POLICE BRUTALITY AS DEMOCIDE IN THE UNITED STATES: THE SUPREME COURT'S ACQUIESCENCE TO POLICE-CIVILIAN VIOLENCE

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ABSTRACT

"Never again"[1] *is a power phrase used by survivors, observers, scholars, and descendants of survivors when reflecting on the mass casualties of innocent civilians resulting from government methods, like Nazism, ethnic cleansing, communism, and genocide, to exterminate groups deemed different or less than. Many blame dictatorial regimes for these mass atrocities, making democracy appear as a sound solution due to its attractive system of checks and balances. However, where the government agents responsible for mass killings of unarmed civilians remain unchecked by the judiciary, the product is not democracy but "democide." This unchecked power serves as a method of persecution of minorities, the least powerful members of society.*[2]

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1 Samantha Power, *Never Again*, PBS: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/nev-eragain.html [https://perma.cc/H2H7-4TZF] (last visited Sept. 16, 2024).

2 *See* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF L. REV. 1275, 1281 (1999).

I. INTRODUCTION

A. Democide Established Through Comparative Analysis

As tweeted by Amnesty International, "NO ONE should have to live in fear of those sworn to protect them."[3] Yet, in the year 2023 alone, approximately 1,232 American citizens were killed by police, the greatest annual number of civilian casualties caused by police in the past decade.[4] 96% of these casualties resulted from fatal shootings, the majority of which occurred following police responses to non-violent offenses or instances where no crime was committed at all.[5] This issue is more pressing considering 82% of the unarmed civilians killed by police were disproportionately Black.[6] These statistics challenge the United States' supposed status as a democracy and highlight the need for imminent reform to improve its reputation at home and abroad in the realm of international human rights.

This Note explores a counter-approach to R.J. Rummel's theory of democide, which posits that there is an inverse relationship between democracy and domestic violence.[7] Instead, this Note argues that regime type alone is not sufficient to preclude government-inflicted mass atrocities within a nation's borders. Rather, the hierarchal structure of the United States, specifically its dispute resolution system, serves to exacerbate internal conflict as power remains concentrated in its bureaucratic institutions. Otherwise put, the United States Supreme Court plays a role in perpetuating police brutality through the development of procedural standards and rules that endorse extra-judicial killings rather than restrain police power and provide remedies for such constitutional violations[8] under 42 U.S. Code Section 1983.[9]

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3 Amnesty International USA (@amnestyusa), X (Aug. 15, 2015, 11:00 AM), https://x.com/amnestyusa/status/632567450526203904?lang=en [https://perma.cc/42KV-B6RA].

4 *2023 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org [https://perma.cc/CX6N-QTR2] (last visited Oct. 14, 2024).

5 *Id.*

6 *Id.*

7 *See* Thomas Chukwuma Ijere, *Democracy and Violent Conflict: A Reflection on the Crisis in Nigeria*, 5 DEVELOPING COUNTRY STUD., no. 18, 2015, at 29, 30.

8 *See* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 31-32 (2021).

9 42 U.S.C. § 1983.

While the concept of democide has not been applied to police brutality in the United States, this categorization has been applied to the ongoing police brutality in Nigeria by local scholars. Accordingly, this Note will argue for the recognition of police brutality in the United States as a form of twenty-first century democide through a comparative analysis with Nigeria. Exploration of the historical and contemporary status of police in the United States and Nigeria reveals shocking parallels between the countries in both the supremacist ideology and state-sanctioned violence that have long defined their policing institutions. This violence is not only attributable to their identical racist roots, but also to the governmental authorization that grants police the ability to use deadly force with the promise of freedom from accountability in the United States and Nigeria alike. Through this comparison, the commission of democide in the United States is established.

Part I of this Note introduces R.J. Rummel's theory of democide following an anecdote of a recent instance of police brutality in Nigeria's ongoing democide. Part II analyzes the Supreme Court's role in the perpetuation of police brutality in the United States as its position satisfies the requisite *indirect* function and *practical intentionality* of democide.[10] Section 1983 is the main avenue for relief for victims of police brutality as it covers constitutional violations by government employees.[11] This part of the Note explores how the Court has chosen to expand police power in Section 1983 cases rather than uphold citizens' constitutional right to be free from excessive force. Through what appears to be willful ignorance to the consequences of immunizing the police, the Supreme Court has maintained an *indirect* lethal impact on civilian lives as the lack of material consequences in civil suits permits the police to act undeterred. Consequently, Section 1983 claims serve not as an avenue for relief, but as a reminder that the police remain governmental tools of power rather than protection.

10 *See generally* CHEMERINSKY, *supra* note 8 (arguing that while the Court can "empower police through silence or doing nothing in the face of abusive police practices," its impact is most dangerous when it crafts legal precedent that fails to uphold "constitutional rights" and enables racist policing to continue).

11 42 U.S.C. § 1983.

B. Resolution Lies in Relabeling Police Brutality and Judicial Reform

The second half of this Note focuses on the societal implications and proposed solutions to the ongoing police brutality in the United States. Part III addresses the importance of labeling the issue as a "democide" to achieve resolution and demonstrates that democracy does not automatically ensure fairness and equality. Moreover, this part explores the risk of the failure to acknowledge the severity of the situation and enact reform as a complete lack of legitimacy and confidence in government institutions will result from undeterred and unrestrained police conduct. More importantly, the reluctance to initiate reform also advances the possibility that the issue is recognized as genocide rather than democide as only so many Black citizens can die at the hands of police before the "intent to destroy" is satisfied, especially given the United States has been accused of committing genocide twice in the past seventy years for this precise reason. Thus, the United States not only risks being held accountable through eventual anarchy, but also on the international platform for human rights violations as well.

Part IV proposes how to reconstruct the right against excessive force that Section 1983 was created to protect. Although the Court is limited as to which cases it may hear and has arguably not explicitly approved of police violence, its refusal to "impose constitutional checks on police or . . . provide adequate remedies for police misconduct"[12] embodies judicial acquiescence.[13] Thus, given the Court's role in restricting plaintiff success under Section 1983, the solution lies not only in labeling the issue as "democide" to "name and shame" the United States to act but also in bringing about judicial reform.

Ultimately, this Note addresses not only the issue of the Supreme Court's indirect role in perpetrating police brutality through the restriction of a remedy under Section 1983,[14] but also the importance of labeling the ongoing crisis of police brutality in the United States as "democide" to achieve the resolution suggested in Part IV. The term

12 CHEMERINSKY, *supra* note 8, at 31.

13 *See also* Bandes, *supra* note 2, at 1275 (arguing that "[t]hrough . . . judicial fragmentation of police misconduct," the Court can rationalize avoiding imposing legal consequences by categorizing police conduct as "isolated," "individual," or "anecdotal" instead of "as part of a systematic, institutional pattern").

14 *See supra* note 8 and accompanying text.

"democide" accurately reveals the severity of the issue and its comparability with other global mass atrocities. The use of the term "democide" will not only shine a light on the harsh reality of the problem in the eyes of citizens and government officials alike, but also trigger the international strategy of "naming and shaming." By "naming" police brutality as democide, the United States will not only face pressure from the American public, but also from surrounding international communities that will "shame" them into reform. If there is one thing to learn from our past, it is that nations guilty of extreme human rights abuses must not be left to answer to themselves as the insidious nature of inaction leaves as much blood on the hands of the international community as on the original transgressor.

II. BACKGROUND

A. Democide Exemplified: Recent Police Brutality Event in Nigeria

It took "[f]orty-eight casualties . . . and eleven people killed"[15] to force the Nigerian judiciary's hand in labeling a military-level response to peaceful protestors as a "massacre."[16] Although the judicial panel's decision manifested progress in Nigerians' fight against ongoing police brutality, the outcome is only a first step necessary for overcoming the ongoing problem of impunity in Nigeria. The most crucial step has been left unaddressed: that is, "bringing the perpetrators to book, as they hold sway over the institutions that are established to serve this purpose."[17]

The 2020 Lekki Toll Gate killings were not only labeled as a "massacre," but also as a "murder by government . . . known as democide."[18] This label was confirmed by Judicial Panel investigations that found the shooting to be a stark example of the

15 Eromo Egbejule, *Panel of Inquiry Finds Nigerian Army Culpable in Lekki 'Massacre*,' AL JAZEERA (Nov. 16, 2021), https://www.aljazeera.com/news/2021/11/16/panel-of-inquiry-finds-nigerian-army-culpable-in-lekki-massacre [https://perma.cc/2PBY-VR4R].

16 *Id.*

17 *Id.*

18 *Lekki Toll Gate Massacre in Nigeria is Death by Government*, INT'L HUM. RTS. COMM'N. (Nov. 19, 2021), https://ihrchq.wordpress.com/2021/11/19/lekki-toll-gate-massacre-in-nigeria-is-death-by-government/ [https://perma.cc/G2XK-V6LL].

murder of unarmed civilians by government officials acting with "the implicit or explicit approval of the highest [government] officials."[19]

Despite being years later, Nigerian authorities have yet to be held accountable for their actions.[20] This is one of the many instances in which the judiciary failed to implement accountability for the police misconduct that has long served to "traumatize[ ] the marginalized, spare[ ] the powerful and remain[ ] unaddressed"[21] in Nigeria. According to scholars, the continual extrajudicial killings of civilians by governmental agents demonstrate a contemporary commitment to "democide" as Nigerian police resemble predators rather than protectors.[22]

B. The Theory of Democide

Scholar R.J. Rummel coined the term "democide" to capture the depravity of condoned killings of civilians by government agents that do not fit neatly into the definition of "genocide." Rummel defines democide as the "intentional killing of people by the government," where the term "intentional" means "*practical* intentionality" as to include deaths "as though intended"[23] and represent "reckless and depraved indifference to human life . . . ."[24] It is important to note this definition explicitly "excludes the killing of those with weapons in their hands . . . ."[25]

Rummel's theory of democide hypothesizes that democracies maintain lower rates of democide as conflicts can be resolved non-violently through the procedures and processes available through

19 *Id.*

20 *See Nigeria: A Year On, No Justice for #EndSARS Crackdown*, HUM. RTS. WATCH (Oct. 19, 2021, 12:00 AM), https://www.hrw.org/news/2021/10/19/nigeria-year-no-justice-endsars-crackdown [https://perma.cc/PJV7-YG3P].

21 Emily Cole, *Months After Protests, Nigeria Needs Police Accountability*, U.S. INST. OF PEACE (Feb. 25, 2021), https://www.usip.org/publications/2021/02/months-after-protests-nigeria-needs-police-accountability [https://perma.cc/X6UN-QZTK].

22 *See Protector Turned Predator: Police Brutality in Nigeria and the Rise of Democide*, OP. NIGERIA (Jan. 2, 2023) [hereinafter *Protector Turned Predator*], https://www.opinionnigeria.com/protector-turned-predator-police-brutality-in-nigeria-the-rise-of-democide-by-tope-shola-akinyetun/ [https://perma.cc/TR2W-VFN9].

23 R.J. Rummel, *Democracy, Power, Genocide, and Mass Murder*, 39 J. CONFLICT RESOL. 3, 4 (1995).

24 *Id.*

25 *Id.*

democratic institutions, making resort to violence both unnecessary and unlikely.[26] To the contrary, totalitarian regimes are highly correlated with democide because of their tendency to "deal with conflict by force, coercion, and fear . . . ."[27] Nazi Germany, the Soviet Union, the Khmer Rouge, and many other communist countries are not the only regimes guilty of such conduct, but also all dictatorships born from democracies.[28]

While the commission of democide by democracies is unlikely, it is not impossible. Recent judicial decisions demonstrate that, contrary to Rummel's theory, the likelihood of democide turns not on regime type, but on the common characteristic that all regimes maintain regardless of their classification: power.[29] The threat lies not in the fact that power kills, but that "absolute power kills absolutely."[30] Otherwise put, when the power of a government body is not adequately checked, "the more it can act arbitrarily according to the whims and desires of the elite . . . ."[31] Thus, failure to properly restrain power[32] appears to be a more accurate determinant of democide as it can be made by democratic and dictatorial regimes alike.

Two scenarios give rise to democide: (1) when a democracy boldly sanctions critical affronts to its current course; and (2) situations where a democracy incrementally elects to limit the democratic rights and freedoms available to citizens to safeguard themselves.[33] While the first scenario has long characterized the role of police in both Nigeria and the United States: (i.e., the role of police in preventing dissent and acting as the frontline against protestors), the second scenario defines the United States Supreme Court's contemporary role in committing democide. Through its development and maintenance of impunity and immunity, the Court has deprived civilians of a just right and remedy enforcement in Section 1983

26 *Id.*

27 *Id.*

28 *See* GERALD W. SCULLY, NAT'L CTR. FOR POL'Y ANALYSIS, MURDER BY THE STATE 1, 4 (1997).

29 *Contra* Rummel, *supra* note 23, at 25.

30 *Id.*

31 R.J. RUMMEL, DEATH BY GOVERNMENT 1 (1st ed. 2009).

32 *See* Rummel, *supra* note 23, at 4-5.

33 *Id.*

actions by tilting the scale in favor of police officers and, as a consequence, perpetuating police brutality.[34]

Consequently, the United States, idealized by many as the epitome of democracy, struggles against being "bedeviled"[35] by its own ongoing policing issues in the same vein as Nigeria. A democratic dilemma exists when the very institution built to protect U.S. citizens is also responsible for killing over 1,000 people every year, an amount that drastically exceeds the number of police killings in any other democratic country while accounting for population differences.[36] Thus, while Nigeria finds itself in the fight to overcome the dictatorial history that fostered the rise of police brutality,[37] the United States is currently at risk of self-destruction through loss of legitimacy due to its persisting police brutality issue.

C. Historical Policing Parallels

Police have long represented "instrument[s] of oppression" under the directives of colonial masters[38]— a characteristic that defines modern police institutions in both Nigeria and the United States.[39] Scholars identify the source of this reputation as both countries' extensive history of colonial rule, the original embodiment of supremacy.[40] The origins of both countries prove that police were created as an instrument to oppress, not protect.[41]

The first creators of the police system in Nigeria were colonial masters, making the establishment of police and colonization in

34 *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force,* 68 FLA. L. REV. 1773, 1777 (2016).

35 Oludayo Philips Famakin-Johnson, Police Brutality in the United States of America, and Nigeria: A Comparative Analysis 13 (2022) (Ph.D. dissertation, Texas Southern University) (on file with Texas Southern University).

36 Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 376-77 (2018) [hereinafter *Racial Character Evidence*].

37 Famakin-Johnson, *supra* note 35, at 1, 13.

38 *Id.* at 90.

39 *See History of Policing in Nigeria*, THIS DAY (2020), https://www.thisday-live.com/index.php/2020/11/15/history-of-policing-in-nigeria [perma.cc/9ER2-HCV8].

40 *See generally* Megan Turnbull, *Nigerians and Americans are Protesting Police Violence, But They Have Different Demands. Here's Why*, POL. VIOLENCE AT A GLANCE (Nov. 16, 2020), https://politicalviolenceataglance.org/2020/11/16/nigerians-and-americans-are-protesting-police-violence-but-they-have-different-demands-heres-why/ [https://perma.cc/3FL3-PNMY].

41 *See History of Policing in Nigeria*, *supra* note 39.

Nigeria inseparable according to historical scholars.[42] Born from Nigeria's existing paramilitary Constabularies,[43] the official Nigerian Police Force (NPF) was ultimately established for the primary purpose of preventing opposition against colonial rule and enforcing the interests of the government.[44] As a result, the organization and education of Africa's largest police force was oriented towards accomplishing "the pacification of dissent."[45] Police in Nigeria continue to serve as guardians of the social inequality by protecting the ruling class of elites.[46]

In the United States, police forces were first established in both the North and the South to safeguard the economic interests of businessmen and slave owners respectively.[47] While police forces in the North were tasked with safeguarding the property of businessmen at shipping centers, police forces in the South were known as "slave patrols" as their primary role was to maintain slavery by tracking down escapees and preventing protests.[48] To execute this responsibility effectively, police used excessive force without fear of legal repercussions.[49] This granting of power by the leaders of society created a social hierarchy with slave owners on top, followed by the police (i.e., slave patrols), and lastly, the poor (i.e., enslaved individuals).[50]

The abolition of slavery perpetuated and exacerbated the punitive role embodied by police forces in the United States.[51] During the Reconstruction Era, newly freed slaves represented a threat to the existing social order, leading police to employ greater methods of

42 *See* Famakin-Johnson, *supra* note 35, at 43.

43 *Id.* at 6-7.

44 *Id.* at 7.

45 Philip T. Ahire, *Policing, and the Construction of the Colonial State in Nigeria, 1860-1960*, J. THIRD WORLD STUD., Fall 1990, at 151, 156.

46 *Id.*

47 Famakin-Johnson, *supra* note 35, at 3-4.

48 *Id.*

49 *See* Kala Bhattar, *The History of Policing in the US and Its Impact on Americans Today*, UAB INST. FOR HUM. RTS.: BLOG (Dec. 8, 2021), https://sites.uab.edu/humanrights/2021/12/08/the-history-of-policing-in-the-us-and-its-impact-on-americans-today/ [https://perma.cc/TL3W-KGN6].

50 *Id.*

51 *Id.* ("During the Reconstruction Era, cruelty was the policing style, and protecting the economic interests of the wealthy proved very beneficial to these units. Police were used as a way to provide a sense of security for the white communities, keeping the black communities intimidated and segregated from the white population . . . .").

violence to enforce strict segregation laws.[52] Society viewed this violent conduct as an effective and acceptable way for the police to ensure the economic interests of the wealthy.[53] The authorization of extreme use of force not only applied to police, but also extended to non-governmental state actors as well, such as the Ku Klux Klan (KKK).[54] The KKK's goal of enforcing anti-Black sentiment led to its recognition as an extended arm of the government, authorized to act with "either the tacit or explicit approval of state authorities."[55] Thus, during the Reconstruction Era, police continued to serve as a source of segregation and intimidation for the poor and people of color, while being a source of protection for society's elite.[56]

Due to the state-sanctioned violence that began to define the Reconstruction Era, legislators established a series of "Enforcement Acts" to "protect African American citizens against this widespread extralegal violence."[57] Section 1 of the Ku Klux Klan Act of 1871, known today as Section 1983, was one part of the series of Enforcement Acts established to end the ongoing impunity enjoyed by Klan members and their sympathizers in the southern states who "were powerful enough that law enforcement would not arrest them, juries refused to convict, and judges would not hold fair trials."[58]

Centuries later, Section 1983's purpose proves obsolete where power still produces impunity and judges continuously fail to reach fair outcomes, allowing police violence to rise and fall in direct correlation with the rounds of ammunition expensed by agents under government authority. However, the media has allowed the masses to

52 *Id.*

53 *Id.*

54 *See* David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routinization of Police Violence Against Black Lives*, 98 DENV. L. REV. 629, 648 (2021) (explaining that officials "not only failed to stop [the] racial violence in the South," but were often themselves "participants, conspirators, and protectors of white supremist racial terror." In fact, "the authorities assigned to deal with the [Klan] terror were often more sympathetic to the perpetrators than their victims," leaving Black Americans with "no refuge in local law enforcement . . . who allowed them to be lynched and enforced violations of their civil rights").

55 Eleanor Lumsden, *How Much is Police Brutality Costing America?*, HAW. L. REV., Winter 2017, at 141, 147.

56 Bhattar, *supra* note 49.

57 Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR. (Apr. 20, 2021), https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act [https://perma.cc/9TLC-7G3Q].

58 *Id.*

gain firsthand exposure to instances of police brutality, igniting protests in the United States and Nigeria alike.[59] While the NPF is condemned for their propensity to commit "extrajudicial killings," the United States Supreme Court's failure to punish police similarly serves to convert police into "street magistrates."[60] Thus, parallel to the policing history of Nigeria as a "tool . . . to wage war against the people,"[61] the policing institutions in the United States also reflect "a long history of systemic oppression . . . ."[62] As a result, both remain instruments of oppression and are equally characterized by a reputation for brutality.

D. POLICE BRUTALITY AS DEMOCIDE IN NIGERIA AND THE UNITED STATES

1. Democide in Nigeria

The police-civilian relationship in Nigeria continues to be threatened by the traditional view that conquered people are without rights and unworthy of respect.[63] This mentality emerged from Nigeria's independence, which transferred power to police, and not to the people, as the new rulers, and has led to major constitutional issues. Hence, Nigeria is not only known for the over-concentration of police power in "the hands of the executive president,"[64] but also the NPF's reputation for corruption.

The NPF is known for targeting the poor in ways so obvious that it is clear its actions are overlooked.[65] While the NPF was created to improve security in Nigeria, it instead operates as a "deliberate source of state violence that the citizens encounter daily."[66] Militarized police units, such as the Special Anti-Robbery Squad (SARS), are recognized

59 *See* Famakin-Johnson, *supra* note 35, at 10-12, 61, 71-72.

60 Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1723-28 (2019).

61 Oriloye Gabriel Lola & Olayinka Babatune Adebogun, *Police Brutality and its Impact on Human Rights: A Comparative Analysis of Nigeria and the United States of America*, 3 POL SCI. & SEC. STUD. J., no. 4, 2022, at 15, 17.

62 *Id.*

63 *See* Ndubuisi J. Madubuike-Ekwe & Olumide K. Obayemi, *Assessment of the Role of the Nigerian Police Force in the Promotion and Protection of Human Rights in Nigeria*, 23 ANN. SURV. INT'L & COMPAR. L. 19, 40 (2019).

64 Edime Yunusa & Abdulkadri Usman, *Obstacles to Effective Policing in Nigeria*, 10 INT'L J. SOC. SCI. & HUMANS. RSCH. 310, 316 (2022).

65 *See* Famakin-Johnson, *supra* note 35, at 51-52.

66 Lola & Adebogun, *supra* note 61, at 22.

as "operating outside of regular police hierarchies and oversight" and for their victimization of marginalized communities.[67] The past and present role of Nigerian police as government agents acting as guardians of the upper-middle class and ruling elite [68] while perpetuating violence against poor and minority groups has led Nigerian scholars to concretely label the situation as democide.[69]

The police brutality issue in Nigeria not only qualifies as democide as it occurs at the hands of police acting as agents of the state against unarmed civilians, but also because of its deep roots in impunity for extra-judicial killings, harassment, and more. [70] Manipulation of the judicial system has allowed the very essence of police brutality—excessive use of force against civilians—to persist in Nigeria where police are known for their "contempt . . . for the rule of law and legal process" rather than as crime fighters. [71] Such contempt is prevalent in officers' abuse of the Nigerian Constitution[72] and the Police Act,[73] which often go unfollowed and unimplemented as victims of police violence in Nigeria avoid trial due to death threats.[74] The overall lack of effort to implement accountability has reinforced "the culture of corruption" so much so that police brutality by the NPF is recognized as "normal" or "the Nigerian factor."[75]

Section 298 of the Criminal Procedure Act in Nigeria, similar to Section 1983, establishes that "[a]ny person authorised by law to use force is criminally responsible for any excess, according to the nature and the quality of the act which constitutes the excess."[76] Nonetheless, it is deemed practically impossible to successfully prosecute any officer for excessive use of force in Nigeria given the "discretionary powers" allotted to officers in using "reasonable force," a phrase

67 Cole, *supra* note 21.

68 *See* Lola & Adebogun, *supra* note 61, at 16.

69 *See Protector Turned Predator*, *supra* note 22.

70 Cole, *supra* note 21.

71 Chukwuma Innocent, *The Legal Structure of the Police and Human Rights in Nigeria*, 14 THIRD WORLD LEGAL STUD. 41, 53 (1997).

72 CONSTITUTION OF NIGERIA (1999).

73 Police Act (1943) Cap. (P19) (Nigeria), https://www.refworld.org/legal/legislation/natlegbod/1943/en/104242 [https://perma.cc/77SM-ZUTJ].

74 *See* Fidelis C. Uwakwe, *Deconstructing the Barriers to Access to Justice by Crime Victims in the Nigerian Criminal Justice System*, 2 CHUKWUEMEKA ODUMEGWU OJUKWU U. J. COM. & PROP. L. 1, 6 (2019).

75 Famakin-Johnson, *supra* note 35, at 52.

76 Innocent, *supra* note 71, at 64 (quoting Criminal Procedure Act (1945) Cap. (395), § 298 (Nigeria)).

representing an "open check for police abuse"[77] as exemplified by the widespread nature of "summary killings." [78] Thus, although the Nigerian Constitution entitles victims of police abuse to a remedy, corrupt judicial and procedural factors hinder effective enforcement of this right. It is clear that the corruption that has fueled police brutality for centuries ultimately amounts to not merely a system of subordination but to democide, as these killings and violence are "perpetrated by agents of the state and then affirmed by state institutions: the courts."[79]

2. Democide in the United States

The corruption that plagues Nigeria and its police forces is often minimized to the abuses and atrocities inherent in third-world countries, while the United States remains idealized as the embodiment of "democratic peace."[80] An impartial judiciary is an essential component to achieving and maintaining democratic peace as the foundation of democracy is built upon values of individual liberty, human dignity, and limited government. [81] The Supreme Court's primary function in a democratic society is to "infuse these . . . values into both the country's legal and constitutional system."[82] However, where the Court's recent decisions appear to contradict value judgements held by the public, the state's "monopoly on dispute resolution powers" proves not only to be a prerequisite to social order,[83] but also to social disorder.

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77 *Id.* at 64-65.

78 Madubuike-Ekwe & Obayemi, *supra* note 63, at 28.

79 Jasmine B. Gonzales Rose, *Civil Rights Summarily Denied: Race, Evidence, and Summary Judgement, in Police Brutality*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 286, 290 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) [hereinafter *Civil Rights Summarily Denied*] (quoting V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1459-60 (2019)).

80 On the myth of democratic peace, see James Ostrowski, *The Myth of Democratic Peace: Why Democracy Cannot Deliver Peace in the 21st Century*, 3 J. PEACE PROSPERITY & FREEDOM 11 (2014).

81 *See* M.P. Jain, *Role of the Judiciary in a Democracy*, 6 J. MALAYSIAN & COMPAR. L. 239, 241 (1979) ("All these crucial tasks can be discharged properly only if the courts constantly play a creative role. A democratic judiciary cannot afford to take a mere passive or mechanical view of its functioning.").

82 *Id.* at 239.

83 Ostrowski, *supra* note 80, at 18.

Democracy represents an increased availability of fair processes and procedures. However, its hierarchal structure nevertheless works to concentrate power in an elite majority, whose authority is magnified by the monopoly the state maintains in providing dispute resolution services.[84] That is, where the system operates to automatically subject all internal issues to consideration by courts controlled by the government, entrusted with broad discretionary powers,[85] a clear conflict of interest exists. Thus, the Court, whether part of a democratic structure or not, has the overwhelming tendency to output decisions that serve to protect the state's own interests rather than those of the individual.[86]

The Supreme Court's proclivity towards protecting state interests is best evidenced by its reputation of immunizing officers sued under Section 1983. As civilian casualties rise in concert with pro-police Court rulings, it is evident the Court is misusing its discretion to operate as a check on the power of police. The procedural devices that are meant to ensure impartiality instead serve as loopholes for police and solidify their role as perpetrators authorized by the state to engage in violence. This violence gives rise to a lethal power dynamic not only comparable to the destructive methods employed by totalitarian regimes, but also qualifiable as democide as the Court's removed role and obvious indifference for the lives of innocent, unarmed citizens amount to a *practically intentional*, *indirect* lethal impact.[87]

According to scholars, police shape democracy as much as they are shaped by it, as police power is derived from the law, not restrained by it.[88] The Supreme Court's contemporary commitment to establish heightened standards and procedural barriers to plaintiff success in Section 1983 proceedings serves to solidify the role of the police not as "fighters of crime," but rather as "guarantors of a social order that benefits dominant groups."[89] Thus, even where brutality is rooted in a minority of police officers, it persists regardless due to "weak systems of police accountability [that] offer impunity, even to repeat offenders."[90] Vested with the power to scrutinize the actions of

84 *See id.*
85 *See id.*
86 *Id.*
87 *See* Rummel, *supra* note 23, at 4.
88 Sekhon, *supra* note 60, at 1719.
89 *Id.* at 1711.
90 Cole, *supra* note 21.

government agents to ensure they conform with the Constitution,[91] the Court's decisions represent authoritative guidelines for daily police behavior nationwide. Therefore, failure to check police power translates into an expansion of authority and a message of acceptance of extra-judicial killings, allowing American policing to "lie[ ] largely outside of democratic control."[92]

E. Systemic Subordination & Section 1983: Not Bad Apples, But Racist Roots

Police brutality in the United States is not only an issue characterized by lack of accountability, but also by the disproportionate targeting and killing of people of color.[93] Review of the past and present policing in Nigeria and the United States reveals that police killings are not the result of a few bad apples, but rather rotten roots that stretch back to a history of state-sanctioned violence as a method to "maintain white superiority"[94] The status of the United States as a democracy is thus inseparable from its era of colonial rule, as both were born from bias.

Since its inception, it is clear that the police have played a crucial role in the government's establishment and maintenance of a colonial state not only by using force, but also through the authorization granted by the judiciary. For instance, Section 1983, the only current source of redress for victims of excessive use of force by police, originated as Section 1 of the Ku Klux Klan Act of 1871 to combat the impunity enjoyed by violent perpetrators.[95] Section 1 was originally intended to "provide a neutral forum for citizens, primarily freed slaves, to file grievances against state officials who failed to enforce the law or deprived citizens of their constitutionally guaranteed rights."[96] However, over the past few decades, judicial interpretation and restriction of Section 1983 claims has turned what was primarily

91 *See* Jain, *supra* note 81, at 240.

92 Jamelle Bouie, *Where American Democracy Isn't Very Democratic*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/opinion/police-violence-democracy.html [https://perma.cc/R2LZ-G4V6].

93 *See Racial Character Evidence*, *supra* note 36, at 376.

94 *Civil Rights Summarily Denied*, *supra* note 79, at 290.

95 *See* Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 GA. L. REV. 1, 25-26 (2020) [hereinafter *Assessing the Impact of Police Body Camera Evidence*].

96 *Id.* at 25 (footnote omitted).

meant to be an avenue for relief "into a judicial apology for—if not an endorsement of—a 'shoot first, think later' police culture."[97]

III. LEGAL ANALYSIS

A. Constitutional Complicity

Police brutality discussions often do not involve reference to the Supreme Court, as the Court does not pick the cases they must choose from, let alone "train or supervise or discipline police officers."[98] However, while the Court cannot necessarily inspire reform in strategically selecting cases, it undoubtedly has the ability to seize upon the opportunities it does have to provide a constitutional check on police power.[99] Through interpretation of the Constitution, the Court maintains a direct role in the daily behavior of the police, shaping both police conduct and the civil rights afforded to American citizens.[100] Thus, to fully capture the Supreme Court's role in policing, its decisions about police must be viewed "as consistent value choices to favor police power over individual rights."[101]

It has been said that "[c]ivil rights are integral pillars of our legal system . . . ."[102] Yet, while outlined in the Constitution, "they are not expressly protected or offensively litigated . . . ."[103] Thus, their legitimacy stems from the strength of their enforcement by the Court. However, one of the many consequences that has emerged from the impunity granted to the police in excessive force cases is increased difficulty for victims of police abuse to successfully sue police forces even in instances where even "egregious" excessive force—resulting in serious injury or death—was used.[104] This is especially problematic

97 Cover, *supra* note 34, at 1777 (footnote omitted) (quoting Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor J., dissenting)).

98 CHEMERINSKY, *supra* note 8, at 26.

99 *See id.* at 28.

100 *Id.* at 31.

101 *Id.* at 33.

102 Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. 470, 481 (2023).

103 *Id.*

104 David Dante Trout, *Taking the Knee No More: Police Accountability and the Structure of Racism*, 79 WASH. & LEE L. REV. 1765, 1786 (2023) (alteration in the original) (footnote omitted) (quoting Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/ [https://perma.cc/Y7GW-NN7K]) ("[T]o charge an officer in a fatal shooting, it takes something so egregious, so over the top that it cannot be explained

considering "officers are trained and employed by the state and its citizens to uphold the law, mak[ing] their violent misconduct more morally egregious than ordinary crimes and unintentional harms."[105] Essentially, the Court has dissolved citizens' right to be free from excessive force in choosing impunity over providing a remedy[106] as "[a] right is meaningless in the absence of a way to enforce it."[107]

Thus, the Supreme Court's complicity in police brutality cases[108] is evidenced by its limitation of victim success in cases brought under Section 1983, which was originally intended to "address the justice system's willful blindness to crimes against the powerless."[109] In diverging from the statute's intended purpose, the Court has utilized its authority to develop a favorable Fourth Amendment standard,[110] one-sided evidence evaluations, and the doctrine of qualified or "absolute" immunity.[111] These "repeated assaults on Section 1983 rights enforcement in federal courts, first following Reconstruction and . . . continuing into the present" are supported by the "perpetual epidemic of police violence in America" as the Court is either "unable or unwilling to solve the problem of police violence."[112] The Court has disregarded Congress's original intentions and expanded the deference granted to officers to kill "predominantly unarmed people" without accountability.[113]

1. Section 1983: Excessive Use of Force Actions

Congress established the Ku Klux Klan Act of 1871 in an effort to put an end to the "white supremacist terrorism" that began to define

in any rational way . . . . But even in the extreme instances where prosecution occurs, the majority of the officers have not been convicted.").

105 *Id.* at 1791 (footnote omitted).

106 *See* Maxted, *supra* note 54, at 629.

107 CHEMERINSKY, *supra* note 7, at 32.

108 *See also* Bandes, *supra* note 2, at 1287-88 ("The resilience of police brutality thrives on compartmentalization, failures to act, and deflection and denial of responsibility . . . . [Police brutality] could not thrive without the complicity of the society police serves. And certainty it could not thrive without the complicity of the court system."); Banteka, *supra* note 102, at 480.

109 Bandes, *supra* note 2, at 1330 (footnote omitted).

110 *See* Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 161-69 (2016).

111 Cover, *supra* note 34.

112 *See* Maxted, *supra* note 54, at 646.

113 Itohen Ihaza, Note, *Police Brutality and State-Sanctioned Violence in 21st Century America*, 9 J. RACE GENDER & ETHNICITY 101, 115 (2020).

the Reconstruction Era due to the federal government's "persistent inability" to intervene and implement accountability.[114] Although initially successful in arresting and convicting perpetrators of racially motivated violence, the surge in Klan Act litigation was short-lived following the Reconstruction Era.[115] Having declared portions of the Klan Act unconstitutional and dissolving all the Act's provisions except for Section 1, the Supreme Court played a pivotal role in this rapid decline.[116]

Section 1983 of the Civil Rights Act now serves as a cause of action for individuals to sue government officials acting "under color of . . . law" who have violated a citizen's civil rights.[117] Section 1983 was intended to represent a "legal avenue to hold government actors accountable if they use their position to deprive someone of their constitutional rights . . . ."[118] However, according to scholars, Section 1983 more accurately constitutes a remedy against state violence limited by the judiciary.[119] Thus, although created as a source of relief against excessive use of force on the part of the police, the restriction on Section 1983 created by the Supreme Court has transformed it into an obstacle for plaintiffs struggling to survive a defendant's motion to dismiss or motion for summary judgement.[120]

This transformation by the Supreme Court has led scholars to conclude that the current state of Section 1983 is no longer reconcilable with its origins in the Reconstruction and Civil Rights Era, "which sought to eradicate post-Civil War state violence targeting African-Americans and to implement the Fourteenth Amendment's due process protections."[121] The origins of Section 1983—and understandably its current state—instead exemplifies the "inextricable

114 *See* Cameron Kistler, *The Ku Klux Klan Act of 1871, Explained*, PROTECT DEMOCRACY (Dec. 5, 2023), https://protectdemocracy.org/work/klan-act-explained/ [https://perma.cc/7QQ2-7D5W].

115 *Id.*

116 *Id.*

117 Rebecca Pirius, *Section 1983 Lawsuit: Suing Police for Civil Rights Violations*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-a-section-1983-lawsuit-against-the-police.html [https://perma.cc/E6ZE-D38V] (July 6, 2022).

118 *Id.*

119 *See* Cover, *supra* note 34, at 1778 ("But the Court's more recent and continuing retrenchment of § 1983—through qualified immunity, together with specific aspects of excessive force doctrine—only deter victims of police violence from vindicating their rights, which were at the heart of § 1983's inception.").

120 *Id.* at 1777.

121 *Id.* at 1773.

relationship between racism and police regulations"[122] and the elimination of accountability due to the Court's implementation of a Fourth Amendment standard that "privileges the police perspective,"[123] permits the manipulation of record evidence, and creates a "get-out-of-jail free card" (i.e., qualified immunity).[124]

Due to ex-post facto consideration of officer conduct, concern for excess litigation and liability defines recent Section 1983 case law. Many believe that in the absence of protective procedural devices, police would be unable to effectively execute their duties due to fear of future liability.[125] Such reasoning references the preservation of public safety while endorsing the killings of unarmed civilians in the same breath. In addressing public safety needs and the split-second decisions that officers must often make, the Supreme Court insulated the interests of the government entirely. As a result, judicial deference to the unsafe nature of police work has instead made everyday life for civilians more dangerous by transferring quick, life-or-death decision-making, found too burdensome for police, onto the public.

2. The Graham Reasonableness Standard

The right to be free from the use of excessive force is guaranteed under the Fourth Amendment.[126] In Section 1983 cases, a plaintiff's success hinges on the Court's determination of whether an officer's excessive use of force was reasonable.[127] Under the "objectively reasonable" standard established in *Graham v. Connor*,[128] the Court must evaluate an officer's conduct from the perspective of a "reasonable officer on the scene" without "the benefit of hindsight."[129] Although based on the consensus that police are forced to make "split-second" decisions in the field, the *Graham* standard has evolved into

122 *Id.* at 1779 (citing RANDALL KENNEDY, RACE, CRIME, AND THE LAW 121 (1997)).

123 *Id.* at 1777.

124 *Assessing the Impact of Police Body Camera Evidence*, *supra* note 95, at 28.

125 *See* Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 595-98 (2020) [hereinafter *Determining the Perspective of a Reasonable Police Officer*].

126 Banteka, *supra* note 102, at 477.

127 *Id.*

128 Graham v. Connor, 490 U.S. 386, 397 (1989).

129 Michael Ranalli, *Police Use of Force: The Need for the Objective Reasonable Standard*, LEXIPOL (Mar. 24, 2017), https://www.lexipol.com/resources/blog/police-use-of-force-need-objective-reasonableness-standard/ [https://perma.cc/JZ5A-QKJK]; *see also Graham*, 490 U.S. at 396.

an opportunity for judges to justify and expand, rather than restrict, police power.[130] Decades later, the *Graham* reasonableness standard's broad, ambiguous language continues to be applied to reach pro-police excessive force decisions.[131]

The establishment of the reasonableness standard represented a sharp departure from subjectivity.[132] Under *Graham*, the primary question before the Court became "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation" to determine whether a violation under Section 1983 occurred.[133] Although initially a fair method of analysis, this inquiry has led judges to blindly trust police testimony, employ rank in determining reasonability and ignore relevant physical evidence,[134] resulting in decisions that reflect what a judge, rather than an officer or ordinary person, finds reasonable.[135]

The judicial deference afforded to officer testimony under the reasonableness standard proves to have a lethal impact, especially for Black and brown victims.[136] A victim's skin color serves as the most detrimental evidence against them in excessive use of force claims.[137] The judiciary is disproportionately white,[138] and both judges and juries been shown to rely on preexisting racial stereotypes (e.g., that people of color are violent and aggressive) in determining whether an officer's use of force was "reasonable."[139]Although judicial elections

130 *See Determining the Perspective of a Reasonable Police Officer*, *supra* note 125, at 590.

131 *Id.* at 585.

132 *See* Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 943 (2014).

133 *Determining the Perspective of a Reasonable Police Officer*, *supra* note 125, at 598 (quoting *Graham*, 490 U.S. at 397).

134 *Id.* at 585.

135 *See also* Banteka, *supra* note 102, at 477-78 ("Under this standard, courts look—from the officer's perspective—to the level of the force used and its justification under the totality of the circumstances. . . . [T]he reasonableness standard was intended to remove officer subjectivity but has instead operated to defer heavily to officer discretion and justifications.").

136 *See Civil Rights Summarily Denied*, *supra* note 79, at 290; s*ee also* Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1330 (2018) (footnote omitted) ("Judges and juries are reluctant to openly discredit law-enforcement officer testimony, where an adverse finding that the officer is lying or is not credible could destroy a career.").

137 *See Racial Character Evidence*, *supra* note 36, at 373-74, 437-38.

138 *Civil Rights Summarily Denied*, *supra* note 79, at 286.

139 *Racial Character Evidence*, *supra* note 36, at 390.

and jury selections serve to ensure neutrality, judges and jurors remain plagued by the same cognitive biases as ordinary citizens.[140]

Application of the "reasonableness" standard has thus plagued Section 1983 with a presumption of legitimacy as it mainly applied to uphold, rather than sanction, police conduct. The characteristics of citizens, such as their conduct, race, appearance, or demographics, are often measured by the Court in determining whether their death was warranted rather than whether the actions of the officer were necessary.[141] As a result, the reasonableness standard operates more accurately as a racialized device, rather than a procedural one.[142] Nonetheless, where the standard is ultimately based upon the presumption of a police officer's increased stress and need for safety, police are continuously "able to evade accountability in almost all cases by simply claiming that they perceived a threat . . . ."[143]

3. Evidentiary Obstacles: The Democratic Costs of Scott

Police-worn body cameras presented a promising procedural device for reducing impunity for police brutality. However, regardless of its potential to increase accountability, the impact of body cameras has been drastically undercut by both officer manipulation and judicial perception. Whether the narrative is changed by the officer on the scene or in the courtroom through judicial interpretation, body camera footage has rarely proven to maintain its intended deterrent effect on police misconduct.[144] Nevertheless, it remains evidence given considerable weight in the Court's decisions to grant summary judgement motions, often finding that the video was "so clear and incontrovertible that it eliminated any genuine issue of material

140 *See Civil Rights Summarily Denied*, *supra* note 79, at 286-87.

141 *Determining the Perspective of a Reasonable Police Officer*, *supra* note 125, at 600-01 (arguing that the "reasonable officer on the scene" standard from *Graham* focuses only on the plaintiff's conduct and the officer's stress, rather than any "distinctive characteristic[s] of the law enforcement officer." Without taking into consideration officers' "training, experience, and applicable department policies," the reasonableness determination "will remain imbalanced and unfaithful to the Graham standard").

142 *See Civil Rights Summarily Denied*, *supra* note 79, at 286.

143 Ihaza, *supra* note 113, at 122.

144 *See generally Assessing the Impact of Police Body Camera Evidence*, *supra* note 95.

fact,"[145] permitting only one conclusion: "any force used by the defendants was reasonable . . . ."[146]

Furthermore, judicial reliance on video evidence appears to correlate more with the desirability to "foreclose the opportunity of a jury trial" [147] rather than increase transparency. Through circumvention of the jury, judges' own beliefs and opinions are not only magnified, but also the judicial process itself is effectively deprived of "democratic legitimacy."[148] As a result, the footage serves as yet another "appreciable advantage" for police in excessive force litigation[149] due to the overwhelming tendency for judges to use video evidence to merely echo police rationale and the tunnel vision effect of the footage.[150]

Scott v. Harris is a model example of judicial manipulation turning body camera footage from a tool for Section 1983 plaintiffs into a weapon against them.[151] In holding that "no reasonable jury could disagree with the events displayed in the dash cam footage," the majority in *Scott* discredited opposing opinions by communicating that the "perspective of persons who share a particular cultural identity [are] 'unreasonable' and [thus] unworthy of consideration . . . ."[152] *Scott* thus embodies proof that summary judgement exists at the expense of democracy as it allows judges to deprive people of their peers' consideration. Although a judicial safeguard against excess litigation and intended to make the facts more favorable to the opposing party,[153] the Court's declaration to "view[ ] the facts in the light depicted by the videotape"[154] transformed summary judgement into an opportunity for judges to side with police officers, reinforcing an "us versus them" mentality.

145 *Id.* at 41.

146 *Id.* at 28.

147 *See Civil Rights Summarily Denied*, *supra* note 79, at 290.

148 *See* Cover, *supra* note 34, at 1813.

149 *Assessing the Impact of Police Body Camera Evidence*, *supra* note 95, at 18.

150 *See Civil Rights Summarily Denied*, *supra* note 79, at 288 (explaining that the availability of body camera footage persuades judges to vindicate officers for the most egregious human rights violations by leading them to exclude outside information and rely only on the evidence provided by the video).

151 Scott v. Harris, 550 U.S. 372 (2007).

152 Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 842 (2009).

153 *See Determining the Perspective of a Reasonable Police Officer*, *supra* note 125, at 611 (alteration in the original) (quoting *Scott*, 550 U.S. at 381).

154 *Id.*

Furthermore, in deciding to let the officer's dash cam footage "speak for itself," the Court in *Scott* directed lower courts thereafter that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record [videotape], so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purpose of ruling on a motion for summary judgment."[155] Consequently, *Scott* represents a dangerous precedent devoid not only of input from the jury, but also of any consideration of the case's background information. This strategical move by the Court not only was used to rationalize the officer's unjustifiable decision in this case to ram his car into Harris's following six minutes of refusal to pull-over for going fifteen miles per hour over the speed limit, but also is likely to be resurrected in many cases to follow.

4. "*Absolute*" *Immunity After Mullenix*

Underlying qualified immunity is the judicial belief that "it is in the best interest of 'society as a whole' to immunize unlawful police violence," consequently "inscrib[ing] unlawful violence into the DNA of law enforcement."[156] Qualified immunity is a policy judgement that is immensely at odds with the purpose of Section 1983 to protect Black lives and citizens' civil rights.[157] Thus, the judicially created doctrine of qualified immunity, which embeds an immunity exception in Section 1983,[158] represents the starkest example of the judicial effort to shield police from liability for using excessive force.

Under the doctrine of qualified immunity, an officer may be immunized from litigation entirely unless their conduct "violated a clearly established constitutional right." [159] The lethal effect of qualified immunity rests in the language "clearly established," which requires plaintiffs to cite identical precedent to prevail on their Section 1983 claim, a highly deferential threshold that scholars find renders the purpose of Section 1983 claims obsolete in their entirety as the Court has gone as far as to demand precedent with identical facts[160] in

155 Scott v. Harris, 550 U.S. 372, 378 n.5, 380 (2007).

156 Maxted, *supra* note 54, at 629.

157 *Id.* at 649.

158 *Id.* at 650-51.

159 *Determining the Perspective of a Reasonable Police Officer*, *supra* note 125, at 595-96 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

160 Kami N. Chavis & Conor Degnan, *Curbing Excessive Force: A Primer on Barriers to Police Accountability*, 2017 J. ACS ISSUE BRIEFS 23, 29.

the wake of cases such as *Garner, Scott, Graham,*[161] and more. Although proponents strongly argue the "clearly established test" is a necessary evil to ensure "fair notice" for officers, the Court's clear commitment to building a body of pro-police precedent has transformed the doctrine into an absolute shield against liability rather than a precautionary procedural device.[162]

Mullenix v. Luna [163] is said to represent "the Court's most recent attempt to protect those who claim to be protecting us . . . ."[164] A Section 1983 case was filed on behalf of a victim who was fatally shot by four of the six bullets fired by Officer Mullenix to terminate an eighteen-minute high-speed car chase. [165] In declaring that no precedent supported that the officer behaved unreasonably "beyond debate" [166] as "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect,"[167] the Supreme Court found Officer Mullenix "entitled to qualified immunity." [168] In validating the disproportionate use of lethal force against an unarmed suspect, *Mullenix* represents a stark example of the Court's perpetuation of police brutality in removing any requirement of de-escalation and neglecting the potential for police abuse of power. Instead of considering alternative methods of termination—such as spike strips or shooting at the tire[169]—and the three minutes it took to make the lethal decision to shoot, *Mullenix* evidences a judicial endorsement of a "shoot first, think later mindset."[170]

Mullenix is also noted as the inception of "absolute immunity."[171] In over-emphasizing the split-second nature of officer decision-

161 Tennessee v. Garner, 471 U.S. 1 (1985); Scott v. Harris, 550 U.S. 372 (2007); Graham v. Connor, 490 U.S. 386 (1989).

162 Nathan S. Chapman, *Fair Notice, The Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 3-4, 10 (2023).

163 Mullenix v. Luna, 577 U.S. 7 (2015).

164 Marshall Heins, Note, *Absolutely Qualified: Supreme Court Transforms the Doctrine of Qualified Immunity into Absolute Immunity for Police Officers*, 8 HOUS. L. REV. 1, 13 (2017).

165 *Id.* at 3-4.

166 *Id.* at 6 (quoting *Mullenix*, 577 U.S. at 12).

167 *Id.* (quoting *Mullenix*, 577 U.S. at 17).

168 *Id.* at 9 (citing *Mullenix*, 577 U.S. at 19).

169 *Id.* at 8.

170 Heins, *supra* note 164, at 9 (quoting *Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting)).

171 *Id.* at 13.

making and requiring their conduct be proved "beyond debate,"[172] the Court expanded immunity not only to officers in the field, but also to the predatory and discriminatory policies enforced by police departments.[173] While it is arguably necessary for the Court to sometimes account for officer stress and safety on the scene, the *Mullenix* decision pointedly overlooked the known influence of training and department policies on officer decision-making.[174] Thus, while previous decisions exhibit a clear hesitation to provide police with "great power to abuse citizens' constitutional rights,"[175] *Mullenix* represents a clear intent to disregard the potential of abuse and unleash "deeper pathologies of power" by extending immunity to misconduct far beyond the scene.[176]

B. The United States: Home to Democracy and Democide

Section 1983 was intended to transform the legal system by opening federal courts as "forums to enforce federal rights against widespread racial terror against Black Americans."[177] However, rather than reconcile our history of racial violence and "do the hard work of enforcing civil rights as was its duty under the Constitution, the Supreme Court closed the doors to the courthouse."[178] The existing body of excessive force case law serves as evidence of the reality of the judiciary's role in prioritizing police power over procedural

172 *Id.* at 11-14.

173 *See also* CHEMERINSKY, *supra* note 8, at 20 ("After incidents of serious police abuse, cities and police departments invariably respond by blaming the misconduct on aberrant officers, a few 'bad apples.' But this explanation ignores the cultures in police departments . . . that encourage excessive force and racist policing.").

174 *Id.*; *see also* Heins, *supra* note 164, at 12 (quoting Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 11-12 (2015)) ("[W]hen the Department of Justice investigated the 'disproportionate use of departments' use of deadly force to be both 'unnecessary' and 'excessive.' Some departments even used tactics that placed 'officers in situations where avoidable force [became] inevitable.'").

175 Heins, *supra* note 164, at 11 (quoting Catherine A. Daubard, *Quasi-Judicial Immunity of State Officials: Butz v. Economou' Distorted Legacy*, 1985 U. ILL. L. REV. 401, 401 (1985)).

176 *See id.* at 12 (quoting Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J. L. & POL'Y 1, 20 (2015)) ("[A]fter its decision in *Mullenix*, the Court has unleashed even 'deeper pathologies of power and extended the reach of police officers' unruly behavior far beyond just black communities.").

177 Maxted, *supra* note 54, at 651 (footnote omitted).

178 *Id.*

fairness, judicial indifference, and, ultimately, acceptance of police violence.

Contrary to Rummel's theory, the hierarchal structure of the dispute resolution system in the United States therefore permits the Supreme Court to establish and maintain this lethal impact. Judicial decisions to absolve officers of liability are inconsistent with goals of deterrence and implicitly authorize police through precedent establishing that merely being the "'wrong' color, in the 'wrong' neighborhood" is enough to trigger a "swift sentence of injury or death."[179] Ultimately, the Court's complicity in failing to protect and enforce citizen's constitutional rights has resulted in a police culture in which "everyday objects become deadly weapons, failure to immediately comply with unreasonable and unclear commands is a death-eligible offense, and firing multiple bullets into an innocent human being is acceptable."[180] This "us versus them" mentality is not only implicit in the superiority complex inherent amongst police,[181] but also magnified by the judiciary's own beliefs and opinions.

IV. SOCIETAL IMPLICATIONS

A. "*Democide*" *Demands Change*

The majority perspective of police brutality in the United States is that it is solely a domestic issue that can only be resolved by internal action. By labeling the issue as democide, the term captures the level of severity and makes it comparable to the mass atrocities associated with the Nazi Regime or the Khmer Rouge. Viewing police brutality as solely an internal conflict[182] allows the issue to not only persist but

179 *See Civil Rights Summarily Denied*, *supra* note 79, at 290.

180 *Id.* at 289.

181 *See* Hubert Williams, *Core Factors of Police Corruption Across the World*, 2 FORENSIC CRIME & SOC'Y 85, 86 (2002); *see also* Scot DuFour, *Us Versus Them Policing: What Causes Warrior Cops?*, AMU EDGE (May 5, 2019), https://amuedge.com/us-versus-them-in-policing-what-causes-warrior-cops/ [https://perma.cc/D6C2-RPGV].

182 Intervention here would involve an international state suing the United States for human rights violations, either to the International Court of Justice or the International Criminal Court. As for the grounds on which to sue, police brutality is a violation of the International Convention Against Torture, which essentially "codifies the customary international law prohibition against police torture . . . ." Banteka, *supra* note 102, at 483-84 (footnote omitted) (citing G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984)).

also thrive as it also provides the international community with an excuse to avoid intervention and a role in the solution. However, by giving into the belief that police brutality in the United States is solely a "domestic" issue, the international community risks partaking in the same insidious inaction that allowed the Rwandan Genocide to claim more than one million civilian lives.[183]

This Note argues that this is the purpose R.J. Rummel intended for the term "democide" to serve: to capture crimes committed by governments that do not neatly fit the definition of genocide and allow the international community to remain bystanders. The use of the term democide draws attention to the mass atrocities occurring domestically that may not be as black and white as genocide or have yet to rise to the level of genocide. Democide prompts intervention and prevention at the international level before it becomes genocide by removing any available excuse to overlook domestic issues and shame a state that is, in fact, participating in the mass killing of its own citizens. Ultimately, this label not only accurately captures the Supreme Court's role in police conduct, but also has the potential to save innocent citizens and American democracy.

B. *The Hidden Danger of Democracy: Exclusionary Ideology and Perceived Acceptability*

The United States' status as a democracy is also a major part of the problem not only because, under Rummel's theory, it is deemed as essentially immune from democide, but also because people generally believe democracies do not require change or reform due to their inherent stability.[184] However, while the hierarchal structure of democracy serves to avoid the over-concentration of power and corrupt leadership, the power nonetheless remains concentrated in the government, the ruling class of society. An equally dangerous concentration of power is masked by the hallmark of democracy: the electoral process. As such, under the guise of the electoral process, the

183 *See The 1994 Genocide Against the Tutsi in Rwanda and the United Nations*, UNITED NATIONS: OUTREACH PROGRAMME, https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml [https://perma.cc/XV7D-RHV9] (last visited Nov. 9, 2024).

184 *See also* Ihaza, *supra* note 113, at 101 ("America is often referred to as the 'land of the free 'and a global leader in democracy and human rights. America is, at the same time . . . built on the foundation of a brutal race-based form of chattel slavery and oppression that exploited black people.").

United States maintains a more covert form of state-sanctioned violence[185] or, as scholars put it, a more "insidious and invisible form of corruption" [186] comparable to the Nigerian Police Force's reputation.

While mass atrocities are predominantly orchestrated by governments and high-level leaders, democracy is especially dangerous when these perpetrators are selected and elected by the general population.[187] The power and insulation elected officials enjoy are thus intrinsically magnified by the fact that citizens view their beliefs and decisions as a reflection of the public consensus.[188] Democracy becomes destructive when this majority embodies enmity and expresses an exclusionary ideology,[189] as both research and history alike proven that "what elites think and believe contributes to mass killing."[190] Thus, while the judiciary may not be the sole perpetrator of police brutality, it is imperative to understand its influence and impact on the people and police whose violent actions rely on judicial "approval, compliance, and/or indifference . . . ."[191]

Scholars theorize that the occurrence of mass atrocities increases when leaders embody a belief system that "justifies efforts to persecute or eliminate certain groups of people."[192] This exclusionary

185 *See generally* Ihaza, *supra* note 113.

186 Ostrowski, *supra* note 80, at 19.

187 Ashleigh Michell Landau, Normalization of the Democidal Mindset: A Cross-Cultural Comparison of Endorsement and Perceived Acceptability 1, 3 (Apr. 29, 2021) (Ph.D. dissertation, University of Oregon) (on file with the University of Oregon), https://scholarsbank.uoregon.edu/xmlui/handle/1794/26209 [https://perma.cc/39YH-YB5X].

188 *Id.* at 4 ("[T]he more people are accustomed to exclusionary beliefs and actions, the more people will tolerate or comply with them. . . . [W]hile people might not necessarily agree with certain beliefs, they may still accept them (or simply not oppose) them as normal in their country. It is this acceptance or tolerance in the general population that could give political leaders and governments the unopposed authority they need to implement discriminatory and often violent policies.").

189 *Id.* ("Where a general population falls along the spectrum of approval or disapproval may be a protective or risk factor when evaluating a country's risk for devolving into mass violence, such that a higher pre-existing approval in a general population would correspond to a higher risk for electing or acquiescing to a leader who disseminates exclusionary rhetoric. And it is what lies on the extreme end of the spectrum of sociopolitical violence that is especially salient: democide.").

190 *Id.* at 1 (citations omitted).

191 *Id.* at 4 (citations omitted).

192 *Id.* at 1 (citations omitted) ("Scholars have asserted that genocide and politicized become more likely when leaders and movements express an exclusionary ideology—a belief system that justifies efforts to prosecute or eliminate certain groups of people.").

ideology operates both at the individual level in the form of personal endorsement and at the societal level as perceived acceptability, both of which are equally destructive.[193] For instance, Nazi Germany weaponized exclusionary ideology in establishing Nazism by merely amplifying preexisting antisemitic beliefs.[194] Even where the argument may be advanced that the United States is not compromised of only bad legal and state actors, it is important to note "mass participation of a population is not needed to carry out a program of mass killing"; it is only necessary that "the majority of the population [does] not actively oppose it."[195] Thus, a government's use of "shared and already existing beliefs of [ ] society . . . to justify their decisions and actions"[196] represents a well-established practice used by both totalitarian regimes to incite mass violence and by the American judiciary to perpetuate police killings.

C. *Denial to Change Risks Death to Democracy*

Democracies' maintenance of authoritarian police can ultimately result in its own demise.[197] Scholars use the term democide to refer to this process of "democratic suicide"[198] that results from a state's continued commitment to condoning civilian killings. This acceptance of civilian deaths is the way through which a government not only kills its own people, but "self-destruct[s]."[199] Although democracies are often viewed as indestructible, the risk nonetheless remains as authoritarianism "[o]ften emerges 'legally,' by democratically elected leaders who subvert democratic norms to stay in power"[200]—a form

193 Landau, *supra* note 187, at 8.

194 *Id.* at 3.

195 *Id.* at 2. (citation omitted).

196 *Id.* at 3 (citation omitted).

197 *See* Sarah Grucza, *How Authoritarian Police Thrive in Democracy*, ASH (Dec. 2, 2020), https://ash.harvard.edu/how-authoritarian-police-thrive-democracy [https://perma.cc/5XML-WAQU] (last visited Oct. 17, 2024).

198 Matthew Wills, *Democide: An Inside Job?*, JSTOR DAILY (July 19, 2022), https://daily.jstor.org/democide-an-inside-job/ [https://perma.cc/ZDA5-6PAD].

199 *Id.*

200 Horizons Project, *Authoritarianism: How You Know It When You See It*, THE COMMONS (2022), https://commonslibrary.org/authoritarianism-how-you-know-it-when-you-see-it/ [https://perma.cc/9MHM-XFER].

of democratic breakdown[201] that occurs when "[e]lected autocrats kill democracy by 'packing and "weaponizing"' the courts . . . ."[202]

While structurally sound, democracies nevertheless maintain weaknesses. For instance, in the wake of the United States' failure to reconstruct the judicially created procedural factors that perpetuate police brutality, it will commit democratic suicide as democracies are theorized to "die by their own hand" if they are unable to effectively redress a political crisis they created themselves.[203] This risk is magnified by the disproportionate impact police brutality has on communities of color, to whom the lack of accountability sends the message of governmental willingness to "provide less protection from violence based on race" and "enforce the racial . . . order."[204]

D. "*We Charge Genocide*"

Given the clear disparity in the impact of police killings on communities of color, police brutality in the United States walks a fine line between democide and genocide with the only requirement left to satisfy being the "intent to destroy."[205] While hate crimes can arguably be committed and remain outside the bounds of the "intent to destroy,"[206] the systemic racism that has gradually worked to exterminate Black citizens while remaining unchecked by the judiciary has the capacity to, and arguably has risen to, the level of genocide. Moreover, the Supreme Court's development of constitutional standards and precedent that authorize pretextual stops, outstanding warrants, designate "high crime areas" and criminalize

201 STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE, *as reprinted in* AM. ACAD. IN BERLIN, https://www.americanacademy.de/how-democracies-die/ [https://perma.cc/MRA9-DM79] (last visited Oct. 17, 2024).

202 Landau, *supra* note 187, at 21 (quoting STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8 (2019)).

203 *Id.*

204 *Racial Character Evidence*, *supra* note 36, at 385-86 (alteration in the original) (quoting Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 79 (2009) ("Discriminatory acquittals not only convey 'that [the] government will provide less protection from violence based on race,' but they also 'enforce the racial . . . order.'").

205 Helen Fein, *Accounting for Genocide After 1945: Theories and Some Findings*, INT'L J. GROUP RTS. 79, 80 (1993).

206 *Thoughts on the Police Brutality and Genocide Studies*, MACMILLAN CTR. FOR INT'L & AREA STUD. AT YALE (June 5, 2020), https://macmillan.yale.edu/gsp/stories/thoughts-police-brutality-and-genocide-studies [https://perma.cc/Q6VA-S4S4].

unprovoked flight further, demonstrate an effort to target and destroy Black American citizens.[207]

Approximately seventy years ago, recognizing the disproportionate killing of unarmed Black men and women by police and lynch mobs, the Civil Rights Congress wrote a letter to the United Nations formally charging the United States with genocide.[208] The letter alleged that the discrimination and violence targeted at Black citizens not only reflected conduct comparable to the actions taken in Hitler's Germany, but also threatened the preservation of "peace and democracy" as "the racist theory of government of the U.S.A. is not the private affair of Americans, but the concern of mankind everywhere."[209] The plea of the Civil Rights Congress was repeated by the American Civil Liberties Union (ACLU) in May of 2021, when the ACLU sent their own "We Charge Genocide" letter to the United Nations to hold the United States accountable for the continued "[e]xtrajudicial killings of Black Americans by policemen" following the killing of approximately 300 people in the first four months of 2021. [210] Nevertheless, despite clear efforts to trigger external accountability, the request for accountability by these advocates similarly went unanswered.

Although criticized as a novice area of law, international accountability is an essential starting point to accomplish domestic resolution of the United States' police brutality issue. Police brutality qualifies as an international crime as it is an "atrocity crime[ ]" that "shock[s] the conscience of humanity." [211] The murder of Black

207 *See Racial Character Evidence*, *supra* note 36, at 431; *see also* Illinois v. Wardlow, 528 U.S. 119 (2000) (holding, in essence, that a person's presence in a "high-crime area" and their "unprovoked flight" constitutes per se reasonable suspicion for a police stop).

208 *See (1951) We Charge Genocide*, BLACKPAST (July 15, 2011), https://www.blackpast.org/global-african-history/primary-documents-global-african-history/we-charge-genocide-historic-petition-united-nations-relief-crime-united-states-government-against/ [https://perma.cc/T2QQ-ZNBS].

209 *Id.*

210 Press Release, Am. Civ. Liberties Union, Families of Victims of Police Violence, ACLU, Organizations Call for U.N. Inquiry into Police Violence and Systemic Racism in the United States (May 10, 2021), https://www.aclu.org/press-releases/families-victims-police-violence-aclu-organizations-call-un-inquiry-police-violence [https://perma.cc/7FRG-324S].

211 Margaret deGuzman, *Systemic Racist Police Brutality Shocks the Conscience of Humanity, but Is It an International Crime?*, JUST SEC. (July 11, 2020), https://www.justsecurity.org/71255/systemic-racist-police-brutality-shocks-the-conscience-of-humanity-but-is-it-an-international-crime/ [https://perma.cc/9AQB-ZS95].

citizens such as George Floyd and Breonna Taylor strongly support this theory given these brutal police killings incited protests and retaliation not only across the nation, but around the world.[212] Thus, where an atrocity crime is defined as "large-scale, deliberate attacks against civilians . . . result[ing] in the suffering and deaths of hundreds of thousands of people,"[213] the international community may be equally liable for non-intervention over the past seventy years despite the clear and convincing evidence of racially-motivated police brutality in the United States.

Recognition of police brutality in the United States as democide represents a crucial first step of intervention on behalf of an international community tasked with a duty to prevent human rights violations. A traditionally effective method to bring countries into compliance is known as "naming and shaming."[214] While public criticism has the potential to incite, rather than deter, political terrorization, "naming and shaming" has a limited impact on governments that are structurally incapable of reform.[215] The American judiciary undoubtedly has the ability to correct its mistakes through better decision-making.[216] Furthermore, studies show democracies are more likely to benefit from a global spotlight on their misconduct.[217]

V. CONCLUSION

A. Judicial Reform to Assist Reconstruction and Resist Acquiescence

It has been said that "[t]here is no 'slippery slope' toward loss of liberties, only a long staircase where each step downward must first be tolerated by the American people and their leaders."[218] As proven

212 *Id.*

213 *Id.* (alteration in the original) ("When former U.S. Ambassador for the War Crimes Issues, David Scheffer, coined the term 'atrocity crime,' what he had in mind was a crime 'of significant magnitude, meaning its commission is widespread or systematic or [is] part of a large-scale commission of such crimes.'").

214 Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 690-91 (2008).

215 *Id.* at 691.

216 *Id.*

217 *Id.* at 693-94.

218 Heins, *supra* note 164, at 2 (quoting BE REASONABLE: SELECTED QUOTATIONS FOR INQUIRING MINDS 135 (John H. George & Laird Wilcox eds., 1994)).

by this Note, recognition as a democratic regime no longer is decisive in evading the commission of democide. Regardless of the hierarchical structure and organized dispute resolution system of American democracy, the racist roots of government institutions maintain the power to sustain abuses of authority that permit systemic subordination. In this case, the Supreme Court has failed to fulfill its role in a system of checks and balances to limit the power granted to police and has subsequently become complicit in the perpetuation of police brutality. It has issued numerous decisions that are wholly inconsistent with the goals of democracy and its people, which demand "[m]ore rights enforcement . . . not less . . . ." [219] Thus, "[b]ecause judges act as the ultimate authority for determining the constitutionality of police behavior, change must stem from within the courts."[220]

B. Reconstructing the Right Against Excessive Force

International pressure and public criticism will force the judiciary to recognize and come to terms with its role in perpetuating police brutality and prompt the reconstruction of the constitutional standards and rules that define Section 1983 cases. Transformation of the "reasonableness" standard to reflect the perspective of a police officer or ordinary person rather than a judge, restriction of the depth of qualified immunity, and the removal of summary judgement, especially in cases involving body cam footage, represent some of the legal reforms that the American judiciary should implement upon being named and shamed.

Furthermore, "naming and shaming" will not only serve to hold the United States accountable but also send a message to police officers and democracies around the world that they are not immune to mass atrocities based on their regime type alone. Countries, such as Nigeria, that similarly identify as a democracy will thus learn from the United States' decision to recognize and reform. Therefore, labeling the police brutality issue more accurately as democide has the potential to resolve policing problems nationwide and globally as well.

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219 Maxted, *supra* note 54, at 630.

220 Heins, *supra* note 164, at 13; *see also* CHEMERINSKY, *supra* note 8, at 28 ("[C]onstraining the police and protecting people's rights greatly depends on the Supreme Court. The Court's interpretations of the Constitution create the rules that police must follow in their searches, arrests, their interrogations, and their procedures for identifying suspects.").