular basis. Residents are encouraged to give the police input regarding the community's concerns and the matters they think need priority police attention. Police officers assigned to the neighborhood try to resolve the top priority concerns of the community, even if these concerns are not strictly within the police department's jurisdiction. If, for example, community residents are concerned about slum landlords and abandoned buildings as sites for criminal activity, police work with housing authorities and other city agencies to address these problems. Increased interaction between police officers and residents breaks down barriers, helping officers to see residents of a community as richly diverse individuals, not simply criminal suspects. It also helps residents see police officers in a more positive light.

In Chicago, for example, the city and the police department worked together to initiate an experiment in community policing in April 1993 called the Chicago Alternative Policing Strategy.<sup>216</sup> During its initial experimental phase, patrol officers were assigned to fixed beats and trained in problem-solving strategies.<sup>217</sup> Neighborhood meetings between police and community residents were held on a monthly basis and citizen committees were formed to advise police regarding residents' concerns.<sup>218</sup> Chicago's experiment in community policing has resulted in better police-community relations and a drop in crime.<sup>219</sup> San Diego and Boston have also experimented with this model of community policing.<sup>220</sup>

Others define community policing quite differently. James Q. Wilson and George Kelling, conservative scholars who developed the "broken windows" theory,<sup>221</sup> describe community policing as a

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Policing: Democratic Theory, Police Integrity and a Service-Oriented Community Justice Model of Law Enforcement (Sept. 23, 1999) (unpublished manuscript, on file with author) (discussing Boston's model of professional policing).

216. Hartnett & Skogan, *supra* note 215, at 3-11.

217. *Id.* at 9.

218. *Id.* at 5-6.

219. *Id.* at 5.

220. Ramirez et al., *supra* note 215.

221. James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29. Wilson and Kelling theorized that if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken. One unrepaired window is a sign that no one cares, and that breaking windows will not result in punishment. *Id.* at 31. Serious crime flourishes in neighborhoods where disorderly behavior, e.g. panhandling, graffiti, drunkenness, goes unchecked. *Id.* at 34. Accordingly, police officers should be given wide discretion to crack down on minor

policy that focuses upon maintaining order on the streets.<sup>222</sup> Under Wilson and Kelling's model, officers take a zero-tolerance approach to crime, arresting people for littering, jaywalking, and other minor offenses.<sup>223</sup> Order maintenance is the main focus of this model of policing.<sup>224</sup> Tracey Meares and Dan Kahan call this model of community policing the "new community policing."<sup>225</sup>

Former New York City Mayor Rudolph Giuliani embraced Wilson and Kelling's broken windows theory and this model of community policing. When he took office in 1994, Giuliani ordered the New York Police Department to aggressively enforce minor violations of the law, such as jaywalking, vagrancy, and public intoxication. New York City experienced a major drop in crime, which many attributed to Giuliani's get-tough approach.<sup>226</sup> Giuliani's zero-tolerance policing policy, however, also brought about a marked increase in the number of complaints filed by racial and ethnic minorities against the police.<sup>227</sup>

### C. Beyond the Traditional Methods of Controlling Police Force

Beyond the traditional methods of controlling police use of force, what else can be done to minimize the loss of life and limb that comes from police decisions to pull the trigger, particularly when those decisions are influenced by racial stereotypes? One possibility is to put ourselves in the shoes of the victim when evaluating the reasonableness of police decisions to use deadly force. Film director Desmond Nakano attempts to do this in a film entitled *White Man's Burden*. John Travolta plays Louis Pinnock, a poor White man struggling to survive in a society where Blacks occupy most, if not all, of the positions of power and prestige.

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offenses and behavior that may not even be criminal. *Id.* at 35.

222. James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, THE ATLANTIC MONTHLY, Feb. 1989, at 46.

223. *Id.*

224. *Id.*

225. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160-61 (1998) (arguing that strict enforcement of curfew laws, anti-loitering laws, and laws against aggressive panhandling, public drunkenness, vandalism, and other forms of public disorder constitute elements of the "new community policing"); cf. David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999).

226. KHALED TAQI-EDDIN & DAN MACALLAIR, CENTER ON JUVENILE AND CRIMINAL JUSTICE, SHATTERING "BROKEN WINDOWS": AN ANALYSIS OF SAN FRANCISCO'S ALTERNATIVE CRIME POLICIES (1999), <http://www.cjcr.org/pubs/windows/windows.html>. San Francisco, which has adopted policing strategies quite different from New York's policing strategies, has registered reductions in crime that equal or exceed New York's reductions in crime. *Id.*

227. AMNESTY INTERNATIONAL, *supra* note 75.

Whites in this made-up society work as housemaids, butlers, gardeners, and blue-collar workers, while Blacks are doctors, lawyers, executives, and managers. Travolta is fired from his factory job after he makes a delivery to the home of the factory owner, a Black man played by Harry Belafonte, who mistakenly thinks Travolta is peeping at his wife while she is wrapped in a towel after coming out of the shower. Travolta is unable to secure another good job, and, in desperation, kidnaps Belafonte to teach him a lesson about powerlessness.

At the end of the movie, Belafonte becomes very ill. Travolta tries to take him to the hospital, but his truck breaks down. He then tries to flag down a passing motorist to no avail. Travolta knows that since they are in a predominantly White, low-income, and high crime neighborhood, the police, who are predominantly Black, will not come into the neighborhood unless they think a crime has been committed. Travolta shoots out the windows of a nearby car and store, hoping that the resulting alarms will summon the police. When police officers arrive, they see the Black man on the ground with Travolta, obviously distraught, standing next to him. The officers yell at Travolta to put his hands in the air. Travolta, still holding his gun, begins to put his hands in the air. The Black officers see the gun in Travolta's hand and assume Travolta is about to shoot them. Responding to this imaginary threat, the officers shoot and kill Travolta.

Nakano's film illustrates the unfairness of assuming a person's dangerousness based upon his race, gender, and class. By switching the racial hierarchy in current society and creating a hypothetical society in which Whites are viewed as poor, immoral, untrustworthy, and violent, Nakano attempts to reach White viewers in the audience who might not think that a real-life police shooting of a Black person, a Latino, or some other person of color is unjust, but will understand the police shooting of a White man, clearly motivated by the Black police officers' racial bias, as an unjust action. Because the switching of the races is explicit, viewers are encouraged to come to the conclusion that it is wrong to judge a person, any person, by his or her appearance.

Race-switching through role reversal training might be used to teach police officers how wrong-headed it is to rely on racial stereotypes, but for reasons explained below, I have doubts about whether such an experiment would succeed. For example, White recruits could be subjected to a week-long training in which Black officers treat them as presumptively criminal. On April 20, 1999, Leonard Manzella tried an experiment of this sort on thirteen cadets

from the San Luis Obispo Juvenile Services Center in California.<sup>228</sup> Manzella used the technique of role reversal to create an environment in which officer cadets would experience being incarcerated to encourage empathy for the incarcerated juveniles they would soon be supervising. Manzella's experiential training program was designed to give the recruits not simply a cognitive understanding of what it is like to be a minor in custody, but an emotional understanding as well. Manzella enlisted three men to role-play three distinct types of officers so the cadets could experience different styles of communication. One man played an aggressive, angry officer who wouldn't listen to anyone else and believed his role was to punish. A second individual played the role of a passive officer, a nice guy who wanted to avoid trouble at all costs and simply put in his hours and leave. The third individual played a strong yet mature and compassionate officer. The cadets experienced feelings of resentment towards the first officer and found themselves refusing to comply with even his reasonable requests because they did not like his personality. They found the second officer ineffective, and did not respect him. The cadets responded best to the third officer.

Although role reversal seemed to be an effective learning technique in Manzella's experiment, I have doubts that race-based role reversal training would have similar positive effects. Manzella was able to create a realistic environment with the types of authority figures he used. Law enforcement officers who are ineffective because they are too authoritarian really do exist. Correctional officers who are too nice also exist. In contrast, there is no pervasive White-as-Criminal stereotype in this society. Temporarily placing a White person in a situation in which he or she is treated as a criminal presumably because of his or her race would not be realistic and therefore might not have any lasting effect.

I have suggested elsewhere that another possible reform involves race-switching at the jury deliberation level.<sup>229</sup> In cases in which racial stereotypes may have influenced the police officer's decision to shoot, racial stereotypes may also influence the jury's decision as to whether to acquit the officer on the ground of self-defense. In such cases, the prosecutor might request or the judge might decide *sua sponte* to issue a jury instruction that reminds jurors of the impropriety of relying on racial stereotypes. The instruction could advise:

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228. See WALK THE TALK: A LESSON IN EMPATHY (1999) (a documentary by Leonard Manzella).

229. Lee, *supra* note 47, at 482.

It is natural to make assumptions about the parties and witnesses in any case based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group.

If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the officer defendant is White and the victim is Black, you could imagine a Black officer and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this may suggest a subconscious reliance on racial stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.<sup>230</sup>

There is reason to be hopeful that a race-switching jury instruction might have a positive effect on a jury in a case in which race is an issue. Social scientists have found that making race salient encourages egalitarian-minded individuals to suppress their otherwise automatic stereotype-driven responses.<sup>231</sup> In one study, for example, Patricia Devine asked White subjects to list all the labels they were aware of for Black Americans, flattering or negative.<sup>232</sup> Devine found that low-prejudiced subjects listed positive attributes consistent with egalitarian principles and high-prejudiced subjects listed negative traits consistent with stereotypes about Black Americans.<sup>233</sup> Devine concluded that when race is made salient to low-prejudiced persons, they will inhibit their negative stereotype-congruent responses and replace them with non-prejudiced thoughts.<sup>234</sup>

Moreover, race-switching has been employed successfully in an actual criminal case. In the late 1990s, criminal defense attorney Jim McComas was representing a young Black male teenager in Alaska charged with aggravated assault against a White male classmate.

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230. *Id.*

231. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989); see also Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 73-86 (John F. Dovidio & Samuel L. Gaertner eds., 1986); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995).

232. Devine, *supra* note 231.

233. *Id.*

234. *Id.*



McComas was afraid that he would get a mostly White jury, which would see his client as the aggressor and disbelieve his client's claim of self-defense because of his race. After reading my 1996 *Minnesota Law Review* article on race and self-defense, in which I first proposed a race-switching jury instruction, McComas asked the judge for a race-switching jury instruction. The judge required the jury to race-switch and they came back with a verdict of not guilty.<sup>235</sup> Even if race-switching jury instructions do not deter police officers from using deadly force in response to subconscious racial bias, they can serve the useful purpose of expressing the law's condemnation of racial bias in police decision-making.<sup>236</sup>

One possible objection to this proposal is that it is unfair to hold the officer liable when even ordinary citizens would have believed the minority victim posed an imminent threat of death or serious bodily injury. In other words, my proposal appears to hold the officer to a higher standard than what we would require of ordinary citizens. We, however, already hold law enforcement officers to a higher standard than that required of ordinary citizens. A law enforcement officer is generally held to the standard of the reasonably well-trained law enforcement officer, not the reasonable lay person.<sup>237</sup> Moreover, it only seems fair to increase the scrutiny of actions which take a human life.

### Conclusion

As this essay has attempted to show, officers who use deadly force rarely suffer criminal liability for their actions. An officer's explanation that he believed the victim posed a serious threat of death or serious bodily injury to the officer or others is usually accepted by judges and jurors not only as a sincere belief, but also as one that is reasonable. Although I have focused on race in this essay, this problem affects not just racial minorities, but also the poor (particularly the homeless) and the mentally ill. Unfortunately, as long as racial minorities, poor people, and individuals with mental problems constitute the bulk of the victims of police shootings, few people outside of these disenfranchised populations will feel motivated to do something to control police use of deadly force. Often, it is only when people feel that one of their own has

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235. James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24.

236. See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000) (discussing the expressive function of law).

237. *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984).

been unfairly victimized that they are motivated to take action.

Take, for example, the August 1999 police shooting of Gidone Busch, a mentally disturbed Jewish man who was shot and killed by police officers in Brooklyn, New York. Unlike many police shootings that occur without any civilian witnesses, this police shooting was witnessed by a number of people who were out on the street that night.

*August 30, 1999. 6:40 p.m. Brooklyn, New York. Police officers responded to a 911 call reporting a man with a hammer at 1619 46th Street, acting strangely. Officers Daniel Gravitch and Martin Sanablin were the first officers on the scene. From the sidewalk, they looked down a narrow flight of stairs and saw Gidone Busch, a tall thin man, inside a basement apartment, wearing a towel-like prayer shawl on his left arm and head. Busch was holding a claw hammer flat in both his hands as if holding the handle of a shopping cart. When Busch refused the officers' orders to put the hammer down, the officers called for back-up and the Emergency Service Unit (a special team trained to handle mentally disturbed individuals). At 6:46 p.m., Sergeant Terrence O'Brien and Officer Kieran O'Leary arrived, followed by Sergeant Joseph Memoly and Officer William Loshiavo at 6:47 p.m.*

*Busch stepped out of the basement apartment into a small landing at the foot of the stairs and rapped his hammer on the bricks. One officer pulled out a can of pepper spray. Busch started running up the stairs, screaming and shouting, "Get out of my way," while swinging the hammer left and right. His hammer hit some of the officers on their toes and legs. When he got to the top of the stairs, Busch rushed past the officers into the street. About ten feet later, Busch ran into a brick wall. He turned to face the officers who had followed him. The officers, with their guns drawn, made a semi-circle around Busch and shouted, "Drop the hammer!" Suddenly, the officers began shooting. All twelve shots hit and killed Busch.<sup>238</sup>*

Initially, the police officers explained that they shot Busch because he was in the process of beating a police sergeant with his hammer and had to be stopped to save the sergeant's life.<sup>239</sup> Eyewitness testimony, the pattern of shell casings, and the position of Busch's body, however, contradicted this account of the shooting.<sup>240</sup> The police continued to insist that the shooting was justified.

Prior to this shooting incident, the predominantly Hasidic

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238. Narrative derived from John Kifner, *Police Account Challenged in Killing of Troubled Man*, N.Y. TIMES, Oct. 4, 1999, at A1.

239. *Id.*

240. *Id.*

community, of which Busch was a member, had been strong supporters of both the New York Police Department and former Mayor Rudolph Giuliani. Eighty-eight percent of the voters in this community had voted for Giuliani in the election preceding the shooting.<sup>241</sup> They supported the mayor and the police department despite numerous police shootings of unarmed Black and Latino men.

The shooting of Busch changed this sentiment. One resident of the community remarked, "I didn't feel [the police officers] were in danger. . . . If I felt any danger, I wouldn't have been standing there."<sup>242</sup> Another eyewitness told reporters, "The police murdered him. They killed him in cold blood. In my opinion, he did not threaten five or six policemen. He wasn't lunging at them."<sup>243</sup> Interestingly, stereotypes about Blacks came into play even though the shooting was directed at a mentally ill Jewish man. Suggesting that the shooting might have been justified had the victim been a Black man with a build like O.J. Simpson's, one resident of the community expressed her criticism of the police in the following way:

[Busch's] been acting a little nutty. So what—you kill a man because he's acting a little nutty? [The police] exaggerate, make him sound like some six-four O.J. Simpson. He's a very skinny guy; he looked like he hadn't eaten in years.<sup>244</sup>

Not surprisingly, the tremendous outrage against the police action in this case did not extend much beyond the Hasidic community that felt closest to the mentally disturbed victim.

As long as police misuse of force is seen as a problem that mainly affects Blacks, Latinos, other minorities, the poor, and the mentally ill, the police will have no incentive to be more careful when using their weapons. If White men constituted sixty percent to eighty-five percent of the victims of police shootings, the public outcry would likely lead to quick reform in police departments across the nation. Of course, I do not suggest that police should go out and shoot more Caucasians. More police violence is not the answer. Instead, more attention should be paid to the racial meaning of police use of force. Whenever a police officer uses force, particularly deadly force, against a person of color, society should critically interrogate the racial meaning of the officer's claim that he

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

acted reasonably in self-defense. One way of encouraging such critical inquiry is by instructing jurors to engage in race-switching. Jurors might be encouraged to switch the races of the defendant and the victim whenever there is reason to believe racial stereotypes may be influencing their deliberative processes. Making race salient has been shown in other contexts to encourage egalitarian-minded individuals to suppress otherwise automatic stereotype-driven responses. As Jim McComas's case suggests, there is reason to be hopeful that making race salient in the jury room can have similar positive results. The time has come for us as a society to critically examine the often used, but never condoling excuse, "but I thought he had a gun."