MORE THAN BIAS: HOW LAW PRODUCES POLICE VIOLENCE

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ABSTRACT

Excessive use of force by law enforcement continues to be a serious problem that leaves bodies broken and communities grieving. This violence is thought to largely emanate from the biased predispositions of individual officers and police departments. While personal and organizational biases are key considerations, it is important to examine the role that law plays in creating the conditions for police to use force illegitimately. This Essay assesses the landscape of police use-of-force doctrine and offers sociological insight into how seemingly neutral Fourth Amendment law that focuses on whether certain applications of force are "reasonable" can predictably lead to avoidable deaths. Understanding these sociological dynamics can provide a meaningful roadmap for reform.

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INTRODUCTION

Police use of force has been a significant issue in the United States for many years, with communities of color disproportionately bearing the brunt of this violence.[1] Much of the legal and social science literature on police use of force frames the issue as stemming largely from implicit or explicit biases harbored by police officers and, to a lesser extent, policy choices made by police departments, such as stop and frisk.[2] Thus, the conversation on developing interventions that might reduce police use of force mostly occurs at the individual and departmental levels. Eliminating bias among individual officers and administrations is often thought to be the most effective path towards more equitable policing.

Of course, implicit and explicit bias in policing are important problems that need to be addressed. Such work is an unqualified good and is sorely needed. There is too much evidence of black and brown people suffering and dying at the hands of the police simply because discriminatory attitudes, rather than any real or perceived threat, shape officers' decisions and practices when engaging communities of color.[3] However, the contemporary focus on implicit and explicit biases obscures another significant contributor to police violence: legal doctrine.

We tend to think that constitutional standards that shape when, how, and under what circumstances the state can use violence on citizens provide a set of ground rules that restrict the government's behavior in order to protect

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[1] *See* German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities [https://perma.cc/LAT8-RH54] ("An analysis of the available FBI data . . . found that US police kill black people at disproportionate rates: Black people accounted for 31 percent of police killing victims in 2012, even though they made up just 13 percent of the US population."). *But see* Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1255-59 (2019) (contesting claim that there are racial disparities in officer-involved shootings).

[2] *See generally* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 23-95 (2019) (detailing mechanics of implicit biases and how these biases impact police behavior and policies); Susan A. Bandes et al., *The Mismeasure of* Terry *Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176, 189 (2019) ("Police chiefs, commanders, and other law enforcement policy-makers are subject to (and in many cases, open to) formal and informal influences as they craft policies and priorities for their communities."); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017) (arguing that because of implicit racial bias and anxiety, "it is inevitable that *Terry* stops and frisks will result in unjustified racial disparities regardless of officers' conscious racial motivations even when Black and White individuals are acting identically").

[3] *See* Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1461-62 (2018) (detailing how U.S. Justice Department's Ferguson Report and recent stop-and-frisk cases represent "gold standard for 'proving' discrimination" by police).

individual rights and liberties.[4] A closer examination of the legal developments giving rise to modern use-of-force jurisprudence reveals an unexpected finding: not only does law fail to provide the protection that many people think it does, it also creates the conditions for the very violence that it is supposed to prevent. Specifically, scholars such as Paul Butler, Devon Carbado, and Tracey Maclin have provided eloquent and powerful analyses on how criminal law and criminal procedure produce inequitable and deadly outcomes for minority populations.[5] This Essay discusses research that blends these doctrinal and theoretical critiques with sociological approaches to expose the mechanisms through which specific legal strategies allow ostensibly "neutral" legal rules to become a significant determinant of police violence that brutalizes, maims, and kills thousands each year.

Rather than seeing such violence as a product of individual decision-making, this approach embraces legal epidemiology to highlight how law and legal institutions produce police violence that adversely impacts health outcomes.[6]

[4] *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1283 (2019) ("[T]he Court and legal scholars have largely framed the Fourth Amendment as a legal shield against police abuse and mistreatment or as a repository of legal rights that protect citizens from under State power . . . .").

[5] *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 2 (2017) (describing that "there has never . . . been peace between black people and the police" because of "criminal process itself," where "police, *as policy*, treat African Americans with contempt"); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537 (2017) (arguing that legality of stops and frisks has facilitated "'wholesale harassment' of African Americans"); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 362 (1998) (stating that Supreme Court's sanctioning of pretextual stops of black motorists because of burdens of performing balancing analyses of costs and benefits of race-based traffic stops "is a perfect illustration of why many blacks feel like second-class citizens in America's judicial system").

[6] Legal epidemiology is the study of how law is a determinant of individual and population health outcomes. *See generally* Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135 (2016). For examples of other epidemiological approaches to police use of force, see Bandes et al., *supra* note 2, at 184 ("Continual exposure to [unwelcome police presence and contact] has been found to produce poor health effects at the community level."); Juan Del Toro et al., *The Criminogenic Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NAT'L ACAD. SCI. 8261, 8261 (2019) (presenting quantitative and qualitative survey results of young nonwhite boys' experiences with police stops, finding that "[p]olice stops predict decrements in adolescents' psychological well-being and may unintentionally increase their engagement in criminal behavior"); Nancy Krieger et al., Essay, *Police Killings and Police Deaths Are Public Health Data and Can Be Counted*, PUB. LIBR. SCI. MED., Dec. 8, 2015, at 1, 2 ("Just as epidemic outbreaks can threaten the public's health, so too can police violence and impunity imperil communities' social and economic well-being, especially if civil unrest ensues.").

This method sharpens our understanding of precisely how police violence persists in light of seemingly protective constitutional rules while also opening up new ways for meaningful intervention.

Part I of this Essay discusses the major Supreme Court decisions that created the framework for modern use-of-force jurisprudence, with a focus on the transformative nature of the 1989 Supreme Court decision *Graham v. Connor*.[7] Part II discusses how police policies governing use of force evolved in the shadow of these constitutional developments. It is not uncommon for observers to assume that the Supreme Court has provided clear guidance on the constitutional rule regarding police use of force and that police departments translate this rule into specific policies that guide officer decision-making to protect community members. However, a closer look at the constitutional rule and its on-the-ground implementation in a series of local use-of-force policies paints a different story. In reality, not only is there tremendous discretion given to officers and departments, but this discretion, when litigated, often shapes how federal courts understand the nature of the constitutional rule itself. This is what Zachary Newman and I have called the *endogenous Fourth Amendment*, where constitutional meaning is created from the ground up by federal courts' deference to use-of-force policies that reflect police officers' perspectives and preferences, rather than from the "top down" by judicial interpretation of the Constitution.[8] Part III draws upon my other work with Newman,[9] which explores opportunities to leverage legal endogeneity theory to improve legal and health outcomes for racial minorities by reimagining this dynamic as a progressive space where the community can redefine constitutional expectations. This Essay concludes with a call for coordinated disruption of this aspect of the Fourth Amendment through community engagements with local policies governing police use of force as a way to supplement federal courts' shortcomings in protecting people from excessive force by the police.

I. LAW AND POLICE USE OF FORCE: WHAT COUNTS AS "EXCESSIVE"?

Some date the origins of police use of force as a tool of social control to the antebellum slave patrols that were used in many parts of the South to ensure

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[7] 490 U.S. 386 (1989).

[8] Obasogie & Newman, *supra* note 4, at 1315 ("[L]egal endogeneity operates as a recursive process through which the status quo can be maintained, and the regulated group gives life to the practices that become the legal standards that ultimately regulates it.").

[9] Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 444-45 (2019) (describing how, if police policies shape how federal courts think about constitutionality of force, then public actors can work with police to reshape their policies, inverting legal endogeneity "from a process police use to protect themselves to one where the public could intervene for reform").

enslaved persons' submission to slave owners.[10] Yet a good place to begin the discussion of the modern law pertaining to police use of force is the 1961 Supreme Court decision *Monroe v. Pape*.[11] Prior to *Monroe*, the federal civil rights statute 42 U.S.C. § 1983 had been largely unused since its inception during the Reconstruction Era.[12] Legislators developed § 1983 (originally enacted as section 1 of the Federal Civil Rights Act of 1871) in the aftermath of the Civil War in response to violence that white supremacists were inflicting upon African Americans—often with either the active participation of local officials or their failure to enforce the law equally.[13] Section 1983 provides a private cause of action for victims to sue state actors who deprive them of constitutional rights, such as those provided by the Fourteenth Amendment.[14] Despite early successes, the end of Reconstruction in the late 1870s led § 1983 to largely lay dormant as a mechanism that could protect formerly enslaved persons from racial violence.[15]

Monroe changed this landscape by reaffirming the viability of § 1983 as a way to hold state officials responsible when they violate constitutional rights.[16]

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[10] *See* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 218 (2003) (arguing that "[m]emories of white law enforcers' control over the actions of slaves and former slaves endured even into the twentieth century" and were used as "illustrations of proper police behavior well after slavery's end"); Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, THE CONVERSATION (June 4, 2019, 8:42 AM), http://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816 [https://perma.cc/XV4F-99XL] (noting that "[p]olicing in southern slave-holding states had roots in slave patrols, squadrons made up of white volunteers empowered to use vigilante tactics to enforce laws related to slavery" and that this policing preceded "modern-day police brutality against African Americans").

[11] 365 U.S. 167 (1961) (holding that state actors can be held liable under § 1983 for violations of constitutional rights but that local governments are immune from suit under § 1983), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (overruling *Monroe* insofar as it held that local governments are immune from suit under § 1983).

[12] *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 125 n.9 (1999) ("Prior to [*Monroe*], Section 1983 was largely unused as a method of enforcement of individual rights.").

[13] *See* Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 484 (1994) ("Section 1983 was enacted as a response to the systematic injustices leveled against blacks in the aftermath of the Civil War." (footnote omitted)).

[14] 42 U.S.C. § 1983 (2018).

[15] *See* George Rutherglen, Essay, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 951 (2003) ("Section 1983 received only sporadic enforcement while Reconstruction lasted, and it fell into disuse almost immediately thereafter.").

[16] *See* Pamela S. Karlan, Foreword, *Democracy and Disdain*, 126 HARV. L. REV. 1, 25 (2012) ("In *Monroe v. Pape*, the Court construed 42 U.S.C. § 1983, initially enacted as part of the Civil Rights Act of 1870 [sic], to authorize a federal damages cause of action for

It re-energized a crucial legal question for civil rights litigation: When does police use of force become excessive and therefore unconstitutional? In the immediate aftermath of *Monroe*, § 1983 plaintiffs harmed by police violence used diverse legal strategies to bring claims against officers in federal court, including substantive due process, equal protection, the Fourth Amendment, and § 1983 as an independent source of rights.[17] However, after the Second Circuit's 1973 decision in *Johnson v. Glick*,[18] most § 1983 cases that explored whether *particular actions* by law enforcement violated the Constitution began using a Fourteenth Amendment substantive due process analysis to understand the scope of victims' rights and the lawfulness of police behavior.[19] This approach was heavily criticized at the time as it focused, in part, on an officer's mental state to determine whether force was used in "good faith" or whether it was deployed "maliciously and sadistically for the very purpose of causing harm"[20]—a state of mind that is nearly impossible to prove in court.

Importantly, many modern analyses of police use of force in this post-*Monroe* era begin with *Tennessee v. Garner*,[21] a 1985 case in which an officer killed an unarmed, fleeing black teen by shooting him in the back of the head.[22] At the Supreme Court, the bulk of the discussion focused on the constitutionality of the Tennessee statute, which authorized using deadly force against fleeing persons who posed no imminent threat.[23] In its decision, the Court found that the Tennessee statute was unconstitutional because these types of state laws were "unreasonable." Accordingly, the Court concluded that the use of deadly force in such circumstances violated the Fourth Amendment.[24]

While *Garner* marked an important moment in police use-of-force jurisprudence by affirming the limited rule that state statutes broadly authorizing

violations of constitutional rights committed by state and local government officials." (footnote omitted)).

[17] *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1485 (2018).

[18] 481 F.2d 1028 (2d Cir. 1973).

[19] Graham v. Connor, 490 U.S. 386, 393 (1989) ("In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part 'substantive due process' test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.").

[20] *Glick*, 481 F.2d at 1033; *see also* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 238 (1984) (criticizing *Glick*'s substantive due process test as overly reliant on subjective factors "to be weighed on a case-by-case basis").

[21] 471 U.S. 1 (1985).

[22] *Id.* at 4 (detailing deadly force used by police officer to prevent plaintiff's decedent, Edward Garner, from fleeing scene of potential crime).

[23] *Id.* at 22.

[24] *Id.* at 11.

deadly force against unarmed fleeing persons are unconstitutional, it did not fully answer the more particular question of the proper constitutional standard courts should use to determine which actions by police officers count as excessive force. Given this lack of guidance, *Glick*'s substantive due process standard remained influential after *Garner*, and federal courts often looked to it as the controlling rule in determining when everyday actions regarding police use of force were permissible and when they were out of constitutional bounds.[25]

This was the case until the 1989 Supreme Court decision in *Graham v. Connor*. In this case, police stopped and beat a diabetic man by the name of Dethorne Graham who was suffering from an insulin reaction. The officers claimed that they thought he was behaving suspiciously and that they mistakenly believed he was intoxicated.[26] Graham filed a § 1983 suit against the Charlotte police officers and argued that their use of force against him violated substantive due process under *Glick*. The trial court and the Fourth Circuit held that the officers' use of force was lawful.[27] However, the Supreme Court moved in a dramatically different direction. The Court said that the proper constitutional standard for determining whether police use of force was excessive is not substantive due process under the Fourteenth Amendment but whether the force was "reasonable" under the Fourth Amendment, which prohibits unreasonable searches and seizures.[28] (Use of force by police during an investigatory stop or arrest is considered to be a seizure.)[29]

Shifting the constitutional standard from the Fourteenth Amendment to the Fourth was a momentous, and often underappreciated, change in use-of-force frameworks. While the substantive due process approach under *Glick* was limited and unduly focused on officers' intent, the fact that this inquiry was doctrinally located within the Fourteenth Amendment allowed for *possibilities* to think through police violence as a structural issue. This could have tied modern use-of-force inquiries to the post-Civil War sensibilities surrounding the origins of the Amendment. Analyzing police use of force under the Fourteenth Amendment suggested that this behavior invokes the injustices that the crafters of the Amendment sought to prohibit. For example, the Fourteenth Amendment's Equal Protection Clause highlights an awareness that both racial groups and individuals can be harmed by unjust laws and practices.[30] However,

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[25] *See* Graham v. Connor, 490 U.S. 386, 393 (1989) (explaining that, in years following *Glick*, most courts applied substantive due process to all § 1983 cases).

[26] *Id.* at 388-89.

[27] *Id.* at 390-92.

[28] *Id.* at 395.

[29] "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." Tennessee v. Garner, 471 U.S. 1, 7 (1985) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

[30] Jim Crow segregation provides an example of this dynamic, where the practice both stigmatized racial minorities as a group and unjustly hurt opportunities for individuals. However, this potential broader awareness of the Equal Protection Clause has been tempered

shifting the conversation from what counts as unlawful use of force under the Fourteenth Amendment to what is reasonable under the Fourth Amendment largely eliminated such possibilities for structural and race-conscious assessments of police force.

Zachary Newman and I engaged in a qualitative examination of a sample of excessive-force cases before and after *Graham* to assess how the decision impacted the way that federal courts approached this issue.[31] We found that federal courts did not regularly rely on the Fourth Amendment in excessive-force cases before *Graham*—from 1962 (after *Monroe* revitalized § 1983 litigation) to 1988.[32] Only 28% of these cases substantively discuss the Fourth Amendment.[33] This changed considerably after the 1989 *Graham* decision. Between 1990 and 2016, 90.4% of these cases discussed the Fourth Amendment.[34]

This shift is significant. As a part of the Bill of Rights, the Fourth Amendment emerged out of a historical moment that was indifferent to racial-group conflict and instead largely concerned the relationship between government and individuals—specifically white, property-owning men.[35] Part of the purpose of the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—was to expand the understanding of the Constitution's duties to include racial and group dynamics beyond the individual and to ensure that the federal government affirms certain rights that states could not unilaterally thwart. In moving the analysis of police use-of-force cases from the Fourteenth Amendment to the Fourth Amendment, *Graham* solidified an individualist perspective in federal courts' approach to excessive-force cases by channeling what are often racialized police engagements into narratives about individual behavior and reasonableness. Importantly, the incorporation of the Fourth Amendment through the Fourteenth Amendment's Due Process Clause allows the Fourth Amendment to apply not only to federal officials but also to state and local police. Nevertheless, *Graham* marks a significant departure from situating police use-of-force conversations within Fourteenth Amendment frameworks that, broadly construed, had the *potential* to be more sensitive to how state violence disproportionately affects racial minorities.

This move toward a Fourth Amendment framework that addresses police violence as an individual issue between police officers and their victims—rather than as an iteration of racial subordination—impedes federal courts' ability to

by Supreme Court decisions since the 1970s that place the weight of these analyses on the intent of the discriminator rather than on the impact on the person discriminated against. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 319 (1987); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280-81 (1979); Washington v. Davis, 426 U.S. 229, 252 (1976).

[31] Obasogie & Newman, *supra* note 17, at 1482-84.

[32] *Id.* at 1486.

[33] *Id.*

[34] *Id.*

[35] *See id.* at 1471.

fully appreciate the role of race and racism in cases that challenge police use of force. Prior to *Graham*, it was not uncommon for this individual framework to appear alongside a substantive due process approach.[36] However, mandating a reasonableness standard under the Fourth Amendment solidified and augmented this individualist perspective to limit the types of legal claims victims could raise.[37]

In making this momentous and consequential move toward reasonableness under the Fourth Amendment, the Supreme Court did not provide any specific definition of or guidance on what "reasonable" means in the use-of-force context. Nor did it provide any real guidance on how lower courts should determine when police use of force is reasonable. In his majority opinion in *Graham*, Chief Justice Rehnquist provided a few broad statements on how reasonableness should be applied, noting that federal courts should pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade by flight."[38] Chief Justice Rehnquist also noted that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[39]

While giving birth to a new legal framework on how federal courts should approach police use of force, the new Fourth Amendment standard for what counts as unlawful excessive force was—and still is—vague and ambiguous. In the aftermath of *Graham*, many people, including Graham's lawyers, thought that the new reasonableness test would be more objective than the substantive due process standard under *Glick* and would lead to fairer outcomes for victims. But that is not how things turned out for Graham and many other victims of police violence over the past three decades. After the Supreme Court's decision, *Graham* went back to the trial court so that the evidence could be reviewed under the new Fourth Amendment standard.[40] The jury concluded that the police officers' treatment of Graham, which left him with lacerations, persistent ringing

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[36] *Id.* at 1485.

[37] *See id.* at 1473 (arguing that applying Fourth Amendment to claims against use of force by police "limit[s] alternative means of addressing the group-based harm that fundamentally characterizes racialized police violence by ensuring that isolated criminal cases and civil suits are the only means to seek remedies").

[38] Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)).

[39] *Id.* at 398 (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

[40] *See* Eileen Sullivan, *Supreme Court Case to Shape Ferguson Investigation*, AP NEWS (Aug. 22, 2014), https://apnews.com/6286d74574014edeb2cbb48fda368884 [https://perma.cc/2ATB-7XEK].

in his ear, and a broken foot—all because police officers mistook a diabetic experiencing a medical emergency as a "drunk"—was somehow reasonable.[41]

II. USE-OF-FORCE POLICIES AND LEGAL ENDOGENEITY THEORY

Federal court decisions after *Graham* continued to affirm and replicate this ambiguity in determining what counts as a reasonable or an excessive use of force by law enforcement.[42] Scholars have voiced concerns over the limited tactical guidance *Graham* provides law enforcement on how to use force in a way that complies with the Constitution.[43] In the absence of more specific guidance from federal courts on what "reasonable" means, many local police departments created their own use-of-force policies to guide officers' engagements with community members. But these policies often fail at providing more clarity.

Newman and I engaged in a qualitative assessment of use-of-force policies from the seventy-five largest American cities to better understand how police departments are instructing officers to lawfully use force.[44] We found that these policies largely replicate *Graham*'s ambiguity with regard to defining reasonableness under the Fourth Amendment. Specifically, each policy that we examined repeated *Graham*'s reasonableness standard—often citing directly to the case—without providing more insight.[45] Overall, these policies provided few protections for community members or substantive constraints on police behavior. For example, only 17% of the policies required that officers use force that is proportional to the resistance offered, and only 31% instructed officers to use all available alternatives before utilizing deadly force.[46] These administrative rules on using force show how *Graham*'s ambiguity creates the conditions for wide discretion for law enforcement that leaves community members without adequate protection.

Newman and I also examined how federal courts use these force policies when they become a part of § 1983 excessive-force claims. We found that federal courts often reference or defer to the policies that police departments create *as the appropriate legal interpretation* of Fourth Amendment reasonableness.[47] *Peterson v. City of Fort Worth*,[48] a 2008 case from the U.S. District Court for the Northern District of Texas, highlights this dynamic. In *Peterson*, an officer struck the plaintiff's leg hard enough to rupture his femoral

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[41] *See id.*

[42] *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 285 (2017).

[43] *See, e.g.*, *id.* at 285.

[44] Obasogie & Newman, *supra* note 4, at 1300-03.

[45] *Id.* at 1303.

[46] *Id.* at 1308.

[47] *Id.* at 1322.

[48] Peterson v. City of Fort Worth, No. 4:06-cv-00332, 2008 WL 440301 (N.D. Tex. Feb. 19, 2008).

artery and cause significant damage.[49] In its decision, the court notes that "[u]nder the Fort Worth Police Department's guidelines, a knee strike is considered an intermediate use of force and not the deadly use of force or a technique that could cause serious injury" and that "[a]ccording to the police department's guidelines . . . the officers used the appropriate level of force to protect their safety and minimize Peterson's potential threat."[50] The court in *Peterson* effectively ignored the broader circumstances and significant harm done to the plaintiff and instead focused on whether the use-of-force policy—not the U.S. Constitution—permitted such force in this situation.

This decision draws attention to the extent that police excessive-force jurisprudence has moved in an unexpected direction. Constitutional law is thought to be exogenous to society—that is, observers often believe that law creates the ground rules for how legal actors and community members behave, with the courts interpreting the Constitution to derive its meaning and enforcing it in a "top-down" manner. *Peterson* (as well as many other decisions) shows how in the excessive-force context, the meaning of the constitutional rule pertaining to what counts as reasonable is often *endogenous* or created "bottom-up." This is an important distinction for understanding how legal meaning is made.

Professor Lauren Edelman first developed legal endogeneity theory in the employment law context to understand how otherwise well-meaning and progressive civil rights statutes—intended to reduce racial and gender biases in the workplace—become co-opted to affirm the managerial preferences of the organization.[51] Edelman's framework has three parts: (1) vague and ambiguous legal standards; (2) organizations' development of symbolic policies that suggest compliance in response to new and ambiguous legal standards; and (3) a response by the courts that, instead of creating their own independent standards, affirms the organization's symbolic gestures as adherence to law.[52] In the employment law context that Edelman studies, she found that courts often reference, refer to, or defer to organizations' interpretations of Title VII as a meaningful implementation of the law even though these largely symbolic

[49] *Id.* at *2.

[50] *Id.* at *10.

[51] LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 14 (2016) ("Legal endogeneity theory reveals a new obstacle that limits the potential of social reform laws, particularly in the context of laws that seek to regulate organizations: judicial deference to symbolic structures that appear to advance the rights of the 'have nots' but frequently fail to do so.").

[52] *Id.* at 12 (arguing that "organizations respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law . . . [which leads] legal actors [to] understand compliance in terms of the presence or absence of these structures and thus fail to scrutinize their effectiveness").

(rather than substantive) applications often reflect preferences that favor management over the workers who might experience discrimination.[53]

While Edelman's work is in the statutory context, Newman and I offer empirical evidence to show that a similar dynamic occurs with regard to constitutional law in the Fourth Amendment use-of-force context.[54] Rather than the Constitution stating a rule that the courts interpret and apply in cases, federal courts often refer or defer to the largely symbolic use-of-force polices that police departments have produced. This shapes federal courts' understanding of the constitutional meaning of "reasonable," whereby they then apply this managerial perspective to the facts at hand. This suggests that police departments' use-of-force policies often play a central role in defining what type of force is deemed excessive and unconstitutional. Federal courts have largely abdicated their responsibilities to interpret and enforce the Fourth Amendment impartially, allowing many police departments to essentially create the meaning of constitutional rules.

III. LEGAL ENDOGENEITY THEORY AND PROGRESSIVE REFORM OF EXCESSIVE-FORCE JURISPRUDENCE

The social and legal conversation surrounding police use of force often boils down to a core issue: accountability. If police officers have the ability to use force against community members to uphold the law, they should be held accountable to ensure that this force is used appropriately. Legal endogeneity theory, as a way to understand the Fourth Amendment, provides new insights into how excessive uses of police force can persist alongside legal rules that are supposed to offer protection. Legal endogeneity theory suggests that this problem of police use of force does not merely stem from biased police officers, but that legal doctrine is structured to allow police perspectives on what counts as reasonable to shape judicial determinations of whether particular applications of force violate the Fourth Amendment.

The dynamics behind legal endogeneity theory often leave victims of organizational abuses without recourse because managerial perspectives are reframed and deferred to as the objective legal rule. This silences victims' experiences and leaves injustice without a remedy. In the use-of-force context, this allows police policies to become the constitutional standard for how federal courts understand which types of force are reasonable or excessive. When police create the constitutional rule and judges abandon their responsibility to impartially interpret the Constitution, the conditions for rampant police abuse are created; there is little room for accountability. Regardless of (yet often in coordination with) any individual bias, legal endogeneity theory provides an explanation for the persistence of police violence despite purported legal protections.

[53] *Id.* at 14 (describing deference courts give to organizations' implementation of law even when these practices violate law, as these compliance programs shape how law is interpreted).

[54] Obasogie & Newman, *supra* note 4, at 1323.

Understanding the doctrinal aspects of how courts read excessive uses of force as reasonable draws attention to the broader issue of police reform. Current approaches to reducing instances of excessive force by police often focus on individual-level mediators, such as implicit-bias and racial-sensitivity training.[55] But to the extent that the Supreme Court has not rethought the *Graham* holding that gives life to the endogenous nature of excessive-force jurisprudence, remedies at the individual level are unlikely to address the structural problems relating to the inordinate influence that police use-of-force policies have in defining Fourth Amendment reasonableness. This tension between the structural and doctrinal nature of the problem and the individual nature of many remedies at least partially elucidates the persistence of police violence in communities of color.

While the endogenous nature of the Fourth Amendment creates seemingly entrenched problems, we can also view legal endogeneity theory as a standpoint from which to create opportunities for reform. Local law enforcement agencies are not entirely autonomous entities and external mechanisms, such as consent decrees with the federal government, can shape their administrative policies. Indeed, civilian oversight boards or other community-level engagements designed to align use-of-force policies with community expectations can inform and influence local law enforcement agencies. When police departments redesign use-of-force policies in collaboration with community members to highlight values and practices such as de-escalation, proportional use of force, and stopping and reassessing force usages during conflicts—approaches that are not common in existing use-of-force policies[56]—this process can create new policy baselines that can inform how courts understand what "reasonable" means as a constitutional norm.

Thus, just as iterations of legal endogeneity theory can lead to harmful policy baselines to which federal courts often defer as appropriate interpretations of Fourth Amendment reasonableness, progressive policy reforms that limit police force and focus on nonviolent tactical resolutions can become reference points from which federal courts come to understand what is reasonable. Therefore, consistent community engagement may very well be key in making sure that constitutional interpretations of the Fourth Amendment become appropriate mechanisms to protect civilians from excessive force.[57]

CONCLUSION

In an ideal world, the excessive-force problem would be addressed by the Supreme Court acknowledging that police use of force is a structural problem

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[55] *See, e.g.*, L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2084-97 (2011) (describing training that police departments have implemented or should implement to reduce implicit racial bias in police officers).

[56] *See* Obasogie & Newman, *supra* note 4, at 1303.

[57] For an extended discussion and modeling of what this type of engagement might look like, see generally Obasogie & Newman, *supra* note 9.

that disproportionately harms minority communities. A model solution would involve a clear statement from the court that excessive use of force by the police is more appropriately addressed through a Fourteenth Amendment equal protection assessment that does not rely on limited notions of intent. However, the current configuration of the Supreme Court and the entrenched interpretations of constitutional doctrine suggest that we are far from this becoming a reality. Until then, we can leverage a broader understanding of the endogenous dynamics that lead police administrative policies to shape the constitutional meaning of Fourth Amendment reasonableness to create new policies that might lead to more equitable judicial understandings. Grassroots interventions and continued community engagement with police administrative policies can filter up to become new use-of-force policies to which the courts defer when seeking guidance on what counts as reasonable or excessive police force.

Turning Fourth Amendment deference into disruption is an important intermediary strategy that can save lives. Police use of force continues to kill and maim thousands each year, not to mention the additional psychological and community harms that it creates for minority populations. While the endogenous nature of the Fourth Amendment leads to remarkable injustices, continued advocacy and litigation that acknowledges this dynamic may lead to a future with greater police accountability.