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Remedies for Police Shootings: A Comment on Slater

Richard Delgado*

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INTRODUCTION

In *It Should Never Be Justified*,¹ Allen Slater points out that the law treats police solicitously. Courts and review boards approach police-shooting cases by means of a binary system of classification in which the officer’s conduct was either justified or not.² Often the reviewing body finds the shooting justified, because the police can avoid liability by merely asserting that the officer feared for their life.³

Sometimes, this is as it should be—the suspect was armed and dangerous, and the officer had to act quickly. But often the situation is ambiguous: The victim was fleeing with their back turned away from the officer, and it was not clear whether they were armed or dangerous.⁴ Or the officer had plenty of backup

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1. Allen Slater, *It Should Never Be Justified*, Berkeley J. African-American L. & Pol. (2020) (herein cited by ms. pages).

2. *Id.* at ms. 1–2.

3. *Id.* at ms. 2 & nn. 7, 23 & n. 112, 25 n.119.

4. *Id.* at ms. 1–2.

and could have taken measures to de-escalate the situation.⁵ Or the suspect was a nonspeaker of English and slow to obey the officer's commands.⁶

I. THE REIGNING PARADIGM: JUSTIFIED OR NOT JUSTIFIED?

In most situations like these, the binary paradigm will find the officer's behavior justified, since the contrary finding (unjustified) will strike the public as harsh. Police must act quickly, most might reason, especially when the circumstances are full of ambiguity, with poor lighting, bystanders in possible danger, and suspects who act upset or defiant.⁷ Imagining themselves in situations like those and offered only two alternatives—justified or not—most observers might easily find the officer's behavior justified.⁸

Slater offers an alternative to the binary paradigm. His insight is elegant and persuasive. It is that the law of police shootings need not confine itself to a duality of options. In other situations where the law is charged with assessing a degree of fault, it offers a wide range of options. In tort law, for example, negligence may be ordinary or reckless, contributory, proportional, vicarious, based on *res ipsa loquitur*, or on negligence as a matter of law.⁹

With police shootings, nothing prevents us from expanding the range of options, much as tort law has done.¹⁰ Slater offers a number of such options and explains why they would enable decision-makers to provide a more nuanced brand of justice.¹¹ He also notes that many victims of police shootings will be young Black men, with each incident containing the potential to inflame the minority community, especially when the officer appears to have acted precipitously or had a past record of shootings that appear to have been avoidable.¹²

5. *Id.*

6. See generally Richard Delgado and Jean Stefancic, "Alto, Cabrón. A Ver Las Manos": A Police Officer's Expectation of Instant Obedience When a Civilian Does Not Speak English: A Comment on *United States v. Parker (the Indian Grandfather Case)*, 68 ALA. L. REV. ONLINE 7 (2016) (discussing one widely publicized such case).

7. See Slater, *supra* note 1, at ms. 1–2.

8. *Id.* at ms. 14 (noting that the current paradigm is one of "broad tolerance").

9. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed., 1984) (discussing types of negligence liability and defenses).

10. See Slater, *supra* note 1, at ms. 2 (listing six such possibilities).

11. *Id.* at 32–40 (proposing a spectrum approach).

12. E.g., *id.* at ms. 28 & n.140; V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, nn. 14, 21, 29 (2019); Errin Haines, *Family Seeks Answers in Fatal Police Shooting of Louisville Woman in Her Apartment*, WASH. POST (May 11, 2020), <https://www.washingtonpost.com/nation/2020/05/11/family-seeks-answers-fatal-police-shooting-louisville-woman-her-apartment/> [<https://perma.cc/Z9RN-6UBW>]. See generally Richard Delgado, *The Trayvon Martin Trial - Two Comments and an Observation*, 47 J. MARSHALL L. REV. 1371 (2014) (discussing an example stemming from a neighborhood watch).

This Comment adds a further reason for expanding the range of options beyond a simple binary. To see why this is advisable, consider why the police-shooter binary may have developed and found favor.

II. WHY HAS A BINARY PARADIGM FOR POLICE SHOOTINGS ARISEN AND PERSISTED?

The binary almost certainly came about—and endures—because it enables and expresses a situational form of class favoritism.¹³ By contrast, tort law exhibits a wide variety of categories, perhaps because with such cases we feel a need to proceed with caution. In the typical torts action, the defendant is a corporation or an insurance company¹⁴—in either case a pillar of the community.¹⁵ We naturally want corporate actors to be careful, for example by testing their products thoroughly before releasing them to the public.¹⁶ But we begin with the presupposition that these defendants are *worthy*—making money, hiring people, donating to our favorite causes or political groups. This accounts for much of the complexity of the tort law of negligence.¹⁷ It needs to be flexible and sensitive, neither over- nor under-protecting actors who are vital cogs in our corporate economy. We need, in short, to make fine distinctions, and the law obligingly creates them.

A. *Parties, Rich or Poor*

With tort cases, hardly anyone sues a poor man—he is judgment proof. As has been seen, this body of law proceeds with defendants in mind who are of the corporate variety, or if they are individuals, rich. Plaintiffs, of course, can be either rich or poor, but defendants are almost always well-heeled.

With police shootings, one encounters much the opposite situation. Plaintiffs are typically young Black men like Freddie Gray or Trayvon Martin.¹⁸ If the law makes it difficult for them to recover, what is the harm in that? In an American society that places little value on Black lives, there is no harm. While offensive stereotypes depict young Black men as going nowhere in life,¹⁹ a police officer represents the “thin blue line” that society relies on for safety—so why

13. Slater attributes the binary paradigm’s persistence to dehumanization. See Slater, *supra* note 1, at ms. 2, 16–22.

14. PROSSER AND KEETON, *supra* note 9.

15. *E.g.*, a manufacturer of cars, pharmaceuticals, or other such necessities of life.

16. See generally RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) (providing examples regarding the automobile industry).

17. See *supra* notes 13–15 and accompanying text, explaining how a nuanced remedial paradigm arose.

18. Rebecca R. Ruiz, *Baltimore Officers Will Face No Federal Charges in Death of Freddie Gray*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/freddie-gray-baltimore-police-federal-charges.html> [<https://perma.cc/2K62-WDWS>]; Delgado, *Trayvon Martin Trial*, *supra* note 12.

19. Slater, *supra* note 2 at ms. 27–28 (discussing the dehumanizing stereotypes of African-Americans).

saddle police officers with a bad mark that will hamper their ability to carry out their work?

B. Suits Against Respected Defendants

The police officer emerges, then, as the criminal law counterpart of the corporate defendant in a tort action for products liability. In both settings, we are reluctant to impose liability too readily for defendants we admire and respect. If plaintiffs sometimes go without a remedy, that is the price of living in a highly complex, advanced economy.

C. Similar Situations Where A Remedial Paradigm Exhibits Class Favoritism

Slater's article invites broader consideration of situations where the law of remedies exhibits a structure reminiscent of the one he finds with police shootings, except in reverse. Consider the law of prejudgment remedies, for example. In landlord-tenant cases or cases in which a merchant brings an action against a defaulting installment purchaser of a household appliance, remedies commonly favor the party seeking relief. Similarly, unlawful-detainer statutes typically enable a landlord to secure quick recourse against a tenant alleged to be behind in their rent, merely by filing a three-day notice with the clerk of the court.²⁰ The local sheriff then puts the tenant out; the trial, if any, comes later. When it does, the tenant may show that their failure to pay was justified because the landlord refused to make essential repairs so that the tenant had to make them at their own expense.²¹ Similar speedy remedies are available against a defaulting installment purchaser.²²

They are not available, however, when the poor seek relief against an empowered actor of some sort. Imagine that a millionaire driving a Cadillac runs over your law school classmate in a crosswalk in front of the law school. Your friend is almost certain to receive a remedy—eventually.²³ But unless the insurance company is exceptionally obliging or the millionaire a paragon of social responsibility, they may have to wait two years for the trial. Unlike the landlord, they cannot obtain damages immediately, and are subject to a trial later if the other party requests one—even though they may be disabled and need the money to pay their medical bills. In short, no pre-judgment remedy for them.

Remedial structures that exhibit such favoritism are manifestly unfair. Yet with police shootings, many find it easy—perhaps because they instinctively side with the officer—to ignore the inequity in the current structure of remedies.

20. *See generally* Lindsey v. Normet, 405 U.S. 56 (1972) (upholding an Oregon statute that permitted summary eviction for a tenant behind in their rent).

21. *Id.*

22. *See* Connecticut v. Doehr, 501 U.S. 1, 22–24 (1991).

23. Richard Delgado, *Making Pets*, 77 TEX. L. REV. 1571, 1575 & n.35 (1999).

Fortunately, Slater does not. This Comment agrees and suggests a reason why society has been slow to see a need for a new paradigm of police liability and a reason for thinking the delay is not merely an oversight but a function of class and race bias. The current binary paradigm for police shootings is not only irrational, as Slater points out. It is biased and unfair.

D. The Backdrop: A History of Race- And Class-Based Oppression

For much of our history, the United States plainly did not want minorities participating in most desirable markets and knowledge-creation institutions like universities and top-tier jobs.²⁴ Instead, society systematically relegated them to inferior schools, neighborhoods, and lines of work.²⁵

A materialist analysis like the one outlined above can begin to explain the current dichotomy and show what is at stake.²⁶ Providing the minority community with a voice in choosing how to see, and avenge, police shootings can make the police more careful, provide some of the victims of excessive force with a remedy, and help the legal community reinforce the kind of behavior it wants and expects from guardians who carry guns and act as agents of a powerful state. We should give careful consideration to Slater's suggestion that we provide more than two options for decision-makers charged with evaluating police shootings.

CONCLUSION

It behooves us, as well, to ponder how we acquiesced in such a plainly inadequate approach. As we have seen, other remedial schemes evince a similar one-sided approach.²⁷ Like the miner's canary, police shootings simply stand out, showing how historical forces shape current bias, in sharp relief.

24. See generally DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2009) (discussing African-American legal fortunes in a number of settings going back to colonial times).

25. *Id.*

26. By "materialist analysis," I mean one that examines a legal practice in light of the material interests it serves, usually those of the ruling class.

27. See *supra* Part II-C. See generally Jennifer Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 *HOW. L.J.* 99 (2005) (discussing how little tort law values Black lives).