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## Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training

Cynthia Lee

*George Washington University Law School, [cylee@law.gwu.edu](mailto:cylee@law.gwu.edu)*

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# RACE, POLICING, AND LETHAL FORCE: REMEDYING SHOOTER BIAS WITH MARTIAL ARTS TRAINING

CYNTHIA LEE\*

## I

### INTRODUCTION

On November 24, 2015, the city of Chicago released dashboard camera video footage of the shooting of a seventeen-year-old Black<sup>1</sup> male teenager named Laquan McDonald by Jason Van Dyke, a police officer with the Chicago Police Department. The video shows McDonald strolling down the street, holding a knife in his right hand by his side.<sup>2</sup> McDonald does not appear to be threatening anyone.<sup>3</sup> In fact, there is no one within his striking distance.<sup>4</sup> Seconds later, we see a small figure to the left of the screen, pointing a gun in McDonald's direction.<sup>5</sup> A shot rings out, and McDonald falls to the ground.<sup>6</sup> Then, the popping sound of several more gunshots—a total of sixteen shots in fifteen seconds—and the sight of McDonald's body twitching as he is shot over and over while lying on the ground.<sup>7</sup> The fatal shooting of Laquan McDonald occurred in October 2014, but the City of Chicago refused requests to release

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This article is also available at <http://lcp.law.duke.edu/>.

\* Cynthia Lee is the Charles Kennedy Poe Research Professor of Law at The George Washington University Law School. She thanks Julian Cook, David Klinger, Eric Miller, Sunita Patel, and Nirej Sekhon for reading and commenting on prior drafts of this article. She also thanks Andrew Kim, Eang Ngov, Wadie Said, and all who provided valuable feedback when she presented it at CAPALF at UC Davis School of Law on April 18, 2016. Thanks are also due to Sgt. Delroy Burton of the Metropolitan Police Department of the District of Columbia for helpful conversations about policing in the District of Columbia. Professor Lee also thanks Kristin Bender, Sara Mykrantz, Erika Ward, and others on Duke University School of Law's *Law & Contemporary Problems* for their very helpful editorial assistance with this article. Finally, she thanks Matthew Halldorson, Mario Kolev, and Lane Kauder for their excellent research assistance.

1. Like many others who write about race, I purposely capitalize the “B” in “Black” and the “W” in “White” to highlight the fact that Blacks and Whites are commonly perceived in the United States as members of clearly defined racial groups.

2. Mark Guarino, Wesley Lowery & Mark Berman, *Officer Charged in Teen's Death*, WASH. POST, Nov. 25, 2015, at A1 (noting that the video “depicts Jason Van Dyke, a 14-year veteran of the police force, drawing his weapon on Laquan McDonald, an African American teen carrying a knife who appears to be crossing a major thoroughfare” and then shooting at McDonald a total of sixteen times as McDonald was “veer[ing] away from the officers”).

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

the video for over a year. The video was not made public until November 2015, when a judge ordered its release.<sup>8</sup> The footage sparked outrage and protests<sup>9</sup> as McDonald's fatal shooting was yet another in a string of highly publicized shootings of Black males by police officers, including the August 2014 shooting of 18-year-old Michael Brown in Ferguson, Missouri;<sup>10</sup> the November 2014 shooting of 12-year-old Tamir Rice in Cleveland, Ohio;<sup>11</sup> and the April 2015 shooting of 50-year-old Walter Scott in North Charleston, South Carolina.<sup>12</sup>

Official governmental data on the exact number of fatal police shootings that occur annually in the United States is woefully lacking.<sup>13</sup> Until fairly recently, government data suggested that approximately 420 persons are killed in police encounters each year.<sup>14</sup> Nongovernmental sources, however, indicate

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8. See Peter Slevin, Mark Guarino & Mark Berman, *Charges Against Policeman Don't Quell Anger in Chicago*, WASH. POST, Nov. 26, 2015, at A1 (noting that Mayor Rahm Emmanuel resisted releasing the video for thirteen months, "asserting that he did not want to prejudice the criminal investigation by the Cook County state's attorney" until a Cook County judge ordered release of the video).

9. See Mark Guarino, *Protest of Slaying Blocks Chicago Stores*, WASH. POST, Nov. 29, 2015, at A3 (noting that nearly 1,000 protestors led by the Reverend Jesse Jackson and Representative Bobby Rush blocked traffic and disrupted holiday shopping in downtown Chicago on Black Friday, the Friday after Thanksgiving); Slevin, Guarino & Berman, *supra* note 8, at A1 (noting that the pre-Thanksgiving demonstrations by several hundred Chicago residents following the release of the video were largely peaceful). On the same day the video was released, the State's Attorney of Cook County Office announced that it was filing first-degree murder charges against Officer Van Dyke. *Id.*

10. Elliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know> [<http://perma.cc/SK6Y-YMZ8>].

11. Abby Ohlheiser, *Death of Tamir Rice, 12-year-old Shot by Cleveland Police, Ruled a Homicide*, WASH. POST, Dec. 12, 2014, <https://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/>.

12. Mark Berman & Wesley Lowery, *Former South Carolina Police Officer Who Fatally Shot Walter Scott Indicted on Federal Civil Rights Violation*, WASH. POST (May 11, 2016, 3:25 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/former-north-charleston-officer-who-shot-walter-scott-indicted-on-federal-civil-rights-violation/>. These and other police shootings invigorated the U.S. Department of Justice to investigate and sign agreements with several jurisdictions to reform police practices and reduce bias in policing. See Sunita Patel, *Towards Radical Democratic Police Reform: "Community Engagement" in DOJ Police Consent Decrees*, 51 WAKE FOREST L. REV. — (forthcoming 2016) (manuscript on file with author).

13. Even though the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701–14223 (2012), mandated the collection and publication of data about excessive force by police, the Department of Justice has not been able to carry out this mandate because of insufficient funding. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 19 (2015). Both President Barack Obama and former U.S. Attorney General Eric Holder have called for better data on the number of persons killed each year by police. See, e.g., Remarks Following a Meeting with the President's Task Force on 21st Century Policing and an Exchange with Reporters, 2015 DAILY COMP. PRES. DOC. 143 (Mar. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/02/remarks-president-after-meeting-task-force-21st-century-policing>; Attorney General Holder Delivers Remarks Honoring the Life and Legacy of Dr. Martin Luther King Jr., DEP'T OF JUST.: JUST. NEWS (Jan. 15, 2015), <https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-honoring-life-and-legacy-dr-martin-luther-king>. The FBI plans to replace its current system for tracking fatal police shootings with a new system, but these changes will not be in place until 2017. Kimberly Kindy, *FBI to Expand Tracking of Fatal Police Shootings*, WASH. POST, Dec. 9, 2015, at A1.

14. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: JUSTIFIABLE HOMICIDE BY

that the actual number of persons killed each year by police is probably double that figure. For example, multiple sources report that over 1,000 individuals were killed by police in the United States in 2015.<sup>15</sup> Other sources suggest more than one thousand individuals were killed by police in the United States in 2014 as well.<sup>16</sup>

The Black Lives Matter movement has been instrumental in calling the nation's attention to the fact that many of those shot and killed by police officers are Black.<sup>17</sup> Approximately one-quarter of the individuals killed by police in 2015 were Black, even though Blacks constitute only thirteen percent of the total population in the United States.<sup>18</sup> In 2014, Black individuals in

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WEAPON, LAW ENFORCEMENT 2009-2013 (2013), [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded\\_homicide\\_data\\_table\\_14\\_justifiable\\_homicide\\_by\\_weapon\\_law\\_enforcement\\_2009-2013.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls) (reporting an annual average of 420 killings of felons by law enforcement officers in the line of duty between 2009 and 2013). Perhaps in response to criticism about the lack of accurate government data, the Bureau of Justice Statistics released a report in March 2015 estimating annual police homicides at 928 per year. BUREAU OF JUSTICE STATS., ARREST-RELATED DEATHS PROGRAM ASSESSMENT 13 (2015), <http://www.bjs.gov/content/pub/pdf/ardpatr.pdf>. Even this number, however, is not completely accurate. The Bureau of Justice notes that its report accounts for only about 72% of all police homicides in the U.S. *Id.* at 33.

15. See, e.g., Jon Swaine, et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM) (finding that 1,134 individuals were killed by police in the United States in 2015), <http://www.theguardian.com/us-news/series/counted-us-police-killings>. According to the Fatal Encounters Database, police “caused or played a role in 1126 deaths in 2015, up from 1072 deaths in 2014.” Paul Hirschfield, *Not a Single U.S. State Has Laws Defining When Police Should Avoid Deadly Force*, HUFFINGTON POST (Jan. 19, 2016, 10:47 PM), [http://www.huffingtonpost.com/entry/police-deadly-force-laws\\_us\\_569e86bde4b00f3e986310a9](http://www.huffingtonpost.com/entry/police-deadly-force-laws_us_569e86bde4b00f3e986310a9). In a year-long study of fatal police shootings, the Washington Post found that 965 civilians were killed by police across the nation in 2015. See Kimberly Kindy & Marc Fisher, *Officers Fatally Shoot 965*, WASH. POST, Dec. 27, 2015, at A1.

16. The Mapping Police Violence project estimates at least 1,149 people were killed by police in 2014, and according to Killed by Police, a nongovernmental organization that documents the occurrence of deaths involving law enforcement, 1,100 individuals were killed in 2014. AMNESTY INT’L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 9 (2015); see also *2014 Police Killings*, KILLED BY POLICE, <https://killed-by-police.silk.co/page/2014-Police-Killings>. For 2015 numbers, see *2015 Police Violence Report*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/2015/> (reporting that at least 1,152 persons were killed by police in 2015).

17. For commentary about the Black Lives Matter movement, see Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015) (providing an accounting of the Black Lives Matter movement, laying out the challenges that it presents to law, and suggesting ways to integrate the teachings of the movement into the classroom); Petula Dvorak, *The ‘Black’ Adds Meaning to ‘Lives Matter,’* WASH. POST, Aug. 7, 2015, at B1 (arguing that cutting out the “Black” from “Black Lives Matter” and saying “All Lives Matter” is “like defacing ‘Support Our Troops’ stickers to read ‘Support Our People’ and wondering why military families would be offended”); Ronald S. Sullivan Jr., *Black Lives Matter Occupies an Important Space*, BOS. GLOBE (Sept. 1, 2015), <https://www.bostonglobe.com/opinion/2015/09/01/the-message-black-lives-matter/EPjIfUd95BeSHyXGthJ9KM/story.html> (“‘All Lives Matter’ is yet another effort to undermine legitimate calls to end anti-black police practices that characterize far too many interactions between police and citizens of color.”); see also Michael A. Fletcher, *Calls for ‘Stronger Outrage’ on Crime*, WASH. POST, Dec. 13, 2015, at A1 (noting that some community leaders are concerned that the Black Lives Matter movement has focused solely on protesting police shootings, while its response to gun violence by civilians is “often muted, fragmented and brief”).

18. Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as*

general were at least three times more likely than White individuals to be killed by a police officer.<sup>19</sup> In 2015, young Black men between the ages of fifteen and thirty-four were at least nine times more likely than other Americans to be killed by police officers.<sup>20</sup>

The vast majority of the individuals shot and killed by police are armed.<sup>21</sup> In many of these cases, especially those involving suspects pointing a gun, replica

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*Likely to be Unarmed as White People*, THE GUARDIAN (June 1, 2015, 8:38 AM), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>; *The Counted: People Killed by Police in the US*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (noting that 304, or 26%, of the 1,145 individuals killed by police in 2015 were Black); see also AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 4 (2015), [http://www.amnestyusa.org/pdfs/AIUSA\\_DeathlyForceExecutiveSummaryJune2015.pdf](http://www.amnestyusa.org/pdfs/AIUSA_DeathlyForceExecutiveSummaryJune2015.pdf) (finding that Blacks made up 27.6% of the victims of homicides by police officers between 1999 and 2013 despite representing 13.2% of the U.S. population); U.S. CENSUS BUREAU, QUICK FACTS: RACE AND HISPANIC ORIGIN 1 (2014), <https://www.census.gov/quickfacts/> (reporting that Blacks made up 13.2% of the U.S. population in 2014). These numbers could be even higher depending on the jurisdiction. In an analysis of 259 officer-involved shootings that occurred in Chicago between 2006 and 2014, Nirej Sekhon found that 81% of the victims of officer-involved shootings during this time period were Black. Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. \_\_ (forthcoming 2016) (manuscript at 12) (on file with author). Sekhon reports that Blacks also constituted nearly 80% of the officer-involved shooting victims in New York and Pennsylvania during this same time period. *Id.* at 13. Sekhon cautions, however, that comparing the percentage of Blacks who are shooting victims to the number of Blacks in the general population may be an inappropriate comparison given the fact that most police shooting victims are armed when shot. *Id.* at 21–22. He uses a hypothetical involving doctors to illustrate this point.

For example, a plaintiff suing a medical employer for racial discrimination in hiring of doctors could not point to the employer's having hired fewer minorities than their share of the general population. The relevant comparison group would be the segment of the general population with medical training and who were available for hire by the employer. That group's demographic profile might be quite different than [that] of the general population. If the relevant comparison group is homogeneously white, a given employer might be forgiven for hiring only White doctors.

*Id.* at 21.

19. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, BBC, May 26, 2015, <http://www.bbc.com/news/world-us-canada-32740523>. Other sources suggest that young Black men are twenty-one times as likely as their White peers to be killed by police. See, e.g., Ryan Gabrielson, Ryann Grochowski Jones & Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>. This is not to suggest that police officers intentionally discriminate against Black individuals. Indeed, studies discussed in this article suggest that racial disparity in the decision to shoot is likely due to implicit bias rather than conscious discrimination. See *infra* text accompanying notes 47–105.

20. Jon Swaine, et al., *Young Black Men Killed by US Police at Highest Rate in year of 1,134 deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> (“Young black men were nine times more likely than other Americans to be killed by police officers in 2015, according to the findings of a Guardian study that recorded a final tally of 1,134 deaths at the hands of law enforcement officers this year.”). According to other sources, Black teenagers were times as likely as White teenagers to be shot and killed by police between 2010 and 2012. Leah Donnell, *Must-Read Reactions to Grand Jury Decision in Tamir Rice Case*, NATIONAL PUBLIC RADIO (Dec. 28, 2015 4:59 PM), <http://www.npr.org/sections/codeswitch/2015/12/28/460590173/no-charges-for-cop-who-killed-tamir-rice-some-must-read-reactions>.

21. Of the 1,149 individuals killed by police in 2014, a little over 100 were unarmed. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, *supra* note 19.

gun, or toy gun that looks like a real gun at an officer or another person, or refusing to drop a weapon after a police directive to do so,<sup>22</sup> courts consider the officer's use of deadly force to be justified.<sup>23</sup>

When an individual is unarmed, there is usually less justification for using deadly force. Of course, an unarmed individual can pose a threat of death or serious bodily injury to a police officer or others. For example, an unarmed individual high on Phencyclidine, or PCP, can kill or seriously wound an officer, even without a weapon. An unarmed individual in close proximity to an officer can grab the officer's gun and use it against the officer. Nonetheless, when a police officer shoots an *unarmed* suspect or a suspect armed with a knife rather than a gun, the shooting is more likely to raise questions about necessity and proportionality than when an officer shoots an *armed* suspect.

Disturbingly, a disproportionate number of the unarmed individuals who are shot and killed by police are Black. In 2015, Black men accounted for approximately forty percent of the total number of unarmed individuals shot and killed by police even though they constituted just six percent of the population.<sup>24</sup> In 2015, unarmed Black men were seven times more likely than unarmed White men to die by police gunfire<sup>25</sup> and “an unarmed black man was fatally shot by police about once every nine days.”<sup>26</sup>

When an officer shoots an unarmed individual under the mistaken belief that the person is armed, the shooting suggests threat perception failure.<sup>27</sup> “Threat perception failure” is a term of art used to describe a situation when an officer thinks a suspect is armed when in fact the suspect is not armed.<sup>28</sup> Associate Professor of Criminology Lorie Fridell explains that threat perception failure is more likely to occur when a police–citizen encounter

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22. For example, on November 22, 2014, twelve-year-old Tamir Rice was shot and killed by a police officer responding to a 911 call about a “guy in the park with a pistol, pointing it at people.” Kimberly A. Crawford, *Review of Deadly Force Incident: Tamir Rice*, CUYAHOGA COUNTY OFFICE OF THE PROSECUTOR 1 (2015), [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf) (reviewing use of deadly force by Cleveland Division of Police Officer Timothy Loehmann against Tamir Rice and concluding “Officer Loehmann’s use of deadly force falls within the realm of reasonableness under the dictates of the Fourth Amendment”). Rice was in possession of an “‘airsoft gun’ with the orange markings of a toy removed.” *Id.*

23. One can be armed with a knife, however, and not pose an imminent threat of death or serious bodily injury to anyone if, for example, one is simply walking with a knife and not threatening anyone with it.

24. Kindy & Fisher, *supra* note 15, at A1; Sandhya Somashekhar, Wesley Lowery & Keith L. Alexander, *Black and Unarmed*, WASH. POST, Aug. 9, 2015, at A1.

25. Somashekhar, Lowery & Alexander, *supra* note 24, at A1.

26. DeNeen L. Brown, *For Black Men, Fear After Clips of Cop Violence*, WASH. POST, May 9, 2016, at B1.

27. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, *supra* note 19.

28. Lois James, Stephen M. James & Bryan J. Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black Than White Suspects?*, 15 CRIMINOLOGY & PUB. POL’Y 457, 458 (2016) (defining threat perception failure as akin to a mistake of fact situation when, for example, the officer mistakes a cellphone for a gun or thinks the suspect is reaching for a weapon when the suspect was reaching for his wallet).

involves a Black suspect than when it involves a White suspect because of deeply rooted stereotypes linking Blacks with crime.<sup>29</sup> In many cases, police officers have shot and killed Black individuals because they mistakenly believed those persons had a gun.<sup>30</sup> These shootings were not necessarily the result of conscious racism.<sup>31</sup> Deeply rooted stereotypes that link Blacks with violence, danger, and criminality may have influenced these officers to perceive a weapon or threat to life where none actually existed.

In a previous paper, I documented numerous cases in which police officers, mistakenly thinking the individual was armed and dangerous, shot and killed unarmed Black men and women.<sup>32</sup> In this article, I explore the social science research on race and the decision to shoot. By and large, this research demonstrates that most individuals are quicker to see a weapon when dealing with a Black suspect than when dealing with a White suspect. Interestingly, several shooter bias studies have found that police officers are better than civilians at deciding when to shoot, suggesting that training and experience can improve accuracy and reduce racial bias in the decision to shoot. In light of this research, I offer two modest proposals for reform aimed at improving the training requirements for police officers.

First, I propose that police departments implement training aimed at improving accuracy and reducing bias in the use of deadly force. Fortunately, the social science research suggests that police officers can be trained to both reduce racial bias and increase accuracy in decisions to shoot. As discussed within, studies have shown that repeated exposure to Black and White suspects when race is not a diagnostic cue as to whether the suspect is holding a gun results in less biased and more accurate decisions about when to shoot.

Second, I propose that police departments mandate ongoing traditional martial arts training for all officers. Such training would be beneficial for many reasons. Regular training in the martial arts<sup>33</sup> would give officers more

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29. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, *supra* note 19.

30. See generally Cynthia Lee, “*But I Thought He Had a Gun*” *Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L. J. 1 (2004) (discussing numerous cases in which a police officer shot and killed an unarmed Black person, thinking the person was armed). In a recent study of officer-involved shootings in Chicago, however, Nirej Sekhon found that in most cases where the officer thought there was a gun threat, a gun was found on the victim’s person or near the scene. Sekhon, *supra* note 18, at 19. No firearm was found in only 14% of cases involving a perceived firearm threat. *Id.* Of course, the study could not account for the possibility of an officer planting a gun to justify the shooting and it is unclear whether these findings are generalizable to police shootings across the nation.

31. See Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 6:00 AM), (“An impressive body of psychological research suggests that the men who killed [Michael] Brown and [Trayvon] Martin need not have been conscious, overt racists to do what they did . . .”), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice>.

32. Lee, *supra* note 30.

33. Use of the term “martial arts” in this article should be understood as referring to traditional martial arts, such as Shotokan karate, Tae Kwon Do, and Kung Fu, as opposed to mixed martial arts (also known as MMA). As Stephen Michael Ian Kumen explains, “Students instructed in traditional martial arts are generally instructed to follow certain philosophical principles, including respecting the

confidence in their ability to handle volatile situations without immediately resorting to the gun. Such training would also provide officers with a healthy way to relieve stress. Regular martial arts training would also promote mental and emotional stability.

## II

### THE BLACK-AS-CRIMINAL STEREOTYPE

It is well documented that despite the fact that most Americans today believe it is wrong to discriminate on the basis of race, they also either consciously or subconsciously associate Blacks with danger and criminality.<sup>34</sup> Americans are more likely to perceive behavior by a Black person as hostile and threatening when they would perceive same behavior by a White person as nonthreatening.<sup>35</sup> Individuals are often unable to help the fact that they view Blacks more negatively than Whites.<sup>36</sup> Research on implicit social cognition has repeatedly shown that even the most egalitarian-minded individuals are quicker to associate Black faces with negative words and White faces with positive words.<sup>37</sup> Most individuals are also quicker to associate Blacks with crime than Whites. This is because of deeply rooted stereotypes linking Blacks with violence, dangerousness, and crime.<sup>38</sup>

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opponent, using skills responsibly, and avoiding confrontations whenever possible.” Stephen Michael Ian Kumen, *Superhuman in the Octagon, Imperfect in the Courtroom: Assessing the Culpability of Martial Artists Who Kill During Street Fights*, 60 EMORY L.J. 1389, 1411–12 (2011). In contrast, MMA “lacks a guiding philosophy” and “is simply a combination of skills from several traditional martial arts that has evolved around sport competition.” *Id.* at 1414. Promoters of MMA do not ascribe to the principle of using as little force as possible to defeat the attacker, but instead advocate a no rules and a no holds bar philosophy, which is totally contrary to traditional martial arts philosophy. *Id.* at 1416.

34. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (noting that the stereotype that links Blacks with violence, dangerousness, and criminality has been documented by social psychologists for over half a century).

35. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); see also 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, 595 (1976) (finding that 75% of individuals observing a Black person shoving a White person thought the shove constituted “violent” behavior while only 17% of individuals observing a White person shoving a Black person characterized the shove as “violent” and 42% characterized the shove as “playing around”); 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, 596 (1980) (finding that both Black and White children saw relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites).

36. Richardson, *supra* note 35, at 2042.

37. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 47 (2013); see also Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1475 (1998). For an excellent examination of how implicit racial bias manifests itself in different areas of the law and society, see IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

38. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–146 (NYU Press 2003) (discussing the tendency to associate Blacks with crime); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of*

In a 2004 study, Jennifer Eberhardt demonstrated the strength of the association people tend to make between Black individuals and crime.<sup>39</sup> Eberhardt subliminally primed unknowing participants with Black male faces, White male faces, or no faces at all.<sup>40</sup> Participants were then presented with objects on a computer screen that started off fuzzy and progressively came into focus.<sup>41</sup> Participants were told to indicate the moment they could tell what the object was.<sup>42</sup> Some of the objects shown to participants were related to crime, such as guns and knives, while other objects, such as cameras and books, were not related to crime.<sup>43</sup>

Eberhardt found that participants primed with Black faces were able to more quickly identify crime-relevant objects than those primed with White or no faces.<sup>44</sup> Participants primed with White faces were slower at detecting crime-relevant objects than those primed with no faces.<sup>45</sup> When it came to crime-irrelevant objects, exposure to either a Black or White face or to no face at all made no difference in the time it took participants to identify what the object was.<sup>46</sup> Eberhardt's study not only illustrates the strength of the Black-as-Criminal stereotype, it also suggests one reason why a police officer may be quicker to see a gun in the hands of an armed Black suspect than one in the hands of an armed White suspect—and why an officer might even think there is a gun in the hands of an unarmed Black suspect.

### III SHOOTER BIAS

Extensive social science research on race and the decision to shoot reveals that most people exhibit racial bias with respect to the decision whether or not to shoot a suspect. This part documents these studies.

#### A. The Early Shooter Bias Studies

In 2000, Anthony Greenwald conducted one of the first empirical studies on shooter bias.<sup>47</sup> In this study, a total of 106 undergraduates participated in two experiments.<sup>48</sup> Each participant was told to pretend they were a plainclothes

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*Reasonableness*, 81 MINN. L. REV. 367, 402–423 (1996) (discussing the Black-as-Criminal stereotype).

39. Eberhardt et al., *supra* note 34.

40. *Id.* at 878. The primes (faces or lines) were shown on the screen for just 30 milliseconds and extensive pilot testing ensured that none of the participants were aware of the primes. *Id.* at 879–880.

41. *Id.*

42. *Id.*

43. *Id.* at 878.

44. *Id.* at 880.

45. *Id.*

46. *Id.*

47. Anthony G. Greenwald, Mark A. Oakes & Hunter G. Hoffman, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003).

48. *Id.* at 401. Experiment 1 administered self-report and implicit attitude tests before the weapons

police officer responding to one of three categories of targets: (1) a criminal holding a gun, (2) a fellow police officer holding a gun, or (3) a citizen holding a non-gun object.<sup>49</sup> All of the targets appeared in street clothes so they were not distinguishable by dress.<sup>50</sup> Participants were told that targets would appear from behind a garbage dumpster on the computer screen and that they should shoot at criminals, respond with a safety signal to fellow police officers, and not respond to citizens holding harmless objects.<sup>51</sup> Race was the only variable distinguishing police officers from criminals.<sup>52</sup> Each participant performed two variations of the task—one in which the criminals were White and the police officers were Black and one in which these roles were switched.<sup>53</sup> Participants who responded within 800 to 900 milliseconds would hear the sound of a silencer-equipped gun being fired.<sup>54</sup> If the participant failed to respond within the deadline, a loud gunshot would issue, indicating that either a criminal had fired at the participant or a fellow police officer had fired.<sup>55</sup> Mistakenly shooting at a police officer or citizen led to a loud scream.<sup>56</sup>

Greenwald found that participants had greater difficulty distinguishing weapons from harmless objects when the person holding the object was Black.<sup>57</sup> They were also quicker to see a weapon when dealing with Black over White targets.<sup>58</sup> Greenwald concluded that the race of the target could affect the ability to distinguish a weapon from a harmless object and bias the decision to shoot.<sup>59</sup>

A 2001 study by B. Keith Payne confirmed the results of Greenwald's study.<sup>60</sup> Payne tested whether being primed with a Black face as opposed to a White face would affect both response latencies, that is, the speed with which participants would correctly identify an object as a gun or a tool, and accuracy in identification.<sup>61</sup> Participants were told they would see pairs of pictures flashed on a computer screen.<sup>62</sup> They were instructed to do nothing with the first picture, which would be a face, but to identify the object in the second picture as either a gun or a tool.<sup>63</sup>

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task while Experiment 2 administered these after the weapons task. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 404.

58. *Id.* at 403.

59. *Id.* at 405.

60. See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001).

61. *Id.* at 182.

62. *Id.* at 184.

63. *Id.* The prime, either a Black or White face, would remain on the screen for approximately 200 milliseconds, and then was replaced immediately by a handgun or a tool. *Id.*

Participants in the study “identified guns faster when they were primed by a Black face than by a White face.”<sup>64</sup> They also “identified tools more quickly when primed with a White face, compared to a Black face.”<sup>65</sup>

A 2002 study by Joshua Correll reaffirmed the existence of shooter bias.<sup>66</sup> Correll showed study participants a series of one to four background scenes.<sup>67</sup> In the final background scene, a Black or White man would appear holding either a gun or something harmless.<sup>68</sup> The participants were told to decide as quickly as possible whether or not the target was holding a gun.<sup>69</sup> If the participant thought the target was holding a gun, they were to press a button labeled “shoot.”<sup>70</sup> If they thought the person was holding an object other than a gun, they were to press a button labeled “don’t shoot.”<sup>71</sup> Participants were quicker to shoot an armed target if the target was Black than if he was White.<sup>72</sup> They were also quicker to not shoot an unarmed target if he was White than if he was Black.<sup>73</sup> When participants were given less time to decide whether to shoot, they mistakenly shot unarmed targets more often if they were Black than if they were White.<sup>74</sup> Participants also mistakenly decided not to shoot armed targets more often when those armed targets were White than when they were Black.<sup>75</sup> Shooter bias was evident in both Black and White participants.<sup>76</sup> Correll theorized that cultural stereotypes characterizing Blacks as aggressive, violent and dangerous likely led participants to display shooter bias.<sup>77</sup>

One possible criticism of the early shooter bias studies is the lack of external validity. External validity refers to the extent to which the results of a particular study are generalizable to other people and other situations. Psychology

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64. *Id.* at 185.

65. *Id.* In the first experiment, subjects had unlimited time to respond to the second picture, and error rates were relatively low. *Id.* In a second experiment in which subjects were forced to respond quickly, Payne found that error rates increased. *Id.* at 187–88. Specifically, subjects were more likely to misidentify a tool as a handgun when primed with a Black face and more likely to misidentify a gun as a tool when primed with a White face. *Id.* at 189.

66. See generally Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

67. *Id.* at 1315.

68. *Id.*

69. *Id.*

70. *Id.* at 1316.

71. *Id.*

72. *Id.* at 1317.

73. *Id.*

74. *Id.* at 1319.

75. *Id.*

76. *Id.* at 1324 (noting that participants in Study 4 included twenty-five Blacks and twenty-one Whites and that both Black and White participants decided to shoot more quickly when the target was armed and Black than if he was armed and White and they pressed the “don’t shoot” button more quickly if the target was unarmed and White than if he was unarmed and Black).

77. *Id.* at 1325.

students, the subjects in the early shooter bias studies, are not necessarily representative of police officers who undergo extensive training in the use of firearms. Moreover, pressing a button labeled “shoot” on a computer keyboard is a very different action from shooting a gun, which is what takes place in actual officer-involved shootings.<sup>78</sup> Additionally, “pressing a ‘don’t shoot’ button requires the same action as pressing a ‘shoot’ button.”<sup>79</sup> Lois James, who has conducted her own shooter bias studies but with vastly different results, explains why this is problematic:

[W]hen a person makes a decision not to discharge a real firearm, no action is required. This distinction is critical because choosing between two equivalent actions has major neurophysiological differences compared with choosing to act or not. The natural inclination is not to act particularly under conditions of uncertainty or personal moral dilemma.<sup>80</sup>

James makes a good point that there is a big difference between pressing a button labeled “don’t shoot” and not pulling the trigger of a gun in one’s hand, but I question whether the natural inclination is not to act under conditions of uncertainty when one is faced with a perceived threat of death or serious bodily injury. When one thinks one is about to be killed, the natural inclination is to act to preserve one’s life even if there is some uncertainty as to whether the attack is actually going to occur. James may be right that as a general matter, the natural inclination may be to not act when faced with a situation of uncertainty, but this is not likely to be true when one is faced with a kill-or-be-killed situation given the universal desire for self-preservation.

A second concern is that the early shooter bias studies used computer simulations rather than more realistic, high-definition shooting simulators. James aptly notes that “[v]iewing still images of people holding objects (e.g., weapons or cell phones) bears little relationship to real-world police encounters with people, where dynamic movement and contextual cues such as suspect compliance are critical.”<sup>81</sup>

### B. Testing Police Officers for Shooter Bias

To address some of the above-described concerns, social scientists began in 2005 to study whether police officers would exhibit similar signs of shooter bias as had been seen in the civilian context. In one study, E. Ashby Plant and B. Michelle Peruche tested fifty police officers, and found that they, just like the civilians in the early shooter bias studies, were more likely initially to mistakenly shoot unarmed Black suspects over unarmed White suspects.<sup>82</sup> After repeated exposure to a computer shooting simulation in which race was not a diagnostic cue as to whether the suspect was armed or unarmed, however,

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78. James, James & Vila, *supra* note 28, at 4.

79. *Id.* at 5.

80. *Id.*

81. *Id.* at 5.

82. See E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers’ Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 181–82 (2005).

police officers were able to eliminate this bias.<sup>83</sup> Repeated exposure to the shooting trials also resulted in more accurate responses.<sup>84</sup> In other words, over time, the number of hits (correct shootings of armed suspects) exceeded the number of false alarms (incorrect shootings of unarmed suspects) for the police officers.<sup>85</sup>

In a 2007 study, Joshua Correll used a videogame simulation to test both police officer and civilian reactions to armed and unarmed White and Black men who appeared in a variety of background images.<sup>86</sup> Like Plant and Peruche, Correll found that police officers did better than civilians on several different fronts. Although police officers, like civilians, showed racial bias in their initial reactions to the various targets by recognizing that a target was armed more quickly when that target was Black as opposed to when that target was White, their ultimate shooting decisions were more accurate than those of civilians.<sup>87</sup> Police officers also showed less racial bias than civilians in the ultimate decision to shoot.<sup>88</sup>

Modupe Akinola offers one explanation for why police officers may perform better than civilians in shooter bias studies involving computer simulations. “The conditions under which police officers engage in shoot/don’t shoot decisions in laboratory studies are low in metabolic demands, making it unlikely that they will engender the level of stress or threat physiological reactivity that officers may experience when making real life shoot/don’t shoot decisions.”<sup>89</sup> Moreover, training in the use of deadly force and actual experience dealing with individuals on the street may facilitate the police officer’s ability to control their responses in a shoot/don’t shoot computer simulation.<sup>90</sup>

In a 2009 study of police officers and racial bias in the decision to shoot, Akinola induced a state of stress in police officers in order to examine the effects of stress on an officer’s shooting decisions.<sup>91</sup> To induce this state of stress, Akinola mimicked the interview process police officers go through every two years when being considered for a promotion.<sup>92</sup> As part of this process, officers had to conduct a role play through a videogame simulation task while being evaluated.<sup>93</sup>

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83. *Id.* at 182.

84. *Id.*

85. *Id.*

86. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020 (2007).

87. *Id.*

88. *Id.* at 1015.

89. Modupe Nyikoale Akinola, *Deadly Decisions: An Examination of Racial Bias in the Decision to Shoot Under Threat* 8 (Apr. 30, 2009) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library system).

90. *Id.*

91. *Id.*

92. *Id.* at 11–12.

93. *Id.* at 12, 18.

Like the researchers who conducted the early shooter bias studies, Akinola found racial bias in the decision to shoot or not shoot.<sup>94</sup> Officers were more likely to not shoot when the target was White than when the target was Black.<sup>95</sup> When police officers were under acute stress, however, they were more accurate in the decision whether to shoot an armed Black target or not to shoot an unarmed Black target than when they were not under conditions of acute stress.<sup>96</sup> Akinola suggests that these findings reflect a possible over-correction effect.<sup>97</sup> She explains,

[This kind of] over-correction effect has been found among White participants in intergroup interactions and in tasks requiring decision making about stigmatized or minority group members. In these contexts, the goal of appearing unprejudiced manifests itself in over-correction, which requires self-regulatory effort. Similarly, in the case of the shooter simulation, when police officers had greater resources, they appeared to engage in strategic behavior in an effort to not appear biased, resulting in a lower shooting threshold being set for White targets. Furthermore, since both minority and majority populations exhibited this effect in decision criterion, this suggests that *over-correction* may extend across social groups, and may be especially relevant for domains in which the appearance of prejudice can have severe consequences, as is the case with law enforcement.<sup>98</sup>

An alternative theory as to why police officers may have been more accurate in the decision whether to shoot a Black suspect when placed under conditions of acute stress is that an officer may perceive time as having slowed when confronted with a Black suspect.<sup>99</sup> One study documents this perceived slowing of time when a White male sees a Black face.<sup>100</sup> This slowing of time might allow an officer to more accurately gauge the level of threat he or she is facing. On the other hand, the researchers of this study suggest that this perceived slowing of time could encourage a police officer to shoot a Black individual sooner than he might shoot a White individual.<sup>101</sup>

A 2012 shooter bias study by Melody Sadler confirmed the findings of the early shooter bias studies.<sup>102</sup> In the first experiment to investigate shooter bias with respect to Latinos and Asians as well as Blacks and Whites, Sadler tested sixty-nine undergraduates from the University of Colorado and 224 police officers from various regions of the United States.<sup>103</sup> Subjects were told to press a button labeled “shoot” if a target who appeared on the computer screen was holding a gun, to press a button labeled “don’t shoot” if the target was holding

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94. *Id.* at 19.

95. *Id.* at 19.

96. *Id.* at 28.

97. *Id.* at 30.

98. *Id.* at 30–31.

99. Gordon B. Moskowitz, Imak Olcaysoy Okten & Cynthia M. Gooch, *On Race and Time*, 26 PSYCHOL. SCI. 1783, 1783 (2015).

100. *Id.*

101. *See id.* at 1792 (“The decision about when to shoot might be altered (i.e., shooting would happen sooner) if time perception slows.”).

102. Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286 (2012).

103. *Id.* at 290, 292, 299.

an innocuous object, and to make their decision within 850 milliseconds.<sup>104</sup> Both civilians and police officers were quicker to shoot at Black targets than White, Asian, and Latino targets.<sup>105</sup> Police officers were also quicker to shoot at Latinos relative to Asians and Whites and quicker to shoot at Whites relative to Asians, “suggesting racial bias in the decision to shoot is not simply an anti-Black phenomenon.”<sup>106</sup>

Complicating the picture, three recent shooter bias studies, all by lead author Lois James, have reached a contrary conclusion, finding that police officer and civilian subjects were slower to shoot Black suspects than White suspects. In the first of these studies, published in 2013, James tested police officers, civilians, and military personnel using laboratory simulators like those used by many law enforcement agencies for training their officers.<sup>107</sup> James found that all of the participants took longer to shoot Black suspects than White or Hispanic suspects.<sup>108</sup> She also found that participants were more likely to shoot unarmed White suspects than unarmed Black or Hispanic suspects and were more likely to refrain from shooting armed Black suspects compared to armed White and Hispanic suspects.<sup>109</sup> In a second study published in 2014, James found that civilians, even those with implicit racial bias, were significantly slower to fire at Black suspects than at White or Hispanic suspects.<sup>110</sup> Although these studies had the advantage of being more realistic than the earlier computer-simulation studies since they used high quality laboratory simulators that more closely replicated actual police–citizen encounters, they also involved relatively small sample sizes from which it is difficult to generalize findings. The first experiment in the 2013 study, for example, involved just six police officers, twelve civilians, and six military personnel.<sup>111</sup> The 2014 study tested just forty-eight civilians.<sup>112</sup>

Subsequently, James conducted a third study, testing eighty police officers from the Spokane Metropolitan Police Department.<sup>113</sup> James found that these police officers showed the same kind of counter-bias found in her 2013 and 2014

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104. *Id.* at 292.

105. *See id.* at 295 (“[P]articipants were especially likely to favor the ‘shoot’ response over the ‘don’t shoot’ response when the target was Black rather than any other race.”).

106. *Id.* at 306.

107. Lois James, Bryan Vila & Kenn Daratha, *Results from Experimental Trials Testing Participant Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 J. EXPERIMENTAL CRIMINOLOGY 189, 196 (2013).

108. *Id.* at 204.

109. *Id.* Accord Mark R. Chaires, *Stereotypes and Deadly Force Decision-Making* (2015) (unpublished Ph.D. dissertation, University at Albany, State University of New York) (finding that the decision to use deadly force was unrelated to race and that unarmed White suspects were more often the recipients of erroneous deadly force decisions).

110. Lois James, David Klinger & Bryan Vila, *Racial and Ethnic Bias in Decisions to Shoot Seen Through a Stronger Lens: Experimental Results from High-Fidelity Laboratory Simulations*, 10 J. EXPERIMENTAL CRIMINOLOGY 323, 334–35 (2014).

111. James, Vila & Daratha, *supra* note 107, at 197.

112. James, Klinger & Vila, *supra* note 110, at 331.

113. James, James & Vila, *supra* note 28 at 462.

studies.<sup>114</sup> Police officers in this most recent study took significantly longer to shoot armed Black suspects than armed White suspects.<sup>115</sup> They were also approximately three times less likely to shoot unarmed Black suspects than unarmed White suspects.<sup>116</sup> This was despite the fact that ninety-six percent of the officers demonstrated implicit bias on a race-weapons implicit association test they took along with a number of other cognitive skills tests that had nothing to do with race.<sup>117</sup> James opines that the most likely reason for the counter-bias shown in her studies is officer “concerns about the social and legal consequences of shooting a member of a historically oppressed racial group” coupled with the heightened media attention that occurs after an officer-involved shooting of a Black suspect.<sup>118</sup>

The contradictory findings of the various shooter bias studies suggest that implicit racial bias may be playing less of a role in police shootings than initially thought. Indeed, recent research by Phillip Atiba Goff and L. Song Richardson on police officers and stereotype threat also suggests that racial bias—implicit or explicit—plays less of a role in police decisions to shoot than whether the officer feels confident in his or her ability to command respect from the subject.<sup>119</sup> Similarly, Frank Rudy Cooper suggests that police officers may be quicker to act punitively against Black suspects than White suspects less because of implicit racial bias and more because they perceive Blacks to pose a greater threat to their masculinity than Whites.<sup>120</sup> Nonetheless, because the bulk

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114. *Id.* at 468.

115. *Id.* at 469.

116. *Id.* James acknowledges that some might believe the police officer participants in her study acted the way they did in order to appear unbiased to the researchers monitoring their behavior, but rejects this possibility, explaining that while an observer effect is certainly possible, it is not likely for the following reasons. *Id.* at 471–73. First, the purpose of the study (to investigate whether race of the suspect affects shooting decisions) was never explained to the suspects nor was it mentioned to the research assistants who were responsible for leading the police officer participants through the simulations. *Id.* at 471. Second, even though the participants completed the race–weapons implicit associations test, “this test was buried in a 60-minute-long battery of cognitive tests” that measured other things. *Id.* at 472. Third, several police officer participants told the researchers that they had no idea they were being tested to see if suspect race influenced their shooting decisions. *Id.* Fourth, the scenarios were randomized so participants did not get a scenario involving a White suspect followed immediately by a similar scenario involving a Black suspect. *Id.* Finally, the average difference in reaction time between shooting a White suspect in shooting a Black suspect was 200 ms, which was “not enough time to suggest a deliberate and considered response on the part of participants.” *Id.* James added that even if the police officer participants were trying to appear unbiased when responding to the scenarios, given the prevalence of bystanders with camera phones and the increasing use of dashboard cameras and body worn cameras, police officers on the street are also aware that they are constantly being monitored and may try to make sure that their actions do not appear to be biased. *Id.*

117. *Id.* at 472.

118. *Id.* at 472–73. It may also be the case that heightened attention to race and the use of deadly force following the shooting of Trayvon Martin by George Zimmerman in 2013 encouraged participants to resist the inclination to shoot Black individuals.

119. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO STATE J. CRIM. L. 115 (2014); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2966–70 (2015).

120. Frank Rudy Cooper, *Training to Reduce ‘Cop Macho’ and ‘Contempt of Cop’ Could Reduce Police Violence*, THE CONVERSATION (Dec. 18, 2015 6:05 AM), <https://theconversation.com/training->

of the research on shooter bias indicates that race plays some role in the decision to shoot, proposals for reform should seek ways to reduce the possibility of racial bias impacting the police officer's decision to shoot, as incorrect shooting decisions can harm not only unarmed Black civilians who are mistakenly perceived to be armed and dangerous, but also police officers who may be too slow to perceive when a White suspect is armed.<sup>121</sup>

#### IV

#### PROPOSALS FOR REFORM

It is important to note at the outset that police officers serve a vital function in our society and often risk their lives to protect those living in the communities they serve. Any reforms that are urged should not diminish our police officers' ability to protect and serve, for that would harm not just our police officers, but all of us. Police officers often have to make split-second decisions about whether to shoot an individual who appears to be a threat when the wrong decision could mean death for the officer or others.<sup>122</sup> This is why juries in police-shooting cases often give police officers the benefit of the doubt. Navigating the space between shooting a person who poses a real threat of death or serious bodily injury and refraining from shooting a person who does not pose such a threat is not an easy task. We must be mindful of this when attempting to curb the number of lives lost due to unnecessary uses of deadly force by the police.

##### A. Training to Reduce Bias and Increase Accuracy in the Decision to Shoot

One way to minimize the number of problematic police shootings that may be considered justified under current law is to enhance the training that police officers receive in the use of deadly force. There is reason to think that training in the use of deadly force already has a positive impact on police officers. Recall Joshua Correll's 2007 shooter bias study, which tested 237 police officers and 127 civilians.<sup>123</sup> Correll found that police officers were more accurate and showed less racial bias than civilians in the ultimate decision to shoot.<sup>124</sup> This is

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to-reduce-cop-macho-and-contempt-of-cop-could-reduce-police-violence-51983; Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (arguing that an officer's concern over appearing sufficiently masculine, as well as the race of the suspect, can affect police interactions with men of color); Angela P. Harris, *Gender Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) (discussing ways in which masculinity and race affect police encounters with Black men); see also Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735 (2015) (cautioning that racial minorities and women may be less able to challenge police or engage in what he calls "contestatory citizenship").

121. See text accompanying notes 58, 64, 72–76, 81, 94, 104, and 127–131. *But compare* notes 107–110, 114–115, 150–154.

122. See generally DAVID KLINGER, INTO THE KILL ZONE: A COP'S EYE VIEW OF DEADLY FORCE (2004) (documenting actual cases in which police officers had to make split-second decisions about whether to use deadly force).

123. Correll et al., *supra* note 86, at 1009.

124. *Id.* at 1015.

probably because police officers, unlike most civilians, receive substantial training in the use of deadly force.

One way to both improve accuracy in the decision to shoot and reduce racial bias is suggested in research conducted by E. Ashby Plant, B. Michelle Peruche, and David A. Butz. Plant, Peruche, and Butz designed a shooting program in which race was not a diagnostic cue as to whether a target was holding a gun or a harmless object. Participants in this experiment were equally likely to see a Black or White face and each face was equally likely to be paired with a gun or a harmless object.<sup>125</sup>

In the early trials, participants made more racially biased errors than in the later trials.<sup>126</sup> They more often incorrectly pressed the “shoot” button when a Black face was paired with a neutral object than when a Black face was paired with a gun.<sup>127</sup> Conversely, they more often incorrectly pressed the “don’t shoot” button when a White face was paired with a gun than when a White face was paired with a harmless object.<sup>128</sup>

As participants continued engaging in this shooting program, however, the racial bias evident in the earlier trials disappeared.<sup>129</sup> To test whether it was merely the practice of shooting or the shooting program itself that led to the elimination of bias, Plant, Peruche, and Butz conducted another experiment in which participants engaged in a shooting program in which researchers did not try to ensure that race was not a diagnostic cue as to whether the suspect was holding a gun or a neutral object.<sup>130</sup> In contrast to the first shooting program, repeated practice in this latter shooting program did not eliminate racial bias.<sup>131</sup> In both the early and later trials, officers made more errors when a White face was paired with a gun and when a Black face was paired with a neutral object.<sup>132</sup> Subsequent research by Plant and Peruche, using police officers as subjects, confirmed that repeated exposure to a shooting program in which race was not a diagnostic cue as to whether a suspect was holding a weapon or a harmless object both increased accuracy and reduced racial bias in police officers’ decisions to shoot.<sup>133</sup> These experiments suggest that practice in shooting when race is not correlated to the presence or absence of a weapon can help improve accuracy and reduce racial bias in the decision to shoot. Police departments should borrow from Plant and Peruche’s design, but, if feasible, should use

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125. E. Ashby Plant, B. Michelle Peruche, and David A. Butz, *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141, 143 (2005). Participants completed twenty practice trials and 160 test trials. *Id.* at 145.

126. *Id.* at 145.

127. *Id.*

128. *Id.*

129. *Id.* at 147.

130. *Id.* at 149 (outlining how, in this latter experiment, Black faces were more likely to be paired with guns and White faces were more likely to be paired with harmless objects to conform to societal stereotypes about Blacks and Whites).

131. *Id.* at 150.

132. *Id.*

133. Plant & Peruche, *supra* note 82, at 182–83 (testing fifty police officers from Florida).

shooting simulators instead of computer keyboard exercises to more closely replicate on-the-street experiences.

#### B. What about Diversity, Cultural Sensitivity, and Implicit Bias Training?

It is important to proceed with caution when trying to implement training programs to reduce racial bias. Some research suggests that diversity training programs aimed at improving attitudes toward people from different racial or ethnic minority groups do not work and can actually exacerbate attitudes,<sup>134</sup> particularly when individuals are required to attend such trainings.<sup>135</sup> Voluntary diversity programs, in contrast, may be more successful than mandatory programs at reducing bias.<sup>136</sup> Individuals who voluntarily participate in such programs probably already believe in the importance of eliminating racial bias, so one reason why voluntary diversity training programs may be more successful than mandatory programs may simply be because such programs are preaching to the choir.

In lieu of diversity or cultural sensitivity trainings aimed at getting people to be more accepting of racial, ethnic, or cultural difference, many favor implicit bias training.<sup>137</sup> Implicit bias training aims to raise awareness of the ways in which all of us are implicitly biased in favor of certain groups and against other groups.<sup>138</sup> A wealth of social science research suggests that making people aware of their own implicit biases can help reduce bias because individuals can then

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134. See Peter Bregman, *Diversity Training Doesn't Work*, HARV. BUS. REV. (Mar. 12, 2012) (citing Frank Dobbin, Alezandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21), <https://hbr.org/2012/03/diversity-training-doesnt-work>; see also B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 193, 198 (2006) (finding that diversity training did not reduce racial bias in the decision to shoot).

135. See Suzanne Lucas, *Why You Should Stop Attending Diversity Training*, CBS NEWS (May 2, 2012, 8:43 AM), <http://www.cbsnews.com/news/why-you-should-stop-attending-diversity-training/>; see also Shankar Vedantam, *Most Diversity Training Ineffective, Study Finds*, WASH. POST (Jan. 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011901899.html>.

136. Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding that students voluntarily enrolled in a prejudice and conflict seminar showed reduced levels of implicit and explicit bias at the end of the semester compared to students who did not enroll in the seminar). Rudman notes that when individuals are forced to undergo diversity training, the training may result in backlash because individuals "may perceive a threat to their freedom of expression or be offended by the implication that they are prejudiced." *Id.* at 857.

137. E.g., Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF, Oct. 2011, at 44; Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, POLICEONE.COM (Mar. 9, 2015), <https://www.policeone.com/patrol-issues/articles/8415353-Police-agencies-line-up-to-learn-about-unconscious-bias/> (noting that implicit bias training for law enforcement officers is gaining traction among police departments in dozens of cities); Tracie L. Keese, *Three Ways to Reduce Implicit Bias in Policing*, GREATER GOOD SCI. CTR. (July 2, 2015), [http://greatergood.berkeley.edu/article/item/three\\_ways\\_to\\_reduce\\_implicit\\_bias\\_in\\_policing](http://greatergood.berkeley.edu/article/item/three_ways_to_reduce_implicit_bias_in_policing).

138. Keese, *supra*, note 137.

consciously work to combat those implicit biases.<sup>139</sup> Some police departments have already started implementing implicit bias training.<sup>140</sup>

Professor Lorie Fridell, an associate professor in the Department of Criminology at the University of South Florida, is at the forefront of such training. In 2013, Professor Fridell received a \$1 million grant from the U.S. Department of Justice to conduct implicit bias trainings for police officers across the nation.<sup>141</sup> Fridell runs the Fair and Impartial Policing training program, which trains officers on the effects of unconscious bias and gives them information and skills to help them reduce and manage their biases.<sup>142</sup> Through this program, police officers learn that policing based on stereotypes and biases might lead to unsafe decisions, such as not frisking the White woman who has a weapon or not being vigilant against the White man in the BMW.<sup>143</sup>

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139. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14–15 (1989) (concluding that when egalitarian-minded persons are made aware of stereotypes, they will inhibit their negative stereotypes-congruent responses and replace them with non-prejudiced thoughts); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71, 141 (2010) (“Awareness of bias is critical for mental decontamination success.”); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Racial Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1586–90 (2013) (discussing importance of making race salient to minimize the effects of implicit racial bias). See generally Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, “Unlearning” Automatic Biases: *The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

140. See Abdollah, *supra* note 137 (noting that the Los Angeles police department plans to have more than 5000 of its officers attend implicit bias training over the next several years). In 2008, the Chicago Police Department was at the forefront of implicit bias training. See Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39, 53 (Lynch, Patterson, & Childs eds. 2008) (detailing its then-innovative curriculum aimed at helping recruits to the Chicago Police Department “see how their biases and stereotypes (pertaining to gender, race, ethnicity, sexual orientation, and other characteristics) impact their perceptions and behavior and result in unjust, ineffective and unsafe policing”). Recruits would engage in role-playing exercises in which stereotype-consistent behavior would result in “unsafe tactics, ineffective investigations and unjust arrests.” *Id.* For example, the woman with the gun would not be frisked, the sex crime committed by a female against a male would not be uncovered, and the law-abiding young men of color on the street would be arrested. *Id.* In their debriefings, recruits would find out how their biases led to faulty decisionmaking. *Id.* It is unclear whether Officer Jason Van Dyke, who was a fourteen-year veteran of the Chicago Police Department when he shot Laquan McDonald in 2014, attended any such training.

141. Jessica Vander Velde, *USF Professor Challenges Law Enforcement to Examine Bias*, TAMPA BAY TIMES (Nov. 24, 2013, 7:27 PM), <http://www.tampabay.com/news/publicsafety/usf-professor-challenges-cops-to-examine-bias/2154068>.

142. Lorie Fridell, *This Is Not Your Grandparents’ Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY, Fall 2013, <http://cebcp.org/wp-content/TCmagazine/TC5-Fall2013>.

143. Martin Kaste, *Police Officers Debate Effectiveness of Anti-Bias Training*, NPR, (Apr. 6, 2015, 4:36 PM), <http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training>; see also Sarah Green Carmichael, *Training Police Departments to Be Less Biased*, HARV. BUS. REV. (Mar. 6, 2015), <https://hbr.org/2015/03/training-police-departments-to-be-less-biased> (detailing interview with Anna Laszlo, Director of Fair and Impartial Policing, who explains the nuts and bolts of implicit bias training for police officers).

It is unclear whether implicit bias training is an effective way of reducing racial bias in police officers. Joshua Correll, one of the leading researchers on shooter bias, questions whether implicit bias training for police officers is a good idea, explaining that “[t]here are a number of very compelling studies that show that if you just ask somebody to try really hard to not show racial bias, you can actually inadvertently increase racial bias.”<sup>144</sup> Some critics of implicit bias training say such training could actually endanger officers’ lives by encouraging officers to hesitate in cases in which they need to act quickly.<sup>145</sup>

Indeed, some social science research suggests that calling attention to race, either by asking people not to rely on race or asking them to rely on race, counterintuitively increases the tendency to stereotypically misidentify non-weapon objects as weapons. For example, in a 2002 study, B. Keith Payne tested whether actively highlighting race prior to the decision to shoot reduced or increased stereotype-congruent errors in the decision to shoot.<sup>146</sup> Participants were told they would see pairs of pictures presented briefly—a face in the first picture and an object, either a gun or a hand tool, in the second picture—and they were to decide quickly whether the object in the second picture was a gun or a tool.<sup>147</sup> Individuals in the control group were given no other instructions.<sup>148</sup> Participants in the “Avoid Race” group were given the same instructions described above, but were also told,

You have been randomly assigned to take the perspective of a completely unbiased person. Regardless of your personal views, we would like you to base your responses only on whether the second object looks more like a gun or tool. Try not to let the race of the face influence your decisions.<sup>149</sup>

Participants in the “Use Race” group were given the same instructions as the control group, but were also told,

You have been randomly assigned to the “racial profiling” condition. Regardless of your personal views, we would like you to play the role of someone engaged in racial profiling. That is, try to make correct classifications, but we would like you to use the race of the faces to help you identify the gun or tool in question.<sup>150</sup>

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144. Kaste, *supra* note 143; see also Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994) (finding that subjects who were instructed not to rely on stereotypes were able to temporarily suppress the stereotype at issue, but once the initial experiment was over, those subjects were more inclined to rely on that stereotype than subjects who were not given any stereotype-suppression instruction).

145. Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, POLICEONE.COM (Mar. 9, 2015), <https://www.policeone.com/patrol-issues/articles/8415353-Police-agencies-line-up-to-learn-about-unconscious-bias/> (noting that some researchers say implicit bias training could potentially endanger police officers and the public by encouraging officers to hesitate in cases where they should shoot).

146. B. Keith Payne, Alan J. Lambert & Larry L. Jacoby, *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).

147. *Id.* at 388.

148. *Id.*

149. *Id.*

150. *Id.*

Consistent with the bulk of the shooter bias research that has been conducted to date, all of the participants misidentified tools as guns more often after seeing a Black face than after seeing a White face.<sup>151</sup> They also misidentified guns as tools more often after seeing a White face than after seeing a Black face.<sup>152</sup> In all three conditions, stereotype-congruent errors, that is, “mistakenly calling a tool a gun when primed with a Black face or mistakenly calling a gun a tool when primed with a White face,” were more likely than stereotype-incongruent errors.<sup>153</sup> Moreover, the difference between stereotype-congruent and stereotype-incongruent errors became greater as processing time decreased.<sup>154</sup> Even participants who self-identified as motivated to avoid relying on stereotypes could not reduce the impact of the racial primes on their responses.<sup>155</sup> Surprisingly, making race salient increased the tendency of individuals to stereotypically misidentify objects regardless of whether participants were told to avoid relying on race or to use race.<sup>156</sup> Participants in both the “Avoid Race” and the “Use Race” conditions were more likely to misidentify harmless objects as guns when held by Blacks and misidentify guns as harmless objects when held by Whites than participants not given any instruction calling attention to race.

Even though this preliminary research suggests that making officers aware of their implicit biases would not be an effective way to reduce racial bias in the decision to shoot, it is hard to conclusively assert, based on just one study, that implicit bias training would be completely useless, especially in light of extensive research to the contrary.<sup>157</sup> It may be that the way race was made salient in this experiment rendered the training an ineffective means of reducing racial bias. There is a big difference between being told to think about race and actually engaging in role-playing that demonstrates how reliance on racial and other stereotypes can endanger the officer. Implicit bias training of police officers may be an effective way to reduce racial bias, but more research is needed before any definitive conclusions can be drawn on this front.

### C. Requiring Ongoing Training in the Martial Arts

My second proposal involves mandating regular and ongoing martial arts training for all officers. Most police departments require their recruits to take approximately forty-four hours of self-defense training,<sup>158</sup> but requirements for

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151. *Id.* at 389.

152. *Id.*

153. *Id.* at 390.

154. *Id.*

155. *Id.*

156. *Id.* at 390–91.

157. Cynthia Lee, *A New Approach to Voir Dire into Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861–63 (2015) (discussing race salience research); Lee, *Making Race Salient*, *supra* note 139, at 1586–90 (discussing race salience research).

158. DEP’T OF JUST., BUREAU OF JUSTICE STATS., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES 1–6 (2002); *see Training/Academy Life*, DISCOVER POLICING (Mar. 18, 2008),

ongoing self-defense training of officers after their initial recruitment vary greatly between states and police departments. Forty-four hours of self-defense training on a one-time basis is not sufficient. Although recruits may learn good techniques for disabling a suspect, without regular and sustained practice of such techniques, a police officer is unlikely to be able to effectively use those techniques if and when needed on the street.<sup>159</sup>

Mandatory regular and ongoing martial arts training for all police officers would be beneficial for several reasons. First, regular and ongoing martial arts training would enhance an individual officer's physical strength. Police officers who work the streets must be physically fit in order to excel at their jobs. Regular martial arts training can help condition the body, not only strengthening the legs, arms, and abdominal muscles, but also improving stamina since a rigorous martial arts training session can also be a high-intensity cardio workout. Even individuals who are not naturally athletic can become stronger through regular martial arts training. Another advantage of martial arts training is that one does not need to be tall or big to be a good martial artist. Indeed, the beauty of martial arts is that a small person who is strong and quick can defeat a larger opponent.<sup>160</sup>

Second, regular and ongoing martial arts training would enhance an individual officer's mental and emotional well-being and help to relieve stress—a significant issue for today's law enforcement officers.<sup>161</sup> Work and family obligations, however, may make it difficult for an officer to make time for regular training. If police officers were required to engage in martial arts training—if such training were considered part of the job—they would have no excuse for not training.<sup>162</sup> Regular martial arts training would help officers to be at their peak, not just physically, but also mentally and emotionally. The meditation that is a regular part of traditional martial arts training, usually

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[http://discoverpolicing.org/what\\_take/?fa=training\\_academy\\_life](http://discoverpolicing.org/what_take/?fa=training_academy_life).

159. See NORM STAMPER, *TO PROTECT AND SERVE: HOW TO FIX AMERICA'S POLICE* 117 (2016) (noting that very few law enforcement agencies provide sufficient entry-level, much less continuing education and training, in the martial arts and that such training should be extensive and ongoing).

160. See ROBERT HILL, *WORLD OF MARTIAL ARTS: THE HISTORY OF MARTIAL ARTS* 3 (2008) (“Special programs in many of the martial arts have been designed to train a smaller or more fragile person to handle a larger, stronger assailant.”).

161. See 1 *ENCYCLOPEDIA OF PSYCHOLOGY AND LAW* 587 (Brian L. Cutler ed., 2008) (reporting that untreated stress among police officers makes officers thirty percent more likely to experience health problems and ten times more likely to become depressed than members of other professions). *But see* Gregory M. Kane, *Perceived Effects of Martial Arts Training on Mood* 57 (Jan. 2008) (unpublished Ph.D. dissertation, University of Connecticut) (on file with author) (finding both positive and negative mood-altering effects with martial arts training).

162. Greg Ellifritz, *Police Defensive Tactics Training—Are Officers Getting Enough?*, *ACTIVE RESPONSE TRAINING* (Dec. 18, 2013), <http://www.activeresponsetraining.net/police-defensive-tactics-training-are-officers-getting-enough> (finding that the average police officer in Ohio reported receiving less than seven hours of weaponless defensive tactics training per year and that the primary non-cost related reason officers gave for not receiving sufficient training in hand to hand combat was lack of a legal requirement from the Ohio Peace Officer Training Commission).

occurring before and after each training session, would help promote mindfulness.<sup>163</sup>

Of course, any rigorous exercise program can enhance physical strength and mental and emotional well-being. Why is martial arts training better as a training regimen for police officers than, for example, jogging or weight lifting? A third benefit to regular and ongoing martial arts training is that such training can help an officer to remain calm when faced with an unruly or combative suspect. One key goal of martial arts training is learning to remain calm in a situation of danger.<sup>164</sup> Most persons will panic when attacked and either freeze or flee.<sup>165</sup> A person who has been training regularly in the martial arts is more likely to remain calm and stay focused on the task at hand since he or she is accustomed to being attacked during sparring practice.<sup>166</sup> One who practices martial arts is repeatedly placed in situations of stress during sparring exercises.<sup>167</sup> The martial artist also knows from such practice that one can get hit and survive.<sup>168</sup> An officer who engages in regular martial arts training would thus be more likely to remain calm when faced with a volatile situation on the street and be able to handle the situation in the way that is most appropriate under the circumstances.

Fourth, regular martial arts training can help improve an officer's ability to accurately assess the dangerousness of a given situation. When an officer is stressed out or not getting enough sleep, that officer is more likely to make mistakes on the job.<sup>169</sup> Many of the shooter bias studies discussed earlier found that error rates increased under time pressure.<sup>170</sup> Error rates may also increase

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163. See SANG H. KIM, *TEACHING MARTIAL ARTS: THE WAY OF THE MASTER* 84 (2d ed. 1997) (discussing the practice and effect of meditation before and after martial arts training). "Mindfulness" is used here to refer to the practice of intentionally "bringing one's attention to the internal and external experiences occurring in the present moment" often developed through the practice of meditation. See Ruth A. Baer, *Mindfulness Training as a Clinical Intervention: A Conceptual and Empirical Review*, 10 *CLINICAL PSYCHOL.: SCI. & PRACTICE* 125 (2003).

164. See CARL BROWN, *THE LAW AND MARTIAL ARTS* 199 (1998) ("Martial artists are trained to display fudoshin (calmness in an emergency).").

165. See DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND* 86 (5th ed. 2015).

166. See ASHLEY P. MARTIN, *THE COMPLETE MARTIAL ARTS TRAINING MANUAL: AN INTEGRATED APPROACH* 9–12 (2012) (discussing the benefits of sparring practice).

167. *Id.*

168. Stephanie Hoppe notes that sparring teaches one to get "used to the idea of being hit." STEPHANIE T. HOPPE, *SHARP SPEAR, CRYSTAL MIRROR: MARTIAL ARTS IN WOMEN'S LIVES* 260 (1998).

169. *Nat'l Inst. of Justice, Officer Work Hours, Stress, and Fatigue*, NAT'L INST. OF JUST. (Aug. 13, 2012), <http://www.nij.gov/topics/law-enforcement/officer-safety/stress-fatigue/pages/welcome.aspx> (reporting that stress and fatigue among officers can impair officers' physical and mental ability, create a cycle of fatigue, limit job performance, and damage officers' health); KAREN MATISON, HESS & CHRISTINE HESS ORTHMANN, *MANAGEMENT AND SUPERVISION IN LAW ENFORCEMENT* 408 (6th ed. 2012) (finding that stress and fatigue increases the likelihood that an officer will engage in inappropriate uses of force, have more difficulty dealing with members of the community, and die in the line of duty).

170. Payne, *supra* note 60, at 187–88; Correll, *The Police Officer's Dilemma*, *supra* note 66, at 1319.

whenever an officer has not gotten sufficient sleep or if an officer is very stressed out. If an officer is engaging in regular and ongoing martial arts training, the officer is less likely to be stressed out and should sleep more soundly. Being physically fit, getting sufficient sleep, and relieving stress can only help officers who are pressed to make split-second decisions.

Fifth, regular martial arts training can give the officer the confidence needed to handle a volatile situation without feeling pressure to shoot right away. Regular martial arts training would help the officer to develop his or her inner power, also known as “chi.” If one has strong chi, one can win even before the fight begins. For example, my husband, who is a martial arts instructor, told me about an incident in which a motorcyclist with a gun made an unsuccessful attempt to rob him. My husband was driving his SUV down a one-way alley. He noticed a motorcyclist driving toward him, the wrong way. Immediately, he had a gut feeling that something was not right. Sure enough, the motorcyclist stopped next to his SUV, knocked on his window, then said, “Give me your wallet. I have a gun,” opening his jacket to show a large gun. Even before the motorcyclist knocked on his window, my husband had already unbuckled his seat belt and had his hand on the door handle, ready to open the car door and knock the motorcyclist down off his motorcycle and follow up with a disabling punch or kick if the motorcyclist made an aggressive move. My husband looked at the motorcyclist and said, “You want my wallet? You picked the wrong person.” The motorcyclist stared into my husband’s eyes for a second and then drove off quickly. My husband was able to win without fighting. His inner power was so strong that he was able to convey to the motorcyclist that the motorcyclist didn’t stand a chance if he were to attempt a robbery.

As noted above, the research on police officers and stereotype threat suggests that police officers with more confidence in their ability to command respect and handle volatile situations are less likely than police officers without such confidence to shoot noncompliant but unarmed Black suspects.<sup>171</sup> One way to bolster such confidence is to require ongoing and regular martial arts training. Much traditional martial arts training involves repetition. By practicing the same punches, blocks, and kicks over and over, the martial artist becomes expert at these moves. The key is repeated and sustained practice, which is necessary if one wants to be really good at anything.<sup>172</sup> Practicing controlled sparring helps the body learn what to do if attacked. By practicing how to block a punch to the face over and over, one’s responses become automatic. Practicing free sparring helps one to react without knowing what is coming.

Finally, regular and ongoing martial arts training can help improve an officer’s intuition. Officers need to be able to accurately read a situation. They

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171. Richardson & Goff, *supra* note 119.

172. See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 40 (2008) (noting that “excellence at performing a complex task requires a critical minimum level of practice” and that most of the successful people in the world have become experts at what they do only after they put in at least 10,000 hours of practice).

must be able to quickly differentiate between unstable people who do not pose a true threat of harm and individuals who do pose a true threat of harm to the officer or others. As Gavin de Becker notes in *The Gift of Fear*, all of us have intuitions about other people, but we need to learn to pay more attention to our intuitions.<sup>173</sup> Police officers need to rely on their intuitions even more so than ordinary citizens because they are more likely to find themselves in situations of danger. Regular and ongoing martial arts training can help police officers hone their ability to sense true danger.

Despite its many benefits, martial arts training will not be a magic solution in all cases. Some police officers may not be naturally good at martial arts and all the training in the world won't make them good. But even for these police officers, regular and ongoing martial arts training will keep them fit, relieve stress, and help them to remain calm in the face of danger.

Some police officers may use their martial arts skills to hurt civilians. These police officers can and should be disciplined if they abuse their martial arts skills. They should also pay more attention to the philosophy underlying martial arts. A key teaching of karate do is never to initiate an attack in real life. Karate is supposed to be used defensively if, and only if, one is attacked.<sup>174</sup> This is why virtually all the kata, or forms, in karate start with a block, not an attack.<sup>175</sup>

The biggest problem with this reform proposal, however, lies in its implementation. Most police officers would probably agree that regular and ongoing martial arts training would be beneficial but would also maintain that they simply lack the time to engage in such training. If each state's Peace Officer Training Commission were to make martial arts training a legal requirement<sup>176</sup> or if insurance companies were to make regular and ongoing martial arts training a condition of insurance,<sup>177</sup> this would go a long way toward incentivizing police departments to give their officers time off for training or count such training as part of an officer's work. The federal government should provide grant monies to police departments to help them build on-site training

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173. GAVIN DE BECKER, *THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE* (1997).

174. See HIDETAKA NISHIYAMA & RICHARD C. BROWN, *KARATE: THE ART OF "EMPTY-HAND" FIGHTING* 13 (Tuttle Publishing 1960) (translating the two Japanese characters that make up the word "karate" to mean "empty hands," reflecting "the fact that karate originated as a system of self-defense which relied on the effective use of the unarmed body of its practitioner").

175. ROBIN L. REILLY, *COMPLETE SHOTOKAN KARATE: THE SAMURAI LEGACY AND MODERN PRACTICE* 92 (1998) (noting that all kata begin with a defensive posture, then a blocking technique, and never an offensive move because it is assumed that the practitioner is training for self-defense, not for attack); KENEI MABUNI, *EMPTY HAND: THE ESSENCE OF BUDŌ KARATE* (Carlos Molina ed., 2009) (noting that kata always begins with a block).

176. Ellifritz, *supra* note 162.

177. The idea of using insurance companies to pressure police departments to enhance training requirements comes from John Rappaport. See John Rappaport, *Cops Can Ignore Protesters; They Can't Ignore Their Insurers*, WASH. POST, May 8, 2016, at B1-B2. See also John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. \_\_\_\_ (forthcoming 2017) (manuscript on file with author) (arguing that liability insurers are capable of effecting meaningful change within police departments).

facilities for martial arts training. Police departments that cannot build an on-site facility could negotiate with reputable martial arts studios for discounted rates. Martial arts studios should welcome the added income stream and the influx of police officer students since they would likely bring an added level of dedication and seriousness to each practice. Police departments that currently provide tuition remission for higher education should expand such programs to include reimbursement for the cost of martial arts training.<sup>178</sup>

## V

### CONCLUSION

The August 2014 shooting of Michael Brown by Officer Darren Wilson in Ferguson, Missouri triggered a national conversation about race and policing that continues today.<sup>179</sup> Even though the “hands up, don’t shoot” narrative that became a rallying cry for Black Lives Matter protesters was later discredited by a Department of Justice investigation into the shooting of Michael Brown,<sup>180</sup> this conversation is important because shootings of minority victims can provoke mistrust between community members and the police and lead to civil unrest. The community may perceive the police as racist even when an individual officer might have been acting justifiably. And the police, in turn, might hesitate to intervene in situations involving criminal activity even when police such intervention would be appropriate.<sup>181</sup>

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178. Ellifritz, *supra* note 162.

179. This national conversation is due in large part to the activism of members of the Black Lives Matter movement. See Sullivan, Jr., *supra* note 17.

180. Michael Brown’s friend, Dorian Johnson, who was with Brown when he was shot, told police that Brown had his hands up and was trying to surrender when Officer Darren Wilson shot him. See Elliott C. McLaughlin, *What We Know About Michael Brown’s Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know> [<http://perma.cc/SK6Y-YM28>]; Eyder Peralta, *Ferguson Documents: What Michael Brown’s Friend Saw*, NPR (Nov. 26, 2014, 3:14 PM), <http://www.npr.org/sections/thetwo-way/2014/11/26/366827836/ferguson-documents-what-michael-browns-friend-saw>. The belief that Brown was shot while trying to surrender led members of the St. Louis Rams football team to walk onto the field at a game against the Oakland Raiders in St. Louis, Missouri, with their hands up in a show of solidarity with those protesting the shooting of Michael Brown. Adam Howard, *St. Louis Rams Players Show Solidarity with Ferguson Protesters*, MSNBC (Dec. 1, 2014, 10:43 AM), <http://www.msnbc.com/msnbc/st-louis-rams-show-solidarity-ferguson-protesters>. After an investigation into the shooting, however, the U.S. Department of Justice found that the physical and forensic evidence supported Officer Wilson’s claim of self-defense and that the officer shot Brown as he was moving toward the officer. See U.S. DEP’T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5–8 (2015).

181. Some have blamed the Black Lives Matter movement for the uptick in violent crime across the nation, suggesting that the movement is at fault for making police officers hesitant to do their jobs. See Wesley Lowery, *FBI Chief Again Talks of Chilling Effect on Law Enforcement*, WASH. POST, Oct. 27, 2015, at A7; Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html>. The notion that increased public scrutiny of police has deterred police from doing their job has been called the “Ferguson Effect.” See, e.g., Christine Byers, *Crime Up After Ferguson and More Police Needed, Top St. Louis Area Chiefs Say*, ST. LOUIS POST-DISPATCH (Nov. 15, 2014), <http://www.stltoday.com/news/local/crime-and-courts/crime->

This conversation about race and policing should be of concern to everyone because problematic shootings by police cost taxpayers millions of dollars in settlements arising from civil lawsuits.<sup>182</sup> These monies could instead be going toward improving social services, schools, and jobs. The need for reform of policing practices, however, transcends race. Almost half of all individuals shot and killed by police each year are White.<sup>183</sup>

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up-after-ferguson-and-more-police-needed-top-st/article\_04d9f99f-9a9a-51be-a231-1707a57b50d6.html; Matt Ford, *Debunking the Ferguson Effect*, THE ATLANTIC, Nov. 21, 2015, <http://www.theatlantic.com/politics/archive/2015/11/ferguson-effect/416931/>; Ashley Gold, *Why Has the Murder Rate in Some U.S. Cities Suddenly Spiked?*, BBC NEWS (June 5, 2015), <http://www.bbc.com/news/world-us-canada-32995911> (noting that the term “Ferguson Effect” was coined by St. Louis Police Chief Sam Dotson, in a 2014 column in the St. Louis Post Dispatch); Heather MacDonald, *The New Nationwide Crime Wave*, WALL STREET J. (May 29, 2015, 6:27 PM), <http://www.wsj.com/articles/the-new-nationwide-crime-wave-143293842>; It is not clear, however, that public scrutiny of police shootings has impacted police officers’ willingness to do their jobs. See Phillip M. Bailey, *Study: Cops Less Motivated Post-Ferguson*, USA TODAY, Nov. 20, 2015, at 12A (“A study co-authored by a University of Louisville criminologist shows that public scrutiny surrounding police shootings of unarmed civilians has diminished officers’ morale but has not created a ‘Ferguson effect,’ which claims the criticism has impacted officers’ willingness to perform their duties.”); see also Juliet Eilperin & Wesley Lowery, *Obama Denies Police Are Shying from Duty*, WASH. POST, Oct. 28, 2015, at A3; Darryl Fears, *In Milwaukee, Weak Evidence for ‘Ferguson Effect,’* WASH. POST, Dec. 6, 2015, at A9; Tracey L. Meares & Jeffrey A. Fagan, *Crime Statistics Don’t Show That the Sky is Falling*, INT’L N.Y. TIMES (Dec. 16, 2015, 6:07 PM), <http://www.nytimes.com/roomfordebate/2015/06/04/have-fearful-police-brought-an-end-to-the-drop-in-crime/crime-statistics-dont-show-that-the-sky-is-falling> (noting that there is little evidence to support the claim that there has been a “Ferguson effect”); Richard Rosenfeld, *Was There a “Ferguson Effect” on Crime in St. Louis?* THE SENTENCING PROJECT (June 2015), [http://sentencingproject.org/doc/publications/inc\\_Ferguson\\_Effect.pdf](http://sentencingproject.org/doc/publications/inc_Ferguson_Effect.pdf) (finding that although the homicide count in St. Louis was higher in 2014 than in 2013 for most of the year, the gap between the two years began to increase two months before the events in Ferguson). A November 2015 report by the Brennan Center for Justice found that although crime was on the increase in some U.S. cities, nationwide crime rates were on the decline. See Jon Schuppe, *Researchers Cast Doubt on “Ferguson Effect” as Cause of Crime Spikes*, NBC NEWS (Nov. 27, 2015, 12:40 PM), <http://www.nbcnews.com/news/us-news/researchers-cast-doubt-ferguson-effect-cause-crime-spikes-n467251>.

182. Over the past decade, the city of Chicago has spent more than \$500 million on police related court judgments, settlements, and legal fees. Peter Slevin & Juliet Eilperin, *A Killing and Video Test Emanuel’s Political Skill*, WASH. POST, Dec. 4, 2015, at A2; see also Marc Fisher, Scott Higham & Derek Hawkins, *Uneven Justice*, WASH. POST, Nov. 4, 2015, at A1 (finding that most families who filed a civil lawsuit after a fatal shooting in which the police officer was criminally charged won awards ranging from \$7,500 to \$8.5 million); see also, e.g., The city of North Charleston, South Carolina, agreed to pay \$6.5 million to the family of Walter Scott, the unarmed Black man who was shot and killed while running away from a White police officer in April 2015. Alex Johnson, *South Carolina Town Settles with Walter Scott’s Family for \$6.5 Million*, NBC NEWS (Oct. 8, 2015, 8:42 PM) (detailing how the city of North Charleston, South Carolina, agreed to pay \$6.5 million to the family of Walter Scott, the unarmed Black man who was shot and killed while running away from a White police officer in April 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/south-carolina-town-settles-walter-scott-s-family-6-5-million-n441426>; Keith L. Alexander, *Baltimore to Pay \$6.4 Million Settlement to Gray’s Family*, WASH. POST, Sept. 9, 2015, at A1 (following the death of Freddie Gray, a Black man who died while in police custody in a police van, the City of Baltimore agreed to pay Freddie Gray’s family \$6.4 million even though Gray’s family had not yet filed a civil lawsuit in the case).

183. See Gabrielson, Grochowski & Sagara, *supra* note 19 (noting that some forty-four percent of all those killed by police across the past thirty-three years were White); see also Valerie Richardson, *Police Kill More Whites Than Blacks, but Minority Deaths Generate More Outrage*, WASH. TIMES (Apr. 21, 2015), <http://www.washingtontimes.com/news/2015/apr/21/police-kill-more-whites-than-blacks-but-minority-d/?page=all> (reporting that roughly forty-nine percent of those killed by officers from May 2013 to April 2015 were White, thirty percent were Black, nineteen percent were Hispanic and two percent

In recognition of these realities, this article proposes two ways to enhance the training that police officers currently receive.<sup>184</sup> One reform proposal—training in the use of force aimed at reducing racial bias and improving accuracy in the decision to shoot—directly responds to the numerous studies suggesting that police officers, like citizens, are quicker to see a weapon in the hands of a Black person than in the hands of a White person. The other, recognizing that the need for reform transcends race, is race neutral: police officers should be required to engage in regular and ongoing weaponless martial arts training. These are modest proposals for reform, but if either of these reforms can save even one life, they will have been worth the effort.

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were Asian or other races); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: SUPPLEMENTARY HOMICIDE REPORT (2012) (noting that fifty-two percent of the victims of police homicides in the given time period were White and thirty-one percent were Black).

184. William Yeomans reminds us of “the limits of criminal prosecutions as vehicles for change.” William Yeomans, *The Red Herring in Prosecuting Officers*, WASH. POST, May 25, 2016, at A19 (“Prosecutions focus on individual circumstances and personalized evaluations of culpability” and “occur within a structure designed to protect individual defendants through procedural safeguards, including rights to counsel, to confront witnesses, to a jury and against self-incrimination and, most important, the requirement that the government prove guilt beyond a reasonable doubt.”).