

CONSTITUTIONAL INTERPRETATION WITHOUT JUDGES:
POLICE VIOLENCE, EXCESSIVE FORCE, AND REMAKING THE
FOURTH AMENDMENT

*Osagie K. Obasogie** and *Zachary Newman***

I. INTRODUCTION.....	425
II. ENDOGENEITY, THE FOURTH AMENDMENT, AND THE PROBLEM OF POLICE ACCOUNTABILITY	428
<i>A. Reasonableness and the Fourth Amendment</i>	428
<i>B. Legal Endogeneity and Constitutional Law</i>	430
<i>C. A Lack of Accountability</i>	434
III. PROCEDURAL JUSTICE AND POLICE VIOLENCE.....	437
<i>A. Divergent Perceptions and Police Mistrust</i>	437
<i>B. What Is Procedural Justice?</i>	439
IV. RECREATING THE CONSTITUTIONAL STANDARD: LEGAL ENDOGENEITY, PROCEDURAL JUSTICE, AND A MORE JUST FOURTH AMENDMENT.....	443
<i>A. Integrating Procedural Justice Values into Use of Force Policies: A New Paradigm</i>	444
V. CONCLUSION	447

I. INTRODUCTION

The national conversation concerning the resurgence of White supremacy and anti-Semitism after the 2017 Unite the Right rally in Charlottesville emerged in the context of other anti-racist social movements—most notably, efforts to draw attention¹ to police violence and excessive

* Haas Distinguished Chair and Professor of Bioethics, University of California, Berkeley, Joint Medical Program and School of Public Health. B.A. Yale University; J.D. Columbia Law School; Ph.D. University of California, Berkeley.

** Visiting Scholar, University of California, Berkeley, Haas Institute for a Fair and Inclusive Society. B.A. University of California, Santa Cruz; J.D. University of California, Hastings College of the Law.

¹ Regina G. Lawrence, *The Politics of Force: Media and the Construction of Police Brutality*, at xi (2000) (“By zooming in on certain news events they see as particularly newsworthy, journalists become key mediators in ongoing struggles of various social groups to designate problems and shape how we define those problems.”); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2058 (2017) (“The Black Lives Matter era has catalyzed meaningful discussion about the tense relationship between the police

force used against communities of color.² Yet, despite the visibility created by this social movement,³ the frequency of fatal force has hardly changed.⁴ Moreover, excessive use of force remains extremely racialized,⁵ with African Americans accounting for forty percent of people shot

and many racially and economically isolated communities, and about how policing can be reformed to avoid deaths like those of Rekia Boyd, Michael Brown, Eric Garner, Alton Sterling, Philando Castile, and more.”); Alicia Garza, A Herstory of the #BlackLivesMatter Movement by Alicia Garza, *The Feminist Wire* (Oct. 7, 2014), <https://thefeministwire.com/2014/10/blacklivesmatter-2/> [<https://perma.cc/PLQ3-HGU4>].

² Franklin E. Zimring, *When Police Kill* 3–11 (2017) (“The shooting of Michael Brown in August was followed by protests and pressure for criminal prosecution of the officer involved, and the angry visibility of the conflict in Ferguson, Missouri, generated sustained national attention. The months after the Ferguson episode saw local killings by police injected into a national conversation about police use of lethal force that was more sustained and intense than any before.”); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 *Iowa L. Rev.* 293, 295 (2012) (“The Trayvon Martin killing has caused our nation, again, to confront both our vicious legacy of racial violence and the long road towards racial equity that we still have to travel.”); see also Garza, *supra* note 1 (pointing to the death of Trayvon Martin in 2013 as the beginning of the Black Lives Matter movement).

³ Claudia Rankine, *The Condition of Black Life is One of Mourning*, in *Rebellious Mourning: The Collective Work of Grief* 25, 33 (Cindy Milstein ed., 2017) (“The Black Lives Matter movement can be read as an attempt to keep mourning an open dynamic in our culture because black lives exist in a state of precariousness.”); Garza, *supra* note 1.

⁴ In 2018, 998 people were killed; in 2017, 987 people; in 2016, 963 people; and in 2015, 995 people. 2018 Fatal Force Database, *Wash. Post*, <https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/> [<https://perma.cc/XM2K-6CGB>]; 2017 Fatal Force Database, *Wash. Post*, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> [<https://perma.cc/4AQ2-6F4W>]; 2016 Fatal Force Database, *Wash. Post*, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/BYQ5-F7BT>]; 2015 Fatal Force Database, *Wash. Post*, <https://www.washingtonpost.com/graphics/national/police-shootings/> [<https://perma.cc/JAE3-3GWC>]. Mapping Police Violence provides a higher number than *The Washington Post* does. Mapping Police Violence states that police killed 1,166 people in 2018, while the *Post* reported 998. Mapping Police Violence, <https://mappingpoliceviolence.org/> [<https://perma.cc/47PD-S7WH>]. For more information on the numbers behind police killings, see Zimring, *supra* note 2, at 23–40; Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 *Harv. C.R.–C.L. L. Rev.* 159, 161 (2016); Eugene Scott, *Police Shootings of Unarmed Black People Have Not Ended. But Top-Level Political Conversations About Them Have.*, *Wash. Post* (Mar. 22, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/03/22/police-shootings-of-unarmed-black-people-have-not-ended-but-top-level-political-conversations-about-them-have/> [<https://perma.cc/E3GN-EJCC>].

⁵ See Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 4 (2016); Justin M. Feldman et al., *Quantifying Underreporting of Law-Enforcement-Related Deaths in United States Vital Statistics and News-Media-Based Data Sources: A Capture–Recapture Analysis*, *PLOS Medicine* (2017), <https://doi.org/10.1371/journal.pmed.1002399>. Police violence is not a standalone issue. It intersects with many other sociopolitical problems, like housing. See Maha Ahmed, *A Hidden Factor in Police Shootings*

and killed by police while only constituting fifteen percent of the population.⁶ Blacks are five times more likely to be shot by police than a White person.⁷

Too many times the justice system has failed to hold police accountable—a reality tied to the discriminatory roots of policing in America.⁸ Mainstream legal thought suggests that the Fourth Amendment and judicial interpretations of “what counts” as unconstitutional use of force can serve as legal mechanisms that can protect minorities from police brutality.⁹ This widespread belief stems from the idea that federal courts serve as an interpretive body that is *exogenous* or external to police departments and dictates to them, in a top-down manner, which practices are permissible and when lines have been crossed. However, in a separate article,¹⁰ we engaged in an empirical assessment of the use of force policies from the seventy-five largest cities in the United States and then examined how these policies were used in constitutional litigation regarding excessive force. Rather than defining the meaning and scope of unconstitutional excessive force, we found that federal courts often referenced, relied upon, or deferred to the meaning of excessive force created by police departments in their use of force documents. Such deference explains, in part, why courts fail to hold police officers accountable when they abuse citizens. By ceding to police understandings of excessive force in defining the scope of Fourth Amendment protections, federal courts essentially allow police to make constitutional rules for themselves—what we call the *endogenous* Fourth Amendment.

While this may partially explain the lack of accountability, it also creates an opportunity. If courts are going to defer to police in defining the

of Black Americans: Decades of Housing Segregation, *The Intercept* (Mar. 10, 2018, 11:00 AM), <https://theintercept.com/2018/03/10/police-shootings-public-health/> [<https://perma.cc/9DCM-4M6P>].

⁶ Kendra Scott et al., A Social Scientific Approach Toward Understanding Racial Disparities in Police Shooting: Data from the Department of Justice (1980–2000), 73 *J. Soc. Issues* 701, 701–02 (2017).

⁷ *Id.* at 702.

⁸ See, e.g., Paul Butler, Chokehold: Policing Black Men 28 (2017); Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 4 (2001).

⁹ For a contrasting view in legal scholarship that is skeptical of the Fourth Amendment’s ostensibly protective powers, see, for example, Butler, *supra* note 8, at 85–86, 88–89, and Devon W. Carbado, From Stop and Frisk to Shoot and Kill: *Terry v. Ohio*’s Pathway to Police Violence, 64 *UCLA L. Rev.* 1508, 1511 (2017).

¹⁰ 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.* (forthcoming 2019).

constitutional meaning of excessive force, then grassroots efforts to change police behavior can not only positively impact individual communities, but perhaps “filter up” to have a more synergistic effect in reshaping the constitutional rule. In this Article, we will discuss how grassroots efforts at remaking Fourth Amendment excessive force jurisprudence might work. Drawing upon the empirical research giving rise to the reform theory of procedural justice, we will discuss how efforts to work with police to use principles of safety and human dignity to rethink and redefine their use of force with communities might, in the context of existing doctrinal rules and at a large enough scale, create new standards that federal courts can rely on, refer to, or defer to and thereby remake constitutional meanings of excessive force in a way that consistently holds police accountable. In Part II, we further describe legal endogeneity and the ways in which it provides an alternative understanding of how the meaning of excessive force is produced. Part III then examines the literature on procedural justice and its response to the problem of police accountability. Part IV explores how the endogenous nature of Fourth Amendment excessive force jurisprudence in combination with efforts of procedural justice at the local level might, at a large enough scale, give federal courts a different baseline from which to reference in conceptualizing what constitutes excessive force. We then briefly conclude in Part V.

II. ENDOGENEITY, THE FOURTH AMENDMENT, AND THE PROBLEM OF POLICE ACCOUNTABILITY

A. Reasonableness and the Fourth Amendment

At the center of the fraught relationship between police and communities of color that often leads to excessive force claims is the role of Supreme Court doctrine and the limits it ostensibly places on law enforcement.¹¹ The modern conversation begins in 1985 with *Tennessee v. Garner*,¹² where a police officer shot and killed a young Black man

¹¹ Erwin Chemerinsky, *The Deck is Stacked in Favor of the Police*, N.Y. Times (May 18, 2016), <https://www.nytimes.com/roomfordebate/2014/11/25/does-ferguson-show-that-cops-who-kill-get-off-too-easily/the-deck-is-stacked-in-favor-of-the-police> [https://perma.cc/86-F5-7W9U]; Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. Times (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html> [https://perma.cc/G6PK-LW7Z].

¹² 471 U.S. 1 (1985).

fleeing the scene of a burglary.¹³ *Garner* is significant in that it held that it is not permissible under the Fourth Amendment for police to shoot a fleeing person alleged to have committed a crime who poses no public danger.¹⁴ In the context of a Fourth Amendment jurisprudence where federal courts have hesitated in providing tactical guidance on what police can and cannot do, this “bright line” offered by the Court was significant.¹⁵ However, Justice Sandra Day O’Connor’s dissent is worth noting as its subsequent impact stays with us to this day.¹⁶ She argued that it is within the bounds of the Fourth Amendment for police to shoot unarmed fleeing suspects, noting that “[t]he clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances.”¹⁷

Garner is important in its own right. Yet, in 1989, the Court decided *Graham v. Connor*, a case that fundamentally changed the Court’s approach.¹⁸ This case stemmed from an incident in which police thought a Black man named Dethorne Graham was intoxicated and acting suspiciously. In reality, he was a diabetic suffering from insulin shock. Police officers treated Graham harshly during his arrest, which led to a broken foot, several lacerations, and persistent ringing in his right ear.¹⁹ Although not a fatal-force case, the *Graham* decision ultimately became the standard through which contemporary use of force is adjudicated.²⁰ The *Graham* Court held that officers must be judged using a Fourth Amendment

¹³ *Id.* at 25–26 (O’Connor, J., dissenting).

¹⁴ *Id.* at 20–21.

¹⁵ Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 233 (2017).

¹⁶ See also *id.*, at 232–33 (lamenting *Graham v. Connor*’s failure to provide clear rules for officers and arguing for clear use-of-force standards that incorporate police tactics).

¹⁷ *Garner*, 471 U.S. at 26 (O’Connor, J., dissenting).

¹⁸ 490 U.S. 386 (1989).

¹⁹ *Id.* at 390 (1989).

²⁰ See, e.g., *Scott v. Harris*, 550 U.S. 372, 381 (2007) (“[A] claim of ‘excessive force in the course of making [a] . . . seizure’ of [the] person . . . [is] properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.”) (alterations in original) (quoting *Graham*, 490 U.S. at 386, 388); *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996) (“The proper standard for judging Fourth Amendment excessive force claims is set out in *Graham v. Connor*.”); *J.H. ex rel. J.P. v. Bernalillo County*, No. CIV 12-0128 JB/LAM, 2014 U.S. Dist. LEXIS 94132, at *248 (D.N.M. July 8, 2014) (“The Supreme Court has long held that all claims of excessive force in the context of an arrest or detention should be analyzed under the Fourth Amendment’s reasonableness standard.”) (citing *Graham*, 490 U.S. at 395).

“objective[ly] reasonable” standard²¹ that mirrors the flexibility and deference to police that Justice O’Connor argued for in her dissent in *Garner*. Through this new interpretation of “reasonable,” the Court created a vague, open-ended standard that favors officer discretion by emphasizing the fact that they cannot be judged with “the 20/20 vision of hindsight” and that they must make “split-second judgments.”²² This holding may sound as though it provides an “objective” metric for adjudicating excessive force claims. Yet, its ambiguity provides the doctrinal conditions that make it difficult to charge and convict officers for using excessive force. Thus, *Graham* quietly stands as one of the Court’s most impactful, yet underappreciated, decisions.

B. Legal Endogeneity and Constitutional Law

The idea that law can work in an “endogenous” way—where meaning filters up from the regulated actor to define law rather than in a top down manner—comes from the employment law and civil rights contexts, as developed by Professor Lauren Edelman.²³ Edelman develops legal endogeneity theory in order to understand and model how inequality and discrimination persist in work organizations despite federal statutes geared towards workplace fairness.²⁴ Legal endogeneity theory illuminates how, despite purported progress, we currently exist in “a symbolic civil rights society.”²⁵ When Edelman uses the term endogenous, she is describing the manner in which law is defined, interpreted, and applied through the “social fields” that the law itself seeks to create rules for and regulate.²⁶ The regulated group or entity shapes the regulation through

²¹ 490 U.S. at 388. For more discussion of *Graham*’s role in diverting excessive force claims away from the Fourteenth Amendment and solely into the domain of the Fourth Amendment, 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, 1465–69 (2018). This trend of cabining such claims to the Fourth Amendment pertains only to force used during a search, arrest, or investigatory stop. Harm done to community members by the police outside of this context can be assessed through other legal claims. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (noting that *Graham* does not bar plaintiffs from making a substantive due process claim when injury is not the result of a seizure).

²² *Graham*, 490 U.S. at 396–97.

²³ Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* 12 (2016).

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.* at 26.

internal organizational policies, thereby becoming embedded in managing its own regulation.

There are three parts to legal endogeneity theory: (1) an ambiguous law, (2) an organization ostensibly following that law by generating “symboli[c]” policies that it believes show compliance, and (3) the legal system, which, instead of establishing its own standards for what it means to adhere to law, acknowledges organizations’ own symbolic policies as evidence of compliance.²⁷ Through this system, the regulated entity is able to vaguely imitate compliance, while ultimately protecting its own interests and limiting exposure to liability. This allows the organization to seem like it is acting in response to a progressive vision of law when, in reality, its interpretation usually means that very little has changed.²⁸

While Edelman develops this theory in the statutory context of employment law and work organizations, it can also be a useful framework for deepening how we understand constitutional issues. Constitutional law, such as Fourth Amendment excessive force doctrine, is thought to be the high point of exogenous, top-down lawmaking. But we argue that Professor Edelman’s theory can help us see how indeterminate case law (e.g., *Graham*) that resists imposing specific rules for police use of force can nonetheless reveal otherwise hidden doctrinal dynamics. Specifically, police departments’ adherence to vague standards of reasonableness through use of force policies that reflect their preferences not only suggests compliance with *Graham* but also shapes federal courts’ understanding of the Fourth Amendment’s protections against excessive force. In this context, legal endogeneity theory provides insight into how police continue to kill, beat, and maim community members in large numbers with little accountability despite the presence of constitutional guarantees, use of force policies, and federal courts that are thought to provide some level of oversight. This approach allows us to deepen our understanding of how police and the federal courts are constantly negotiating terms on what law is²⁹ and what “counts” as excessive force.

In expanding this theory to a constitutional context, our work has sought to illuminate the iterative process through which an ambiguous rule such as *Graham*’s objectively reasonable standard is comprehended

²⁷ *Id.* at 12.

²⁸ *Id.* at 24–25.

²⁹ See, e.g., Marianne Constable, *Law as Claim to Justice: Legal History and Legal Speech Acts*, 1 U.C. Irvine L. Rev. 631, 639 (2011) (“[E]vents of law involve many more legal speech acts than stating rules or, for that matter, commanding.”).

and applied by the Fourth Amendment's regulatory target, i.e., the police. By failing to elucidate what constitutes reasonable use of force, *Graham*'s imprecision allows law enforcement to largely define these terms through use of force policies that inform how police engage civilians. We sought a more precise understanding of what these protocols contain,³⁰ so we examined the use of force policies from the seventy-five largest available cities and coded for an array of possible elements, including whether and how the policy discusses "reasonableness," whether there are substantive protections like de-escalation and force continuums, and the extent to which rules such as intervention and reporting other officers' use of excessive force are present.³¹

Our findings suggest that these use of force policies are often empty and insubstantial, relying heavily on a vague recitation of *Graham*'s holding while simultaneously failing to provide much in terms of tactical guidance that could actually limit force usage against citizens.³² First, we found that one hundred percent of the policies spoke to "reasonableness" in some way, such as how the police department in Portland cites *Graham* overtly: "Under *Graham v. Connor* and subsequent cases, the federal courts have established that government use of force must comply with the 'reasonableness' requirement of the Fourth Amendment."³³ Second, while some departments have what we termed "basic protections"—like not shooting at moving vehicles (80% of policies included this kind of language)—they often refrained from having substantive, affirmative protections that could guide officers in using less severe force, such as de-escalation (only 52% of policies), continuum of force (48%), or reassessment during the interaction (19%).³⁴ Third, only some policies spoke to the health and dignity of civilians, such as including discussions of more philosophical elements like statements against bias and prejudice (12%). The policies we reviewed also showed a lack of material guidance on what to do when one officer believes another officer is using excessive

³⁰ See also Garrett & Stoughton, *supra* note 16, at 212 (discussing force policies and arguing for a new constitutional standard regulating police use of force that balances law enforcement goals with protecting the lives of officers and citizens); Limit Use of Force, Campaign Zero, <https://www.joincampaignzero.org/force/> [<https://perma.cc/HY8D-X6LE>].

³¹ Obasogie & Newman, *supra* note 10.

³² *Id.*

³³ Portland Police Bureau, Use of Force Policy (effective Aug. 19, 2017), available at <https://www.portlandoregon.gov/police/article/647779> [<https://perma.cc/BSH5-HFSS>].

³⁴ Obasogie & Newman, *supra* note 10, at 24–25.

force, such as mandatory reporting (27%) or intervening (33%).³⁵ Since these policies largely refrain from clear rulemaking and instead rely on repeating (without defining) reasonableness, the policies remain symbolic. This allows police to demonstrate compliance while still being able to keep “managerial prerogatives and practices” in their internal rules.³⁶

Symbolic compliance is just one manifestation of *Graham*’s influence. Our findings show that use of force policies can also be remarkably productive in shaping how federal courts understand, interpret, and apply the Fourth Amendment.³⁷ While police often develop use of force policies to signal compliance with constitutional norms, federal courts play a key role in putting police perspectives at the center of many excessive force inquiries. In the third part of legal endogeneity theory, symbolic compliance can lead judges to incorporate the perspective of the regulated *as the substantive legal rule*, either by referencing the policy (basically noting the policy exists and is meaningful), relying upon the policy as key evidence of compliance, or fully deferring (stating that since the organization *has* a policy, it *must* be legally compliant).³⁸

First, a court could merely refer to the policy, allowing the policy to speak within the “judicial lexicon” as something significant in regard to the court’s application of the law to an instance of force.³⁹ For example, in a 2008 case from the Eastern District of California that involved the use of a K-9 on someone allegedly engaging in a burglary, the court notes in the “Undisputed Facts” section of the opinion that the “Kern County Sheriff Department’s use of force policy prohibits excessive force” and that the “Department has policies that govern the appropriate use of police dogs.”⁴⁰ Second, the court might deem the policy relevant to the analysis, such as in an excessive force case from the Middle District of Pennsylvania where the court stated that the “City of York has a comprehensive use of force policy that is compliant with both federal and state law, as well as the Pennsylvania Law Enforcement Accreditation Program which was

³⁵ *Id.* at 28.

³⁶ Edelman, *supra* note 23, at 31.

³⁷ See *infra* Part IV.

³⁸ Edelman, *supra* note 23, at 31–32 (describing how private compliance specialists may craft statute-like policies to garner deference from courts).

³⁹ *Id.* at 40.

⁴⁰ *Brown v. County of Kern*, No. 1:06-CV-00121-OWW-TAG, 2008 WL 544565, at *1 (E.D. Cal. Feb. 26, 2008).

designed by the Pennsylvania Chiefs of Police Association.”⁴¹ Third, in terms of overt deference toward a policy, a court from the Northern District of West Virginia wrote in an excessive force case: “Officer Hennessey acted reasonably under the circumstances to protect both Mr. Neiswonger and himself, in accordance with the Morgantown City Police Department’s Use of Force policy. Officer Hennessey did not violate Mr. Neiswonger’s Fourth Amendment right to be free from unreasonable search and seizure.”⁴² The court essentially said that because he followed the policy, there was no Fourth Amendment violation, indicating a highly deferential attitude to the department’s policy. In these examples, we see how use of force policies can be used to endogenously structure the way that federal courts approach questions about excessive force. By eschewing external standards created by the judiciary and embracing the presence of force policies as evidence of compliance with the constitutional rule, legal endogeneity theory allows us to see how police perspectives on force usage *become* constitutional law.

C. A Lack of Accountability

Legal endogeneity as a theoretical lens allows us to see how law perpetuates police violence. Despite protections in the Constitution (via the Fourth Amendment), Supreme Court case law, and use of force policies, legal endogeneity exposes the mechanisms that allow police to continue to maim and kill with impunity in a liberal democracy. The lack of accountability is central; indictments of police officers for using excessive force in either state or federal court are rare, and convictions even more so.⁴³ Between 1995 and 2015, out of a total of 13,233 complaints against

⁴¹ *Bonilla v. City of York*, No. 1:14-CV-2238, 2016 WL 3165619, at *3 (M.D. Pa. June 7, 2016); see also *Bowyer v. Houck*, No. 5:05-CV-00628, 2006 WL 6854908, at *2 (S.D. W. Va. Nov. 14, 2006). In *Bowyer*, an excessive force case discussing *Graham*, the court declared that, regarding the issue of “whether Officer Kerr’s adherence to Mabscott’s use of force policy [was] relevant to his decision to use pepper spray on Ms. Bowyer,” “an objectively reasonable officer would consider his training when making a split-second decision to use pepper spray on a person under arrest.” Thus, “whether Officer Kerr followed Mabscott’s use of force policy [was] relevant evidence that the finder of fact should consider in deciding whether Officer Kerr was objectively reasonable in his use of pepper spray on Ms. Bowyer.”

⁴² *Neiswonger v. Hennessey*, 89 F. Supp. 2d 766, 774 (N.D. W. Va. 2000).

⁴³ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015), <https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<https://perma.cc/9MKE-JC6D>]; Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. Times (last updated Oct. 5, 2018), <https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html>

police, prosecutors declined to charge 12,703 of these potential civil rights violations—ninety-six percent.⁴⁴ From 2005 to 2018, only eighty-five officers have been charged in connection with a shooting, and just thirty-two of those have been convicted.⁴⁵ Only thirteen officers were charged in 2016, even with all of the media attention to police killings.⁴⁶ Moreover, police departments generally fail to discipline officers themselves when they do something wrong.⁴⁷ Between departments and the courts, there is little accountability for police misuse of force.⁴⁸

[<https://perma.cc/X6HE-HXAR>]; Madison Park, *Police Shootings: Trials, Convictions Rare for Officers*, CNN (last updated Oct. 3, 2018, 4:41 PM), <https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html> [<https://perma.cc/J2T4-TMEQ>].

⁴⁴ Joseph Ax, *Police Escape Charges in 96 Percent of Civil Rights Cases: Report*, Huffington Post (Mar. 14, 2016, 9:34 AM), https://www.huffingtonpost.com/entry/police-civil-rights-violations_us_56e6bc80e4b065e2e3d6689c [<https://perma.cc/74AG-2G34>].

⁴⁵ Mark Berman & Wesley Lowery, *Baton Rouge Police Officers Won't Be Charged in Fatal Shooting of Alton Sterling*, Wash. Post (Mar. 27, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/03/27/baton-rouge-police-officers-wont-be-charged-in-fatal-shooting-of-alton-sterling/> [<https://perma.cc/E62U-SLPB>].

⁴⁶ All Things Considered, *Alton Sterling Case Raises Questions About Prosecution of Police Officers*, NPR (May 3, 2017, 4:31 PM), <https://www.npr.org/2017/05/03/526779533/alton-sterling-case-raises-questions-about-prosecution-of-police-officers> [<https://perma.cc/8Q6C-2XML>].

⁴⁷ Max Felker-Kantor, *Police Departments Should No Longer Be Allowed to Police Themselves*, Wash. Post (Mar. 19, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/03/19/police-departments-should-no-longer-be-allowed-to-police-themselves/> [<https://perma.cc/8JSE-77X7>]; see, e.g., Matthew McClellan & Paris Lewbel, *Family Says Officer Used Excessive Force During Woman's Arrest; IMPD Says Officer Followed Protocol*, The Indy Channel (Oct. 9, 2018, 12:08 AM), <https://www.theindychannel.com/news/local-news/indianapolis/family-says-officer-used-excessive-force-during-woman-s-arrest-impd-says-officer-followed-protocol> [<https://perma.cc/ZXS9-W7HA>] (“An internal investigation called a ‘blue team report’ is completed after every use of force incident involving an officer to make sure that force is justified under departmental policy. If department policy is believed to be broken, an internal affairs investigation is then opened on the incident. . . . [S]ources say that report was completed and the use of force was found to be within policy. No internal affairs investigation was ever opened.”).

⁴⁸ Emanuella Grinberg, *Why Police-Involved Shooting Trials Rarely End in Convictions for Officers*, CNN (June 24, 2017), <http://www.cnn.com/2017/06/23/us/police-deadly-force-trials/index.html> [<https://perma.cc/2GV5-D73U>]; German Lopez, *Cops are Almost Never Prosecuted and Convicted For Use of Force*, Vox (Sept. 11, 2018), <https://www.vox.com/cards/police-brutality-shootings-us/police-use-of-force-convictions> [<https://perma.cc/WFT2-PS76>] (“Police are very rarely prosecuted for shootings—and not just because the law allows them wide latitude to use force on the job. Sometimes the investigations fall onto the same police department the officer is from, which creates major conflicts of interest. Other times the only available evidence comes from eyewitnesses, who may not be as trustworthy in the public eye as a police officer.”).

If the legal system fails to provide the public with some sense that police will be held accountable, people will no longer believe in its efficacy.⁴⁹ As Philando Castile's sister said when the police officer who killed her brother did not face legal repercussions: "I will never have faith in this system; I will never have faith in this system; I will never have faith in this system."⁵⁰ Similarly, after San Francisco police killed Alex Nieto, his relatives said, "[n]o consequence, no confidence."⁵¹ When there is no consequence, there is no confidence in the system, and when there is no confidence in the system, people take to the streets in public mourning and protest to make the issue visible.⁵²

As a result, this lack of legal accountability invariably produces the visible expressions of grief, frustration, anguish, and public mourning that have manifested in the streets, city halls, public squares, and freeways across the country over the last few years.⁵³ This outpouring is what made a usually invisible form of normalized, routinized violence capable of being seen. The protests and riots arise out of a feeling that the state and the courts are failing to hold officers accountable.⁵⁴ When we think about accountability and solutions to police violence, this involves thinking through the affective dimensions of the issue. This includes the ways in which the public feels affronted, aggrieved, or generally distrustful of that outcome and the procedure through which the system arrived at it.⁵⁵

⁴⁹ Josh Bowers & Paul H. Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 212 (2012) ("[A] criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion, and may lose its capacity to harness powerful social and normative influence."); see also Ta-Nehisi Coates, *Between the World and Me* 11 (2015) ("The men who had left [Michael Brown's] body in the street like some awesome declaration of their inviolable power would never be punished.").

⁵⁰ Jackie Wang, *Carceral Capitalism* 95 (2018).

⁵¹ Refugio and Elvira Nieto, Justice and Love for Alex Nieto, in *Rebellious Mourning: The Collective Work of Grief* 235, 243 (Cindy Milstein ed., 2017).

⁵² Cindy Milstein, Prologue: Cracks in the Wall in *Rebellious Mourning: The Collective Work of Grief* 1, 8 (Cindy Milstein ed., 2017).

⁵³ See, e.g., *id.* at 8 ("Our grief—our feelings, as words or actions, images or practices—can open up cracks in the wall of the system."); Christina Sharpe, *In the Wake: On Blackness and Being* 7 (2016) ("What happens when we proceed as if we *know* this, antiblackness, to be the ground on which we stand, the ground from which we to attempt to speak, for instance, an 'I' or a 'we' who know, an 'I' or a 'we' who care?").

⁵⁴ See, e.g., Erwin Chemerinsky, *The Fire This Time*, 66 S. Cal. L. Rev. 1571, 1572 (1993) ("When people come to believe that a system offers them nothing, they have nothing to lose by burning it down.").

⁵⁵ See, e.g., Nazgol Ghandnoosh, *The Sentencing Project*, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 3 (2015) ("'Black lives matter' has become a

III. PROCEDURAL JUSTICE AND POLICE VIOLENCE

A. Divergent Perceptions and Police Mistrust

Public trust in law enforcement is stratified along subject position—namely race.⁵⁶ Polls demonstrate communities of color distrust police, which is a sentiment that has been persistent for many years.⁵⁷ According to recent research by Professors Reinka and Leach, African Americans are more likely to distrust police and hold them in lower esteem than Whites while also exhibiting stronger opposition to the unlawful use of deadly force than Whites.⁵⁸ After Ferguson, 46% of Black respondents said they had “very little confidence that the police treat Blacks and Whites equally” and 40% responded “they had very little confidence that police won’t use excessive force on members of their community.”⁵⁹ 35% of White respondents stated “they had a great deal of confidence that police treat racial groups equally” and 36% said “they had a great deal of confidence that the police officers would not use excessive force.”⁶⁰

Black study participants were also more aware of both recent and past incidents involving police violence.⁶¹ Black participants have reported feeling more “attentive” to novel photos of police violence (i.e., lesser known images and victims) than White participants, who expressed more “surprise.”⁶² Black participants have expressed greater “morally outraged anger” as well as more “sadness and fear” in response to imagery of Black

rallying cry in light of evidence that the criminal justice system is failing to uphold this basic truth.”).

⁵⁶ See e.g., Bell, *supra* note 1, at 2059 (“Ample empirical evidence supports the idea that African Americans, and residents of predominantly African American neighborhoods, are more likely than whites to view the police as illegitimate and untrustworthy, along several axes.”). But see James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America*, 78–118 (2017) for a discussion of the ways in which Black leaders in the 1970s played a role in producing policy that led to mass incarceration.

⁵⁷ President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing* 9 (2015).

⁵⁸ Mora A. Reinka & Colin W. Leach, *Race and Reaction: Divergent Views of Police Violence and Protest Against*, 73 *J. Soc. Issues* 768, 769 (2017); see also Kevin L. Nadal et al., *Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study*, 73 *J. Soc. Issues* 808, 809–10 (2017) (analyzing data on how various ethnic groups perceive police).

⁵⁹ Reinka & Leach, *supra* note 58, at 774.

⁶⁰ *Id.*

⁶¹ *Id.* at 771.

⁶² *Id.*

victims of police violence.⁶³ White respondents reported less emotion about police violence against Black victims, including just “‘a little’ anger and ‘very slight’ sadness and fear” regarding police violence.⁶⁴ Researchers concluded that “White participants did not see police violence as ‘relevant to their group membership’ or [relevant] ‘to their advantaged position in U.S. society.’”⁶⁵

Outrage also differed regarding protests in response to police violence. 55% of Black respondents said the protests in Baltimore regarding the killing of Freddie Gray were “legitimate outrage,” while 68% of White respondents said the protesters were “opportunistic criminals.”⁶⁶ White respondents generally support protest (67%), but, when the protesters are framed as Black, then only 45% support it.⁶⁷ Non-White study participants believe that “the country is better off when Black Americans speak up,” at 65%.⁶⁸ When shown images of Black protest, White participants felt only “very slightly” sad and angry about the photos, leading researchers to conclude that imagery of Black protest “may not invoke their sense of injustice.”⁶⁹

In sum, the data from Reinka and Leach suggests that African American and White conceptualizations of justice, race, racism, and protest in the context of police violence differ largely. “Black Americans tend to believe that there is clear racial bias in police use of deadly force and in the government’s handling of such cases,” and White people “tend to believe that the police and the courts are fair and that any racial disparity is due to other factors.”⁷⁰ White people “are less likely to endorse protests as helpful or positive, and are quicker to label those engaged in collective action as ‘thugs’ or ‘criminals.’”⁷¹ Black Americans generally show more support for “protests aiming to counter perceived injustice.”⁷² Hence, there is a difference in how police violence is understood by differently-

⁶³ *Id.* at 773.

⁶⁴ *Id.* at 773–74.

⁶⁵ *Id.* at 774 (citation omitted).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 776.

⁷⁰ *Id.* at 782.

⁷¹ *Id.*

⁷² *Id.*

impacted audiences,⁷³ which highlights an ideological aspect of the viewing experience that intersects with racial subject positions.⁷⁴

Thus, where some see tragedy, violence, and racism, others see acceptable uses of force deployed by upstanding officers against unruly people.⁷⁵ More specifically, this suggests that African American and White citizens see race and policing differently.⁷⁶ This has important implications for the crisis of legitimacy for police and African American communities. Procedural justice, in theory, offers a way to disrupt this relationship by building legitimacy, trust, and just interactions into systems in order to improve relations between officers and the communities they serve.⁷⁷

B. What Is Procedural Justice?

Arising out of the research on “control theory” by Professors John Thibaut and Laurens Walker in 1975⁷⁸ as well as Professor Leventhal in 1980,⁷⁹ the concept of procedural justice has primarily been discussed by Yale Law Professors Tom Tyler and Tracey Meares, as well as others who

⁷³ See *id.*

⁷⁴ Wang, *supra* note 50, at 93 (“Empirical evidence (such as video footage) that reveals that cops are murdering black people without reason does very little to disabuse some white people of their belief that the officers are justified in their actions.”).

⁷⁵ See Reinka & Leach, *supra* note 58, at 781 (“White and Black Americans have long had divergent views of police and policing that have grown further apart in the wake of the publicized succession of police killings of unarmed Black young people and adults since Trayvon Martin’s killing in 2012.”).

⁷⁶ See Wang, *supra* note 50, at 92 (“White identity is consolidated during moments when the position of the spectator is shared and when whites are given an occasion to inhabit the same affective space as other white people.”).

⁷⁷ See, e.g., The Justice Collaboratory at Yale Law School, *Principles of Procedurally Just Policing* 6 (2018) (“Research demonstrates that when members of the public perceive police officers to behave in a procedurally just manner, they have a more positive view not only of their individual encounters with those officers, but of the legitimacy of law enforcement more generally.”); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 *Alb. L. Rev.* 1095, 1097 (2013/2014); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime & Just.* 283, 351 (2003) (“The studies of public evaluations of the police and courts outlined always find that assessments of how these authorities treat community members are important elements in over-all evaluations of performance and legitimacy, and a major antecedent of compliance, cooperation, and empowerment.”).

⁷⁸ John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* 1–5 (1975).

⁷⁹ Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in *Social Exchange* (K. J. Gergen, M. S. Greenberg, and R. H. Willis eds., 1980).

have written alongside them.⁸⁰ Procedural justice is defined as encouraging police engagement with the public using four principles: “[t]reating people with dignity and respect,” “[g]iving individuals ‘voice’ during encounters,” “[b]eing neutral and transparent in decision making,” and “[c]onveying trustworthy motives.”⁸¹ In 1988, Professor Tyler wrote *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, an introductory piece on the concept and application of procedural justice and the research supporting it.⁸² Since then, Tyler has written several articles on or related to the concept of procedural justice.⁸³ Even police advocates—such as the Police Executive Research Forum—have acknowledged the benefits of procedural justice, insofar as it relates to improving police legitimacy.⁸⁴ Moreover, there is a growing literature examining procedural justice that bridges the silos between sociology and law. As Hagan and Hans noted recently in the *Annual Review of Law and Social Science*, there have been twenty-two

⁸⁰ See, e.g., Tracey Meares, Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation, 111 Nw. U. L. Rev. 1525, 1531–34 (2017); Tracey L. Meares & Tom R. Tyler, Justice Sotomayor and the Jurisprudence of Procedural Justice, 123 Yale L.J. F. 525, 526–27 (2014); Tracey Meares, The Legitimacy of Police Among Young African-American Men, 92 Marq. L. Rev. 651, 658–59 (2009).

⁸¹ President’s Task Force on 21st Century Policing, *supra* note 57, at 10.

⁸² Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 Law & Soc’y Rev. 103, 103–04 (1988); see John Hagan & Valerie P. Hans, Procedural Justice Theory and Public Policy: An Exchange, 13 Ann. Rev. L. & Soc. Sci. 1, 2 (2017) (“[T]his research has focused on the causal links posited by the theory between perceptions of the justness of police practices, citizen perceptions of police legitimacy, and legal compliance.”).

⁸³ See, e.g., Tom R. Tyler, Why People Obey the Law 6–7 (1990); Tyler & Sevier, *supra* note 77, at 1097; Tom R. Tyler, Can the Police Enhance Their Popular Legitimacy Through Their Conduct?: Using Empirical Research to Inform Law, 2017 U. Ill. L. Rev. 1971, 1971 (2017); Tom R. Tyler, From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century, 111 Nw. U. L. Rev. 1537, 1539 (2017); Tom R. Tyler, Legitimacy and Criminal Justice: The Benefits of Self-Regulation, 7 Ohio St. J. Crim. L. 307, 319 (2009); Tyler, *supra* note 82, at 104; see Hagan & Hans, *supra* note 82, at 2 (“The theory of procedural justice developed, tested, and applied by Tom Tyler and his colleagues has been eagerly embraced by politicians and policy makers as a guide for improving police-community relations in the United States.”).

⁸⁴ Police Executive Research Forum, Legitimacy and Procedural Justice: A New Element of Police Leadership 2 (2014).

articles in that journal discussing procedural justice.⁸⁵ Other Annual Review journals have published more than fifty such pieces.⁸⁶

Recently, Megan Quattlebaum, Tracey Meares, and Tom Tyler, as part of the Justice Collaboratory at Yale, produced *Principles of Procedurally Just Policing*.⁸⁷ In the report, they contend that police departments should integrate procedural justice models into policing theory and practice.⁸⁸ The report suggests three policy changes to promote a procedurally just policing culture: “[a]ddressing transparency and public engagement,” “[a]ddressing ‘internal’ procedural justice in police departments,” and “[a]ddressing ‘external’ procedural justice in the community.”⁸⁹ In terms of transparency and public engagement, the report calls on departments to change their operating procedures to be more transparent, such as through reporting and documentation designed to facilitate impartiality and neutrality while allowing the public to have a voice.⁹⁰ Regarding internal procedural justice, the report speaks to increasing procedural justice practices within departments (e.g., officers being “truthful and courteous” amongst themselves and within departmental hierarchies) which will ripple outward into community interactions.⁹¹ Last, external procedural justice refers to police-citizen engagements, which means integrating these principles into how officers treat people in everyday interactions (i.e., with respect, especially for certain groups, like LGBTQI communities or youth).⁹²

Procedural justice formally made it into the mainstream when it was a central concept in the Obama Administration’s 2015 Final Report of the President’s Task Force on 21st Century Policing.⁹³ Under “Pillar One: Building Trust and Legitimacy,” the report speaks to the division between people and the police.⁹⁴ The report notes the importance of both trust and legitimacy; people will respect the efficacy and authority of legal systems

⁸⁵ Hagan & Hans, *supra* note 82, at 2.

⁸⁶ *Id.*; see, e.g., Amy E. Nivette & Thomas D. Akins, Determinants of Satisfaction with Police in a Developing Country: A Randomised Vignette Study, *Policing & Soc’y* 2 (2017), available at [<https://perma.cc/RV5M-3WP6>].

⁸⁷ The Justice Collaboratory, *supra* note 77.

⁸⁸ *Id.* at 7 (“We believe that procedural justice can and should be integrated throughout the policies of a department.”).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ President’s Task Force on 21st Century Policing, *supra* note 57, at 1.

⁹⁴ *Id.*

if they believe the law and legal actors are fair.⁹⁵ Acknowledging that “[t]he public confers legitimacy only on those whom they believe are acting in procedurally just ways,” police cannot function as an “occupying force” or through a “warrior” culture.⁹⁶ Instead, police need to contribute to developing relationships built on procedural justice principles, accountability, and transparency.

Some have been critical of procedural justice. In Monica Bell’s recent article, *Police Reform and the Dismantling of Legal Estrangement*, she offers important critiques of procedural justice, identifying its shortcomings and limitations.⁹⁷ Bell describes the fact that “[t]he message conveyed in policing jurisprudence is not only one of oppression, but also one of profound estrangement” for communities of color.⁹⁸ However, in evaluating the relationship between communities of color and the police, many conclude it is solely a problem of police legitimacy and getting police to treat people fairly will resolve all of the problems between police and communities of color.⁹⁹ Bell points to the President’s Task Force report as an example of a “prominent” application of the argument that it comes down to building trust between communities and police.¹⁰⁰

Differing from these perspectives, Bell offers the concept of “legal estrangement.” She notes that this alternative concept “provides a rounder, more contextualized understanding of this relationship that examines the more general disappointment and disillusionment felt by many African Americans and residents of high-poverty urban communities with respect to law enforcement.”¹⁰¹ Based on a sense of “anomie”—which speaks to “ruptures in the social bonds that connect individuals to their community” and to “the state through law enforcement”—Bell introduces the concept of legal estrangement to articulate a more nuanced sense of the nexus of legal cynicism and structural conditions that produce a current policing system more complicated and insidious than one that can be solved by

⁹⁵ Id. (“Building trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve. Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority.”).

⁹⁶ Id.

⁹⁷ Bell, *supra* note 1, at 2058–61, 2066.

⁹⁸ Id. at 2057.

⁹⁹ Id. at 2058.

¹⁰⁰ Id.

¹⁰¹ Id. at 2066.

simply making the police appear more legitimate.¹⁰² Other scholars, such as Robert E. Worden and Sarah J. McLean, argue that procedural justice offers only illusory relief and cannot, in and of itself, produce the lasting change that is needed in police-community relations.¹⁰³

IV. RECREATING THE CONSTITUTIONAL STANDARD: LEGAL ENDOGENEITY, PROCEDURAL JUSTICE, AND A MORE JUST FOURTH AMENDMENT

Since *Graham v. Connor*,¹⁰⁴ federal courts have shown little interest in explicating Fourth Amendment excessive force jurisprudence. Therefore, waiting on the judiciary to develop an interpretation of the Fourth Amendment that protects communities from the police is an effort in vain. Yet, the endogenous nature of the Fourth Amendment might create alternative pathways for rethinking this aspect of constitutional law. As discussed in Part II, legal endogeneity as theory provides a lens through which to see how judicial reference, relevance, and deference can allow police administrative polices on use of force to shape the way courts think about the substance of constitutional rules. Thus, in the excessive force context, our findings show how police perspectives can *become* the constitutional standard in determining what is a reasonable use of force.

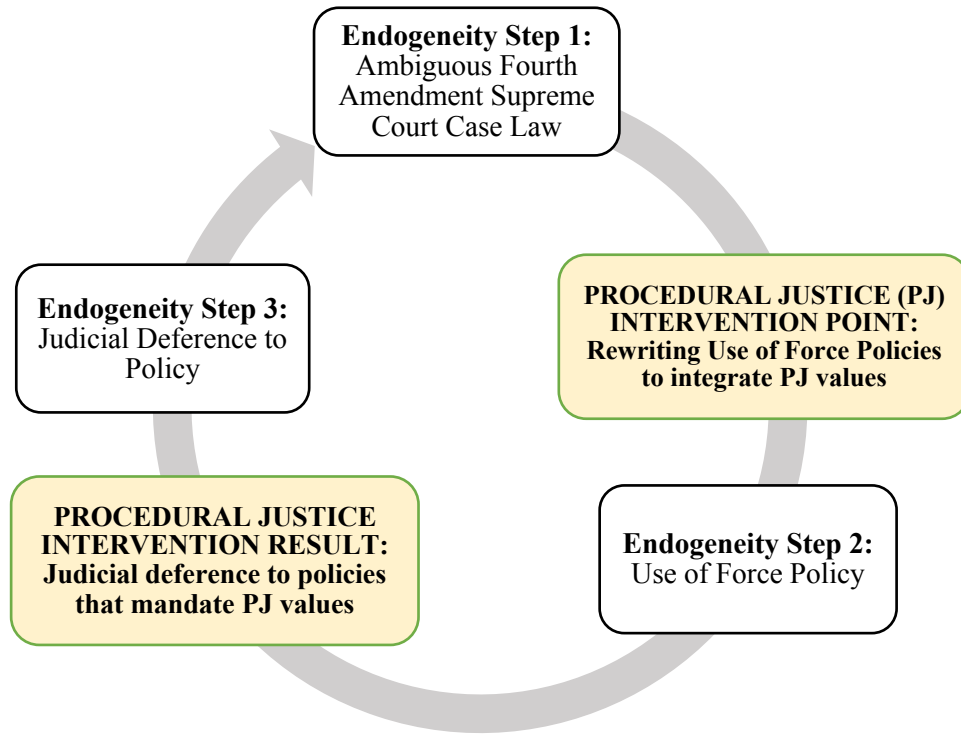
While this process is one that police have used to insulate themselves, there may be opportunities to reconfigure legal endogeneity in a manner that creates a path for citizens, stakeholders, and others invested in stopping police excessive force to reshape the constitutional standard that informs policing. Can use of force policies be strategically rewritten in such a way that procedural justice becomes baked into these documents? And, given the endogenous nature of the Fourth Amendment in terms of the judicial deference to police perspectives, can legal endogeneity provide a method for procedural justice to reach a scale that can not only meaningfully impact lives and change police behavior, but also (after repeated implementations) change how federal courts think about Fourth Amendment values in relation to excessive force inquiries?

¹⁰² Id. at 2066–67.

¹⁰³ Robert E. Worden & Sarah J. McLean, *Mirage of Police Reform: Procedural Justice and Police Legitimacy* 5 (2017).

¹⁰⁴ 490 U.S. 386 (1989).

A. Integrating Procedural Justice Values into Use of Force Policies: A New Paradigm



If police largely control the administrative site where use of force policies are developed and ultimately impact how federal courts think about the constitutional boundaries of excessive force, then citizens, stakeholders, and the public can work with police to intervene at this point. Disrupting the very mechanism that police use to limit accountability can create the conditions for reimagining the Fourth Amendment from the “bottom up.” This can play an important role in both preventing police use of force before it happens while also providing rules to point to in demonstrating liability when officers deviate from force policies and violate rights. If these policies are reframed with improved values and strategies for avoiding force, and courts continue to deem them relevant in signaling compliance, then legal endogeneity could be inverted from a

process police use to protect themselves to one where the public could intervene for reform.¹⁰⁵

While the use of force policies developed by police can shape federal courts' understanding of what counts as lawful force, legal endogeneity can also be leveraged as a point for progressive intervention. These force policies—as an interpretive site of *Graham*—give citizens a point of entry to change what the policies contain, moving towards a more procedurally just Fourth Amendment standpoint. In the context of police distrust exhibited by many communities of color,¹⁰⁶ procedural justice serves as a corrective, altering dynamics and building a different relationship between officers and community members.¹⁰⁷ Procedural justice signifies a theory and tactical approach designed to fundamentally change how police and citizens interact, shifting toward better interpersonal dynamics, like dignity and respect. Moreover, procedural justice goes hand-in-hand with the goal of reducing the severity and frequency of force.

Critically, if legal endogeneity functions to define law from the bottom-up, then perhaps it can serve as an opening for other community members—not just police—to, in a sense, influence the interpretation of excessive force law. Procedural justice aligns with legal endogeneity in that it offers a set of tools that can be mobilized in order to change both how people see the police and, more importantly, how the police behave in everyday situations. Legal endogeneity shows that the law is malleable and generated daily, while procedural justice tells us we can create the conditions for constitutional norms to be organically reshaped into something that ensures people are treated with dignity.

Our empirical examination of use of force policies highlights the types of substantive rules and tactics that are largely missing from existing policies but could nevertheless be incorporated at higher rates as part of an effort to make procedurally just norms more widespread. Some of the affirmative protections that these policies ought to contain include de-escalation, proportionality, reassessment, force continuums, mandatory

¹⁰⁵ See, e.g., *Shoulders v. Baton Rouge Police Dep't*, No. 09-494-JJB-SCR, 2013 WL 5757867, at *5 (M.D. La. Oct. 23, 2013) (describing how the officer deviated from the force continuum: “[I]t appears that Defendant Coleman used an extremely strong level of force to combat the least-serious level of resistance. While the deposition of Defendant Coleman and the arrest report provide a different view regarding Plaintiff’s actions, the ‘Use of Force Report’ highlights the stark disproportion in the level of response by Defendant as compared to the level of resistance by Plaintiff.”).

¹⁰⁶ See, e.g., Reinka & Leach, *supra* note 58, at 782.

¹⁰⁷ See, e.g., The Justice Collaboratory, *supra* note 77, at 6.

reporting, and required intervention when officers see colleagues using excessive force.¹⁰⁸ For example, a policy could contain a discussion of proportionality, like San Antonio's policy does, requiring officers to base their actions "on an ascending scale of the officer's presence, verbal communications, open/empty hands control, physical force, intermediate weapon and deadly force, according to and *proportional* with the circumstances of the situation."¹⁰⁹ Similarly, a policy might describe the exhaustion of alternatives before using force, like Nashville's policy where police "are permitted to use only that force which is reasonable and necessary under the particular circumstances to protect themselves or others from bodily injury, and only after other reasonable alternatives have been exhausted or it is determined that such alternative action(s) would be ineffective under the circumstances."¹¹⁰ With regards to de-escalation, the New Orleans policy requires officers to "de-escalate the amount of force used as the resistance decreases."¹¹¹ Policies' discussions of reassessment could mimic what San Francisco's policy mandates: "Using a critical decision-making model, officers shall collect information, assess the threats and risk, consider police powers and the Department's policies, identify options and determine the best course of action, and review and *re-assess* the situation."¹¹² Ultimately, these examples show the kind of language policies can build in from the beginning to guide officers to not immediately resort to force and to fundamentally shift how an encounter transpires.

These protections should be combined with procedural justice values, including a focus on dignity, respect, interpersonal dynamics, communication, transparency, and voice.¹¹³ Empirical research has demonstrated

¹⁰⁸ See, e.g., San Francisco Police Department, General Order 5.01: Use of Force Policy 1–2, 5–6, 15 (Dec. 21, 2016), available at <https://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20%28Rev.%2012-21-16%29.pdf> [<https://perma.cc/6N8C-NS3P>].

¹⁰⁹ San Antonio Police Department, Procedure 501: Use of Force Policy 1 (Nov. 10, 2015), available at <https://www.sanantonio.gov/Portals/0/Files/SAPD/501-UseOfForce-11-10-15.pdf> [<https://perma.cc/F56K-ERA8>] (emphasis added).

¹¹⁰ Metropolitan Nashville Police Department, Title 11: Use of Force Policy 651 (2018), available at <https://www.nashville.gov/Portals/0/SiteContent/Police/docs/Strategic%20Development/MNPDManual.pdf> [<https://perma.cc/QMC6-HQRE>].

¹¹¹ New Orleans Police Department, Use of Force Policy 29 (Dec. 6, 2015), available at <https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf> [<https://perma.cc/N3A8-3Y3P>].

¹¹² San Francisco Police Department, *supra* note 108, at 5 (emphasis added).

¹¹³ See, e.g., President's Task Force on 21st Century Policing, *supra* note 57, at 10.

that “police can achieve positive changes in citizen attitudes to police through adopting procedurally justice [sic] dialogue as a component part of any type of police intervention.”¹¹⁴ Ultimately, a police-citizen interaction is procedural, in the sense that at the most basic level it is an interaction between a person and a state representative.¹¹⁵ In thinking about procedural justice, we need to consider how to restructure encounters to incorporate values of fairness, respect, and the precious nature of life. This can start with changing use of force policies.

Placing these values and affirmative guidelines in use of force policies can create opportunities that, at a large enough scale and over a sufficient period of time, might organically and endogenously reconfigure Fourth Amendment excessive force jurisprudence at the administrative level and orient it toward a new baseline—a new normal. This is where the courts come in. If changing force policies to integrate substantive protections and procedural justice values is the first step toward disruption, then the second step means that federal courts need to, in turn, adapt to a changing understanding of what constitutional policing looks like. Convincing federal courts to acknowledge this shift and incorporate it as part of their work is the enduring challenge of this effort.

V. CONCLUSION

Strategized correctly, an endogenous understanding of Fourth Amendment excessive force jurisprudence can open up new ways of thinking about police reform as well as doctrinal reform. Focusing on police department use of force policies changes the backdrop from which police engage with community members so that the goals of procedural justice—dignity, respect, and fairness—can be implemented in a way that these values, at a large enough scale, can become the new deference point that courts use to interpret the “objectively reasonable” test in excessive force cases. In so doing, a reformulation of the Fourth Amendment can slowly happen through grassroots interventions and filter up to the courts through a mix of remaking use of force policies toward a procedurally just approach and strategically arguing for judicial deference to such practices

¹¹⁴ Lorraine Mazerolle et al., *Legitimacy in Policing: A Systematic Review*, 2013 *Campbell Sys. Revs.* 1, 10 (2013).

¹¹⁵ See also Tyler & Sevier, *supra* note 77, at 1097 (arguing that the strongest effect of procedural justice is its ability to affect public opinion about the legal system).

as an appropriate interpretation of the Fourth Amendment. Legal endogeneity can be a reform strategy.

Whether we think about the relationship between the police and communities of color as one of legal estrangement (which requires a structural approach) or through a limited procedural justice lens (requiring a reconfiguration of interpersonal relationships), legal endogeneity theory offers insights on how to disrupt problematic Fourth Amendment excessive force case law.¹¹⁶ While an effort led by federal courts to rethink Fourth Amendment jurisprudence so that it goes beyond the vague, officer-centric standard of *Graham* would be ideal, we must further recognize that administrative policies concerning the appropriate use of force are a critical site in how law is interpreted and applied. Thinking about law in an endogenous fashion allows us to see this role. Rather than just a simple top-down regulatory approach, we can see how the regulated become invested in interpreting and applying the law that governs them. This creates the possibility that building procedural justice into local use of force policies can, through the endogenous dynamic we have laid out, also impact the courts' understanding of the law.

¹¹⁶ See generally Bell, *supra* note 1, at 2066 (offering the concept of “legal estrangement” as an alternative to the procedural justice model).