# VIOLENCE EVERYWHERE: HOW THE CURRENT SPECTACLE OF BLACK SUFFERING, POLICE VIOLENCE, AND THE VIOLENCE OF JUDICIAL INTERPRETATION UNDERMINE THE RULE OF LAW

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## INTRODUCTION

*"Our demand is simple: stop killing us." —Netta Elzie*[1]

Police violence is ubiquitous in American life. We see it, again and again, day after day; "an endless loop of black men and women who have been shackled, beaten, hurt, and killed by police."[2] Commentators frequently, and powerfully, include long lists of name after name after name of a Black person killed, maimed, or otherwise abused by the police and then emphasize that these names represent the tip of a Titanic-sized iceberg.[3] We are inundated with images, videos, news coverage, month after month, of police violence. From YouTube, TikTok, Facebook, and Instagram to the nightly news, magazines, and newspapers,

1. Jay Caspian Kang, '*Our Demand Is Simple: Stop Killing Us': How a Group of Black Social Media Activists Built the Nation's First 21st-Century Civil Rights Movement*, N.Y. TIMES (May 4, 2015), https://perma.cc/DBM2-F2YC.

2. Benjamin Balthaser, *Racial Violence in Black and White*, BOS. REV. (July 13, 2016), https://perma.cc/6NQG-79Q9.

3. *See, e.g.*, Marcus Bell, *Criminalization of Blackness: Systemic Racism and the Reproduction of Racial Inequality in the US Criminal Justice System*, *in* SYSTEMIC RACISM: MAKING LIBERTY, JUSTICE, AND DEMOCRACY REAL 163, 172-73 (Ruth Thompson-Miller & Kimberley Ducey eds., 2017) (discussing Mike Brown, Tamir Rice, Eric Garner, Freddie Gray, Walter Scott, Alton Sterling and Philando Castile, and pointing out that these cases "and many more like them" have "thrust the intersection of race, crime, and policing in the US into the national (even international) spotlight"); Jamison v. McClendon, 476 F. Supp.3d 386, 390-92 (S.D. Miss. 2020) (setting forth the police violence against Michael Brown, Tamir Rice, Elijah McClain, Eric Garner, George Floyd, Philando Castile, Tony McDade, Jason Harrison, Charles Kinsey, James Earl Green, Ben Brown, Phillip Gibbs, Amadou Diallo, Botham Jean, Breonna Taylor, Rayshard Brooks, Sandra Bland, Walter Scott, Hanna Fizer, and Ace Perry, and then pointing out that "too many others" have not lived and that the "death toll continues to rise"); ALEX S. VITALE, THE END OF POLICING 1 (2017) (beginning his book by discussing the killings of Tamir Rice, John Crawford, Antonio Zambrano-Montes, Jason Harris, Oscar Grant, Akai Gurley, Eric Harris, Walter Scott, and Eric Garner); Katheryn Russell-Brown, *Body Cameras, Police Violence, and Racial Credibility*, 67 FLA. L. REV. F. 207, 208-09 (2016) (pointing out "scores of cases" involving deadly force beyond Rodney King and Michael Brown by additionally pointing to violence against Amadou Diallo, Abner Louima, Malice Green, Patrick Dorismond, Sean Bell, Tyisha Miller, Prince Jones, Oscar Grant, Mario Woods, Tamir Rice, Eric Garner, Laquan McDonald, Walter Scott, Bettie Jones, Freddie Gray, Sam DuBose, John Crawford, Corey Jones, and Rekia Boyd).

year after year, images of police violence are ever-present often unavoidable.[4] Given the expansion of contemporaneous recording from camcorders to nearly all cell phones, we have now seen police violence decade after decade.[5] And when 2020 saw protests against police violence, demonstrations were often met with a striking retort—more police violence.[6]

For those troubled and angered by these images, emotional fatigue (sometimes called "outrage fatigue") can make it difficult to process the pervasive, ever-present violence.[7] Others fear police violence has been normalized, or even glorified.[8] Many—and particularly Black Americans and other people of color—have attempted, to little avail, to stop seeing or even hearing about the images; there is too much grief.[9] These reactions make sense. When violence is as seemingly plentiful as the air we breathe, it can be difficult to fully process yet another complaint of "I can't breathe" because we know the deaths of Eric Garner, George Floyd or Manuel Ellis are an infinitesimal fraction of the violence that persists even when unrecorded.[10] While there have been calls for reform, and

4. The January 6, 2021, insurrection on the U.S. Capitol stands as a shocking counter-example. The myriad reasons for the disparate treatment—the *lack* of police violence—against these Americans is beyond the reach of this paper. But some of the reasons are obvious and unsurprising, given the racial and ideological makeup of the demonstrators. *Cf.* Louis Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protestors, Data Finds*, THE GUARDIAN (Jan. 14, 2021), https://perma.cc/2BAK-272L.

5. *Cf.* Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 791 (2017) ("Lethal police violence has always existed, but it has not always commanded sustained public attention. Video has changed that.").

6. A particularly egregious example is Seattle, Washington. There, even though the City's police force was under a federal consent decree (and will remain so through 2022) due to its rampant use of excessive force and racial profiling, in the wake of the May and June 2020 protests, the police resorted to flagrant, excessive force against protestors. Then, even after being enjoined by the federal court overseeing the consent decree, the police refused to stop the prohibited forms of violence and were held in contempt. *See* Mike Carter, *Judge Bars Seattle Police From Using Tear Gas, Force Against Nonviolent Protestors*, SEATTLE TIMES (June 12, 2020), https://perma.cc/UQE8-22LL; Mike Carter, *Federal Judge Holds Seattle Police Department in Contempt for Use of Pepper Spray, Blast Balls During Black Lives Matter Protests*, SEATTLE TIMES (Dec. 7, 2020), https://perma.cc/8C4P-BE3Z.

7. *See, e.g.*, David J. Ley, *Coping With Outrage Fatigue*, PSYCH. TODAY (Sept. 25, 2017), https://perma.cc/3R95-WWVP.

8. *E.g.* Jamil Smith, *Videos of Police Killings Are Numbing Us to the Spectacle of Black Death*, NEW REPUBLIC (Apr. 13, 2015), https://perma.cc/Q384-Q964.

9. *See, e.g.*, Brianna Sacks, *Black Gen Z'ers Want You to Stop Sharing Videos of Police Killing People Who Look Like Them*, BUZZFEED NEWS (Apr. 30, 2021), https://perma.cc/4MWU-3DEW.

10. *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://perma.cc/KL8A-GN98 (discussing the deaths of Eric Garner, George Floyd, and 68 other people killed while by law enforcement whose last words included the statement, "I can't breathe."). Indeed, even Baker's article cannot keep up and omits other killings of black people suffocated by the police, including Manuel Ellis in Tacoma, Washington. *See* Stacia Glenn, '*Can't breathe': Tacoma Police Restraint of Manuel Ellis Caused His Death, Medical Examiner Reports*, SEATTLE TIMES (June 3, 2020), https://perma.cc/5WG8-3KYR. Eric Garner's death via chokehold, for what was at worst a minor infraction, also resonates with one of the most consequential civil-rights cases decided

while some of these efforts are broadly felt, police violence has not stopped. American police on average kill 1000 people a year, meaning that the odds of getting killed by the police are roughly five times higher in the United States than countries like Canada, Australia, England, Italy, and Germany.[11] Despite lockdowns, those figures did not drop during the first year of the pandemic or early 2021, either.[12] If anything, by the continued and persistent violence, one could argue many officers have conveyed the message "this violence *will not* stop." Such a message has particular salience when there are just too many names, too many hashtags, and too many shootings, tasings, body slams, and pepper-sprays to possibly keep tabs on.

In the end, a simple demand—stop killing us—can be, and has been, drowned out by the fact that the shooting and violence has continued not only unabated but even where we do not want to see the spectacle. Violence *as spectacle* is not an exceptional, rare, or divergent aspect of American life. Quite the opposite. Spectacle violence shares a history with public executions and torture in 18th century Europe, and with widespread violence and lynching during Reconstruction and the Jim Crow era. Drawing on this history, Part I argues that what Foucault called the "spectacle of the scaffold" in European monarchical execution and what commentators have called "spectacle lynching" during Reconstruction and Jim Crow have reconstituted themselves in the 21st century in what I will call the Spectacle of Black Suffering.[13] Common (and essential) to each form of spectacle violence are: (1) a political expression of power via some form of "sovereign authority"; (2) violent acts that are disproportionate, and intentionally so; and (3) consumption and viewing of these acts by the masses.

There are several reasons to consider these historical antecedents. The first is personal. One goal of this paper is to emphasize that the spectacle of police violence itself has meaning—and it can be terrifying. Moreover, the ongoing and repeated spectacle of seemingly never-ending violence commands a profound

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by the Supreme Court. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). There, Adolph Lyons was pulled over for a broken taillight and, without offering any resistance or provocation, was choked nearly to death by LAPD officers acting pursuant to the City's official force policy; a policy the Supreme Court held Lyons could not eliminate through the courts.

11. DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 113 (2021); *see also* VITALE, *supra* note 3, at 1-2 (explaining that there "is no question that American police use their weapons more than police in any other developed democracy" and then discussing and collecting sources about the number of victims of police shootings, including statistics showing that Black people are "disproportionately victims of police shootings" and that Black teens are 21 times more likely than White teens to be killed by the police).

12. *See Fatal Force*, WASH. POST, https://perma.cc/295Y-45X2 (last visited April 10, 2021) (database of fatal police shootings, illustrating over 1000 in 2020); Josiah Bates, *Report: Police Shootings Continue Unabated Despite COVID-19 Shutdowns*, TIME (Aug. 19, 2020), https://perma.cc/CMF2-YY4K.

13. MICHAEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 32 (Alan Sheridan trans., 1977); EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA 33 (2017), https://perma.cc/YV2C-YVFQ [hereinafter EJI].

*grief*.[14] Finally, while what this paper shall call the Spectacle of Black Suffering has been discussed by commentators in other contexts,[15] there are very few discussions of the *legal* implications of Black suffering as spectacle in the legal academy.[16] The legal academy needs to consider the voices of Black children who say that watching videos of Black suffering is not just a matter for "legal discussion," but implicates real threats of violence: "It's like a foreshadow of your own death."[17]

To further understand the legal implications of the Spectacle of Black Suffering, Part II draws upon scholarship in what has been called the "jurisprudence of violence." Two points are emphasized here. First, the idea of the rule of law, at core, is founded on violence, or at least the threat of violence, by the state. It is the coercive power of government, in theory, that is authorized to use force against our bodies in exchange for some form of democratic peace and "order." The rule of law rests on a further notion that violations of "the law" can be subject to punishment, and that punishment can include unwanted intrusions on our bodies and property. Law's enforcement is permitted to explicitly involve violence.

Second, for related reasons, law's violence does not just include that which is physically perpetrated against our bodies; it includes violence of the word. Verbal violence is an extension, and manifestation, of physical violence. Like physical violence, verbal violence is another mechanism to control behavior and bodies. Here, the law's violence includes not only the actual violence on the ground but the fact that judicial interpretation can authorize or prohibit violence on the front end and condemn or bless violent acts after they have occurred. That legal interpretation takes place in the "field of pain and death" means that judicial interpretation and its relationship to violence can pose potentially grave questions for the law, not just as a matter of abstract theory, but in a very tangible,

14. *See* Darius Liddell, *Black Death as Spectacle and Ritual*, 34JUSTICE (Sept. 29, 2017), https://perma.cc/R6QA-FG56 (describing the multiple phases of Black grief and the grief that occurs when someone encounters their own death, which is analogized to witnessing the "unprovoked loss of black life").

15. *See, e.g.*, Balthaser, *supra* note 2; Jalen Banks, *Black Death as Spectacle: An American Tradition*, BERKELEY POL. REV. (Nov. 23, 2019), https://perma.cc/7JUA-6AHZ; Brittney Cooper, *Black Death Has Become a Cultural Spectacle: Why the Walter Scott Tragedy Won't Change White America's Mind*, SALON (Apr. 9, 2015), https://perma.cc/N7CS-4ZSU; Liddell, *supra* note 14; Phillip Williams, *The Spectacle of Black Death: Remembering Our Killed or Rekindling Their Murders?*, RACEBAITR (Nov. 24, 2015), https://perma.cc/8K8E-V84X; Kelly Hayes, *Spectacles of Black Death and White Impunity*, TRUTHOUT (Nov. 22, 2015), https://perma.cc/V7FT-VCYG; Smith, *supra* note 8.

16. Of the few articles that discuss the spectacle of Black death, the phenomenon is acknowledged as a matter of fact, but the implications thereof for the law—and the rule of law in particular—are undiscussed. *See, e.g.*, Morrison, *supra* note 5, at 793; Devan Byrd, Note, *Challenging Excessive Force: Why Police Officers Disproportionately Exercise Excessive Force Towards Blacks and Why This Systemic Problem Must End*, 8 ALA. C.R. & C.L. L. REV. 93, 110 (2017).

17. Sacks, *supra* note 9.

felt way on the ground in the course of daily civilian encounters with law enforcement.[18]

With these points in mind, Part II argues that the judicial blessing of unconstitutional police violence is a form of violence that not only dilutes the value of constitutional rights but can also erode the rule of law. Part II discusses two ways the Supreme Court has imposed such judicial violence: (1) through separating rights as hermetically distinct and unrelated to their remedies, and (2) through qualified immunity. Both of these developments allow judges to deny civil damages remedies that, albeit imperfect, are the bedrock of remedies in the U.S. legal system.[19] In this system, and as enshrined in the Constitution, the jury plays an important role in deciding specific disputes and as a form of deliberative democracy that can serve as a backstop to government intrusion.[20] Nonetheless, by ignoring the value of remedies to rights themselves and via qualified immunity, judges are permitted to leave victims of unconstitutional violence with no effective remedy and without even their day in court.

Though many have rightly questioned the profoundly flawed doctrine of qualified immunity, this Article seeks to provide a modest but hopefully unique discussion of how this doctrine undermines the law—and the rule of law—itself. The extent to which the rule of law is harmed by qualified immunity is exacerbated by the Spectacle of Black Suffering, given that this iteration of violence as spectacle is so ubiquitous that even those who are appalled by the violence often cannot avoid viewing these images.

To conclude, drawing on some practical experience from litigation, Part III will make some observations about ways in which judicial violence, and harms to the rule of law, might be reduced even if qualified immunity is not abolished or substantially curtailed (as it should be).[21] Though imperfect, an important option courts have at their disposal is deferring the adjudication of the constitutionality of police violence to the people. In other words, courts should defer to the law's best (though imperfect) proxy for involving community—the jury trial. The roots for such deference already exist in the law, but are too infrequently invoked. Judges can do less harm to the rule of law, even within the doctrine of

18. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

19. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822, 822 n.13 (1994) (citing the 1760s arrest of John Wilkes under a general warrant where the remedy was a civil damages remedy against both the officer who made the arrest and the Lord who issued it in the first place (citation omitted)).

20. *See generally* U.S. CONST. amend. VII; ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 324-31 (Henry Reeve trans., 2002) (1835); JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

21. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); JAY SCHWEIKERT, CATO INSTITUTE, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE (2020), https://bit.ly/3jJz2gr.

qualified immunity, by acknowledging the violence on the ground and then submitting the questions of liability to a version of the people themselves: the jury.[22]

## I. IN THREE ACTS, VIOLENCE AS SPECTACLE

This Part begins with a discussion of the antecedents of spectacle suffering and torture in Europe in the 18th and 19th centuries, and then in the United States, both of which provide some helpful analogies for contextualizing the current Spectacle of Black Suffering in the United States.

### A. Monarchical execution and torture: The spectacle of the scaffold

Foucault's account provides a useful framework for examining violence as spectacle. In *Discipline and Punish*, Foucault describes torture and execution in France and other European nations over nearly a decade between the 18th and 19th centuries, before punishment became "modern."[23] The stage is set with a gruesome account of public torture and execution where an executioner tears flesh from the body of the condemned and then pours boiling water into the wounds, after which the victim is then literally ripped apart and "quartered" by horses pulling his body in several directions. Torture like this was commonly part of an execution because the *ordeal* was an element of the punishment itself. This regime included the "gloomy festival of punishment" where "the tortured, dismembered, amputated body, symbolically branded on face or shoulder" was famously "exposed alive or dead to public view."[24] In this regime, the *body* was the target of "penal repression."

Apart from the ordeal, spectacle punishment had other important hallmarks. First, punishment as spectacle served important political ends. Punishment served to deter people from committing crimes, or else suffer dearly. In this way, public execution was a mechanism by which *power*—the "sovereign" power of the state—manifested itself.[25] Spectacle punishment was also about respect. In a monarchy, crimes are not only an offense to the victim (if there is one) but to the sovereign itself. Thus, execution served as a form of retribution imposed because the criminal "placed the sovereign in contempt."[26]

Second, to serve these goals, punishment was often disproportionate to the crime committed, and intentionally so. To serve as a reminder of sovereign power, the point of public torture and execution is to "bring into play, at its extreme point, the dissymmetry between the subject who has dared to violate the

22. *Cf.* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). The insight Kramer advances, and which is very roughly invoked here, is that constitutional meaning should, and historically did, come from citizens, not exclusively from the courts.

23. FOUCAULT, *supra* note 13, at 7-8.

24. *Id.* at 8.

25. *Id.* at 47.

26. *Id.* at 48.

law and the all-powerful sovereign who displays his strength."[27] In this way—through an "exercise of 'terror'" that was imbalanced and excessive—the public killing illustrated an emphatic affirmation not just of power but of superiority.[28] Moreover, the ceremony of public torture displayed, for all to see, the power relation that gave force to the law—power that was strengthened by its *visible* manifestations.[29] Punishment, even physical or fatal, behind closed doors does not send this message to the public because it cannot be seen.

Third, and of course what made the spectacle a spectacle, was the main character—the people. The tangible, immediate presence of crowds was required for the performance, and so executions took place not only in public squares where folks could gather but also in front of the proverbial "scene of the crime," so that those closest to the "offense" against the crown could witness its superiority. To achieve maximum effect, "[n]ot only must people know, they must see with their own eyes"; they must be made to be afraid, and must be the witnesses of the punishment.[30] In short, public execution's policy of terror "did not re-establish justice; it reactivated power."[31]

In the end, as Foucault describes it, steps towards modernization featured "the disappearance of torture as a public spectacle," and punishment became the most hidden part of the process.[32] In formally banning torture, European legislatures implemented long prison sentences in increasingly institutionalized confines under constant monitoring. Public pain against the body was replaced with discipline—measures Foucault suggests were implemented to break down the soul of the condemned.[33] The shift from "bodies" to "souls" involved "reforms" well known and mirrored in the U.S. experience: focusing on "crime," expanding the definition of what constitutes crime, and then punishing crimes with lengthy periods of institutionalization.[34] In the end, though the apparatus of force changed, the "power relation remains at the heart of all mechanisms of punishment," and expressions of power are still "found in contemporary penal practice."[35]

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27. *Id*. at 49.

28. *Id*. at 49.

29. *Id*. at 50, 57.

30. *Id*. at 58.

31. *Id*. at 49.

32. *Id*. at 7.

33. *Id*. at 10-11; *see also id*. at 16 (The "expiation that once rained down on the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations."). For a discussion of the rise of the prison, see *id*. at Parts Three and Four, or Jeremy Bentham's writings on the panopticon as a form of prison. *See, e.g*., A. BRUNON-ERNST, BEYOND FOUCAULT: NEW PERSPECTIVES ON BENTHAM'S PANOPTICON (2013).

34. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

35. FOUCAULT, *supra* note 13, at 55.

B. Lynching: The spectacle of Black death after the Civil War

In the United States, public execution through formal criminal processes continued longer than in Europe but was also eventually abolished. However, a different spectacle of pain and execution emerged during Reconstruction and the Jim Crow Era via systemic violence and lynching of Black Americans.[36]

The history is underreported, and the true number of just how many people were lynched is unknown due to its pervasiveness. The groundbreaking Equal Justice Initiative report *Lynching in America* is among the most comprehensive accounts on the topic and estimates there were at least 4084 "terror lynchings" in southern states between the end of Reconstruction in 1877 and 1950.[37] Lynching began with "popular justice" in the West, where it often included torture short of death, and simultaneously grew in the South as a means of enforcing slavery.[38] That all dramatically changed after the Civil War brought about the formal freedom of enslaved Black people. Then, the symbol of violence frequently increased beyond "mere" torture to death, and spectacle terror lynchings became routine and systemic.[39] Perpetrators of both torture and lynchings were not solely members of hate groups like the Ku Klux Klan, but importantly included law enforcement officers. In fact, the involvement of law enforcement was essential: beyond participating in some acts of violence, they blessed them with a blind eye, preventing participants from being prosecuted as murderers and therefore allowing beatings, floggings, other mutilations to go on with impunity.[40]

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36. This Article has focused largely on the lynching of Black Americans but it is important to emphasize that these practices—and the spectacle of suffering as an act of power—included horrific acts against Indigenous and Latino communities as well. *See generally* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. REV. 297, 301-302 (2009); Maritza Perez, *Los Lazos Viven: California's Death Row and Systematic Latino Lynching*, 37 WHITTIER L. REV. 377, 379-83 (2016); Cecily Hilleary, *Remembering Native American Lynching Victims*, VOANEWS (Apr. 25, 2018), https://perma.cc/LA62-HVD2 (recounting the database of lynchings in the United States, including at least 137 against Indigenous people, and discussing how these acts mirror lynching of Black people as well).

37. EJI, *supra* note 13, at 4.

38. *Id*. at 27; *see also* Balthaser, *supra* note 2 (explaining that "'[s]pectacle lynching emerged in the antebellum and Jim Crow South when white landowners began to fear an alliance between poor white and black workers'" (quoting DORA APEL, LYNCHING PHOTOGRAPHS (2007)).

39. EJI, *supra* note 13, at 27-28.

40. *Jamison*, 476 F. Supp.3d at 398-99; *see also, e.g.*, Brown v. Mississippi, 297 U.S. 278, 281-82 (1936) (describing such violence during a "murder" investigation": "On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. . . . A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail . . . and while on the way . . .

Spectacle lynchings bore the same features as monarchical violence. First, lynching served political ends and sent a political message: one of white supremacy, and continued subjugation of Black Americans (which included punishment for their supporters). To Southerners, as with offenses against the sovereign in the 18th century, public lynching and torture was not merely about vengeance for crime, but was imposed based upon the belief that "terror is the only restraining influence" that could be brought to bear against Black people.[41] (And the "restraining influence" was to influence Blacks to continue to accept racial inferiority as unequal citizens.)

Second, the penalties were disproportionate, and intentionally so. American lynching took this to another level by killing Blacks who were not even accused of a crime, but instead of violating social mores like "speaking disrespectfully," swearing, arguing with a White man, or refusing to step off a sidewalk to make way for a White person.[42] Death was frequently imposed on suspicion of minor offenses because, to the perpetrators of these acts, these Black Americans illustrated "contempt" for the "sovereign" (here, white supremacy rather than the crown). As before, Blacks were punished for the insult of daring to "disrespect" the sovereign, only this time that disrespect was often simply a plea to be treated with equal dignity and worth as White Americans.[43]

Third was the visible expression of public execution and torture as *terror*; *i.e.*, violence as spectacle. For the spectacle lynchings to have their intended effect—terror, control, and a show of power—a crowd was necessary. Crowds were ever-present. Spectacle lynchings were festive community gatherings where "large crowds of whites watched and participated in the Black victims' prolonged torture, mutilation, dismemberment, and burning at the stake."[44] These were carnival-like events, including thousands of people, food and drink vendors, and even "souvenirs" to commemorate the occasion. The most popular "souvenirs" were postcards rush-printed in real time with pictures of the lynching and the corpse of the condemned Black body.[45] These postcards were then sent to friends and family around the country who could not witness the event. As a result, "[t]hese killings were not the actions of a few marginalized vigilantes or extremists; they were bold, public acts that implicated the entire community and sent a clear message" to both the victims and to the community at large.[46]

As in Europe, these public acts of torture eventually faded through "modernization." In the United States, the decline of lynching correlated with—and relied heavily upon—massive increases in the imposition of capital punishment

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the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed").

41. EJI, *supra* note 13, at 28.

42. EJI, *supra* note 13, at 31.

43. *Id.* at 29, 31, 38-39.

44. *Id.* at 28.

45. *Id.* at 33.

46. *Id.* at 35.

by court order, frequently following sham trials.[47] In this way, the decline of spectacle violence did not eliminate the expression of power against the condemned, but reconstituted that power in a different way. Jim Crow led to the passage of criminal laws designed to codify and criminalize minor transgressions once sufficient to warrant an execution in the name of controlling Black bodies, sentencing them to filthy prisons and frequently fatal labor camps, thereby inflicting pain upon the *soul*.[48]

Modernization also came through the federal legislature. In response to racialized terror against the newly-freed slaves during Reconstruction, Congress passed a series of laws including the Ku Klux Klan Act of 1871, codified as 42 U.S.C. § 1983 and colloquially referred to as "Section 1983." Important here, Section 1983 was a specific, Congressional response to racialized terror and extrajudicial killings that specifically created a damages remedy against any law enforcement or other state actor who operated under a governmental "badge of authority" to violate the constitutional rights of the newly-freed slaves.[49]

### C. Police violence: The spectacle of Black suffering in the twenty-first century

My thesis is plain: the hallmarks of spectacle violence in the past have been reconstituted in the 21st century Spectacle of Black Suffering engulfing our daily lives. In present life, "Black death has become an omnipresent exhibition for consumption."[50] We are inundated with image after image of Black death, Black pain, Black suffering, and unquantifiable loss and profound grief. On the flipside, we often see police power, police calm, and police control. The juxtaposition of the fear and horror of frequently deadly police violence with the almost institutionally numb actions of the police are terrifying, like the executioners of the 1700s ripping flesh from bodies and torturing the condemned upon the scaffold without batting an eye.

In watching George Floyd die with a knee to his neck—*for over 9 minutes*—I could not help but be struck by how calm the officer was in committing these acts but also how dismissive yet calm the others were in rebuffing bystanders calling for help and attempting to intervene to prevent Floyd's death. The same coldness was evident when Walter Scott was killed. There, the officer, having just shot a fleeing unarmed man, did not provide any assistance or even seem alarmed. Instead, without skipping a beat, the officer quickly dropped a Taser

47. *Id*. at 5.

48. *See* Bell, *supra* note 3, at 166-69 (describing the criminalization of blackness through Black codes and vagabond laws where "violators" of these new rules were frequently punished by being placed in labor camps that often killed them before their lengthy sentences could be completed).

49. Monroe v. Pape, 365 U.S. 167, 172-80 (1961); *see also* Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 154-57 (2005) (describing the origins of § 1983); Jamison v. McClendon, 476 F. Supp.3d 386, 398-99 (S.D. Miss. 2020) (same).

50. Banks, *supra* note 15.

next to Scott's body and began to spin a web of lies.[51] And when a Houston Police Department officer shot and killed Jordan Baker, he left Baker lying face down on the pavement, handcuffed Baker's hands to his pants, and walked away.[52]

There are many parallels here to monarchical torture in Europe and to lynching during Jim Crow. To begin, seeing all of this is well and truly terrifying. Many people, like myself, have developed routines for police encounters for one reason: to attempt to avoid death because we are afraid.[53] Black parents give their children "the talk" about being perceived as threats by the police, and offer strategies that they might undertake to ensure they remain alive.[54] The shock, terror, pain, and helplessness of those subjected to police violence, disproportionately Black communities and other people of color, still sends a powerful message to people like me who could end up dead, tased, body-slammed, or arrested simply for not responding to police authority in the perfect and submissive way an officer might demand. Indeed, for many in these communities, the emergence of police scrutiny due to video, while positive, only reaffirms that their voices were not previously deemed sufficient, on their own, to be believed.[55]

The same three hallmarks of prior spectacle violence are also present, though in different ways, in the modern Spectacle of Black Suffering. First, acts of spectacle violence—committed by the police and often defended by the legal system—are political acts. The violence is not merely a reconstitution of justice or

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51. *See, e.g.*, *A Closer Look At the Walter Scott Shooting*, NBC NEWS (Apr. 8, 2015), https://perma.cc/U5VA-PT9L.

52. Estate of Baker *ex rel*. Baker v. Castro, Civil Action No. H-15-3495, 2018 WL 4762984, at *3 (S.D. Tex. Aug. 31, 2018).

53. Try being pulled over by the police as a black man with long dreadlocks wearing a hooded sweatshirt. I know, and fear, in that moment, there is some chance I will die if the interaction does not go perfectly, and even that might not be enough. Like others, I have developed extensive routines for getting pulled over that involved turning off the car, putting the keys on the dash, putting the cell phone on the dash or in its holder, rolling all windows down, and gripping the steering wheel as if it will help save my life. Importantly, even if for the sake of the argument one were to assume that these fears are not "justified" or could be deemed "exaggerated," that proves the point. The effect of Spectacle of Black Suffering—fear and terror within the community whose bodies have been maimed and killed—is nonetheless felt, internalized, and "may be as potent" as the acts of physical violence themselves. Cover, *supra* note 18, at 1603 n.5.

54. *E.g.*, Geeta Gandbhir & Blair Foster, *A Conversation with My Black Son*, N.Y. TIMES (Mar. 17, 2015), https://perma.cc/7RNF-XPTL (documentary video of parents and children describing the "talk"); Pria Mahadevan et al., *'The Talk' is a Rite of Passage in Black Families. Even When the Parent is a Police Officer*. GA. PUB. RADIO (June 26, 2020, 6:41 PM), https://perma.cc/A8CG-XQGS; Dahleen Glanton, *What Black Parents Tell Their Sons*, CHI. TRIB. (Mar. 24, 2012), https://perma.cc/JB3D-BXE8.

55. *See* Russell-Brown, *supra* note 3, at 213 ("Members of some communities have been told that their negative (sometimes criminal) encounters with law enforcement were not real and not their lived experiences, that their eyes were 'lying.' The popularity of body cameras as a solution to police violence underscores this racialized vision: Video evidence is necessary to 'prove' what many people, particularly those in poor, Black communities, have been saying for decades.").

application of the law in the abstract; it is an assertion of *power on display*.[56]

These political messages are particularly salient given the second hallmark of spectacle violence emphasized here: the Spectacle of Black Suffering is excessive, imbalanced, and disproportionate, and intentionally so. A death sentence is imposed for even the most minor transgressions, *e.g.*, selling loose-leaf cigarettes, allegedly passing a forged check, jaywalking, or for traffic infractions like driving too fast, too slow, or with a broken taillight.[57] As with monarchical "contempt of sovereign" or failure to respect white supremacy after the Civil War, massive suffering and even death is meted out for *perceived social transgressions* against the representative of the state's authority—the police.

Failure to acknowledge and follow every exact command of a police officer or, worse yet, to complain about an intrusion, can be treated as an indignity upon this authority. Some police officers have been explicit about this mentality, which has been called "comply or die."[58] Officers treat certain community members as subjects who must follow every word; who cannot voice an objection even against unjustified excessive acts; and whose failure to perfectly comply (or even perceived failure to comply despite actual compliance) can subject them to violence or even death. Though the "comply or die" myth rests on a doubtful premise—compliance with commands will avert violence or death—the more remarkable thing about this mantra is that it makes explicit that a consequence for failing to behave "perfectly" in the eyes of the officer is *death*. Put differently, "comply or die" is founded on the idea that disproportionate police violence, including death, is perfectly justified and appropriate. In this light, additional police violence in response to protests against police violence is no surprise. Quite the opposite: it is the obvious and inevitable response of a "sovereign" who feels insulted by citizens refusing to respect its authority by daring to even question that authority.

Third, the modern Spectacle of Black Suffering involves the quintessential

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56. *Cf.* Austin Sarat & Aaron Schuster, *To See or Not to See: Television, Capital Punishment, and Law's Violence*, 7 YALE J. L & HUM. 397, 399 (1995) ("Executions have always been centrally about *display*—in particular the display of the awesome power of sovereignty as it was materialized on the bod of the condemned.").

57. Jamison v. McClendon, 476 F. Supp.3d at 390-92 (S.D. Miss. 2020) (collecting these cases).

58. *See, e.g.*, John W. Whitehead, *Comply or Die: The Police State's Answer to Free Speech is Brute Force*, COUNTERPUNCH (July 12, 2017), https://perma.cc/AAX6-XK7H. The "comply or die" mentality is not a myth or secret but sometimes even a police talking point. The Houston Police Officer's Union, for example, highlights the slogan "Comply Don't Die. Live to Have Your Day In Court," based upon the notion that "if citizens complied with an officer's lawful commands, no force would be need to be used." Barbara A Schwartz, *Comply Don't Die, Live to Have Your Day in Court*, Houston Police Officers Union (June 2019), https://perma.cc/2L7M-LV2J; *see also* Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me,* WASH. POST (Aug. 19, 2014), https://perma.cc/35NZ-3MXZ (arguing that it is "not the cops, but the people they stop, who can prevent detentions from turning into tragedies,"; that "if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you"; and claiming that if you "[d]o what the officer tells you to and it will end safely for both of you").

component of any spectacle: the multitude, the crowd, the community as witness. As Foucault put it, in the ceremonies of public execution "the main character was the people, whose real and immediate presence was required for the performance."[59] This remains true. We find ourselves as viewers of a "performance art piece" where the "conspicuous consumption of black death" is something "to be gawked at, internalized, amused by, as a perennial window into western morality."[60] Police violence has replaced lynching as the main vehicle through which people view the Spectacle of Black Suffering, and "watching Black people die is still a national pastime."[61]

At the same time, the current Spectacle of Black Suffering differs from prior iterations in important ways. First, and perhaps foremost, is the fact that there is often a desire that such violence *not* be spectacle, both on the part of those inflicting the pain (here, the police) and the crowds who observe it. On the police side, acts of police violence include those the police do not anticipate are being recorded (like the beating of Rodney King and the killings of Oscar Grant, Walter Scott, and Eric Garner). Relatedly, there has also been significant police hostility or resistance to expansion of body cameras, as well as efforts to hide footage of acts of gratuitous violence.[62]

The community side is more complicated. Calls for body cameras have been hailed as reforms designed to make policing safer and to provide accountability for unjustified policing (whether it be violent, racially discriminatory, or something else). When someone is killed by the police, immediate release of footage, if it exists, is frequently demanded. The current Spectacle of Black Suffering implicates us all as witnesses, even if we do not *wish* to be party to these acts. The public are "simultaneously fearful subjects, authorizing witnesses, and critical participants."[63]

The fact that these images are ubiquitous is also disempowering. For a time, and in powerful ways, images of Black suffering could be used as tools of critique and protest. Such critique, where the means of publication could be controlled, famously included the work of W.E.B. Dubois in publishing images of Black death in the N.A.A.C.P's magazine.[64] Powerful criticism was made through the bold action of Emmett Till's mother in 1955 after her son was lynched, when she demanded an open-casket funeral showing the bruised and beaten face of her 14-year old child and then publicized a photograph of his face

59. FOUCAULT, *supra* note 13, at 57.

60. Liddell, *supra* note 14.

61. Banks, *supra* note 15.

62. One example is the shooting of Laquan McDonald in Chicago. There, the city quickly settled a civil-rights lawsuit and attempted to bury the tape of the officer later convicted of homicide. It took a public records act lawsuit to finally compel the release of the tape. *See* Kyung Lah, *Laquan McDonald Shooting: Why Did It Take 13 Months to Release Video?*, CNN (Dec. 2, 2015), https://perma.cc/8UA9-6DK2.

63. Sarat & Schuster, *supra* note 56, at 400.

64. Balthaser, *supra* note 2.

in newspapers and magazines throughout the country.[65] At the time, the images shook the world.

Undoubtedly, images and videos have sparked reform and accountability in the modern era. George Floyd's killer would not likely be a convicted murder in the absence of bystander footage; the officers who killed Sylville Smith and Philando Castile likely would have never been charged with homicide without video; and the Chicago police officer who killed teenager Adam Toldeo would not be facing potential firing or prosecution after members of the prosecutor's office misled the public about what happened without video. However, the Spectacle of Black Suffering is no longer something that can be controlled or managed as part of a targeted critique in the same way it was with Emmett Till. Instead, when images of violence against Black people go viral, a sense of narrative is difficult or impossible to control because the acts of violence are broadcast nearly contemporaneously.

These images of violence permeate our ears and eyes in ways unknown to generations before. In *The Trayvon Generation*, Elizabeth Alexander, who wrote a famous essay about the beating of Rodney King in 1991, expressed the deep, motherly concern about what this sort of ever-present violence means for our children.[66] These kids watch "their peers shot down and their parents' generation get gunned down and beat down and terrorized as well"—the "agglomerating spectacle" continues in all parts of their lives when the violence is viewed "up close and on their cell phones"; in near real time; on the school bus; and under the covers at night.[67] The level of grief suffered is profound, and the sense of *terror*—a potential foreshadowing of death—is overwhelming.[68]

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We can now ask: in the 21st century, what does it mean to be subjected to ubiquitous images of Black Americans being killed, maimed, and wounded? What does it mean for our country that the Spectacle of Black Suffering is omnipresent? And what does it mean when violence as spectacle is something we wish was not a spectacle at all? I offer three preliminary thoughts.

First, the political messages sent by the expressions of power in police violence are more intense and potent than prior iterations of spectacle violence like lynching. Technology obviously plays a part. With current media, what makes the spectacle a spectacle—consumption of the violent imagery by the masses—is not just spread to more and more people. It is also spread to more people in a manner that is in some sense involuntary. This is a double-edged sword. Shocking images of violence can sometimes lead to some reform or social change (as with the death of George Floyd). However, when violence does not stop despite these images, the political expression of police power is doubly felt: it continues

65. *Id*.

66. Elizabeth Alexander, *The Trayvon Generation*, NEW YORKER (Jun 15, 2020), https://perma.cc/MRZ8-ETTG.

67. *Id*.

68. *Cf*. Sacks, *supra* note 9.

to be more ubiquitous and involuntarily spread while remaining unabated by events that shock the conscience. Police violence in response to protests against police violence presents an indignant flex, a show of authority that is made all the more terrifying because of how troubling the violence that prompted the protests was in the first place.[69]

Second, there is the irony: many police officers resist expansive recording (via private citizens, body cameras, or squad car cameras) of them while they treat people violently. Other times, where there is video of violence, its publication is resisted by law enforcement. This phenomenon, admittedly, does not fit neatly within the spectacle framework, but it does not undermine it either. Instead, resistance to recording even though recording is already widespread confirms that police know that violence is endemic to American policing, regardless of whether there are some individual officers who would not be so violent. Violence is part of police culture and the notion that it is confined to "a few bad apples" is, at best, a misnomer.[70]

Finally, this iteration of spectacle violence raises legal issues that transcend particular doctrine and go to the very idea of law itself. There are doctrinal questions raised by the Spectacle of Black Suffering. For example, the Fourth Amendment is the primary lens through which questions of police violence are litigated as a matter of constitutional law. We might ask, then, how well does the Fourth Amendment regulate police violence? The short answer: very poorly.[71] We might also ask questions about how doctrine is applied in actual litigation or

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69. *Cf.* Liddell, *supra* note 14.

70. *See generally* VITALE, *supra* note 3, at Chapter 2 (discussing the history of policing and how it professionalized force); Steiker, *supra* note 19, at 830-833 (similar); Sidney Harring, *The Development of the Police Institution in the United States*, 5 CRIME & SOC. J. 54 (1976); SKLANSKY, *supra* note 11, at 107-114. These sources emphasize the history of racism in policing, but socioeconomic class and class control is an integral part of the history of policing as well. *See generally* SIDNEY L. HARRING, POLICING A CLASS SOCIETY (2017). The factually inaccurate notion of isolated police abuse is consistent with the "warrior mentality," *see* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. FORUM. 225 (2015), has impacted the development of the law, *see* Chiraag Bains, *"A Few Bad Apples": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L. REV. 29 (2018), and illustrates how inadequate police regulation perpetuates additional violence, *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some Causes*, 104 GEORGETOWN L.J. 1480, 1514-17 (2016).

71. *See* SKLANSKY, *supra* note 11, at 95-107 (describing that "we really do not have rules for police uses of non-deadly force" but instead have "mostly highly deferential, after-the-fact, case-by case review); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521 (2020); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1916 (2007) (explaining how Fourth Amendment doctrine frequently fails to address police violence because of focus on warrants, probable cause, and search doctrine) (citing Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 402, and William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1068 (1995)).

about the impact, for better or worse, on how constitutional claims are adjudicated.[72] We might ask what legislatures should do to parlay calls for social change into statutory alterations that are necessary because Fourth Amendment doctrine is inadequate. These are important questions to be addressed. However, the Spectacle of Black Suffering also raises deeper issues concerning the very idea of law itself.

## II. JUDICIAL VIOLENCE, THE RULE OF LAW, AND THE VALUE OF CONSTITUTIONAL RIGHTS

### A. The rule of law depends on violence

As we have seen, the imposition of violence against subjects of the crown was a mechanism for ensuring compliance with state authority. As both the Revolutionary and Civil Wars made plain,[73] the rule of law depends on violence and/or the threat of violence as a state-sanctioned basis for ensuring compliance. This is true as a matter of political philosophy, too. The idea that law can coerce compliance requires that law have the ability to be enforced; *i.e.*, the concept of law includes the notion there is a basis for the application of state authority *by force*.[74] As Derrida put it: "There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct, indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic," or "coercive or regulative."[75]

Moreover, it is the prevention of additional unjustified violence that forms a basis of the rule of law. In this way, "unlawful" or "illegitimate" violence is a threat to the rule of law and, for the sake of the law, must be curtailed. Courts, as adjudicators of types of violence, theoretically stand between lawless violence on the one hand and "order" on the other, which supplies the justification for judicial interpretation (and judicial authority) in the first place.[76] This aspect of

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72. The Supreme Court's decision in Scott v. Harris, 550 U.S. 372 (2007), which involved video evidence posted on YouTube, has raised divergent treatment about how to evaluate video evidence. *Compare* Hurt v. Wise, 880 F.3d 831, 840 (7th Cir. 2018) (discussing the significance of *Scott*, and treating it as not having presented a sea-change in the law), *with* Sevy v. Barach, 815 F. App'x 58, 61 (6th Cir. 2020), and DiLuzio v. Vill. of Yorkville, Ohio, 796 F.3d 604, 609 (6th Cir. 2015) (both discussing *Scott* as creating an "exception" to normal rules of adjudicating evidence at summary judgment and even altering standards for review on appeal).

73. *Cf.* Cover, *supra* note 18, at 1605-06 (discussing the American Revolution and Civil War).

74. Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 919, 925 (1990); *see also* Cover, *supra* note 18, at 1605 (explaining that what "constitutes 'Law' is never just a mental or spiritual act" because a "legal world is built only to the extent that there are commitments that place bodies on the line").

75. Derrida, *supra* note 74, at 925, 927.

76. *See, e.g.*, United States v. Dickson, 40 U.S. 141, 162 (1841) ("But it is not to be forgotten, that ours is a government of laws, and not of men; and that the judicial department

the rule of law was expressed in a famous passage from *Marbury v. Madison*: "The government of the United States has been emphatically termed a government of laws, and not of men."[77] In other words, government in the United States relies on the existence of rules which everyone must obey, as well as the principle that refusal to follow them can and will be rebuked, both as a manifestation of the law itself but also for the sake of the rule of law.

In the past, the Supreme Court has, at times, stepped in to enforce the rule of law in the face of violence (and spectacle suffering).[78] The Court's 1936 intervention in *Brown v. Mississippi* was necessary to curtail the use of torture-derived false confessions as part of spectacle violence in the South.[79] During the Civil Rights Movement, Justice Frankfurter provided a powerful invocation of the "government of laws, not of individuals" principle in *Cooper v. Aaron*,[80] when the Court enforced *Brown v. Board of Education*[81] by demanding that Little Rock, Arkansas, integrate its schools after refusing the Court's command to integrate with "all deliberate speed."[82] *Cooper* involved a dramatic backdrop, where the National Guard was called in—*i.e.*, the threat of violence—to enforce a desegregation order. In chastising Little Rock's "defiance of law," Justice Frankfurter emphasized that the rule of law (as expressed by the phrase 'government of laws not men') "epitomizes the distinguishing character of our political society."[83] As a result, Frankfurter argued, the "Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.'"[84]

Scholars who have written in the "jurisprudence of violence" have recognized that the rule of law and the relationship between law and violence are simultaneously theoretical and a very serious part of daily life. With this in mind, the jurisprudence of violence recognizes that "violence, as a fact and a metaphor, is integral to the constitution of modern law" because modern law is itself "a creature of both literal violence, and of imaginings of threats of force, disorder, and pain."[85] Violence, then, is constituent of law in at least three senses: (1) it

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has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.").

77. Marbury v. Madison, 5 U.S. 137, 163 (1803). I take "of men" to mean of "individuals" and use individuals as a substitute going forward.

78. See sources in n. 40, *supra*.

79. Brown v. Mississippi, 297 U.S. 278 (1936).

80. 358 U.S. 1 (1958).

81. 347 U.S. 483 (1954).

82. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 301 (1955).

83. *Cooper*, 358 U.S. at 23 (Frankfurter, J., concurring)

84. *Id.* (quoting Roscoe Pound, *The Future of Law,* 47 YALE L.J. 1, 13 (1937)).

85. AUSTIN SARAT & THOMAS R. KEARNS EDS., LAW'S VIOLENCE, *Introduction*, at 1 (1995). In this field, *see also* AUSTIN SARAT ED., LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE (Austin Sarat ed., 2001), Cover, *supra* note 18, and Robert Paul Wolff, *Violence and the Law* 60, *in* THE RULE OF LAW (Wolff, ed., 1971).

provides the *method* and basis for the foundation of legal orders (e.g., war, unjustified violence); (2) it provides the law with a *reason* for being (through regulation, coercion, or the threat thereof); and (3) it provides the *means* through which the law acts (once established, law is maintained through force).[86]

At the same time, law itself seeks to mask the violence that underpins it.[87] Law and legal institutions that involve violence use different words or theoretical frames to describe such acts. In this paradigm, "murder is an act of violence, but capital punishment *by a legitimate state* is not; theft or extortion is violent, but the collection of taxes *by a legitimate state* is not."[88] The list goes on: "capital punishment" now masks the violence of the slow, methodical execution; "use of force" describes police violence against civilians; and a coercive, involuntary, and often sexually invasive body search is labeled a mere "stop and frisk." Apart from narrative, distinguishing between violence in these ways communicates the presumption that the violence of the state is "lawful" and, for that reason, not worthy of being referred to with explicitly violent terms.[89]

The law cannot be permitted to hide its violence. Instead, to understand these exercises of state power, and particularly their implications for the law, we must examine and describe violence as just that: violence. The term need not necessarily imply a positive or negative, but understanding violence *as* violence can help clarify things like whether and when certain acts are justified; where certain forms of violence originate; how to assess the significance of particular acts; and how to respond to particular forms of violence if we would like to see certain actions reduced.[90] Thus, even if deemed "lawful," "constitutional violence is still violence nonetheless; it crushes and kills with a steadfastness equal to violence undisciplined by legitimacy" and must be understood in this way.[91]

### B. Violence and the word

Violence is not confined to physical acts against our bodies. Instead, this Part argues, violence includes language and words. Verbal violence can frequently involve an extension of physical violence—another mechanism for expressing political power used to control people. This Part focuses on (1) the nature of the language used by police (and others) as part of an expression of power and (2) the violence of legal interpretation in judicial utterances (the judicial word).

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86. SARAT, *supra* note 85 at 3-4.

87. SARAT, *supra* note 85, at 5 ("[L]aw denies the violence of its origins.").

88. WOLFF, *supra* note 85, at 59.

89. *See* WOLFF, *supra* note 85, at 59; SKLANSKY, *supra* note 12, at 114 ("The reason the police don't describe what they do as 'violence' is that the term has a pejorative connotation. It usually, although not always, is understood to the *illegitimate* or *unjustified* use of force. So describing police conduct as 'violent' can suggest that it is necessarily wrongful.")

90. *Id*. at 114-15.

91. SARAT & KEARNS, *supra* note 85, at 5.

1. Violent language

Narrow conceptions of "violence" might suggest it is confined to physical force against bodies. Such conceptions ignore the reality on the ground and the power of words. Most theorists recognize that we can extend the concept of violence to non-physical acts without destroying the concept altogether.[92]

Examples of policing from the modern Spectacle of Black Suffering illustrate the point. One thing often overlooked in the newest videos of suffering is how the *language* of power and violence permeates police-civilian interactions. This violence is systemic and institutional.

Consider Alvin Cruz, a Black man who had been repeatedly stopped by the police. On one occasion, an officer grabbed him and twisted his arm behind his back, saying: "Dude I'm gonna break your fucking arm, and then I'm gonna punch you in the fucking face."[93] The insult to the "sovereign" that led to this violence? Cruz had asked why he was being stopped. As with other forms of violence as spectacle, the officer's expression of power against Cruz was disproportionate, and intentionally so.

The violence, both physical and in the word, against Chris Lollie was similar. Lollie, a Black man, was arrested, tased, and thrown to the ground in a St. Paul, Minnesota skyway and business lobby while waiting to pick up his kids from daycare. Parts of the encounter are captured on video from Lollie's cell phone, the officers' body cameras, and surveillance footage from the lobby. One officer approaches Lollie and asks why he is sitting in the lobby, so he begins to walk toward the daycare. Lollie and the officer engage in a "walk and talk" along the way. As they proceed into a different building, two more officers approach. Lollie says: "What's going on brother, I gotta go get my kids."[94] One of the approaching officers advances on Lollie, who is cornered near a wall, and reaches toward Lollie, who says "please don't touch me." The officer's response is twofold: (1) "[w]ell you're going to go to jail then" and (2) "I'm not your brother."[95]

Both of these statements by the officer reflect the fundamental power disparity between Lollie and the three police officers. As with an insult to the crown, they serve as a reminder that the police are in no way on equal footing with or equal in dignity to Lollie. Being called "brother"—a term for an equal—was an affront to this officer, who took Lollie's expression of the notion that he had equal power in this moment as an act of disrespect justifying an exercise of power.

The officers make good on their threats: physical violence and jail follow.

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92. *E.g.*, SKLANSKY, *supra* note 11; WOLFF, *supra* note 85, at 60 (arguing, on anarchist grounds, that it is "wrongheaded" to restrict the term violence "to uses of force that involve bodily interference or direct infliction of physical injury").

93. VITALE, *supra* note 3, at 2 (internal quotes and citation omitted).

94. Side-by-side Videos of Arrest of Chris Lollie in Skyway, YouTube.com, https://perma.cc/RFF9-7AQ8; *see also* Lollie v. Johnson, 159 F. Supp. 3d 945 (D. Minn. 2016).

95. *Id.*

Lollie is grabbed by the officers, forced to the ground, tased, and then handcuffed. All the while, Lollie screams out to people passing by for help, for any sort of help, to resist these coercive acts. In response, an officer commands Lollie to "be calm."

As with Alvin Cruz and spectacle lynching in the South, we again have the imposition of violence as a result of a "social transgression" and no obvious crime. There are at least two forms of *verbal* violence imposed on Lollie. The first one is obvious: the threat of violence and jail time reflecting the "comply or die" mentality seen elsewhere. The second is more nuanced, but perhaps more striking: the police tell Lollie to "be calm" after slamming him to the ground and tasing him. From the perspective of violence and the law as verbal acts, there is a particularly troubling expression of power—akin to torture—in being told to "be calm" after having just been humiliated, tased, and taken down by the police. No reasonable person is "calm" after having been slammed to the ground, tased, shot, or beaten by anyone, let alone the police, when they have committed no crime other than refusing to be ruled by the authorities.

But we see the "be calm" language appear again and again as police administer violence. In Chicago, the police "served a warrant" on a home they incorrectly suspected of belonging to a drug dealer. In reality, it was the home of Anjanette Young. They stormed into this innocent Black woman's home while she was in the shower and began to ransack her apartment, breaking the doors and damaging other property. All the while Young stood by in handcuffs, naked, pleading with the officers to tell her what was happening.[96] They refused. Instead, the police repeatedly told Young to "be calm." Again, who would be calm in this situation? The request—in the face of so much pain—is an impossible, excruciating show of power. But it is not an isolated incident, confirming, again, that the norms of disproportionate police violence are not confined to a few outliers but are part of the culture and DNA of American policing throughout the country.

2. Judicial violence: The violence of legal interpretation

Many contributors to the jurisprudence of violence begin their discussion with Robert Cover's essay, *Violence and the Word*.[97] Rightly so. Cover's account is powerful and bracing. This Part shall take the same cues.

Cover famously draws our attention to the "violence of legal acts," as legal

96. *See Behind the Mistaken Raid by Chicago Police on an Innocent Social Worker's Home*, WTTW (Dec. 19, 2020), https://perma.cc/H44U-UUY4.

97. *See* SARAT & KEARNS, *supra* note 85, at 1-21; SARAT, *supra* note 85, at 3-13. To this author's knowledge, even when seeking the perspective of a judge (Hon. Patricia Wald), these scholars have yet to extend Cover's seminal work in the manner intended here—to apply the violence of legal interpretation in the development of legal doctrine on the field of pain and death (e.g., regulation of police violence under the Fourth Amendment) to discuss how the relationship between judicial violence and constitutional rights impacts the notion of constitutional rights and the rule of law.

interpretation "takes place in the field of pain and death."[98] Legal interpretation exists in this way because legal acts signal and occasion the imposition of violence upon others, and legal interpretation provides justifications for violence that has already occurred on the ground.[99] Acts of judicial interpretation, then, leave behind "victims whose lives have been torn apart by these organized social practices of violence" because legal interpretation is "part of the *practice* of political violence."[100] Accordingly, the relationship between legal interpretation and "the infliction of pain" is not unusual or rare; it "remains operative even in the most routine of legal acts."[101]

To understand the violence of interpretative acts, Cover argues, we must understand that violence operates as: (1) a practical activity; (2) designed to generate credible threats and actual deeds of violence; *i.e.*, within a system designed to generate violence; and (3) it does so "in an effective way."[102] As a practical activity, the "judicial word is a mandate for the deeds of others" and judicial interpretation is not simply practical but is itself a practice.[103] "[T]he practice of interpretation requires an understanding of what others will do with such a judicial utterance."[104] Legal interpretation within a system designed to generate actual violence recognizes that "legal interpretation is as a practice incomplete without violence," and that we expect the judicial word to "serve as virtual triggers for action."[105] Doing so in an effective way, as we have seen, requires that the words can be enforced.

For present purposes, this is the crucial point: to understand the violence of a judge's interpretive act, we must understand the way in which it is transformed into a violent deed; and to understand the *meaning* of this violent deed "we must also understand in what way the judge's interpretive act authorizes and legitimates it."[106] Cover wrote most directly about the violence of the judicial word in imposing criminal sentences or in ordering the death penalty. Nonetheless, the analysis sets the stage for understanding how judicial interpretation *legitimates* violence; how it occasions the *practice* of violence; and how it thereby contributes directly to additional violence as the result of what others do with the "virtual triggers" to action occasioned by "judicial utterance." I call this judicial violence.

Juxtaposing judicial violence with spectacle violence provides an informative backdrop for examining violence today. The judicial word is part of the practice of police violence (and of ignoring violence in those acts by, for example,

98. Cover, *supra* note 18, at 1601.
99. *Id.*
100. *Id.* at 1601, 1606 n.15.
101. *Id.* at 1607.
102. *Id.* at 1610, 1613.
103. *Id.* at 1611.
104. Cover, *supra* note 18, at 1612.
105. *Id.* at 1613.
106. *Id.* at 1614.

calling them a "use of force" or a "*Terry* stop").[107] As with the practice of monarchical torture, of lynching, and of police violence, judicial violence makes a political statement. That statement likewise involves a political expression of power. Power is expressed not solely because the judicial word can directly order or mandate pain and death, but because it can legitimize violence that has already happened. Conversely, the judicial word can also prohibit or enjoin future violence or condemn violence that has already happened. Either way, judicial utterances send a message to both those committing violent acts (*e.g.*, the police) but also those who are on the receiving end of such violence (*e.g.* disproportionately Black, Indigenous, or Brown communities, the poor, etc.). When courts excuse or condone police violence they send a message to both the police and those who have had that violence perpetrated against them. On the flipside, as we saw in *Cooper* when the Supreme Court marshalled the threat of violence to integrate schools, the opposite is also true—where the judicial word indicates that state violence is unlawful or will not be tolerated, that act of legal interpretation has political meaning and power as well.

Where these things happen as a result of judicial interpretation, the act is violent. When juxtaposed against the on-the-ground police violence of the Spectacle of Black Suffering, the act of judicial violence can present a form of violence that is more profound and powerful in some ways. Judicial violence can routinize violent behavior, legitimate past violence, and therefore contribute to more pain and suffering in the future.

### C. Judicial violence in constitutional rights litigation

The practice of judicial violence impacts both what law *is* and what constitutional rights mean (or, in fact, do not mean). In our tradition, given the importance of both the concept of rights in general and the special status afforded to *constitutional* (as opposed to statutory) rights, constitutional interpretation stands on a different plane than other interpretive acts.[108] Constitutional interpretation sets the bounds of government action vis-à-vis the people subject to government authority, and presupposes the government established by the Constitution "has the power to practice violence over its people," as that "is the very idea of government."[109] The fact that constitutional interpretation is "inextricably bound up with the real threat or practice of violent deeds" means that such interpretation is properly treated as distinct from, and more significant than, other forms of interpretation.[110]

In describing the rule of law as the "government of laws, not of men" in

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107. *Cf.* SKLANSKY, *supra* note 11 (discussing *Mapp* and the fact that violence played no part in the decision or in the development of criminal procedure).

108. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

109. Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, The Deed, and the Role*, 20 GA. L. REV. 815, 819 (1986).

110. *Id.* at 816.

*Marbury*, the Supreme Court recognized the importance of the relationship between the rule of law and the protection of rights. The Court worried that the United States would cease to be a government of laws and not of individuals "if the laws furnish no remedy for the violation of a vested legal right."[111] To preserve the rule of law itself, *Marbury* reasoned, courts must enforce the "general indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[112] To effectuate these principles, judges have an attendant *duty* to use their (sometimes violent) power to ensure that violations of rights have remedies, else the law is jeopardized because its violations go unenforced and we become a nation of "people" acting on our own rather than within "the law."

The Supreme Court has sometimes acknowledged the duty described in *Marbury*. Take, for example, *Boyd v. United States*, the Supreme Court's first decision addressing the Fourth Amendment. *Boyd* requires courts to liberally construe constitutional provisions because a narrow construction deprives rights of their "efficacy" and "leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[113] As a result, *Boyd* held that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[114] To preserve constitutional rights, *Boyd* explained, a judge's "motto should be *obsta principiis*;"[115] *i.e.*, to "resist the first approaches or encroachments."[116]

This view of rights, and of the judicial role in preserving those rights, has been central to many decisions (some of which were unpopular).[117] Most significantly, the Court used this sort of language to find implied rights of action for violations of constitutional or statutory rights in *Bivens*, in which it created a federal analogue to § 1983 on the rationale that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[118] Unfortunately, when it comes to the constitutional rights of civilians, and particularly those who claim their rights have been violated by

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111. Marbury v. Madison, 5 U.S. 137, 163 (1803).

112. *Id.* (quoting 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109 (1783) (internal quotation marks omitted)).

113. Boyd v. United States, 116 U.S. 616, 635 (1886).

114. *Id.*

115. *Id.*

116. BLACK'S LAW DICTIONARY 1107 (8th ed. 2004).

117. One line of cases focuses on worries about prejudice to "discrete and insular minorities," United States v. Carolene Products Co., 304 U.S. 144, 153, n.4, (1938), as in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Other cases that come to mind are the Court's race discrimination decisions that culminated in *Brown v. Board of Education* and *Cooper v. Aaron*, *e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); the Court's treatment of § 1983 in *Monroe v. Pape* itself; and in its early prison cases, *e.g.*, Cooper v. Pate, 378 U.S. 546 (1964) (applying § 1983 to prisoners); Haines v. Kerner, 404 U.S. 519 (1972) (extending § 1983 prison suits to medical needs).

118. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392 (1971). A similar principle was at work when the Court found an implied right of action in Title IX, which prohibits sex discrimination, in Cannon v. University of Chicago, 441 U.S. 677 (1979).

the police, the Supreme Court no longer adheres to anything remotely like these principles.

The departure from the rule of law principles expressed in cases like *Boyd* and *Bivens,* as *Marbury* predicted, has eroded the rule of law. We can see this in two ways: (1) through the Court's abandonment of the linkage between rights and their remedies, and (2) in the doctrine of qualified immunity.

1. The importance of legal remedies to the rights themselves

There are a host of potential remedies for constitutional violations by police officers. These include criminal prosecution, internal discipline and firing, meaningful oversight at the local, state, or national levels, and the development of police practices, training, and policies designed to reduce violence. Civil remedies for systemic issues include the federal government conducting "pattern-or-practice" investigations into police departments that result in consent decrees and ongoing monitoring of those departments. But, for reasons beyond the reach of this paper, legal remedies for individual people subject to violence are limited in the U.S. legal system.

In our system, a civil damages remedy is the quintessential form of redress, and the civil jury serves as the bedrock of determining not just liability but also the remedy (the amount of money damages) for any constitutional harm.[119] A civil damages remedy is *highly* imperfect. Financial remedies are *never* fully adequate. Having represented the families of Black people killed by the police, even so-called "record-breaking" monetary amounts do not come anywhere close to bringing back the brothers, sisters, mothers, fathers, cousins, aunts, uncles, and friends who will never take another breath. For a civil rights plaintiff, the opportunity to have your "day in court" is not a theoretical exercise; it is an important opportunity for personal vindication. In this framework, juries serve as important checks on the legal system and its expression of power. Juries, while also imperfect, also provide a mechanism for public, democratic input for assessing whether a particular act of violence should be treated as lawful or not.

Given the damages/jury system, judicial pronouncements that concern actual violence on the ground or whether a plaintiff will have their day in court are particularly important for ensuring whether constitutional remedies exist. In our tradition, judges, unlike the police, have the ability to say "what the law is."[120] Practically speaking, when judges proclaim that the "law is" no remedy for a violation of one's constitutional right, they have, in effect, said that "you do not have such a right." This is the insight from *Marbury* and *Boyd*, and one that is powerfully argued by legal realists.[121]

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119. *Cf.* Steiker, *supra* note 19, at 822.

120. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* RONALD DWORKIN, LAW'S EMPIRE 2 (1986).

121. *See, e.g.*, David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L. REV. 563 (2010) (discussing

The notion that courts have any duty to enforce rights in a manner that ensures a remedy has been abandoned—if not completely disregarded—by Supreme Court doctrine. This process has involved two steps: (1) separating constitutional rights on the one hand from remedies on the other, and (2) proceeding as if there was no relationship between the two. In so doing, courts have assumed that constitutional rights exist in a sphere that is separate and unrelated to the entirely distinct sphere of legal remedies. To be clear: acknowledging that rights and remedies are different concepts is not necessarily flawed; a remedy is not the *same thing* as a right. There can be important and even difficult theoretical questions about what *types* of remedies the law should provide to redress particular harms. The problem with this approach, however, is that it views the value of constitutional rights as completely *independent of* their remedies—a profound mistake. In short, the problem with this approach is that it pretends that what the law provides for in terms of remedies has no impact on the value of a constitutional right.[122] This, again, ignores reality on the ground but also impacts the rule of law itself—where there is no *enforceability*, there is no law.

In contrast, a "remedial equilibration" perspective recognizes the important, co-extensive relationship between rights and remedies, which demands that questions of remedies be treated with the same seriousness given to expounding on the right itself.[123] After *Boyd*, the Supreme Court held that exclusion of evidence was required in federal criminal cases where that evidence was obtained in violation of the Fourth Amendment. One rationale for such a requirement was "judicial integrity."[124] The idea here is that courts cannot allow unlawfully obtained evidence to be used in criminal proceedings because it would corrupt the proceedings themselves by making the court a party to the illegality of the underlying act. This idea of judicial integrity is also consistent with Cover's analysis of the violence of interpretive acts, where judicial interpretation is concerned about what others will do with a judicial utterance—here, seek to convict a person despite a violation of their constitutional rights.

The rationale underlying *Marbury*, *Boyd*, and other cases presents the concern that, for judicial acts to retain their legitimacy as justified lawful pronouncements, they cannot make themselves party to eliminating remedies for rights violations. Indeed, the rationale was so strong that courts had a duty to ensure that encroachment did not happen at the margins.

Things have changed. Instead of being a careful protector of constitutional

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legal realist scholars).

122. This view has been called "rights essentialism." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

123. *Id.* at 889, 905, 910.

124. Weeks v. United States, 232 U.S. 383, 394 (1914); *see also id.* ("To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of people against such unauthorized action."); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 65 (1966) ("Courts were part of the law enforcement process, and, as such, shared responsibility for preventing the invasion of constitutional rights.").

rights—and recognizing that rights demand remedies to have practical value—the Court has gone in the opposite direction. A good example is the Supreme Court's 1949 decision in *Wolf v. Colorado*.[125] *Wolf* was part of a long string of cases after the Civil War and the Reconstruction Amendments that made the Bill of Rights applicable to state actors via the Due Process Clause of the Fourteenth Amendment. In discussing the rights at issue, the Court held that state actors were required to follow the Fourth Amendment because it is a "fundamental right, . . . basic to a free society, and implicit in 'the concept of ordered liberty.'"[126] However, despite the purported importance of the right, *Wolf* reasoned, "ways of enforcing such a basic right raise questions of a different order.[127] With the question of the constitutional right separated from the question of a remedy, the Court declined to require the exclusion of evidence (or any other remedy) for the violation at issue there—a contradiction that warranted a dissent.[128] The Court's next treatment of Fourth Amendment remedies held that the exclusionary rule "is calculated to prevent, not repair" and that its purpose is deterrence (and apparently no longer impacted by any notion of judicial integrity).[129]

By putting remedies on the back burner in terms of significance and ignoring their relationship to rights, the Court has strayed away from core principles that underlie the rule of law itself. Again, the problem is not necessarily asking *which* remedies are necessary for a violation of a constitutional right; it is proceeding as if the remedial question has *no value* for the underlying right. As the legal realists have argued, however, "[a]bsence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."[130] From this perspective, courts must be attentive to the fact their remedial changes do not exist in the abstract realm of policy but determine the actual value of a right.[131]

These linkages between right and remedy map onto the jurisprudence of violence, expressed in the principle that, for law to exist and have meaning, it must be *enforceable*. Enforceability includes not only criminal laws enforced by the government but also enforcement of the Constitution by people whose rights have been violated. If law does not exist without enforceability, constitutional rights do not meaningfully exist without enforceability, either. To put a finer point on it, in the context of the Spectacle of Black Suffering—for Anjanette

125. 338 U.S. 25 (1949).

126. *Id*. at 25.

127. *Id*. at 28.

128. *Id*. 338 U.S. at 41 (Murphy, J., dissenting) ("It is difficult for me to understand how the Court can go this far and yet be unwilling to make the step which can give some meaning to the pronouncements it utters . . . . Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.").

129. Elkins v. California, 364 U.S. 206 (1960).

130. KARL N. LLEWELLYN, THE BRAMBLE BUSH 83-84 (1951)

131. Levinson, *supra* note 122, at 910.

Young, Chris Lollie, and thousands of other community members disproportionately stopped and frisked by the police or subject to egregious violence through devastating warrant effectuations against innocent people—Fourth Amendment rights mean absolutely nothing if those whose rights have been violated have no means of *enforcing* their rights under the law. Young and Lollie have filed lawsuits. But countless others have not or may not be able to, or may face obstacles in court that deprive them of redress. Where that is the case, the message of political power inherent in the Spectacle of Black Suffering is made all the more palpable, especially where judicial violence is the mechanism that denies remedies for rights violations. That is precisely the structure and impact of qualified immunity.

2. Judicial violence in qualified immunity

Keeping in mind that damages remedies are imperfect, but that they are essential to our current system and are often the only meaningful remedy available to the aggrieved, we turn to the doctrine of qualified immunity. This doctrine can be the final violent nail driven into the coffin of rights, the end of a chain of violence that begins on the street and is later played out in the courts. Qualified immunity poses a serious threat to the rule of law because it involves judicial violence that denies remedies for the violation of constitutional rights; because it is a judicial utterance that promotes police violence; and because it lacks legal legitimacy.

To be sure, qualified immunity is strong medicine; it is an "immunity from suit;" it entitles officers the ability to seek interlocutory appeals if denied (something not afforded to other litigants in federal court); and its mere invocation can be used as a basis for seeking to halt litigation so the privileged concept of immunity can be decided first.[132] Technically speaking, under qualified immunity, courts are permitted to conclude that (1) your rights were violated, but (2) you have no remedy because the rights violation was not sufficiently "clearly established"—a determination made by a judge, rather than a jury. Indeed, under this doctrine, courts can simply skip the question of whether a constitutional violation even occurred and dismiss a suit because a judge does not think the right was sufficiently "clearly established."[133]

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132. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (emphasizing that qualified immunity serves to prevent state actors from having to "bear the burdens of discovery" (citing Mitchell v. Forsyth, 472 U.S. 511, 527-28 (1985)). This rationale has led some courts to take the extreme position that even filing a motion to dismiss a lawsuit based upon immunity *requires* courts to stay discovery and prevent the plaintiff from even investigating the evidence that supports her claims, which is overwhelmingly held by the state actors the plaintiff has sued. *E.g.*, Kennedy v. City of Cleveland, 797 F.2d 297, 299–300 (6th Cir. 1986) (citing *Mitchell*, 472 U.S. at 527).

133. *See* Pearson v. Callahan, 555 U.S. 223 (2009) (holding that courts may ask whether rights are "clearly established" without even addressing an underlying constitutional violation in the first place); Wilson v. Layne, 526 U.S. 603, 609-617(1999) (finding constitutional rights violated under principles that go back to the 1600s but nonetheless concluding that the state

Moreover, the Supreme Court has been particularly aggressive when it comes to determining what constitutes "clearly established" law. Constitutional rights, we are told, cannot be defined at too high a level of generality. The Court has repeatedly chastised lower courts for thinking that certain constitutional rules are sufficiently established by requiring a greater level of specificity.[134] With important exceptions, the Court's view of immunity is so strong that its own seminal decisions governing police violence (or, what it calls "use of force") apparently establish very little as far as the "clearly established" inquiry is concerned.[135] A frequent consequence of this doctrine is to "leave the impact of constitutional violations where they fall," as the Court has "become so fixated on the costs of litigation to defendants that it has stopped even acknowledging the costs of unconstitutional conduct to victims."[136]

Troublingly, the Supreme Court made up this doctrine.[137] There have been many arguments advanced about why qualified immunity is unlawful, but it seems that one (perhaps because it is obvious) has received too little attention: qualified immunity contradicts the plain language of the statute being interpreted.

A bedrock principle of statutory interpretation—and of the democratic legitimacy that allows the courts to have interpretive power in the first place—is that the plain and unambiguous language of a statute controls its interpretation, and judges are not permitted to contradict such language for their own policy preferences.[138] With qualified immunity, however, the Supreme Court has done just that. According to statute itself, the only thing a plaintiff must show is: (1) a

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of the law, in 1999 was not clearly established and so the plaintiff could not proceed with their lawsuit).

134. *See, e.g.*, City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases where the "Court often corrects lower courts when they wrongly subject individual officers to liability"); White v. Pauly, 137 S. Ct. 548, 552 (2017) (reversing denial of qualified immunity because the court did not identify law specific enough to be "clearly established"); District of Columbia v. Wesby, 138 S. Ct. 577, 591 (2018) (similar).

135. *White*, 137 S. Ct. at 552. This is not to suggest that qualified immunity is absolute. The Supreme Court has, in a line of cases, established safety valves for egregious conduct it deems "obvious," and the Court has, at times, emphasized broader principles of fair notice rather than demanding particularity. *See* Hope v. Pelzer, 536 U.S. 730, 740-41 (2002); Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) (applying the obviousness principle from *Hope* to a prison conditions case); McCoy v. Alamu, 134 S. Ct. 1364 (Mem) (2021) (remanding an excessive-force suit in light of *Taylor*).

136. Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UKMC L. Rev. 875, 887 (2010).

137. Baude, *supra* note 21; Schwartz, *supra* note 21.

138. *See, e.g.*, Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." (citation omitted)).

deprivation of a constitutional right, (2) by a person acting under the authority of law as a state actor.[139] Once those conditions are met, § 1983 provides that persons responsible for the deprivation of rights "*shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[140] There is no question that "shall" is mandatory language, and § 1983 does not have any other prerequisites for liability. There is no room in this statute for the Supreme Court to change the words "shall be liable" to something like "may be liable only if the constitutional violation was clearly established in a particularized sense such that liability attaches for only intentional violations of the law or violations by those who are plainly incompetent."

It is difficult to imagine a justification for such an extreme departure from the plain statutory text. That said, the focus here is not on whether the doctrine is legally sound (it is not), whether the assumptions that underlie its rationale are empirically accurate (they are not), or what the world would look like, in terms of the Supreme Court's invented policy rationales for immunity, without the doctrine (just fine).[141] Instead, the current goal is to assess, in terms of judicial violence, the consequences of a doctrine that can shut the remedial door to victims of police violence whose constitutional rights a jury may very well conclude were violated.

The consequences and harms of qualified immunity are myriad. First, the result of blessing police violence—shoot first and ask questions possibly never—is simply bloodshed, scars, psychological trauma, and death. These concerns are not merely abstract, as Justice Sotomayor and other jurists have pointed out.[142] For example, in *Kisela v. Hughes*, the Court granted qualified immunity to a police officer who shot Amy Hughes after expressly refusing to decide whether the police officer violated the Fourth Amendment when he shot Hughes.[143] Given

139. 42 U.S.C. § 1983.

140. *Id.* (emphasis added).

141. *See also* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. (2021) (providing empirical data that police officers do not know, or depend upon, caselaw when making decisions); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) (imagining a world without qualified immunity).

142. *See, e.g.*, Estate of Jones by Jones v. City of Martinsburg, W. Va., 961 F.3d 661, 673 (4th Cir. 2020) ("Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept."); *Jamison v. McClendon*, 476 F. Supp.3d 386, 390-92 (S.D. Miss. 4, 2020); Hon. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017), https://perma.cc/63P8-5RY3.

143. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

the troubled facts of the case, as Justice Sotomayor recognized, the Court's decision sends "an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[144]

A secondary but related harm is moral. Lawsuits matter in a way that "cannot be measured in money or even liberty" because there is "inevitably a moral dimension to an action at law."[145] Moral harm occurs "when a plaintiff with a sound claim is turned away from court" and, as a result, "the community has inflicted a moral injury on one of its members."[146] Put differently, while the legal system imposes a moral harm through the wrongful conviction of an innocent person, it also does so when a meritorious claim is improperly rejected by the courts.

Third, there is harm to constitutional rights themselves; what some call "constitutional stagnation." When qualified immunity was first created, courts were strongly encouraged and later required to address the underlying constitutional rights question before turning to whether that right was "clearly established."[147] Assessing the constitutional question, the Court reasoned, was necessary to "set forth principles which will become the holding that a right is clearly established;" *i.e.*, for constitutional elaboration from case to case, as society and technology continue to evolve.[148] No longer. Now, courts can skip the constitutional question altogether.[149] As a result, because courts fail to consider constitutional questions in the first place, law is itself deprived of the articulation of constitutional rights. This puts plaintiffs (and all of us, really) in a Catch-22: if the meaning of certain constitutional rights, even those litigated again and again, might not ever be "clearly established," people whose rights are violated in the future may not have "clearly established law" to point to because the courts have skipped the question that would establish them.[150]

Fourth, the courts themselves have become parties to the violation of constitutional rights by the police. *Wilson v. Layne* is a telling example. There, the Supreme Court unanimously decided that the plaintiff's Fourth Amendment rights had been violated. But under "qualified immunity," the police still won. This is anathema to the concept of "judicial integrity" we saw before: it is the

144. *Id.* at 1162.

145. RONALD DWORKIN, LAW'S EMPIRE 1-2 (1986).

146. *Id.*

147. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999); Saucier v. Katz, 533 U.S. 194, 201 (2001).

148. *Saucier*, 533 U.S. at 201.

149. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

150. *See* Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ("Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.").

opposite of courts acting with a "motto" or "duty" to ensure that there are remedies for the violations of vested rights. It is violence.

This harm—the judiciary being caught up in the constitutional violation itself—brings us back to the issue of spectacle, and spectacle as a political act that expresses power. Many of the police officers who used even more force in response to protests about police violence will undoubtedly seek refuge in the doctrine of qualified immunity, and some may well find it. In addition, even if officers do not receive immunity off-the-bat, their privileged status is something that the victims of violence are forced to contend with as they seek to obtain something simple: a jury trial where a group of peers can hear the evidence and determine who was right and who was wrong. Cases involving police violence nearly always involve pervasive disputes of fact, and those disputes frequently persist even where there is video footage (and even when those videos go viral or spark protest).[151] Yet, qualified immunity provides an avenue for ignoring the actual and disputed facts by asking a question of abstraction about what it means for a right to be "clearly established" in the context of a particular case. Nothing about this reflects a duty to enforce rights or prevent their erosion. Instead, it occasions and expedites the erosion itself.

## D. How judicial violence can undermine the rule of law

### 1. Qualified immunity contributes to the erosion of the rule of law

This Part will argue that the harms of qualified immunity discussed above are the tip of the iceberg. They point overwhelmingly to a deeper underlying issue: that the judicial violence of qualified immunity undermines the rule of law. Furthermore, the extent to which qualified immunity undermines the rule of law is particularly powerful when juxtaposed against the proliferation of images, often in near real time, that constitute the contemporary Spectacle of Black Suffering.

If we operate from the perspective of *Marbury*—a nation of laws, and not of individuals—it seems clear qualified immunity undermines the rule of law. *Marbury* itself understood that the rule of law will suffer "if the laws furnish no remedy for the violation of a vested legal right." By definition, a grant of qualified immunity due to the law not being "clearly established" meets this precondition for eroding the rule of law. It indicates that the law binds civilians subject to

151. For example, the 2016 killing of Sylville Smith was captured on the body camera footage of two Milwaukee Police Department officers, one of whom shot Smith twice, the second time while Smith was laying on his back after having already been shot once. Despite the video, and despite criminal charges against the officer (a rarity), the killer argued the video supported his case while the family of Smith (as plaintiffs in the lawsuit) contended otherwise. *See* Estate of Smith by Haynes v. City of Milwaukee, Wis., 410 F. Supp. 3d 1066 (E.D. Wis. 2019).

violence, but not the police when it comes to curtailing that violence. If one accepts the premise that legal rights only exist to the extent they can be enforced—the remedial equilibration perspective, and the basis for the rule of law itself—there is no doubt that judicial violence in the context of qualified immunity perpetuates a significant harm that reaches to, and undermines, the basis of law itself.

Likewise, if we return to the three components of Cover's violence in interpretative acts—(1) a practical activity, (2) designed to generate credible threats or justify actual deeds of violence, (3) done in an effective way—qualified immunity is particularly violent. Thousands of lawsuits have been dismissed upon granting officers qualified immunity. The practice has justified acts of police violence and enabled threats of violence to continue (even if those threats or acts are unconstitutional). And the law does so in an extremely effective way—civil rights plaintiffs are not allowed to proceed with their suits.

The extent to which qualified immunity impacts the rule of law is magnified when viewed against the 21st century's Spectacle of Black Suffering. First, as in all forms of violence as spectacle, the spectacle itself gives power to the judicial pronouncement that either blesses or condemns violence on the ground. In this iteration of the spectacle, however, the manner and speed with which social media and the internet spread violent images is unparalleled as compared to spectators at the scaffold in Europe or even lynching postcards or images in magazines in the decades after the Civil War. Instead, one significant problem with the ubiquity of police violence at present is that even those who do not want to be subject to these images are often unable to avoid them. Through these images and judicial blessing of so many of these images, we are told, again and again, that the police are essentially above the law because the law will not even address the unconstitutionality of their conduct in the first place.[152] Citizens believe and expect their constitutional rights can be enforced when violated. Without enforceability, the "law" has no practical value.

Finally, based on my own experience as an attorney representing victims of police violence, the current iteration of qualified immunity is detrimental to the rule of law because it ignores the fact that what constitutes law, and what constitutes reasonableness in a given circumstance, is itself the subject of dispute. In the same way that the law ignores the violence of its origins, qualified immunity ignores that the violence underpinning police conduct is also subject to dispute. The Supreme Court's strong language of qualified immunity casts these interpretations of facts to the side, displacing the perspectives of those who disagree, in favor of the judge's *own* views about whether law was clearly established. The problem has only grown worse with the Supreme Court's consideration of video

152. *Cf.* Daniel Epps, *Abolishing Qualified Immunity is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), https://perma.cc/B94B-D24H ("Qualified immunity routinely requires courts to say that there will be no penalty for a police officer who has violated the Constitution. That sends the message — to officers and the public — that the police are above the law.").

evidence in police violence cases.[153] Many (though not all) judges have limited understanding of the perspective of the communities—people of color and the poor—who are most impacted by police violence, and current doctrine relies on empirically untrue assumptions about how policing works.[154] Likewise, the notion of general reasonableness, supposedly taken from the officers' perspective and then filtered through an inquiry about whether a violation was "clearly established," ignores the fact of how policing has developed and the fact that many concerns of "dangerousness" are based upon racial bias and the direct result of laws passed during Reconstruction to criminalize Blackness and poverty in the first place.[155] Qualified immunity directly undermines a statute meant to remedy racial discrimination after the Civil War, this time by setting up a barrier to litigation success that relies on assumptions inherent in the very Jim Crow laws that were due to be abolished.

In sum, regardless of whether we reach consensus on qualified immunity being lawful or justified, it is plain that qualified immunity constitutes judicial violence. These acts of judicial violence that preclude remedies deprive the law of its enforceability for those who assert that their rights have been violated. When this is done on a grand scale, in the face of nearly non-stop police violence as spectacle, the rule of law is weakened.

2. Evidence that the rule of law has already been eroded

"When the law furnishes no remedy because the Supreme Court has created doctrines that shrug off constitutional violations, we face hard times indeed."[156] Those times are here.

One function of the rule of law (and the idea of living in a nation of "laws, not individuals") is that law provides a reason to resist our most basic impulses of retribution, vengeance, and violence. For example, an "eye for an eye" makes way for a judicial process that adjudicates the criminal penalties for a violent attack. Hypothetically, the civilian aggrieved or wounded by a police officer during an unconstitutional seizure can rest assured that they will be able to secure a remedy for this constitutional wrong once given the opportunity. Chris Lollie did avail himself of this opportunity and survived a qualified immunity challenge before settling his suit. Others were not so lucky. In this context—where frequent and flagrant constitutional violations go un-remedied and are thus unenforceable—the rule of law, and the idea of faith in the law, has already been eroded.

While it is difficult to quantify erosion of the rule of law, and doing so is beyond this paper, this Part will provide two anecdotal examples that illustrate

153. *See*Scott v. Harris, 550 U.S. 372 (2007); Plumhoff v. Rickard, 572 U.S. 765 (2014).

154. *See, e.g.*, Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (empirical study documenting how lay people viewed deadly force differently than the Supreme Court); Dan Kahan, *Cognitive Bias and the Constitution*, 88 CHI.-KENT L. REV. 367 (2013).

155. Bell, *supra* note 3.

156. Karlan, *supra* note 136, at 888.

that, at some level, the Spectacle of Black Suffering and the increasing judicial violence concerning that spectacle has already eroded the rule of law.

First: *"Looting" following ongoing, high profile police violence*. Much has been said about the so-called "looting" that happened when protests over George Floyd's death were met with even more police violence and stores in Minneapolis were vandalized; when Jacob Blake and Rayshard Brooks were shot and communities in Kenosha, Wisconsin and Atlanta, Georgia took to the streets not only in protest but in acts of property damage; and when Chicago police killed yet another in August of 2020, leading to extensive vandalism and "looting" of affluent businesses downtown. Politicians and leaders were quick to condemn these acts, calling them things like "indefensible," "not a protest," and even imply (or threaten) they would be met with more shooting.[157]

I do not offer any normative comment about these characterizations.

Instead, the focus here is on whether these actions tell us anything about the rule of law with the Spectacle of Black Suffering in the backdrop. Viewed through that lens, these acts might be descriptively understood as a protest of the actual police violence on the ground, but also as even stronger evidence that the notion of the "rule of law" for these communities has fallen apart. Violent protests, property damage, etc., are consistent with a view that the means of enforcing the law within the law provide no hope, no redress, and no chance for accountability. Instead, with police seen as "above the law" (and the government as one "of individuals" rather than "of laws"), widespread acts of violence in the face of police violence hardly seem surprising.

Moreover, both these protests and the violent acts that follow police violence elsewhere can be viewed as of a form of constitutional interpretation. For Cover, the acts of the "dissenting community" are a "species of true constitutionalism" that push back against the perceived violent overreach of the state.[158] Cover theorized, therefore, the "citizen or dissenter's constitutional interpretation cannot be *less* than the deed of that of the state's officials. If the officials of the state realize their vision in blood, the dissenter must also either suffer or impose a parallel form of violence."[159] So-called looting of property is, thankfully, less than the deed of physical violence against bodies. Yet, when viewed through the lens of the Spectacle of Black Suffering and in evaluating consequences for continued police violence without apparent remedy, breaking into businesses as an act of defiance looks different. In other words, as Cover theorized, the so-called riots and acts of "looting" bear a direct link to an erosion of the rule of law and

157. *See, e.g.*, respectively, Jenni Fink, *Chicago Mayor Says Looting is 'Never Justifiable' After Activist Defends Theft As 'Reparations,'* NEWSWEEK.COM (Aug. 14, 2020); Brook Seipel, *Atlanta Mayor Condemns Violent Protests in Fiery Speech: 'If You Love This City Go Home*,' THE HILL.COM (May 29, 2020); Barbara Sprunt, *The History Behind 'When the Looting Starts, the Shooting Starts*,' NPR.ORG (MAY 29, 2020).

158. Cover, *supra* note 109, at 832. Cover made these comments in discussing pro-life abortion protestors. In citing this passage, which provides an analytical tool, this author does not credit, condone, or agree with Cover's framing of that issue.

159. *Id*.

any faith in the *enforceability* of the law for the largely Black communities who took to damaging businesses after protests were insufficient for the police to "stop killing us."[160] In short, so-called "looting" is powerful evidence that, in certain communities, the rule of law has already failed.

Second: *police violence as crime*. Part of the manner in which law constitutes itself is by treating state-sponsored violence differently than violence between private individuals. As discussed, this is why "murder is an act of violence, but capital punishment *by* a legitimate state is not;" and why body slamming my neighbor to the ground is an act of battery, but for the police officer it is a "use of force."[161] In essence, violent acts by the police are not generally considered criminal because they represent justified violence that itself constitutes the law.

Criminal prosecution of police officers for acts of violence is traditionally extremely rare. While there are many reasons for this, one view is that we, collectively, have some belief that acts of police violence must be particularly egregious in order to be considered *criminal* (even if they were unconstitutional or wrong in some other way). Many states have enacted statutes specifically treating police violence differently than private actors in a codification of the view that most police violence is not criminal and that a different standard does (and even should) apply to law enforcement.

In light of the Spectacle of Black Suffering—and the repeated acts of violence—cries for police to be prosecuted criminally for their acts appear to be on the rise. In the last decade, charging decisions that would have been blips on the radar, if anything at all, have become high-profile, newsworthy events that often lead to substantial demonstrations and even some "looting" in protest as well.[162] Unscientifically of course, the increased pressure to treat police violence *as crime* also appears to be at least anecdotal evidence that the rule of law has been undermined. It illustrates that the premise justifying the state's exclusive claim to "legitimate" violence has begun to fall away.

## III: WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?[163]

Though this paper has addressed some abstract questions about the "rule of law" and the tripartite nature of "law's violence," it remains the case that judicial violence well and truly deals in pain and death that impacts everyday lives. So,

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160. This is something akin to what J.F.K. said in 1962, when the last great social movements against police violence were occurring: "Those who make peaceful revolution impossible will make violent revolution inevitable." President John F. Kennedy at the first Anniversary of the Alliance for Progress (March 13, 1962), available at perma.cc/4CDA-ARYQ.

161. WOLFF, *supra* note 85, at 59.

162. *See, e.g.*, Brakkton Booker, *Prosecutor Announces No Charges Will Be Filed Against Officer Who Shot Jacob Blake*, NPR.com, (Jan 5, 2021); Karen Jordan & Liz Nagy, *Jacob Blake Shoting: Kenosha Braces for Unrest With Charging Decision Expected in January*, ABC7Chicago.com (Jan. 4, 2021); Wisconsin Public Radio, *Hundreds Protest Tony Robinson Decision*, https://perma.cc/GN2A-35V6 (May 13, 2015).

163. MARTIN LUTHER KING JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967)

where do we go from here? I offer two limited, preliminary suggestions.

First, courts can reduce the judicial violence of qualified immunity by, whenever possible, allowing constitutional questions to be adjudicated by juries rather than judges, even when qualified immunity has been raised. As noted above, juries serve important roles in the deliberative democratic process. And despite their imperfection in an imperfect system, they provide an important form of symbolic impact for the plaintiff. Given practice on the ground, the significance of the role of the jury is extremely important—in some ways, at least as important as the actual amount of money damages that are awarded. Even in cases of so-called "nominal" damages, where a jury awards something like $1, the signaling and adjudication of a constitutional violation—the feeling of having been *violated* but then *vindicated*—is a powerful message a jury can send. Simply put: having one's "day in court" matters. Additionally, the integrity of the law and the acceptance of the result are far better served when a jury rather than a judge (an institutional actor who is frequently distrusted by the folks most likely to be civil rights plaintiffs) decides whom to believe, and whether an act of violence was justified.

Moreover, in many instances of police violence, the facts are hotly disputed. As a result, the inferences a reasonable jury could make from objective evidence (like video or other recordings) are often disputed, and different community members may see certain acts differently from judges who are frequently from very different communities than those who are subject to police violence. Where these disputes exist, courts ought to defer to the jury to determine constitutional questions, even when qualified immunity has been raised. The law already amply supports this approach.[164]

164. *See, e.g.*, Dufour-Dowell v. Cogger, 152 F.3d 678, 680 (7th Cir. 1998) ("Because the facts are in hot dispute, the officers cannot seek pretrial refuge behind a claim of qualified immunity. Raising a defense of qualified immunity in the face of disputed facts that control the answer to the question is a waste of everybody's time."); Zia Trust Co. ex. rel. Causey v. Montoya, 587 F.3d 1150, 1155 (10th Cir. 2010) (denying summary judgment and qualified to officer upon determining that the officer did not have probable cause to believe there was a serious threat of serious physical harm); Ellison v. Lesher, 796 F.3d 910, 916-917 (8th Cir. 2015) (denying summary judgment in deadly force case where disputed facts were, from the officer, that plaintiff had charged at him, waved a weapon, and allegedly disobeyed multiple commands from the officer, and instead crediting Plaintiff's account that he was not wielding the cane, concluding that if the officer shot plaintiff "while he was simply standing in his apartment and holding no cane, then there were no reasonable grounds to believe that [plaintiff] posed a serious threat of death or serious physical injury to the officers or others"); Williams v. Village of Maywood, 2016 WL 4765707, at *5-*6 (N.D. Ill. Sept. 13, 2016) (denying summary judgment where disputed fact was whether victim of shooting had a gun or was unarmed); S.R. Nehad v. Browder, 929 F.3d 1125, 1140 (9th Cir. 2019) (finding "numerous genuine disputes of material fact, which preclude a grant of summary judgment on qualified immunity" and noting that when disputed issues of fact are necessary to a qualified immunity determination, such factual issues must be resolved by the jury); Barlow v. Ground, 943 F.2d 1132, 1136 (9th Cir. 1991) ("In the present case, facts necessary to decide the issue of qualified immunity are in dispute. Summary judgment is therefore appropriate only if the officers are entitled to judgment on the basis of the facts most favorable to Barlow. That is not the case here. Barlow's version of the facts suggest that no reasonable officer could have believed there

More generally, my suggestion is that courts should develop something akin to a canon of interpretation for the adjudication of constitutional rights—the juror deference canon. Particularly in cases where the parties dispute the facts (of which police violence and force cases are quintessential examples), deferring to jurors to resolve those disputes alleviates problematic issues of judicial violence, ignoring the relationship between rights and their remedies, and whether a plaintiff will get their day in court at all.

From the perspective of judicial violence, particularly in the face of the Spectacle of Black Suffering, there are many upsides of deferring to jurors to resolve the constitutional rights questions in the suit rather than judges (particularly when judges resort to invented legal doctrines): the plaintiff gets her day in court, the role of judicial violence is, in many instances, reduced, and the substitution of a community-based response, while imperfect, sends a message to the community that their concerns are not merely a formalized part of the process but have been heard. If we have all been made part of the Spectacle of Black Suffering via mass social media, it is undeniably better to allow the public the opportunity to evaluate the violence that serves as a prerequisite to the suit in the first place.[165]

Second, perhaps unsurprisingly, courts would do well to acknowledge violence—their own violence, the violence of the police, and the violence that constitutes law—directly. Too often the "law denies the violence of its origins"[166] and does so by masking violence with fluffy language that obscures what is happening on the ground; namely, violence in word and deed. Judicial decisions and judicial decision-making ought not to be like the cold, calculated acts of the executioner, or the police officer who tells someone they have just treated violently to "be calm." That is torture, and it is soul crushing.

There is more to say, and many other reforms are needed. But it is sufficient for present purposes to say that the law cannot go on pretending it does not rely upon, or operate in, violence. Law is violent. The judicial word is violent. When the judicial word eliminates any possible remedy for the violation of a vested legal right, it constitutes a form of violence that undermines the rule of law.

## CONCLUSION

The Spectacle of Black Suffering has antecedents in public execution in monarchical Europe and in spectacle lynching in the South after the Civil War. Each

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was probable cause to arrest or that the amount of force used against Barlow was justified. Summary judgment was therefore inappropriate."); Bryan v. Las Vegas Metro. Police Dep't, 349 F. App'x 132, 135 (9th Cir. 2009) ("'Given the significance of the disputed issues of fact here, qualified immunity from suit is effectively unavailable . . . .'" (quoting Sledd v. Lindsay, 102 F.3d 282, 288 (7th Cir.1996)); Baulch v. Johns, 70 F.3d 813, 815 (5th Cir. 1995) (conflicting facts about amount of force used preclude summary judgment on qualified immunity basis); Baker v. Putnal, 75 F.3d 190, 198 (5th Cir. 1996) (similar).

165. This suggestion is admittedly imperfect. Some jury pools are themselves the result of inequitable, sometimes racist, processes. Jurors may bear their own biases in favor of either the plaintiff or the police.

166. SARAT, supra note 85, at 5.

iteration of violence as spectacle conveys messages of political power from a different "sovereign:" the crown, white opposition to the equality of the previously enslaved, and now the police. In the current version of spectacle violence, judicial violence through qualified immunity has threatened and already eroded the rule of law itself. Qualified immunity fails for many reasons, but its consequences for the rule of law constitute its biggest problem; it compromises the legitimacy of the law itself.

These problems of policing are pressing and multifaceted. I think abolishing, or significantly curtailing, qualified immunity would be a step in the right direction. But, short of that, courts can maintain their fidelity to their duty to ensure law retains its enforceability, in many ways already supported in the law. Our lives, if they matter, depend on it. And so does the law itself.