

# **It Should Never Be Justified: A Critical Examination of the Binary Paradigm Used to Categorize Police Shootings**

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## INTRODUCTION

Whether the investigators are from a police internal-affairs division, a local district attorney's office, a state attorney general's office, or a federal investigation team, the reported result in a police shooting seems to be largely the same—justified or not justified.<sup>1</sup> Approximately 1,000 people die yearly as a result of police shootings in the United States,<sup>2</sup> and thousands more non-fatal police shootings take place every year<sup>3</sup> in an infinite permutation of scenarios. People from all walks of life fall victim to these shootings, but people of color—men, women and transwomen—are the most vulnerable.<sup>4</sup> Some people pose an imminent threat to the lives of officers or other people,<sup>5</sup> while others pose no threat to anyone.<sup>6</sup> No matter what, the circumstances of police shootings are fluctuating and multifaceted, and the victims of police violence are people no different than the readers of this Article; they are leading and trying to navigate complex lives in communities nationwide. The thread connecting them is that their lives have been irreversibly altered by police bullets. Moreover, not only are the shooting scenarios complex, so are the police officers involved—during these emotionally charged situations, the officers simultaneously undertake the role of disinterested actor carrying out the will of the State, and the role of a vulnerable, afraid, and possibly vengeful person trapped in the heat of the

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1. See, e.g., Ethan DeWitt, Attorney General finds Belmont police shooting “legally justified”, *Concord Monitor* (Aug. 6, 2019), <https://www.concordmonitor.com/Belmont-officer-involved-shooting-New-Hampshire-27530268> [<https://perma.cc/QS4Z-DPX2>]; Carina Julig, April police shooting of 17-year-old was justified, DA announces, *Denver Post* (Aug. 12, 2019), <https://www.denverpost.com/2019/08/12/denver-police-shooting-justified-anthony-vasquez/> [<https://perma.cc/B9LU-XDMQ>]; Tim Willert, Edmond: Police justified in shooting of unarmed teenager, *Oklahoman* (Aug. 8, 2019), <https://oklahoman.com/article/5638108/edmond-police-justified-in-shooting-of-unarmed-teenager> [<https://perma.cc/3WF2-29HR>].

2. *Fatal Force*, WASH. POST, 2019, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> [<https://perma.cc/J7EC-MBVR>].

3. *Shot by Cops and Forgotten*, VICE NEWS (Dec. 11, 2017), [https://news.vice.com/en\\_us/article/xwvv3a/shot-by-cops](https://news.vice.com/en_us/article/xwvv3a/shot-by-cops) [<https://perma.cc/3XMF-S7HQ>] (examining the fifty largest police departments in America and finding that police in those departments shot at least 3,649 people between 2010 and 2016).

4. See generally ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017) (discussing police violence against communities of color); Amina Kahn, *Getting killed by police is a leading cause of death for young black men in America*, L.A. TIMES (Aug. 15, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men> [<https://perma.cc/43LU-E86G>]; Laura Santhanam, *After Ferguson, black men still face the highest risk of being killed by police*, PBS NEWS HOUR (Aug. 9, 2019), <https://www.pbs.org/newshour/health/after-ferguson-black-men-and-boys-still-face-the-highest-risk-of-being-killed-by-police> [<https://perma.cc/M5MB-AEUK>].

5. See Jacey Fortin, *No Civilians Were Hit by Police Gunfire at Pulse Nightclub Shooting, Authorities Say*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/pulse-nightclub-orlando-officer-gunfire.html> [<https://perma.cc/SM6B-3KNV>].

6. See Allyson Chiu, *'Mom they shot me': Unarmed 12-year-old maimed in bed during SWAT raid*, WASH. POST (Aug. 9, 2019), <https://www.washingtonpost.com/nation/2019/08/09/amir-worship-chicago-swat-raid-knee-lawsuit/> [<https://perma.cc/J2NN-QG5Q>].

moment.<sup>7</sup> These variables are public knowledge, and yet our system has only “justified” or “not justified” to describe all of that complexity. It is not merely inadequate to describe the most visible intersection of state power, citizens, and violence with so few words; it is also wrong.

The binary paradigm that we use to evaluate police shootings—“justified” versus “not justified”—is wrong for several reasons. First, it dehumanizes the victims of police violence. Dehumanization is inextricably linked to racial disparities among those victimized by police violence.<sup>8</sup> Victims are further dehumanized when their suffering is minimized or glossed over. At its core, dehumanization is about creating in-groups and out-groups in order to justify what would normally be unacceptable behavior. The binary paradigm’s lack of nuance plays a crucial role in making shooting victims part of an out-group. “Justified” tells the public and the community that the “good guys” did what needed to be done and that the victim’s death or maiming was necessary to preserve order. It conveys the message that there is nothing for “regular folks” to be concerned with, because it happened to those bad “others.” “Justified” implies righteousness, and thus whoever received justified punishment cannot be righteous; they are not one of “us,” and we must be protected from them. Our need for protection from the out-group means that when the White officer who shoots an African-American person had a history of using racial slurs,<sup>9</sup> or a history of marginalization and unprofessional behavior,<sup>10</sup> those wrongs do not matter. “Justified” wipes those sins clean and places the blame on the victim; if the victim had not been “one of the bad ones,” an out-group member, then they would still be alive and whole. “Justified” means that because they were not one of us, they must have deserved it. That dehumanization, and the accompanying unfairness felt by communities of color, who bear the brunt of police violence, erodes trust between the police and the communities that they serve. Moreover, the binary paradigm fails to capture the complex scenarios that police often find

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7. See Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1121 (2008).

8. See, e.g., Themal I. Ellawala, *Pulling the Trigger: Dehumanization of African Americans and Police Violence*, 2 SCHOLARLY UNDERGRADUATE RES. J. AT CLARK 1, 2–4 (2016) (discussing police violence and the dehumanization of African-Americans).

9. See Wesley Lowery, *Darren Wilson told attorneys he and other Ferguson officers used the n-word*, WASH. POST (Mar. 14, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/14/court-document-former-officer-darren-wilson-says-ferguson-officers-used-n-word-to-refer-to-african-americans/> [<https://perma.cc/798V-WY3D>].

10. See Rebecca Santana, *Chief apologizes over hiring of officer who shot black man*, AP NEWS (Aug. 1, 2019), <https://apnews.com/f6f14016c7b64a6d883a35a48b330298> [<https://perma.cc/BLE4-A6CY>] (stating that the police chief of the Baton Rouge Police Department apologized to the family of Alton Sterling for hiring Blane Salamoni, the officer who killed Sterling. The chief stated that Salamoni’s killing of Sterling was part of a well-documented pattern of “unprofessional behavior, police violence, marginalization, polarization and implicit bias by a man who should have never ever wore this uniform.” The Department of Justice and the Louisiana Attorney General’s Office found Sterling’s killing justified. Salamoni was not prosecuted. Thus, Salamoni was allowed to resign and is free to seek employment as a police officer elsewhere).

themselves in during shootings, further undermining their legitimacy and reducing their effectiveness.

Our system can take a step toward addressing these shortcomings by discarding the binary and employing a spectrum approach, in part drawing on the tort law concept of negligence. Negligence jurisprudence is a category of civil law used to describe and categorize a wide swath of events and behaviors, ranging from purposeful neglect to freak accidents. One feature of negligence law that makes it especially useful in evaluating police shootings is nuance—negligence offers a legal framework to discuss complex, dynamic sets of facts, like police shootings. This Article proposes that when applying a negligence-inspired lens to police shootings, investigating authorities should classify “justified” shootings as either: (1) a non-negligent mistake; (2) non-negligent and reasonable; or (3) non-negligent and necessary. In shootings that are “not justified,” the officer’s actions should be described as: (1) “negligent;” (2) “grossly negligent;” or (3) an appropriate criminal charge.

Words are the most powerful tool of policy and law. After all, words form the statutes and binding precedent that generations of Americans must use to guide their behavior. Words created the unjust and inadequate legal doctrine of qualified immunity, which has placed many instances of rogue police behavior beyond reproach.<sup>11</sup> We cannot dismantle the qualified immunity doctrine overnight, but if our system can at least change the way that it speaks about police shootings, it can begin the long process of rebuilding community trust and police legitimacy that is critical to effective, accountable policing. This Article aims to start that conversation.

To begin, Part I illustrates the complexity inherent in police shootings by providing the reader with four stories. All but one are based on actual police/citizen encounters, though the names of those involved have been changed to give readers a chance to draw their own conclusions about these scenarios, rather than relying on conclusions of highly publicized media accounts. Part II explores the case law that laid the foundation for the binary paradigm and provides examples of the real-world effects of the law as evidence of the binary paradigm’s inadequacy. Part III examines why the binary paradigm has persisted by critically exploring different factors that shape and reinforce the binary. Part IV discusses the crucial role that legitimacy plays in effective policing. Further, it explores how the binary paradigm undermines that legitimacy and offers a proposal to replace the binary with a spectrum approach that is based on the tort law concept of negligence.<sup>12</sup> This Article concludes by exploring the limits and applicability of its proposed approach.

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11. See generally, Marcus R. Nemeth, Note, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989 (2019).

12. Tort law was selected as the framework for this approach because it has developed sophisticated language to deal with nuanced situations. This evolution is perhaps a result of the high costs of losing a civil lawsuit (i.e., for a product liability case), the potentially high rewards for

## I. THE STORIES BEHIND THE BULLET

The complexity of police-involved shootings is best illustrated by first-hand perspectives. To that end, this Part presents four different stories to demonstrate the variety and volatility of these incidents. At the conclusion of each story, the reader should imagine themselves either as the victim of a police shooting or as the loved one of the victim. The reader should then ask themselves if an investigator's report that ultimately said that the shooting was "justified" or "not justified" would describe this scenario satisfactorily.

### *Scenario 1*

In our first story, we meet Officer Jackson, a school resource officer. Jackson has just heard the sounds of gunfire and screams coming from the cafeteria. She rushes toward the sounds and is greeted at the scene by wounded and dying children, teachers, and staff. The sound of gunfire has moved deeper into the school, so Jackson again rushes toward it with her service weapon, a handgun, drawn. She confronts the shooter in the hallway as he attempts to kick in a classroom door—both Jackson and the shooter can hear the frightened screams of the children within. "POLICE! FREEZE!" yells Jackson. The shooter turns toward the sound and raises his gun, aiming at Jackson, finger on the trigger. Jackson aims and fires her service weapon repeatedly until the shooter slumps to the ground seriously wounded. After handcuffing the shooter and securing his weapon, Jackson radios for backup officers and emergency medical assistance to help treat the wounded and secure the crime scene for an investigation.

In this scenario, we know that the shooter has killed people already, and had the intention of shooting, if not killing, Jackson. Jackson had few, if any other options for protecting herself or the potential victims from imminent death without using her weapon. Here, it seems that our system should differentiate between "justified" and "absolutely necessary." Jackson's action was likely a case of the latter.

### *Scenario 2*

In our second story, we meet Officer Barnes. Barnes is working a security detail in a shopping mall when suddenly she hears a gunshot ring out. She heads toward the sound and sees a young man, Carlos, rolling on the floor in pain

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victims, and the reality that many entities likely to engage in litigation (i.e., doctors, manufacturers, or corporations) can afford to hire top echelon legal teams to advocate for their causes. In our legal system, where victory can often depend on narrowly distinguishing cases to avoid the negative consequences of stare decisis, an increase in the volume of cases will breed nuance. Typically, only those with the resources to begin and maintain litigation will be able to increase case volume. Unfortunately, the most likely victims of police shootings—poor people of color—usually lack the resources to engage in protracted litigation. The government defendants in police-shooting cases have those resources, and they also have every incentive to keep the language and law in this area simple. After all, if everything short of a statutorily enumerated crime is "justified," then the government can escape liability for a wide variety of undesirable behaviors. This may provide an alternative explanation for the lack of legal nuance in this area.

clutching his stomach. She also sees another young man, Adam, walking away from Carlos, headed toward two other men and holding a handgun. All of this has taken place in less than one minute. At this point, Barnes has not had time to ask anyone questions—people around the scene are screaming and fleeing. Barnes, seeing the gun, believes that Adam is the one that shot Carlos, and fears that Adam is going to harm or kill the two others that he is walking toward. Believing time is of the essence, Barnes decides not to give a warning before shooting. Barnes fires her pistol at Adam, striking him in the head and killing him instantly. Barnes believes that she has stopped a mass shooting.

After an investigation, we discover that Adam, in fact, had never fired a shot. Carlos was shot by Peter, one of the two men that Adam was pursuing. Carlos and Adam were friends, and Adam was chasing after Peter. Was Adam going to exact revenge? Or was he going to hold Peter at gunpoint until police arrived, playing the “good guy with a gun” role that his state government advocates? We will never know, and we will never have the chance to ask. What we do know is that Barnes’s assumption and decision to fire were mistakes. Perhaps they were reasonable given the circumstances, or perhaps not—the end result was an innocent person killed by a police bullet. If a citizen is doing something that they have a legal right to do and has committed no crime, should we be comfortable as a society with labeling that person’s death at the hands of the police as “justified”?

### *Scenario 3*

In our third story, we meet Officer Henry. Henry is one of several police officers who have been called to a hotel in response to a complaint about a man with a rifle in one of the rooms. The man in the room, James, had been showing off a legal pellet gun to a friend in the room with him while the door was open. The police approach the room with their service handguns and rifles in hand. They command the room’s occupants to exit with their hands up and then to kneel on the ground. James comes out unarmed and complies with the police commands, putting his hands up and kneeling so that his entire torso is visible to the officers. Officer Henry yells out, “If you move, we’re going to consider that a threat and we are going to deal with it, and you may not survive it.” “Please do not shoot me,” James responds, with his hands in the air. One of the officers then orders James to cross his legs, lie prone, and crawl towards them. James again says, “Please don’t shoot me,” and begins to crawl forward on all fours. While crawling towards the officers, James pauses and reaches his right hand toward his waistband, attempting to prevent his shorts from sliding down while he crawled. Henry then opens fire, striking James five times and killing him almost instantly.

Henry is subsequently charged with murder for the shooting and fired from his job soon thereafter. Henry testified in court that he believed James was reaching for a gun and that he would have done the same thing again. Is it truly a strong enough condemnation of this police officer’s behavior to label the shooting as “not justified”?

#### Scenario 4

Our fourth and final story introduces us to Officer Smith. Smith has been called to the apartment of a suicidal man, Charles. Entering the apartment, Smith sees that the walls are covered in blood at varying angles and amounts—he calls out and finds Charles is in his kitchen standing near the sink. The two are standing less than ten feet apart. The blood on the walls indicates to Smith that somewhere in the apartment there is a sharp object that Charles has been using to harm himself. Smith begins to speak to Charles and learns that Charles is a former military service member suffering from Post-Traumatic Stress Disorder. Charles states that he will continue to self-harm. Smith continues to speak with Charles in an attempt to deescalate the situation. Smith believes he has convinced Charles to voluntarily commit himself to psychiatric treatment, and he begins to call paramedics to do a medical assessment and provide transportation. Suddenly, Charles reaches into the sink, grabs a butcher knife, and turns to face Smith. Smith knows that his ballistic vest will not protect him from stab wounds and draws his service weapon. He aims the gun at Charles and orders him to drop the knife. Charles hesitates, the knife shaking in his hand. He then shifts his weight to the balls of his feet, as if to charge Smith. Smith braces himself, preparing to shoot to save his own life. Just as Smith is about to press the trigger, Charles turns the knife on himself, deeply slashing his own arm, and then drops the knife. Though the shooting was not necessary in this scenario, if Officer Smith had fired in the split second before Charles cut himself, would it have been reasonable or unreasonable?

As mentioned, all but one of these stories are true. Scenario 1 is fictional; it is an amalgamation of news stories and police active shooter training scenarios. Scenario 2 is the story of the shooting of Emantic Bradford, Jr., an African-American man killed by a still unknown police officer.<sup>13</sup> Scenario 3 details the killing of Daniel Shaver, a white man shot by white police officer Philip Brailsford.<sup>14</sup> Scenario 4 is a personal experience that occurred during the author's service in law enforcement. Split-second decisions as a police officer are part of my lived experience, and that experience reinforces the inadequacy of the binary paradigm.

## II. WE ARE NOT BOUND TO THE BINARY PARADIGM

The binary paradigm of police shootings (justified or not) is not a legal mandate. Rather, it is an outgrowth of the slim volume of legal doctrine on police

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13. *Attorney General's Report Regarding the Officer-Involved Shooting Death of Emantic ("E.J.") Bradford, Jr. at the Riverchase Galleria on November 22, 2018*, ALABAMA OAG (Feb. 5, 2019), <https://www.alabamaag.gov/Documents/news/Hoover/Report.pdf> [https://perma.cc/4KF4-RTUY].

14. Erik Ortiz, *Police officer who fatally shot sobbing man temporarily rehired to apply for pension*, NBC NEWS (Jul. 12, 2019), <https://www.nbcnews.com/news/us-news/police-officer-who-fatally-shot-sobbing-man-temporarily-rehired-apply-n1028981> [https://perma.cc/RT5F-73AP].

deadly force provided by the Supreme Court, combined with police institutional pressure. Though we have used the binary for quite some time, the increased visibility of police violence, coupled with demands for transparency from the citizenry require a more comprehensive, descriptive approach to addressing these issues. The cases examined here *Tennessee v. Garner*,<sup>15</sup> *Scott v. Harris*,<sup>16</sup> and *Plumhoff v. Rickard*<sup>17</sup>—were chosen specifically because they illustrate the Court’s view on the use of deadly force by the police.<sup>18</sup> In *Garner*, the Supreme Court’s holding implied that police use of force must be reasonable under the Fourth Amendment, laying the foundation for the binary. *Garner* resulted in police establishing strict guidelines for when deadly force could be used; in fact, compliance with the *Garner* standards actually reduced police shootings in some places.<sup>19</sup> *Scott* disabused the police of that notion; there, the Court stated that the Fourth Amendment’s reasonableness standard was to be applied to police uses of deadly force without any strict formula. *Plumhoff* reaffirmed the *Scott* standard. Below, readers will see that the *Scott* decision reinforced the binary and widened the net for what could be understood as reasonable under the Fourth Amendment.

#### A. *Tennessee v. Garner: The Origin of the Binary Paradigm*

In *Tennessee v. Garner*, the Supreme Court established an analytical framework for police homicide that deems the homicide either “reasonable” or “unreasonable,” thus setting the stage for the “justified” versus “not justified” binary.<sup>20</sup> In this case, a police officer was responding to a report of a burglary in a residential neighborhood.<sup>21</sup> Upon arrival, the suspect, Edward Garner, fled, and

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

16. *Scott v. Harris*, 550 U.S. 372 (2007).

17. *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

18. Though *Graham v. Connor* is relevant to discussions of police use of force in general, it does not specifically address the use of *deadly* force. 490 U.S. 386, 394–95 (1989). In *Graham*, the Court explicitly held that all claims that law enforcement officers have used excessive force in the context of any seizure should be analyzed under the Fourth Amendment’s reasonableness standard. *Id.* at 395. This distinguishes it from *Garner*, an earlier case, which only applied the reasonableness standard to the use of deadly force against fleeing felons. *Id.*; *Garner*, 471 U.S. at 7–12. However, because this paper examines police shootings and the way our system evaluates the use of deadly force, the *Graham* analysis is not as relevant to this discussion as the three chosen cases.

19. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 642 (2018) (citing Jerry R. Sparger & David J. Giacopassi, *Memphis Revisited: A Reexamination of Police Shootings After the Garner Decision*, 9 JUST. Q. 211, 224 (1992) for the finding that after the Memphis Police Department altered its shooting policy to comply with the *Garner* decision, the total number of shootings and the racially discriminatory application of lethal force by officers in Memphis significantly decreased).

20. Stacy Barchenger, *How a Tennessee case forever changed police shootings*, THE TENNESSEAN (Aug. 32, 2015), <https://www.tennessean.com/story/news/2015/08/21/how-tennessee-case-forever-changed-police-shootings/31848333/> [perma.cc/D7AK-TNCD].

21. *Garner*, 471 U.S. at 3.



the police officer followed.<sup>22</sup> The officer saw no sign of a weapon and was “reasonably sure” that Garner was unarmed.<sup>23</sup> As Garner attempted to climb a fence to escape, the officer shot him in the head, killing him.<sup>24</sup> The officer shot Garner because he feared that Garner would escape if he made it over the fence, and the law provided that officers could shoot any fleeing felon to prevent their escape.<sup>25</sup> Garner, who was fifteen years old,<sup>26</sup> had stolen ten dollars and a purse.<sup>27</sup> The Court held that laws authorizing the police use of deadly force against fleeing, unarmed, non-violent felony suspects were unconstitutional.<sup>28</sup> Further, the Court held that deadly force may not be used against a fleeing suspect unless “it is necessary to prevent the escape 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.”<sup>29</sup> The Court stated:

[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>30</sup>

In that paragraph, the Court laid out a rigid standard about when police can use deadly force against a fleeing suspect. The analysis centered several things—*probable cause* to believe that the suspect has inflicted or will inflict *serious harm* on the officer or the public at large, the officer’s reasonable belief in the *necessity* of deadly force to prevent that harm, and if *feasible*, some kind of warning from the officer. This language, combined with the Court’s determination that it is unreasonable for police to use deadly force against non-violent felons,<sup>31</sup> suggests that the Court attempted to narrow the circumstances that are appropriate for the police to use deadly force. The Court limited such circumstances to when the lives of officers or the public were genuinely threatened by people who had committed violent crimes. Even in those extremely dangerous circumstances, the Court wanted officers to deliver a warning when feasible.

The *Garner* standard remained the police deadly force standard for decades.<sup>32</sup> In 2007, nearly twenty years after the *Garner* decision, the Court changed the standard.

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22. *Id.*

23. *Id.*

24. *Id.* at 4.

25. *Id.*

26. *Id.* at 4 n.2.

27. *Id.* at 4.

28. *Id.* at 11–12.

29. *Id.* at 3.

30. *Id.* at 11.

31. *Id.* at 9–11.

32. Lee, *supra* note 19, at 642 (citing *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793–94 (9th Cir. 2014); *Vaughan v. Cox*, 343 F.3d 1323, 1329–30 (11th Cir. 2003); *Colston v. Barnhart*, 130 F.3d 96, 99–100 (5th Cir. 1997); *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993)).

*B. Scott v. Harris: Police Discretion Widens*

In *Scott v. Harris*, the Supreme Court reshaped the boundaries of when a police officer can use deadly force against a fleeing suspect. In March 2001, a Georgia deputy sheriff caught Victor Harris speeding nearly twenty miles per hour over the posted speed limit, and attempted to pull him over.<sup>33</sup> Harris refused to stop and the deputy sheriff gave chase, their speeds exceeding eighty-five miles per hour along a narrow two-lane road and near the vehicles of bystanders.<sup>34</sup> The officer radioed for backup, and Deputy Timothy Scott joined the chase.<sup>35</sup> After six minutes and approximately ten miles down the road, Scott ended the chase by ramming the front of his patrol car into the rear section of Harris's vehicle, in an attempt to make the vehicle spin out of control and then stop.<sup>36</sup> Harris lost control of the vehicle after Scott struck it.<sup>37</sup> The vehicle left the road and overturned, resulting in severe injuries and paraplegia to Harris.<sup>38</sup> Harris filed a § 1983 civil-damages suit against Scott, arguing that Scott's actions amounted to an unreasonable use of deadly force under the *Garner* standard and therefore violated Harris's Fourth Amendment right against unreasonable seizures.<sup>39</sup> Harris filed a motion for summary judgment, claiming qualified immunity.<sup>40</sup> The Supreme Court disagreed with Harris's interpretation of the standard set by *Garner* and ruled in favor of Scott.<sup>41</sup>

This case upended longstanding assumptions about and applications of the *Garner* ruling by lower courts,<sup>42</sup> which had until then interpreted *Garner* to mean that police use of deadly force had to meet three conditions to be reasonable, and thus eligible for qualified immunity:

- (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning.<sup>43</sup>

The Court ruled that the lower courts misunderstood the standard; instead, the Court explained, "*Garner* did not establish a magical on/off switch that triggers

33. *Scott*, 550 U.S. at 374.

34. *Id.* at 375.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 375–76.

40. *Id.* at 376.

41. *Id.* at 382.

42. See, e.g., *Harris v. Coweta County*, 406 F.3d 1307, 1314 (11th Cir. 2005); *Smith v. Cupp*, 430 F.3d 766, 776–77 (6th Cir. 2005); *Fitch v. Scott*, 2005 U.S. Dist. LEXIS 44753 at \*10–11 (M.D. Fla., Aug. 10, 2005); *Vaughan v. Cox*, 343 F.3d 1323, 1329–30 (11th Cir. 2003); *Haugen v. Brosseau*, 339 F.3d 857, 877 (9th Cir. 2003); *Acoff v. Abston*, 762 F.2d 1543, 1547 (11th Cir. 1985); *Pruit v. Montgomery*, 771 F.2d 1475, 1482–83 (11th Cir. 1985); *Mumm v. Mornson*, 708 N.W.2d 475, 486 (Minn. 2006); *Davis v. Little*, 670 F.Supp. 1115, 1120 (D. Conn. 1987); *Ryder v. Topeka*, 814 F.2d 1412, 1418 (10th Cir. 1987).

43. *Scott*, 550 U.S. at 382.

rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the *Fourth Amendment's* 'reasonableness' test,"<sup>44</sup> which meant that the use of deadly force was to be evaluated under a much more flexible standard. This case formally released police from an element-based analysis of their use of deadly force, thus "reduc[ing] the Fourth Amendment regulation of reasonable force to its vaguest form: an ad hoc balancing of state and individual interests unconstrained by any specific criteria."<sup>45</sup>

### C. *Plumhoff v. Rickard*: Reinforcing the Scott Standard

*Plumhoff v. Rickard* reaffirmed the *Scott* standard that granted police significant discretion to deploy deadly force.<sup>46</sup> Donald Rickard was driving a car when the West Memphis Police Department pulled him over for a headlight problem.<sup>47</sup> The officer on scene, Joseph Forthman, thought that Rickard was acting nervous.<sup>48</sup> Rickard also had a basketball-sized indentation on his windshield. Forthman requested Rickard's driver's license and asked him to exit the car.<sup>49</sup> Rickard refused and sped away.<sup>50</sup> Forthman chased him in his patrol car, joined by several police officers, including Vance Plumhoff.<sup>51</sup> The officers attempted various means to stop Rickard's vehicle, all of which failed, until they were able to pen Rickard between their patrol cars in a parking lot.<sup>52</sup> Plumhoff and another officer exited their vehicles, guns in hand.<sup>53</sup> They approached Rickard's car and pounded on the windows to get him to stop pressing the accelerator.<sup>54</sup> Rickard tried to use his vehicle to ram one of the police cars penning him in, and Plumhoff responded by firing three shots into Rickard's car.<sup>55</sup> Rickard then maneuvered his vehicle in a "180 degree arc," nearly striking another officer, and fled the scene.<sup>56</sup> As Rickard left, two other officers fired 12 shots into his vehicle.<sup>57</sup> Rickard lost control and crashed into a building.<sup>58</sup> Rickard and his passenger both died from a combination of gunshot wounds and crash injuries. Rickard's surviving daughter filed a federal claim against the officers, alleging that they used excessive force.<sup>59</sup>

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44. *Id.* (emphasis added).

45. Harmon, *supra* note 7, at 1136–37.

46. *Plumhoff*, 572 U.S. at 776.

47. *Id.* at 768.

48. *Id.* at 768–69.

49. *Id.* at 769.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 769–70.

54. *Id.*

55. *Id.* at 770.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

The Court stated that determining the objective reasonableness of a Fourth Amendment seizure requires the court to balance the nature and intrusion on the individual's interests against the government interest at issue, considering the totality of the circumstances.<sup>60</sup> Responding to the issues of this case, the Court reiterated the holding from *Scott*, stating that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>61</sup> Thus, the Court held, because "Rickard's flight posed a grave public safety risk,"<sup>62</sup> the police "acted reasonably in using deadly force to end that risk."<sup>63</sup> The Court also rejected an argument that it was possible for the number of shots fired by police to be indicative of excessive force, stating that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended."<sup>64</sup> The upshot of this ruling is twofold: the Court reaffirmed the *Scott* standard and removed another check on police discretion to deploy deadly force.

#### D. *The Real-World Consequences of the Case Law*

Collectively, the language of these cases must be examined against the crux of the Court's reasoning—the police killing of a suspect is a seizure under the Fourth Amendment, and thus, must comport with the reasonableness standard that Fourth Amendment jurisprudence requires.<sup>65</sup> In essence, Fourth Amendment jurisprudence lays the foundation for the binary paradigm, because it views deadly force as either reasonable, or not—justified, or not.<sup>66</sup> Linguistically, that binary seems like a reasonable attempt to bring order to a complex area of the law, but recent examples, like the death of Emantic Bradford Jr.,<sup>67</sup> demonstrate that the binary paradigm has allowed police to make mistakes of fact that take innocent life, yet still fall within that "reasonable" umbrella without having to admit to making a mistake. For an explanation of how this came to pass, one needs to look no further than the evolution of the law—from *Garner*'s strictly enumerated circumstances, to the nebulous "public safety risk" standard of *Scott* and *Plumhoff*.<sup>68</sup>

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60. *Id.* at 774 (citing *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985)).

61. *Id.* at 776.

62. *Id.* at 777.

63. *Id.*

64. *Id.*

65. *Garner*, 471 U.S. at 1.

66. *Id.* at 8–12.

67. See Richard Gonzales, *Ala. Police Officer Will Not Be Charged In Fatal Shooting Of Man Mistaken For Gunman*, NPR (Feb. 5, 2019), <https://www.npr.org/2019/02/05/691798641/alabama-police-officer-will-not-be-charged-in-fatal-shooting-of-mistaken-gunman> [<https://perma.cc/4NK8-EAWL>].

68. *Plumhoff*, 572 U.S. at 765.

The law's broad tolerance of police deadly force mistakes has robbed citizens of the opportunity to hold officers accountable for injustices in their community. Here, mistake is a term used to describe situations where officers follow their training and department protocols when deploying deadly force, but they misinterpret facts; in the absence of that misinterpretation, a particular victim would not have been shot. There are countless examples of real world, deadly mistakes where an officer shot a person because of the incorrect belief that the victim was holding or reaching for a gun.<sup>69</sup> Mistakes are distinct from shootings born of negligence, where an officer shot someone because they ignored their training and regulations, or deployed the wrong tool.<sup>70</sup> The core difference between these two types of shootings is in the adherence to department regulations and training. As discussed, police departments attempt to conform their training and standards to legal rulings.<sup>71</sup> Those legal rulings, and the police training and standards that they spawn, are the only institutional guardrails that our society has for demarcating acceptable and unacceptable uses of deadly force by police. Police acting outside of those rules are demonstrating either contempt for, ignorance of, or an inability to comply with use of force guidelines. Therefore, those officers have demonstrated to society that they cannot be trusted to responsibly use force, and should not be allowed to wield the rest of the authority that is explicitly and implicitly entrusted to police as a whole. In short, police that cannot follow the rules or their training should not be allowed to be police officers.

Even so, our legal system rarely finds police shootings, including mistakes and negligent shootings, unreasonable.<sup>72</sup> That tolerance also means that officers who have shown that they should not be allowed to continue policing are allowed to stay in their jobs, either with their current agency, or as with Timothy

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69. See, e.g., Eric Levenson, Madison Park & Darren Simon, *Sacramento police shot man holding cellphone in his grandmother's yard*, CNN (Mar. 22, 2018), <https://www.cnn.com/2018/03/22/us/sacramento-police-shooting/index.html> [<https://perma.cc/LY3K-GJTH>]; Don Sweeney, *Officer shoots and kills man after mistaking a bicycle part for a gun, L.A. cops say*, SACRAMENTO BEE (Jan. 19, 2020), <https://www.sacbee.com/news/california/article239446583.html> [<https://perma.cc/C66L-4L96>].

70. See, e.g., Emily S. Reub, *Officer Who Used Gun Instead of Taser Won't Face Charges for Shooting Unarmed Man*, N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/04/15/us/pa-police-taser-gun.html> [<https://perma.cc/CC77-BA7Q>]; Enjoli Francis, *Former Kansas police officer expected in court for accidentally shooting suspect with gun instead of stun gun*, ABC NEWS (Mar. 26, 2019), <https://abcnews.go.com/US/kansas-police-officer-expected-court-accidentally-shooting-suspect/story?id=61965369> [<https://perma.cc/6V3H-GK24>]; Elahe Izadi, *Ohio Wal-Mart surveillance video shows police shooting and killing John Crawford III*, WASH. POST (Sept. 25, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii/> [<https://perma.cc/3PKS-CHPL>]; Eric Berger, *The Jason Stockley case, explained*, ST. LOUIS MAG. (Sept. 7, 2017), <https://www.stlmag.com/news/stockley/> [<https://perma.cc/6A2P-ASU2>].

71. See Lee, *supra* note 19 and accompanying text.

72. Janell Ross, *Police officers convicted for fatal shootings are the exception, not the rule*, NBC NEWS (Mar. 13, 2019), <https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741> [<https://perma.cc/P2X9-TFCD>].

Loehmann, who killed twelve-year-old Tamir Rice for playing with a toy gun,<sup>73</sup> in another department.<sup>74</sup> Loehmann and his partner were at a minimum, incompetent, and thus demonstrated that they should not be allowed to work in law enforcement. Their incompetence is shown by their ignorance of, or failure to apply, basic police tactics. Their failure escalated their encounter with Rice, and likely led to the shooting. This author was trained to approach an armed subject from a position of cover and concealment, a training standard validated by experts who analyzed this shooting.<sup>75</sup> Approaching from concealment means that the officer should make an effort to be hidden from the armed subject before engaging with them in any way. This makes sure that the officer sees the subject first, and can assess the situation and create a plan of response appropriate to the circumstances. Applied to the shooting of Rice, that would have meant parking the officers' patrol vehicle away from the park, and approaching on foot behind trees or other barriers. Cover, meaning a material that bullets are unlikely to penetrate, ensures that the officer has a relatively safe area to plan, observe, or fight from, in the event of a gun battle. Approaching from cover applies virtually the same tactics as approaching from concealment; the difference is strength of the material that the officer is hiding behind. The point of this training is to allow an officer to survive an encounter with a possibly armed subject while minimizing their chances of getting shot, or having a shootout that could harm innocent bystanders. It is standard training for police officers across the country.<sup>76</sup> The available video shows that Loehmann and his partner drove directly next to Rice, jumped out of the patrol car, and shot Rice within two seconds of their arrival.<sup>77</sup> They did not attempt to find concealment or cover, in order to evaluate and observe the situation from a safe position. They did not give themselves the time and space to think through the problem and act appropriately. Instead, they ignored training and regulations meant to safeguard their lives, and took the life of a child as a result, demonstrating their incompetence and unfitness for policing.

The binary paradigm allows police chiefs to justify hiring demonstrably incompetent officers, like Loehmann. For example, Chief Richard Flanagan of the Bellaire, Ohio Police Department, who hired Loehmann after Rice's death, justified this decision by saying, "[Loehmann] was cleared of any and all

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73. Shaila Dewan and Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html?module=inline> [<https://perma.cc/AG2V-8BLS>].

74. Matthew Haag, *Cleveland Officer Who Killed Tamir Rice Is Hired by an Ohio Police Department*, N.Y. TIMES, (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/timothy-loehmann-tamir-rice-shooting.html> [<https://perma.cc/94U5-V5UB>].

75. Ryllie Danylko, *Police procedure experts question tactics of officers involved in Tamir Rice shooting*, CLEVELAND.COM (Dec. 2, 2014), [https://www.cleveland.com/metro/2014/12/police\\_procedure\\_experts\\_quest.html](https://www.cleveland.com/metro/2014/12/police_procedure_experts_quest.html) [<https://perma.cc/R2RC-F8J8>].

76. *Id.*

77. Dewan and Oppel Jr., *supra* note 73.

wrongdoing. . . He was never charged. It's over and done with.”<sup>78</sup> Calling Loehmann's actions “reasonable” or “justified” essentially co-signed all of the decisions that he made, even though a previous police employer called him emotionally unfit to serve,<sup>79</sup> which should have precluded him from employment with the Cleveland Police Department in the first place.<sup>80</sup> At its core, the binary paradigm established by *Garner* and broadened by *Scott* and *Plumhoff* acts as a serious impediment to police reform and accountability. This is not necessarily because of the language of the cases, but because it creates an avenue for police officials to escape any nuanced scrutiny of their officers' training or practices.

### III. WHY HAS THE BINARY PARADIGM PERSISTED?

There are many potential explanations for the binary's persistence, and none of them are mutually exclusive. First, consider Max Weber's theory that state power is partly composed of a “monopoly of the legitimate use of physical force.”<sup>81</sup> The binary paradigm serves to perpetuate that monopoly—its lack of nuance discourages questions about the State's use of force. Moreover, the State's authority rules out any requirement that the government must explain itself fully after killing or maiming citizens or their loved ones. All of this sends a strong message that the lives of the citizens are worthless, or at least worth less than the State's interest in maintaining order and control of the populace.

The binary paradigm may also simply be the path of least resistance that evolved under the guidance of the courts. The courts demanded no nuance in explaining police officers' use of force,<sup>82</sup> and without an obligation to do so, investigators and administrators simply opt to focus their resources elsewhere. The binary paradigm benefits the police, who are under no obligation to call a mistake a mistake. Mistakes can simply be called “justified” given the right circumstances.

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78. Jessica Schladebeck, *Former Cleveland Cop Who Shot 12-Year-Old Tamir Rice Hired by Another Ohio Police Department*, TRIB. NEWS SERV. (Oct. 8, 2018), <https://www.governing.com/topics/public-justice-safety/tns-tamir-rice-officer-hired-ohio-police-department.html> [<https://perma.cc/3XEU-8BF4>].

79. Joshua Barajas, *Cleveland police officer who shot Tamir Rice was unfit for duty years ago, records show*, PBS NEWS (Dec. 3, 2014), <https://www.pbs.org/newshour/nation/cleveland-police-office-shot-tamir-rice-unfit-duty-years-ago-police-reports-show> [<https://perma.cc/EYH5-UPYE>].

80. Adam Ferrise, *Cleveland police never reviewed Independence personnel file before hiring officer who shot Tamir Rice*, CLEVELAND.COM (Dec. 3, 2014), [https://www.cleveland.com/metro/2014/12/cleveland\\_police\\_never\\_reviewe.html](https://www.cleveland.com/metro/2014/12/cleveland_police_never_reviewe.html) [<https://perma.cc/63FW-8YTJ>] (stating that the Cleveland Police Department amended their written policy to mandate the viewing of personnel files during employment background checks after journalists exposed that the department had not done so with Loehmann).

81. Karl Duzsa, *Max Weber's Conception of the State*, 3 INT'L J. OF POL., CULTURE, AND SOC'Y 71, 75 (1989) (citing MAX WEBER, *ECONOMY AND SOCIETY* 59 (1968)).

82. See generally *Tennessee v. Garner*, 471 U.S. 1 (1985) (focusing only on whether a shooting was legally reasonable without any demand that the police give a nuanced explanation to the public about the circumstances of the shooting); *Scott v. Harris*, 550 U.S. 372 (2007) (same).

Neither of these reasons address deeply rooted sociological factors that reinforce the binary paradigm and enable it to persist. Primary among these factors is dehumanization. The dehumanization of victims inherent in the binary paradigm allows violence to continue, to be justified, and to reinforce preexisting negative stereotypes surrounding the poor and minority populations that are most likely to be on the receiving end of police violence.<sup>83</sup>

#### A. *Dehumanization and the Perpetration of Violence*

Dehumanization of the victims of police violence is not only a central feature of the binary paradigm. It also occupies a cyclical, reinforcing relationship with the paradigm: dehumanize, shoot, dehumanize, justify, repeat. Dehumanization persists because it is a critical component of perpetrating violence against others.<sup>84</sup> Dehumanization is a catalyst for moral exclusion,<sup>85</sup> the process of placing stigmatized groups “outside the boundary in which moral values, rules, and considerations of fairness apply.”<sup>86</sup> In the context of police shootings and the binary paradigm, dehumanization is a norm of dominant society. It begins as a top down message from the government to the people that those outside of the dominant group are dangerous and unlike them,<sup>87</sup> and that the dominant group deserves protection from the threat. The threat message, once received, is internalized and deployed as both weapon and salve for the dominant group—“they” are dangerous, so it makes sense to call the police on “them” for otherwise innocuous activities,<sup>88</sup> and when those encounters turn brutal or deadly, “they” must have deserved it, so the dominant group cannot be blamed for the harm. Once an out-group is morally excluded, those in power, like the police, can do anything to members of the excluded group, no matter how heinous or cruel the action is.<sup>89</sup>

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83. Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*, PNAS (Aug. 20, 2019), <https://www.pnas.org/content/116/34/16793#sec-2> [<https://perma.cc/SST4-RL2D>] (stating that “people of color face a higher likelihood of being killed by police than do white men and women, that risk peaks in young adulthood, and that men of color face a nontrivial lifetime risk of being killed by police”).

84. See generally STEVEN W. BENDER, *MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY* (2015) (discussing the process of dehumanization).

85. Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. OF PERS. AND SOC. PSYCHOL. 292, 293 (2008).

86. Susan Opatow, *Moral Exclusion and Injustice: An Introduction*, 46 J. OF SOC. ISSUES 1, 1-20 (1990).

87. See, e.g., Vanessa Williams, *How President Trump’s speech to police tapped into a history of dehumanizing people of color*, WASH. POST (Aug. 4, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/08/04/how-president-trumps-speech-to-police-tapped-into-a-history-of-dehumanizing-people-of-color/> [<https://perma.cc/8C6V-QLCQ>].

88. See generally Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 334 (2019).

89. Goff et al., *supra* note 85, at 293.



Multiple academic disciplines have researched the symbiotic relationship between dehumanization and violence.<sup>90</sup> That research has been particularly effective in exploring the way that dehumanization can justify atrocities, such as the Holocaust or the trans-Atlantic slave trade.<sup>91</sup> Scholars have shown that one of the key contributors to dehumanization is the way that we attribute emotions among those within our group (i.e., race or socioeconomic class), and outside of our group.<sup>92</sup> In studying how we attribute humanness to others, social psychologists have focused on two kinds of emotions: primary (happiness, sadness, anger) and secondary emotions (jealousy, sympathy, hope).<sup>93</sup> Their research found that “secondary emotions, which are perceived to distinguish humans from nonhumans, are consistently denied to those who don’t belong to one’s social group . . . and preferentially attributed to members of one’s own group.”<sup>94</sup>

Social scientists then applied those findings to the study of race relations between African-Americans and Whites in the United States,<sup>95</sup> focusing on the expansive history of depictions of African-Americans as ape-like rather than human in America, and the implications of that dehumanization in the modern criminal-justice setting.<sup>96</sup> Using a series of six studies, several samples of mostly White undergraduate males, and a data comparison of several hundred court cases and newspaper articles,<sup>97</sup> researchers discovered that even when controlling for explicit or implicit racial biases, the following findings were true: (1) participants bi-directionally associated Black faces and apes;<sup>98</sup> (2) ape-related visual stimuli provided improved attention to Black faces;<sup>99</sup> (3) the ape association did not extend to other racial groups;<sup>100</sup> (4) ape-related visual stimuli made a participant more likely to believe that a police use of force against a Black

90. Ellawala, *supra* note 8, at 3.

91. See generally Nick Haslam & Stephen Loughman, *Prejudice and dehumanization*, BEYOND PREJUDICE: EXTENDING THE SOC. PSYCHOL. OF CONFLICT, INEQUALITY AND SOC. CHANGE 89–105 (2012).

92. Ellawala, *supra* note 8, at 3 (citing Leyers et al., *Psychological Essentialism and the Differential Attribution of Uniquely Human Emotions to Ingroups and Outgroups*, 31 Eur. J. Soc. Psychol. 395, 397–98 (2001)).

93. Leyers et al., *Psychological Essentialism and the Differential Attribution of Uniquely Human Emotions to Ingroups and Outgroups*, 31 EUR. J. SOC. PSYCHOL. 395, 397 (2001).

94. Ellawala, *supra* note 8, at 3 (citing Demoulin et al., *Dimensions of “Uniquely” and “Non-Uniquely” Human Emotions*, 81 COGNITION & EMOTION 71, 88–91 (2004); Gaunt et al., *Intergroup Relations and the Attribution of Emotions: Control Over Memory for Secondary Emotions Associated with the Ingroup and Outgroup*, 38 J. OF EXPERIMENTAL SOC. PSYCHOL. 508, 512–13 (2002)).

95. Goff et al., *supra* note 85, at 292.

96. *Id.*

97. *Id.* at 294–304.

98. *Id.* at 296–98 (stating that bi-directional association means that participants associated apes with African-Americans and vice versa).

99. *Id.* at 297–98.

100. *Id.* at 299–300 (researchers used Asian faces to measure whether this apelike association extended beyond African-Americans).

suspect was justified;<sup>101</sup> and (5) apelike representations of African-Americans still persist in the media, “though hidden in metaphor rather than explicitly rendered.”<sup>102</sup> The implications of this research are broad—dehumanization emerges as an ongoing historical phenomenon associated with racial biases, and also as an enabler of violence in the real world.<sup>103</sup> These findings are applicable to multiple minority groups in the United States, because throughout this nation’s history, those groups have been the subject of pervasive and insidious dehumanizing tropes for various purposes.<sup>104</sup>

### 1. *Police Militarization and Dehumanization*

The increasing militarization of police<sup>105</sup> also feeds and reinforces the binary, as it has caused the police to embrace more of a “warrior” mentality than a “guardian” mentality.<sup>106</sup> Journalists have noted that as police acquire more military equipment, they adopt the military-style tactics and mindset to match it.<sup>107</sup> Empirically, scholars have discovered that the acquisition of military equipment by police correlates strongly with an increase in killings of both civilians and dogs.<sup>108</sup> When hyper-militarized, police no longer feel that their job is to preserve public safety and civil rights; instead, they develop an “us versus them” mindset<sup>109</sup> and become like soldiers patrolling occupied territory.<sup>110</sup> Hyper-militarization could be seen clearly on the streets of Ferguson, Missouri during the police response to protests of Michael Brown’s death,<sup>111</sup> where unarmed protestors faced armored vehicles with snipers perched on top of

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101. *Id.* at 302–03.

102. *Id.* at 303–04.

103. *Id.* at 305.

104. See *infra* notes 127–162 and accompanying text.

105. See generally RADLEY BALKO, *THE RISE OF THE WARRIOR COP* (2013).

106. Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612-14 (2016).

107. See, e.g., BALKO, *supra* note 105; Ryan Welch & Jack Mewhirter, *Does military equipment lead police officers to be more violent? We did the research.*, WASH. POST (Jun. 30, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/30/does-military-equipment-lead-police-officers-to-be-more-violent-we-did-the-research/> [https://perma.cc/9XX9-9D7Z].

108. Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, 4 RES. AND POL. 1, 3–5 (2017).

109. Joseph B. Doherty, *Us vs. Them: The Militarization of American Law Enforcement and the Psychological Effect on Police Officers & Civilians*, 25 SO. CAL. INTERDISC. L. J. 415, 442–45 (2016).

110. Danny Sjursen, *The Disturbing Parallels Between US Policing at Home and Military Tactics Abroad*, NATION (Oct. 12, 2017), <https://www.thenation.com/article/the-disturbing-parallels-between-us-policing-at-home-and-military-tactics-abroad/> [https://perma.cc/6P4H-DTYD].

111. OFF. OF CMTY. ORIENTED POLICING SERV., U.S. DEP’T OF JUST., *AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI*, 53–60 (2015).

them<sup>112</sup> and camouflage-clad officers armed with tear gas and rifles.<sup>113</sup> The most clear manifestation of the “us versus them” mindset can be seen in the “Blue Lives Matter” movement, which paints police as vulnerable victims of violence in need of additional legal and physical protection.<sup>114</sup> “Blue Lives Matter” rhetoric then uses that victimhood as a cudgel to simultaneously justify further violence from the police and silence critiques of police brutality.<sup>115</sup>

Understanding the role of police militarization in perpetuating the binary paradigm requires acknowledging some uncomfortable truths about what adopting a military mindset<sup>116</sup> may do to police officers. From “haji” in Iraq,<sup>117</sup> to “gook” in Vietnam,<sup>118</sup> to “kraut” in World War II,<sup>119</sup> American soldiers have had an inglorious tradition of dehumanizing the “enemy” in order to wage war.<sup>120</sup> Their position of authority as invaders and the dehumanization of the invaded gives soldiers a shield for their minds and a sword against their enemies, enabling soldiers to harm “others” while viewing themselves as the true victims for having to engage in brutality.<sup>121</sup> It also makes them “alarming[ly] willing[] . . . to harm others, even when they face no immediate danger themselves.”<sup>122</sup> When the police—who are inherently cloaked in authority—become soldiers, and the

112. Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS (Aug. 14, 2014), <https://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization> [<https://perma.cc/RTD4-FFKY>]; Paul Szoldra, *This is the Terrifying Result of Police Militarization*, BUS. INSIDER (Aug. 12, 2014), <https://www.businessinsider.com/police-militarization-ferguson-2014-8> [<https://perma.cc/H2HF-YAWH>].

113. Christine Byers, *Justice Department faults Ferguson protest response*, ST. LOUIS POST-DISPATCH (Jun. 30, 2015), [https://www.stltoday.com/news/local/article\\_32d55f9f-0bf4-51e4-93d6-71b873cb8038.html](https://www.stltoday.com/news/local/article_32d55f9f-0bf4-51e4-93d6-71b873cb8038.html) [<https://perma.cc/635A-T8U4>]; Matthew Shaer & Jon Lowenstein, *Photos From the Heart of the Ferguson Protests*, SMITHSONIAN MAG. (Jul. 2015), <https://www.smithsonianmag.com/arts-culture/photos-from-heart-ferguson-protests-180955737/> [<https://perma.cc/7DRT-XNJU>]; Jeff Roberson, *PHOTOS: Militarized police in Ferguson, Mo.*, ABC7 NEWS (Aug. 15, 2014), <https://abc7chicago.com/news/photos-militarized-police-in-ferguson-mo-/260154/> [<https://perma.cc/4H7W-7YYD>].

114. Matthew Guariglia, *‘Blue lives’ do matter—that’s the problem*, WASH. POST. (Nov. 30, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/11/30/why-blue-lives-matter/> [<https://perma.cc/NRK8-DKUB>].

115. See Natasha Lennard, *Call Congress’s “Blue Lives Matter” Bills What They Are: Another Attack on Black Lives*, INTERCEPT (May 19, 2018), <https://theintercept.com/2018/05/19/blue-lives-matter-bill-police-brutality/> [<https://perma.cc/K8YZ-36TR>].

116. Doherty, *supra* note 109, at 443.

117. Anna Badkhen, *Letters from Iraq: From ‘Charlie’ to ‘Haji’*, ETH Zurich Center for Security Studies (2019), <https://css.ethz.ch/en/services/digital-library/articles/article.html/88397/pdf>.

118. Lt. Col. Pete Kilner (USA Ret.), *Know Thy Enemy: Better Understanding Foes Can Prevent Debilitating Hatred*, Association of the United States Army (Jun. 26, 2017), <https://www.ausa.org/articles/know-thy-enemy> [<https://perma.cc/Y4VL-ULZ7>].

119. *Id.*

120. See Shannon E. French and Anthony I. Jack, *Dehumanizing the Enemy: The Intersection of Neuroethics and Military Ethics*, RESPONSIBILITIES TO PROTECT 169, 176–77 (2015).

121. See *id.* at 173–74.

122. *Id.*

citizens become dehumanized enemies,<sup>123</sup> the consequences can be catastrophic. That militarized mentality may translate into police officers referring to protesters as “animals,”<sup>124</sup> or lead to increasingly aggressive tactics that result in more shootings.<sup>125</sup> Scholars have also found that increased militarization leads to more violence *against* police,<sup>126</sup> thus beginning a self-feeding cycle where the police feel under attack, dehumanize the citizens as enemies, treat them as enemies, face backlash, and begin the cycle over again.

## 2. Dehumanization and Marginalized Groups in America

Any conversation about the dehumanization of people in the United States is incomplete without recognizing the harmful stereotypes that affect those who bear the brunt of police violence in this country: racial minority groups,<sup>127</sup> and the mentally ill.<sup>128</sup> Many of the implications of the impact of dehumanization of African-Americans, such as their increased vulnerability to police violence, can extend to many marginalized groups.<sup>129</sup> Harmful stereotypes can continue the process of dehumanization,<sup>130</sup> which is important to remember in a society where some explicitly biased attitudes face a decline.<sup>131</sup> So long as these stereotypes

123. Jesse Singal, *How Militarizing Police Can Increase Violence*, N.Y. MAG. (Aug. 14, 2014), <https://www.thecut.com/2014/08/how-militarizing-police-can-increase-violence.html> [<https://perma.cc/9HHDG-SDZ2>].

124. Amanda Terkel, *Police Officer Caught on Video Calling Michael Brown Protesters ‘F\*\*\*ing Animals’*, HUFFINGTON POST (Aug. 12, 2014), [https://www.huffpost.com/entry/michael-brown-protests\\_n\\_5672163](https://www.huffpost.com/entry/michael-brown-protests_n_5672163) [<https://perma.cc/C89T-NN3U>].

125. Delehanty et al., *supra* note 108.

126. Kevin R. Carriere, *The Militarization of Police’s Eyes, Ears, and Hands: The 1033 Department of Defense Program and Police Safety Outcomes* (Apr. 11, 2016) (unpublished M.P.P. thesis, Georgetown University) (on file with McCourt School of Public Policy, Georgetown University); Geoffrey C. Wickes, *Demystifying “Militarization”: A Partial Analysis of the Impact of the U.S. Department of Defense’s “1033” Equipment Transfer Program on Police Officer Safety Outcomes* (2015) (unpublished M.P.P. thesis, Georgetown University) (on file with McCourt School of Public Policy, Georgetown University).

127. See, e.g., Edwards et al., *supra* note 83.

128. Emma Frankham, *Mental Illness Affects Police Shootings*, 17 CONTEXTS 70, 70-72 (2018).

129. See, e.g., Christy E. Lopez, *Response: The Reasonable Latinx: A Response to Professor Henning’s The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 68 AM. U. L. REV. F. 55, 78–83 (2019) (discussing the impact of longstanding dehumanization and stereotyping of Latinx people in the United States, and its impact on policing); *Police Killings of Native Americans are Off the Charts and Off the Radar*, EQUAL JUSTICE INITIATIVE (Oct. 31, 2016), <https://eji.org/news/native-americans-killed-by-police-at-highest-rate-in-country/> [<https://perma.cc/C823-GNMW>] (discussing how the United States’ legacy of violence toward Native Americans manifests itself in the context of police brutality and criminal justice).

130. See Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow From Perceived Status and Competition*, 82 J. PERS. AND SOC. PSYCHOL. 878, 880-890 (2002); Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 847–48 (2006).

131. Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Research: How Americans’ Biases Are Changing (Or Not) Over Time*, HARV. BUS. REV., Aug. 2, 2019, <https://hbr.org/2019/08/research-on-many-issues-americans-biases-are-decreasing> [<https://perma.cc/8CA8-XFFU>].

persist, they reinforce and perpetuate the binary because they make it easier to see “others” as automatically deserving of violence that has been meted out against them, without a need for further explanation. Media representation can affect the way the public stereotypes different groups,<sup>132</sup> and those stereotypes can influence police interactions in the field.<sup>133</sup> Exploring these stereotypes enables readers to recognize and confront harmful tropes when they encounter them in the courts and the media,<sup>134</sup> and underscores the need for a more descriptive, transparent approach to examining police violence than the current binary. Though many groups—including Asian Americans, Arab/Middle Eastern Americans, and others—experience dehumanizing stereotypes that can lead to police violence, this paper will examine stereotypes for the three ethnic groups most at risk of being victims of police shootings: African-Americans, Native Americans, and Latinos/Latinas. My intent is not to exclude, undervalue, or erase the suffering of any other group. Instead, I use these three groups to illustrate the connection between a history of oppression and the current police violence and carceral system. I seek to demonstrate that it is no coincidence that the groups that suffered slavery, genocide, lynching, and land theft are the same groups most likely to be killed by police officers today. This section also examines the dehumanization of the mentally ill, a designation that crosses ethnic lines.

*a. African-Americans*

African-Americans have been so extensively stereotyped as criminals that a branch of scholarship developed in response.<sup>135</sup> Newspapers and TV broadcasts portray African-Americans as criminals more often than they portray African-Americans positively,<sup>136</sup> even though those representations are not representative of reality.<sup>137</sup> African-Americans are also portrayed as more threatening and more

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132. Jean Reith Schroedel & Roger J. Chin, *Whose Lives Matter: The Media’s Failure to Cover Police Use of Lethal Force Against Native Americans*, 10 RACE AND JUSTICE 150, 151–52 (2020).

133. *Id.* (citing Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 CRIMINAL JUSTICE AND BEHAVIOR 1262, 1269–76 (2007)).

134. *See, e.g.*, Bryan Adamson, *Reconsidering Pretrial Media Publicity: Racialized Crime News, Grand Juries and Tamir Rice*, 8 ALA. C.R. & C.L. L. REV. 1, 33 (2017).

135. *See, e.g., id.* at 33; Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 786 (1994); Mary Beth Oliver, *African American Men as “Criminal and Dangerous”: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men*, 7 J. OF AFRICAN AMER. STUDIES 2, 3–10 (2003).

136. *See Adamson, supra* note 134, at 33 (citing John Wihbey, *Racial Bias and News Media Reporting: New Research Trends*, JOURNALIST RESOURCES (2015)).

137. *Id.* (citing Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. OF COMM. 229, 230–31 (2007); and Travis Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television*, 50 J. OF COMM. 131, 131, 147 (2000)).

culpable than Whites for similar crimes.<sup>138</sup> Further, African-American suspects are more likely to be shown on the news using mug shots,<sup>139</sup> doing “perp walks,”<sup>140</sup> or being physically restrained by police than White suspects.<sup>141</sup> The media is also more likely to report the criminal record of an African-American suspect than a White one.<sup>142</sup> With this information in mind, it is no surprise that African-Americans are shot by police at a higher rate than any other ethnic group in America.<sup>143</sup> The sweeping nature of this media behavior stems from a history of structural racism in this country and speaks to the urgent need to combat white supremacy in American institutions.

*b. Native Americans*

Police officers kill Native Americans at one of the highest rates of any ethnic group in the United States.<sup>144</sup> Further, some scholars believe that the number of Native American deaths at the hands of police may be “wildly underreported.”<sup>145</sup> Unfortunately, in many instances, Native American narratives and experiences with racism and police brutality are often left out of the public sphere,<sup>146</sup> even though Natives have an extensive history of anti-police brutality activism.<sup>147</sup> The insidious trope that Native Americans are “savages” who should be dominated by White society due to their inability to assimilate with White culture<sup>148</sup> is deeply rooted in American history and culture. Additionally, Natives have been stereotyped as unreliable, lazy, drunk, and violent.<sup>149</sup> That history leaves some activists worried that officers can be trapped in a “frontier mentality”<sup>150</sup> when dealing with Natives, meaning that police may feel that they

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138. *Id.* (citing Robert M. Entman & Kimberly A. Gross, *Race to Judgement: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93, 99–100 (2008)).

139. *Id.* (citing ROBERT M. ENTMAN & ANDREW ROJECKI, VIOLENCE, STEREOTYPES, AND AFRICAN AMERICANS IN THE NEWS, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 82 (2000)).

140. *Id.* (citing Entman & Gross *supra* note 139, at 100).

141. *Id.* (citing Entman & Rojecki *supra* note 140, at 82).

142. *Id.* (citing STEPHANIE GRECO LARSON, *MEDIA & MINORITIES: THE POLITICS OF RACE IN NEWS AND ENTERTAINMENT* (2005); and Entman & Rojecki, *supra* note 136, at 46–59).

143. Edwards et al., *supra* note 83, at 16794.

144. *Id.*

145. Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN, Nov. 13, 2017, <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html> [https://perma.cc/E8KC-QS5G] (quoting Matthew Fletcher, director of the Indigenous Law and Policy Center at Michigan State University).

146. Schroedel & Chin, *supra* note 132.

147. *Id.* at 2 (stating that an anti-police brutality stance was one of the catalysts for the creation of the American Indian Movement in the 1960s, according to DAVID E. WILKINS & HEIDI K. STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM*, 3d (2011)).

148. Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 249 (1989).

149. Adrienne Freng, *American Indians in the News: A Media Portrayal in Crime Articles*, 31 AMER. INDIAN CULTURE AND RESEARCH J. 21, 22–23 (2007).

150. Schroedel & Chin, *supra* note 132, at 2 n.4.

are “only killing Indians.”<sup>151</sup> The dangers of that mindset are best stated by the late President Theodore Roosevelt, who said in an 1886 speech, “I don’t go so far as to think that the only good Indians are dead Indians, but I believe nine out of every ten are, and I shouldn’t like to inquire too closely into the case of the tenth.”<sup>152</sup>

### c. *Latinx People*

Latinx people suffer from an amalgamation of stereotypes that combine aspects of both the African-American experience and the Asian American experience.<sup>153</sup> Like African-Americans, Latinxs are often stereotyped as criminals.<sup>154</sup> This is expressed through characterizations of Latinxs as gang affiliated, hot-blooded, and prone to violence.<sup>155</sup> Like Asian Americans, Latinxs are often “perceived as foreigners, outsiders, or immigrants.”<sup>156</sup> These stereotypes contribute to the dehumanization of the group, which manifests in brutal and deadly ways when law enforcement interacts with them.<sup>157</sup>

### d. *People with Mental Illness*

People with mental illnesses—a demographic that crosses both gender and race lines—also face serious risks of police violence.<sup>158</sup> According to the Treatment Advocacy Center, people with untreated mental illness are 16 times more likely to be killed than other civilians who are approached or stopped by law enforcement.<sup>159</sup> Around 25% of fatal law enforcement incidents target an individual with severe mental illness.<sup>160</sup> Given that mentally ill people are often stereotyped as violent, prone to criminality, or drug addicted,<sup>161</sup> these figures are not entirely surprising. Moreover, a persistent stigma against mentally ill people

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151. *Id.*

152. HERMAN HAGEDORN, ROOSEVELT IN THE BAND LANDS 355 (1921).

153. Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 441 (1996).

154. *Id.* at 442.

155. *Id.* at 443.

156. *Id.* at 441.

157. See, e.g., Cleve R. Wootson Jr., *Border agents beat an undocumented immigrant to death. The U.S. is paying his family \$1 million.*, WASH. POST (Mar. 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/28/border-agents-beat-an-undocumented-immigrant-to-death-the-u-s-is-paying-his-family-1-million/> [https://perma.cc/AF6G-NJ2C]; *Cops Fired 17 Rounds at Unarmed Mexican Immigrant Antonio Zambrano-Montes*, VICE NEWS (Feb. 26, 2015), [https://www.vice.com/en\\_us/article/qva7qq/cops-fired-17-rounds-at-unarmed-mexican-immigrant-antonio-zambrano-montes](https://www.vice.com/en_us/article/qva7qq/cops-fired-17-rounds-at-unarmed-mexican-immigrant-antonio-zambrano-montes) [https://perma.cc/AF6G-NJ2C].

158. See generally Dorris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, TREATMENT ADVOCACY CENTER OFFICE OF RESEARCH & PUBLIC AFFAIRS (2015).

159. *Id.* at 1 and 12.

160. *Id.* at 2, 3, 5, 6, and 12 (citing reports from *The Washington Post* and *The Guardian*).

161. Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16, 17 (2002).

is rooted in the idea that they are responsible for their own disabilities.<sup>162</sup> Members of society often react to mentally ill people with anger rather than compassion and empathy, and likewise believe that those suffering from a mental illness do not deserve help.<sup>163</sup>

### 3. *Why Dehumanization Matters*

All of these stereotypes are likely known to those familiar with American culture, but it is impossible to overstate their role in the dehumanization of these groups. That dehumanization increases their vulnerability to police violence and makes it easier for society to erase their victimhood.<sup>164</sup> Perceptions of danger, criminality, inferiority, and “otherness” of these groups fester at all levels of society—the same places from which police officers are drawn. When these are set in against the backdrop of the victim-blaming language of the binary paradigm, a seemingly innocuous phrase like “they were reaching for something” is afforded a new, harmful meaning. The problem is not the reaching—grandmothers reach for purses, children reach for toys, and many middle-class motorists reach for their phones or car insurance with no repercussions during police encounters. The problem arises when the “wrong people” are doing the reaching. Our society may be more likely to excuse police homicide when the victim is African-American, Native, Latinx, or mentally ill, because we have come to understand “those people” as dangerous threats.<sup>165</sup> Part of the reason the binary persists is that it allows society to be complacent in response to police violence. After all, “justified” is a lot easier and more comforting to say than, “My society indoctrinates me to fear and dehumanize you, and that indoctrination teaches me that I should endorse and perpetrate violence against people like you because it protects my place in the social hierarchy and preserves the status quo.”<sup>166</sup>

Within the binary paradigm, dehumanization fits in this manner: our society has determined that we are a place where the police must kill, so those who are killed cannot be humanized. In the eyes of the law (which protects police discretion to kill) and in the eyes of society (whose members sanction the killing as the cost of maintaining order), police shooting victims cannot be just like us. They cannot be family members, they cannot be average or nonthreatening, and their reactions to being faced with sudden and intrusive violence can certainly never be seen as reasonable or understandable—they must be morally excluded. Our society accomplishes that exclusion, and thus reinforces the binary paradigm, with the language that our courts and media use to describe the behavior of both the police and the victims of police violence, and by reinforcing negative stereotypes about the people most likely to be victims of that violence.

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162. *Id.*

163. *Id.*

164. *See, e.g.,* Goff et al. *supra* note 85.

165. *See, e.g.,* Lopez, *supra* note 129; Oliver, *supra* note 135.

166. *See generally* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).



B. “They Deserved It”—Dehumanizing Police Victims with the  
Language of Justification

While the courts and the media employ broad, coded language to dehumanize victims of police shootings, they rely on exculpatory verbiage to discourage scrutiny of police conduct during shootings. The nature of the descriptive language matters—particularly in the media—because it frames the way that our society approaches and solves problems.<sup>167</sup> Additionally, media attention influences the level of importance that the public places on an issue.<sup>168</sup> Reflect on some familiar refrains:

- The officer feared for their own life.<sup>169</sup>
- The officer had to make a split-second decision.<sup>170</sup>
- The officer’s actions were necessary to preserve public safety.<sup>171</sup>

This language, both from the news media and from courts, perpetuates the binary paradigm in a critical way: it paints the officer’s decisions, no matter how impulsive or flawed they were, as inevitable and justified. The implication that an officer’s conduct was both righteous and born of necessity compels society to look for flaws in the victim, rather than critically examine why an officer made the decision to pull the trigger. Further, as Cynthia Lee notes, the law currently examines the reasonableness of an officer’s subjective *beliefs* about the need to employ deadly force at the time of the shooting, and not the objective reasonableness of the officer’s *actions* given the circumstances.<sup>172</sup> Such circumstances include police actions that may have escalated, or even caused the shooting.<sup>173</sup> The focus on the officer’s belief implies that the decisions that the officer made up to the moment of the shooting—including the officer’s determination of what constitutes a threat—is the default to which fact finders should defer. By using both legal doctrines and exculpatory language in judicial opinions and media accounts to justify police shootings, our system changes the inquiry from “why did you choose to shoot?” to “what did you (civilian) do to get yourself shot?” As a result, the onus is on the untrained citizen to conduct themselves in a manner that withstands extreme scrutiny during an adrenaline-charged encounter. The trained police officer, on the other hand, is granted a

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167. Schroedel & Chin, *supra* note 132, at 1–3.

168. *Id.* at 2.

169. Felix Sarver and Bob Okon, *Officer ‘feared for his life,’* THE HERALD NEWS (Feb. 12, 2019), <https://www.theherald-news.com/2019/02/11/officer-feared-for-his-life/ajqz8fo/> [<https://perma.cc/4UF8-WFKJ>].

170. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (stating that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements”).

171. *Scott*, *supra* note 12, at 383 (stating that “ensuring public safety” is a “paramount governmental interest”).

172. Lee, *supra* note 19, at 637–40.

173. *Id.*

strong presumption that whatever they did was correct, which can overcome major flaws in that officer's judgment.<sup>174</sup>

We see further evidence of this line of thinking when we examine the language used to describe the victim's conduct leading up to the shooting. Innocuous phrases are suddenly laden with hidden meaning to demonstrate why a police officer was justified in using deadly force. Think about these phrases commonly used to describe the victim's behavior:

- They were reaching for something.<sup>175</sup>
- They were moving unpredictably.<sup>176</sup>
- The look on their face was wrong.<sup>177</sup>

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174. See, e.g., Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (Jun. 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [https://perma.cc/PTY4-33EB]. Officer Jeronimo Yanez shot Philando Castile during a traffic stop in Falcon Heights, Minnesota. On video, Yanez tells Castile that he was being stopped because of a broken taillight. Later, Yanez told investigators that he stopped Castile because he thought Castile matched the description of a robbery suspect. When officers conduct a traffic stop on a suspect that they believe may be armed and who has committed a serious crime, they employ a tactic known as a high-risk, or felony traffic stop. See generally Andrew Borrello, *Felony Car Stops: A Comparison of Two Widely Used Methodologies*, 49 L. & ORD. 49 (2001). During a felony traffic stop, an officer calls for backup, and most importantly, remains near their patrol car in a position of cover and concealment, while giving verbal commands to a suspect. The suspect is brought to the officer, rather than the officer going to the suspect. The point of the technique is to minimize the opportunity that the suspect has to reach for concealed weapons, and if the suspect does draw a weapon, the officer is already behind cover. This technique minimizes the potential for a negligent shooting by placing the officer in a position of significant tactical advantage, making it easier for the officer to remain calm while managing a dangerous situation. Felony traffic stops are part of basic police training. In Minnesota, robbery is a violent felony. MINN. STAT. §§ 609.24 and 609.245 (2020). If Yanez truly suspected that Castile matched the description of a robbery suspect, a violent felon, then he should have followed basic training and performed a felony stop. Instead, Yanez ignored that training, with predictably tragic results. Had Yanez conducted a felony stop, the outcome here might have been different; it is impossible to say for certain. What is certain is that even with Yanez's poor judgement on full display, his actions, which ignored basic police training, were deemed justified by a jury that acquitted him of all charges.

175. Wesley Lowery, *Graphic video shows Daniel Shaver sobbing and begging officer for his life before 2016 shooting*, WASH. POST (Dec. 8, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/12/08/graphic-video-shows-daniel-shaver-sobbing-and-begging-officer-for-his-life-before-2016-shooting/> [https://perma.cc/6CBB-8EMN] (Officer Philip Brailsford shot unarmed Daniel Shaver as Shaver reached toward his waistband while crawling towards the officers, under their instructions. It is believed that Shaver was possibly trying to pull up his shorts).

176. Chelsea Bailey, *Terence Crutcher Shooting by Tulsa Police was 'Tragic' but Justified: Jury Foreman*, NBC NEWS (May 20, 2017), <https://www.nbcnews.com/news/us-news/terence-crutcher-shooting-tulsa-police-was-tragic-justified-jury-foreman-n762566> [https://perma.cc/655V-WA4X] (stating that the jury found the shooting of Terence Crutcher, an unarmed motorist "unfortunate and tragic, but justifiable due to the actions of the suspect" after the officer testified that "she feared for her life as Crutcher . . . failed to listen to commands and moved unpredictably").

177. Jamelle Bouie, *Michael Brown Wasn't a Superhuman Demon: But Darren Wilson's racial prejudice told him otherwise*, SLATE (Nov. 16, 2014), <https://slate.com/news-and-politics/2014/11/darren-wilsons-racial-portrayal-of-michael-brown-as-a-superhuman-demon-the-ferguson-police-officers-account-is-a-common-projection-of-racial-fears.html> [https://perma.cc/654G-JMBQ] (quoting Officer Darren Wilson's description of Michael Brown:

Our system under the binary paradigm uses a simplistic, either-or set of concepts to judge an officer's conduct, usually concluding with the finding that they acted sensibly. To judge the conduct of the civilian victim, however, we deploy an extended, highly nuanced set of criteria (e.g., their movements or looks, objects they were holding, eye contact or lack of it, slow or quick response) that the civilian must satisfy fully in order to not be considered responsible for his or her own shooting.

Consider an analogy that compares police shootings to some kind of macabre obstacle course. The citizen-contestants are thrust into a game where they must jump through the correct hoops, in the correct sequence, with the correct attitude, while anticipating when the referee—the police officer—might change the rules, which could happen at any time. Further, every venue—like the jurisdiction in which shootings occur—has a different rulebook and follows different standards. If the contestant fails, they are shot. Regardless of whether they live, the victim will face an invasive inquiry into their personal life coupled with a ruthless examination of their conduct leading up to the shooting to determine whether the police bullet should be deemed “tragic, but justified,”<sup>178</sup> or if the victim somehow deserved it.

Think back to Scenario 3: While looking down the barrel of a gun, the citizen was yelled at and told not to move, otherwise he would be shot. Then, when he was commanded to move, he was shot because he did not move in a specific enough way. What could he have done that would have saved his life? And in the grip of terrifying circumstances, staring death in the face unarmed, how was he supposed to know what to do? When the police force civilians to make life-or-death decisions on the spot, the ultimate result is a no-win scenario. Whether the citizen is killed or not, their life has been altered forever.

#### IV. USING A SPECTRUM APPROACH TO BREAK OUT OF THE BINARY

Up to this point, this article has focused on why the binary is problematic from a social scientific and criminological perspective; however, that should not overshadow its more pragmatic, real-world shortcomings. For example, it is easy to overlook how the binary approach delegitimizes police in the communities of color most likely to bear the brunt of violence. By prioritizing the justification of police violence<sup>179</sup> rather than justice for harmed communities, the current paradigm reduces the effectiveness of police in providing public safety services. If members of communities that already have troubled relationships with

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“[he] had the most aggressive face. That’s the only way I can describe it, it looks like a demon, that’s how angry he looked”).

178. Bailey, *supra* note 176.

179. See *supra* notes 169–174 and accompanying text (discussing how current legal standards dismiss police conduct that may have escalated a situation and led to a shooting, in favor of looking at the isolated moment in time when the trigger was pulled.).

police<sup>180</sup> know that their loved ones can be maimed or killed by the police for various reasons<sup>181</sup> they will come to view the police as an entity without their best interests in mind. When they also know that even the shoddiest excuses for a shooting will likely be justified,<sup>182</sup> those communities will view police as illegitimate,<sup>183</sup> and may lash out in response.<sup>184</sup> Much impressive scholarship

180. Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, THE CATO INST. (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america>.

181. See, e.g., Jose A. Del Real, *New Video Shows That Fresno Officer Shot Teen as He Fled*, N.Y. TIMES (Oct. 25, 2019) <https://www.nytimes.com/2019/10/25/us/fresno-police-shooting-video.html> [<https://perma.cc/F754-ZDPW>] (stating that a police officer shot sixteen-year-old Isiah Murrietta-Golding in the back of the head after he fled officers who wanted to question him about his knowledge of or possible involvement in the homicide of his brother. Isiah briefly complied with officers before fleeing on foot for several blocks and hopping over a fence. He was shot through the fence by an officer as he tried to pull up his pants while running. The Fresno Police Department stated that the shooting was justified because, “[i]n view of the fact the suspects had used a firearm the previous day, and the weapon was outstanding, the gestures were interpreted as the suspect possibly reaching for a weapon” although Isiah was unarmed); Molly Olmstead, *Felony Charges Dismissed Against Miami Cop Who Shot Black Caregiver With Arms Raised*, SLATE (Jun. 18, 2019), <https://slate.com/news-and-politics/2019/06/miami-caretaker-shooting-officer-convicted-misdemeanor.html> [<https://perma.cc/6WYH-S8MM>] (stating that Officer Jonathan Aledda of the North Miami Police Department shot an unarmed 47-year-old caretaker of an autistic man. The victim of the shooting was laying on his back with his hands in the air, yelling that he did not have a gun, and that the autistic man was holding a toy. Other officers testified that they announced over the radio that both people were unarmed. Aledda stated that he did not hear them, and fired because when the caregiver was yelling that no one was armed, it sounded to him like the caregiver was begging for mercy, and that the autistic man was going to shoot him. Aledda stated that he fired at the autistic man, but missed. Aledda’s shots struck the caregiver three times in the thigh. Aledda was acquitted of attempted manslaughter charges, but was convicted of a misdemeanor); Adam Ferrise, *Cleveland officer who shot Tamir Rice had ‘dismal’ handgun performance for Independence police*, CLEVELAND.COM (Dec. 3, 2014), [https://www.cleveland.com/metro/2014/12/cleveland\\_police\\_officer\\_who\\_s.html](https://www.cleveland.com/metro/2014/12/cleveland_police_officer_who_s.html) [<https://perma.cc/6NXQ-CEC6>] (stating that Timothy Loehmann, who killed Tamir Rice for wielding a toy gun, could not follow simple instructions on the firing range, lied to instructors, refused to follow orders, and instructors did not believe time or training would be able to correct Loehmann’s deficiencies).

182. Ross, *supra* note 72 (stating that of the 900–1000 police shootings per year in the United States since 2005, only 98 nonfederal law enforcement officers have been charged with a crime. Of those cases, only thirty-five officers have been convicted of a crime, while thirty-one were acquitted, and ten were dismissed by a judge or prosecutor. Twenty-one cases are still pending).

183. National Institute of Justice, *Race, Trust and Police Legitimacy* (2013), <https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy>.

184. See, e.g., Russell Contreras, *Albuquerque police face hundreds of protestors*, AP NEWS (Mar. 31, 2014), <https://apnews.com/fcf29b8129584a7ea6ee4448260ec6ec> [<https://perma.cc/A7AA-PKNJ>]; *Black Lives Matter protestors crash wedding of cop who shot Stephon Clark*, CBS NEWS (Sacramento, CA) (Aug. 8, 2018), <https://www.cbsnews.com/news/black-lives-matter-protesters-crash-wedding-of-cop-who-shot-stephon-clark/?intcid=CNI-00-10aaa3a> [<https://perma.cc/DPZ2-C5SE>]; Troy Briscoe, *Laquan McDonald protesters clash with Chicago police*, CHI. TRIB. (Nov. 24, 2015), <https://www.chicagotribune.com/visuals/85144451-132.html> [<https://perma.cc/YBC6-HCQ2>]; Sheryl Gay Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray’s Death*, N.Y. TIMES (Apr. 15, 2015), <https://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html> [<https://perma.cc/F8GX-3Y9K>]; Jon Swaine, *Ferguson protests: state of emergency*

explores police legitimacy<sup>185</sup> and underscores its importance to the effectiveness of policing.<sup>186</sup> Because legitimacy and transparency are so important to effective policing,<sup>187</sup> and because the binary paradigm does little to enhance these features, it is imperative that our investigative and legal systems find a new approach for examining and classifying police shootings. Fortunately, the jurisprudence surrounding negligence provides us with a framework that can be easily adapted to police shootings. Though not a perfect solution, it is markedly better than our current approach.

#### A. *The Law of Negligence in Torts as a Blueprint*

While it may be novel to apply a negligence-spectrum approach to police shootings, this spectrum is deeply rooted in American tort law. Random events in everyday life occur on a spectrum, and the negligence jurisprudence in tort law provides proof that our legal system has long recognized this fact and has the tools to accommodate it. While negligence as a concept can be defined simply as the failure to exercise reasonable care under the circumstances,<sup>188</sup> American civil law recognizes several variations of negligence: (1) mere negligence—failure to act with the level of care that a reasonable person would under similar circumstances;<sup>189</sup> (2) gross negligence—a lack of care that shows a conscious, reckless disregard for the safety of others;<sup>190</sup> (3) negligence per se—negligence that violates a statute;<sup>191</sup> (4) contributory negligence—where a plaintiff’s conduct, in concert with the defendant’s negligence, contributes to the plaintiff’s harm;<sup>192</sup> and (5) comparative negligence—a rule for dealing with

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*declared after violent night*, THE GUARDIAN (Aug. 10, 2015), <https://www.theguardian.com/us-news/2015/aug/10/ferguson-protests-st-louis-state-of-emergency> [<https://perma.cc/4RLH-B5NR>].

185. See, e.g., Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFFALO L. REV. 837, 849 fn. 56 (2016); Jannie Noppe et al., *Guest Editorial*, 40 POLICING: AN INTERNATIONAL J. OF POLICE STRATEGIES AND MANAGEMENT 474, 476–79 (2017); William Terrill et al., *Three pillars of police legitimacy: Procedural justice, use of force, and occupational culture*, 21 SOC. OF CRIME, LAW, AND DEVIANCE 59, 60–66(2016); Robert E. Worden & Sarah J. Mclean, *Research on police legitimacy: the state of the art*, 40 POLICING: AN INTERNATIONAL J. OF POLICE STRATEGIES AND MANAGEMENT 480, 481–92 (2017); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. AND SOC. REV. 513, 516–21 (2003).

186. Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RES. L. REV. 931, 933 (2016).

187. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OH. ST. J. OF CRIM. L. 231, 275 (2008).

188. RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE DEFINED § 282 (AM. LAW INST. 1965).

189. *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (discussing a §1983 negligence claim, and stating that “far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person.”).

190. *Id.* at 334; *Gross Negligence*, L. INFO. INST., [https://www.law.cornell.edu/wex/gross\\_negligence](https://www.law.cornell.edu/wex/gross_negligence) [<https://perma.cc/E6BE-9MLU>].

191. Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 960 (2014).

192. RESTATEMENT (SECOND) OF TORTS: CONTRIBUTORY NEGLIGENCE DEFINED § 463 (AM. LAW INST. 1965).

situations where both parties are at fault, and a jury allocates percentages of that fault to aid in the determination of damages.<sup>193</sup> Negligence can even be extended to criminal offenses in many states.<sup>194</sup>

In other words, negligence exists on a spectrum. This spectrum is already applied by investigators, lawyers, judges, and scholars in situations ranging from car accidents to medical malpractice. This area of the law provides fertile ground to explore a different way to approach police shootings which, like negligence cases, take the form of unique and complex fact patterns.

### B. Applying a Spectrum Approach to Police Shootings

Thus far, this paper has explored the inadequacies of the binary and the social and institutional forces that perpetuate it without elaborating on a solution. One solution to the inadequacies of the binary could be the application of a spectrum classification system to the way that we evaluate police shootings. Such a spectrum would extend from different types of negligence. Behavior that is grossly negligent, yet does not warrant criminal charges, would be at one end of the spectrum, while the other direction would extend into variations of non-negligence. (See Fig.1)



Fig.1 – A simple model of the proposed spectrum.

This section will begin by discussing some of the problems with determining negligence in police shootings under the categories already defined in law, as well as a possible solution. Afterward, it will specifically outline proposals for the categories of the non-negligence spectrum: (1) Non-Negligent Necessary; (2) Non-Negligent Reasonable; and (3) Non-Negligent Mistake.

While determining whether to press criminal charges requires a relatively simple process (matching the facts to statutorily enumerated elements), delineating between simple negligence and gross negligence requires significantly more nuance. The dividing line between simple and gross negligence is a distinction that judges and scholars constantly debate.<sup>195</sup> What makes a police shooting negligent or grossly negligent? If an officer fails to follow the exact department policy, is the entire shooting negligent? How

193. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) (establishing a comparative negligence rule in admiralty collision cases); *Comparative Negligence*, L. INFO. INST., [https://www.law.cornell.edu/wex/comparative\\_negligence](https://www.law.cornell.edu/wex/comparative_negligence) [<https://perma.cc/59FE-FPCT>].

194. *See, e.g.*, LA. REV. STAT. § 14:12 (2019); OR. REV. STAT. § 161.085 (10) (2019); CAL. PENAL CODE § 20 (2019); CODE OF ALA. § 13A-2-2 (2019).

195. *See, e.g.*, Olga Voinarevich, *Overview of the Grossly Inconsistent Definitions of “Gross Negligence” in American Jurisprudence*, 48 J. MARSHALL L. REV. 471, 472 (2015).

significant a departure from training or procedure should a shooting be to move from negligent to grossly negligent? What other factors should come into play? Should we adopt an all-or-nothing approach, determining that a shooting is unreasonable if the officer made a single mistake? Or should we adopt an approach more consistent with comparative negligence, where investigators allow officers a certain “percentage” of departure from protocol before deeming them negligent? Shooting situations often unfold rapidly and always involve imperfect human beings, not robots or computer algorithms. There is fear, miscommunication, and unknown variables in all of these scenarios, so inevitably mistakes will be made. Our system must grapple with that fact while also making sure to hold police officers accountable—our democracy demands it. We are citizens, not subjects. We are consenting peers, not potential suspects. So, what should we do?

One solution to these problems could be to remove negligence determinations from the hands of government investigators entirely, instead shifting the task to insurance companies.<sup>196</sup> The movement toward professionalization of the police has been ongoing for decades,<sup>197</sup> but one thing that the police are missing that is present in many other professions, such as medicine and law, is a standard for malpractice and the individual liability insurance to cover it.<sup>198</sup> Instead, police officers are currently covered either by department insurance or indemnified by the government of their jurisdiction.<sup>199</sup> Adopting mandatory individual liability insurance for police officers could incentivize high-quality police officers and their departments to adopt risk-limiting behaviors and practices, and render bad police officers uninsurable and thus, unemployable.<sup>200</sup> Translated to police shootings, perhaps that would lead to changes in how police are trained in shoot/don’t shoot scenarios, or overall shift the culture of police toward de-escalation through top-down pressure. Insurers rely on data about an activity to calculate the risks and costs of insuring that activity. We can look to automobile insurance for an example—reckless drivers are either priced off of roads by high premiums, or they drive uninsured, risking civil or criminal penalties.<sup>201</sup>

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196. See, e.g., Noel Otu, *The Police Service and Liability Insurance: Responsible Policing*, 8 INT’L J. OF POLICE SCI. & MGMT. 294, 307–310 (2006) (exploring the effect of requiring individual officers to take out insurance); Deborah Ramirez et al., *Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide a New Accountability Model?*, 45 AM. J. CRIM. L. 407, 436 (2019) (arguing for mandatory professional liability insurance for police officers).

197. David A. Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSPECTIVES IN POLICING (2011), <https://www.ncjrs.gov/pdffiles1/nij/232676.pdf> [<https://perma.cc/6U88-BCZF>].

198. Ramirez, *supra* note 196, at 440.

199. *Id.* at 436.

200. *Id.* at 436–43.

201. *Id.* at 444.

While much of the data around police shootings remains unreported, and thus unanalyzed, the data are still available to be collected.<sup>202</sup> In fact, scholars have already completed a study indicating that “bad” officers can be identified through objective metrics before a fatal shooting occurs.<sup>203</sup> Given that the data are available, and that insurance companies have extensive experience converting data into risk evaluations,<sup>204</sup> they make an ideal platform for untangling mere and gross negligence along this spectrum. When the circumstances of a police shooting are egregious, but might not rise to the level of a crime,<sup>205</sup> insurance can step in as a method of accountability that not only categorizes the incident, but also removes the burden of police misconduct from municipal taxpayers.<sup>206</sup> Further, it remedies some of the legitimacy concerns<sup>207</sup> around current investigations of police shootings by introducing a third party who is not only independent of the government, but also has a financial stake in an accurate, objective analysis of the scenario in question.<sup>208</sup> Additionally, leaving negligence determinations in the hands of insurers can bypass some of the problems with getting rid of bad police officers that are created by police labor unions,<sup>209</sup> and give municipal leaders or police chiefs the political and institutional cover that they need to take action.<sup>210</sup>

Non-negligent behaviors are not nearly as difficult to parse as negligent ones; here, communities can set boundaries describing the behavior that they wish to see from their police. Below, I provide a model framework for those boundaries, and discuss why they are important. We begin with the Non-Negligent Necessary category. In general, Non-Negligent in this context means that the officer was taking appropriate care to exercise good judgement according to their department’s training standards and policies, so long as those policies are legally compliant and ethical. This part of the definition operates to set a ground floor for acceptable behavior among police officers. In this context, “Necessary” maintains its common use—something that is required to resolve a situation. This classification would apply in situations where police had no choice but to shoot a suspect in order to save a life in view of the totality of the circumstances,

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202. *Id.* at 414–15.

203. *Id.* at 437; Kyle Rozema & Max Matthew Schazenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AMER. ECON. J.: ECON. POLICY 225, 225–28 (2019).

204. Ramirez, *supra* note 196, at 414–15.

205. See, e.g., Michael Kunzleman, Officers face discipline for poor tactics in deadly shooting, AP NEWS (Mar. 29, 2018), <https://apnews.com/3cdf9773fdad4013acba05154da9f7f3/Officers-face-discipline-for-poor-tactics-in-deadly-shooting> [<https://perma.cc/2YDM-SZUQ>] (discussing the killing of Alton Sterling and noting that “the officers’ actions created tactical problems which may have escalated the threat,” their language “may have exacerbated the situation,” and that the decision to tackle Sterling was the “dumbest” thing that one of the officers did during the encounter).

206. See Ramirez, *supra* note 196, at 448.

207. See *supra* notes 181–187 and accompanying text.

208. Ramirez, *supra* note 196, at 450.

209. *Id.* at 428–30, 450.

210. *Id.*



including the police officer's actions leading up to the shooting. Officer Jackson's shooting in Scenario 1, where she fired her gun to stop an active shooter who was seconds from killing her, or a group of children, could easily be described as Non-Negligent Necessary. This category of shootings should be distinguished from others because it clearly sets the standard for the ideal behavior of police officers in shooting situations; a police officer's gun should be a last resort, not the default option based on a fear reflex. America is a nation saturated in guns,<sup>211</sup> and police shootings are likely inevitable for the foreseeable future. However, by setting up a Non-Negligent Necessary category, our system would implicitly acknowledge that there are times when shootings are not necessary. By acknowledging that some shootings are unnecessary, our system sends two messages: first, that the lives of citizens have meaning beyond a police officer's subjective fears; and second, that police are not infallible, and their actions are not intrinsically just or correct. This second message is a direct rebuttal to the blanket approval of officers' actions that our current binary's exculpatory language provides.<sup>212</sup>

The Non-Negligent Reasonable classification would apply in situations where it was not absolutely necessary for the officer to shoot, but under the totality of the circumstances it was understandable, given that there were few alternatives to shooting. This is not to be confused with the current standard of "justified," which operates as a catch-all category for all but the most egregious police misconduct. Instead, this is an attempt to deal with the plethora of scenarios that lie between an absolutely necessary shooting and a mistake, without crossing the line into negligence or misconduct. If Officer Smith had shot the knife-wielding suspect in Scenario 4, it might fit into this category. However, additional facts would be necessary to reach that conclusion. For example, the investigators could consider the officer's individual training regarding suspects armed with knives, the training that the majority of officers receive, the distance between the officer and the citizen, prior police interactions with this particular individual, the layout of the room they were in, and the officer's previous history (or lack thereof) of excessive or premature uses of force. This category is important because, like Non-Negligent Necessary, it sets a clear boundary that can inform police officers about what kinds of deployments of deadly force our society will tolerate. One of the counter-arguments to this and the "necessary" designation is that it will cause police officers to hesitate, and might dissuade them from shooting in significantly dangerous situations.<sup>213</sup>

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211. Aaron Karp, *Estimated Global Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY (2018), <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf> [<https://perma.cc/JY89-9MS3>] (stating that there are an estimated 393.3 million civilian-held firearms in the United States, which amounts to approximately 120.5 firearms for every 100 people in the country. Further, the United States accounts for nearly half of the estimated 857 million civilian-owned firearms in the world).

212. See *supra* notes 169–179 and accompanying text.

213. See *What changing the UOF standard would mean to cops*, POLICEONE.COM (Apr. 25, 2018) (discussing fears that police would hesitate in crisis situations if California passed a

That counter-argument overlooks a key point: Our society should want police officers to have a certain amount of hesitancy before firing a gun—shooting at someone and being shot are both life-altering events, and neither can ever be taken back. Knowing that, it is only sensible that the people charged with making the decision to shoot should be as certain as possible that alternative solutions are not feasible. The use of deadly force is a significant and terrible responsibility, and our system should incentivize officers to restrain themselves from deploying it at every opportunity.

The Non-Negligent Mistake classification would be used in situations in which the officer made a mistake of fact where, if true, it would have made it necessary or reasonable for the officer to shoot. This category could only come into play where the mistake was not a result of any negligence on the part of the officer. Officer Barnes's actions in Scenario 2 might fit this category, depending on further facts, such as what Barnes was trained to do in that scenario (or if he was trained for it at all). This category is the most critical one to overcoming the shortcomings of the binary that led to the loss of public trust and to community oppression. Police officers are human; they have made and will continue to make mistakes in deploying deadly force. Those mistakes alter lives every time they occur. This classification is superior to the binary paradigm because of all that it does (such as adding nuance and promoting accountability), but also because of what it does not do. This classification does not treat deadly-force mistakes as “collateral damage” or “the cost of doing business.” It treats mistakes as events worthy of acknowledgment and explanation. In essence, this category comes as close to an apology as our system has ever gotten. One can never underestimate the power of an apology, especially by those in a position of authority.<sup>214</sup> Apologies can be an important element of healing, reconciliation, and forgiveness between the transgressor and the victim,<sup>215</sup> and that forgiveness can increase the victim's willingness to cooperate with the transgressor.<sup>216</sup> Cooperation from the community makes police more effective,<sup>217</sup> so by following this approach, the police have nothing to lose and everything to gain.

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legislator's proposal to restrict law enforcement uses of force to “necessary force” rather than “objectively reasonable force”).

214. The Editorial Board, *Patients are less likely to sue when doctors apologize for errors*, ST. LOUIS POST-DISPATCH (Sept. 1, 2010), [https://www.stltoday.com/opinion/editorial/patients-are-less-likely-to-sue-when-doctors-apologize-for/article\\_a326f80a-b619-11df-8897-0017a4a78c22.html](https://www.stltoday.com/opinion/editorial/patients-are-less-likely-to-sue-when-doctors-apologize-for/article_a326f80a-b619-11df-8897-0017a4a78c22.html) [<https://perma.cc/G38G-FHYU>] (In 2002, the University of Michigan Health System changed its policy around medical errors—where appropriate, the hospital apologizes to patients and shares internal investigation results with the injured parties. As a result, litigation costs were halved and new malpractice claims against the hospital dropped by forty percent); see also *The Michigan Model: Medical Malpractice and Patient Safety at Michigan Medicine*, MICHIGAN MEDICINE—UNIVERSITY OF MICHIGAN, <https://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs> [<https://perma.cc/AQ6V-SBDP>].

215. Katrina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 74, 74–78 (2018).

216. *Id.*

217. Tyler & Fagan, *supra* note 187, at 275.

The Non-Negligence categories are relatively malleable, as they are a novel approach, and thus are open to refinement. On the other hand, the different categories of negligence, as they are already established in law, must be navigated, rather than refined. In a community or department that adopted this framework, it would be critical to determine where the spectrum would begin during an investigation. For example, whether shootings would be investigated under a rebuttable presumption of negligent behavior, or whether officers would be deemed non-negligent as long as no rule violations were discovered during the investigation. Moreover, communities would have to determine whether they wanted draconian enforcement of all department training and regulations, or whether certain infractions would be allowed to slide (i.e., standing five feet from a subject during a call, when department training taught officers to stand ten feet from potential suspects at all times). Flexibility in the face of these questions is a strength of the spectrum approach; it is a framework, not a strict set of rules.

#### CONCLUSION

Our culture already recognizes the need for nuance in this area. Dozens of books, movies, and television series show that law enforcement operates in shades of gray, rather than with a simple binary of black and white. The legal system should be as capable of dealing with the complexities of police shootings in a manner that is at least as competent as the entertainment industry. That the current binary approach describes police shootings more shallowly than an episode of *Law and Order*<sup>218</sup> is evidence of its painful inadequacy; we deserve more from our government and our police.

The spectrum approach is not a panacea—it will not fix all community relations or police brutality issues. It does not tackle the abysmal state of police qualified immunity jurisprudence,<sup>219</sup> nor does it uproot the reasonableness standard at the base of so many unconscionable justifications of police misconduct. But as the saying goes, every journey begins with a single step. This approach represents that small step. It is a low-cost, potentially high-impact step toward transparency and accountability in police uses of deadly force. It is a policy change, aimed at giving our system the words and concepts that citizens desperately deserve after seeing their brothers and sisters brutalized and killed, and then hand-waved out of existence with the word “justified.” Moreover, the spectrum approach is modular; a police department or district attorney’s office would not need to apply every category exactly as described here in order to be effective. Implementing a classification system that applied only the Non-Negligent Necessary or Non-Negligent Mistake category to the existing framework would improve police-community relations dramatically. Both of those categories carry an implicit acknowledgement that not every use of deadly

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218. *Law & Order: Special Victims Unit: Community Policing* (NBC television broadcast Oct. 14, 2015).

219. See Nemeth, *supra* note 11.

force by police is absolutely necessary or correct. That acknowledgement humbles the police, and offering nuanced explanations to the public moves the police away from being detached overseers and closer toward servants of the public.

The police and citizens are peers. One group having special responsibilities does not change that. The logic of “because I said so,” has no place among equals, and that is what the binary paradigm offers. The spectrum approach treats citizens as partners whose approval and consent is important, in accordance with the nine foundational principles enumerated by Sir Robert Peel, the father of modern policing.<sup>220</sup> The people of Baltimore, St. Louis, Chicago, Los Angeles, New York City, and countless other communities have tasted the fruit that the binary paradigm offers for decades and found it bitter and unsatisfying. Why not try something new?

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220. See generally Keith L. Williams, *Peel's Principles and Their Acceptance by American Police: Ending 175 Years of Reinvention*, 76 CRIMINOLOGY AND CRIMINAL JUSTICE 97, 100 (2003) (discussing Sir Robert Peel's nine principles, which are:

- 1) To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
- 2) To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect.
- 3) To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
- 4) To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
- 5) To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.
- 6) To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
- 7) To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
- 8) To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary, of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.
- 9) To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them).