SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 72 | Issue 3 Article 11

2022

We Can't Breathe: Reimagining Equal Protection as a Collective Right

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— Note —

We Can't Breathe: Reimagining Equal Protection as a Collective Right

George Floyd couldn't breathe.

We can't either.

We live in fear.

Fear of walking outside. Wearing a hoodie. Going for a jog. Sleeping in our own home. Existing.

Every day, a new hashtag. Every hour, a new injustice. Every second, more pain.

We don't deserve to live like this—and we continue to fight until white supremacy no longer permeates every corner of this country—until we can live full lives—freely.

- Black Lives Matter, "Rest in Power, Beautiful"[1]

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1. *Rest in Power, Beautiful*, Black Lives Matter (emphasis added) (reformatted), https://blacklivesmatter.com/rest-in-power-beautiful/?___cf_chl_jschl_tk___=pmd_M.Bw6J8.RN7FR83VDzfxtf_X9HU24ZpxUmSZ.gHs9ZU-1633194642-0-gqNtZGzNAiWjcnBszQjR [https://perma.cc/PWT6-WJH2] (last visited Jan. 2, 2022).

INTRODUCTION

From Eric Garner[2] to Breonna Taylor[3] to George Floyd[4] to Tamir Rice[5] and Sandra Bland,[6] the seemingly endless deaths of Black individuals in the United States at the hands of the police recentered

2. *See* Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 19, 2014, at A1 (explaining how Eric Garner's death following officer's use of a banned, dangerous chokehold resulted in renewed conversations about the use of the banned practice in recent excessive force complaints).

3. *See* Dylan Lovan, *Impatience Grows for Cops' Arrests in Breonna Taylor's Death*, ASSOCIATED PRESS (June 25, 2020, 5:39 AM), https://apnews.com/article/us-news-ap-top-news-arrests-racial-injustice-shootings-bb0b2c8e4e10b35421fd70f5fc5fb9c6 [https://perma.cc/K69B-JDV9] ("[T]hree months after plainclothes detectives serving a warrant busted into [Breonna Taylor's] Louisville, Kentucky apartment and shot the 26-year-old Black woman to death, only one of the three officers who opened fire has lost his job. . . . Calls for action against the officers have gotten louder during a national reckoning over racism and police brutality . . . .").

4. *See* Kadijatou Diallo & John Shattuck, Opinion, *George Floyd and the History of Police Brutality in America*, BOS. GLOBE (June 1, 2020, 5:06 PM), https://www.bostonglobe.com/2020/06/01/opinion/george-floyd-history-police-brutality-america/ [https://perma.cc/X758-955U] ("By recognizing the long history of racism in the justice system, Americans can grasp why deaths like George Floyd's are symptomatic of a larger failure of American justice.").

5. *See* Richard A. Oppel, Jr., *National Questions Over Police Hit Home in Cleveland*, N.Y. TIMES (Dec. 9, 2014), https://www.nytimes.com/2014/12/09/us/family-of-boy-killed-by-cleveland-officer-to-pursue-criminal-case.html [https://perma.cc/8KQM-EEKC] (explaining how details of twelve-year-old Tamir Rice's death by police have "become part of a broader narrative about police violence in African-American communities around the country").

6. *See* David Montgomery, *Sandra Bland, It Turns Out, Filmed Traffic Stop Confrontation Herself*, N.Y. TIMES (May 7, 2019, 7:58 AM), https://www.nytimes.com/2019/05/07/us/sandra-bland-video-brian-encinia.html?searchResultPosition=34 [https://perma.cc/WCG3-CBWH] ("[Sandra] Bland, a 28-year-old African-American from the Chicago area, was taken into custody in southeast Texas following [a] confrontational 2015 traffic stop and was found hanging in a jail cell three days later in what was officially ruled a suicide. . . . . The case, which drew international attention, intensified outrage over the treatment of black people by white police officers and was considered a turning point in the Black Lives Matter movement.").

debates over the causes of police brutality in legal and popular commentary. Traditionally, police excessive force has been described in individualistic terms, as a problem of "bad apples" or rogue police officers who go beyond department regulation because of overt or implicit animosity towards Black people.[7] More recently, however, this narrative has been challenged by arguments that emphasize the structural dimensions of police brutality. Sociologists and socio-legal scholars in particular have highlighted the myriad ways in which structural forces such as gentrification, housing policies, environmental policies, and policing practices converge to increase Black Americans' exposure to police and risk of death at their hands.[8] Legal scholars further point to the nation's constitutional terrain as a structural dimension of excessive force, with a legal structure represented in Fourth Amendment jurisprudence that both enables and perpetuates state violence against communities of color by insulating officers via a "highly deferential" reasonableness standard and denying group-based remedies to its victims.[9]

At the heart of current debates over the causes of police excessive force are differing conceptions of the nature of police brutality, its causes, and its consequences. Is police brutality caused by intentional acts of prejudice of independent officers against communities of color? Or is such state violence the result of implicit biases or social forces? Further, what precisely is the harm that results when officer after officer kills a Black person? Is police brutality a harm confined to the individual victim, or is it a form of structural oppression, a harm experienced at and against the level of the collectivity? At a practical level, answers to these questions undoubtedly inform the legal vehicles by which victims of police brutality can secure justice and the types of remedies deemed necessary to redress the harm inflicted by state violence.

This Note critically analyzes the ways in which police brutality—as a rights violation—is currently framed by the Supreme Court and the implications of such rights framing for the pursuit of racial justice

7. 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, 1468 (2018).

8. *See, e.g.*, Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549–62 (2017); Rory Kramer, Brianna Remster & Camille Z. Charles, *Black Lives and Police Tactics Matter*, CONTEXTS, Oct. 5, 2017, at 20, 24 (2017); Obasogie & Newman, *supra* note 7, at 1468; Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1493–95 (2016) [hereinafter Carbado, *Blue-on-Black Violence*].

9. *See* Obasogie & Newman, *supra* note 7, at 1480–1481 (quoting and discussing John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 155–56 (2016)).

in the United States. Since *Graham v. Connor*,[10] the Supreme Court has largely framed police brutality through a Fourth Amendment individual rights frame, holding excessive force as a violation by a singular officer of a person's Fourth Amendment right against unreasonable seizure.[11] Increasingly dissatisfied with the *Graham* doctrine's inability to recognize and redress the structural dimensions of police brutality, scholars have called for a re-examination of the potential of the Equal Protection Clause of the Fourteenth Amendment as an alternative mechanism by which the courts can take the structural dynamics of excessive force into account.[12] Such calls, however, neglect the fact that police brutality under the Equal Protection Clause is similarly framed as a violation of an individual's right to equality before the law. That is, the Supreme Court has adopted individual rights framing of the right to equal protection of the law, solidified by the intentional-discrimination requirement of *Washington v. Davis*,[13] that constructs police brutality as an isolated harm caused by purposeful acts by individual officers motivated by racial prejudice.

Ultimately, this Note argues that reconstructing police brutality under an equal-protection frame will fail to acknowledge and redress the structural causes and consequences of police excessive force until both equal protection and police brutality are reframed in collective terms. In other words, only when the nature of police brutality against individuals in the Black community is understood as a violation of the Black community's collective right to equal protection, caused by structural practices and resulting in collective harms, can the Fourteenth Amendment offer Black people any kind of legal vehicle for the pursuit of racial justice in the context of state-sponsored violence.

Importantly, as many scholars aptly note, the *potential* of the Fourteenth Amendment in responding to police excessive force against communities of color is constrained by the current hold the *Graham* and *Washington v. Davis* doctrines have on Supreme Court jurisprudence.[14] While recognizing the apparent impracticality of equal-protection claims prevailing in court when such claims are framed as a collective right, particularly in light of the individualist, liberal-legalist cultural context in which Supreme Court reasoning is embedded, this Note asserts that reframing police brutality as a violation of the Black community's collective right to equality is not a futile endeavor. Adopting a performative perspective to rights framing, this Note argues that by declaring that Black people, as a community, have a right to equality, plaintiffs engage in a fundamentally political activity whose

10. 490 U.S. 386 (1989).

11. *See id.* at 396–99; Obasogie & Newman, *supra* note 7, at 1485.

12. Obasogie & Newman, *supra* note 7, at 1498.

13. 426 U.S. 229, 242 (1976).

14. *See, e.g.*, Obasogie & Newman, *supra* note 7, at 1469–70, 1469 n.11.

instrumental value extends beyond the realm of the courts. Rather, such rights claiming is, at its core, a political practice with constitutive and transformative effects on conceptions of issues related to identity, citizenship, and state-citizen relations. Thus, this Note examines not only the practical impact of framing police brutality in individual versus collective rights terms, but also the performative potential of such rights frames.

Part I of this Note briefly describes the performative approach to rights framing, which is then adopted in the subsequent analysis. A performative approach shifts focus from whether a particular rights claim reflects legal or moral reality to what is done *in* and *by* making a rights claim.

Part II examines the content of the dominant frame in current excessive-force jurisprudence—the Fourth Amendment individual rights frame solidified by the Court in *Graham*, which construed § 1983[15] excessive-force claims as a violation of an individual's right to be free from unreasonable seizure. This Part's performative-frame analysis of the *Graham* doctrine and subsequent jurisprudence reveals the ways in which the causes and consequences of excessive force are framed in individualistic, ahistorical, and decontextualized terms that distort the lived reality of police brutality. The Court's reliance on the Fourth Amendment individual rights frame reinforces an atomized, colorblind conception of police brutality, its perpetrators, and victims.

Part III responds to scholarly calls to re-examine the potential of the Fourteenth Amendment's Equal Protection Clause, concluding that the Supreme Court treats equal-protection claims in similarly individualistic and decontextualized terms.

Part IV recommends that the legal community adopt an understanding of police brutality and the right to equal protection that is grounded in collective terms. This results in a reframing of the individual rights to be free from unreasonable seizure and equal protection of the law as the collective right to be free from gratuitous, racialized state violence. In doing so, this Part reconceptualizes the organizing beliefs of the equal protection frame in terms of structural racism, eschewing the individualistic focus of traditional racism that drives contemporary Fourth Amendment and equal-protection rights frames. Rather than locating the impetus for police excessive force in individual overt racial animus or implicit racial bias, a collective rights frame holds as the catalyst for excessive force a confluence of racially motivated structural practices that disproportionately expose communities of color to police use of force. While a discussion of the array of structural forces that contribute to the heavy burden of state violence experienced by the Black community is beyond the scope of this Note, this Part highlights the causal role of policing practices in driving contemporary police brutality. This Part also reconstructs the resultant

15. 42 U.S.C. § 1983.

harm of police brutality under a collective rights frame, drawing on interdisciplinary research to demonstrate the collective dimensions of such state violence within the Black community. The performative implications of such a collective rights framing are then considered in light of the concept of dissident citizenship.

In the Conclusion, the practical ramifications of framing police brutality through a collective rights frame are then examined. This Part offers several remarks, including reassessing the instrumental and performative value of a collective rights framing of equal protection claims in light of the existing constitutional terrain. Critical to the collective framing of the right to be free from state-sponsored racial police violence is a reimagination of the remedies necessary to redress the harm experienced by the Black community at the hands of the police. Whereas under an individual rights framing of police brutality, plaintiffs are precluded from pursuing injunctive relief, limiting § 1983 relief to individual compensation,[16] a collective rights framing provides temporary avenues by which plaintiffs can plead around the enormous burden placed by the courts on those pursuing equitable relief.

I. Performative Frame Analysis

Interdisciplinary in nature, frame analysis has been embraced by scholars in a wide range of fields including behavioral economics, social psychology, anthropology, political science, sociology, and organizational management.[17] A shared starting point for this line of research is the understanding that "rhetorical frames matter."[18] That is, how a given phenomenon is understood is derived, in part, from how that phenomenon is framed.

The notion that the way the courts frame police brutality matters is not surprising when one adopts a constitutive approach to the law. This perspective is driven by the belief that the "law shapes society from the inside out" by providing individuals a set of categories and

16. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1982).

17. *See generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Ann. Rev. Socio. 611 (2000); W.E. Douglas Creed, Jeffrey A. Langstraat & Maureen A. Scully, *A Picture of the Frame: Frame Analysis as Technique and as Politics*, 5 Org. Rsch. Methods 34 (2002); Michael Lee Wood, Dustin S. Stoltz, Justin Van Ness & Marshall A. Taylor, *Schemas and Frames*, 36 Socio. Theory 244 (2018); David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 Am. Socio. Rev. 464 (1986); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 Am. Econ. Rev. 1449, 1458–67 (2003).

18. Carbado, *Blue-on-Black Violence*, *supra* note 8, at 1480 n.2; *see also* George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind 116 (1987); Benford & Snow, *supra* note 17, at 614.

frameworks through which the world can be interpreted.[19] As Austin Sarat and Thomas Kearns note, "[*m*]*eaning* is perhaps the key word in the vocabulary of those who speak about law in constitutive terms."[20] The law, according to constitutivists, acts as a reservoir of meaning, a cognitive lens through which perceptions, experiences, and actions of the everyday can be understood.[21] Notions of legality have permeated a range of settings outside of legal institutions, with the law serving as the basis for constructing and understanding social relationships and social boundaries in a diversity of contexts ranging from the workplace and schools to the home.[22] As such, the law is responsible for not only modifying social conduct, but for shaping the very identities people assume and the relationships they hold with others.[23]

As an emergent structure of social life, the law does not exist separate from social practices and identities but is intertwined with them.[24] As individuals find meaning in legal symbols and use such meaning as the basis for social action, such meanings hold the potential to become patterned, objectified, and institutionalized within material and discursive structures of a given society.[25] It is the institutionalization of legal categories, symbols, and terms that enables as well as constrains processes of meaning-making in the future, with the law setting the terms by which future experiences can be legitimately understood.[26] Within the context of police brutality, it is precisely the courts' discursive institutionalization of legal concepts surrounding "'race,' 'justice,' and 'criminality' that play into how a situation like the death of a young black man 'makes sense.'"[27]

It is important to note here that, because of the socially constructed nature of law, the rules, categories, and codes that constitute it are far from objective. While many in the Western legal tradition think of the law as a body of rules that can be mechanically applied to a given case, the law is more akin to an ideology or discourse, existing as a set of

19. Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21, 22 (Austin Sarat & Thomas R. Kearns eds., 1995).

20. *Id.* at 30.

21. *Id.*

22. *Id.* at 50–61.

23. *Id.* at 60.

24. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW 39–40 (1998).

25. *Id.*

26. *Id.*

27. Zach Newman, Note, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 128 (2015).

contested categories and symbols that may be interpreted and manipulated in a number of ways. As Sally Engle Merry notes, "[t]he discourse of law is neither internally consistent nor unambiguous."[28] For interpretivist scholars, it is precisely these "ambiguities, inconsistencies, and contradictions [that] provide multiple opportunities for interpretation and contest."[29] To fully understand the influence of law on society, the diverse ways in which the courts *frame* the law must be considered.

A. Frame Analysis

Most scholars trace the origins of frame analysis to the 1974 work of sociologist Erving Goffman, who, advancing a social-psychological perspective, explored the processes by which individuals rely on expectations to make sense of routine experiences, such as daily interactions, advertising, and other aspects of social life.[30] According to Goffman, frames exist as mental scripts that enable individuals to "locate, perceive, identify, and label a seemingly infinite number of concrete occurrences defined in its terms."[31] As individuals enact conventionalized social behavior during the course of routine settings such as shopping or dating, they rely on certain frames as cognitive shortcuts to make sense of the circumstances encountered. Frames, thus, exist to order and ascribe meaning to daily interactions, cultural norms, discourses, and other aspects of social life.[32]

The values and beliefs within a given frame function to reflexively determine which aspects of reality are considered relevant to an issue at hand.[33] The metaphor of a window or picture frame is frequently invoked to describe the selective function of a frame's organizing principles.[34] Framing is akin to looking out a window, as both are activities by which boundaries are defined, aspects of reality are selected, and one's understanding of the world is structured.[35] Just as looking through a framed window restricts one's gaze to a certain perspective while excluding others, framing is a process that selectively identifies relevant facts that both constitute and sustain a particular reality.[36]

Since Goffman's cognitive research on framing, sociologists and socio-legal scholars have subsequently explored the notion of "collective

28. Sally Engle Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans 9 (1990).

29. *Id.*

30. *See generally* Erving Goffman, Frame Analysis (1974).

31. *Id.* at 21.

32. *Id.*

33. Creed, Langstraat & Scully, *supra* note 17, at 36.

34. *See id.* at 36–37.

35. *Id.* at 36.

36. *Id.*

action frames," packages of meaning that exist at the level of the collectivity and work to focus attention, synthesize events, experiences, and information, and assist in the interpretation of social life.[37] In the United States and many other liberal Western democracies, rights frames serve as a prominent type of collective action frame deployed by social-movement organizations seeking to advance their causes.[38]

1. Rights Framing

Rights discourse is central to the collective framing behavior of social-movement organizations.[39] Indeed, rights talk serves as the foundation for legal frames that are often deployed by social-movement organizations to transform problems into social grievances, mobilize constituents, and provoke change.[40] The cultural status of the law as a master frame and the ubiquity of rights discourse and framing across social movements by no means suggests that the content of deployed legal frames are the same. Rather, social-movement actors have deployed, alternatively, two types of rights frames—collective and individual rights frames—that vary, first and foremost, with respect to their organizing beliefs (i.e., diagnostic and prognostic beliefs).[41]

A frame's diagnostic beliefs address questions such as: What is the nature of the problem, event, or issue?[42] And how is it defined and experienced?[43] Beliefs in this category include judgments about the seriousness, nature and causes of a problem, issue, or event; "stereotypic beliefs about antagonists or targets of influence;" and beliefs about the victimized group.[44] Diagnostic beliefs inform how actors are defined (i.e., protagonists, antagonists, and spectators) and the extent of their centrality to the issue at hand.[45] Under one frame, actors may be deemed essential to the resolution of a problem, while under another, the same actors may be characterized as peripheral to or even the cause

37. *See* Benford & Snow, *supra* note 17, at 613–14.

38. For an overview of rights framing, see Gwendolyn Leachman, *Legal Framing*, *in* 61 Studies in Law, Politics, and Society 25, 33–37 (Austin Sarat ed., 2013).

39. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 Am. J. Socio. 1718, 1726 (2006).

40. *Id.* at 1751.

41. For an in-depth discussion of the difference between individual and collective rights frames, see Leachman, *supra* note 38, at 33–37.

42. *See* Snow et al., *supra* note 17, at 470.

43. *See id.*

44. *Id.*; *see* William A. Gamson, Talking Politics 111 (1992).

45. James K. Hertog & Douglas M. McLeod, *A Multiperspectival Approach to Framing Analysis: A Field Guide*, *in* Framing Public Life 141, 148, 157 (Stephen D. Reese et al. eds., 2001).

of a problem.[46] Causal attributions—beliefs about the cause of a problem, protagonists, and antagonists—are often subject to more rigorous debate than beliefs about the nature of the problem itself, with negotiated contestation often occurring despite agreement as to the precise nature of the harm caused.[47]

Actors relying on legal rights frames may construct grievances as violations of individual or collective rights. Whereas collective rights frames define social grievances as group harms that violate the status-based rights of a collectivity, individual rights framing emphasizes the individual as the entity in need of individuated legal redress, with grievances framed as violations of personal—rather than group—rights.[48] The diagnostic beliefs of an individual or collective rights frame can have considerable impact on *frame amplification*, a discursive process of accenting and highlighting issues, experiences, events, or beliefs within a frame, punctuating certain aspects while excluding others.[49]

With diagnostic beliefs positioning the harm experienced as collective in nature, collective rights frames emphasize the social differences and distinct experiences of a movement's constituency to legitimize demands for status-based legal protections.[50] As such, collective rights frames turn the focus of a movement inward, with collective rights discourses, combined with messages of solidarity, working to reinforce a sense of "collective identity among movement participants, which in turn motivates collective action."[51] In contrast, individual rights frames often strategically downplay the differences between the movement's constituency and other groups, preferring instead to amplify the ways in which victimized individuals are similar to the rest of society, and thus, deserving of equal—not special—protection under the law.[52]

Whereas diagnostic beliefs define a given problem as such, prognostic beliefs articulate a proposed solution to the problem, outlining a general plan of attack and the strategies necessary to ensure change.[53] Prognostic beliefs answer the question "What is to be done?"[54] Prognostic beliefs are intrinsically connected to diagnostic beliefs: the manner in which a problem is identified and characterized shapes the

46. *See id.* at 157–58.

47. Benford & Snow, *supra* note 17, at 616.

48. Leachman, *supra* note 38, at 33–35.

49. Benford & Snow, *supra* note 17, at 623.

50. Leachman, *supra* note 38, at 33–34.

51. *Id.* at 34 (citation omitted).

52. *Id.* at 36.

53. Benford & Snow, *supra* note 17, at 616.

54. *Id.*

range of solutions and strategies that are deemed reasonable and possible to adopt.[55] Prognostic beliefs do not form in a silo, but are often shaped by the nature of solutions advocated by opponents, targets of influence, the media, and bystanders.[56]

Whether a social movement defines a grievance as a violation of individual or collective rights has an impact on the types of remedies (i.e., prognostic beliefs) proposed by the legal frame.[57] By framing grievances as collective harms reflecting in structural modes of oppression, collective rights framing advocates for the adoption of status-conscious legal protections that address the unique characteristics and, by extension, experiences, of the victimized group.[58] In contrast, individual rights frames' emphasis on individual harm supports advocacy efforts at securing legal remedies that focus on protecting individual rights, regardless of group status.[59]

Often, movement actors shift between individual and collective rights frames. In the reproductive-rights movement in the United States, for example, movement actors first framed restrictions on reproductive health as a violation of women's collective rights, emphasizing the ways in which reproductive health, contraception, and abortion are issues exclusive to the domain of women.[60] Under a collective rights frame, the uniqueness of womanhood and the vulnerabilities that come with it were amplified, suggesting a need for status-based legal remedies.[61] The framing of reproductive health issues eventually shifted over time, with mainstream activists "situat[ing] abortion as a matter of choice, which women, like men, should be able to exercise freely as rights-bearing citizens."[62]

By framing the issue of abortion in terms of individual rights, the women's reproductive-health movement shifted in the ways in which they described their constituency. Activists no longer emphasized the uniqueness of group status; rather, an individual rights frame drove activists to instead highlight the similarities between men and women, such as essential autonomy and rationality in decision-making.[63] By

55. *Id.*

56. *Id.* at 616–17.

57. *Id.* at 616.

58. Leachman, *supra* note 38, at 34.

59. *Id.* at 35–36.

60. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 Am. J. Socio. 304, 322 (2003).

61. *Id.* at 335.

62. *Id.* at 314.

63. *Id.* at 315.

downplaying the systematic biases that women face, the women's reproductive rights movement shifted from a collective rights frame to an individual rights frame, with the values of universal protection under the law becoming a dominant organizing principle of the latter frame.[64]

B. Performativity and Legal Framing

To capture the constitutive effects of legal framing and avoid the descriptive bias endemic to framing research, this Note adopts a performative approach to the judicial framing of excessive force. The understanding of performativity advanced here is rooted in the speech-act theory of J.L. Austin, subsequently developed by scholars such as Jacques Derrida and Judith Butler, and exemplified by the work of Karen Zivi.[65] Austinian speech-act theory conceptualizes performative utterances as those speech acts that, rather than simply describing an already existing reality, work to construct reality through the uttering process.[66] The original examples of performative utterances provided by Austin include saying "I do" in a marriage ceremony or "I bet" in a game of poker.[67] According to Austin, "if a person makes an utterance of this sort we should say that he is *doing* something rather than merely *saying* something."[68] By saying "I do," an actor does not describe a marriage, but creates and participates in it.[69] Thus, a performative approach is concerned less with what a particular utterance *means* than what a particular utterance *does*.[70]

Applying a performative approach to discourse surrounding Proposition 8, a gay marriage referendum in California,[71] Zivi shifts focus from whether or not a particular rights claim regarding gay marriage reflects legal or moral reality to what is done "[*i*]*n* and *by* making a claim to th[e] right."[72] As a practice of persuasion as well as a social and political practice, Zivi finds that rights claiming, like legal framing, is contextual, inextricably linked with the identity and political subjectivities of those making such claims.[73] According to Zivi, rights claims

64. *Id.* at 322–24; Leachman, *supra* note 38, at 36.

65. Karen Zivi, Making Rights Claims 14 (2012).

66. *Id.* at 8, 14–16.

67. J.L. Austin, How to Do Things with Words 5–6 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975).

68. J.L. Austin, *Performative Utterances*, *in* Philosophical Papers 233, 235 (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970).

69. Zivi, *supra* note 65, at 17.

70. *Id.* at 9.

71. Voter Information Guide for 2008, General Election 128 (2008).

72. Zivi, *supra* note 65, at 71–72 (emphasis added).

73. *Id.* at 12.

such as "I have the right to equality" are fundamentally political activities, with the political character of rights claiming extending beyond the instrumental value of rights discourse.[74] Rather, rights claiming is, at its core, a political practice with constitutive and—potentially—transformative dimensions.[75]

Adopting a performative approach to the framing of excessive force jurisprudence allows scholars to analyze these constitutive and transformative dimensions. Through the process of framing police brutality as a violation of, *inter alia*, the right to be free from unreasonable seizures or the right to equality under the law, the courts construct and reaffirm the social identities of perpetrators and victims of police violence.[76] In addition, because the "law may be the source of new expectations for existing relations," such rights framing is not only constitutive but potentially transformative as well.[77] By making rights claims that are intelligible, yet novel, aggrieved groups have the opportunity to deploy existing legal categories and concepts in new or alternative ways. When such reframing is codified by the courts, social and political identities and relationships may be transformed, demonstrating the power of legal frames to foster change beyond a given social movement or struggle.

C. Liberal Legalism as the Interpretive Context of Police Violence

Socio-legal scholars have documented the ubiquity of legal framing across disparate social movements, particularly in the United States, where rights discourse maintains high narrative fidelity with the legal culture and consciousness of American society.[78] Importantly, however, not all rights discourse is treated equally. Rather, the type of legal framing that has come to dominate social movements in the United States and other Western capitalist democracies is primarily that of *individual* rights framing, with the framing process informed by the cultural landscape in which such movements are embedded.[79] In the United States, that landscape is shaped largely by the interpretive reservoir of liberal legalism, which serves as a superordinate "master"

74. *Id.* at 118–19.

75. *Id.* at 84.

76. For an overview on the connection between social identities and rights framing, see generally Scott A. Hunt, Robert D. Benford & David A. Snow, *Identity Fields: Framing Processes and the Social Construction of Movement Identities*, *in* New Social Movements 185 (Enrique Laraña, et al. eds., 1994).

77. Lisa J. McIntyre, Law in the Sociological Enterprise: A Reconstruction 113 (1994) (emphasis omitted).

78. Benford & Snow, *supra* note 17, at 622–28.

79. *Id.* at 628.

frame from which movement-specific organizational frames are derived.[80]

The liberal legalist master frame that dominates Western social movements exists as a kind of political common sense in liberal capitalist democratic countries.[81] At the very foundation of the liberal-legalist frame is a commitment to the equality of all individuals vis-à-vis the state.[82] The liberal theory of equality is intrinsically connected to negative liberty and individual autonomy.[83] Liberty, according to liberal theorists such as Rawls, is individual, negative, and pluralist in nature, reflecting an understanding of the person as an autonomous moral agent concerned with pursuing individual conceptions of the good.[84] An individual's enjoyment of liberty to realize his or her own conceptions of the good is prioritized to the extent that such aims and preferences do not infringe on the liberty of other individuals.[85] As liberalism acknowledges a plurality of conceptions of "the good" exist, it holds that the state should position itself according to the "maximum degree of noninterference [(negative liberty)] compatible with the minimum demands of social life" in order to enable individuals, as separate persons, to pursue their respective conceptions of the good.[86] Equality, then, is defined as equal distribution of negative liberty across individuals in a given society.[87]

According to Michael Walzer, liberalism's conception of the individual as atomistic, isolated, and rational results in a language of individual rights that unites these individual atoms within broader society.[88] Through specific discourse surrounding individual rights to privacy, property, and voluntary association, amongst others, liberal selves *and* communities are created that selectively reinforce those same liberal rights and values. As Marcos Scauso asserts, through state recognition and fostering of only those communities that validate liberal principles of individual rights, "liberalism creates a bounded notion of

80. Leachman, *supra* note 38, at 31.

81. Shiraz Dossa, *Liberal Legalism: Law, Culture, and Identity*, 4 European Legacy, no. 3, 1999, at 73, 83.

82. Peter Hudson, *Liberalism, Democracy, and Transformation in South Africa*, 27 Politikon 93, 94 (2000).

83. *See* John Rawls, A Theory of Justice 27 (1971).

84. *See id.*

85. Isaiah Berlin, Four Essays on Liberty 170 (1969).

86. *Id.* at 161.

87. Hudson, *supra* note 82, at 94.

88. Marcos S. Scauso, Intersectional Decoloniality: Reimagining International Relations and the Problem of Difference 21 (2021). *See generally* Michael Walzer, *The Communication Critique of Liberalism*, 18 Pol. Theory 6 (1990).

equality and freedom for those individuals and groups that are 'rational.'"[89] Equality, then, is granted "to those who fit within the commonality of each 'rationality,'" and withheld from those who exist outside such liberal boundaries of rationality.[90] "In turn, this form of statecraft delineates who can access rights and who is an 'other' that needs to be normalized, disciplined, assimilated, or killed."[91]

The natural affinity between liberal theory and legalism and the overlap in their core tenets positions legalism as the legal ideological foundation for liberal politics. But what is legalism, precisely? As the "logical and ideological offspring of liberal ideology"[92] legalism has been referred to as a legal theory, a professional ideology, and a meta narrative of the law—as "law's explanation of itself."[93] Judith Shklar defines legalism as a commitment to "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[94] That is, legalism insists on the morality of conduct that conforms with rules (i.e., laws) established in the past, an insistence that positions the law as "simply *there*—if one has a moral duty to obey rules, it must be the case that the rules are there."[95]

This definition suggests that legalism maintains an affinity to legal formalism, which holds the law to be an objective, independent, closed logical system, derived from the existence of a legal science that makes possible the objective determination of disputes.[96] Indeed, at the heart of legalism (and liberal legality more broadly) is the formalist, positivist view of the law as a determinable and empirical science, static and universal in nature, merely waiting to be applied by legal actors to a given case.[97] Legalism, thus, depicts legal actors as mechanical decision-makers and noncontributing agents of the law, waiting on the sidelines to solve conflicts and grievances via a legal final solution.

As Shiraz Dossa notes, "the formal split between law and morals, the primacy of individual liberty and autonomy and of right over the good, the focus on the visibly factual (distinguished from values),

89. Scauso, *supra* note 88, at 21.

90. *Id.* at 22.

91. *Id.* (citation omitted).

92. Dossa, *supra* note 81, at 77.

93. Narnia Bohler–Muller, *Western Liberal Legalism and Its Discontents: A Perspective From Post–Apartheid South Africa*, 3 Socio–Legal Rev. 1, 5 (2007).

94. Judith N. Shklar, Legalism: Law, Morals, and Political Trials 1 (1964).

95. Robin West, *Reconsidering Legalism*, 88 Minn. L. Rev. 119, 120 (2003).

96. *Id.* at 119.

97. *Id.* at 120.

constitute sacral tenets of liberal legality and politics."[98] Under a liberal legalist framework, the law is seen as neutral and apolitical, with the "assumed sanctity of the judicial torso" placing legal decision-making outside of the realm of politics.[99] Distinctly apolitical and divorced from social context, the law, according to this frame, serves as the ultimate protector of the free market by reinforcing the status quo through unquestionable faith in the nature and purpose of the law.

Framing violence and oppression as the violation of individual rights, with a narrow focus on political and civil rights, the liberalist frame has served as the master frame for a variety of social movements, which have drawn on these principles in the creation of movement-specific frames.[100] The civil-rights frame, as with most individual rights frames, was derived from the liberalist master frame and was deployed by American civil-rights activists during the 1950s and 1960s to give voice to their experiences with Jim Crow laws, widespread violence against Black communities, and the pervasive legacy of slavery in America.[101] By depicting segregation, for example, as a violation of their *individual* rights to equality before the law, civil-rights activists constructed a frame that resonated with the liberal values and constitutional principles deeply rooted in American political and legal culture.[102] The civil-rights movement's emphasis on individual rights rather than collective rights reflects liberalism's prioritization of abstract individualism over social differentiation.[103] As Cathi Albertyn and Beth Goldblatt note, "In liberal legalism, it is differentiation which is seen to be the problem and the assumed objective is a society where equal (meaning same) treatment is the norm and where racial and sexual distinctions do not exist."[104] Thus, framing group-based discrimination as a violation of individual rights allowed the civil-rights movement to construct their grievances in a manner that resonated well with the liberal values of United States political and legal culture.

Before turning to the specific impact of liberal legalism on the Court's framing of police violence, it is important to note that liberal legalism is not a static interpretive resource. That is, "liberalism does

98. Dossa, *supra* note 81, at 75.

99. *Id.* at 73.

100. Leachman, *supra* note 38, at 33.

101. David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, *in* Frontiers in Social Movement Theory 133, 146 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

102. *Id.*

103. Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. Afr. J. Hum. Rts. 248, 251 (1998).

104. *Id.* at 252.

not itself come ready-made with particular constellations of legal arguments."[105] Liberal legalism, like all cultural frames, is subject to shifts in its content, just as rights frames themselves shift in content across time and space.[106] Yet, as Justin Desautels-Stein suggests, "we can see that [the mid-twentieth century] strain of civil rights law as performing in the modern liberal style, even while there was nothing about the style itself that necessitated the legal particulars."[107]

II. Police Violence and the Fourth Amendment Frame

A. The Fourth Amendment Individual Rights Frame

With a liberal-legalist interpretive background informing its jurisprudence, the Supreme Court has addressed the question of what constitutes excessive force only three times. In 1985, the Court began its foray into Fourth Amendment reasonableness analysis in *Tennesee v. Garner*,[108] where an officer shot an eighth-grade Black boy in the back of the head as he fled, unarmed, across the yard of a house where a prowler was reported.[109] Stating that the reasonableness of police use of force required consideration of the "totality of the circumstances" and a balancing of the individual interest in one's own life against the societal interest in effecting arrests, the Court held that it was unreasonable to "seize an unarmed, nondangerous suspect by shooting him dead."[110]

Four years after *Garner*, the Court in *Graham v. Connor*[111] established the definitive framing of excessive force in the contemporary age. Prior to *Graham*, excessive force had been addressed by the courts through a variety of approaches, including the Fourteenth Amendment's due-process guarantees.[112] Rejecting substantive due process as a legal vehicle for addressing excessive-force claims, the *Graham* Court instead declared "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory

105. Justin Desautels–Stein, *Race as a Legal Concept*, 2 Colum. J. Race & L. 1, 31 n.147 (2012).

106. *Id.*

107. *Id.*

108. 471 U.S. 1 (1985).

109. *Id.* at 3–5 & n.2.

110. *Id.* at 9, 11.

111. 490 U.S. 386 (1989).

112. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (considering police misconduct under the Due Process Clause of the Fourteenth Amendment and concluding that a violation exists when the officers' conduct "shocks the conscience"); Rinker v. County of Napa, 831 F.2d 829, 831–32 (9th Cir. 1987); Gumz v. Morrissette, 772 F.2d 1395, 1399 (7th Cir. 1985), *overruled by* Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987).

stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[113] The reasonableness inquiry set forth in *Graham* is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[114]

Nearly twenty years later, the Supreme Court took up the issue of excessive force once again in *Scott v. Harris*.[115] Here, the Court faced the question of whether, within the context of a high-speed chase following a speeding violation, an officer's ramming of a suspect's vehicle with his police car, resulting in a collision and the paralysis of the suspect, was unreasonable.[116] Emphasizing the threat posed by Harris to police officers and other motorists, the Court held that the officer's use of force was reasonable under the circumstances.[117] Rejecting the notion that *Garner* created a bright-line rule regulating the use of force against fleeing suspects, the Court noted that the vast factual differences between *Garner* and *Scott* made the former inapplicable.[118] Instead, at the center of its reasonableness inquiry was the "ad hoc balancing of state and individual interests unconstrained by any specific criteria"[119] put forth by *Garner* and affirmed in *Graham*.

B. Performative Frame Analysis

The diagnostic and prognostic beliefs found in the framing established by *Graham* and its progeny clearly reflect an individual rights framing of excessive force. Recall that—whereas diagnostic beliefs refer to a frame's organizing principles regarding the nature of a given harm, its perpetrators, and victimized group—prognostic beliefs refer to beliefs about the remedy considered necessary.[120]

Importantly, a performative approach to excessive-force legal framing requires going beyond merely describing the diagnostic and prognostic beliefs of the Fourth Amendment frame. It requires further considering what the courts do in and by saying that, within the context of police brutality, individuals have the right to be free from unreasonable seizures. As the following subsections demonstrate, the Court's use of an individual rights frame to make sense of police violence has a

113. *Graham*, 490 U.S. at 395.

114. *Id.* at 396.

115. 550 U.S. 372 (2007).

116. *Id.* at 374.

117. *Id.* at 386.

118. *Id.* at 382–83.

119. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1137 (2008).

120. Benford & Snow, *supra* note 17, at 615.

number of performative effects, including the individualization and decontextualization of the victims of police brutality; the privileging of the raced logic of white law enforcement while dismissing the racial experiences of Black victims with police as irrelevant; distortions to the reality of police officers and policing in the modern age; and the individualization of pathways to redress what has become a structural phenomenon.

1. Individualization of Police Violence's Victims and Harm

What is the nature of the harm under the Fourth Amendment frame? Under *Graham*, excessive force is (re)framed as a violation of an *individual's* right, under the Fourth Amendment, "to be secure in their persons . . . against unreasonable . . . seizures."[121] Referring to police brutality as "physically intrusive governmental conduct" against an individual,[122] the Court placed state violence on par with the minimally intrusive restraints on an individual's liberty found in custodial arrests. In linking excessive force to the judicial doctrine governing unreasonable seizures, the *Graham* Court individualized and decontextualized the harm of police violence.

The individualizing nature of the Fourth Amendment and related jurisprudence is derived from several sources, including its historical origins in liberalism and its placement within the Bill of Rights. As Osagie Obasogie and Zachary Newman note, the Fourth Amendment, with its placement in the Bill of Rights—"a rights-granting framework largely based on the conception of singular individuals being provided singular rights"—historically governed the relationship between *individuals* (and their privacy interests) and the government.[123] Historically, the Fourth Amendment has functioned as a means of protecting the *individual* right to individual security.[124] Motivated in part by the use of suspicionless writs of assistance by the British to combat smuggling in the American colonies and consequent resentment by American colonists, the Framers enshrined in the Fourth Amendment "their strong concern for the protection of the individual's right to be free from arbitrary and general searches and seizures," favoring individual liberty over collective security.[125]

121. U.S. Const. amend. IV.

122. Graham v. Connor, 490 U.S. 386, 395 (1988).

123. Obasogie & Newman, *supra* note 7, at 1470.

124. Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 Tex. Tech L. Rev. 255, 256 (2010) ("For most of the history of the United States, the view that the Fourth Amendment served to protect individual security—that it was an individual right—was so patently obvious that it needed no support.").

125. *Id.* at 260.

While the Court has described the rights protected by the Fourth Amendment in expansive terms, including the inviolability of the person, the right to privacy, and the right of free movement,[126] each reformulation of the Fourth Amendment's protections references an *individual* right to be secure.[127] The history of the Fourth Amendment and its subsequent treatment by the courts indicate that the scope of its protections extend to individual persons seeking redress for unreasonable governmental searches and seizures. This framing implies that the victims of excessive force, under a Fourth Amendment frame, are atomistic, rather than any social group, and that the harm experienced occurs at the individual—rather than collective—level.

Such a framing results in an utter distortion of consequences of police violence within the Black community. As Part IV discusses in more detail, the harm that results from the murder of yet another Black individual by the police extends beyond the direct victim, to the broader Black community in the form of collective traumatization.

2. Reaffirmation of the Rights-Bearing Citizen as White

By adopting a reasonableness standard, *Garner*, *Graham* and their progeny erase the salience of race for both the perpetrators and victims of police brutality, while simultaneously reaffirming a construction of the rights-bearing citizens as white.[128] In contrast to the Court's position on race, race matters, for example, when it comes to a Black person's decision to flee from police,[129] a police officer's assessment of the threat posed by a Black suspect,[130] and a court's decision as to the

126. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 672 (1995) (O'Connor, J., dissenting) (personal dignity); Soldal v. Cook Cnty., 506 U.S. 56, 63 n.8 (1992) (liberty); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 613 (1989) (freedom of movement); Hayes v. Florida, 470 U.S. 811, 815–16 (1985) (freedom of movement); Winston v. Lee, 470 U.S. 753, 760 (1985) (personal dignity); Smith v. Maryland, 442 U.S. 735, 740 (1979) (privacy).

127. Clancy, *supra* note 124, at 261.

128. Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for 'Location Plus Evasion'* Terry *Stops*, 6 Mich. J. Race & L. 355, 358 (2001).

129. *Id.* at 359–62 (noting that there are a number of legitimate, noncriminal reasons for a Black person to flee from the police, including violence avoidance and skepticism toward police).

130. A 1990 study, for example, reported that "over 56 percent of Americans" perceive Black people as more "violence prone" than white people. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan. L. Rev. 781, 787 (1994) (discussing Tom W. Smith, Ethnic Images 4, 8 (Gen. Soc. Surv. Project, Topical Report No. 19, 1990), https://gss.norc.org/Documents/reports/topical-reports/TR19.pdf [https://perma.cc/DT2U-CBFH]); *see also* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth*

reasonableness of a police officer's judgment.[131] Yet, courts have continuously adopted a colorblind approach to police-citizen encounters,[132] with the regulation of police conduct made at the expense of and "on the back of blacks."[133] Through *Graham*'s objective reasonableness standard, the courts "regularly adjudicate[] cases that involve and impact African-Americans without expressly engaging how members of that community perceive and experience the police."[134]

The Tenth Circuit, for example, has explicitly excluded race from reasonable-person inquiries on the grounds that "there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures."[135] By confining the consideration of race to assessments of the voluntariness of statements made to the police, the Tenth Circuit deemed irrelevant the fact that, for many Black individuals, "the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security."[136] The reasonable-person analysis, premised on Anglo and Western European cultural, political, and economic norms and values, ultimately functions as a tool of white supremacy, working to perpetuate racial exclusion by demanding that Black individuals "comport themselves as a reasonable person that

Amendment, 74 N.Y.U. L. REV. 956, 983–91 (1999) (discussing social science research on the role of cognitive schema and categorization on perceptions by police officers of Black people as more likely to engage in criminal conduct); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 243 n.2 (discussing six studies over the course of three decades that verify police officers' negative attitudes and feelings of anxiety toward Blacks).

131. Carpiniello, *supra* note 128, 368.

132. *See, e.g.*, Tennesee v. Garner, 471 U.S. 1, 22 (1985) (erasing the racial dimension from the analysis of the reasonableness of an officer's decision to use deadly force against an unarmed, nonthreatening fleeing suspect).

133. Devon W. Carbado, *Race and the Fourth Amendment*, *in* 4 ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 153, 182 (Erik Luna ed., 2017) (quoting Toni Morrison, *On the Backs of Blacks*, TIME (Dec. 2, 1993), http://content.time.com/time/subscriber/article/0,33009,979736,00.html [https://perma.cc/3H23-BVUA]).

134. *Id.*; *see, e.g.*, California v. Hodari D., 499 U.S. 621 (1973) (the decision to chase); United States v. Mendenhall, 446 U.S. 544 (1980) (the decision to follow and approach, and question generally); Florida v. Bostick, 501 U.S. 429 (1991) (the decision to question on a bus); United States v. Drayton, 536 U.S. 194 (2002) (the decision to not inform defendants of the right to not cooperate).

135. United States v. Easley, 911 F.3d 1074, 1082 (10th Cir. 2018).

136. Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239, 247 (1993).

bears very little resemblance to their lived reality."[137] As such, the Fourth Amendment's framing of police brutality as an unreasonable seizure decontextualizes the victims of state-sponsored violence, erasing the culturally-rooted racial logics that shape Black American's behavior in police-citizen encounters.

At the same time, despite purporting to be race-neutral and objective, courts considering excessive force under a Fourth Amendment frame privilege the "raced" logic of police officers, thereby reinforcing white cultural norms about blackness as inherently criminal. For example, in *Illinois v. Wardlow*,[138] a location-plus-evasion case, the Court held that a Black defendant's fleeing from police officers in a known drug trafficking area in Chicago constituted reasonable and articulable suspicion to justify a *Terry* stop of the defendant.[139] As Mia Carpiniello asserts, by characterizing a white police officer's perception of the Black defendant as "commonsensical,"[140] the Court reveals its racial bias toward white America implicit in its avowedly colorblind application of the Fourth Amendment.[141]

Behaviors such as running are, in actuality, implicitly racialized. As the May 2020 murder of Ahmaud Arbery in Georgia reflects, Black individuals engaged in exercise are more likely to be perceived as fleeing a crime and posing a threat than their white counterparts.[142] This is due, in part, to the pervasive association in America between blackness and criminality, which can lead "people [to] evaluate ambiguous actions performed by non-[w]hites as suspicious and criminal while identical actions performed by [w]hites go unnoticed."[143] When assessing the reasonableness of a seizure, the Court relies primarily on "the officer's

137. Scott Astrada & Marvin L. Astrada, *The Enduring Problem of the Race-Blind Reasonable Person*, AM. CONST. SOC'Y: EXPERT FORUM (May 11, 2020), https://www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person/ [https://perma.cc/L6GL-6GRQ].

138. 528 U.S. 119 (2000).

139. *Id.* at 121–25.

140. Carpiniello, *supra* note 128, at 370 (citing *Wardlow*, 528 U.S. at 128).

141. *Id.* at 368.

142. Natalia Mehlman Petrzela, Opinion, *Jogging Has Always Excluded Black People*, N.Y. TIMES (May 12, 2020), https://www.nytimes.com/2020/05/12/opinion/running-jogging-race-ahmaud-arbery.html [https://perma.cc/2PVJ-6QCS].

143. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012); *see also* Vincent J. Roscigno & Kayla Preito-Hodge, *Racist Cops, Vested "Blue" Interests, or Both? Evidence from Four Decades of the General Social Survey*, SOCIUS: SOCIO. RSCH. FOR DYNAMIC WORLD (2021), https://journals.sagepub.com/doi/pdf/10.1177/2378023120980913. Through statistical analysis, Roscigno and Preito-Hodge reflect on "how much police stand out as unique and in ways that support the contention that their worldviews are more racist in character."

construction of his *perception* of threat and his *suspicion* of criminal activity . . . [thereby] accept[ing] racial affect that portrays blacks as reasonably feared or suspected of criminality.[144] As Valdez and colleagues aptly characterize, "blackness—intelligible primarily as 'the presumed danger it poses to public welfare'—is the ultimate object of, and justification for, police power."[145] This avowedly racial logic held by American society at large, as well as individual police officers, is deemed reasonable under the broad standard set forth by the *Graham* Court and adopted in subsequent decisions.

In *Whren v. United States*,[146] the Court doubled down on its privileging of the racial logic of the white majority in America. In *Whren*, the Supreme Court held that an officer's subjective racial animus, as a motivation to stop a defendant, is irrelevant to the assessment of the reasonableness, and by extension, the constitutionality of the seizure.[147] By erasing the explicit racial logic of law enforcement, the Court effectively "legalized . . . reliance on affective priors regarding the threat and criminality of Blacks to guide policing."[148] Furthermore, "to the extent that the deciding body—most typically a judge, but sometimes a jury or grand jury—shares the racial affect that perceives blackness as a threat, the law creates systemic incentives for police officers to exaggerate racialized narratives after-the-fact to obtain legal cover for violence."[149] Combined with the doctrine of qualified immunity, the Court's deference to officers' racialized perceptions of Black bodies has provided law enforcement with "an absolute shield . . . [thereby] gutting the deterrent effect of the Fourth Amendment."[150]

What are the performative impacts of this double standard embedded in the colorblind jurisprudence of the Court? Recognizing the performative character of rights claims forces a reconceptualization of the contours of U.S. citizenship. Whereas traditional conceptualizations of citizenship portray citizenship as a relatively stable legal institution defined by rights and centered around a relationship with the state, a

Id. These worldviews are most prevalent in white and male officers, who make up the majority of law enforcement officers in America. *Id.*

144. Inés Valdez, Mat Coleman & Amna Akbar, *Law, Police Violence, and Race: Grounding and Embodying the State of Exception*, 23 Theory & Event 902, 922–23 (2020).

145. *Id.* at 919.

146. 517 U.S. 806 (1996).

147. *Id.* at 820.

148. Valdez et al., *supra* note 144, at 923.

149. *Id.* at 924.

150. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

theory of performativity suggests that citizenship, because it is constitutive of rights, is inherently unstable, contestable, and something that must be exercised, enacted, and, thus, performed.[151] According to Engin Isin, since the 18th century, beginning in Euro-America, the dominant group associated with modern citizenship is "propertied, adult, male, rational, white, Christian, heterosexual, and able-bodied"—an association that has had the natural effect of disqualifying from citizenship those that exist outside of this dominant group.[152] Historically, other social groups such as the poor, Black, queer, and non-Christian were perceived as "not capable of fulfilling the duties of citizenship and hence acting as citizens." [153]

Within the context of police violence, the reasonable-person standard and the privileging of the raced logic of law-enforcement officers results in a further dispossession of Black Americans from the rights constitutive of citizenship in the United States. The Court deems Black Americans' historical experiences of violence and trauma at the hands of law enforcement as irrational and irrelevant to legal judgments about the use of force, while simultaneously affording the racial biases held by officers significant weight in the reasonableness calculus. This double standard results in a reaffirmation of the hegemonic image of the rights-bearing citizen in the United States as white and furthers the legal marginalization of Black Americans.

3. Distortion of the Causes of Police Violence

Just as the reasonable-person standard distorts victims of police brutality by isolating "suspicious" behavior of Black people from its cultural and racial contexts, the Court's Fourth Amendment framing of excessive force warps contemporary understandings of officers' decisions to use force through its deference to an individual officer's judgment at the scene. Notably, the *Graham* Court observed that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[154] Thus, *Graham* locates the responsibility for use-of-force decisions, including the use of excessive force, within the individual officer.

151. Gurchathen Sanghera, Katherine Botterill, Peter Hopkins & Rowena Arshad, *'Living Rights,' Rights Claims, Performative Citizenship and Young People—The Right to Vote in the Scottish Independence Referendum*, 22 Citizenship Stud. 540, 540 (2018) ("[R]ights are fundamental to citizenship, which is practised both with the enacting of rights *and* by claiming them." (citations omitted)).

152. Engin Isin, *Performative Citizenship*, *in* The Oxford Handbook of Citizenship 500, 502–03 (Ayelet Shachar et al. eds., 2017).

153. *Id.* at 503.

154. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

In *Brower v. County of Inyo*,[155] the Court clarified its definition of excessive force as a seizure when it considered a Fourth Amendment claim brought under § 1983 after an eluding suspect crashed into a roadblock put in place by police and was killed.[156] The Court held that a Fourth Amendment seizure occurs "only when there is governmental termination of freedom of movement *through means intentionally applied*."[157] Thus, excessive force under a Fourth Amendment frame results from *intentional* acts by independent law enforcement agents to terminate an individual's freedom of movement. As Devon Carbado has criticized, the Court created "a relatively high bar for when police conduct constitutes a seizure. The higher the bar, the narrower the Fourth Amendment boundary between the police and the people—and the greater the discretion police officers have to decide how to engage [with African-Americans]."[158]

While Carbado is correct in his observation that the Court's definition of seizure increases the discretionary power of officers vis-à-vis the Black community, this framing endows individual officers with a degree of agency that ultimately distorts the dual nature of perpetrators of excessive force. As Rachel Harmon notes, policing is, in reality, characterized by both state authority and human agency:

> Police officers use force as an authorized form of state coercion, but they do so in tense and often emotionally charged interpersonal encounters. An officer using force to arrest a subject is neither entirely a neutral actor, detached and disinterested, charged with carrying out the will of the state, nor entirely an individual acting in the heat of the moment, vulnerable and in harm's way, perhaps vengeful and afraid. Strangely but inevitably, he is both.[159]

Fourth Amendment jurisprudence on police violence ignores this duality inherent in policing, with the Court and commentators instead framing excessive force as the result of intentional decision-making of individuals, rather than acknowledging the dual nature of police violence perpetration: systemic and individual.[160]

155. 489 U.S. 593 (1989).

156. *Id.* at 594, 599.

157. *Id.* at 597.

158. Carbado, *Blue-on-Black Violence*, *supra* note 8, at 1506.

159. Harmon, *supra* note 119, at 1121 (footnote omitted).

160. *See* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.–C.L. L. REV. 159, 161 & n.3 (2016) (noting that "[commentators] continue to frame excessive force as a problem that derives from rogue police officers who harbor racial animus against African Americans" and collecting commentary).

Such framing, according to Carbado and Patrick Rock, "obscures the structural dimensions of police violence and ignores significant empirical evidence . . . suggesting that conscious racial animosity likely only accounts for a small percentage of racially-motivated conduct."[161] Indeed, as Akhil Reed Amar notes, due to the "vastly increased bureaucratic density" of the 19th and 20th centuries, "[t]he true locus of decision-making authority [regarding police search and seizure conduct] has shifted from the individual to the organization."[162] The importance of police departments, their policies and procedures regarding the use of force, and other structural aspects of these organizations is underemphasized within the Fourth Amendment framing of police brutality.

III. POLICE VIOLENCE AND THE EQUAL PROTECTION FRAME

As Obasogie and Newman aptly note, the extant literature consists primarily of critiques of the Fourth Amendment framing of excessive force, "with little discussion of the *potential* of the Fourteenth Amendment—specifically, equal protection—to address the use of force as" a deeply structural issue shaped by racialized group dynamics.[163] This dearth in scholarly discussions about the utility of the Equal Protection Clause in remedying the structural aspects of police brutality is understandable, given the *Graham* decision's preclusion of the Fourteenth Amendment as a relevant frame for understanding excessive force in seizure contexts. The doctrinal choices of the Supreme Court in *Graham* and subsequent excessive-force cases created a constitutional environment unconducive to equal-protection claims of Black victims.

The *Graham* decision effectively precludes the use of the Fourteenth Amendment's Equal Protection Clause as a viable rights frame for victims of police brutality. The impact of *Graham* on channeling police violence claims into the Fourth Amendment frame has been profound on lower-court jurisprudence. Prior to *Graham*, the courts were open to a multiplicity of framings of excessive force, with plaintiffs relying on the Fourth Amendment in some contexts and the Fourteenth Amendment in others.[164] Post-*Graham*, however, lower courts turned away from a Fourteenth Amendment framing of police violence, relying

161. *Id.* at 161–62 (drawing on social psychological research in the construction of a theoretical model that integrates the individual and structural predicates of police violence).

162. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 813 (1994).

163. Obasogie & Newman, *supra* note 7, at 1478.

164. Obasogie & Newman, *supra* note 7, at 1485 ("Only 28.0% of the qualifying pre–*Graham* cases include a discussion of the Fourth Amendment. . . . . [T]he Supreme Court . . . moved [post–*Graham*] away from examining police violence matters through the Fourteenth Amendment (decreasing from 40.0% to 25.6%) . . . .").

instead on a Fourth Amendment frame in approximately 90% of cases in the period following *Graham*.[165]

The following discussion delineates the content of the current Equal Protection frame constructed by the Court, before turning to a performative frame analysis of such a framing of police violence. Notably, since the Court's interpretation of equal protection under the Fifth and Fourteenth Amendments is embedded within—and highly influenced by—the broader legal culture predominant in American society (i.e., liberal legalism), much of the same critiques made of the Fourth Amendment frame remain relevant with respect to the equal-protection frame. Both the Fourth Amendment and equal-protection frames view police violence as a violation of individual rights, thereby reconstructing the nature and experience of police brutality in historical, decontextualized terms, with the pervasive murders of Black people at the hands of the state attributed to intentional acts of discrimination.

A. The Equal Protection Individual Rights Frame

To view police brutality against Black people as a violation of their constitutional right to equal protection of the law is to continue the Fourth Amendment tradition of framing police violence as an *individual* rights violation. That is, the harm endured by Black people at the hands of the police remains localized—within the domain of the individual, rather than the community. This atomistic framing, informed by liberal legalism's predominant focus on the relationship between the *individual* and the state, is reflected both in the language of the Fourteenth Amendment and subsequent judicial interpretations of the clause's constitutional demands.[166]

The language of the Equal Protection Clause itself prohibits states from denying "to any *person* within its jurisdiction the equal protection of the laws."[167] In *Shelley v. Kraemer*,[168] the Supreme Court echoed this liberal legalistic interpretation of the Equal Protection Clause. Faced with the question of whether judicial enforcement of a covenant restricting the sale of property to non-Black people violated the Equal Protection Clause,[169] the Court noted that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed

165. *Id.*

166. *See infra* Part IV. As Part IV discusses, however, this surface level reading of the text of the Equal Protection Clause is not the only interpretation of the Amendment. Indeed, as the legislative history of the Amendment confirms, the Fourteenth Amendment may be read as a status–based corrective amendment requiring attention to differences in the positionality of racial groups in America.

167. U.S. Const. amend. XIV, § 1 (emphasis added).

168. 334 U.S. 1 (1948).

169. *Id.* at 4.

to the individual. The rights established are personal rights."[170] Thirty years later, Justice Powell, in *Regents of the University of California v. Bakke*,[171] an affirmative-action-in-higher-education case, further endorsed an individual rights framing of equal protection: "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."[172]

Robert Farrell argues that individual-rights interpretations of the Court's treatment of the Fourteenth Amendment are "misleading and unnecessary,"[173] citing a number of Court decisions as "very strong evidence that the Equal Protection Clause does not protect individual rights" but rather functions solely as a "limit on government classification."[174] To Farrell, even in cases such as *Shelley* and *Bakke*, where individual-rights language is prominent in the Court's opinions, the Justices' own recognition of the class-based nature of the issues before them undermines the importance of such individual-rights discussions to the court's ultimate holdings, and, by extension, contemporary understandings of the very rights protected by Fourteenth Amendment.[175]

While Farrell correctly observes that *Shelley* "involved a challenge to a racial *classification*, not a claim of harm to an individual person,"[176] his focus on the *necessity* of individual-rights interpretations of equal protection to deciding the constitutionality of racial classifications obscures the performative salience of such discussions to the construction of modern police brutality and its aftermath. From a performative perspective, the framing of the Equal Protection Clause as a mechanism of individual-rights protection, is a form of legal speech that *acts*. By continuing to affirm, through the courts, the individualistic nature of the rights protected by the Equal Protection Clause, the Court continues to construct Black victims of police brutality as individuals, isolated from the collective traumatization that weighs on the broader Black community.

Indeed, while the Court rightfully locates the undesired results of discriminatory classifications at the group level, the Court refrains from reconstructing the harm experienced by victims of police brutality in

170. *Id.* at 22.

171. 438 U.S. 265 (1978).

172. *Id.* at 299.

173. Robert C. Farrell, *Affirmative Action and the "Individual" Right to Equal Protection*, 71 U. Pitt. L. Rev. 241, 264 (2009).

174. *Id.* at 263–64.

175. *Id.* at 264–67.

176. *Id.* at 265.

truly collective terms. Even when facing the sword of the Equal Protection Clause, held at the subaltern's side, the Court ultimately conceptualizes the harm of excessive force as an invasion of an individual's, rather than a group's, right. Thus, while government classifications along racial and national-origin lines trigger heightened judicial scrutiny of such classifications for compliance with the Equal Protection Clause,[177] this scrutiny still conceptualizes the harm it seeks to remedy in individualized terms, distorting the nature of police brutality, its victims, and its consequences in the process.

B. Performative Frame Analysis

While the potential of an equal-protection frame as an alternative interpretive resource of excessive-force claims remains understudied, the potentiality of an equal-protection framing of police violence remains limited by its commitment to liberal legalism's emphasis on individual rights. A performative frame analysis of judicial treatment of equal-protection claims with respect to police brutality brings to the forefront a disappointing recognition that the Equal Protection Clause frame, like its Fourth Amendment counterpart, remains deeply individualizing and decontextualizing, unable to account for the systemic causes of the phenomenon. This inability stems largely from Supreme Court jurisprudence and subsequent lower-court interpretations of this case law that conceptualizes racism in traditional terms and requires discriminatory intent to trigger strict scrutiny of state action with respect to race.

The meaning lawyers impute to the Fourteenth Amendment's guarantee of equal protection is restricted by the interpretive milieu in which it is deployed—one dominated by liberal legalism. Indeed, equal protection, in its current construction, is informed significantly by liberal legalism's traditional construction of racism as a volitional phenomenon, one characterized by prejudice, intent, and active discrimination.[178] This understanding of racism—referred to by William Wiecek as "traditional racism"[179]—is reflected in the (few) decisions of post-*Graham* lower courts that actually address a plaintiff's Fourteenth Amendment claims with respect to police brutality.[180] Traditional racism, according to Wiecek, "focuses on an individual with a bad attitude. It assumes that the racist is aware of his beliefs and by acting on them, intends to bring about discriminatory results for the victim."[181]

177. *E.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976).

178. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 4 (2011).

179. *Id.* at 3–5.

180. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

181. Wiecek, *supra* 178, at 4.

Traditional racism, as this section discusses, is at the heart of an equal-protection framing of excessive force.

The diagnostic beliefs embedded in an equal-protection frame are also significantly informed by the interpretive foundation established in *Washington v. Davis*,[182] a case unrelated to police brutality. Prior to *Davis*, the Court had not addressed the question of whether disparate impact of state action provided sufficient grounds to establish equal-protection liability.[183] During this time, however, lower federal courts viewed state actions with discriminatory racial impact as creating a suspect classification, thereby subjecting the action to strict scrutiny.[184] *Davis* settled the question of discriminatory impact's role in equal protection assessments.

In *Davis*, the plaintiffs—Black applicants to the Washington D.C. police force—alleged a violation of the Equal Protection Clause, citing statistics demonstrating that Black applicants failed the police examination at a much greater rate than their white counterparts.[185] While noting disproportionate impact was not irrelevant to an inference of discriminatory purpose, the Court held that disparate impact was insufficient, by itself, to support claims about the existence of a racial classification: discriminatory impact, "[s]tanding alone, does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[186] Rather, "the basic equal protection principle [requires] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[187]

Davis—combined with existing case law on equal protection's scrutiny standards, which were well established by 1976[188]—resulted in state action that is facially neutral with respect to race receiving heightened judicial deference (i.e., rational-basis review), unless there is evidence of discriminatory intent beyond disparate impact.[189] The

182. 426 U.S. at 242.

183. Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328, 331 (1982).

184. *Id.*

185. *Davis*, 426 U.S. at 235.

186. *Id.* at 242 (citation omitted).

187. *Id.* at 240.

188. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 311–12 (1976).

189. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1081 (2011). For additional cases in which the Court has held that discriminatory impact is insufficient to establish a racial classification and trigger strict scrutiny see, for example, City of Mobile v. Bolden, 446 U.S. 55, 56 (1980), which rejected findings of discriminatory impact, alone, as indicative of purposeful discrimination.

Court reaffirmed this requirement of discriminatory purpose in *Personnel Administrator of Massachusetts v. Feeney*,[190] where the Court mandated that lawmakers must have enacted a law "in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[191] *Feeney* also limited the ability of the courts to rely on foreseeability of disparate impact as indicative of intent to discriminate.[192] Thus, the Court virtually eliminated any potential role that disparate impact might have played in equal-protection analysis of the courts.[193] This articulation of the discriminatory-purpose requirement in *Davis* and its progeny has reaffirmed the Fourth Amendment's construction of police brutality as a conscious decision by individual officers, reflecting liberal legalism's traditional construction of racism.

In *Jackson v. City of Pittsburgh*,[194] where a white officer assaulted a Black person during a traffic stop,[195] a U.S. District Court in Pennsylvania rejected the plaintiff's Fourteenth Amendment claim because "the officers did not make any sort of racist remarks to him."[196] Similarly, in a suit brought by a Black plaintiff alleging excessive force, the plaintiff's equal-protection claim failed because, according to the court, "none of the officers made any derogatory racial remarks to [him]."[197] As these cases intimate, the Equal Protection Clause, in its current formulation, holds overt evidence of racial animus (i.e., racist remarks) as a proxy for discriminatory intent. The courts place traditional racism front and center in equal-protection jurisprudence, continuing the Fourth Amendment frame's construction of police violence as an intentional act by rogue officers whose racial animus motivated the rights violation. Not only does this place a high evidentiary burden on plaintiffs, who must provide proof of such overt racism, but this framing obscures the roles of both implicit bias and structural racism as contributing factors of excessive force incidents against Black people.

190. 442 U.S. 256 (1979).

191. *Id.* at 279.

192. *Id.* at 279 n.25.

193. Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 Ala. L. Rev. 653, 661–62 (2015).

194. 688 F. Supp. 2d 379 (W.D. Pa. 2010).

195. *Id.* at 385.

196. *Id.* at 395.

197. Loharsingh v. City and County of San Francisco, 696 F. Supp. 2d 1080, 1106 (N.D. Cal. 2010).

IV. Recommendation: Reframe Equal Protection as a Collective Right

The Court's current interpretation of the Equal Protection Clause constructs police brutality as a violation of an individual's personal right to equality before the law—but an individual rights frame is not the only possible interpretation of the Fourteenth Amendment's protections. Indeed, as this section argues, police violence against Black people is better understood as a violation of the Black community's collective right to equal protection of the law. Recall that collective rights frames define a given harm as a violation of the status-based rights of a group, emphasizing—rather than downplaying—the unique experiences of a group with marginalization in order to legitimize demands for status-based legal protections.[198] As with individual rights frames, collective rights frames do so by proposing alternative diagnostic beliefs. What might such a reframing look like?

A. Reconstructing the Nature of Police Brutality

The diagnostic beliefs of a collective rights framing of equal protection consist of several propositions regarding the nature of and harm imposed by police brutality. First, the nature of police brutality is not, at its core, an (il)legal intervention, but rather, *gratuitous state violence* perpetuated against the Black community.[199]

1. Reframing Excessive Force as Gratuitous State Violence

Police violence against the Black community is not merely excessive, but gratuitous, anchored in an anti-Black system of white supremacy that is predicated on the refusal to recognize Black humanity.[200]

198. *See supra* Part I(A)(1).

199. This notion builds on ideas developed by Zach Newman. *See* Zach Newman, Note, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 Hastings Const. L.Q. 117, 131–33 (2015) (concluding that "police 'violence' *is* violence"). While Newman aptly notes that a reconceptualization of excessive force as violence is necessary to diminishing "the unimpeachable legitimacy of the police," denoting such brutality as merely violence obscures the role of the state in enacting technologies of violence against the Black community. *Id.* at 133. L. Song Richardson and Phillip Atiba Goff get closer to capturing the role of power and dominance in police brutality, relying on the term "hegemonic racial violence . . . to define the violence perpetrated by dominant group members, such as white individuals and the police, against racially subordinated individuals." L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 Ohio St. J. Crim. L. 115, 118 (2014).

200. "Anti–blackness describes the inability to recognize black humanity. It captures the reality that the kind of violence that saturates black life is not based on any specific thing a black person—better described as 'a

Gratuitous violence may be contrasted with contingent violence: whereas the latter occurs after some breach in the symbolic order, the former "precedes and exceeds Blacks."[201] That is, gratuitous violence is senseless violence, with no penological goal justifying its deployment. The murder of George Floyd by Minneapolis police exemplifies this kind of violence; in no way can the use deadly violence a Black man be justified by his alleged crime of using a counterfeit check.[202]

Yet, such instances of gratuitous violence against Black people occur because "the structure of antiblackness [in America] positions black people as subhuman . . . black people are targeted for what blackness represents socially, not for what they may or may not be doing individually."[203] Blackness—to white people (and to some extent, other non-Black racial groups)—is a necessary predicate for white identity construction; indeed, the definition of another as "non-white" is at "the core of white self-definition."[204] The implications of this "ontological paradox," in which white people rely on the denigration and subjugation of Black people in order to maintain whiteness as an identity of supremacy are profound within the context of violence against Blacks. Within this system of identity construction, physical violence is essential.[205] As Steve Martinot notes, "[t]he other is both placed at the center of white identity and continually evicted from it. And because it is a self-generated attribute of white identity, this violence is always gratuitous. It marks the need to continually reconstitute white identity as autonomous, precisely because it is dependent."[206] Police violence, then, continues to be perpetuated by the state and its agents, long after

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person who has been racialized black'—did. The violence we experience isn't tied to any particular transgression. It's gratuitous and unrelenting." Kihana Miraya Ross, Opinion, *Call It What It Is: Anti–Blackness*, N.Y. Times (June 4, 2020) https://www.nytimes.com/2020/06/04/opinion/george–floyd–anti–blackness.html [https://perma.cc/GN9R-A6W3].

201. Frank B. Wilderson III, Red, White, & Black: Cinema and the Structure of U.S. Antagonisms 76 (2010).

202. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (Oct. 29, 2021), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/79AK-Y87A].

203. Tryon P. Woods, Blackhood Against the Police Power: Punishment and Disavowal in the "Post–Racial" Era 221–22 (2019) ("[O]nly sentient beings constructed as nonhuman objects are subjected to gratuitous, rather than contingent, violence.").

204. Steve Martinot, *White Skin, White Affect: Redundancy, Obsession, and Gratuitous Violence*, Open Computing Facility https://www.ocf.berkeley.edu/~marto/affect.htm [https://perma.cc/W2QM-ELYX] (last visited May 5, 2022).

205. *Id.*

206. *Id.*

the end of formal chattel slavery, because the existence and psychic health of whites in America is based so firmly on gratuitous violence against Black people that the mere existence of Black people requires violence in order to sustain whiteness as an identity.[207]

Reframing excessive force as gratuitous requires a further reconceptualization of police brutality as *state violence.* The notion that police brutality is state violence is not new, but, rather, is a conceptualization underutilized in contemporary legal discussions of such violence. Indeed, elsewhere in the social sciences, scholars have described police brutality as "a form of unwarranted physical violence perpetrated by an individual or group symbolically representing a government sanctioned, law enforcement agency as opposed to an individual perpetrator who only represents themselves."[208]

Excessive force is state violence. As an arm of the state, police officers and departments conduct themselves under the color of law, as state agents, thereby imbuing their acts of state violence with meaning distinct from that of private violence.[209] As the Court noted in *Bivens*,[210] "power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[211] David Kennedy succinctly captures the special meaning attached to state violence:

> It is simply a statement of the human condition to say: people will forever and always kill each other, no matter how hard we try to prevent it. If we say: our government will forever and always kill us, and beat us, and do us violence under color of law, no matter how hard we try to prevent it, that is fundamentally different. That is an admission and an acceptance of the failure of the state of our democracy, and the American experiment.[212]

As part of the social contract endowing the democratic state with sovereign authority, citizens give up their natural rights to violent self-

207. *Id.*

208. Thema Bryant-Davis, Tyonna Adams, Adriana Alejandre, and Anthea A. Gray, *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. Soc. Issues 852, 853 (2017).

209. David M. Kennedy, *State Violence, Legitimacy, and the Path to True Public Safety*, Niskanen Center (July 8, 2020), https://www.niskanencenter.org/state-violence-legitimacy-and-the-path-to-true-public-safety/ [https://perma.cc/U396-A6DF].

210. Bivens v. Six Unknown Named Agents of Fed. Narcotics Agents, 403 U.S. 388 (1971).

211. *Id.* at 392.

212. Kennedy, *supra* note 209.

help (i.e., private violence) and accept the state's "monopoly of the *legitimate* use" of violence.[213] The state, in turn, promises to protect citizens from *illegitimate* violence by the state[214] and private violence by fellow citizens.[215] Nonetheless, the Fourth Amendment's reasonableness equation, bolstered by the doctrine of qualified immunity, results in the classification of most police violence as legitimate, and therefore, denoted as a "legal intervention," rather than actual violence.[216] Reframing excessive force as state violence brings the role of the state—the alleged watchman—to the forefront, localizing responsibility for such brutality in the state.

2. Police Brutality as the Deprivation of the Black Community's Entry Rights

Further, reframing equal protection as a collective right forces a reconceptualization of the types of rights violations that occur when state agents inflict gratuitous violence against the Black community. Police violence is neither an unreasonable seizure nor an impermissible government classification. Rather, such state violence is, at its core, a deprivation of what West terms "rights to enter civil society."[217] Civil rights are one category of entry rights—that is, rights of participation, inclusion, membership and belonging. Drawing on Thomas Paine's *Rights of Man*, West notes "three defining attributes" of civil rights as entry rights: "they are (1) natural rights (2) that arise by virtue of one's membership in society, and (3) that cannot be enforced or protected on their own."[218] According to West, civil rights are "rights to enter civil society"; that is, "rights *to* law, rather than rights *to be free of* law,"

213. MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds., 1958) (emphasis removed); Liliya Abramchayev, Note, *A Social Contract Argument for the State's Duty to Protect from Private Violence*, 18 ST. JOHN'S J. LEGAL COMMENT. 849, 849–52 (2004).

214. Newman, *supra* note 27, at 131–33.

215. Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 898–99 (2014) ("[T]he simple yet powerful image of the state as a watchman lies at the core of the social contract. In exchange for relinquishing our natural rights to violent self-help, which is destructive of communal life, the watchman promises to protect us and our property from private violence . . . [T]he foundational civil right of the individual to look to the state for protection, as well as the obligation of the state to provide such protection . . . are not just essential to, but constitutive of, civil society.").

216. Newman, *supra* note 27, at 131–132 ("Police forces use a 'legitimate' violence when using fatal force against individuals. This legitimate violence is a 'legal intervention,' a numerical event tabulated by the Center for Health Services.").

217. For an introduction to West's concept of "rights to enter civil society," see West, *supra* note 215, at 905–06.

218. *Id.*

and the protection of the state against private violence.[219] It would be a mistake, however, to limit West's conceptualization of civil rights to the right to physical security in the face of *private* violence. Rather, civil rights, as entry rights, include the right to be free from illegitimate *state* violence. Indeed, the civil right to physical security is a natural right held, not by virtue of an individual's humanity, but by virtue of their membership in a state—a membership that comes with the relinquishment of self-help in exchange for such protection.[220] Just as with state enforcement of the right to be free from private violence, state enforcement of the right to be free from state violence allows Black people to "enter civil society and as . . . equal[s]. Without [such enforcement], either we are slaves to whomever has legal violent power over us or we are out in the cold" and are thrust into a state of effective slavery.[221]

A collective reframing of equal protection centers the notion that Black people in America have historically existed in this state of effective slavery, a condition reaffirmed every time government agents tasked with serving and protecting us beat and brutalize us instead. Such constant brutalization at the hands of the state has devastating effects beyond the direct victim. The subsequent traumatization of Black people from police violence exists at individual *and* collective levels. At the individual level, evidence demonstrates that Black persons may suffer from greater rates of PTSD, generalized anxiety, and stressor-induced depression than the population.[222] This disproportionality results from both direct experience with police violence as well as experiencing such violence vicariously, as the moments of victims' last breaths are broadcast to cellphones across the country.[223] Yet, the

219. *Id.* at 906, 909 (emphasis omitted) (discussing Thomas Paine, Rights of Man 69 (Eric Foner & Henry Collins eds., Penguin Books 1984) (1791–92)).

220. *Id.* at 908–09.

221. *Id.*

222. Bryant-Davis et al., *supra* note 208, at 857 (citing Janet E. Helms, Guerda Nicolas, & Carlton E. Green, *Racism and Ethnoviolence as Trauma: Enhancing Professional and Research Training*, 18 Traumatology 65, 66 (2012)).

223. Kenya Downs, *When Black Death Goes Viral, It Can Trigger PTSD-like Trauma*, PBS News Hour, (July 22, 2016, 8:04 PM), https://www.pbs.org/newshour/nation/black–pain–gone–viral–racism–graphic–videos–can–create–ptsd–like–trauma [https://perma.cc/D9WR-7GZZ] (discussing symptoms and prevalence of PTSD and similar psychological issues among Black people, and describing an activist who said, "I hadn't had nightmares about Ferguson and tear gas or protests for a long time, but they came back when I saw those videos [of Alton Sterling and Philando Castile's killings]"); *see also* Jacob Bor, Atheendar S. Venkataramani, David R. Williams, & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-*

direct-injury requirements embedded in both the Fourth Amendment and the Equal Protection Clause's individual rights frames suggest these frames are unable to capture the psychological impact of this rights violation as it pertains to anyone beyond the direct victim.

Collective traumas—analytically distinct from their individual counterparts—exist at the level of the group and result from "blow[s]" to the essence of a community, with damage concentrated in the social "tissues" that bind human groups together, keep communities intact, and inform how individuals relate to the world.[224] The history and persistence of police violence against the Black community in the United States has served as a source of collective traumatization by virtue of the damage such state-sponsored violence inflicts on the social ties connecting the Black community to broader American society and the state itself.[225]

As with most events that cause collective trauma, police violence brings about a "realization that the community no longer exists as an effective source of support and that an important part of the self has disappeared."[226] Here, two forms of community are implicated in the collective traumatization of Black Americans.

First, police violence targets the social ties of the Black community itself, destroying families and disrupting the day-to-day social practices

Experimental Study, 392 LANCET 302, 302 (2018) (finding that police killings of unarmed Black Americans adversely affect the mental health of Black adults not directly involved in the killings).

224. Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma*, *in* CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1, 1, 4 (2004) (quoting KAI T. ERIKSON, EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD 153–54 (1976)). For an overview of such a sociological approach to collective traumatization, see Alexander, *supra*, at 1–30. Central to the concept of collective trauma is the recognition that traumatization can occur in victims who are not directly involved in the triggering event. For example, Ron Eyerman, writing on American slavery as a form of cultural trauma, argues that the repressive structures of racism—and in particular, the memories of slavery these structures engendered—played a primary role in the creation of African American identity, even amongst generations which lack firsthand experience with these traumatizing structures. RON EYERMAN, CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY 14–15 (2003) ("Whether or not they directly experienced slavery or even had ancestors who did, blacks in the United States were identified with and came to identify themselves through the memory and representation of slavery. This came about not as an isolated or internally controlled process, but in relation and response to the dominant culture.").

225. Downs, *supra* note 223; Tasha Williams, *Research Shows Entire Black Communities Suffer Trauma After Police Shootings*, YES! MAG. (Aug. 3, 2018), https://www.yesmagazine.org/health-happiness/2018/08/03/research-shows-entire-black-communities-suffer-trauma-after-police-shootings [https://perma.cc/5BJY-9HVP].

226. ERIKSON, *supra* note 224, at 154.

of Black people everywhere. To be Black in America means to live in constant fear of death at the hands of the state. Our decisions—from the mundane to the monumental—are shaped by the possibility of this fatal outcome. Whether deciding to go jogging or wear a hoodie or eat a sandwich, the threat of police brutality seeps into every judgment, every calculation, of the Black community. Black people choose to not leave their home for work and to not have children out of fear of police violence.[227]

Second, police brutality damages the social contract between Black Americans and the State. As Monnica Williams, a clinical psychologist and Director of the Center for Mental Health Disparities at the University of Louisville, notes, within the Black community, police killings have resulted in "a heightened sense of fear and anxiety when you feel like you can't trust the people who've been put in charge to keep you safe."[228] Such state-sponsored violence effectively eliminates the basis of social cooperation, leaving even the basic definition of the broader American community—and thus Black individuals' identities, capabilities, and feelings of security—in need of critical reexamination.[229] The collective traumatization plaguing the Black community is characterized by what Monica Bell terms "legal estrangement," that is, the "process by which the law and its enforcers signal to marginalized groups that they are not fully part of American society—that they are not imbued with all the freedoms and entitlements that flow to other Americans, such as dignity, safety, dreams, health, and political voice, to name a few."[230] The current interactional and structural regimes that maintain feelings of legal estrangement within the Black community operate to effectively exclude that community from the broader American collectivity, perpetuating a conception of blackness as social and political death.

The Court's individual rights framing of police violence against the Black community results in an inability to legally account for the collective dimensions of the trauma that results from excessive force. The disruption of the very identities of Black Americans, the diminishment of their sense of security, and the deterioration of the ties that bind Black people and the democratic state—these aspects of police violence are ignored by the Court by virtue of the emphasis on individual rights violations. Reframing equal protection as a collective right to be free from gratuitous state violence, held by virtue of Black

227. Williams, *supra* note 225.

228. *See* Downs, *supra* note 223 (quoting Monnica Williams, clinical psychologist and Director of the Center for Mental Health Disparities at the University of Louisville).

229. Roberto Beneduce, Archeologie del Trauma: Un'Antropologia del Sottosuolo 42 (2012).

230. Monica C. Bell, *Legal Estrangement: A Concept for These Times*, 48 Am. Socio. Ass'n Footnotes (Special Issue) 7, 8 (2020).

people's membership in society, allows for a more holistic portrayal of the rights violations that occur when police employ gratuitous force.

B. Broadening the Causes of Police Violence

A second diagnostic belief critical to a reframing of police brutality is that such state violence is caused by a combination of factors, including racial animus, implicit biases, *and* structural racism. The notion that implicit bias plays a role in bringing about police brutality is not new.[231] While analysis of the potentiality of the Equal Protection Clause remains limited, robust discussions exist with respect to implicit-bias critiques of the discriminatory-intent requirement. Drawing on social science, particularly that from cognitive and social psychology, legal scholars have decried the Court's discriminatory-intent requirement for its refusal to consider unconscious biases as a motivational basis for police violence against Black people.[232] In his seminal piece on unconscious racism and equal protection, Charles Lawrence noted that "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy."[233] Implicit-bias research since then makes clear that much of policing involves decision-making that takes place largely at the sub-conscious level;[234] thus, officers often lack the requisite intent—that is, the conscious volition—to act in a way that triggers liability.

Ultimately, courts' disregard of the significant corpus of research demonstrating the role of implicit bias as a catalyst for police violence has resulted in the continued distortion of the causes of police violence, thereby continuing the Fourth Amendment construction of officers as isolated perpetrators. Under the existing equal-protection individual rights frame, responsibility for the violation lies with the bad apples,

231. Implicit bias is defined as "the process of associating stereotypes or attitudes towards categories of people without conscious awareness." Kathleen Osta & Hugh Vasquez, *Don't Talk About Implicit Bias Without Talking About Structural Racism*, NATI'L EQUITY PROJECT (June 13, 2019), https://medium.com/national-equity-project/implicit-bias-structural-racism-6c52cf0f4a92 [https://perma.cc/J4T7-YY8C].

232. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 & n.11 (1995). For a discussion of implicit bias, see generally Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS PSYCH. SCI. 123 (2002); Marianne Bertrand, Dolly Chugh, Sendhil Mullainathan, *Implicit Discrimination*, 95 AM. ECON REV. 94, 94–95 (2005).

233. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987).

234. Carbado & Rock, *supra* note 160, at 161–62 & n.5.

whose overt racial animus—rather than implicit bias—drives violations of Black individuals' right to equality under the law.[235]

Critiques of the courts' failure to consider the role of implicit bias are well founded but, ultimately, offer only a partial picture of the causes of police brutality—one that still locates responsibility for police violence in individual officers. The racism of officers—whether explicit or implicit—is certainly important to consider in attempts to improve officer training and minimize use-of-force incidents. However, the extant literature's overemphasis on implicit bias results in a neglect of the structural conditions, particularly those characterized by institutional racism, that give rise to and maintain racial inequities and allow implicit racial biases to flourish with impunity.

Reframing police violence as a violation of the collective right to equal protection allows for a more holistic analysis of the causes of police brutality: an analysis that captures the interactional *and* structural nature of modern policing. At its core, a collective rights frame places structural racism at the forefront of equal-protection violation assessments. Structural racism is distinguished from traditional racism through the former's seemingly invisible mode of operation. Whereas traditional racism is enacted out in the open, structural racism operates behind the scenes, as a "complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color."[236] Importantly, structural racism as a predicate for police violence encompasses the "cultural beliefs" that form the foundation for implicit biases, in addition to the "historical legacies," structural configurations, and "institutional policies" that interact to create racially disparate life outcomes.[237]

Interestingly, in academic discussions of structural racism and equal protection, scholars often neglect police brutality as a consequence of structural racism, choosing to focus on phenomena that are seemingly more protracted, such as residential segregation, voter disenfranchisement, and the school-to-prison pipeline.[238] This neglect is due, perhaps, to the fact that police violence is often seen as a discrete event by intentional actors, whereas racially disparate outcomes, such as residential segregation, appear to develop and take root over a longer period of time. Nonetheless, a collective rights framing of both police violence

235. *See supra* Part I(A)(1).

236. Wiecek, *supra* note 178, at 4–5.

237. *Id.* at 5.

238. *See, e.g.*, Chauncee D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases through a Structural Racism Framework*, 36 Fordham Urb. L.J. 1009 (2009) (focusing on the school-to-prison pipeline); Victoria J. Haneman, *Contemplating Homeownership Tax Subsidies and Structural Racism*, 54 Wake Forest L. Rev. 363 (2019) (focusing on homeownership tax subsidies).

and equal protection mandates redirecting attention away from individual motives to the structural mechanisms that enable and actively promote police violence against Black people in America.

This reframing follows calls by Obasogie and Newman to remain attentive to the roles played by policing policies in shaping the dynamics of police brutality.[239] A burgeoning corpus of Fourth Amendment legal scholarship has begun to identify the ways in which police departments, their policies, and other structural features contribute to the continued increase in police violence against the Black community. Carbado and Rock, for example, propose a theoretical model that characterizes racialized police violence as the product of interactions between racialized structures in society.[240] The implicated structures—which increase Black people's exposure to police officers, thereby increasing the probability of use of force against them—include proactive policing, mass criminalization, racial segregation, racial stereotypes, group vulnerability, police departments' emphasis on revenue generation, and Fourth Amendment case law.[241] Carbado and Rock's model demonstrates how implicit biases regarding the presumed criminal inclinations of Black people, through institutional structures such as proactive policing, become significant catalysts for racialized police violence.[242] Without a structural environment conducive to implicit racial stereotypes, their effect may diminish.[243]

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239. 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, 1285–86 (2019).

240. Carbado & Rock, *supra* note 160, at 162–65.

241. *Id.* at 163–64. According to Carbado and Rock,

> repeated police interactions create a risk of police violence exposure. There are a number of reasons for this. First, the simple fact of repeated police interactions overexposes African Americans to the possibility of police violence. Second, the fact that African Americans' exposure to the police occurs against the background of stereotypes of African Americans as violent and dangerous increases the likelihood that police officers will interact with African Americans from the perspective that violent force is both necessary and appropriate. Third, the more exposed African Americans are to the police, the greater the probability that they will be arrested. This is important because an arrest — being handcuffed and placed in the back of a patrol car — increases the likelihood that an officer will use force.

Id. at 164.

242. *Id.* at 163–64.

243. *Id.* at 167 ("The flipside is that one's underexposure to police diminishes one's vulnerability to police violence. If one is never stopped by the police, the chance of being killed or physically abused by the police is virtually nil.").

Among these structural catalysts for police violence are departmental use-of-force policies themselves. Applying "legal endogeneity theory" to a content analysis of Fourth Amendment jurisprudence and use-of-force policies, Obasogie and Newman documented a pattern of "federal courts abdicating their interpretive role and allowing the administrative policies of police departments to define the meaning of excessive force under the Fourth Amendment."[244] This legal endogeneity occurs via an iterative process by which the Supreme Court's impoverished and vague case law with respect to police violence and reasonable use of force give rise to departmental use of force policies that symbolically reflect compliance with the ambiguous case law while promoting departmental policy preference.[245] This interaction results in judicial deference to such symbolic compliance "with an external law that was never clearly defined" in the first place.[246] Rather than acting as an external mechanism which police use-of-force policies conform to, the Court's Fourth Amendment framing of police brutality results in the courts defining excessive force via reference to the meaning established in police department's use-of-force documents.[247] Courts have invoked compliance with use-of-force policies as indicative of the reasonableness of the officer's decision-making in excessive force cases.[248] Some

244. Obasogie & Newman, *supra* note 239, at 1288–89 (crediting the creation of legal endogeneity theory to LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 12 (2016)).

245. *Id.* at 1316–18, 1317 fig.3 (citing EDELMAN, *supra* note 244, at 12).

246. *Id.* at 1315 (citing EDELMAN, *supra* note 244, at 12).

247. Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 427 (2019). Obasogie & Newman note that judicial deference occurs when the courts treat compliance with use-of-force policies as significant facts in evaluating the reasonableness of an excessive force claim, going as far as to integrate such policies as central pieces in court holdings. Obasogie & Newman, *supra* 239, at 1328–30. *See also* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1777 (2016) ("[T]he Court has diminished a victim's civil rights remedy through a substantive constitutional standard under the Fourth Amendment that *privileges the police perspective* in excessive force cases, affording latitude to the escalation of violence and to police biases." (emphasis added)).

248. Obasogie & Newman, *supra* note 239, at 1326–27 (discussing Parker v. City of South Portland, No. 06–129–P–S, 2007 WL 1468658, at *13, *27–29 (D. Me. May 18, 2007), *adopted and affirmed by* 2007 WL 2071815 (D. Me. July 18, 2007), and finding that it was appropriate to grant summary judgment for most of the involved officers in an excessive force case in part because the officer complied "with his department's use–of–force policy and applicable law").

courts have gone as far as to rely on "internal adjudicatory process[es] of . . . police department[s]" in reasonableness analyses.[249]

This line of research emphasizing the influential role of police department policies in enacting—and justifying—police violence against the Black community reflects a major deficit of the Fourth Amendment and Equal Protection Clause's individual rights frame. In addition to individualizing the victims of police brutality, the Court's framing individualizes the perpetrators of what is both an agentic and deeply structural act of violence. Reframing equal protection as a collective right remedies the failures of both frames, shifting the locus of responsibility for racialized state violence from individual police officers to police departments. As the following discussion demonstrates, this shift is crucial if remedies for police violence are to have any lasting deterrent effect.[250]

C. Reconceptualizing Equal Protection as Anti-Subordination

Recall that the prognostic beliefs of a given frame are inherently linked to these frames' diagnostic beliefs.[251] That is, how the nature and harm of police violence is constructed and understood intimately informs the range of remedies deemed legitimate and necessary to redress this harm. Reframing equal protection as a collective, rather than individual, right forces a reconceptualization of what "equal protection" means, moving understandings of equality away from anti-classification and towards anti-subordination.

Such a reconceptualization is possible, in part, because of the glaring absence of an "intelligible rule of decision" in the language of the Equal Protection Clause itself.[252] As Owen Fiss notes, the constitutional declaration that no state shall "deny to any person within its jurisdiction the equal protection of the laws" blesses the concept of equality with constitutional status but provides no indication of what the ideal of equality looks like or requires.[253] This lack of legal clarity

249. *See id.* at 1326–27 (first citing *Parker*, 2007 WL 1468658, at *13; then citing Scott v. Deleon, No. 15-cv-02193, 2016 WL 9685994, at *1 (W.D. Ark. Nov. 8, 2016); then citing Remato v. City of Phoenix, No. CV 09-2027-PHX-FJM, 2011 WL 3648268, at *2 (D. Ariz. Aug. 19, 2011); and then citing Gilbert v. Baldwin, No. 05-CV-1627-OWW-NEW (TAG), 2007 WL 4126084, at *5 (E.D. Ca. Nov. 20, 2007)).

250. Amar, *supra* note 162, at 812–13 ("The deterrence concept implicit in both the text and history of the Amendment calls for placing (initial) liability at the level best suited to restructure government conduct to avoid future violations. For the Framers, that level was the constable; for us, the police department." (footnote omitted)).

251. Snow et al., *supra* note 17, at 470; *see also supra* Part I(A)(1).

252. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976).

253. *Id.* (quoting U.S. CONST. amend. XIV, § 1).

has prompted the need for "mediating principle[s]"—paraphrases of the Equal Protection Clause's textual provisions that "'stand between' the courts and the Constitution" and imbue such provisions with "meaning and content."[254] In his seminal piece on groups and equal protection, Fiss distinguishes between two competing mediating principles that the courts and commentators rely on when defining equality and its requirements: the anti-discrimination (also known as anti–classification) principle and the anti-subordination principle.[255] Over time, the former principle has triumphed over the latter, with courts and commentators adopting anti-discrimination as the primary interpretive guideline for making sense of the demands of the Equal Protection Clause.[256]

Indeed, the Equal Protection Clause's individual rights framing of police violence (which currently exists as the dominant framing of such violence) reflects an anti-discrimination understanding of equality. Under this hegemonic view, equality is reduced to formal or literal equality, that is, the universal treatment of similarly situated individuals.[257] This conception of equality is analogous to the liberal legalist conception of "equal justice," that is, the "norm prohibiting the adjudicator from taking into account certain irrelevant characteristics of the litigants—their race, wealth, and so on."[258] Liberal legalism's impersonal view of judges, captured by Montesquieu's declaration that "the national judges are not more than the mouth that pronounces the words of the law," asserts that it is the law itself, in the absence of human input, which generates decisions in the legal system.[259] Such a colorblind

254. *Id.* at 107–08.

255. *Id.* at 108 (referring to the anti-subordination principle as "the group-disadvantaging principle"); *see also* Barnes & Chemerinsky, *supra* note 189, at 1063–64 (noting that debates over the meaning of the Equal Protection Clause "especially in the area of race jurisprudence, ha[ve] also been historically represented as the difference between the principles of antisubordination and anticlassification, or between the concepts of formal and substantive equality." (footnotes omitted)).

256. Fiss, *supra* note 252, at 108, 118 ("Antidiscrimination has been the predominant interpretation of the Equal Protection Clause.").

257. Barnes & Chemerinsky, *supra* note 189, at 1063–64, 1064 n.17; Fiss, *supra* note 252, at 108 (The antidiscrimination principle "reduce[s] the ideal of equality to the principle of equal treatment—similar things should be treated similarly."); *see also* Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 Clev. St. L. Rev. 823, 831 (2008) ("Literal equality, without regard to context or history, is the unifying principle of the Court's race jurisprudence.").

258. Fiss, *supra* note 252, at 119–20.

259. George P. Fletcher, *Some Unwise Reflections About Discretion*, 47 L. & Contemp. Probs. 269, 273–274, 274 n.18 (1984) (quoting 1 Montesquieu (Charles de Secondat), The Spirit of the Laws 159 (Thomas Nugent trans., Colonial Press rev. ed. 1900)).

view of the law serves to legitimize the authority of the law and the legal status quo by promoting uncritical acceptance of the legal canon, working to silence alternative interpretations of the world in favor of legalism's "objective" legal reality.[260]

Under the individual rights frame, the Equal Protection Clause, as mediated by the anti–discrimination principle, prohibits the government from breaking the veil of legal objectivity through differential treatment on the basis of race. The state breaches its duty of equal protection when it classifies individuals "either overtly or surreptitiously on the basis of a forbidden category" such as race.[261]

The constitutional promise of equal protection of the laws under the individual rights frame is "essentially a guarantee that the categories delineated by legal rules will be 'rational' and will be rationally related to legitimate state ends."[262] All that the Equal Protection Clause requires is rationality in legislation; any legislation that recognizes racial differences is inherently irrational and thus irrelevant to any legitimate state purpose.[263] This understanding of equal protection, as adopted by the Court, has "created a framework for equal protection analysis that all but ensures only a narrow group of discrimination claims will be actionable or succeed."[264]

This irrelevancy of racial differences is based on a historical view of the Equal Protection Clause as a constitutional response to the theory of white supremacy and racial difference justifying slavery and the Reconstruction-era's black codes.[265] Where slave laws and black codes of the Southern states rested on the false theory of white supremacy, the Fourteenth Amendment emerged as a federal repudiation of racial distinctions in any form.[266] The Equal Protection Clause, then, when mediated by the anti-discrimination principle, is prohibitory in nature, requiring nothing more than equal treatment of all groups under the law. Such mediation may be seen in a variety of racial-justice issues before the Court. For example, in *Ricci v. DeStafano*,[267] the Court held that the race-based rejection of test results "is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity

260. Shklar, *supra* note 94, at 41.

261. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Mia. L. Rev. 9, 10 (2003).

262. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. Va. L. Rev. 111, 111 (1991).

263. *Id.* at 111–12.

264. Barnes & Chemerinsky, *supra* note 189, at 1066.

265. West, *supra* note 262, at 112.

266. *Id.*

267. 557 U.S. 557 (2009).

regardless of race."[268] Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[269] the Court declared that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[270]

In contrast, under a collective rights framing of equal protection, in which the mediating principle is that of anti-subordination, the meaning of "equal protection of the law" is recontextualized and rehistoricized as a critical provision in the broader Reconstruction Amendments. Indeed, whereas anti-discrimination advocates willfully neglecting the original purpose and legislative history of the Fourteenth Amendment, a collective rights framing of the clause places such interpretive tools at the forefront of the equality analysis.[271] An anti–subordination view of the Fourteenth Amendment is: "historically grounded not in the pernicious idea of racial difference but, rather, in the pernicious practice of racial subordination: the willful and continuing attempt of white people, with the willing acquiescence of state governments, to subordinate, deny, oppress, and use black people for their own ends."[272]

Indeed, the Reconstruction Amendments,[273] of which the Fourteenth Amendment was a key part, were enacted due to the post-Civil War fear that the newly freed Black citizens would experience discrimination and rights violations by a hostile majority.[274] Anti-subordination advocates note that the subordination that prompted the Fourteenth Amendment did not end with the Amendment's passage. Rather, the subordinating practices of whites merely adapted to the times, with the continued oppression of the Black community found in Jim Crow laws, the ghettoization of the North, and the hyper-carceral

268. *Id.* at 582, 584–85.

269. 551 U.S. 701 (2007).

270. *Id.* at 748.

271. Shedding light on the meaning of equality is hard to do without placing the challenges that modern society faces within the context of the particular history that produced the Amendment. *See* Barnes & Chemerinsky, *supra* note 189, at 1068–69.

272. West, *supra* note 262, at 112.

273. The "Reconstruction Amendments" refers to the Thirteenth, Fourteenth, and Fifteenth Amendments.

274. Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1252 (1996); *see also* Screws v. United States, 325 U.S. 91, 140 (1945) (Roberts, J., dissenting) ("Undoubtedly, however, the necessary protection of the new freedman was the most powerful impulse behind the Fourteenth Amendment.").

complex of the 20th and 21st centuries.[275] This subordination is further perpetuated through so-called facially neutral laws that preclude the social, political, educational, and economic mobility of Black people.[276]

From an anti-subordination perspective of equality, the constitutional guarantee of equal protection cannot be realized in a society characterized by "pervasive social stratification."[277] Rather, under a collective rights framing of equal protection, Congress has a constitutional imperative to avail itself of the enforcement powers found in the language of the Fourteenth Amendment to protect Black Americans from state-sanctioned and private harm.[278] Albeit intermittently, the Court has at times recognized the affirmative nature and corrective purpose of the Fourteenth Amendment. In the *Slaughter-House Cases*,[279] the Court acknowledged that a central purpose of the Fourteenth Amendment was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen."[280] Similarly, in *Strauder v. West Virginia*,[281] in which the Court found unconstitutional a state law declaring that only white people may serve on juries, the Court noted that, while the language of the Amendment is, in part, prohibitory, the text

> contain[s] a necessary implication of a positive immunity, or right, most valuable to the colored race[]—the right to exemption from unfriendly legislation against them distinctively as colored[]—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[282]

The mandate, then, of the Equal Protection Clause, is not to ensure the law is colorblind in its content and application, but to eradicate the inequalities that comprise contemporary public and private life. In sum, a collective rights framing of police violence as a violation of the Black community's right to equal protection of the law requires affirmative

275. For an overview of how the subordinating practices of the white majority have evolved over time, see generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (10th Anniversary Ed. 2020).

276. West, *supra* note 262, at 112–13.

277. Balkin & Siegel, *supra* note 261, at 9–10.

278. Barnes & Chemerinsky, *supra* note 189, at 1070; *see* U.S. Const. amend. XIV, § 5 (granting Congress "the power to enforce . . . the provisions of this article").

279. 83 U.S. (16 Wall.) 36 (1873).

280. *Id.* at 71.

281. 100 U.S. 303 (1880).

282. *Id.* at 307–08.

steps to not only prevent further subordination of the Black community through gratuitous state violence, but affirmative steps to minimize the inequalities stemming from such subordination as well.

D. Performative Analysis: The Enactment of Dissident Citizenship

Understanding police violence against the Black community as a violation of this community's collective right to equal protection of the law brings with it certain performative effects. Leaving the instrumental value of such a rights frame aside, what are victims of police violence *doing* in and by claiming a collective right to be free from gratuitous, racialized state violence? A performative approach to such rights claims highlights the ways in which such rights claims made by those on the margins of society are not only the part of the process of securing rights, but as a performance of citizenship as well—one that begins to challenge the hegemonic constructions of the rights-bearing American citizen as white.

It is precisely because citizenship is unstable, contestable, and constitutive of rights that citizenship is performed—and potentially transformed—in and through the process of making rights claims. Citizenship marks a status within society that is dependent on not only the nature of rights, but also on who is included in the rights-bearing regime in the first place. As such, "[p]erformative citizenship signifies both a struggle (making rights claims) and what that struggle performatively brings into being (the right to claim rights)."[283] It is through the process of making rights claims that citizenship is not only enacted but possibly transformed as well.

Because "a performative perspective considers citizenship as anything but stable,"[284] the subject positions of Black Americans making rights claims to the characteristics of citizenship are thus made open to a change in status, from the "subaltern" to a "more liveable position[]."[285] By making status-based rights claims, Black victims of police violence can engage in the generative process of creating new forms of political subjectivity, a process "whereby people who have no place or voice in a political community act as if they have both and, in doing so, shift the basic understandings and boundaries of that community."[286] In doing so, Black victims of state violence work to enact a kind of *dissident citizenship* that is fundamentally democratic in nature.

First conceptualized by Holloway Sparks, "dissident citizenship" can be understood as "the practices of marginalized citizens who publicly contest prevailing arrangements of power by means of oppositional democratic practices that augment or replace institutionalized

283. Isin, *supra* note 152, at 506.

284. *Id.* at 502.

285. *Id.* at 503.

286. Zivi, *supra* note 65, at 92.

channels of democratic opposition when those channels are inadequate or unavailable."[287] Eschewing institutionalized practices of resistance, such as voting and petitioning, dissident citizens engage in creative oppositional practices in the public sphere such as marches, sit-ins, and street theater—practices that have the potential to "reconstitute the very boundaries of the political itself."[288]

Sparks's conception of dissident citizenship differs from traditional notions of citizenship found in the liberal and civic-republican traditions, as well as the more provocative views of citizenship found in participatory and deliberative democracy literature, in that dissident citizens do not contest current arrangements of power as participatory equals. Rather dissident citizens act "from the margins of their non-democratic polities because they have no institutionalized channels of opposition available or because they lack meaningful access to those channels."[289] While Sparks focuses primarily on dissident acts of citizenship that occur outside of institutionalized forms of contestation, namely, in the public sphere, she maintains room for dissident citizens to engage in institutionalized dissent as well.[290]

Merry's exploration of legal consciousness among working-class plaintiffs reflects this kind of enactment of dissident citizenship in institutionalized channels of democratic contestation.[291] Merry notes that although working-class plaintiffs in America

> have submitted their problems voluntarily for the court's consideration, suggesting a willingness to accept its authority. . . . [T]he choice of court is not unconstrained: virtually the only alternatives are violence and enduring the situation. Local authorities are absent or ignored. These people are resisting in the sense that they are trying to control the course of their problem in court. . . .
>
> Here, resistance consists of challenges to the court's efforts to determine which discourse frames the problem at hand. Plaintiffs resist this cultural domination by asserting their own understanding of the problem, usually by insisting on talking about it in legal discourse.[292]

287. Holloway Sparks, *Dissident Citizenship: Democratic Theory, Political Courage, and Activist Women*, 12 Hypatia, no. 4, 1997, at 75.

288. *Id.* at 75.

289. *Id.* at 84.

290. *Id.*

291. *See generally* Sally Engle Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans 134–49 (1990) (discussing plaintiff's narratives).

292. *Id.* at 147.

Thus, the enactment of dissident citizenship can take place even within institutionalized channels associated with the state, provided that such challenges come from, not participatory equals, but those existing on the margins of a community. By making a claim to the collective right to equality within the context of the broader constitutional terrain that forecloses such claims, Black victims can enact a form of dissident citizenship that undermines dominant conceptions of rights-bearing citizenship in the United States that are premised on the exclusion of Black people.

Conclusion: The Return of Injunctive Relief?

The performative value of reframing excessive force as a violation of Black people's collective right to equality before the law is distinct from its instrumental value in the courtroom. As Zivi rightfully observes, by

> treat[ing] rights claims as performative utterances rather than as representations of legal fact or moral truth, as claims of persuasion that represent perspectives that may or may not influence the behavior and thought of others rather than as trumping claims that will, if uttered under the proper circumstances, guarantee some particular outcome, a great deal more becomes visible.[293]

For Black victims of police violence, such rights claiming can be seen as an expression of the community's democratic commitment to substantive, rather than formal, equality, as well as an enactment of dissident citizenship, in which Black people demand accountability from a reluctant state to acknowledge and redress racialized state violence.

While a performative approach to the framing of police violence through various constitutional amendments brings to the forefront the nature of such violence and its impact, victims, and perpetrators, such analysis has instrumental value as well. Indeed, by reframing equal protection as a collective right to be free from gratuitous state violence, a broader view of the harms of police violence emerges that may be useful to plaintiffs facing an uphill battle in securing equitable relief.

Since *Los Angeles v. Lyons*,[294] the Court, using a Fourth Amendment frame, has interpreted the standing requirements for victims of police brutality strictly, refusing to make injunctive relief available to plaintiffs in the absence of credible assertions that (1) all police officers in a given department always use excessive force against "any citizen with whom they happen to encounter, whether for the purpose of arrest,

293. Zivi, *supra* note 65, at 70–71.

294. 461 U.S. 95 (1983).

issuing a citation, or for questioning"; or (2) a municipality orders or authorizes officers to use excessive force.[295] This sets an almost impossible threshold for obtaining injunctive relief, meaning that plaintiffs are essentially prevented from enjoining police violence at the institutional level, where deterrent effects are at its greatest.

To be Black in America means to live in constant fear of death at the hands of the state. Yet, the Constitution does not protect my right, as a Black person, to go for a run in my own neighborhood without having to consider the state-sponsored threats waiting for me outside. Indeed, the Constitution imposes no affirmative duty on law enforcement to prevent the fear of being murdered by the police.[296] Since federal "judicial powers may be exercised only on the basis of a constitutional violation,"[297] for Article III standing purposes, such a psychological injury does not constitute the requisite personal stake necessary to establish a case or controversy.[298]

However, when we take a broader view of the harms imposed by police violence, as the collective rights frame does, the rights implicated by discriminatory state violence and, by extension, the necessity of equitable relief, becomes clear. To be free from discriminatory state violence means to be free to exercise, to the fullest extent possible, one's constitutional right to movement (Trayvon Martin,[299] Casey

295. *Id.* at 105–06.

296. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 375–77 (1976) (holding that city officials had no "constitutional 'duty'" to "'eliminate' future police misconduct," even "in the face of a statistical pattern" of police abuse); O'Shea v. Littleton, 414 U.S. 488, 496–97 (1974) (holding that a "perceived threat" of future "discriminatory practices" by state officials is unactionable "speculation and conjecture," even in the face of "past wrongs"); Laird v. Tatum 408 US 1, 13–14 (1972) (holding that "subjective" "apprehensiveness," "perception[s]," or "beliefs" of future injury will not, alone, confer standing).

297. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

298. *See, e.g.*, *Rizzo*, 423 U.S. at 372–73 (holding that plaintiffs "lacked the requisite 'personal stake in the outcome'" because their fears of police conduct were based on "what one of a small, unnamed minority of policemen might do to them in the future").

299. N.Y. Times Ed. Bd., *Trayvon Martin's Legacy*, N.Y. TIMES (July 14, 2013), https://www.nytimes.com/2013/07/15/opinion/trayvon-martins-legacy.html [https://perma.cc/RF3M-KCZK] ("Trayvon Martin was an unarmed boy walking home from the convenience store.").

Goodson,[300] Clayton Dobbins[301]), to bear arms (Philando Castile[302]), to receive due process (Sandra Bland[303]), to associate (Breonna Taylor[304]), to be left alone at home (Shase Howse[305]) and to enjoy one's life and liberty (Tamir Rice,[306] and countless others). The injury of relevance here is not "the plaintiff's subjective apprehensions"[307] but how these subjective apprehensions impinge on the entry rights of Black individuals in America. Thus, a collective equal rights framing of the right to be free from gratuitous state violence provides a pathway by which victims of police violence may plead around the standing requirements set forth in *Lyons*.

Unlike in *Rizzo v. Goode*, the "constitutional 'duty'" posited, under a collective rights frame, on behalf of the state (and a corresponding "right" of Black people in America) is not "to 'eliminate' future police

300. John Ismay & Christine Hauser, *Casey Goodson Died from Multiple Gunshot Wounds, Coroner Says*, N.Y. Times (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/us/casey-goodson-ohio-homicide.html [https://perma.cc/MS7F-GFXU] ("Mr. Goodson was returning home with sandwiches after a dentist's appointment . . . .").

301. Andrea Januta, Andrew Chung, Jaimi Dowdell & Lawrence Hurley, *Challenging Police Violence . . . While Black*, Reuters (Dec. 23, 2020, 7:21 AM), https://www.reuters.com/article/uk-usa-police-immunity-race-specialrepor-idUKKBN28X1H2 [https://perma.cc/LHD9-SDUR] ("Clayton Dobbins . . . [was] riding his bike in his own neighborhood.").

302. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. Times (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html [https://perma.cc/XWH4-JGRP] (noting that Castile "had acknowledged having [a gun] with him when he was pulled over" and that a witness said that Castile "had merely been reaching for his identification" when he was shot).

303. Mitch Smith, *Grand Jury Declines to Indict Anyone in Death of Sandra Bland*, N.Y. Times (Dec. 21, 2015), https://www.nytimes.com/2015/12/22/us/grand-jury-finds-no-felony-committed-by-jailers-in-death-of-sandra-bland.html [https://perma.cc/77CW-MBTG] (noting that Bland's apparent suicide "was met with suspicion by family members and activists" and that no one was ever indicted for her death).

304. Rukmini Callimachi, *Breonna Taylor's Life was Changing. Then the Police Came to Her Door*, N.Y. Times, https://www.nytimes.com/2020/08/30/us/breonna-taylor-police-killing.html [https://perma.cc/G838-EXJZ] (last visited Oct. 28, 2021) (noting that Taylor was staying with her boyfriend at her sister's apartment and that police were actually looking for her ex-boyfriend).

305. Januta et al., *supra* note 301 ("Shase Howse . . . [was] fumbling for his keys while standing on his front porch in Cleveland.").

306. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. Times (Dec. 28, 2015), https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html [https://perma.cc/43DB-7ZE2] (noting that Rice was "a 12-year-old boy holding a pellet gun" in a park).

307. City of Los Angeles v. Lyons, 461 U.S 95, 107 n.8 (1983).

misconduct."[308] Rather, the duty in its narrowest sense is to prevent gratuitous, racialized state violence. More broadly, this duty (and the corresponding right) of law enforcement is one of ensuring equal opportunity for the Black community to exercise those entry rights that exist by virtue of our membership in American society. When the state, through law enforcement, breaches this affirmative duty—whether due to the adoption of proactive policing policies, the de facto policies of police departments, or the discriminatory intent of individual officers—courts must be empowered to order prospective equitable relief in order to ensure these entry rights.

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308. Rizzo v. Goode, 423 U.S. 362, 376 ("Respondents posit a constitutional 'duty' on the part of petitioners (and a corresponding 'right' of the citizens of Philadelphia) to 'eliminate' future police misconduct; a 'default' of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary . . . to secure the 'right' at issue. . . . We have never subscribed to these amorphous propositions, and we decline to do so now."). While the Supreme Court is misguided in its denial of the non-recurrence of violence as a fundamental—if not, constitutional—right, a discussion of the right to non-recurrence of state-sponsored violence is beyond the scope of this Note.

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