

The Perspective of the Reasonable Officer on the Scene: My Trip to the Shooting Simulator

Tung Yin*

Controversy over police officer shootings of unarmed civilians is not a new phenomenon, but the advent of social media and readily available video recordings via smartphones has focused public attention on a string of such killings since 2014. Further fueling public concern, if not outrage, is the fact that in nearly all of the high-profile incidents, the officers were white while the victims were African-American men.¹ One indicator of the degree of concern and outrage over these incidents is the rise and popularity of movements such as Black Lives Matter.

Typically, the police officer is absolved of wrongdoing on the grounds that the shooting was justifiable,² even when it turns out that the officer was mistaken about believing that the suspect/victim was armed. Stating the blackletter law on the constitutional use of deadly force is easy: “[S]uch force may not be used unless it is necessary to prevent the escape [of an unarmed felon] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”³ When evaluating civil rights claims for excessive force, “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁴ Moreover, the trier of fact must consider “the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁵

* Professor of Law, Lewis & Clark Law School. Thanks to the Clackamas County Sheriff's Office for the opportunity to use the shooting simulator and to Deputy Sheriff Don Weatherford for leading me through the exercise, and to my Lewis & Clark colleagues, especially John Parry and Susan Mandiberg, for helpful feedback.

¹ For examples of such shootings see *A Look At High-Profile Police Shootings Of Black People*, CBS MINNESOTA (May 18, 2017), <http://minnesota.cbslocal.com/2017/05/18/high-profile-police-shootings/>.

² Rare exceptions include Michael Slager, who pleaded guilty to federal civil rights violations for shooting Walter Scott in the back and then falsely claiming that he was reacting to Scott's grabbing of his Taser; see, e.g., Andrew Knapp, *Unsealed transcript: Prosecutor said Walter Scott shooting a "close call" between murder, manslaughter*, POST & COURIER (S.C.), Aug. 9, 2017, at A1; and Peter Liang, who was sentenced to five years of probation for criminal negligence that resulted in the accidental shooting of Akai Gurley. See Alan Feuer, *Ex-Officer Avoids Prison for a Brooklyn Killing*, N.Y. TIMES, Apr. 20, 2016, at A1.

³ *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁵ *Id.* at 396–97.

This forgiving standard stems in part from judicial recognition of the need to ensure the safety of police officers. *Officer safety* is something of a magic talisman in criminal procedure. It is the justification for dispensing with the Fourth Amendment's warrant requirement when searching the surrounding area and body of an arrestee,⁶ or pursuing certain fleeing suspects into homes,⁷ or conducting protective sweeps of buildings.⁸ In all those circumstances, the Fourth Amendment yields to the officer's need to eliminate the possibility that the arrestee might have access to a weapon. And yet, officer safety has been taken to extremes. It was once the justification for allowing police officers to search the passenger compartment of a vehicle whose driver had been arrested—even though the driver may have been secured in the backseat of the police car (or even headed on the way to the police station).⁹

Of course, law enforcement is a dangerous profession. In 2016, 135 police officers were killed in the line of duty, nearly half by gunfire.¹⁰ That may be a tiny fraction of the enormous number of police officer-civilian interactions that take place every year, but given the literal life-and-death consequences, one wonders how much the remote but deadly possibility of being one of those statistics weighs on a law enforcement officer's mind on an everyday basis. Unfortunately, doctrine and theory simply do not come close to providing a sense of what a police officer actually experiences. Police ride-alongs provide a decent sense of a police officer's typical shift, but my experience with them has (fortunately, I suppose) not come close to being in any potentially dangerous situation.

However, through a local school fundraiser, I was able to take part in "A Day at the Sheriff's Office," which included the option of experiencing the shooting simulator—the high-tech equipment that the Clackamas County Sheriff's Office uses to train its deputies. I figured this would be as close as I hoped to get to experience a "shoot/don't shoot" situation.

[The Set Up]

The shooting simulator used was the MILO Range Pro,¹¹ manufactured by IES Interactive Training, Inc. An overhead projector cast a video from the computer program on the far wall of the room in the Clackamas County Public

⁶ *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

⁷ *See Warden v. Hayden*, 387 U.S. 294, 298–99 (1967).

⁸ *See Maryland v. Buie*, 494 U.S. 325, 334–36 (1990).

⁹ *See New York v. Belton*, 453 U.S. 454, 460 (1981). *Arizona v. Gant*, 556 U.S. 332, 339 (2009), significantly narrowed the scope of the search incident to arrest of a driver.

¹⁰ *See Preliminary 2016 Law Enforcement Officer Fatalities Report*, NAT'L LAW ENFORCEMENT OFFICERS MEMORIAL FUND (2016), <http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf>.

¹¹ For more information on the technical specifications see <https://www.faac.com/milo-range/simulators/milo-range-pro/>.

Safety Training Center and Indoor Shooting Range. The “gun” was an actual Glock-17 but re-engineered so that the firing breech was blocked,¹² and the gun barrel contained a small laser that would turn on briefly with each tap from the hammer. According to my instructor, it was the same weight as an operable Glock-17, but there would not be a kick with each “shot.” A separate detector next to the overhead projector would capture the location of the laser “hits” to trigger gunshot sounds and to mark the location for later review and analysis during debriefing sessions.

After going over basic firearm safety instructions and guidance on holding the gun properly, my instructor started me off with target shooting of stationary pumpkins, then moving pumpkins, and finally mixed green and red dishes—the green ones were the targets, and the red ones were not to be shot. With that bit of basic training under my belt, we proceeded to the scenarios. Each of these was a live-action video with decision point branching controlled by the instructor at the computer. Thus, in any given interaction, the person (or people) in the video could cooperate, comply, or attack, and the video would segue appropriately. If I fired the gun, the system would assess whether I scored a hit and could alter the video in response.

I. THE SCENARIOS

A. Apartment Interview

The first scenario took place in the dining nook of an apartment or small house. I was sitting across a table from a young teen female and interviewing her about her grandmother, who was suspected of committing fraud. The teen seemed mostly calm with a tinge of understandable anxiety.¹³ All of a sudden, the front door (in the distance behind her) banged open and a large man came in. He was wearing a white T-shirt underneath an unbuttoned and untucked collared shirt, and jeans.

“What the hell is going on?” he demanded.

The teenager cringed in her seat.

The man started yelling at me, “Get the hell out!” and “You have no right to be here!”

I stood up and moved away from the table. Because there was no holster for this simulation, I was holding the gun in my right hand, but I kept it pointed down

¹² This was a safety measure so that even if a live round somehow made its way into the barrel, it could not be fired.

¹³ I have to admit that I found myself wondering if this teenager was going to turn violent unexpectedly. That, of course, was meta-level thinking and a consequence of knowing that this was a use of force simulation, which might call into question the ultimate effectiveness of the simulation. The effect is roughly analogous to being a character in a work of fiction who realizes that he is a character in a work of fiction; that knowledge would affect the characters’ actions. See, e.g., JOHN SCALZI, *REDSHIRTS* (Patrick Nielson Hayden ed., 2012).

at the ground. I held my left hand out and said, “Sir, please step back.”¹⁴ Instead of stepping back, he tugged his shirt free of his pants. I saw something in his back pocket but couldn’t identify it.

As he reached back for it, I said, “Sir, please keep your hand in front.” He did not comply, and brought out a large knife.

“I ain’t fooling around,” he said, “I’ll make you leave.”

At this point, he was about six feet away. I brought the gun up, holding it in both hands, and asked him again to step back. I started to think about the alleged “21 foot rule,”¹⁵ which I know has been criticized¹⁶—but then again, he was *much* closer than 21 feet. He took a step forward and raised the knife, at which point I fired. He was thrown back several feet,¹⁷ but during the debriefing afterward, the instructor observed that even a gunshot through the heart might not incapacitate someone immediately, as there could be as many as 30 seconds of remaining oxygen to fuel the brain. His conclusion was that the suspect probably would have wounded me with the knife.

B. Active Shooter at School

The next scenario started with the report of an active shooter at a local school. I went into the school behind two other armed officers.¹⁸ Truth be told, I was glad to be behind them. I held the gun in both hands at about a 45 degree angle so that I would be less likely to shoot someone by accident.

We were in a short hallway that intersected a longer one. One glance down each direction of the longer hallway suggested that the carnage was to the left. We immediately encountered victims on the ground lying in pools of blood, seemingly dead. One open doorway revealed another victim and two survivors huddled together. One of them pointed down the hall and said, “He went that way!”

The two other officers and I progressed down the hall, and then, without warning, one of the two officers fell down, clutching his neck. Blood was spurting

¹⁴ The instructor had explained that “you get out of this what you put in,” and encouraged talking to the people in the videos as if it were real.

¹⁵ First propounded by a Salt Lake City police officer, this “rule” suggested that a suspect armed with a knife could cover 21 feet in about 1.5 seconds, which is about the time that it takes a trained person to draw, aim, and fire a gun. See Dennis Tueller, *How Close is Too Close?*, SWAT MAG. (June 1983), http://www.theppsc.org/Staff_Views/Tueller/How.Close.htm.

¹⁶ See, e.g., Ron Martinelli, *Revisiting the “21-Foot Rule,”* POLICE: THE LAW ENFORCEMENT MAG. (Sept. 18, 2014), <http://www.policemag.com/channel/weapons/articles/2014/09/revisiting-the-21-foot-rule.aspx> (suggesting that there are too many variables to treat 21 feet as anything more than a guideline).

¹⁷ Episode 38 of the television show *Mythbusters* demonstrated that gunfire does not knock someone back. *Mythbusters: Mythbusters Revisited* (Discovery Communications Oct. 12, 2005). (See http://kwc.org/mythbusters/2005/10/episode_38_mythbusters_reviste.html.)

¹⁸ These officers were in the video, not live participants with me.

between his fingers. “Keep going!” he yelled. It took me a moment to figure out what had happened. It wasn’t until after the scenario was over that I realized I could have been the one to get shot.

Anyway, the remaining officer and I approached the next hallway intersection and cross-covered them, meaning I was hugging the left side of the wall and peering toward the kitty-corner, and he did the same from the right side of the wall. The kitty-corner from me was clear, meaning the suspect was in the other side of the cross-hallway. When I turned the corner, I saw the suspect with a gun pointed toward a kneeling teenaged male. Shooting the suspect would be legally justified, but I had no confidence that I could avoid hitting the hostage.¹⁹

The suspect shot the hostage in the back of the head! He actually murdered the hostage right in front of me!

I was so stunned by what I’d seen that I froze for a moment, during which time the suspect turned his gun toward us. We all fired, although the suspect got his shot off first. I thought my return shot hit him in the head or neck, but according to MILO, I hit the gun(!).²⁰ The instructor thought it was likely a debilitating shot, because the round might have continued on toward the suspect’s face. All of this presupposed that the shooter didn’t hit me, or not badly enough to prevent me from returning fire.

C. Domestic Violence

My third scenario had me inside the ground level of a split-level home. A little girl came running toward me, screaming, “Daddy’s hurting Mommy!” I went up the half level of stairs and turned right into the living room. The husband was against the back door, holding his wife in front with a gun on her. They were about ten feet away. I held my gun in both hands but at an angle because I wanted to keep my eyes on the husband, not the front gunsight. As with the previous scenario, I did not see myself being able to shoot around a hostage so I did not shoot.

The wife broke free and twisted away to the right of her husband. I had a clear shot, but was unprepared for how quickly the suspect turned his gun on me and began firing. I fired back, and the scenario ended with seven total shots exchanged, four by him and three by me. The sequence of events, though, was that he fired three times before I fired once. MILO marked my first shot as a low miss to his right, my second shot as a direct hit on his right knee, and my third shot as a wild miss to his left into the door. In my haste to defend myself with return fire, I had forgotten to line up the rear and front sights on the gun, which was why my shots were low and wild.

¹⁹ Reflecting upon this exercise in the comfort of my home, I wonder what would have happened if I had approached the suspect slowly until I could take a clear head shot.

²⁰ Likely the result of not aiming properly by focusing on the far gunsight, but instead on the immediate threat—the suspect’s gun.

The instructor judged my lone hit on the knee as a debilitating injury that would have knocked the suspect down and prevented him from following me. Assuming that I survived the gunfight, I could have escaped the way I came without being followed.

D. Car Stop

My last scenario involved pulling over a motorist who had been driving over 90 miles per hour on the highway and who did not stop immediately when pulled over. The video began with the suspect's having finally stopped in a residential neighborhood. The male driver stepped out of the pickup truck and ranted about being pulled over. He claimed to be a military veteran and began yelling at me. "Are you going to shoot me?" he asked. I responded that I did not want to shoot him and asked him to calm down. He began to jump up and down and wave his arms around wildly. "Shoot me, go ahead and shoot me!"

I repeated that I was not going to shoot him. He muttered "I'm going to kill you," which I found disturbing, to say the least. Then he leaned through his opened door and said, "Oh, you're going to like this." He began backing out slowly, holding a long item that quickly became apparent was a firearm. I said, "Sir, please put the weapon down and step away from your car."

He did not comply. I felt a mix of annoyance and trepidation over my inability to control the situation. "Now you're in trouble," he said with a strange grin. He started to swing the shotgun toward me.

"Sir, stop, drop the weapon right now!" I yelled.

He fired at me. The sound of the shot broke me out of my state of inaction, and I fired back. On the screen, he collapsed. When we reviewed the encounter, I saw that MILO marked my shot as a hit right below his neck. The instructor remarked that I definitely put him down, but that not before taking a load of buckshot that I had to hope would be stopped by body armor.

II. OBSERVATIONS

A. Non-Representativeness

It would be a mistake to treat the four scenarios—and my performance within them—as representative in any way of the typical law enforcement encounter. All four of my encounters turned violent, and all four suspects were in fact armed with weapons. My experience at the shooting simulator certainly painted a scary view of what police officers face. Yet, obviously, the frequency with which law enforcement encounters turn violent in real life is nowhere near 100 percent. One

recent survey of law enforcement officers found that only 27 percent reported ever having “discharged their service firearm while on duty.”²¹

It is important to keep in mind that the shooting simulator is not meant to replicate the typical law enforcement encounter. It is a tool design to train police officers about the circumstances in which they can (or cannot) and should (or should not) fire their guns at other people. That all of my encounters turned violent might have been because the instructor thought I would want a taste of action, or it might have been because the instructor believed that my handling of the encounters triggered uncooperative reactions. But in a sense, none of these encounters was “typical,” in that they all contained the potential for violent outcomes. If anything, these seemed to present worst case scenarios.

My instructor explained to me that teaching police officers when they *cannot* shoot suspects proved too complicated and time-consuming to implement in the heat of the moment, because there were too many decision trees to resolve. On the other hand, because there are so few situations in which the police are justified in shooting suspects,²² it would be simpler to train officers to ask, “Does the suspect pose a significant and imminent risk of serious injury or death to the officer or others?” If the answer is no, then the officer is not justified in shooting. Accordingly, the shooting simulator should ideally test an officer’s ability to judge accurately whether the conditions for a lawful shooting exist.

B. Justifiable versus Prudent

The fact that an officer would be legally justified in shooting a suspect does not mean that doing so would be the prudent decision. In the car stop scenario I faced, there were at least a couple of points during the session itself where I believed that I would have been justified in firing: (1) when he brought the shotgun out of his car and refused to drop it; and (2) when he told me I was “in trouble” with the shotgun in hand. One should keep in mind that he had already stated “I’m going to kill you.” True, he was unarmed at the time he said that and he might not have meant it as a definite statement of intent, but that earlier expression combined with the subsequent acquisition of a weapon made it seem reasonable to believe that he posed an imminent and significant threat of death or serious injury to me.

Why then did I refrain from shooting? One reason was that I thought the driver’s erratic behavior (jumping and waving his arms) and demeanor (the odd looks) might be indicative of some kind of mental illness. Admittedly, I am not trained to make mental health diagnoses, so my mindset was not so much a belief

²¹ See Rich Morin et al., *Behind the Badge*, PEW RESEARCH CENTER (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>.

²² See *supra* notes 3–8; see also Joseph D. McNamara, *Never an Excuse for Shooting Unarmed Suspects, Former Police Chief Says*, REUTERS: THE GREAT DEBATE (Aug. 19, 2014), <http://blogs.reuters.com/great-debate/2014/08/19/as-police-chief-i-knew-we-had-no-justification-for-killing-an-unarmed-suspect/>. (former San Jose police chief arguing, “What justification do the police have for killing an unarmed suspect? The answer is always: None.”).

that he was in fact mentally ill as it was an acknowledgment of the possibility that there were reasons other than intent to kill to explain his conduct.²³

With the benefit of hindsight, I would have been better off shooting the driver as soon as he brought the shotgun out of the car and refused to comply with the order to drop the weapon. But of course, the encounter was not predestined to end the way that it did. Although I have taught Criminal Procedure at Lewis & Clark Law School since 2009, I have not attended a police academy, and no law enforcement agency would send me out right now with a badge and a gun.²⁴ It is difficult to assess how much, if at all, my responses and reactions would have changed had I received training in firearm use, situational awareness, combat tactics, and de-escalation techniques,²⁵ but it is at least plausible that they might have. Better situation awareness and combat tactics might have enabled me to avoid being put into a situation where the use of lethal force became a justifiable option (or necessity). Better de-escalation techniques might have validated my initial restraint by enabling me to talk the driver into complying with my orders.

C. Training to Shoot?

On the other hand, it is also possible that I might have been less hesitant to shoot in any of the scenarios had I been trained as a law enforcement officer. I have fired at and killed dozens of digital enemies in a couple of first person shooter video games, *Deus Ex* and *System Shock 2*,²⁶ but as immersive as those games were, there was a clear abstraction to the violence; and in *System Shock 2*, the enemies were not even human, making it even easier to avoid the moral squeamishness of killing another person. In the shooting simulator, even as I realized that it was merely a “simulation,” in the moment, I felt the weight of having to decide whether to fire—and likely take the life of the person I was facing.

It turns out that the fourth scenario I faced—the car stop with the erratic driver—was based on an actual incident in Georgia in 1998, when Deputy Kyle Dinkheller pulled over a military veteran named Andrew Howard Brannan, who pranced around and said, “Shoot me!”²⁷ As in my scenario, Brannan brought out a

²³ That I did not shoot him as soon as he began swinging the shotgun in my direction was not due to any prudential consideration on my part, but rather my falling prey to the “freeze” reaction in “fight/flee/freeze.”

²⁴ Actually, I did not have a badge for the exercise. Cf. *The X-Files* (20th Century Fox 1997) (FBI Agent Mulder self-deprecatingly observing that he “chases after little green men with a badge and a gun”).

²⁵ See, e.g., Timothy Williams, *Police Begin Stressing De-escalation Tactics, Despite Skepticism in the Ranks*, N.Y. TIMES, June 28, 2015, at A16.

²⁶ *Deus Ex* (Eidos Interaction, rel. 17, June 2000); *System Shock 2* (Electronic Arts, rel. 11, Aug. 1999).

²⁷ See Christine Mai-Duc, *Georgia Executes Man for 1998 Slaying of Sheriff's Deputy*, L.A. TIMES (Jan. 13, 2015), <http://www.latimes.com/nation/nationnow/la-na-georgia-execution-andrew->

firearm from his car and fired, hitting Deputy Dinkheller at least nine times, including the killing shot in the head after Dinkheller had collapsed from his wounds. Although Brannan was able to flee the scene, he too had been wounded in the gunfight, and he was captured the next day. A jury rejected Brannan's insanity defense (based on a claim of post-traumatic stress disorder resulting from his military service in Vietnam) and convicted him of premeditated murder, for which he was sentenced to death.²⁸ The dashboard camera in Deputy Dinkheller's vehicle recorded the tragic encounter, and the video has since been used extensively for training purposes.²⁹ The lesson that many law enforcement officers have drawn from the Dinkheller murder video is that the doomed deputy should have fired much sooner than he did.³⁰

One police officer who watched the Dinkheller video was Jeronimo Yanez, who in 2016 stopped a car driven by Philando Castile in St. Anthony, Minnesota.³¹ Castile informed Yanez that he (Castile) was carrying a firearm, for which he had a legal permit. Although Castile's next actions were disputed, with Yanez claiming that Castile refused to obey an order to keep his hand away from the gun, it is undisputed that Yanez drew his gun and fired seven shots, hitting Castile five times and killing him. When prosecuted for manslaughter, Yanez claimed self-defense, testifying that he was in fear for his life.³²

Perhaps not surprisingly, a past study of police department practices found that "[a]gencies with simulator, stress, and physical exertion firearms training experience a higher [justifiable homicide rate] than agencies without such training."³³ Considering that this study was conducted in 1982 when the technology for simulating shooting scenarios was far inferior to modern simulators such as the MILO Range Pro, one would think that the impact of simulators is greater today given their increased realism. In a related vein, there has been a considerable amount of research into whether there is a connection between video game play and real-life violence. One 2014 metastudy of 98 prior studies

brannan-20150113-story.html; Thomas Lake, *The Endless Death of Kyle Dinkheller, The Trigger and the Choice*, Part I, CNN: Politics, (Aug. 2017), <http://www.cnn.com/interactive/2017/politics/state/kyle-dinkheller-police-video/>.

²⁸ Brannan v. State, 561 S.E.2d 414, 420 (Ga. 2002).

²⁹ See Lake, *supra* note 27.

³⁰ *Id.*

³¹ *Id.* The jury acquitted Yanez, but the St. Anthony police department still fired him, suggesting that either it doubted the reasonableness of his belief that the shooting was necessary to save himself, or it concluded that the community would not accept Yanez's continued presence as a police officer. Emily Shapiro & Julia Jacobo, *Minnesota Officer Fired From Police Force After Acquittal in Philando Castile Shooting*, ABC News (June 16, 2017), <https://abcnews.go.com/US/minnesota-officer-found-guilty-fatal-shooting-philando-castile/story?id=48003144>.

³² See Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES, June 17, 2017, at A1.

³³ See KENNETH J. MUTALIA, A BALANCE OF FORCES 25 (1982).

concluded that video games can impact social outcomes in either aggressive or prosocial ways, depending on the nature of the games.³⁴

Indeed, maybe the most important thing I gained from experiencing the shooting simulator was an understanding of how fast a situation could turn actively violent. In the active shooter and domestic violence scenarios, I was aware of the dangerousness of the situations, but was still surprised at how quickly the suspects attacked me.³⁵ Notably, all of the suspects in the scenarios I faced were actually armed with dangerous weapons (one long knife, two handguns, and one shotgun), which necessarily made the “shoot/don’t shoot” decision easier than if it had been unclear whether a suspect was armed.³⁶ Even without needing the additional time to process the uncertainty of whether I was facing an armed suspect, and even though I already had the firearm in my hand (not needing to draw it from a holster), I was unable to react fast enough to actual threats.

Note that the 1982 study found an increase specifically in the *justifiable* homicide rate, not just the overall homicide rate. That is to say, the use of simulation training increases the likelihood that a police officer will shoot when reasonably perceiving a suspect as posing a threat of serious injury or death to the officer or others. However, reasonably *perceiving* a suspect as posing such a threat level does not mean that the suspect *actually* poses that threat level. Police officers have been cleared of criminal charges after shooting unarmed suspects believed to have been armed, but who in fact were carrying cell phones or other innocuous objects.³⁷

The latter incidents—where police officers reasonably but incorrectly believe there is a serious threat to themselves or others and act on that belief—would correspond to type I errors in statistical hypothesis testing (or false positives).³⁸

³⁴ See Tobias Greitemeyer & Dirk O. Mügge, *Video Games Do Affect Social Outcomes: A Meta-Analytic Review of the Effects of Violent and Prosocial Video Game Play*, 40 PERSONALITY AND SOC. PSYCHOL. BULL. 578, 583 (2014).

³⁵ For a video clip of a CNN reporter undergoing a live action simulation with a similar lesson, see *Inside the Mind of a Cop: Shoot or Don’t Shoot?*, CNN (Nov. 27, 2015), <http://www.cnn.com/videos/tv/2015/11/27/use-of-force-police-drill-pt-1-costello-dnt-newsroom.cnn/video/playlists/police-use-of-force/>.

³⁶ The instructor did show me a different active shooter scenario in which the participant comes across a man with his back to the hallway, fiddling with something in his hand, while students run away in panic. The scenario can be triggered so that when the man turns around to face the participant, he is either reloading a gun or dialing 911 on a cell phone. According to the instructor, this man gets shot a lot in the simulation.

³⁷ See, e.g., Bootie Cosgrove-Mather, *Cops: Phone Looked Like a Gun*, CBS NEWS (June 11, 2003 5:16 PM), <https://www.cbsnews.com/news/cops-phone-looked-like-a-gun/> (reporting district attorney’s decision not to charge police officers who killed unarmed man who was holding a phone); Erin Alberty & Marissa Lang, *DA Says Dillon Taylor Officer-Involved Killing was Justified*, THE SALT LAKE TRIB. (Oct. 1, 2014 1:27 PM), <http://archive.sltrib.com/article.php?id=58472404&itype=CMSID> (reporting district attorney’s decision not to charge police officer who killed unarmed man).

³⁸ KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* 75 (1997).

Such a shooting is justifiable because, under the circumstances, it was not unreasonable for the police officer to use lethal force, but had the officer refrained from firing, he or she would have ascertained that the suspect in fact posed no serious threat to the officer or others. All else being equal, it would be preferable to reduce this kind of type I error, and certainly to avoid increasing the number of such errors.

But all things are not equal, and the officer faces a risk in refraining from shooting when it would be justifiable to do so—specifically, the risk that the suspect will take violent action against the officer. In such a situation, with the benefit of hindsight, we would see that the officer probably should not have waited to shoot. These erroneous perceptions would correspond to type II errors in statistical hypothesis testing (or false negatives).³⁹

Because reducing the risk of one type of error generally will increase the risk of the other type of error,⁴⁰ we can expect to improve the outcomes in the justifiable shooting situations by making the police less likely to shoot, and hence less likely to shoot persons who posed no actual threat; or by making the police more likely to shoot, and hence less likely to be surprised by persons who indeed pose real and serious threats. If use of the shooting simulator (and similar experiences) increases the rate of justifiable homicides, then it follows that the simulator reduces the frequency of type II errors, but in doing so, increases the frequency of type I errors. To be sure, this is a positive description, not a normative claim. It does raise the question of how much risk of personal harm or death we can reasonably ask police officers to incur as the price for reducing the chances of shooting someone who appears dangerous but in fact is not.

D. Path Dependency

Going into this experience, I had expected that the entire focus would be on the simulated encounters and my reactions and responses—in particular, whether I had made the correct decision to shoot (or not to shoot). And much of the instructor's debriefing of me did involve discussion of whether and when I was justified in shooting the suspect.

However, some of the scenarios also presented opportunities to discuss ways that I could have avoided getting into the situation where I felt I had to shoot the suspect. The shooting simulator offered some limited avenues for doing so; successfully defusing the confrontation in the judgment of the instructor, for example, could lead to a non-violent resolution. But because the simulator could not evaluate my body position, it could not tell if I were stepping back or running away.

³⁹ *Id.*

⁴⁰ See, e.g., PAUL G. HOEL ET AL., INTRODUCTION TO STATISTICAL THEORY 55 (1971); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 15 & n.61 (1993).

During my debriefing after the first scenario, the instructor pointed out that when the man burst into the apartment and demanded that I leave, it might have prudent to do so if I could have left safely. Going around the man to exit through the door behind him was not necessarily safe, but perhaps there was an exit behind me. Considering that my purpose in being in the apartment was not one where time was of the essence, I could have resumed the interview of the young female at some other time. Leaving might have defused the situation and avoided putting myself in a position where I felt like I had to shoot the man to protect myself. In other words, *path dependency* plays a potentially significant role in leading some officers to finding themselves in situations where firing on a civilian becomes justifiable. By the time the officer has to decide whether shooting would be justifiable, the result may already be foreordained.

The aptly named television drama *Justified*,⁴¹ for example, followed Raylan Givens, a Deputy U.S. Marshal with a penchant for manipulating suspects into presenting a serious enough threat that he would be justified in shooting them. In opening scene of the pilot episode, Givens approached an antagonist in the man's highrise apartment balcony, having given the man 24 hours to leave Miami and never return. Givens expected that the man would not only not comply, but also attempt to shoot him; so prepared, Givens waited until the man made a move for a hidden gun, at which point Givens killed him. Bookending this scene was the series finale, in which Givens confronted his series-long antagonist, trying to goad that man into picking up a discarded gun so that Givens would be justified in gunning him down.⁴² At least in the TV show, Raylan Givens' kills were all justifiable, but even his superiors were troubled by his methods. And while Givens was an extremely entertaining character to follow on TV, one would hope that his frontier justice mentality coupled with his manufacturing of "shoot/don't shoot" confrontations is confined to fiction. But simply ensuring that real life law enforcement officers do not act like Givens is not enough; it is also critical to train police officers to reduce the likelihood of facing a "shoot/don't shoot" confrontation.

As it turns out, much of the value of the experience for me lay in the probative debriefing after the simulation. The extension of the debriefing after some scenarios into ways I could have avoided getting into the position of having to shoot (justifiably) made me think much more afterward about the use of lethal force compared to the actual "shoot/don't shoot" decisions. To the extent that the shooting simulator may prime participants to be quicker in real-life use of lethal force, that impact might be countered by effective debriefing sessions, or

⁴¹ *Justified: Fire in the Hole* (FX Productions Mar. 16, 2010).

⁴² Spoiler: the series antagonist, Boyd Crowder, was too smart to fall for Givens' manipulation and refused to pick up the gun. *Justified: The Promise* (FX Productions April 14, 2015). For another example of this sort of manipulative behavior, see ELMORE LEONARD, *CITY PRIMEVAL: HIGH NOON IN DETROIT* (1980).

simulators capable of near 360-degree interaction so that retreat and avoidance can be factored into the scenario responses.⁴³

III. CONCLUSION

It may be an exaggeration, but not too much of one, to suggest that anyone involved professionally in matters of law enforcement use of lethal force—civil rights and government lawyers, trial and appellate judges, law professors teaching criminal procedure or civil rights litigation, civilian review boards, and community organizers and activists—would find value in experiencing the shooting simulator. This is true even if the scenarios encountered, like all four of mine, present suspects who are actually armed, as opposed to the more challenging situation where the “shoot/don’t shoot” decision has to be made at a time when it is unclear whether the suspect is armed. The experience becomes even more valuable if it includes debriefing about de-escalation and other steps that might have been taken to avoid any confrontations that result in simulated shooting.

⁴³ One example is the VirTra (VTSD) V-300 Use of Force & De-Escalation Simulator, which provides a step-in 300 degree environment. See VirTra <https://www.virtra.com/>.