

## Defusing Implicit Bias

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### ABSTRACT

The February 2012 killing of Trayvon Martin has slowly reignited the national conversation about race and violence. Despite the sheer volume of debate arising from this tragedy, insufficient attention has been paid to the potentially deadly mix of guns and implicit bias. Evidence of implicit bias, and its power to alter real-world behavior, is stronger now than ever. A growing body of research on “shooter bias” reveals that, as a result of implicit bias, White and Black Americans are more likely to shoot unarmed Black men than unarmed White men. The problem has been diagnosed. What remains to be determined is the solution. While defusing implicit bias is a daunting task, the stakes are too high to ignore the problem. States, responsible for laws regulating gun ownership and use, must help defuse implicit bias before it becomes deadly.

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## INTRODUCTION

The February 2012 killing of Trayvon Martin reignited the national conversation about race and violence.<sup>1</sup> Despite the sheer volume of discussion and debate arising from this tragedy,<sup>2</sup> insufficient attention has been paid to the potentially deadly mix of guns and implicit bias.<sup>3</sup> Evidence of implicit bias and its power to alter real-world behavior is stronger now than ever.<sup>4</sup> A growing body of research on “shooter bias” reveals that, as a result of implicit bias, both White and Black Americans are more likely to shoot unarmed Black men than unarmed White men.<sup>5</sup> While the science cannot tell us whether implicit bias caused George Zimmerman to shoot Trayvon Martin, this moment marks an opportunity to examine the connection between implicit bias and guns.<sup>6</sup> Defusing implicit bias

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1. See, e.g., Brian Stelter, *In Slain Teenager's Case, a Long Route to National Attention*, N.Y. TIMES, Mar. 25, 2012, <http://www.nytimes.com/2012/03/26/business/media/for-martins-case-a-long-route-to-national-attention.html>. While Trayvon Martin's death has captured the nation's attention, we should not forget that this shooting of an unarmed Black youth was not an isolated event. See, e.g., Richard Winton, *Officers Who Shot Pasadena Youth Identified*, L.A. TIMES, Mar. 31, 2012, <http://articles.latimes.com/2012/mar/31/local/la-me-0331-pasadena-shooting-20120331>.
  2. For instance, the Huffington Post and New York Times each created pages specifically designed to follow the developments in this story. See *The Trayvon Martin Case*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/trayvon-martin> (last visited June 29, 2012); *Times Topics, Trayvon Martin Case (George Zimmerman)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/m/trayvon\\_martin/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/trayvon_martin/index.html) (last updated June 21, 2012).
  3. We are not claiming that race was the only relevant factor in this tragedy. Other characteristics particular to Trayvon and the shooter, George Zimmerman, likely played crucial roles. See Rich Benjamin, Op-Ed, *The Gated Community Mentality*, N.Y. TIMES, Mar. 29, 2009, <http://www.nytimes.com/2012/03/30/opinion/the-gated-community-mentality.html> (“[Trayvon's] ‘suspicious’ profile amounted to more than his black skin. He was profiled as young, loitering, non-property-owning and poor.”).
  4. See *infra* Part II.
  5. Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 49 (2010) (“Implicit bias research suggests that large sectors of the population hold biases against minorities beyond their conscious awareness or control and that, in simulations, those individuals are more likely to shoot unarmed blacks than unarmed whites.”); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514–28 (2005).
  6. To be clear, we are not claiming that in this particular instance George Zimmerman acted because of implicit bias. In line with prior scholarship on this issue, we are not advocating that it is valuable or even possible to use an individual's implicit bias measure to determine whether a prior act was done with prejudice. See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 492–93 (2011) (“No serious scientist has called for using instruments such as the IAT in this specific, ex post context.”). However, the inability to make a specific, ex post determination does not diminish the efficacy of the type of ex ante interventions we describe in Part III.

is a daunting task,<sup>7</sup> but the stakes are too high to ignore the problem. States, responsible for laws regulating gun ownership and use, must help defuse implicit bias before it becomes deadly.

## I. TRAYVON MARTIN

Seventeen-year-old Trayvon Martin was fatally shot while out walking on February 26, 2012.<sup>8</sup> On the day he was killed, Trayvon and his father were visiting a friend in a gated community in Sanford, Florida.<sup>9</sup> Trayvon walked to the local 7-Eleven,<sup>10</sup> where he bought Skittles and an iced tea.<sup>11</sup> George Zimmerman, a local neighborhood watch captain, was driving in his SUV when he noticed Trayvon walking back from the store.<sup>12</sup> Unlike Zimmerman,<sup>13</sup> Trayvon was Black.<sup>14</sup> Trayvon was wearing a hooded sweatshirt.<sup>15</sup> Zimmerman called the police because he felt Trayvon looked “real suspicious.”<sup>16</sup> The police explicitly instructed Zimmerman not to follow Trayvon.<sup>17</sup>

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7. A central impediment to defusing implicit bias results from the relatively nascent understandings of the underlying mechanisms surrounding this cognitive process. *See generally* Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008) (finding that intergroup contact negatively correlates with prejudice); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1098 (2006) (explaining that strategies for defusing implicit bias may gain greater relevance as our understanding of the science improves); Kang, *supra* note 5 (presenting debiasing agents as a potential strategy for reducing implicit bias); Kang & Lane, *supra* note 6.
  8. Charles M. Blow, Op-Ed, *The Curious Case of Trayvon Martin*, N.Y. TIMES, Mar. 16, 2012, <http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html>; Stelter, *supra* note 1.
  9. Blow, *supra* note 8 (“Trayvon had been gunned down in a gated townhouse community in Sanford, Fla., outside Orlando. . . . Trayvon had left the house he and his father were visiting to walk to the local 7-Eleven.”).
  10. *Id.*
  11. *Id.*
  12. *Id.* (“On his way back, he caught the attention of George Zimmerman, a 28-year-old neighborhood watch captain, who was in a sport-utility vehicle.”).
  13. Zimmerman’s father described his son as “a Spanish speaking minority with many black family members and friends.” Rene Stutzman, *George Zimmerman’s Father: My Son Is Not Racist, Did Not Confront Trayvon Martin*, ORLANDO SENTINEL, Mar. 15, 2012, [http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315\\_1\\_robert-zimmerman-letter-unarmed-black-teenager](http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315_1_robert-zimmerman-letter-unarmed-black-teenager) (internal quotation marks omitted).
  14. Blow, *supra* note 8 (“Trayvon is black. Zimmerman is not.”).
  15. Tim Padgett, *The Controversial Florida Law at the Heart of the Trayvon Martin Case*, TIME, Mar. 20, 2012, <http://www.time.com/time/nation/article/0,8599,2109511,00.html>.
  16. Blow, *supra* note 8 (“Zimmerman called the police because the boy looked ‘real suspicious,’ according to a 911 call released late Friday.”).
  17. *Id.* (“The operator told Zimmerman that officers were being dispatched and not to pursue the boy.”).

Exactly what happened next is the subject of much debate, and we make no attempt to resolve any factual disputes here. What is clear is that although Trayvon was unarmed, Zimmerman eventually left his car and shot and killed Trayvon with a 9mm handgun.<sup>18</sup> After police arrived at the scene, “Zimmerman was taken into custody, questioned and released.”<sup>19</sup>

Zimmerman claimed from the outset that he acted in self-defense.<sup>20</sup> According to Zimmerman’s father, at some point during the encounter Zimmerman lost sight of Trayvon and began walking back to his car.<sup>21</sup> Before reaching his car, Trayvon reappeared and allegedly punched Zimmerman “in the nose and slammed his head into the sidewalk.”<sup>22</sup> In the ensuing moments, Zimmerman pulled his pistol from his waistband and shot Trayvon in the chest.<sup>23</sup>

Under a 2005 Florida statute,<sup>24</sup> Zimmerman had no duty to retreat before using deadly force in self-defense as long as he was attacked in a place where he had a lawful right to be.<sup>25</sup> Florida law states the following:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.<sup>26</sup>

In light of Zimmerman’s self-defense claim, the Sanford police initially concluded they had insufficient evidence to arrest Zimmerman on a manslaughter charge.<sup>27</sup>

Coverage of the case evolved slowly. A local television channel covered the killing the following day, and Florida newspapers picked up the story within a

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18. Stutzman, *supra* note 13.

19. Blow, *supra* note 8.

20. See Stutzman, *supra* note 13.

21. Haeyoun Park et al., *The Events Leading Up to the Shooting of Trayvon Martin*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/04/02/us/the-events-leading-to-the-shooting-of-trayvon-martin.html> (last updated June 21, 2012).

22. *Id.*

23. *Id.*

24. 2005 Fla. Laws 199 (codified at FLA. STAT. §§ 776.012–.013, .031–.032 (2010)).

25. Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 524 (2007); Zachary L. Weaver, Comment, *Florida’s “Stand Your Ground” Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 395 (2008) (“Florida’s ‘Stand Your Ground’ Law has been controversial since Governor Jeb Bush signed it into law on April 26, 2005.”).

26. FLA. STAT. § 776.013(3).

27. Stutzman, *supra* note 13 (“Police on Tuesday turned the case over to the State Attorney’s Office, saying they did not have evidence to justify George Zimmerman’s arrest on a charge of manslaughter.”).

week.<sup>28</sup> The national news media began reporting on the case in mid-March.<sup>29</sup> As the story spread, the “reluctance to arrest Zimmerman sparked a national outcry, with many observers suspecting that Zimmerman, who is half-white and half-Latino, was given a break because of his race, and the race of the young man he fatally shot.”<sup>30</sup> The public response to the incident included numerous rallies and protests.<sup>31</sup> Supporters, including the Miami Heat basketball team<sup>32</sup> and a Congressman on the House floor,<sup>33</sup> symbolically wore hooded sweatshirts in solidarity.

As the public response grew, Florida Governor Rick Scott appointed State Attorney Angela Corey to act as special prosecutor on the case.<sup>34</sup> On April 11, the state charged Zimmerman with second-degree murder,<sup>35</sup> and he turned himself in to authorities.<sup>36</sup> On April 20, Zimmerman took the stand during his bail hearing and apologized to Trayvon’s parents.<sup>37</sup> Zimmerman was formally arraigned on

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28. Stelter, *supra* note 1.

29. *Id.* (“It was not until mid-March, after word spread on Facebook and Twitter, that the shooting of Trayvon by George Zimmerman, 28, was widely reported by the national news media, highlighting the complex ways that news does and does not travel in the Internet age.”).

30. Richard Fausset, *Trayvon Martin Case: George Zimmerman Waives Right to Speedy Trial*, L.A. TIMES, May 8, 2012, <http://www.latimes.com/news/nation/nationnow/la-na-nn-zimmerman-waives-speedy-trial-20120508,0,4573513.story>.

31. See, e.g., *High School Students Walk Out in Protest of Trayvon Martin Shooting*, MSNBC NEWS (Mar. 23, 2012, 1:13 PM), [http://usnews.msnbc.msn.com/\\_news/2012/03/23/10830314-high-school-students-walk-out-in-protest-of-trayvon-martin-shooting](http://usnews.msnbc.msn.com/_news/2012/03/23/10830314-high-school-students-walk-out-in-protest-of-trayvon-martin-shooting) (describing a walk-out involving students from several South Florida high schools); *Trayvon Martin: Protesters March to L.A. City Hall*, L.A. TIMES BLOGS—L.A. NOW (Apr. 9, 2012, 6:47 PM), <http://latimesblogs.latimes.com/lanow/2012/04/trayvon-martin-protesters-decry-racist-violence-march-to-la-city-hall.html> (describing a march through downtown Los Angeles that arose in response to the Trayvon Martin killing).

32. See Laura Isensee, Lesley Clark & Frances Robles, *Trayvon Support Spreads to the Miami Heat, the White House and Dade Schools*, MIAMI HERALD, Mar. 23, 2012, <http://www.miamiherald.com/2012/03/23/2710602/trayvon-support-spreads-to-the.html>.

33. See Catalina Camia, *Hoodie for Trayvon on House Floor Sparks Debate*, USA TODAY—ONPOLITICS (Mar. 29, 2012, 6:45 PM), <http://content.usatoday.com/communities/onpolitics/post/2012/03/house-dress-code-hoodie-trayvon-martin-bobby-rush-/1>.

34. See Toluse Olorunnipa, *Prosecutor: No Grand Jury for Trayvon Case*, MIAMI HERALD, Apr. 9, 2012, <http://www.miamiherald.com/2012/04/09/2739151/trayvon-martin-case.html> (“After public outcry, Gov. Rick Scott assigned Corey, the state attorney for the Jacksonville area, to take over the case on March 22.”).

35. Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 11, 2012, <http://www.nytimes.com/2012/04/12/us/zimmerman-to-be-charged-in-trayvon-martin-shooting.html>.

36. Fausset, *supra* note 30.

37. Serge F. Kovalski & Jennifer Preston, *I Am Sorry, Zimmerman Says as Bail Set at \$150,000*, N.Y. TIMES, Apr. 20, 2012, <http://www.nytimes.com/2012/04/21/us/george-zimmerman-bail-hearing.html>.

May 8.<sup>38</sup> Zimmerman did not attend the arraignment, but his attorney, Mark O'Mara, entered a written plea of not guilty<sup>39</sup> and communicated Zimmerman's wish to waive his right to a speedy trial.<sup>40</sup> As a result, Zimmerman's trial is not expected to begin before October 2012.<sup>41</sup> A pretrial hearing has been set for August 8, 2012.<sup>42</sup>

Media and public debate following the shooting focused on the role that race might have played in arousing Zimmerman's initial suspicions and subsequent actions. Time magazine revealed that "Zimmerman reportedly has a long history of making 911 calls about 'suspicious' black persons."<sup>43</sup> President Obama delicately marked this as a racially inflected moment when he told reporters, "If I had a son, he'd look like Trayvon."<sup>44</sup> Charles M. Blow, a Black New York Times columnist addressed the problem more directly, explaining "[t]his is the fear that seizes me whenever my boys are out in the world: that a man with a gun and an itchy finger will find them 'suspicious.'"<sup>45</sup> Jonathan Capehart of the Washington Post offered additional perspective, explaining that "[o]ne of the burdens of being a black male is carrying the heavy weight of other people's suspicions."<sup>46</sup> Trayvon's parents, and many others, have suggested that they believe racial profiling played a role in Trayvon's death and the subsequent handling of the case.<sup>47</sup>

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38. Barry Leibowitz, *George Zimmerman 'Not Guilty' Plea at Arraignment for Trayvon Martin Killing*, CBSNEWS.COM (May 8, 2012, 3:11 PM), [http://www.cbsnews.com/8301-504083\\_162-57430236-504083/george-zimmerman-not-guilty-plea-at-arraignment-for-trayvon-martin-killing](http://www.cbsnews.com/8301-504083_162-57430236-504083/george-zimmerman-not-guilty-plea-at-arraignment-for-trayvon-martin-killing).

39. *Id.*

40. Fausset, *supra* note 30.

41. *Id.*

42. Leibowitz, *supra* note 38.

43. Padgett, *supra* note 15.

44. Sam Stein, *Obama on Trayvon Martin Case: 'If I Had a Son, He'd Look Like Trayvon'*, HUFFINGTON POST (Mar. 23, 2012, 3:39 PM), [http://www.huffingtonpost.com/2012/03/23/obama-trayvon-martin\\_n\\_1375083.html](http://www.huffingtonpost.com/2012/03/23/obama-trayvon-martin_n_1375083.html).

45. Blow, *supra* note 8.

46. Jonathan Capehart, *Under 'Suspicion: The Killing of Trayvon Martin*, WASH. POST—POST PARTISAN (Mar. 18, 2012, 6:00 PM), [http://www.washingtonpost.com/blogs/post-partisan/post/under-suspicion-the-killing-of-trayvon-martin/2011/03/04/gIQAz4F4KS\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/under-suspicion-the-killing-of-trayvon-martin/2011/03/04/gIQAz4F4KS_blog.html).

47. See, e.g., Leibowitz, *supra* note 38 ("Martin's family and supporters claim the black teen was a victim of racial profiling."); Luke Russert, *Trayvon Martin's Family Alleges Racial Profiling Before Congress*, MSNBC NEWS (Mar. 27, 2012, 10:58 AM), [http://usnews.msnbc.msn.com/\\_news/2012/03/27/10885680-trayvon-martins-family-alleges-racial-profiling-before-congress](http://usnews.msnbc.msn.com/_news/2012/03/27/10885680-trayvon-martins-family-alleges-racial-profiling-before-congress) ("Ben Crump, an attorney for Martin's parents, told the panel that the family was convinced Martin was targeted for special attention because of his race, arguing that tougher laws against profiling might have averted the shooting."); Erika Bolstad, *Trayvon Martin Slaying Sparks Racial Profiling Discussions on Capitol Hill*, MIAMI HERALD, Mar. 27, 2012, <http://www.miamiherald.com/2012/03/27/2717699/trayvon-martin-slaying-sparks.html> ("Trayvon's parents spoke only briefly at the event, sponsored by Democrats on the House Judiciary Committee and billed as a briefing on racial profiling and

In response to these claims, Zimmerman's father insisted that his son "would be the last to discriminate for any reason whatsoever," and that "[t]he media portrayal of George as a racist could not be further from the truth."<sup>48</sup> Zimmerman's original attorney similarly denied any racial motivation, explaining that his client mentors Black children and saying on CNN: "I don't believe George Zimmerman is a racist, or that this was motivated by a dislike for African-Americans."<sup>49</sup> Others also criticized the focus on race. Former Republican Presidential hopeful Newt Gingrich slammed President Obama's remarks, insisting, apparently without irony, that "we should be concerned about children of every background and all too often we're not."<sup>50</sup>

Unpacking the varied responses to Trayvon's death requires a close look at the growing body of scientific evidence concerning implicit bias. At a basic level, implicit bias refers to the subconscious associations we make between a particular object and the meanings we attach to it.<sup>51</sup> In the context of human beings, implicit biases result in automatic associations between an individual's race and corresponding stereotypes and attitudes. Perhaps most importantly, we now know that implicit bias predicts actual behavior. Part II explores how evidence of implicit bias bridges the gap between those who see race as a key factor in Trayvon's death and those who insist that race played no role at all.

## II. IMPLICIT BIAS

Some, including Trayvon Martin's parents, have implied that Trayvon's death was the result of racial profiling or racial discrimination.<sup>52</sup> Others, including Zimmerman's father and his first attorney,<sup>53</sup> rejected suggestions that race played

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hate crimes. But they thanked the panel for a forum, so that as Trayvon's father said, his son 'did not die in vain.'").

48. Stutzman, *supra* note 13.

49. Isensee, Clark & Robles, *supra* note 32.

50. Rebecca Kaplan, *Gingrich Defends Criticism of Obama's Trayvon Martin Comments*, CBSNEWS.COM (Mar. 26, 2012, 6:59 PM), [http://www.cbsnews.com/8301-503544\\_162-57404856-503544/gingrich-defends-criticism-of-obamas-trayvon-martin-comments](http://www.cbsnews.com/8301-503544_162-57404856-503544/gingrich-defends-criticism-of-obamas-trayvon-martin-comments).

51. For instance, through implicit cognitions we automatically identify a flat piece of wood with four legs as a table. This process occurs without our conscious awareness. We similarly make automatic associations that attach to human beings based on their race. See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 888 (2010).

52. See *supra* note 47.

53. Zimmerman changed lawyers in April. Alvarez & Cooper, *supra* note 35 ("Mr. Zimmerman changed his lawyers this week, and his old legal team held an odd news conference on Tuesday to say that they were withdrawing from the case and had not heard from him since the weekend. Mr. Zimmerman's

any role in Zimmerman's decision to pursue and ultimately to shoot Trayvon.<sup>54</sup> Given the conflicting accounts and understandings of how events unfolded, how can we know whether race was a factor in Trayvon's death? What evidence would prove that race motivated Zimmerman? Was this a moment of racial profiling? Is it fair to call Zimmerman a racist?

These questions lie at the heart of the national conversation that developed around this tragedy.<sup>55</sup> Before trying to answer these questions, it is crucial to clearly define the term "racial discrimination." The dominant conception of racial discrimination in the current debate has squarely reflected the U.S. Supreme Court's antidiscrimination jurisprudence.<sup>56</sup> Under the Court's current approach,<sup>57</sup> known as disparate treatment theory,<sup>58</sup> racial discrimination exists if, and only if, an identifiable perpetrator treats a victim in a harmful way *because of* the victim's race.<sup>59</sup>

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new lawyer, Mark M. O'Mara, a well-known criminal lawyer, said in a brief interview Wednesday night that his client would plead not guilty at a hearing on Thursday.").

54. See *supra* notes 48–49.

55. See, e.g., Michael Arceneaux, *Rush Limbaugh Downplays Racism in Trayvon Martin Case*, NEWSONE (Mar. 30, 2012), <http://newsone.com/newsone-original/michaelarceneaux/no-surprise-rush-limbaugh-downplays-trayvon-martin-race> (criticizing Limbaugh for framing the killing as not racist at all); Ruben Navarrette, Jr., *Trayvon Martin Killing Raises Loaded Racial Terms*, CNN.COM (Mar. 29, 2012, 10:23 AM), <http://www.cnn.com/2012/03/29/opinion/navarrette-white-hispanic/index.html> (discussing the fact that Zimmerman could be racist even though he is Hispanic).

56. There are some notable exceptions. See, e.g., Sally Kohn, Opinion, *Trayvon Martin, Obama, and the Persistence of Bias*, REUTERS—GREAT DEBATE (Mar. 21, 2012), <http://blogs.reuters.com/great-debate/2012/03/21/trayvon-martin-obama-and-the-persistence-of-bias>.

57. We use the term "current" to indicate that the antidiscrimination principle, which reflects a disparate treatment theory, is only one of several possible conceptions of racial discrimination. For a critique of the antidiscrimination principle, see, for example, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29 (Kimberlé Crenshaw et al. eds., 1995), and Laurence H. Tribe, *Making Sense of the Equal Protection Clause: A Right Not to Be Subjugated*, in AMERICAN CONSTITUTIONAL LAW 1514–21 (2d ed. 1988).

58. The Supreme Court formally adopted disparate treatment theory as part of its equal protection jurisprudence in *Washington v. Davis*, 426 U.S. 229 (1976), in which the Court held that cognizable equal protection claims required a showing of discriminatory intent even in the presence of profound disparate impact. In previous Title VII claims, the Court had found cognizable claims of discrimination without a showing of discriminatory intent. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." (emphasis omitted)).

59. Alternatively, we can think of this in terms of the counterfactual: The perpetrator would not have treated the victim in such a way if that victim had belonged to a different racial group. For instance, disparate treatment would exist if members of a jury rated the performance of a White attorney higher than an Asian attorney solely as a result of the attorneys' race. See Kang et al., *supra* note 51.

While this articulation of racial discrimination appears straightforward, it begs the question: How do we know when someone acted *because of race*?

The public debate has been consistent with traditional applications of disparate treatment theory in characterizing the decision to act *because of race* as a conscious choice or intention.<sup>60</sup> It should thus be unsurprising that parties on both sides have tried to offer evidence aimed at establishing the presence or absence of conscious intent.

As mentioned above, Zimmerman's father and first attorney have adamantly denied that Zimmerman is a racist.<sup>61</sup> To support their claims, Zimmerman's father pointed out that his son was a "Spanish speaking minority with many black family members and friends" who had good relationships with his black neighbors and served as a mentor to two black children.<sup>62</sup>

Reliance on these forms of evidence to rebut accusations of Zimmerman's racism should not be a surprise because of their relation to conscious intent. The value of this evidence depends on the assumption that if we explicitly reject racist behavior,<sup>63</sup> we are not racist and will not discriminate because of race.<sup>64</sup> This reliance, which we term the "racism defense," has three components—an element to be proved and two associated logical inferences: (1) The perpetrator is not a racist and does not endorse racial discrimination; (2) Because the perpetrator is not a racist and does not endorse racial discrimination, the perpetrator would never intend to discriminate on the basis of race; and (3) Because the perpetrator did not intend to discriminate on the basis of race, the perpetrator could not have acted *because of race*.

Like allegations of racism, accusations of racial profiling often require or rely on evidence of conscious intent. Though presumptively unconstitutional,<sup>65</sup> racial

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60. Conscious intent can be understood as akin to the criminal law concept of a *mens rea* intent, which is distinguished from other levels of fault because it describes a *deliberate* act.

61. See Stutzman, *supra* note 13 (detailing Robert Zimmerman's comments and including full text of a letter he sent the newspaper defending his son).

62. *Id.*

63. For example, Zimmerman's father offered George's non-White identity, multiracial family, and Black acquaintances as evidence that George explicitly rejected racist behavior.

64. Cf. Assoc. Press, *Montana Judge Apologizes for Racist Email About Obama's Mother*, CHRISTIAN SCI. MONITOR, Mar. 1, 2012, <http://www.csmonitor.com/USA/Latest-News-Wires/2012/0301/Montana-judge-apologizes-for-racist-email-about-Obama-s-mother> (reporting that after sending a racist joke from his court email account, Judge Richard Cebull "acknowledged that the content of the email was racist, but said he does not consider himself racist").

65. See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that police could not make a roving patrol stop of a vehicle based on the sole fact that the driver and passengers were of apparent Mexican ancestry). *But see* *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the Fourth Amendment does not require an inquiry into whether police officers were motivated by race

profiling is often justified on policy grounds as a rational form of racial discrimination.<sup>66</sup> Racial profiling is rational in the sense that it relies on perceived statistical correlations between a particular racial group and a corresponding trait or behavior.<sup>67</sup> For instance, when New York officials conduct covert surveillance on Muslim communities,<sup>68</sup> the decision is based on a conscious belief that the targeted individuals are more likely to engage in terrorism than the general population.<sup>69</sup> Understood in this way, a successful claim of racial profiling requires proof of a conscious decision to discriminate against the targeted group because of their race.<sup>70</sup>

These examples of racism defenses and racism allegations illustrate the central role that evidence of conscious intent plays in our public dialogue. Even within the disparate treatment theory of racial discrimination, however, such an approach fails to take into account recent findings from the fields of psychology and social cognition that complicate the way we may think about racially motivated acts.<sup>71</sup> These findings reveal that implicit biases, often undetectable through introspection

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so long as probable cause exists). Also noteworthy, while most racial classifications are subject to strict scrutiny (the highest degree of judicial review), suspect descriptions that rely on race are subject to nothing more than rational basis review (the lowest degree of judicial review). See *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000).

66. See Richard Thompson Ford, *The Depressing Cycle of Racial Accusation*, SLATE, July 23, 2009, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/07/the\\_depressing\\_cycle\\_of\\_racial\\_accusation.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/07/the_depressing_cycle_of_racial_accusation.html) (“And even racial profiling in the sense of using race as a part of a generic composite of a typical criminal isn’t necessarily racist. It’s a tragic fact that blacks as a group commit a disproportionate number of certain types of crime.”).
67. *Id.*
68. See Eileen Sullivan & Pete Yost, *NYPD Muslim Surveillance: Attorney General Eric Holder Reviewing Spying Complaints*, HUFFINGTON POST (Feb. 29, 2012, 9:58 AM), [http://www.huffingtonpost.com/2012/02/29/nypd-muslim-surveillance\\_n\\_1308798.html](http://www.huffingtonpost.com/2012/02/29/nypd-muslim-surveillance_n_1308798.html).
69. *Id.*
70. The Supreme Court has also made distinctions between racial antagonism and common sense racial profiling. In upholding the curfew and exclusion orders targeting Japanese Americans during World War II, the Court consistently differentiated between racial antagonism (which we could think of as pure, irrational racial hostility) and a more common sense racial profiling. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . . For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.” (citations omitted)); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (“To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . .” (emphasis omitted)).
71. For an example of these findings, see Kang et al., *supra* note 51.

and self-reporting, cause us to treat others differently because of their race.<sup>72</sup> To gain a more accurate sense of the role played by implicit biases, we begin by disaggregating the concepts of explicit and implicit biases.

Both explicit and implicit biases are the result of social cognitions.<sup>73</sup> Cognitions are thoughts or feelings, and “[a] social cognition is a thought or feeling about a person or a social group, such as a racial group.”<sup>74</sup> Explicit biases are thoughts or feelings that we are aware of and are able to identify through introspection.<sup>75</sup> We commonly, though not always, “agree with and endorse our explicit [biases].”<sup>76</sup> Racism allegations, and the corresponding racism defenses, often reflect our familiarity with explicit biases. Racism defenses regularly rely on the type of evidence offered by Zimmerman’s father, while those alleging racism correspondingly search for the smoking-gun quote or document that will reveal racist intent.<sup>77</sup> The national focus on Zimmerman’s possible use of the pejorative term “coon” provides one such example of evidence common to a racism allegation.<sup>78</sup>

Implicit bias research shows that traditional understandings of conscious intent fail to tell the whole story. Implicit biases “pop[] into mind quickly and automatically without conscious volition.”<sup>79</sup> Unlike explicit biases, implicit biases are difficult to identify because of introspective limitations and our own self-monitoring.<sup>80</sup> In fact, we are usually unaware of, or mistaken about, the sources of our implicit biases and the influence they have on our judgment and behavior.<sup>81</sup> Implicit biases may actually include “thought[s] or feeling[s] that we would reject as inaccurate or inappropriate upon self-reflection.”<sup>82</sup> This disassociation between implicit and explicit biases means that we may honestly believe we hold positive

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72. See *infra* Part III.

73. See Kang et al., *supra* note 51, at 888.

74. *Id.* at 887; see also *id.* (“For instance, once we map an individual to the group Asian American, we might associate the traits ‘quiet,’ ‘foreign,’ or ‘mathematical’ to that person.”).

75. See Kang & Lane, *supra* note 6, at 469–70. For example, if an individual is aware of his or her belief that White men can’t jump, that is an explicit bias against White men.

76. *Id.* at 470.

77. For example, those trying to make a credible racism allegation might look for a statement in the legislative history or the corporate meeting notes that reveals a conscious intent to discriminate.

78. See, e.g., David Edwards, *Attorney: Zimmerman Used ‘Term of Endearment’ Before Killing Trayvon Martin*, RAW STORY (Mar. 25, 2012, 3:23 PM), <http://www.rawstory.com/rs/2012/03/25/attorney-zimmerman-used-term-of-endearment-before-killing-trayvon-martin>; *Trayvon Martin Shooting: Zimmermans’s Friend Speaks*, ABCNEWS (Mar. 25, 2012, 8:09 AM), <http://abcnews.go.com/GMA/video/trayvon-martin-shooting-geroge-zimmerman-legal-advisor-joe-oliver-interview-us-15997138>.

79. Kang et al., *supra* note 51, at 887.

80. See *id.* at 888.

81. See *id.* at 887.

82. *Id.*

attitudes about a particular racial group, yet we simultaneously hold negative attitudes toward that same group at an implicit level.<sup>83</sup> This explains why being Hispanic, growing up in a multiracial household, having Black friends, and honestly professing antiracist ideals does not preclude the possibility that an individual might hold implicit negative attitudes about Blacks.

To circumvent challenges posed by our inability to access implicit biases, psychological tests have been designed to measure our unconscious cognitions. These tests have relied on various linguistic cues, physiological responses, microfacial movements, neurological activity, and “reaction times when completing various tasks.”<sup>84</sup> Perhaps the most well-known test is the Implicit Association Test (IAT), which measures reaction times for sorting stimuli into categories.<sup>85</sup> The IAT consistently reveals “implicit attitudes in favor of one social group over another.”<sup>86</sup> For many Americans, implicit biases manifest “in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”<sup>87</sup>

Because many people hold implicit biases, the real question becomes whether these biases influence or predict behavior. Jerry Kang summarizes the prevailing wisdom on this point:

There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality. In other words, even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. Controlled, deliberative, rational processes are not the only forces guiding our behavior. That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.<sup>88</sup>

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83. See Kang, *supra* note 5, at 1512–13 (discussing how “Whites exhibited some *explicit* preference for themselves over Blacks, but that explicit preference paled in comparison to their *implicit* preference” (citing Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002))).

84. Kang & Lane, *supra* note 6, at 471.

85. *Id.* at 472. For more information on the Implicit Association Test (IAT), see PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit> (last visited June 29, 2012).

86. *Id.* at 474 (“[P]articipants systematically preferred socially privileged groups: Young over Old, White over Black, Light Skinned over Dark Skinned, Other Peoples over Arab-Muslim, Abled over Disabled, Thin over Obese, and Straight over Gay.”).

87. Kang, *supra* note 5, at 1494, 1512.

88. *Id.* at 1514 (footnote omitted).

In fact, studies have shown that “[a]utomatic associations influence behavior by both professionals and laypeople in employment, medical, voting, law enforcement, and countless other contexts.”<sup>89</sup> Perhaps most troubling, and especially relevant to Trayvon’s death, evidence suggests that police officers and private citizens unconsciously rely on race when making decisions about whether or not to shoot.<sup>90</sup> Part III proceeds by detailing the potentially deadly combination of implicit bias and guns.

### III. IMPLICIT BIAS & GUNS

More than twenty studies have measured the impact of race on the decision to shoot.<sup>91</sup> These studies typically involve simulations, which are similar in some respects to video games.<sup>92</sup> The simulations display individuals of various races in a wide variety of contexts, carrying either guns or innocuous items like cell phones or wallets.<sup>93</sup> Participants are instructed to shoot anyone who is armed and to refrain from shooting anyone who is unarmed.<sup>94</sup> Psychologists have found that “[p]articipants are faster and more accurate when shooting an armed Black man than an armed White man, and faster and more accurate when responding ‘don’t shoot’ to an unarmed White man than an unarmed Black man.”<sup>95</sup>

The apparent importance of implicit bias to these studies’ findings is striking. Benforado explains that “[s]cores on explicit prejudice scales do not correlate with shooter bias. However, experimental participants who demonstrate implicit

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89. Benforado, *supra* note 5, at 50; *see also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (observing that otherwise identical resumes with typically White names, as opposed to Black names, received 50 percent more callbacks for interviews); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORG. BEHAV. 39 (2009) (responding to critiques of the IAT and summarizing research that reveals the existence of implicit bias among individuals in a range of industries); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 435–36 (2001) (observing a correlation between implicit attitudes and stranger-to-stranger social interactions); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 747–48 (2001) (observing a correlation between implicit attitudes and behavior vis-à-vis women).
90. Benforado, *supra* note 5, at 42. Adam Benforado highlighted the dangers inherent in the combination of implicit bias and guns in 2009. *See id.* Part III draws heavily on his research and work.
91. *See id.* at 43; *see also* Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002).
92. *See* Benforado, *supra* note 5, at 43.
93. *Id.* A sample simulation is available at <http://home.uchicago.edu/~jcorrell/TPOD.html>.
94. Benforado, *supra* note 5, at 43.
95. 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, 1015, 1017, 1019, 1020–22 (2007).

associations between Blacks and weapons are more biased in their shooting behavior.<sup>96</sup> Moreover, Black and White participants reveal equivalent levels of shooter bias, suggesting that implicit stereotypes influence shooting decisions more than conscious racial attitudes.<sup>97</sup> Collectively, the science suggests that “blacks face a threat from firearms that is both far more significant and different in character than that posed to whites.”<sup>98</sup>

#### IV. DEFUSING IMPLICIT BIAS

The growing evidence demonstrating that the combination of guns and implicit bias can lead to deadly mistakes makes state intervention imperative. As the primary regulators of guns,<sup>99</sup> states should focus on strategies that defuse this potentially lethal cocktail.<sup>100</sup> Two promising interventions are discussed below: gun training and revised self-defense laws. Both interventions are intentionally *ex ante* in that they are designed to prevent harm before it occurs.<sup>101</sup> However, neither proposal is a panacea. They are manageable steps intended to minimize the most dramatic harms that can arise from implicit biases and guns.

##### A. Gun Training

Adam Benforado argues that states should address the link between implicit bias and shooter decisionmaking through regulations requiring mandatory gun training focused directly on mitigating the effect of implicit biases.<sup>102</sup> Research indicates that training can help reduce the extent to which implicit bias influences

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96. Benforado, *supra* note 5, at 43–44.

97. *Id.* at 44 (“The notion that, at the unconscious level, racial stereotypes have a stronger impact on firing decisions than general negative sentiments toward African Americans is bolstered by the fact that white and black participants demonstrate equivalent levels of shooter bias.”).

98. *Id.* at 42.

99. *Cf.* Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 206 (2008) (“Precedent confirms the relevance of federalism arguments to national gun control. Two of the most important decisions in the Rehnquist Court’s federalism revolution invalidated Congressional attempts to micromanage gun policy.”).

100. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 413–17 (2007) (discussing various debiasing techniques, including confronting jurors with biases).

101. Alternatively, it would be possible to propose *ex post* interventions designed to place blame and legal liability after the harm occurs. *See* Kang & Lane, *supra* note 6, at 492.

102. Benforado, *supra* note 5, at 57 (“In addition, unlike current firearm training courses—whose emphasis is solely on educating students about gun laws; safe storage; weapon cleaning, loading, and firing; and other issues—new regulations would mandate firearm-simulation training and shooting practice aimed directly at reducing the impact of implicit bias.”).

the decision to shoot.<sup>103</sup> Trainings vary by location, but relevant components include “shoot/don’t-shoot decisions for target silhouettes that appear suddenly, either armed or unarmed” at the firing range, “interactive video simulation[s] of . . . potentially hostile suspect[s],” and “simulated searches, [in which police] confront live actors armed with weapons that fire painful but nonlethal ammunition.”<sup>104</sup> Police officers who have received extensive training make better decisions in shooter simulations than private citizens.<sup>105</sup> Unlike trained police officers, untrained participants consistently “set a lower (i.e., more lenient or ‘trigger-happy’) criterion for Black, rather than White, targets.”<sup>106</sup>

Interestingly, however, even after trainings effectively improved the accuracy of officer decisionmaking, police officers retained an implicit bias against Black men. For instance, it required less time for trained officers to accurately respond “to targets congruent with culturally prevalent stereotypes (i.e., armed Black targets and unarmed White targets) . . . [than] to stereotype-incongruent targets (i.e., unarmed Black targets and armed White targets).”<sup>107</sup> These results suggest that officers continue to harbor implicit biases but that training helps them reduce the actual consequence of their implicit biases.<sup>108</sup> Given the evidence that training can help reduce the danger that arises from the combination of guns and implicit biases, states should require targeted training for gun owners.<sup>109</sup>

Such training should survive any constitutional challenges because “[n]o mainstream scholar of the Second Amendment denies that government must have the authority to adopt legislation . . . requiring education and training.”<sup>110</sup> Moreover, as Benforado has stated, the training requirements could be designed so that the ultimate burdens on the state and individual gun owners would be relatively limited.<sup>111</sup>

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103. See, e.g., Correll et al., *supra* note 95, at 1015, 1017, 1019–22; see also E. Ashby Plant et al., *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141, 153 (2005).

104. Correll et al., *supra* note 95, at 1007.

105. Benforado, *supra* note 5, at 47.

106. *Id.*

107. Correll, *supra* note 95, at 1020.

108. See Benforado, *supra* note 5, at 48 (“Officers, just like the community sample, held implicit racial bias, but their training allowed them to override the automatic associations.”).

109. Valid arguments might be made about whether owners of certain types of firearms, or those already regulated by limited licenses, should be exempted from such a requirement. We leave those questions for another day.

110. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 707 (2007).

111. Benforado argues that “a training requirement is unlikely to force gun owners to significantly alter their routines and caters to existing preferences.” Benforado, *supra* note 5, at 63. Additionally, “the

## B. Self-Defense Laws

Trayvon's case has drawn national attention to Florida's "stand your ground" self-defense law,<sup>112</sup> described above in Part I. Historically, the common law imposed a duty to retreat. As Elizabeth Megale explains,

The duty to retreat protects individuals by requiring an actor to avoid an altercation unless his back is to the wall. This means, if someone attacks a pedestrian on the street, the pedestrian has a duty to run away or otherwise avoid engaging with the attacker, so long as it is reasonably safe to do so.<sup>113</sup>

Stand your ground laws eliminate this duty, and instead allow "an individual to defend against violence without retreating, so long as the individual is lawfully present in that place."<sup>114</sup> Florida is not the only state that has eliminated or reduced the common law duty to retreat.<sup>115</sup> Oklahoma has also adopted a nearly identical "Make My Day" statute,<sup>116</sup> and between 2005 and 2009 over fifteen states adopted some form of the "castle doctrine," which eliminates the duty to retreat before using deadly force under certain circumstances.<sup>117</sup> These types of self-defense laws have troubling implications. Under Florida's law, "anytime one claims to perceive a threat, that individual would be justified in reacting violently; they would have little incentive to diffuse the situation by retreating."<sup>118</sup> Benforado explains that permissive self-defense laws may also alter shooter decisionmaking in a way that increases

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proposed training requirements would not necessitate any major alterations to present institutions or structures, and they are unlikely to be prohibitively expensive to implement." *Id.*

112. *Trayvon Martin Shooting Puts Focus on FL Gun Laws*, S.F. CHRON., Mar. 30, 2012, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/03/29/MNBN1NS224.DTL> ("Florida's gun rules, particularly its 'stand your ground' provision, have come under scrutiny since the Feb. 26 shooting of Trayvon Martin and have made Florida a national laboratory for firearm regulations.").

113. Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity With A Presumption of Fear Allow Criminals to "Get Away with Murder"*, 34 AM. J. TRIAL ADVOC. 105, 112 (2010) (footnote omitted).

114. *Id.*

115. For a history of the common law duty to retreat, the evolution of the "castle doctrine," and the development of "stand your ground" laws, see, for example, *id.* at 111–28.

116. See Benforado, *supra* note 5, at 17 (citing OKLA. STAT. tit. 21, § 1289.25 (2010) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.")).

117. See *id.* ("In general, these 'castle doctrine' laws allow an individual to use reasonable force, including deadly force, against an attacker and eliminate any duty to retreat to safety. These laws have become increasingly popular in the last five years, with over fifteen states adopting some form of the 'castle doctrine' since 2005.").

118. Megale, *supra* note 113, at 115.

the impact of implicit bias.<sup>119</sup> A primary concern is that “[o]verly-broad Stand Your Ground statutes place lives in danger because a person is permitted to harm, or even kill, another before considering whether an actual threat exists.”<sup>120</sup>

Encouraging a culture of permissive self-defense is especially problematic because our implicit biases make it difficult for us to accurately evaluate potentially threatening situations. Studies have shown that identical ambiguous behaviors are more often interpreted as violent when the perpetrator is Black, rather than White.<sup>121</sup> Additionally, researchers have found that those with high levels of implicit bias perceive Black faces as more hostile than identical White faces.<sup>122</sup> Importantly, “explicit prejudice did not predict when Whites saw threatening affect in Black faces.” Thus, while it is impossible to know whether implicit bias played any role in this case, research shows that implicit biases could have caused Zimmerman to perceive Trayvon Martin as hostile, even if “[t]he media portrayal of George as a racist could not be further from the truth.”<sup>123</sup>

As explained in Part III above, the deadly actions that might be taken in response to these perceived threats also appear to be influenced by implicit biases. Permissive self-defense laws encourage automatic decisionmaking by encouraging people to take immediate action if they perceive a person to be threatening or suspicious.<sup>124</sup> The evidence that implicit bias can contribute to deadly outcomes suggests that permissive self-defense laws are too vulnerable to abuse by our own implicit biases and the real world ways we unconsciously act on them. State self-defense laws should be revised to discourage the hasty use of deadly force, so that gut reactions based on unfounded fears and suspicions rooted in implicit biases have time to subside. Reinstating the common law duty to retreat is an important step in the right direction.

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119. Benforado, *supra* note 5, at 56 (“[S]elf-defense laws may be altering the shooting decision itself in a way that makes implicit bias more of a threat.”).

120. Megale, *supra* note 113, at 116.

121. Birt L. Duncan, *Differential Social Perceptions and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1976) (“White university subjects perceived the ‘somewhat ambiguous,’ certainly less than blatant shove as violent (and labeled it thusly) for all conditions in which the black was the harm-doer, to a greater extent when the victim is white, but also when the victim was another black.”), *discussed in* Kohn, *supra* note 56.

122. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) (“Compared with individuals low in implicit prejudice, those high in implicit prejudice saw hostility as lingering longer and appearing more quickly on the faces of African Americans.”).

123. Stutzman, *supra* note 13.

124. Benforado, *supra* note 5, at 56 (“The more permissive legal regime removes a check on pulling the trigger and encourages automaticity. Experiencing any threat? Shoot first and ask questions later.”).

### CONCLUSION

Trayvon Martin's killing has provided an opportunity for collective reflection on issues of race and violence. However, the bulk of the conversation has focused on explicit racism, ignoring evidence that common implicit biases can also influence real-world behavior. We hope the tragedy will refocus attention on the importance of defusing the deadly combination of implicit bias and guns. Studies show that implicit biases influence shooter decisions, putting Blacks at greater risk than Whites. States must help defuse implicit bias before it becomes deadly. First, states should consider new gun training programs designed to reduce the power of implicit biases. Second, states should incorporate the latest evidence on implicit bias into their self-defense laws. These interventions may be a small step toward preventing similar tragedies.