

## **Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity**

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*Encounters between police officers and members of the community are deeply influenced by race. Yet when courts assess whether police officers have complied with the Fourth Amendment, they explicitly exclude consideration of the ways in which racial bias, assumptions, and fear influence police-civilian interactions. In determining whether law enforcement officers seized a civilian, for example, courts look to the objective circumstances of the event, such as the number of officers involved, whether police weapons were drawn, and the tone of voice the officers used. They then assess whether, under such circumstances, a reasonable person would feel free to refuse law enforcement requests or otherwise terminate the encounter. Courts disregard the racial dynamics of the interaction as falling outside of the objective parameters of the seizure inquiry.*

*This Article suggests a novel pathway to a racially conscious reasonable person standard that does not require courts to abandon their allegiance to objectivity. This approach focuses attention on the assumption, already inherent to that inquiry, that a reasonable person is one with a knowledge of the controlling law. A reasonable person is thus one with an understanding both of Fourth Amendment jurisprudence and the legal doctrine intended to deter or punish police misconduct, such as criminal and civil liability and the exclusion of illegally obtained evidence from criminal trials. A reasonable person with such knowledge would understand that police officers are not meaningfully constrained in the moment and are not consistently held accountable by the law. This approach would thus serve to shift the Fourth Amendment seizure analysis closer to racial realities by requiring courts to engage with the lack of police accountability as an issue of consequence to all reasonable people.*

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*“And you now know, if you did not know before, that the police departments of your country have been endowed with the authority to destroy your body. . . . And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detainings, beatings, and humiliations. All of this is common to black people. All of this is old for black people. No one is held responsible.” – Ta-Nehisi Coates, *Between the World and Me*.<sup>1</sup>*

#### INTRODUCTION

Race and policing in the United States are inextricably intertwined. Organized law enforcement in this country has, among its historical roots, slave patrols conceived in the antebellum era to prevent enslaved people from escaping or otherwise rebelling.<sup>2</sup> In the modern age, African American people are stopped, beaten, arrested, and shot by police officers in greater

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<sup>1</sup> TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 9 (2015).

<sup>2</sup> See Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUSTICE 156, 159 (2001) (“Although informal policing mechanisms began in the colonial period, the emergence of a semi-formal, organized policing force can be traced to slavery.”).

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percentages than any other racial group.<sup>3</sup> The names of African American men, women, and children killed in recent years by law enforcement—Michael Brown, Charleena Lyles, Tamir Rice, Philando Castile<sup>4</sup>—have become an invocation and a rallying cry for police reform.<sup>5</sup> Community members, advocates, and scholars describe, in stark and passionate terms, how racialized policing impacts Black lives,<sup>6</sup> and references to the

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<sup>3</sup> According to one set of data, African American people are three times more likely to be killed by the police than are white people. See MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> (last visited Nov. 24, 2017); see also FRANKLIN E. ZIMRING, *WHEN POLICE KILL*, 46–47 (2017) (noting that African Americans, Native Americans, and Asian Pacific Islanders are “overrepresented in the police killings distribution,” with African American people composing the “largest population group with outsized death tolls,” and noting that different data sources indicate that African American people are killed at either two or three times the rate “that would represent their current share of the U.S. population”); Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force*, at 15 (July 2016), [http://policingequity.org/wp-content/uploads/2016/07/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) (study finding that the use of all types of police force—from minor physical acts to dog bites to shootings—is three times greater for African American people than for whites).

<sup>4</sup> See Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (describing the shooting of Michael Brown, an unarmed African American teenager, by a white police officer in Ferguson, Missouri); Matthew Haag, *Fatal Police Shooting of Seattle Woman Raises Mental Health Questions*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/us/seattle-police-shooting-charleena-lyles.html> (describing the shooting death of Charleena Lyles, an African American woman, by two police officers in front of her young children); Abby Ohlheiser, *Death of Tamir Rice, 12-Year-Old Shot by Cleveland Police, Ruled a Homicide*, WASH. POST (Dec. 12, 2014), [https://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/?utm\\_term=.415cda469c71](https://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/?utm_term=.415cda469c71) (describing the shooting of Tamir Rice, a 12-year-old African American child, holding a toy gun, by a white police officer); Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> (describing the killing of Philando Castile, an African American man, by a police officer in front of his girlfriend and young daughter).

<sup>5</sup> For a reporter’s perspective on protests and activism following the police killings of Michael Brown in Ferguson, Missouri; Tamir Rice in Cleveland, Ohio; and Freddie Gray in Baltimore, Maryland, among others, see WESLEY LOWERY, *THEY CAN’T KILL US ALL: FERGUSON, BALTIMORE, AND A NEW ERA IN AMERICA’S RACIAL JUSTICE MOVEMENT* (2016).

<sup>6</sup> See, e.g., MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP* 27 (2017) (“I am sorely afraid that some snap of racist judgment—which, by now, means it will be justified as rational assessment under threatening circumstances, circumstances that our color always provokes—will cause the hair trigger of some cop’s weapon to fire fury at my children.”); Teri A. McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 *MERCER L. REV.* 651, 653 (2016) (“Black female bodies are regularly policed and eventually sorted in United States prisons in accordance with their material value to the State and their ability to threaten its foundations.”). For a series of recollections by African American men—including Justice Thurgood Marshall, former Attorney General Eric Holder, and Professor Derrick Bell, among many other professionals—regarding racial profiling by the police and members of the public, see CHARLES J. OGLETREE, *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES, JR. AND RACE, CLASS AND CRIME IN AMERICA* 115–241 (2010).

significance of race in police encounters can be found everywhere from poetry to popular culture.<sup>7</sup> Whatever the complexities of the causes, it seems impossible to reasonably deny that contact between a police officer and a member of the community is deeply impacted by race.<sup>8</sup>

Yet when courts analyze the constitutionality of the police power to engage, detain, and arrest civilians, they apply objective legal standards that explicitly exclude consideration of how racial<sup>9</sup> bias, assumptions, and fear inform the interaction. In determining whether a police officer has “seized” a civilian for Fourth Amendment purposes, courts evaluate whether a reasonable person would feel free to terminate the encounter with law enforcement under the circumstances of the contact.<sup>10</sup> Courts look to the objective facts of the encounter, such as the number of officers involved, whether officers brandished weapons, and how police phrased their

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<sup>7</sup> Examples of references to police violence in popular culture and art are myriad. Such references include the image of Beyoncé sinking beneath the water on the top of a police cruiser in her *Formation* video, as well songs such as Jay-Z’s “Spiritual” (“Yeah, I am not poison/no I am not poison/Just a boy from the hood that/Got my hands in the air/In despair don’t shoot”). BEYONCÉ, *LEMONADE* (Parkwood Entm’t 2016); JAY-Z, *Spiritual* (single) (TIDAL 2016). KRS-One’s “Sound of Da Police” is an indictment of police violence (“The overseer had the right to get ill/And if you fought back, the overseer had the right to kill/The officer has the right to arrest/And if you fight back they put a hole in your chest”), as are poems such as Hakim Bellamy’s A.A. (Afro Anonymous) aka “In Recovery” aka WARDrobe (“When their life/or pride/is in danger/they cannot tell the difference between you/and the criminal record/they been bumping in their patrol car all day.”). KRS-ONE, *Sound of Da Police, on RETURN OF THE BOOM BAP* (Jive Records 1993); HAKIM BELLAMY, A.A. (AFRO ANONYMOUS) AKA “IN RECOVERY” AKA WARDROBE, <https://hakimbe.bandcamp.com/track/a-a-afro-anonymous-aka-in-recovery-aka-wardrobe>.

<sup>8</sup> Nevertheless, some do dispute a connection between race and police violence. See, e.g., Philippe Lemoine, *Police Violence against Black Men is Rare*, NATIONAL REVIEW (Sept. 18, 2017), <http://www.nationalreview.com/article/451466/police-violence-against-black-men-rare-heres-what-data-actually-say> (arguing that police violence against black men is rare, and any racial discrepancies in the rate of such violence is attributable to black males committing more violent crimes); but see Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <https://www.vanityfair.com/news/2016/07/data-police-racial-bias> (drawing findings from “academic studies, legal rulings, and media investigations” regarding how race impacts civilian encounters with the police).

<sup>9</sup> This Article focuses on how Fourth Amendment seizure analysis fails to consider issues of race, but the conclusions could apply in many ways to other identities that impact police-civilian interactions, including gender, sexual orientation, age, and disability status. See, e.g., NORM STAMPER, *TO PROTECT AND SERVE: HOW TO FIX AMERICA’S POLICE* 45–66 (2016) (discussing the impact of mental illness, both that of community members and of police officers, in interactions between civilians and police); McMurtry-Chubb, *supra* note 6 (discussing the history of the impact of policing on Black women from slavery until the present day).

<sup>10</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”).

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questions, and gauge how such circumstances would impact a hypothetical reasonable person.<sup>11</sup> The feelings, knowledge, and background of the actual person involved are not considered. The racial dynamics of the interaction, which can require analysis of psychology, history, culture, and the civilian's personal experiences, are also disregarded as falling outside of the objective parameters of the inquiry.

Critics have long argued that the "objective" approach to the seizure inquiry requires courts to view police encounters with civilians through a lens cleansed of social context, one that claims to be race-neutral by resolutely avoiding engagement with race altogether.<sup>12</sup> Yet the significant scholarship, advocacy, and public outcry against racially disparate patterns of police violence have not influenced courts to broaden the factors they consider when applying the reasonable person test in the context of Fourth Amendment seizure analysis. This Article seeks to contribute to the arguments for a race-focused and racially realistic seizure doctrine by suggesting a pathway to an expanded legal analysis of the reasonable person standard that does not require courts to abandon allegiance to objectivity.

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<sup>11</sup> *Id.* (citations omitted) ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.").

<sup>12</sup> See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 340 (1998) ("Although the casual reader of the Court's Fourth Amendment opinions would never know it, race matters when measuring the dynamics and legitimacy of certain police-citizen encounters. Indeed, in light of past and present tensions between the police and minority groups, it is startling that the Court would ignore racial concerns when formulating constitutional rules that control police discretion to search and seize persons on the street."); Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968 (2002) ("[T]he racial effects of the Supreme Court's Fourth Amendment law is a function of the Court's adoption of what I call the perpetrator perspective. Two normative and race-constructing commitments underwrite this perspective: (1) the notion that how people interact with and respond to the police is neither affected by nor mediated through race; and (2) the idea that whether and how the police engage people is not a function of race. As a result of these commitments, the Court conceptualizes race primarily through the racial lens of colorblindness. In this sense, the race and Fourth Amendment problem is not just a function of the fact that the Court ignores race. It is also, and perhaps more fundamentally, a function of the Court's underlying investment in a particular conception of race: race neutrality or colorblindness."); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 570 (1998) (arguing that *Whren* and other Supreme Court rulings have established that "[a]s long as there is an objective basis on which the officer could have formed the requisite reasonable suspicion" to conduct a stop, "it would seem to be almost impossible for a suspect to present evidence that racial bias infected the officer's thinking, even if the allegation is true."); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247 (2010) ("The Fourth Amendment accomplishes its racial project in three parts. First, the jurisprudence rarely mentions race. Next, it grants extraordinary discretion to police and prosecutors. Finally, it constructs the criminal as colored, and the white as innocent.").

This approach focuses attention on the assumption, already inherent to the reasonable person inquiry, that a reasonable person is one with a knowledge of the controlling law. This Article argues that courts determining whether a reasonable person would feel free to ignore the police or end a police encounter should consider the civilian's presumptive knowledge of the law as an objective factor. A reasonable person is thus one with an understanding both of Fourth Amendment jurisprudence and the legal doctrine intended to deter or punish police misconduct, such as criminal and civil liability and the exclusion of illegally obtained evidence from criminal trials. A reasonable person knows her constitutional rights and the remedies available if those rights are infringed—as do the police officers with whom she is engaged.<sup>13</sup>

If a reasonable person weighing her freedom to terminate a police encounter is presumed to be cognizant of the legal standards applied to police misconduct, this presumption could expand judicial conceptions of seizure without taking on the additional burden of dismantling the objective standard. Under the current objective standard analysis, courts do not ask whether a particular person's experiences with the police or knowledge of data regarding race and police misconduct affected the individual's freedom to terminate a police encounter. But if courts focus on the reasonable person's objective knowledge of the relevant law, they must consider whether that reasonable person should feel free to disregard a police officer's requests or otherwise terminate the encounter if the legal system doesn't serve to meaningfully control police misconduct. In doing so, courts must explore whether a reasonable person is only free to terminate a police encounter if she is willing to ignore or absorb the risk of police lawbreaking when asserting her constitutional rights. Courts may less easily disregard that question as the subjective concern of individual people of color if it is derived from the neutral, reasonable person's knowledge of the applicable law.

This approach does not seek to promote the "objective" reasonable person standard as an unalloyed good in Fourth Amendment jurisprudence. Nor does it seek to deny the reality that African American people and other people of color are disproportionately the target of police contact and violence. It instead meets courts where they are in the seizure analysis:

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<sup>13</sup> Courts have championed the connection between legal rights and remedies since *Marbury v. Madison* ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right"), and the significance of legal remedies to the enforcement of rights has been consistently championed by legal realists. 5 U.S. 137, 163 (1803). *See, e.g.*, BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 77–78 (2017) ("In the eyes of many, a right without any remedy is no right at all . . . . The story of the Supreme Court's failure to regulate the police is as much about the remedies as the rights themselves.").

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unwilling to move beyond a reasonable person standard stripped of racial considerations, but also committed to the presumption that ordinary people have a working knowledge of the law and its consequences.<sup>14</sup> In doing so, this approach explores whether it is possible to move the reasonable person analysis towards race-consciousness by assuming objective knowledge of the state of the relevant law.

This Article proceeds in three parts. Part One outlines the legal standards applied to police officers and community members in Fourth Amendment jurisprudence related to law enforcement seizures. This Part explores the reasonable police officer inquiry and notes the ways in which this objective analysis arguably incorporates the individual officer's subjective viewpoint through consideration of his training and experience. It also reviews the more rigid approach to objectivism in the reasonable person standard, and explains how both standards avoid consideration of the impact of race in police-civilian interactions. Part Two addresses one largely unexplored aspect of the reasonable person analysis in the Fourth Amendment seizure context: the presumption that civilians and police possess knowledge of the law governing police-civilian encounters. This Part argues that courts should thus also presume that the reasonable person interacting with the police has a knowledge of the law that serves to deter or punish police misconduct, and outlines the relevant areas of that law. Part Three explores the implications to the Fourth Amendment seizure inquiry if courts recognize a reasonable person as one with the knowledge that police officers are not meaningfully constrained in the moment and are not consistently held accountable by the law. This Part argues that this approach could serve to shift the analysis of Fourth Amendment seizure determinations closer to racial realities. This Part also addresses possible critiques of this approach, including whether a reasonable person standard grounded in legal realism would have meaningful impact if Fourth Amendment remedies are so difficult to obtain.

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<sup>14</sup> This Article considers the implications to the Fourth Amendment seizure analysis of a reasonable person's knowledge of the law applied to police misconduct. It acknowledges, however, that there could be a range of objective knowledge that might impact the reasonable person analysis. For example, a reasonable person could be one who is aware of the data regarding suspected or confirmed police wrongdoing (such as the number of violent acts committed by police each year) along with knowledge of the data regarding consequences of such wrongdoing (such as the number of convictions obtained, the percentage of police officers who are indemnified against damages claims, or the percentage of officers who lose their jobs following confirmed acts of misconduct). While this approach to the objective knowledge standard is beyond the scope of this Article, objective knowledge of varied sorts beyond those currently represented in the reasonable person standard could also play a part in altering that standard in some of the ways suggested herein.

## I. THE RACE-AVOIDANT FOURTH AMENDMENT SEIZURE ANALYSIS

The Fourth Amendment protects people from unreasonable searches and seizures performed by government agents.<sup>15</sup> Fourth Amendment doctrine is thus focused on determining when government actors have “seized” or “searched” persons or their property, when they are constitutionally permitted to do so, and what consequences should apply if government agents act outside the scope of those constitutional parameters. This Part will provide an overview of the ways in which shifting judicial interpretations of reasonableness and objectivity in the seizure context has created a jurisprudence in which race is almost entirely ignored.

A. *Reasonable Police Officers and Seizure of Persons*

When a law enforcement officer “seizes” a civilian, the encounter crosses a constitutional dividing line. A police officer can approach and engage with a person for any reason, or for no reason whatsoever, without implicating the Fourth Amendment; only if the officer has conducted a seizure of the person does the Fourth Amendment apply.<sup>16</sup> In order to determine when a “casual encounter” morphs into a seizure, courts ask whether a reasonable person in the same circumstances would feel free to decline requests or otherwise terminate the encounter.<sup>17</sup> As discussed below, this analysis has created a muddled doctrine that makes it difficult to identify the line between consensual encounter and police seizure; once a court has determined that such a shift occurred, however, the police must have justification for the seizure that satisfies Fourth Amendment standards.

While the text of the Fourth Amendment appears to demand that officers have probable cause to carry out a seizure—a conclusion echoed in judicial opinions for decades<sup>18</sup>—current Fourth Amendment jurisprudence instead asserts that the level of justification required depends on whether the encounter is an investigatory stop or an arrest. Since the 1968 Supreme Court decision in *Terry v. Ohio*, officers have been permitted to temporarily

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<sup>15</sup> U.S. CONST. amend. IV (“*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*”).

<sup>16</sup> See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (explaining that “law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”).

<sup>17</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>18</sup> See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (*citations omitted*) (“*We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.*”).



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seize a person for investigative purposes without violating the Fourth Amendment if the officer has a reasonable and articulable suspicion that the individual is involved in criminal behavior.<sup>19</sup> Reasonable and articulable suspicion only justifies investigative stops; officers may go further and conduct an arrest only if they have probable cause to believe that the person has committed or is in the process of committing a crime.<sup>20</sup>

In evaluating whether the officer was constitutionally justified in making the stop or arrest, courts undertake an objective inquiry as to whether the factual circumstances of which the officer was aware constituted reasonable suspicion or probable cause to believe a crime had occurred or was in progress.<sup>21</sup> The universe of facts relevant to this analysis is broad. Police officers may draw upon sources of information well beyond their own observations, including information known by other officers<sup>22</sup> and general knowledge of criminal activity and neighborhood crime rates gleaned from the officer's time on the force.<sup>23</sup> Officers can even rely on information that is factually wrong, such as the existence of a warrant or a misleading description of a suspect, without violating the Fourth Amendment, so long as the reliance is reasonable.<sup>24</sup> The universe of objective facts is not

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<sup>19</sup> *Id.* at 28 (stating that the officer can also go further and conduct a “frisk” of the seized person to search for weapons if “a reasonably prudent man in the circumstances, would be warranted in the belief that his safety or that of others was in danger”). Although *Terry* and its progeny treat the temporary seizure and the limited weapons search as two separate acts with separate reasonableness requirements, officers conduct the two together so routinely that police encounters with civilians under *Terry* are generally referred to as “stop and frisks.” *Id.* at 12.

<sup>20</sup> *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (citations omitted) (stating the existence of probable cause depends on “whether, at the moment the [warrantless] arrest was made . . . the facts and circumstances within [the arresting officer’s] knowledge and of which [the arresting officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense”).

<sup>21</sup> *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (concluding courts must assess whether the “historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause”).

<sup>22</sup> *United States v. Hensley*, 469 U.S. 221, 230–32 (1985) (concluding that an officer can rely on a wanted-person flyer issued by another police department so long as the original department had reasonable suspicion to justify the stop).

<sup>23</sup> See Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 755–56 (2010) (discussing Supreme Court case law that establishes that “the quantum of suspicion arising from a particular set of facts may vary depending on what a police officer knew based on her training, experience, and familiarity with the neighborhood”).

<sup>24</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (“The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.”).

unlimited, however; courts evaluating the constitutionality of police seizures do not take into consideration some arguably relevant facts of which officers should also be aware, such as the significance of the race of the person seized (unless the defendant's race is part of a suspect description that contributed to the seizure) or data about disparate stop and arrest rates of people of color in the area of the seizure.<sup>25</sup>

Despite avowed commitment to the objectivity of the reasonable suspicion and probable standards, judicial analysis frequently strays beyond a basic inquiry as to whether the facts of the situation at hand were sufficient to provide a hypothetical reasonable officer with reasonable suspicion or probable cause. Courts regularly credit officer training and experience, for example, as providing law enforcement officials with insight into the criminal significance of the manner in which a person is dressed, walking, standing, talking, or driving.<sup>26</sup> Courts also cite such training and experience in support of officers' assertions that an area has a high level of criminal activity, and that the high-crime context casts criminal suspicion on behavior that might appear benign to others, such as a man running<sup>27</sup> or a group of teens hanging out on a corner.<sup>28</sup> So deferential are courts to the inherent credibility of officer assessment of civilian behavior that judges assessing seizures rarely require the government to produce empirical evidence to support the officer's interpretation of the factual circumstances at issue.<sup>29</sup> Instead, they defer to officer's background and experience, even when referenced in general terms, as a source of law enforcement expertise.<sup>30</sup>

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<sup>25</sup> See, e.g., *United States v. Collins*, 532 F.2d 79, 82 (8th Cir. 1976) (stating that "the color of a person's skin, be it black or white, is an identifying factor which, while insufficient by itself, assists the police in narrowing the scope of their identification procedure").

<sup>26</sup> See, e.g., *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977) (citation omitted) (stating courts must evaluate whether the facts supported reasonable suspicion "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training").

<sup>27</sup> See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 122, 124–25 (2000) (holding that officers possessed reasonable and articulable suspicion to conduct a stop when Mr. Wardlow fled from the police in a high-crime area).

<sup>28</sup> See, e.g., *Oates*, 560 F.2d at 61 ("Thus, it may well be that some patterns of behavior which may seem innocuous enough to the untrained eye may not appear so innocent to the trained police officer who has witnessed similar scenarios numerous times before.").

<sup>29</sup> Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2078 (2017) ("From suppression hearings to the analysis of vague laws, judges have repeatedly embraced police judgment in scenarios that raise significant empirical or doctrinal concerns, the repercussions of which they neither address nor attempt to justify.").

<sup>30</sup> See Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 227 (2012) (contending that, when analyzing police officer determinations of probable cause and reasonable suspicion, "the Court repeats like a mantra the importance of officer training and experience. Police training and experience thus establishes the police as craftsmen members of a specialized guild, one that the Court has granted something of a monopoly on evaluating the significance of criminogenic evidence. The rest of us,

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Some courts and commentators have concluded that the officer's training and experience is simply another objective factor for the court to consider, while others have characterized this information as a subjective lens through which the facts of the encounter are evaluated.<sup>31</sup> This may be a distinction without a practical difference; in whatever way it is described, it is clear that courts are willing to enter the minds of the police officers involved at least to the extent of incorporating consideration of their professional backgrounds.

Judicial willingness to take into consideration the unique perspective of the police officer does not extend, however, to examination of the officer's motivations for conducting the seizure. In *Whren v. United States*, the Supreme Court held that even when it is clear that an officer seized a person for a constitutionally impermissible reason, such as racial animus, that improper subjective impetus does not constitute a Fourth Amendment violation so long as other, permissible factors existed to justify the stop.<sup>32</sup> The fact that the officer in question did not rely on those neutral factors, but instead was motivated by personal hostility toward people of color, is thus irrelevant if objective facts existed that would give a reasonable officer a permissible reason to conduct the seizure.<sup>33</sup>

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including the judiciary, lack this specialized guild knowledge and so should defer to the on-the-street judgments of police experts.”); *see, e.g., United States v. Arvizu*, 534 U.S. 266, 275–276 (2002) (holding that a border patrol agent's “specialized training and familiarity with the customs of the area's inhabitants” provided the officer with reasonable suspicion to believe that a passing driver's “slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer” indicated that the driver was engaged in criminal activity).

<sup>31</sup> *See* Kinports, *supra* note 23, at 757 (describing the conflict between state and federal courts that rely on “the officer's training and experience as independent factors supporting the existence of probable cause and reasonable suspicion,” and courts that “take the position that the facts purportedly giving rise to probable cause are to be evaluated from the perspective of someone with the particular officer's training and experience”).

<sup>32</sup> 517 U.S. 806, 814–15 (1996).

<sup>33</sup> The Supreme Court's “colorblind” rulings have been widely critiqued. For example, Professor Ian Haney López has argued that in Supreme Court case law, “[t]he colorblind conceptions of race and racism function similarly: both exist only when mentioned . . . . This magic-word formalism strips race and racism of all social meaning and of any connection to social practices of group conflict and subordination.” IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 160–61 (2006). The approach adopted by the Court in *Whren* takes the Court's colorblindness even further, concluding that even when government actions are explicitly motivated by race, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” 517 U.S. at 813. This approach is echoed in cases such as *Batson v. Kentucky*, in which the Court held that prosecutors may rebut a *prima facie* showing that they exercised preemptory challenges of jurors in a racially discriminatory way by putting forth a “neutral explanation for challenging black jurors.” 476 U.S. 79, 96–97 (1986). So long as a ‘race-neutral’ explanation for a discriminatory action exists, the *discrimination* itself will be ignored. *See* Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355, 365 (2001) (“As long as the police officer offers some race-neutral reason for the stop, other reasons can act as proxies for race.”).

It is difficult to discern a clear organizing principle within Fourth Amendment jurisprudence analyzing reasonable suspicion and probable cause. Courts will consider the perspective of the police officer when it comes to professional training and experience, but not when those perspectives involve personal bias. An officer may be aware of many facts regarding a particular encounter; courts will view some of these facts as significant to the reasonable suspicion and probable cause analysis, and others as largely irrelevant. Critics of this disparity argue that it can be explained by judicial deference to governmental objectives, so that information that bolsters justification for the seizure is validated, but that which undermines the integrity of the stop or arrest is ignored.<sup>34</sup> In this way, the reasonable officer analysis in the seizure context shares commonalities with other areas of law addressing police actions, which, as discussed further below, are designed to provide ample room for deference to police decision-making.<sup>35</sup> Whatever the motivations behind the shifting analytical framework, it serves to almost entirely exclude considerations of the ways that racial bias and fear implicate police-civilian interactions when courts review the constitutionality of civilian seizures by law enforcement.<sup>36</sup>

#### B. *Reasonable Persons and Seizures by Police*

Of course, courts only engage in an analysis of whether an officer had reasonable suspicion or probable cause to justify a seizure of a person if such seizure—a stop or an arrest—has actually occurred. As noted previously, law enforcement officers have seized a person under the Fourth Amendment if a reasonable person in the same circumstances would not feel free to deny the officer's requests or to otherwise terminate the encounter.<sup>37</sup> The

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<sup>34</sup> See, e.g., Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 61 (2015) (noting that since the turn of this century, the Supreme Court has issued decisions that “have broadly expanded the government’s power to seize people. In twenty-two of . . . twenty-eight cases [regarding seizure], the Court ruled in favor of the government, solidifying existing seizure authority and expanding the government’s ability to arrest, stop, or otherwise detain individuals”).

<sup>35</sup> See *infra* Part II for a description of doctrines, including qualified immunity and justifiable force, that privilege the perspective of the police.

<sup>36</sup> The courts are not alone in failing to consider the impact of race in police-civilian encounters. Police officers and representatives for the police department routinely state that law enforcement actions are not motivated by race. As former officer and police chief Norm Stamper explains, “Most police officers would have us believe they are officially colorblind (as if observing racial and cultural differences is a bad thing) they make their decisions based strictly on the ‘facts.’ Context doesn’t matter. History doesn’t matter. The preexisting relationship between cops and communities doesn’t matter. White cops’ inordinate fear of black men doesn’t matter.” NORM STAMPER, *TO PROTECT AND SERVE: HOW TO FIX AMERICA’S POLICE* 131 (2016).

<sup>37</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (stating that in determining whether a police encounter is a seizure, “the

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reasonable person inquiry, like the reasonable suspicion and probable cause analyses, is an objective one.<sup>38</sup> When determining whether a reasonable person would feel free to refuse an officer or leave the encounter, however, courts have a stricter interpretation of the “objective” approach than when examining whether officers had reasonable suspicion or probable cause to justify a stop or arrest. Courts consider a more limited universe of facts from which the reasonable person can draw constitutional conclusions, and do not factor in the personal history and knowledge of the person involved in the police encounter.<sup>39</sup> As with the reasonable suspicion and probable cause inquiry, the reasonable person analysis disregards the racial dynamics of the interaction.<sup>40</sup>

While police officers may rely on an array of information beyond their own observations when making stop and arrest determinations, courts determining whether a reasonable person would feel free to end a police encounter focus more narrowly on the circumstances of the encounter itself. With the exception of certain limited circumstances that generally are understood to constitute a seizure—such as police physically restraining an individual<sup>41</sup>—courts look to the observable facts of the interaction and ask how those circumstances would affect a reasonable person in the abstract.<sup>42</sup> Courts consider a wide variety of factors in making this determination, including whether officers drew their weapons, spoke quietly or loudly, or actively prevented the community member from walking away.<sup>43</sup>

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appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”).

<sup>38</sup> *Mendenhall*, 446 U.S. at 554.

<sup>39</sup> Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 *CARDOZO L. REV.* 2161, 2192-93 (2016) (stating that courts applying the Fourth Amendment reasonable person analysis in the seizure context “ordinarily neglect to evaluate any of the suspect’s subjective characteristics.”).

<sup>40</sup> A recent, and notable, exception to judicial avoidance of race when conducting seizure analysis under the Fourth Amendment is *Commonwealth v. Warren*, 475 Mass. 530, 539-40 (2016), in which the Massachusetts Supreme Court held that, while flight is a factor in reasonable suspicion analysis, “where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston.”

<sup>41</sup> See *California v. Hodari D.*, 499 U.S. 621, 637-38 (1991) (seizure requires physical force or submission to a show of authority).

<sup>42</sup> *Mendenhall*, 446 U.S. at 554; see, e.g., *United States v. Stover*, 808 F.3d 991, 995 (4th Cir. 2005) (describing the *Mendenhall* “free to leave” standard as an “objective test”).

<sup>43</sup> *Mendenhall*, *supra* note 10, at 554 (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”).

The line between a consensual encounter and a seizure is not always easy to discern. For example, courts have held that civilians would feel free to refuse an officer's requests or otherwise terminate the police encounter when armed police officers entered a cross-state bus and questioned the passengers,<sup>44</sup> when police officers stopped a man and took his driver's license;<sup>45</sup> and when three police officers approached a man and stated, "[we are] here for your marijuana plants."<sup>46</sup> In making these determinations, courts do not consider the racial identities of the officers and the community member, nor do they consider data about how those dynamics might impact the interaction. Courts do not even consider information about recent high-profile accounts of police misconduct in the area that might play a role in a reasonable person's assessment of her ability to exit the interaction without consequence.

Further, in the reasonable person analysis, courts do not consider the civilian's individualized perspective of the circumstances of the encounter, nor do they credit the personal education or experiences of the civilian as relevant to her understanding of the significance of law enforcement words or actions. Courts do not defer to civilian expertise on police conduct gained through personal experience and education in the way that they credit police with expertise regarding criminal behavior in the community. Because the judicial portrait of a reasonable person is stripped of identities such as age, race, gender, or disability status, it is consequently devoid of the perspective on policing that a person with these particular characteristics might possess. A person's knowledge of the history of police-civilian interactions in a particular neighborhood, such as the experiences of an African American person who has had multiple encounters with local law enforcement, is thus beyond the scope of the reasonable person analysis. Rather than take any of this information into account, courts arguably reach conclusions about the impact of the circumstances of the police encounter on the objective 'reasonable person' based on the judge's own experiences, instincts, and imagination.<sup>47</sup>

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<sup>44</sup> See *Bostick*, 501 U.S. at 439–40; *United States v. Drayton*, 536 U.S. 194, 203 (2002).

<sup>45</sup> *United States v. Weaver*, 282 F.3d 302, 311–12 (4th Cir. 2002).

<sup>46</sup> *United States v. Jones*, 701 F.3d 1300, 1305 (10th Cir. 2012).

<sup>47</sup> Desiree Phair, Comment, *Searching for the Appropriate Standard: Stops, Seizure, and the Reasonable Person's Willingness to Walk Away from the Police*, 92 WASH. L. REV. 425, 430 (2017) (describing judicial reliance on "instincts regarding what members of the public consider reasonable and when an average individual feels seized"); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 (2002) ("[T]he existing empirical evidence . . . suggests that observers outside of the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse. Members of the Court are themselves such outside observers, and this partly explains why the Court repeatedly has held that police-citizen encounters are consensual and that consent to search was freely given.").

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The internal contradictions within Fourth Amendment jurisprudence surrounding seizures—among them the fact that courts consider the personal perspective of police officers, but only certain aspects of that perspective, and ignore the individual perspective of civilians entirely—cannot be reasonably explained by neutral legal concepts like the commitment to objectivity. These contradictions make more sense, however, if they are understood to arise from a judicial desire to avoid confronting the complexities of race<sup>48</sup> in the seizure analysis. The pursuit of a ‘race-neutral’ seizure analysis has resulted in a jurisprudence willing to contort itself to avoid meaningful engagement with race and its impact on the encounter. This approach has been critiqued as a constitutional analysis framed as a “real world behavioral construct”<sup>49</sup> that works, in reality, as a legal fiction.<sup>50</sup>

C. *Scholarly Attention to the Incorporation of Race in the Seizure Analysis*

Scholars and advocates have widely critiqued the race-avoidant nature of the Fourth Amendment seizure standards. When relationships between the police and community members are so deeply affected by race, critics argue, judicial analyses that depict encounters between members of both groups as a featureless shadow play are not only inaccurate and incomplete, they can both mask and perpetuate the social inequalities they are choosing to ignore.<sup>51</sup> Police stops motivated by race are condoned, and people of color

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<sup>48</sup> And, as noted previously, other social identities such as age, gender, and sexual orientation. See, e.g., David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 53, 81–88 (2009) (explaining study results demonstrating that a person’s age and gender impact whether she feels free to terminate a police encounter).

<sup>49</sup> Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN. DIEGO L. REV. 507, 510 (2001).

<sup>50</sup> Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 324–25 (2012) (stating that “[f]rom its inception in *Mendenhall*, the free-to leave test was a legal fiction crafted in order to permit some police seizures to fall outside the Fourth Amendment, and therefore to allow police some latitude to stop and detain without cause”).

<sup>51</sup> See, e.g., Carbado, *supra* note 12, at 1002–03 (“To the extent that the application of the free-to-leave test avoids this racial difference, masks it, or both, it legitimizes racial asymmetries in people’s vulnerability to and perceptions of police authority. In other words, eliding the ways in which race structures how people interact with and respond to the police leaves people of color in a worse constitutional position than whites.”); Carpiniello, *supra* note 33, at 369 (“The Court’s limited recognition of race as central only when race is explicitly identified as the sole factor in a decision to stop invites the use of racial proxies and prohibits the Court from challenging the use of race as a proxy for criminality. By refusing to acknowledge the constant forces of racial discrimination, the Court actually reinforces existing informal racism. The Court reinforces the existing White majority perception that racism is anomalous in Fourth Amendment law.”).

who do not feel free to ignore police requests have no method by which they can prove their fears are reasonable.<sup>52</sup> The larger societal and structural forces that implicate officers' decisions to contact, stop, arrest, and use force against people of color are disregarded in favor of highly fact-focused inquiries scrubbed clean of cultural or racial context.

In response to these concerns, critics have proposed new approaches to the seizure analysis that would require courts to explicitly incorporate racial considerations.<sup>53</sup> Scholars and advocates have argued, for example, that reasonable suspicion and probable cause determinations should include the recognition that police officers are influenced by societal depictions of African American people as violent or prone to criminality.<sup>54</sup> Courts would thus inquire into how implicit and explicit biases that arise from exposure to societal depictions of African Americans impact police as they engage with the public.<sup>55</sup> Others argue that the reasonable person standard should recognize that African American people are subjected to police violence at a rate far exceeding their percentage of the population, and acknowledge the ways in which fear of such violence could reasonably impact an individual's assessment of her freedom to terminate a police encounter.<sup>56</sup> In pursuit of

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<sup>52</sup> See, e.g., Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1498 (2016) (“[M]embers of vulnerable groups are impossible witnesses to their own victimization . . .”).

<sup>53</sup> See, e.g., Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) (arguing that courts should consider race when determining whether a police-civilian interaction was coercive); Carpiniello, *supra* note 33, at 356–57 (proposing that in cases in which reasonable suspicion is based on flight, that suspicion should be assessed through consideration of the race of the suspect); *but see* Kathryn M. Young & Christin L. Munsch, *Fact and Fiction in Constitutional Criminal Procedure*, 66 S.C. L. REV. 445, 486 (2014) (rejecting the inclusion of factors such as race, age, or gender into the seizure analysis, because courts would be bogged down in determining “the difference between a ‘reasonable’ young, poor Asian man whose parents went to Yale, and a ‘reasonable’ elderly, wealthy Latina whose parents did not graduate from high school,” and because this approach appears to concede social inequities rather than seek to remedy them).

<sup>54</sup> See Carbado, *supra* note 52, at 1495–97, 1513–17 (describing empirical research exposing the association between blackness and criminality, such that “[n]ot only does seeing a black person arouse suspicions of criminality, but thinking about criminality brings to mind the image of a black person. This finding suggests that, even absent evidence of racial animus or explicitly held stereotypes, the formally race-neutral project of crime prevention and detection is already racially inflected,” and going on to discuss the role of police training and culture in fostering police violence).

<sup>55</sup> See, e.g., Carbado, *supra* note 12, at 977 (discussing the impact of associations between criminality and race in police officer decision-making, such as an officer choosing to stop a group of African American people rather than a group of white people because of a belief that “between the two groups, there is a greater likelihood that the group of black men is involved in crime,” thus increasing the vulnerability of African American people to police encounters).

<sup>56</sup> See Maclin, *supra* note 53, at 249–59 (discussing police violence against African American people and how this history can influence African American people to submit to



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centering the reasonable person analysis on racial realities, scholars have also sought to contextualize police-civilian interactions in the modern age within the racialized history of policing in the United States. They have, among other approaches, called for a reasonable person standard that takes into account the race of the seized person and how that race impacts the nature of the police-civilian encounter,<sup>57</sup> and advocated for recognizing the influence of race and gender roles in interactions between civilians and police.<sup>58</sup>

These suggestions have not thus far altered judicial approaches to Fourth Amendment seizure analysis. Nor has that analysis been affected by the recent increase in social media and news media attention, spurred by highly publicized incidents of police violence against people of color, to the impact that race has on police decision-making and civilian views of law enforcement.<sup>59</sup> Widely-circulated videos of police officers shooting and beating African American people<sup>60</sup>, and social movements such as Black

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police requests); see *Commonwealth v. Warren*, *supra* note 40, for an example of a case in which the court adopted this type of analysis.

<sup>57</sup> See, e.g., Carbado, *supra* note 12, at 1000–04; Maclin, *supra* note 53, at 250; Graham Cronogue, Note, *Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor*, 20 TEX. J. ON C.L. & C.R. 55, 58 (2015) (arguing that a person’s race has a “real and profound effect” on interactions between police officers and civilians).

<sup>58</sup> See Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 738 (2015) (stating that “the republican idea that citizens can actively contest police actions is currently the least likely to work for women and people of color. In particular, it is precisely the act of asserting political standing that is likely to trigger police escalation and hostility against these groups.”).

<sup>59</sup> See The Associated Press-NORC Center for Public Affairs Research, *Law Enforcement and Violence: The Divide between Black and White Americans*, <http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-and-violence-the-divide-between-black-and-white-americans0803-9759.aspx> (discussing racial differences in perceptions of the severity and frequency of police violence; for example, the study revealed that “85 percent of blacks think police are more likely to use force against a black person in most communities, compared with 63 percent of Hispanics and 39 percent of whites”); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 3-7 (Nat’l Bureau of Econ. Research, Working Paper No. 22399, 2016), [www.nber.org/papers/w22399.pdf](http://www.nber.org/papers/w22399.pdf) (analyzing data regarding race and police use of force, and concluding, among other findings, that “blacks and Hispanics are more than fifty percent more likely to have an interaction with the police which involves any use of force,” and “blacks are 21 percent more likely than whites to be involved in an interaction with police in which at least a weapon is drawn”); Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN, July 27, 2017, <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> (“Today, live streaming, tweets and Facebook posts have blasted the incidents of police brutality, beyond the black community and into the mainstream media.”); Jay Caspian Kang, *Our Demand is Simple: Stop Killing Us*, N.Y. TIMES, May 4, 2015 (describing the use of social media by African American people to build a movement against police brutality).

<sup>60</sup> Mercy Benzaquen, Damien Cave, & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES, updated Dec. 17, 2017

Lives Matter and #SayHerName,<sup>61</sup> which address the fact that African American people comprise a widely disproportionate percentage of persons stopped, arrested, and harmed at the hands of the police, have had little impact on judicial assessments of police seizures of civilians.<sup>62</sup> Fourth Amendment seizure analysis remains resolutely immune to meaningful engagement with racial realities.

## II. LEGAL CONSCIOUSNESS AND THE SEIZURE ANALYSIS

This Article suggests an additional way in which advocates might move courts towards increased racial realism, an approach that works within the current Fourth Amendment seizure standards.<sup>63</sup> By focusing on one aspect of those standards—the assumption that civilians and police have both knowledge of the law and its application—courts could be pushed towards an analysis that better reflects racial realities in police-civilian encounters without altering the framework of the seizure analysis which courts appear disinclined to abandon. After first discussing the role that the presumption of legal consciousness plays in the seizure analysis and our justice system as a whole, this Part will provide an overview of the areas of the law surrounding police misconduct that might serve as objective factors in the reasonable person standard.

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(compiling videos of acts of police violence against African American people).

<sup>61</sup> See Black Lives Matter, <http://art.blacklivesmatter.com/> (last visited Nov. 24, 2017) (discussing the history and principles of the Black Lives Matter movement); #SayHerName: Resisting Police Brutality Against Black Women, AFRICAN AM. POLICY FORUM (July 16, 2015), <http://www.aapf.org/sayhernamereport> (report documenting the killing of African American women by police officers, as well as providing “some analytical frames for understanding their experiences and broaden[ing] dominant conceptions of who experiences state violence and what it looks like”).

<sup>62</sup> See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. Rev. 1182, 1202 (2017) (“I have presented the doctrinal framework [of police seizures] with barely a word about race. That is the way the Supreme Court usually discusses suspicion and its ability to legitimate seizures.”).

<sup>63</sup> This Article does not suggest that advocates should abandon efforts to alter the current legal standards like those described above. Rather, it seeks to support efforts to create more racially-conscious seizure analysis under the Fourth Amendment by suggesting a pathway works within the analysis as it currently stands, while remaining conscious of the substantial limitations of the current analytical approach.

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The presumption that members of the community are cognizant of the law can be found, explicitly and implicitly, throughout our legal system.<sup>64</sup> Notably, the standard of legal knowledge to which civilians are held is much higher than that expected of government agents, who, as discussed elsewhere, are provided amnesty for reasonable mistakes of law in a variety of contexts.<sup>65</sup> Civilians are granted no such leniency.<sup>66</sup> For example, in the criminal system, in a presumption designed in part to promote efficiency,<sup>67</sup> individuals cannot defend themselves against a criminal accusation by arguing that they didn't know the act was illegal.<sup>68</sup> Except in certain circumstances, such as when the language of the law is unconstitutionally vague<sup>69</sup> or the knowledge of the law is required by statute,<sup>70</sup> people are

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<sup>64</sup> See *Hamburg-American Steam Packet Co. v. United States*, 250 F. 747, 758 (2d Cir. 1918) (“The principle is elementary that every one is presumed to know the law of the land, both common law and statutory law, and that one’s ignorance of it furnishes no exemption from criminal responsibility for his acts. ‘Ignorantia juris neminem excusat’ is a maxim in both civil and criminal jurisprudence which centuries of experience have approved.”).

<sup>65</sup> See Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 B.Y.U. J. PUB. L. 71, 81–82 (2013) (describing doctrines of law, such as qualified immunity, in which reasonable mistakes of law by government actors are forgiven; these doctrines “rest on the proposition that not every mistake demands a remedy,” as the “criminal justice system is better served through forgiveness than punishment when an actor in the criminal process stumbles”).

<sup>66</sup> *Id.* at 100 (“Consider the contrast in the type of treatment that the law affords government officials and private parties. If a police officer makes a reasonable mistake, he does not lose his case or his home; the evidence he acquired can be used at a trial of a suspect to establish his guilt . . . . Additionally, a suspect or defendant cannot successfully sue the officer, the prosecutor, or the judge for damages even if one of them makes a mistake. By contrast, if that same suspect made a reasonable mistake in believing that his actions were lawful—a mistake that any reasonable person would have made—he still can be sent to prison.”).

<sup>67</sup> Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 749 (2012) (explaining that among the justifications for the principle that members of the community have knowledge of the criminal law is the “expediency,” as the burden that proof of such knowledge might place on prosecutors would be such that the law would be extremely difficult to uphold).

<sup>68</sup> *Id.* at 725–27 (explaining that the maxim “ignorance of the law is no excuse,” is often phrased as “[e]very man is presumed to know the law,” and that this principle dates back, at least in some form, to Roman law, was then incorporated into English law, and now exists in the law of every level of court in the United States).

<sup>69</sup> See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”).

<sup>70</sup> Michael Anthony Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 144–45 (2014) (describing the exceptions to the “ignorantia legis neminem excusat” principle, such as when the statute includes legal knowledge as an element and in certain crimes of omission, and critiquing the ancient principle as unworkable in light of the enormous number of complex and obscure laws in the modern United States).

expected to be aware of the criminal law. Members of society are further assumed to understand the legal consequences of their criminal acts; the purported efficacy of lengthy sentences and capital punishment hinge, at least in part, on the deterrent effect that public knowledge of these consequences should carry.<sup>71</sup>

Courts also expect citizens to be cognizant of their constitutional rights. To be sure, in some contexts, such as pleading guilty in a criminal case and foregoing trial or consenting to speak to police while in custody, the voluntariness of an individual's waiver of constitutional rights depends in part on whether that waiver was knowing, intelligent, and voluntary.<sup>72</sup> In such contexts, police officers and judges are charged with providing the individual with a written or oral recitation of his or her rights.<sup>73</sup> In many circumstances in which constitutional rights are implicated, however, government actors are not required to inform the community member of the applicable constitutional law,<sup>74</sup> and, in some situations, a person must clearly and on her own volition invoke a constitutional right in order to be shielded by it.<sup>75</sup> In reaching these conclusions, perhaps courts believe that community members knew or should know the law, or perhaps courts are entirely unconcerned about whether the community member at issue possessed such

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<sup>71</sup> See William T. Pizzi, *Understanding the United States' Incarceration Rate: What Has Caused Prison Sentences to Climb So Sharply and Consistently in the Last Four Decades?*, 95 JUDICATURE 207, 207–08 (2012) (discussing the history of the deterrence theory of punishment in the United States).

<sup>72</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Parke v. Raley*, 506 U.S. 20, 28–29 (1992) (“It is beyond dispute that a guilty plea must be both knowing and voluntary. . . . That is so because a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one’s accusers, and the privilege against self-incrimination.”).

<sup>73</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 237–38, 242 (1973) (explaining that Supreme Court precedent requiring a “knowing and intelligent” waiver of constitutional rights, “has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial,” such as “the right to confrontation, to a jury trial, and to a speedy trial, and the right to be free from twice being placed in jeopardy,” as well as “trial-type situations, such as . . . the waiver of counsel in a juvenile proceeding.” The “knowing and voluntary” waiver standard does not apply in the Fourth Amendment context, however, as “[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial”).

<sup>74</sup> See, e.g., *id.* at 227 (holding that a person’s knowledge of his or constitutional right to refuse a police request to conduct a warrantless search is a factor in determining whether the consent was voluntary or the result of duress or coercion, but “the government need not establish such knowledge as the *sine qua non* of an effective consent”).

<sup>75</sup> See, e.g., *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (holding that a man who was voluntarily speaking with police without having been Mirandized, but who fell silent after being specifically questioned about a murder weapon, could have his silence used against him at trial; the Fifth Amendment did not apply because he simply “stood mute” and did not “expressly invoke the privilege against self-incrimination in response to the officer’s question”).

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legal knowledge.<sup>76</sup> In either case, in the words of the Supreme Court, “a citizen who lacks knowledge of his basic constitutional rights has only himself to blame.”<sup>77</sup>

In the Fourth Amendment seizure context, as with other areas of the law, courts do not require police officers to notify civilians that they have the right to terminate the encounter, and the lack of such notice is not dispositive in determining whether a reasonable person would feel free to ignore the officer’s requests or otherwise end the interaction.<sup>78</sup> At least implicitly, therefore, a reasonable person is one who knows that under the Constitution, some interactions with the police are merely consensual encounters that civilians may end at any time,<sup>79</sup> and one who is also able to accurately identify when the encounter has escalated into a seizure.<sup>80</sup>

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<sup>76</sup> Young & Munsch, *supra* note 53, at 448 (noting in relation to the holding in *Salinas* that “[t]wo conclusions are possible: either the Court believed it was realistic for someone in *Salinas*’s position to have this level of rights knowledge, or the Court knew that this level of rights knowledge might be unrealistic, but found this unproblematic (or simply did not know and did not care)”).

<sup>77</sup> See *Kentucky v. King*, 563 U.S. 452, 470 (2011) (stating that the people within a dwelling who, rather than refusing entry to police who knocked on their door without a warrant, “choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue”); see also Young & Munsch, *supra* note 53, at 447 (arguing that “absent unconstitutional coercion, [a person’s] decision about whether to assert a right he knows he possesses is a product of his own ratiocination”).

<sup>78</sup> *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (“Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed.”).

<sup>79</sup> See *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (citations omitted) (“The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.”).

<sup>80</sup> Civilians are held accountable for misidentifying when an encounter has become a seizure, and attempts to refuse requests or to otherwise terminate the encounter after a seizure has occurred can lead to charges such as resisting arrest or preventing officers from discharging their duty, among others. See Monu Bedi, *The Asymmetry of Crimes by and Against Police Officers*, 66 DUKE L.J. ONLINE 79 (2017) (discussing enhanced penalties for crimes against police officers). This is the case despite the Supreme Court’s acknowledgement that “it is not always clear just when minimal police interference becomes a seizure.” *Tennessee v. Gardner*, 471 U.S. 1, 7 (1985).

Further, courts do not treat the fact that the person did not terminate the encounter—as most people do not<sup>81</sup>— as evidence that the person did not feel reasonably free to do so. Rather, judges tacitly, if not overtly, assume that a reasonable person in the same circumstances would know her right to refuse the officer's requests and any continued interaction with law enforcement was consequently voluntary.<sup>82</sup> Courts further assume that the police officers involved in the seizure have an understanding of criminal law as well as knowledge of the constitutional and statutory parameters surrounding their interactions with the public, although, as noted previously, officers are also permitted to be reasonably mistaken about some aspects of the law.<sup>83</sup>

The presumption that members of society have both knowledge of the substantive law and an understanding of how it is applied, while ubiquitous in our legal system, is not an evidence-based conclusion.<sup>84</sup> According to a recent study addressing the level of legal knowledge possessed by members of the public, most people in the United States have a limited understanding of the law and the legal system.<sup>85</sup> Further, even people who have a grasp of

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<sup>81</sup> Because the majority of people comply with police requests and demands, most seizure analyses involve circumstances in which the person contacted by the police did not end the interaction. See Alisa M. Smith *et al.*, *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285, 291 (2013) (relating the results of a study that demonstrated that "upon an encounter with security, not one of the eighty-three people during the four stages of the encounter terminated the encounter with, walked away from, or ignored the officers. One hundred percent of those encountered complied through every stage of the interaction. Not a single individual even questioned the officer's authority or asked whether he had to comply. Gender, race, or situational factors (including the number of officers, location of the encounter, or time of day) did not matter.").

<sup>82</sup> See Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 296 (2016) (explaining that the "United States Constitution not only entrenches rights to resist the police, but also requires civilians to resist policing precisely as the means of asserting those rights. The right to decline a police encounter, or police officer's request to search, or police officer's demand to answer questions on the street or at the front door, or during an interrogation requires the public to refuse to comply by walking away, or remaining silent, or calling for a lawyer. To fail to take these non-compliant measures negates those rights.").

<sup>83</sup> *Heien v. North Carolina*, 135 S. Ct. 530 (2014). Police officers can rely on reasonable mistakes of the law when forming reasonable suspicion, such as in *Heien*, when an officer stopped a vehicle for a brake light violation based on a misunderstanding of a statute at issue that was confusingly worded. See Larkin, Jr., *supra* note 65, at 72 (discussing areas of the law, such as in the reasonable-mistake exception to the exclusionary rule, in which the law provides leeway for "reasonable, honest" mistakes by government officials); Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 70 (2011) (describing judicial "willingness to excuse police mistakes of law").

<sup>84</sup> Young & Munsch, *supra* note 53, at 449 (discussing the historic lack of significant quantitative and qualitative data regarding citizen rights knowledge and rights assertion, and reviewing the results of the studies that do exist).

<sup>85</sup> *Id.* at 462-66 (reporting the findings of their own study regarding rights knowledge and rights assertion, specifically that people are largely unaware of their rights, and "when

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a constitutional right or of a particular area of the law—such as the “right to remain silent” when questioned by the police or the definition of a “criminal act”—commonly misunderstand its scope or application.<sup>86</sup> In the seizure context, for example, people are often unaware that they are permitted to terminate *any* encounter with the police or that they may refuse some police requests.<sup>87</sup> Studies also show that even if people are aware that they are permitted to terminate encounters with the police, many are afraid to do so.<sup>88</sup> Indeed, common sense tells us that assuming a person without legal training has a meaningful comprehension of our complex laws and legal institutions is, at best, a legal illusion. Nevertheless, courts, scholars, and others assert the necessity and value of citizens’ understanding of the law, both for the efficacy of the legal system and because such knowledge is essential to an involved and functioning citizenry.<sup>89</sup>

In the Fourth Amendment seizure analysis, as in other areas of the law, courts have assumed that both a reasonable police officer and a reasonable civilian would be aware of the relevant law implicating the interaction. Despite this fundamental assumption, courts have not recognized or explored the implications of citizen knowledge of the law governing police misconduct in assessing whether a reasonable person would feel free to terminate the encounter. This Part now turns to the question of why courts

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they try to figure out which rights they possess, the current procedural regime leads them to perform even worse than chance.” Interestingly, rights knowledge is “not correlated with demographic factors such as race, social class, or even prior experience as a subject of criminal investigation,” although the “willingness to assert rights is positively correlated with social position”).

<sup>86</sup> *Id.* at 473–74 (providing an overview of studies demonstrating that “not only do people not know their rights, but they also hold misconceptions that lead them to incorrect conclusions . . . the knowledge people *do* have appears to lead them astray”).

<sup>87</sup> Kessler, *supra* note 48, n.142 (reporting that 60% of people studied were not aware of their rights in the seizure context).

<sup>88</sup> Nadler, *supra* note 47, at 155 (stating that “empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures”).

<sup>89</sup> See Ahson T. Azmat, *What Mistake of Law Just Might Be: Legal Moralism, Liberal Positivism, and the Mistake of Law Doctrine*, 18 *NEW CRIM. L. REV.* 369, 370–71 (2015) (describing the Positivism justification for the Mistake of Law doctrine, originating with Justice Holmes, as “arguing that it is designed to encourage individuals to acquire legal knowledge—that is, to undertake research in order to learn what the law is. On this account, by warning individuals that ignorance shall not excuse, the doctrine strips them of an incentive to engage in ‘strategic heedlessness’ or ‘willful ignorance.’”); Meese & Larkin, Jr., *supra* note 67, at 726–27 (“[A]n old criminal law proverb is the proposition that ‘Ignorance of the law is no excuse,’ which sometimes is phrased as a rule of evidence that ‘Every man is presumed to know the law.’ The ignorance-of-the-law rule traces its lineage back to Roman law. The English common law courts adopted the rule, from whence it came to America. In this country, state and federal courts, including the Supreme Court of the United States, as well as criminal law treatise writers, have long endorsed that rule.”).

have failed to address this type of legal knowledge in the seizure context, and outlines the law governing police wrongdoing that a reasonable person might be presumed to understand.

B. *Knowledge of the Law Governing Police Misconduct*

In the application of the seizure analysis, courts, at least implicitly, characterize a reasonable person as one who views the objective circumstances of that encounter within the framework of the applicable law.<sup>90</sup> The question of whether a reasonable person would understand those circumstances—flashing lights, demanding tones, and so forth—as denoting a limitation on her freedom to terminate the encounter necessarily depends on knowledge that such freedom exists in the first place. Further, courts assume that a reasonable person is one who understands that, once an encounter has escalated to a seizure, there are legal consequences when an individual fails to comply with police demands. That is to say, if a person who had been legally seized attempted to elude police, she could not take refuge in legal ignorance as a defense to criminal charges that might ensue, such as eluding police or resisting arrest.<sup>91</sup>

The judicial assumption of relevant legal knowledge in the seizure analysis does seem to have its limits. In conducting this inquiry, courts generally presume, implicitly if not explicitly, that a reasonable person is one who believes that the police themselves will comply with the law. Courts undertaking a seizure inquiry thus do not consider whether a reasonable person would contemplate the possibility that assertion of her constitutional rights could be met with unjustified police violence or with groundless stops or arrests, and whether the police would face legal consequences for such acts. The ‘race-neutral’ reasonable person appears instead to be one who believes that if she complies with the law and asserts the appropriate constitutional rights at the appropriate time and in the appropriate way, the police will, in turn, respect that assertion and take no further action.<sup>92</sup> This

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<sup>90</sup> Evan M. McGuire, *Consensual Police-Citizen Encounters: Human Factors of a Reasonable Person and Individual Bias*, 16 SCHOLAR ST. MARY’S L. REV. & SOC. JUST. 693, 707–08 (2014) (In undertaking the objective reasonable person analysis in the seizure context, “courts assume a reasonable person . . . is aware of the Fourth Amendment’s nuances and attendant abilities granted to government officers under each level of scrutiny . . . . Furthermore, in the Supreme Court’s estimation, a reasonable person will consistently resist the advances of an aggressive officer seeking consent, cognizant that refusing to consent cannot create its own reasonable suspicion.”).

<sup>91</sup> See Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1504 (2007) (outlining possible consequences to civilians for failure to obey a police officer).

<sup>92</sup> Indeed, the Supreme Court has made clear that the police may not use the fact that a person asserts his rights to refuse to cooperate with the police as grounds for detention if other grounds do not exist. See *United States v. Mendenhall*, 446 U.S. 544, 556 (1980).



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largely unspoken assumption is presumably based on the court's belief that a reasonable person would have faith in the officer's inherent integrity and confidence that the officer is legally prevented from acting improperly.<sup>93</sup>

Indeed, rather than asking whether objective legal knowledge might affect a reasonable person's assessment of her freedom to terminate a police encounter, courts seem to have treated concerns regarding police misbehavior as a subjective viewpoint—one based on the individual's personal experiences or beliefs, and thus beyond the scope of the objective reasonable person analysis.<sup>94</sup> This perspective reflects the race-adverse nature of the seizure analysis; under this approach, an objective, 'race-neutral' reasonable person would not fear police misconduct nor ask whether the law prevents it, as such considerations are the subjective, individualized concerns of people of color.

This Article suggests that the combination of the objective reasonable person standard, the legal fiction that members of society are cognizant of the applicable law, and the judicial commitment to the value of 'race-neutrality' in the seizure analysis might provide an unexpected opportunity for a more racially realistic Fourth Amendment jurisprudence. If the seizure analysis is one that does not consider race, then a reasonable person within that analysis should be one who looks objectively at the law as it applies to police transgressions and assumes it is applied 'race-neutrally.' A reasonable person assessing her freedom to terminate an encounter with the police might thus ask: (a) if I assert my right to terminate this encounter, what law should deter the officer from seizing me without cause? and (b) if I assert my right to terminate this encounter, what law should deter the officer from using unjustified force against me?

Police officers are expected, of course, to abide by the law. If they fail to do so, the law provides for a variety of consequences, including the exclusion of illegally obtained evidence at the arrested person's criminal trial; criminal charges; civil penalties; and internal police sanctions.<sup>95</sup> Yet, a

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<sup>93</sup> See Ross, *supra* note 50, at 339 (noting that the reasonable person test in the seizure analysis "assumes a certain level of trust. Not only does the Court assume that the police will not punish those who try to leave in determining whether there has been a consensual encounter, but the Court also assumes that individuals trust the police will not punish them for asserting this right. The data proves the assumption of trust is unfounded.").

<sup>94</sup> Maclin, *supra* note 53, at 248 ("[I]nstead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion is naive, it produces distorted Fourth Amendment rules and ignores the real world that police officers and black men live in.").

<sup>95</sup> See, e.g., Brent E. Newton, *The Real-World Fourth Amendment*, 43 HASTINGS CONST. L.Q. 759, 802–03 (2016) ("Traditionally, with respect to Fourth Amendment violations, there are two main types of remedies: 'suppression' of the 'tainted' evidence in a criminal prosecution ('the exclusionary rule') and/or a civil remedy such as money damages or an

close look at the ways in which these areas of the law have evolved demonstrates that officers face little risk of suffering any serious penalty for misconduct in the Fourth Amendment—or any other—context.<sup>96</sup> This is so both because the risk of detection of Fourth Amendment violations is low,<sup>97</sup> and because the legal standards applied to police misconduct provide a great deal of protection for police officers suspected of violating the law. A reasonable person with knowledge of the law would thus be aware that the applicable law does not serve to reliably deter or punish police wrongdoing.<sup>98</sup>

This Part will turn to an overview of the law that addresses police misconduct, and, in so doing, identify what a reasonable person might be presumed to understand about the available legal remedies and deterrents to police wrongdoing.

### 1. Evidence Exclusion

Since the Supreme Court's ruling in *Weeks v. United States* over one hundred years ago, evidence either obtained as a direct result of, or derived from, searches or seizures conducted in violation of the Fourth Amendment cannot be admitted against the defendant at a criminal trial.<sup>99</sup> The Supreme Court and lower courts viewed the rule as arising from the Fourth

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injunction in a civil rights case. According to the Supreme Court, however, violations of the Fourth Amendment do not automatically mean that either of these remedies will be available. As discussed below, the Court has placed numerous limits on the remedies available for a Fourth Amendment violation.”); Corinthia A. Carter, *Police Brutality, The Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521 (2017) (describing federal, state, local, and administrative remedies for police misconduct, and their failure to prevent police brutality).

<sup>96</sup> Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 755 (2011) (“Professor Anthony Amsterdam has observed that when a constitutional remedy is too severe, many judges will ‘prefer the disease.’ At this point in the history of the Fourth Amendment, we are in danger of experiencing an inversion of this problem. A remedy is so rarely available—either in habeas, civil actions, or criminal litigation—that courts may soon regard diagnosing the precise disease, if any, as a strenuous and avoidable chore.”).

<sup>97</sup> See Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103, 1115–20 (2017) (discussing the difficulty of detecting when law enforcement officers violate the Fourth Amendment).

<sup>98</sup> See Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 470, 477–78 (2010) (applying economic theory to the laws intended to deter police misconduct, and concluding that if the expected benefits of such misconduct outweigh the expected costs, “the rational police officer will engage in the misconduct.” Because the expected costs related to police wrongdoing is low in all areas of potential risk—evidence exclusion, civil suits, internal sanctions, and so forth—“none of these potential sanctions acts as a deterrent. Further, and perhaps counterintuitively, some even encourage police violations of suspects’ constitutional rights.”).

<sup>99</sup> *Weeks v. United States*, 232 U.S. 383, 398 (1914) (applying the exclusionary rule to federal law enforcement); *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (establishing the “fruit of the poisonous tree” doctrine); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to states).

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Amendment, and it was understood to both protect individual rights and to ensure that the justice system did not rely on evidence tainted by illegal activity.<sup>100</sup>

The application of this principle was once fairly automatic: if the court identified a seizure or search as occurring in violation of the Fourth Amendment, the evidence “secured incident to that violation” could not be used by the government to prove the charge against the defendant at trial.<sup>101</sup> Over time, however, the Supreme Court redefined the rule as a remedy created by the Court rather than one arising from the Constitution, and re-characterized the rule’s primary value as deterring police misconduct.<sup>102</sup> The deterrence-based focus has accompanied, or perhaps instigated, a substantially more convoluted application of the exclusionary rule. The correlation between illegal police conduct and evidence suppression has grown more and more attenuated, as courts seek to balance what they view as the appropriate level of police deterrence (not too much, so police are overly afraid to act, and not too little, so police have no limitations) against the judicially-identified social costs of evidence exclusion.<sup>103</sup> In the words of one commentator on contemporary Fourth Amendment exclusionary analysis, “[n]othing else matters except deterring police misconduct and the countervailing social cost of excluding probative evidence.”<sup>104</sup>

This cost-benefit analysis has yielded a Fourth Amendment exclusionary jurisprudence that commentators have referred to as “a mess.”<sup>105</sup> Exceptions to the cut-and-dried approach to exclusion of evidence derived from unconstitutional searches and seizures have proliferated. Under the inevitable discovery doctrine, for example, evidence obtained as the result of illegal police conduct will be admitted at trial if it would have “ultimately or inevitably” lawfully been discovered anyway.<sup>106</sup> In such

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<sup>100</sup> Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 756–57 (2008).

<sup>101</sup> *Arizona v. Evans*, 514 U.S. 1, 13 (1995); Kyle Robbins, Davis, Jones, and the Good-Faith Exception: Why Reasonable Police Reliance on Persuasive Appellant Precedent Precludes Application of the Exclusionary Rule, 82 MISS. L.J. 1175, 1179 (2013) (discussing the history of the exclusionary rule).

<sup>102</sup> Milhizer, *supra* note 100, at 757.

<sup>103</sup> For this reason, the exclusionary rule does not apply to hearings other than trials, as courts have assumed that the deterrent value of excluding evidence in, for example, grand jury proceedings, deportation hearings, and federal civil tax proceedings would be outweighed by the loss of the use of the probative evidence. See WAYNE LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(f) (5th ed. 2016).

<sup>104</sup> Milhizer, *supra* note 100, at 759.

<sup>105</sup> Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 821–22 (2013).

<sup>106</sup> *Nix v. Williams*, 467 U.S. 431, 447 (1984); Marceau, *supra* note 96, at 734. To benefit from the inevitable discovery doctrine, the government must prove by a preponderance of the evidence that, despite the illegality of the search, the evidence should be admitted into trial

circumstances, the Supreme Court concluded that the evidence should be admitted, as the disadvantage of excluding evidence that officers could have obtained legally outweighs whatever deterrent benefit exclusion might have carried.<sup>107</sup> In addition, under the good faith exception to the exclusionary rule, officers may reasonably rely on information that later turned out to be incorrect, such as a court-issued warrant that was found to be constitutionally inadequate,<sup>108</sup> an inactive warrant mistakenly recorded as active by a clerk in a court database,<sup>109</sup> and binding case law that was later overturned.<sup>110</sup> The good faith exception rests on the reasoning that officers will not be deterred from future misconduct by exclusion of evidence obtained as a result of reasonable reliance on wrong information, and thus the cost of the exclusion outweighed the benefit.<sup>111</sup>

Far from the straightforward application of the exclusionary rule in its earlier years, under its current application the Supreme Court has made clear that exclusion of evidence is considered a “last resort.”<sup>112</sup> In *Herring v. United States*, the Court explained that, “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system”<sup>113</sup>—a price that includes allowing the guilty and dangerous to escape justice.<sup>114</sup> The deterrent benefit must be

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because the police could have found it through legal means, although they did not actually do so. See 68 Am. Jur. 2d, Searches and Seizures § 174, *Inevitable Discovery Exception*. Perhaps, for example, the evidence would eventually have been seen in plain view, or perhaps the police would ultimately have been legally entitled to conduct an inventory of the car in which the evidence was improperly found.

<sup>107</sup> Nix, *supra* note 106, at 443-44.

<sup>108</sup> United States v. Leon, 468 U.S. 897 (1984).

<sup>109</sup> Arizona v. Evans, 514 U.S. 1 (1995).

<sup>110</sup> Davis v. United States, 564 U.S. 229 (2011).

<sup>111</sup> Kinports, *supra* note 105, at 825-28 (providing an overview of good faith exception caselaw, and noting the Court’s reasoning in *Davis* that “exclusion in those circumstances ‘deters no police misconduct’ and therefore ‘suppression would do nothing to deter’ the police”).

<sup>112</sup> In *Hudson v. Michigan*, the Supreme Court did not exclude evidence obtained by police officers who violated the procedure for a ‘knock-and-announce’ execution of a search warrant. 547 U.S. at 591. The Court, stating that the suppression of evidence “has always been our last resort, not our first impulse,” reasoned that the deterrent value of excluding evidence for such a violation was low, because police officers did not have much to gain from failing to abide by knock-and-announce procedures and therefore would be likely to comply with them even absent the risk of evidence exclusion. *Id.* at 591.

<sup>113</sup> 555 U.S. 135, 144 (2009). In *Herring v. New York*, a police officer arrested a person based on an inactive warrant that was mistakenly recorded as active in a police computer system. *Id.*

<sup>114</sup> *Id.* at 141. See FRIEDMAN, *supra* note 13, at 81-83 (explaining that the exclusionary rule is affected by the fact that judges in criminal cases see a “biased sample”—only those searches in which evidence was discovered, not the many in which nothing was found—and “because judges don’t want to let a bad guy go, they bless what the police did in that case, no

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extraordinarily high, therefore, to outweigh the magnitude of that cost. The *Herring* Court then introduced a *mens rea* element to the exclusionary rule analysis, holding that police errors that constituted “isolated negligence”—rather than the more serious “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence”—would not be meaningfully deterred by evidence exclusion.<sup>115</sup> These and other exceptions to the exclusionary rule have triggered an avalanche of scholarship and commentary, and the proliferation of such exceptions has caused courts and others to question what, if any, power the exclusionary rule holds today.<sup>116</sup>

A reasonable person with an understanding of the exclusionary rule would, at minimum, know the following things: that the exceptions to the rule are myriad, and it is difficult to predict when such an exception will apply; that courts have determined that the rule does not act as a sufficient deterrent to justify evidence exclusion in a wide variety of situations, including those in which officers have acted negligently or failed to know or follow the law; and that exclusion of evidence will occur only as a last resort. A reasonable person with this legal knowledge might rationally conclude that police officers would not be meaningfully deterred from conducting an illegal seizure by fear of the risk of evidentiary exclusion.<sup>117</sup>

## 2. Civil Consequences

As the exclusionary rule has waned in power, courts have pointed to the existence of civil remedies such as injunctive relief and money damages as providing a more powerful deterrent to police misconduct than exclusionary principles.<sup>118</sup> There are, however, serious questions as to whether civil remedies serve to limit police wrongdoing, starting with the lack of clear legal standards regarding police behavior.

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matter how out of line it was.” Once that blessing has occurred, it provides precedent that condones the same behavior in future cases.)

<sup>115</sup> *Herring*, 555 U.S. at 137, 144.

<sup>116</sup> FRIEDMAN, *supra* note 13, at 83 (“Not only does judicial distaste for the effect of the exclusionary rule lead to bad decisions, it also is leading the Supreme Court to systemically dismantle the exclusionary rule itself.”); *See also* Kinports, *supra* note 105, at 832 (“[C]ommentators across the political spectrum representing a variety of jurisprudential disciplines have acknowledged that deterrence is not susceptible to empirical proof and thus at some level is largely a matter of conjecture.”).

<sup>117</sup> This conclusion would be bolstered if the person was further aware that the vast majority of criminal cases are resolved by plea bargain, thus rendering the exclusionary rule, which attaches at trial, moot. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

<sup>118</sup> *Hudson v. Michigan*, 547 U.S. 586, 596–99 (2006).

As Professor Barry Friedman has argued, courts are comfortable providing guidance as to what police are allowed to do, but tend to avoid bright-line rules when it comes to imposing limitations on police power.<sup>119</sup> In evaluating whether the police violated the law, therefore, courts often consider all the circumstances at issue rather than setting definitive parameters limiting police conduct.<sup>120</sup> Here, as with the exclusionary rule, judicial decision-making is influenced by the desire to deter police misconduct while not going so far that police become afraid to act at all.<sup>121</sup>

For example, in *Graham v. Connor*, the Supreme Court noted that police officers are allowed to use “some degree of physical coercion or threat thereof” when effecting a seizure. The Court held that, when considering excessive force claims against officers, courts should evaluate the use of that force under the objective Fourth Amendment reasonableness standard, which involves a balancing of the intrusion on the civilian’s Fourth Amendment rights against the “countervailing governmental interests at stake.”<sup>122</sup> Reasonableness is judged from the perspective of a police officer on the scene who is making “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>123</sup> Even cases which appear to establish a bright-line rule, such as *Tennessee v. Garner*’s prohibition against officers using deadly force to apprehend unarmed, non-dangerous fleeing suspects, involve balancing tests and circumstance-focused analyses that give the benefit of the doubt to police officers.<sup>124</sup> The lack of clear guidelines

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<sup>119</sup> FRIEDMAN, *supra* note 13, at 86–87 (emphasis in original) (arguing that “the Supreme Court is happy to fashion clear rules telling the police what they *can* do, but terrified of telling them what they *cannot*,” and describing the abundance of bright line rules regarding permissible police actions—such as the power to arrest for any legal violation, including those that carry no incarceration penalties, as established by *Atwater v. Lago Vista*, 532 U.S. 318 (2001), and the dearth of such clear rules proscribing police actions).

<sup>120</sup> *Id.* at 87 (emphasis in original) (“But when asked to formulate a rule for what police may *not* do, the justices invariably choke. All of a sudden, clear rules are a problem . . . [I]t is sheer delusion to believe the courts are regulating the police when no one else does. The courts aren’t either.”).

<sup>121</sup> *Id.* at 84 (“Like Goldilocks’s porridge, when it comes to deterring police misconduct, one wants to get it exactly right.”).

<sup>122</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>123</sup> *Id.* at 396–97. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 223–24 (2017) (contending that the use-of force balancing test requires courts to look at the “facts known to the officer at the moment that force is employed.”). The test does not take into account what the officer may have done to escalate the situation, nor does it consider what steps the officer could have taken to avoid the use of force, and thus is neither truly a totality of the circumstances test nor a reasonableness test.

<sup>124</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that “[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead,” but “where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly

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regarding police misconduct thus makes it more difficult for plaintiffs to establish that the police violated a person's Fourth Amendment rights.<sup>125</sup> Complicating the situation still further is the fact that legal routes to remedies for such misconduct are convoluted and often blocked entirely.

A basic outline of the state of the law of civil remedies for police wrongdoing reveals its complexities and limitations.<sup>126</sup> A person who has been harmed by police officers and seeks money damages, for example, must navigate a byzantine set of legal standards. Except in narrow circumstances, that person cannot sue the federal or state government in federal court because those entities are protected by sovereign immunity.<sup>127</sup> She can sue federal,<sup>128</sup> state,<sup>129</sup> and local officials in their individual capacities, although local officials can only be sued for damages if the agent at issue was acting pursuant to an official "policy or custom"<sup>130</sup>—a standard that is extremely difficult to meet.<sup>131</sup> Further, in suits seeking retrospective damages for individuals in their individual capacities, the plaintiff faces the additional hurdle of overcoming qualified immunity, a doctrine which protects government officials from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

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force."). See ZIMRING, *supra* note 3, 122–23 (discussing the fact that although Garner established decades ago that police may not use lethal force to seize a person in the absence of serious risk of harm to the officers or community, the Supplemental Homicide Reporting system within the FBI's Uniform Criminal Reporting Section lists all killing of felons by police as "justifiable homicides").

<sup>125</sup> See *Scott v. Harris*, 550 U.S. 372, 382 (2007) (In evaluating whether a police officer violated the Fourth Amendment though his use of force, courts do not have recourse to an "easy to apply legal test," but must instead "slosh . . . through the factbound morass of 'reasonableness.'"); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.").

<sup>126</sup> For a helpful and thorough summary of the law governing civil litigation related to allegations of Fourth Amendment violations by the police, see Marceau, *supra* note 96, at 717–30.

<sup>127</sup> See *Hans v. State of Louisiana*, 134 U.S. 1, 13 (1890) (holding that a person cannot sue a state in federal court without the state's consent); U.S. CONST. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

<sup>128</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>129</sup> 42 U.S.C. § 1983 (2012).

<sup>130</sup> *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978) ("We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

<sup>131</sup> Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1776–77 (2016) (describing the policy and custom requirement as a "near-impossible" standard).

would have known.”<sup>132</sup>

After the Supreme Court’s decision in *Pearson v. Callahan*, courts determining whether a government official is protected by qualified immunity may first decide if a right was “clearly established” before determining whether it was a right anchored in the Constitution;<sup>133</sup> indeed, if a court determines that the right was not clearly established, it often does not address the question of constitutionality at all.<sup>134</sup> As critics have observed, however, courts generally find that a rule or law was clearly established at the time of the officer’s conduct only when a previous case or cases in the same jurisdiction found fault with almost identical police behavior.<sup>135</sup> This cramped approach to the ‘clearly established’ analysis has expanded qualified immunity protections to such a degree that the Supreme Court has declared that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”<sup>136</sup> As a practical matter, furthermore, the vast majority of officers are indemnified by the jurisdictions in which they work, and thus even if damages are imposed against them they are borne by the municipality and not the individual.<sup>137</sup>

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<sup>132</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Some jurisdictions also ask whether the officer’s actions were objectively reasonable in light of the established law, which “makes it even harder for plaintiffs to succeed against defendant officers.” Cover, *supra* note 131, at 1810. In addition to qualified immunity, some government officials are granted absolute immunity from suit. See, e.g., Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (granting legislators absolute immunity under § 43 (now § 1983)); see also Alan Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 234–35 (2006) (describing the absolute immunity doctrine).

<sup>133</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Court in *Pearson* overruled *Saucier v. Katz*, in which the Court mandated that lower courts determine whether a constitutional violation occurred before determining whether the right involved was clearly established. 533 U.S. 194, 201 (1994). For a review of the history of the qualified immunity doctrine, and an empirical analysis of the impact of the order of analysis on acknowledgement of constitutional rights, see Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009).

<sup>134</sup> Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 71 (2016) (“Since *Pearson*, the Court has repeatedly exercised this discretion, sometimes opting to decide the constitutional question and sometimes not.”); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523 (2010) (reviewing cases in which courts addressed the constitutional violation question and considering the impact of such consideration on the grant of qualified immunity).

<sup>135</sup> Cover, *supra* note 131, at 1792–93 (explaining that the Supreme Court “has defined ‘clearly established’ so as to require that case law involve an almost exact same set of facts and that the case come from the Supreme Court or a circuit court of the same jurisdiction. The clearly established law test’s rigid specificity requirement has proven difficult for plaintiffs to surmount. The Court has admonished courts not to look to generalities of law but only to precedents mirroring the complaint’s set of facts.”).

<sup>136</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>137</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–13 (2014) (reporting study results which indicated that, in forty-four jurisdictions covered by the



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Plaintiffs in police brutality cases thus face significant barriers to success.<sup>138</sup> This is not to say that police departments never pay damages or undertake institutional changes as a result of lawsuits; these consequences certainly occur, and in some cases cost jurisdictions millions of dollars.<sup>139</sup> There is no evidence, however, that even these large damage amounts deter police wrongdoing. Further, because officer misconduct, including the commission of acts of violence against community members, is rarely met with legal consequences, in the words of Professor Franklin Zimring, “police killings . . . are usually dirt cheap.”<sup>140</sup>

The applicable law regarding injunctive or declaratory relief is similarly difficult to navigate. A person may bring a lawsuit for declaratory or injunctive relief against a federal,<sup>141</sup> state,<sup>142</sup> or local<sup>143</sup> official in his official capacity—although again, only if the local government employee was acting pursuant to agency custom, policy, or practice.<sup>144</sup> While the qualified immunity doctrine does not apply in suits seeking injunctive or declaratory relief from the actions of federal or state agents acting in their official capacity, plaintiffs in such cases face a different obstacle to litigation. Because they are asking for prospective relief, they must demonstrate that, under the standing requirement of Article III of the United States Constitution, there is a ‘case’ or ‘controversy’ that the court is capable of resolving.<sup>145</sup> Plaintiffs can only meet this standard if they can demonstrate that an injury is imminent, not hypothetical.<sup>146</sup>

The Court’s ruling in *City of Los Angeles v. Lyons* set a high bar for the establishment of imminent injury. In *Lyons*, the Court held that, despite substantial evidence that Los Angeles police officers routinely applied

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study, police officers paid only 0.02% of damages recovered by plaintiffs in civil rights suits as a result of indemnification).

<sup>138</sup> Cover, *supra* note 131, at 1777 (stating that, as a consequence both of the qualified immunity doctrine and the Supreme Court’s focus on the police perspective when assessing allegations of excessive force, it is “exceedingly difficult for victims of police brutality to overcome defendants’ motions to dismiss or motions for summary judgment.”).

<sup>139</sup> See Rachel Moran, *Ending the Internal Affairs Farce*, 64 *BUFF. L. REV.* 837, 850–51 (2016) (reviewing monetary awards paid in several high-profile police misconduct cases).

<sup>140</sup> ZIMRING, *supra* note 3, at 120; *id.* at 126–28 (describing the lack of data on how many lawsuits are filed related to police killings, how many of those lawsuits are successful, the range of settlement outcomes, and the extent to which the government pays any damages imposed, but noting that most of the “immediate costs are imposed on the victims of violence and their families”).

<sup>141</sup> 28 U.S.C. § 1331 (2012).

<sup>142</sup> 42 U.S.C. § 1983 (2012); *Ex parte Young*, 209 U.S. 123 (1908).

<sup>143</sup> 42 U.S.C. § 1983 (2012); *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

<sup>144</sup> *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 37 (2010) (holding that the policy or custom requirement of *Monell* applies to suits for injunctive relief as well as damages).

<sup>145</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>146</sup> *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

chokeholds to members of the community, Mr. Lyons, who himself had been choked by an officer, could not establish “a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”<sup>147</sup> Without such a demonstration, Mr. Lyons did not establish standing to sue.<sup>148</sup> Such a challenging standing requirement has served to significantly impede litigation seeking injunctive or declaratory relief, as plaintiffs in such suits struggle to establish Article III standing.

A reasonable person with even a basic understanding of the law governing civil lawsuits involving police misconduct would know that police misconduct is not clearly defined, making it difficult for plaintiffs to establish that a legal violation has occurred, and the law either completely blocks the filing of suits or establishes extremely high barriers to plaintiff success. A person with this legal knowledge could then rationally conclude that police officers would not be meaningfully deterred from conducting an illegal seizure by fear of the risk of civil consequences.

### 3. Other Potential Penalties

A police officer who uses unjustified force or violence against a civilian could, like all members of society who violate the law, face criminal charges as a result of his actions.<sup>149</sup> In order for this to occur, a prosecutor must be willing to charge the officer and/or bring a case before a grand jury to obtain an indictment. The prosecution must also be willing to seek a conviction, which in the case of trial requires proof beyond a reasonable doubt that the officer is guilty of all elements of the crimes for which he is charged. These procedural hoops and protections apply to police as they do to all members of society, but charging and convicting police officers with crimes committed on the job has its own unique challenges due to the protections that the law and the legal system provide to law enforcement officers suspected of wrongdoing.

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<sup>147</sup> *Id.* at 105–06 (“In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.”).

<sup>148</sup> *Id.* at 107–12.

<sup>149</sup> *See* Bedi, *supra* note 80, at 82–83, n.20 (noting that the officer may be prosecuted under state or federal criminal law statutes, or might perhaps face consequences under “official oppression statutes,” which are “broadly worded laws that make it a crime for a police officer or other official to knowingly abuse her power,” or the close federal equivalent, prosecution under 18 U.S.C. § 242, which “subjects police officers to liability if they deprive a person of a constitutional right, which can include physical harm.”).

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First, prosecutors work closely with police officers, a connection that has caused observers to raise concerns regarding bias and conflicts of interest when DA's offices are called upon to investigate and prosecute law enforcement.<sup>150</sup> Prosecutors have provided police officers with a heightened level of process before making charging decisions or seeking an indictment, such as presenting detailed evidence to grand juries that includes the police officer's perspective and testimony that supports that perspective.<sup>151</sup> This approach is rarely undertaken in cases where the suspect is not on the police force. Further, in many jurisdictions, police are statutorily protected under a Law Enforcement Officers' Bill of Rights (LEOBOR) from particular methods of investigation at the hands of other officers, such as certain types of interrogation tactics.<sup>152</sup> LEOBOR statutes also provide benefits such as enforced delays between the act of suspected misconduct and the initiation of a police investigation.<sup>153</sup> Officers therefore receive a much higher standard of pre-trial protections and review than do community members suspected of criminal behavior, which bolsters the likelihood that officers will not be charged with crimes by prosecutors or indicted by grand juries.

Further, there are no bright-line rules regarding when an officer is justified in employing violence against a civilian. The legal standards regarding police use of force favor the police officer's perceptions of the encounter and the "split-second" decision-making inherent to police work.<sup>154</sup> The focus on the reasonableness of the police officer's decision to use force, a focus which takes into account the officer's perspective on the danger he faced—such as the nature of the neighborhood, the actions of the civilian, his feelings of fear, and so forth—frequently results in prosecutors, grand juries, and jurors finding that the use of force was justified.<sup>155</sup> While criminal

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<sup>150</sup> See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1147–48 (2016) (arguing that giving prosecutors responsibility for charging and trying police officers in the same jurisdiction constitutes an unwaivable conflict of interest).

<sup>151</sup> See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 750 (2016) (describing the type of process prosecutors "tend to give to police suspects, including thorough investigation and full evidentiary presentations to well-informed grand juries").

<sup>152</sup> Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1224–27 (2016) (discussing the protections provided to police by LEOBOR in at least fourteen states in regards to interrogation by police, including limitations on the number of officers who can conduct the interrogation, the restriction on the use of abusive language and the use of promises as an incentive to encourage the officer to speak, and the requirement that questioning take place during the day).

<sup>153</sup> Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officer's Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 212 (2005) (discussing the protections provided to police by LEOBOR statutes, including enforced delays before investigations can begin).

<sup>154</sup> See *Scott v. Harris*, 550 U.S. 372 (2007); *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>155</sup> See Carbado, *supra* note 52, at 1518–19 (discussing the ways that the reasonableness

convictions of police officers do occur, because police are guarded by extensive legal defenses and rarely convicted, a reasonable person could have substantial concerns about the criminal law's deterrent effect on police misconduct.

In addition to this knowledge, a reasonable person could be aware that police are also governed by, and may receive additional protections from, a multitude of laws that may impact police accountability, such as civil service and collective bargaining statutes.<sup>156</sup> Perhaps more attenuated from pure “knowledge of the law” is the reasonable person's awareness of possible sanctions imposed against wayward police officers by the police department itself. Here, too, the reasonable person would have reason to doubt that the possibility of internal police department sanctions serves as an effective deterrent to police misconduct. While police departments have internal review procedures in which departments investigate alleged misconduct by their own officers, such as civilian complaints, these procedures are critiqued as ineffective at best.<sup>157</sup> Problems with the systems, as Professor Rachel Moran has explained, include the imposition of byzantine requirements for the filing of civilian complaints, failure to follow up complaints with investigations, investigations in which departments apply high standards of proof and a proclivity to believe and support their fellow officers, and an unwillingness to impose sanctions on officers, even in cases of serious misconduct.<sup>158</sup> Independent review agencies, in which police departments receive oversight from people or organizations outside of law enforcement, do not fare much better, as they are often hampered by issues such as low staffing, a lack of access to the evidence needed to meaningfully review the case, and the inability to discipline officers found to have acted

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doctrine in excessive force cases “translate[s] [police] violence into justifiable force,” and noting that in trial “[t]he inquiry is . . . whether a reasonable person in the officer's position would have believed that the use of force was necessary. An officer's testimony that he/she feared for his/her life, that he/she was in a high-crime area, that it was late at night, and that he/she thought the suspect had a gun, will often be enough to support the conclusion that the officer acted reasonably”); Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 679–81 (2017) (discussing the ways that state criminal law—through the provision of a “public authority” defense—and federal criminal law analyze the reasonableness of or justification for police violence).

<sup>156</sup> Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764, 795–809 (2012) (addressing “the full web of federal, state, and local laws that govern the police outside of the context of criminal investigations,” and arguing that “courts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms”).

<sup>157</sup> See, e.g., Moran, *supra* note 139, at 854, 866–68 (discussing the ways in which “[a]llowing officers within the same police department to investigate each other presents a variety of problems throughout the entire complaint process, from intake to investigation to decision-making and discipline”).

<sup>158</sup> Moran, *supra* note 139, at 853–61.

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wrongfully.<sup>159</sup>

A reasonable person with an understanding of the criminal law or administrative procedures related to police wrongdoing thus would know that the protections afforded the police are derived from multiple legal sources, and proving that a police officer violated the law or police codes of conduct requires surmounting a variety of complex legal and procedural challenges. A reasonable person with this legal knowledge could then rationally conclude that police officers would not be meaningfully deterred from committing a wrongful act by fear of the risk of consequences within the criminal system or police departments themselves.

### III. LEGAL CONSCIOUSNESS AS RACE CONSCIOUSNESS

African American people and other people of color have long stated that interactions with police are deeply affected both by the fear of police misconduct and violence and a belief that such actions, even when unprovoked and unwarranted, carry no consequences to the officer. African American scholars, authors, and advocates have described the daily anxiety of living in a society in which police misconduct and violence goes unchecked and undeterred.<sup>160</sup> Under current Fourth Amendment seizure jurisprudence, courts do not engage with any aspect of these assertions. As described above, courts evaluating whether an officer had reasonable suspicion or probable cause to conduct a stop or seizure do not consider data involving police interactions with people of color or even, in most cases, the personal bias of the police officer. Further, the subjective fear of the civilian, even if based on specific experiences with the police, falls outside of the strict objective approach to the reasonable person standard. The lived experiences of people of color in interactions with the police are not just pushed to the margins, but are kept out of the analysis altogether.

But if courts explicitly assume that both civilians and police officers have knowledge of the law that governs interactions between law enforcement and members of the community, the marginalized perspective of people of color moves toward the center. This is so because all parties with such knowledge would be aware that laws that apply to police misconduct —laws that provide few clear limits on police behavior, are deferential to police decision-making, and byzantine in their application — provide little deterrent influence to those officers who act outside of Constitutional and statutory limits. All people stopped by the police should thus be assumed to understand what many African American people have

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<sup>159</sup> *Id.* at 868–82 (describing the reasons that independent review boards are often not an effective means of identifying or punishing police misconduct).

<sup>160</sup> *See, e.g.,* McMurtry-Chubb, *supra* note 6; DYSON, *supra* note 6, at 27; OGLETREE, *supra* note 6, at 115–241.

long been asking courts—and society as a whole—to recognize: that an encounter with the police is one in which police power is largely unchecked.

A. *Knowledge of the Law and the Reasonable Person's Freedom to Terminate a Police Encounter*

Advocates for reform have sought to persuade courts to consider the reasonable fear of police misconduct in the seizure analysis by demonstrating why failure to do so is dismissive of the racialized reality of police encounters.<sup>161</sup> African American people may be subjectively aware of the lack of legal accountability for police misconduct based on personal or community experience, because African American people are statistically more likely to experience that misconduct and its racially-influenced aftermath. People of color are far more likely to be stopped by police without reasonable suspicion, arrested without probable cause, and be assaulted or killed by police than are white people.<sup>162</sup> Police shootings of unarmed African American people have, on the public stage, remained unindicted by grand juries, uncharged by prosecutors, unconvicted by juries, and unpunished under the civil law—a phenomenon that Professor Margalynne Armstrong has termed “legal impunity for taking Black lives.”<sup>163</sup> Understanding the law surrounding police accountability and how it is or is not enforced demands a race-conscious analysis; it is not a ‘race-neutral’ body of law just as the Fourth Amendment is not truly a ‘race-neutral’ jurisprudence.

But courts undertaking a Fourth Amendment seizure analysis have, as we have seen, explicitly evaded grappling with the implications of race in police-civilian encounters. Courts analyzing interactions between the police and community members under the Fourth Amendment reasonable person standard do not factor in the subjective experiences of the community member involved in that encounter, including her knowledge of how such encounters are shaped by race. Such knowledge, in the eyes of the judiciary, falls outside the boundaries of reasonableness, into a subjective landscape in which fear of police wrongdoing is based on individualized experiences that have no bearing on what reasonable people think or feel.

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<sup>161</sup> See Carbado, *supra* note 51, at 967–68 (discussing the racial realities of police-civilian encounters and the ways that “the Supreme Court’s construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing”).

<sup>162</sup> See *supra* note 3.

<sup>163</sup> Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721 (2016) (discussing the history of impunity granted by the U.S. legal system to those who killed African American people and reviewing legal movements seeking to hold law enforcement officers responsible for disproportionate violence against African American people).

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To dismiss this knowledge as subjective is to acknowledge the racialized nature of the law's enforcement. That is to say, the judicial assumption that a 'neutral' reasonable person would not harbor concerns about police wrongdoing and the lack of police accountability, because such concerns are based on subjective experiences or beliefs that are beyond the scope of the objective inquiry, is implicitly based on the recognition that the law is influenced by race. Courts do not consider whether a reasonable person would be constrained in their freedom to terminate a police encounter because of fear of unchecked police wrongdoing because such concerns are the subjective fears of people of color. The judicially-created reasonable person is thus not race-neutral, but rather is presumptively white.<sup>164</sup>

But if courts committed to this race-avoidant approach assume that the law applies equally to all people, and thus all reasonable people would have an objective working understanding of the applicable law—the assumptions that characterize the seizure analysis as it currently stands—than they should contend with knowledge of the lack of police accountability under the law as an objective factor in the reasonable person test. This approach changes nothing about the reasonable person analysis, but simply places emphasis on the relevant legal knowledge that reasonable people in the seizure context are already assumed to possess. For the purposes of the Fourth Amendment seizure analysis, the question then becomes: is a reasonable person with this knowledge ever free to terminate any encounter with the police?

A brief walkthrough of a police encounter can illuminate how knowledge of the law related to police wrongdoing could implicate the seizure analysis. A police officer approaches a person on the street and asks if he can speak with her. Or stands in front of a bus stopped far from its final destination and asks all the passengers for permission to search their belongings. Or walks up to a parked car and asks the person in the passenger seat whether he lives in the neighborhood. Have any of these people been seized by law enforcement? Under the objective reasonable person analysis, as we have seen, that depends. The reasonable person listens to the officer's tone of voice, notes whether he is making requests or demands, looks to see if his weapon is holstered or drawn. She observes whether police officers

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<sup>164</sup> See Carpiniello, *supra* note 33, at 358 ("In our criminal justice system, reasonable behavior is defined as White behavior."). An argument can also be made that a reasonable person is also presumed to be gender-conforming, male, and in other ways lacking a marginalized identity that might influence the nature of the police interaction. See Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 *CARDOZO L. REV.* 2161, 2198 (2016) (explaining that the objective approach to the reasonable person test has resulted in jurisprudence in which "*the 'reasonable person' is actually implicitly white, male, adult, and able-minded. His speech and conduct are treated as normal, and the different speech and conduct of women, juveniles, and the intellectually disabled is not incorporated into the doctrine*").

have blocked her car from moving, locked her in a police car, or told her to sit on the curb and stay still. The hypothetical objective reasonable person asks herself whether, in each of these circumstances, she feels free to refuse the officer's requests or otherwise terminate the encounter.

Perhaps the officer's weapon is holstered, his tone is friendly, his requests seem benign, and the reasonable person, knowing her constitutional right to end a consensual police encounter, decides to politely move on. But a reasonable person's knowledge of the areas of the law addressing police accountability frames the encounter, as does knowledge of her constitutional rights. Before deciding whether she is free to terminate the encounter, she consults her knowledge of the rest of the relevant law, and she knows the police officer must be (at least reasonably) aware of the law as well. She knows that the officer is expected to follow the law and, under the law, it appears clear—though, given the murky state of the seizure jurisprudence, perhaps not certain—that she is free to terminate the encounter without repercussion.

But even if the reasonable person is not assumed to be familiar with the facts of recent well-publicized acts of police violence, in which fairly benign situations—a man selling loose cigarettes on the street,<sup>165</sup> a stop for a traffic violation,<sup>166</sup> a child playing with an air gun in a park<sup>167</sup>—escalated into deadly acts by the police within minutes or seconds, she would certainly understand that her decision to terminate a police encounter may be a turning point in the interaction in which police wrongdoing is a possibility. If the person chooses to refuse the officer's request or to leave, perhaps the particular officer at issue will act wrongfully, perhaps he will not. But knowledge of the relevant law tells her that if she says no to the officer's requests or walks away, and he wrongfully grabs her, or shoots her, or arrests her, both he and she are aware that the likelihood of any legal or personal ramifications to that officer are vanishingly remote. This legal frame, more so than the friendliness of the officer's tone or whether the lights in the squad car were activated, arguably provides her with an accurate understanding of the freedom she possesses to terminate the interaction.

A reasonable person with a knowledge of the law would only feel free to leave if the circumstances of the encounter indicate that the encounter is consensual *and* the reasonable person assumes that the police will not react wrongfully even in the absence of legal consequences for doing so. Nothing

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<sup>165</sup> Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?mcubz=0> (describing police choking Eric Garner to death after contacting him for selling loose cigarettes).

<sup>166</sup> Smith, *supra* note 4.

<sup>167</sup> Ohlheiser, *supra* note 4.



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in the substance of the law merits that assumption, as noted above; people feel secure in their ability to leave a police interaction because of social privileges that are unspoken in the law itself. Without acknowledgement of those privileges, all reasonable people would know that police misconduct is not reliably deterred by the law, and thus all reasonable people would believe they are at risk of unchecked police misconduct if they assert their constitutional rights. An interaction with the police in which law enforcement can act wrongfully without meaningful fear of consequences is not one that a reasonable person is free to terminate. A person continuing the interaction is not doing so voluntarily, but rather in reaction to the coercion and intimidation inherent to interacting with a person with unchecked power.<sup>168</sup> Under the objective reasonable person test, knowledge of the law governing police accountability constrains the freedom of all reasonable people to terminate a police encounter, and thus arguably all police-civilian interactions are seizures demanding Fourth Amendment protections.

B. *The Limitations of Legal Knowledge as a Route to Expansion of the Seizure Analysis and as an Agent of Change in Police-Civilian Interactions*

An emphasis on the reasonable person's knowledge of the law surrounding police misconduct is not, however, a guaranteed pathway to an expanded seizure analysis. There are a variety of ways that courts could avoid the conclusion that knowledge of the law regarding police wrongdoing has implications in the seizure context. Courts could find that reasonable people are free to terminate encounters with the police based on the objective facts of those encounters, notwithstanding the question of the probability of legal consequences for law enforcement misconduct.<sup>169</sup> Judges may be convinced that police officers *are* held accountable by the law and thus unpersuaded that a reasonable person would have an objective, law-based reason to be concerned about officer wrongdoing. Some courts might conclude that police officers do not commit legal transgressions with enough regularity to cause a reasonable person alarm, even if such misconduct is not significantly deterred by the law. Other judges may acknowledge that the police officers commit misconduct, acknowledge that such misconduct is not always deterred by the legal system, but feel that law-abiding citizens are not

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<sup>168</sup> Even under the current state of the law, the Supreme Court recognizes that if a person is simply submitting to a show of police authority the encounter is not a consensual one. *See Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (holding that a person's consent to search is not voluntary if it resulted from "acquiescence to a claim of lawful authority").

<sup>169</sup> Ross, *supra* note 50, at 340–41 (discussing the perspective that because the reasonable person standard is a legal fiction, the Supreme Court will not be persuaded to change it even in the face of empirical evidence).

the targets of such behavior, and thus a reasonable, innocent person would have no cause to consider police wrongdoing when determining whether he is free to terminate a police encounter.

But for courts who take knowledge of the lack of police accountability seriously, mindful incorporation of that knowledge as an objective factor in the reasonable person test could shift the seizure analysis such that most, if not all, interactions with the police could constitute seizures for Fourth Amendment purposes. This approach may bring the Fourth Amendment seizure analysis into greater alignment with the realities of police encounters that people of color have been asserting for years. Yet if courts find that knowledge of the lack of meaningful deterrence to police misconduct transforms police encounters into seizures, the implications regarding Fourth Amendment jurisprudence, police behavior, and legal outcomes in criminal and civil cases remain undetermined. Some might view the incorporation of legal knowledge of the law surrounding police accountability into the reasonable person standard as effecting too much change and too much constraint on police actions; others might view it as providing little to none of both.

If courts more regularly find that civilian encounters with police constitute seizures, police officers and others may fear that that this change will constrain law enforcement from engaging with the public and over-deter police officers from conducting investigations. If police cannot interact with civilians without reasonable suspicion or probable cause, these critics might argue, they will not be able to build community ties through informal encounters or gain information from casual interactions with people on the street. Detractors might also contend that this approach could provide greater legal cover to people violating the law. People charged with crimes could, for example, more easily seek to suppress evidence based on the argument that the police contact constituted a seizure from its outset, and thus the officer must possess reasonable suspicion or probable cause at an earlier point in the encounter than the law currently requires. These and other concerns have been leveled against Fourth Amendment seizure jurisprudence as it stands, and would be heightened by expansion of the circumstances in which courts acknowledge seizures to have occurred.

These possible reactions are all based on the assumption that if courts recognize police-civilian encounters as seizures, such a recognition would bring about a change in police behavior and in the consequences of police actions. Yet even those who would applaud such changes might wonder whether an increased recognition of police encounters as seizures would instigate any change in police encounters with the public. The analysis proposed here posits that if a reasonable person is aware that the law does not meaningfully deter police misconduct, that person is less free to

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terminate a police encounter, and thus courts recognizing such knowledge must necessarily determine that a seizure has occurred. But it is the very lack of consequences to police that informs this seizure analysis, so even in a world in which courts more readily identify police-civilian interactions as seizures, there are still no meaningful constraints preventing officers from violating the law. Even advocates for the incorporation of explicit knowledge regarding police misconduct into the reasonable person standard might question whether this recognition would bring about substantial change in the legal system or play a role in deterring police wrongdoing against people of color.

C. *The Merits of Addressing Legal Knowledge in the Seizure Analysis*

There is nevertheless merit in requiring courts to contend with the implications of a reasonable person's knowledge of the law surrounding police accountability. The increased attention to the law addressing police wrongdoing may have positive long-term benefits for those seeking to anchor judicial decision-making in legal and factual realities and for those seeking to increase police accountability under the law. Explicit incorporation of knowledge of the law related to police conduct would encourage courts to explore the remedies that shape the right in the Fourth Amendment seizure context. The focus on the nature of the law and its application could help push courts towards a greater understanding of the realities of police-civilian interactions and their aftermath, and thus serve as a pathway to a more racially realistic Fourth Amendment jurisprudence.

For example, if courts found that the lack of legal deterrence to police wrongdoing did affect the reasonable person's freedom to terminate a police encounter, an increase in the number of seizure determinations would be a significant legal disruption in a system in which courts have become accustomed to viewing a wide range of police-civilian interactions as consensual encounters. Even if judicial recognition of police-civilian encounters as seizures did not bring about immediate changes in police behavior, this disruption in the status quo could be an impetus for lawyers, legislators, and judges to address the lack of police accountability under the law. This is so because if there *were* meaningful constraints imposed on police misconduct, the reasonable person would have a basis to believe that police would comply with the law. Knowledge of the law would thus not be a factor that limits a reasonable person's freedom to terminate an encounter with the police, thereby returning the seizure analysis to its current focus: the objective factors of the police encounter. Those persons committed to the seizure analysis as it stands could therefore be incentivized to seek reform of the law surrounding police wrongdoing. Such changes, while not focused

specifically on the racial implications of that wrongdoing and the consequences imposed, could nevertheless be of benefit to the communities of color impacted by police misconduct.

Acknowledgement of the significance of the knowledge of the law regarding police accountability in the Fourth Amendment seizure analysis could spill out into other contexts. Under Fourth Amendment jurisprudence related to searches, for example, the fact that the police did not have probable cause to justify a search of a person or property (or a warrant based on probable cause) does not render the search unconstitutional if the person voluntarily consented to the search.<sup>170</sup> Officers are not required to inform the person of his right to refuse consent—although jurisdictions often rely on written consent forms that do provide acknowledgement of those rights<sup>171</sup>—but a consent that was obtained through duress or coercion cannot be voluntary.<sup>172</sup> If courts assume that people who agree to such searches are aware of the lack of legal accountability for police officer misconduct, they may conclude that all such searches are inherently coercive and thus no consent is truly voluntary.<sup>173</sup> The loss or restriction of the consent option would drastically transform the landscape of police searches. Implications for other areas of the law, such as the voluntariness of a suspect's waiver of his right to counsel when in police custody,<sup>174</sup> while beyond the scope of this Article, might also push courts and others to engage with questions of race and police accountability that have widely been ignored in judicial analysis of interactions between law enforcement and the community.

There is also merit in requiring courts to engage with the racial assumptions that underlie the reasonable person standard. Scholars and advocates have long implored judges to understand that a reasonable person would not feel free to terminate a police encounter if that person knows that her race places her at greater risk of harm and that the legal system provides few deterrents to police inflicting harm upon her. The approach advocated

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<sup>170</sup> The question of voluntariness of consent requires consideration of the totality of the circumstances. *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973). In *Schneekloth* and subsequent cases, the Court considered both subjective and objective factors, up to and including evaluating the significance of race in *United States v. Mendenhall*, 446 U.S. 544 (1980). In recent years, however, the Court has focused solely on objective factors. See Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751 (2013) for an overview of the consent law doctrine.

<sup>171</sup> See Leong & Suyeishi, *supra* note 170.

<sup>172</sup> *Bumper*, 391 U.S. at 550 (“Where there is coercion there cannot be consent.”).

<sup>173</sup> It is unclear, however, whether people who consent to searches are actually assumed to have knowledge of the law, or whether such knowledge simply is not dispositive of the consent question. In either case, courts could avoid grappling with knowledge of the relevant law related to police accountability in the consent context by asserting that it is not an essential aspect of the totality of the circumstances test as it currently stands.

<sup>174</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

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in this Article seeks to engage courts in an exercise in racial empathy<sup>175</sup> by requiring them to contend with the lack of police accountability as an issue of consequence to the fictional reasonable person. Courts cannot as easily sidestep the lack of police accountability under the law as a subjective concern of marginalized groups without acknowledging the very racial dynamics they seek to ignore. This approach thus requires courts to view the world through the eyes of a person who knows that the risk of police wrongdoing is both real and unconstrained by the law, and ask whether that person enjoys any meaningful freedom to terminate a police encounter. While this is a far cry from true understanding of the racial dynamics of our society, police-community relations, and our legal system, it could move courts who have otherwise ignored those dynamics altogether towards a greater understanding of the experiences of people of color and their interactions with the police.

## CONCLUSION

The approach to the seizure analysis outlined in this Article is not intended to obfuscate the realities of our society's racial history or the realities of the racially disparate impact of police misconduct. It certainly does not stand for the proposition that 'race-neutrality' is the pathway to racial justice in the seizure context or elsewhere. Rather, it seeks to flip the role of race-avoidance in the seizure analysis, so that rather than ignoring racial realities, courts are required to engage with the lack of legal deterrents to police misconduct as an issue of concern to all reasonable people, not one that people of color alone are expected to endure.

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<sup>175</sup> I do not by this statement mean to imply that all judges are white, or that no judges have had negative encounters with the police, or that African American or other judges of color would share a uniform view of the police and their interactions with members of the community. None of these things are true; however, it is accurate to state the majority of judges, both federal and state, are white men who have not shared the lived experiences of people of color in the United States. See Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, AM. CONST. SOC. FOR L. & POL'Y 7 (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf> (finding that more than half of state trial and appellate judges are white men, despite the fact that white men make up only 30% of the population); Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 115 (2016) (finding that a little more than 60% of sitting federal judges are white males).