

# Notes

## Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor

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## I. INTRODUCTION TO THE PROBLEM

On July 16, 2009, police responded to reports of a black male attempting to break into a home in Cambridge, Massachusetts.<sup>1</sup> After police arrived on the scene, they arrested the man for disorderly conduct and “exhibiting loud tumultuous behavior.”<sup>2</sup> However, the “suspect” was not a criminal but one of the nation’s preeminent scholars, Harvard University professor Henry Louis Gates.<sup>3</sup> How could such an esteemed scholar be mistaken for a criminal?

While theories about the incident vary, the most compelling reason is, unfortunately, all too clear: he was black. After Professor Gates was seized for allegedly breaking into his own home, Americans were forced to reexamine the “color-blind” nation toward which we were reportedly moving.<sup>4</sup> This specific incident was largely resolved following a “beer summit” hosted on the White House lawn, but Professor Gates’s story is symptomatic of the broader racial problem plaguing our justice system.<sup>5</sup> It is an unfortunate reality that a person’s race has a non-trivial impact on how that person is viewed and treated by law enforcement.<sup>6</sup> As Justice Stevens observed in *Illinois v. Wardlow*,<sup>7</sup> even innocent people in minority communities often “believe that contact with the police can

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<sup>1</sup> Melissa Trujillo, *Henry Louis Gates Jr. Arrested, Police Accused of Racial Profiling*, HUFFINGTON POST (July 20, 2009), [http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre\\_n\\_241407.html](http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre_n_241407.html); Abby Goodnough, *Harvard Professor Jailed; Officer Accused of Bias*, N.Y. TIMES (July 20, 2009), <http://www.nytimes.com/2009/07/21/us/21gates.html>.

<sup>2</sup> Trujillo, *supra* note 1.

<sup>3</sup> See *id.*; see also HENRY LOUIS GATES, JR., <http://www.aas.fas.harvard.edu/directory/faculty/henry-louis-gates-jr>.

<sup>4</sup> Richard Thompson Ford, *The Depressing Cycle of Racial Accusation*, SLATE (July 23, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/07/the\\_depressing\\_cycle\\_of\\_racial\\_accusation.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/07/the_depressing_cycle_of_racial_accusation.html).

<sup>5</sup> See Obama: *Police Who Arrested Professor ‘Acted Stupidly’*, CNN, (July 23, 2009), <http://www.cnn.com/2009/US/07/22/harvard.gates.interview/>; Robert Tomsho, *White House ‘Beer Summit’ becomes Something of a Brouhaha*, WALL ST. J. (July 30, 2009), <http://online.wsj.com/articles/SB124891169018991961>.

<sup>6</sup> DAVID H. BAYLEY & HAROLD MENDELSON, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 91 (1969).

<sup>7</sup> 528 U.S. 119 (2000).

itself be dangerous.”<sup>8</sup> This self-perpetuating cycle of racial bias and maltreatment infects the enforcement and understanding of criminal laws. From responses to mandatory minimums<sup>9</sup> to policing of peremptory strikes,<sup>10</sup> courts have struggled to remedy the most invidious manifestations of racial bias in criminal law. One area of Fourth Amendment law plagued by racial bias has been largely overlooked by the nation’s courts and legislatures: the seizure analysis.<sup>11</sup>

The Fourth Amendment to the United States Constitution provides constitutional protections for individuals unreasonably seized by state actors.<sup>12</sup> However, in order for any of these protections to attach, the individual must first show that he has been “seized” for Fourth Amendment purposes.<sup>13</sup> According to the Supreme Court’s decision in *United States v. Mendenhall*,<sup>14</sup> a person has been “seized” for Fourth Amendment purposes only if “in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. . . .”<sup>15</sup> Thus, this objective test only asks whether a “reasonable person” in the defendant’s situation would have felt free to terminate his contact with law enforcement.<sup>16</sup>

As is the case with many other reasonable person tests, there has been significant debate over whether and to what extent an individual’s personal characteristics should be taken into account.<sup>17</sup> For instance, in *Mendenhall*, Justices Stewart and Rehnquist both stated that the defendant’s race and gender were “not irrelevant” in their calculus.<sup>18</sup>

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<sup>8</sup> *Id.* at 132.

<sup>9</sup> See, e.g., SENTENCING COMMISSION ISSUES COMPREHENSIVE REPORT ON STATUTORY MANDATORY MINIMUM PENALTIES U.S. SENTENCING COMMISSION 2 (Oct. 31, 2011) (“Black offenders convicted of an offense carrying a mandatory minimum penalty remained subject to a mandatory minimum penalty at the highest rate of any racial group . . . .”); Nathan A. Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, ExpressO (2008) (on file with author) (discussing ways that judges can avoid imposing mandatory minimums; the solutions range from not following the statute to finding the defendant guilty of a lesser offense).

<sup>10</sup> North Carolina Racial Justice Act, N.C. Gen. Stat. § 15A-2010 (2009), <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H472v3.pdf>.

<sup>11</sup> Though the New York “stop-and-frisk” campaign has breathed new life into questions surrounding racially-discriminatory stops, prohibitions on racial profiling do not address the analysis of whether a seizure has occurred or the profound impact such programs have on the expectations and attitudes of the victims of racial bias. See, e.g., *Floyd v. City of New York*, 861 F. Supp. 2d 274, (S.D.N.Y. 2012) (analyzing “stop-and-frisk” under *Terry* stop standard).

<sup>12</sup> U.S. CONST. amend. IV. (“the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”).

<sup>13</sup> See *id.*

<sup>14</sup> 446 U.S. 544 (1980).

<sup>15</sup> *Id.* at 545.

<sup>16</sup> See *id.* at 550–52.

<sup>17</sup> See, e.g., Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 J. GENDER, SOC. POL’Y & L. 633, 645–49 (2002) (discussing whether the reasonable person should consider gender and the effects of this determination).

<sup>18</sup> *Mendenhall*, 446 U.S. at 558 (“It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, neither were they decisive . . . .”) (citation omitted).

However, the Court did not elaborate on the significance of these or other factors, except to say that age, race and gender were not “decisive.”<sup>19</sup> As a result, contemporary analyses of seizures do not take into account the extent to which a person’s race affects their ability and willingness to comply with the police.<sup>20</sup> These race-neutral approaches ignore the real and profound effect that race has on an individual’s contact with law enforcement.<sup>21</sup>

In addition to critiquing the state of the social science literature, this Note argues that the feeling of being seized is not the same across all communities and races and that these differences should be considered under the seizure test enunciated by the Supreme Court. There is an understandable reluctance to treat individuals differently based on race in any context. However, race has been given great salience in American society, especially in American law enforcement, often causing people to treat individuals more positively or negatively based solely on that individual’s race and preconceived notions about that racial group. This phenomenon of race-based treatment, in turn, affects how individual members of that racial group should likely react, based on their shared experiences and common expectations.

This Note analyzes the social-science evidence and argues that the Fourth Amendment seizure analysis should explicitly take into account a person’s race. Since whether or not a person feels empowered to refuse a request from the police will be heavily influenced both by his perception of the police and by the way he believes the police perceive him, any factor that substantially influences these determinations must be considered. While a few scholars have discussed this issue, and even fewer have attempted to provide a solution to this problem, the existing literature has failed to provide an acceptable and scientifically-sound examination of the subject.<sup>22</sup>

This Note begins by setting out the current state of the law for seizures.<sup>23</sup> Next, the Note examines the current state of police and minority relations.<sup>24</sup> In an attempt to fill the holes in the current

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<sup>19</sup> *Id.*

<sup>20</sup> See Peter A. Lyle, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L. J. 243, 260 (2001).

<sup>21</sup> ERICA L. SMITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT NCJ 211471, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 1 (Carolyn C. Williams ed. 2006) (2002) (finding that roughly 22% of young black male drivers were searched at traffic stops for speeding, while only 8% of young white males were searched during similar stops). Since the New York stop-and-frisk controversy, the influence of race in police interactions has garnered significant media attention and likely has an even greater impact on minorities’ views of police. See, e.g., J. David Goodman, *Officers Are Told Race Can Be a Factor in Street Stops, but Not the Only One*, N.Y. TIMES (Nov. 25, 2013), [http://www.nytimes.com/2013/11/26/nyregion/officers-are-told-race-can-be-a-factor-in-street-stops-but-not-the-only-one.html?\\_r=0](http://www.nytimes.com/2013/11/26/nyregion/officers-are-told-race-can-be-a-factor-in-street-stops-but-not-the-only-one.html?_r=0) (discussing the influence of race on police stops).

<sup>22</sup> See generally Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1988).

<sup>23</sup> See *infra*, p. 6.

<sup>24</sup> See *infra*, p. 8.

literature, this Note presents current social science data on race and consent and critiques how contemporary scholars have approached the subject.<sup>25</sup> Following a discussion of other scholarly approaches, this Note proposes how the courts can utilize this evidence to create a racially sensitive seizure test.<sup>26</sup> This Note concludes by considering potential difficulties with considering race in this context.<sup>27</sup>

## II. STATE OF THE LAW ON THE REASONABLE PERSON AND SEIZURES

The Fourth Amendment protects against the unreasonable search and seizure of the person.<sup>28</sup> However, these protections are not automatically triggered during every encounter with law enforcement.<sup>29</sup> A seizure for Fourth Amendment purposes occurs only when “the officer, by means of physical force or show of authority, terminates or restrains [a person’s] freedom of movement through means intentionally applied.”<sup>30</sup> For instance, if an officer merely asks someone for the time of day, then he has clearly not “seized” this person. On the other hand, putting an individual in a police car or handcuffs clearly indicates an intention to restrain someone’s freedom. In many other instances, an officer’s intentions are ambiguous.

In the circumstances in which police actions do not “show an unambiguous intent to restrain [the individual], a seizure occurs if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>31</sup> Given the significant room for interpretation regarding the impression a police officer creates when he approaches an individual, this “reasonable person” standard often becomes the key question in determining whether a seizure has occurred. Under the reasonable person standard, a seizure occurs only when these circumstances are “so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave.”<sup>32</sup> The reasonable person standard is necessarily an objective test that examines the situation from the standpoint of the average, “reasonable” person.<sup>33</sup>

Since different groups of individuals possess traits or share

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<sup>25</sup> See *infra*, p. 16.

<sup>26</sup> See *infra*, p. 25.

<sup>27</sup> See *infra*, p. 42.

<sup>28</sup> U.S. CONST. amend. IV.

<sup>29</sup> *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

<sup>30</sup> *Brendlin v. Cal.*, 551 U.S. 249, 254–55 (2007).

<sup>31</sup> *Id.* at 255.

<sup>32</sup> *INS v. Delgado*, 466 U.S. 210, 216 (1984).

<sup>33</sup> See *id.* (holding that the “Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.”).

common experiences that affect their responses, there has been significant controversy over the exact traits the “reasonable” person should possess in both the civil and criminal context. Should the reasonable person be the defendant’s same age or gender? Or should the reasonable person instead have no gender or age and just be “average”? Since social categorical variables such as race, gender, and age could influence a person’s decisions and views, the traits considered by the court have mattered a great deal in other contexts.<sup>34</sup> For instance, in determining whether a person was negligent, courts look to a reasonable person standard; however, in doing so, courts also consider whether the individual was very young<sup>35</sup> or had advanced training in the conduct at issue.<sup>36</sup> Such considerations can drastically alter the standard of care and can even be outcome determinative.<sup>37</sup> Similarly, the Supreme Court has held that, in certain instances, the consideration of age is appropriate in the Miranda custody analysis.<sup>38</sup> Therefore, it is now likely that young defendants will be afforded Miranda protections more often, and courts as well as police have increased guidance on treating young suspects fairly.<sup>39</sup>

The social science data suggests that an individual’s perceptions of police and expectations of force or violence affect how that individual views law enforcement.<sup>40</sup> Despite these findings, the Supreme Court has not clearly defined what factors a court should consider in the seizure context. In *United States v. Mendenhall*,<sup>41</sup> the Court discussed the reasonable person standard in the seizure context.<sup>42</sup> The Court made it clear that this standard “presupposes an innocent person.”<sup>43</sup> However, little else is known about him or her. In the *Mendenhall* plurality, the Court hinted that the defendant’s race and gender “were not irrelevant”

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<sup>34</sup> See, e.g., Robert S. Adler and Ellen R. Pierce, *The Legal, Ethical and Social Implications of a “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.*, 773, 798 (1993) (In sexual harassment cases, courts have differed in applying a reasonable person versus a reasonable woman standard in determining whether the conduct was “unwelcome” and “sufficiently severe and pervasive.”); Shoenfelt et al., *supra* note 17, at 639 (discussing whether using the reasonable woman standard would actually alter outcomes or whether it would merely be a difference of semantics).

<sup>35</sup> See *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (considering a defendant’s race in the Miranda custody analysis).

<sup>36</sup> See *Cervelli v. Graves*, 661 P.2d 1032, 1032–31 (Wyo. 1983) (finding that the court erred in “instructing the jury that it was not to consider a person’s skills in determining whether that person is negligent”).

<sup>37</sup> See *Goss v. Allen*, 70 N.J. 442, 448 (1976) (reversing lower court for using improper standard of care based on age).

<sup>38</sup> 131 S.Ct. at 2404 (“[s]o long as [a] child’s age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”).

<sup>39</sup> But see Christopher Jackson, *J.D.B. v. North Carolina and the Reasonable Person*, *MICH. L. REV. ONLINE* 1, 3 (2010) (arguing that this new standard might actually create more confusion for law enforcement).

<sup>40</sup> See generally *BAYLEY & MENDELSON*, *supra* note 6.

<sup>41</sup> 446 U.S. 544 (1980).

<sup>42</sup> *Id.*

<sup>43</sup> *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

in their analysis, but they provided little additional guidance, leaving lower courts with no guidance on the value of race in the Fourth Amendment seizure context.<sup>44</sup>

### III. POLICE AND RACE RELATIONS

Despite the Supreme Court's reluctance to recognize the impact of race, the social science evidence clearly shows that an individual's race profoundly affects how he views and is viewed by law enforcement.<sup>45</sup> Race blind standards inherently rely on one of two underlying assumptions: (1) race has only a trivial effect on the fair administration of justice; or (2) ignoring the effects of race on the administration of justice is justified by some greater benefit that could not be achieved by a justice system in which it is considered a relevant factor. In the world of street policing, these assumptions are flawed.

On the street, there is often an appreciable difference between how black and white individuals are viewed and treated by law enforcement.<sup>46</sup> Several studies suggest that police are more likely to view an African-American man as dangerous and threatening than they are to view a similarly situated and dressed Caucasian man.<sup>47</sup> As a result, blacks are often treated more aggressively by law enforcement.<sup>48</sup> Ignoring these misconceptions and racial disparities in treatment and misconceptions serves no overriding social interests and, instead, only perpetuates mistrust and feelings of governmental illegitimacy among members of minority communities and in society at large. The following section discusses how the popular misconception that blacks are somehow more dangerous has resulted in a system of over-policing and abuse within black communities. In turn, these and other minority communities have developed a profoundly different view of law enforcement, dramatically affecting how a member of such a community interprets encounters with

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<sup>44</sup> 446 U.S. at 550–52.

<sup>45</sup> See, e.g., Ronald Weitzer & Steven Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC'Y FOR STUDY SOC. PROBLEMS 305, 305 (2004) (finding that African Americans were more likely to view police actions negatively than were other racial groups).

<sup>46</sup> See e.g., B. Keith Payne, *Weapon Bias: Split-Decisions and Unintended Stereotyping*, CURRENT DIRECTIONS IN PSYCHOL. SCI., 287, 87–89 (2006) (participants in a study “falsely claimed to see a gun more often when the face [shown] was black than when it was white. Under the pressure of a split-second decision, the readiness to see a weapon became an actual false claim of seeing a weapon.”).

<sup>47</sup> See, e.g., Joshua Correll et al., *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 (1) J. EXPERIMENTAL SOC. PSYCHOL., 184–89 (2012) (respondents more frequently shoot armed blacks than armed whites); Payne, *supra* note 46; BAYLEY & MENDELSON, *supra* note 6 (“there seems little doubt that interpersonal violence as well as violence directed against policemen is considered [by the police] more likely to take place in minority neighborhoods regardless of economic class.”).

<sup>48</sup> Correll et al., *supra* note 47, at 184–89 (finding that participants shoot armed blacks more often than armed whites and make “don’t shoot” responses more frequently and quickly for unarmed whites than unarmed blacks).

law enforcement.

### A. Race Affects How Individuals Are Viewed and Treated by Law Enforcement

The first relevant paradigm is the blacks-as-aggressive paradigm.<sup>49</sup> As David Bayley and Harold Mendelsohn pointed out in their book on police and race:

[t]he factor of race is clearly a specific clue in the policeman's world. Policemen associate minority status with a higher incidence of crime, especially crimes against the person, with bodily harm to police officers, and with a general lack of support of the police<sup>50</sup>

Police officers have been victims of attacks perpetrated by African Americans, perhaps causing police officers to approach black males with extra caution and aggression.<sup>51</sup> Moreover, whether it is caused by the legacy of slavery during the colonial era, the collective recollection of police beatings during the 1960's as blacks struggled for equality, or the persistent education, income, and achievement gap resulting from this legacy of abuse, many officers believe that "hatred and distrust of the police among some blacks has been around for a long time and continues today."<sup>52</sup> As a group, African Americans "are indeed involved in a disproportional amount of crime in general and violent crime in particular."<sup>53</sup> However, the instances of criminal activity across races are significantly less pronounced than the popular image portrayed in the media on shows like "COPS" or that seemingly shared by many police officers.<sup>54</sup> In fact, the majority of crimes committed in the United States

<sup>49</sup> See, e.g., Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. OF CONTEMPORARY CRIM. JUST. 276, 278 (2007).

<sup>50</sup> BAYLEY & MENDELSON, *supra* note 6.

<sup>51</sup> See generally James Unnever & Shaun Gabbidon, *A Theory of African American Offending: Race, Racism, and Crime*, CRIMINOLOGY JUST. STUD. (2011) (stating that the arrest rate for young African Americans is overrepresented).

<sup>52</sup> Granville J. Cross, *The Negro, Prejudice, and the Police*, 55 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 405, 407 (1964) (citing surveys that show vastly disparate views of police "courtesy" and "misconduct" among races and finding that African Americans tend to view police actions with greater mistrust and hostility); see also Eric Baumer et al., *Institutional-Anomie Theory*, in ENCYCLOPEDIA CRIMINOLOGICAL THEORY (2010) (examining the strain theory, which argues that social structures which lead to inequality and deprivation in segments of its population indirectly encourage crime).

<sup>53</sup> Welch, *supra* note 49, at 278.

<sup>54</sup> See *id.* at 276–77; see generally LINDA G. TUCKER, LOCKSTEP AND DANCE: IMAGES OF BLACK MEN IN POPULAR CULTURE (2007) (discussing how representations in popular culture of criminal black men help perpetuate the stereotype). "In fact, white Americans in several geographic regions engage in higher rates of criminal activity." Leah J. Floyd et al., *Adolescent Drug Dealing and Race/Ethnicity: A Population-Based Study of the Differential Impact of Substance Use on Involvement in Drug Trade*, 36(2) AM. J. DRUG & ALCOHOL ABUSE 87, 88 (2010) ("Rates of drug dealing did not differ across race.").



are actually committed by white Americans, not black Americans.<sup>55</sup> While this conception of African Americans as violent is not grounded in fact or empirical evidence, it is widely shared, and influences the decision-making processes of many individuals.<sup>56</sup> For instance, the National Race Survey found that a majority of both white and black Americans agreed with the statement that blacks are “aggressive or violent.”<sup>57</sup>

The chief problem with this stigma is that, even though the overwhelming majority of African Americans, like that of all other racial groups, does not act violently—toward the police or others—African Americans are often all painted with the same broad brush.<sup>58</sup> This distorted view may make it more likely that an African American will be viewed as a threat than will a similarly situated white person with similar intentions. While this issue can manifest in Harvard professors being arrested in their own homes, the more profound and lasting problem occurs in the “shoot or don’t shoot” decision officers have to make on the street.<sup>59</sup> Unfortunately, reports of shooting deaths involving unarmed black males continue to dominate the headlines, and serve as harsh reminders of this disparate treatment. In addition to these more anecdotal examples as to how race affects expectations of violence, the social science evidence suggests that the individual’s race has a non-trivial impact on the decision of whether deadly force is necessary.<sup>60</sup>

Several studies have analyzed whether race plays a factor in the split second decisions of whether an individual poses a threat of violence.<sup>61</sup> While the methodology for each study varied slightly, each test displayed images of either a black or white person and asked the participant to gauge the dangerousness of the individual.<sup>62</sup> For instance in one study, the images depicted an individual holding various objects, such as guns, bottles, and cell phones.<sup>63</sup> The participant was told to “shoot” any armed person by pressing one button and to “not shoot” any unarmed person by pressing a different button.<sup>64</sup> In another study, a

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<sup>55</sup> Welch, *supra* note 49, at 277.

<sup>56</sup> See Cross, *supra* note 52, at 407.

<sup>57</sup> PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993); see also JON HURWITZ, *PERCEPTION AND PREJUDICE: RACE AND POLITICS IN THE UNITED STATES* (Mark Peffley ed., 1998) (finding that a majority of individuals agree with a similar statement regarding violence and African Americans).

<sup>58</sup> See generally SNIDERMAN, *supra* note 57 (finding that a majority of individuals believe African Americans as a group are more violent).

<sup>59</sup> Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OREGON L. REV. 1, 3 (2010) (arguing that “[a]dvances in implicit social cognition reveal that most people carry biases against racial minorities beyond their conscious awareness. . . . Americans are faster and more accurate when firing on armed blacks than on armed whites.”).

<sup>60</sup> See, e.g., Payne, *supra* note 46, at 287–89; Correll et al., *supra* note 47, at 1314–15 (arguing that race impacts the decision regarding whether lethal force is needed).

<sup>61</sup> Payne, *supra* note 46, at 287–89.

<sup>62</sup> *Id.*; Correll et al., *supra* note 47, at 1314–15.

<sup>63</sup> Correll et al., *supra* note 47, at 1314–29.

<sup>64</sup> *Id.* at 1316.

picture of either a black or white face flashed on the screen briefly and was immediately followed by a picture of either a gun or a harmless object. In all of these studies, participants were more likely to identify the images associated with black individuals with danger.<sup>65</sup> As one scholar observed, participants in the flashed picture study “falsely claimed to see a gun more often when the face [shown] was black than when it was white. Under the pressure of a split-second decision, the readiness to see a weapon became an actual false claim of seeing a weapon.”<sup>66</sup> Participants also shot unarmed black individuals more often than unarmed white individuals.

Police officers undergo considerable training to identify and respond to perceived threats. However, the social science evidence shows that, in addition to the intentional acts of race-based violence, racial bias and preconceptions can have a non-trivial effect on our subconscious or gut reactions.<sup>67</sup> Therefore, one popular image of African Americans leads to a scenario in which African Americans can expect to be treated with force or violence in more situations than a white person would.<sup>68</sup>

## B. Race Affects How Individuals View Law Enforcement

While the predominant view in much of the United States may be that blacks, especially young black males, are more dangerous or aggressive toward police than the average individual, the more compelling, indeed truer, narrative in the police-minority relationship is the “blacks-as-law-enforcement-victims” paradigm.<sup>69</sup> As Don Jackson, a former police officer, observed in his New York Times piece: “[t]he black American finds that the most prominent reminder of his second-class citizenship are the police.”<sup>70</sup>

American society has made many positive steps in terms of equal treatment across racial categories, there remains significant room for improvement, especially on the street. African Americans as a group have suffered racial profiling,<sup>71</sup> police brutality,<sup>72</sup> and other forms of

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<sup>65</sup> Payne, *supra* note 46, at 287–89.

<sup>66</sup> *Id.* at 287–88.

<sup>67</sup> *Id.*

<sup>68</sup> See *id.*; see also Aaron Blake, *The Vast Majority of African Americans Say Police Unfairly Target Them*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/08/11/in-ferguson-an-all-to-familiar-recipe-for-racial-discord/>.

<sup>69</sup> See, e.g., KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACRO AGGRESSION* (1998) (discussing the “criminal black man” myth and stereotypical views of black aggression); Welch, *supra* note 49, at 276–77.

<sup>70</sup> Don Jackson, *Police Embody Racism to My People*, N.Y. TIMES, Jan. 23, 1989, at A25.

<sup>71</sup> See *Stop-and-Frisk Campaign*, NEW YORK CIVIL LIBERTIES UNION, [www.nyclu.org/issues/racial-justice/stop-and-frisk-practices](http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices); Tracey Maclin, *supra* note 22; BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC 2005 (2007) (“blacks . . . were

humiliation to a degree and extent unmatched by any other group.<sup>73</sup> These shared experiences can shape how individual members of that group interpret police actions and inform each person's expectations of violence.<sup>74</sup>

The social science data suggests that, on average, an African American individual tends to view the motivations of police less favorably than a white person, as well as that the interaction will produce more harmful results. As a group, African Americans tend to have more negative interactions with police and less confidence that police will treat minorities equally in a given scenario.<sup>75</sup> Perhaps most importantly, for the purposes of the seizure analysis, a greater percentage of African Americans than white Americans believe that police engage in excessive force.<sup>76</sup> Exacerbating these problems of increased expectations of violence and negative interactions is the all-too-close correlation between race and socioeconomic status,<sup>77</sup> which leaves a higher proportion of African Americans depending on over-worked and under-paid public defenders or appointed counsel when they are charged with a crime.<sup>78</sup> This lack of financial means can also lead to a sense of powerlessness and increased fear of a negative result from police interaction.

Compounding the effect of these more personal interactions is the anecdotal proof of the effect of racial bias. As the Ferguson, Missouri, incidents demonstrate, contemporary culture and media are concerned about the potential for racially-motivated police violence. The events in Ferguson are an instructive example not only of how historic discrimination and racially-motivated violence can color how events are perceived, but also the profound effect that police altercations can have on an individual's or a community's feelings of fear or powerlessness

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more likely than whites to be searched by the police.”).

<sup>72</sup> See e.g., POLICE MISCONDUCT STATISTICAL REPORT, NATIONAL POLICE MISCONDUCT STATISTICS AND REPORTING PROJECT (2010); see also Tucker, *supra* note 54; Unnever, *supra* note 51, at 46; Charles Pulliam-Moore, *UN Committee Condemns U.S. for Racial Disparity, Police Brutality*, PBS (Aug. 29, 2014), <http://www.pbs.org/newshour/rundown/un-committee-condemns-us-racial-disparity-police-brutality/> (criticizing the United States for acts of police brutality and racial bias).

<sup>73</sup> See Don Wycliff, *Black and Blue Encounters* 7 CRIM. JUST. ETHICS 2 (1988) (discussing humiliating encounters with police).

<sup>74</sup> Weitzer, *supra* note 45, at 307 (“Citizen contacts with police officers have been found to influence general satisfaction with the police. Negative contacts tend to lower opinions of the police and have a stronger effect on attitudes than positive experiences.”).

<sup>75</sup> See, e.g., *Blacks Upbeat About Progress*, PEW RES., (Jan. 12, 2010), <http://www.pewsocialtrends.org/2010/01/12/blacks-upbeat-about-black-progress-prospects/>.

<sup>76</sup> Weitzer, *supra* note 45, at 314.

<sup>77</sup> See, e.g., James House & David Williams, *Understanding and Reducing Socioeconomic and Racial/Ethnic Disparities in Health*, in PROMOTING HEALTH: INTERVENTION STRATEGIES FROM SOCIAL AND BEHAVIORAL RESEARCH (Brian Smedley ed., 2000); *Ethnic and Racial Minorities & Socioeconomic Status*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx>.

<sup>78</sup> While public defenders are extremely effective advocates that perform an invaluable function, the sheer volume of cases creates a significant strain on the attorney-client relationship and also negatively impacts the actual, or at least the perceived, efficacy of representation. See, e.g., Laurence Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIMINAL JUSTICE MAGAZINE 1, 2–5 (2011).

against the police. In Ferguson, Missouri, police killed a young and unarmed black male. The details of the shooting are ambiguous and each side involved presented a different interpretation of the what events actually caused the officer to fire his weapon, whether the young man was threatening the police or whether the police merely perceived him as a threatening black man. The incident was framed in the public discourse as a reminder that unarmed black males can still be the victims of police violence and that minority communities feel a greater threat from the police.<sup>79</sup> Regardless of whether this incident was proof that that the “blacks as aggressive” paradigm is still the norm, there is little doubt that this highly-publicized killing has had a greater impact on how blacks view police than it has on how whites view them.<sup>80</sup>

Accordingly, the social science data suggests that the legacy of historical discrimination and racially-motivated violence likely leads to different expectations of violence and differing views of how the conflict will be resolved. The following section examines how the current literature attempts to apply what we know about race and police relations to the seizure context.

#### IV. SOCIAL SCIENCE DATA ON HOW THIS LEGACY AFFECTS SEIZURES

The social science literature has documented this disparate treatment of African Americans as well as the effects of expectations of violence on an individual’s free will. It has not, however, adequately connected these two problems to address the Fourth Amendment seizure question. Based on a thorough review of the social science literature on the subject, it appears that existing data is significantly underdeveloped, and scholars have been unable to provide a meaningful and robust examination of the effect of race on the Fourth Amendment seizure analysis.

In “*Black and Blue Encounters*” *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, Professor Maclin laid the still nascent foundation for conceptualizing race in this context.<sup>81</sup> Professor Maclin drew upon a large number of reports of police violence and abuse to argue that:

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<sup>79</sup> Blake, *supra* note 68.

<sup>80</sup> See *Stark Racial Divisions in Reactions in Ferguson Police Shooting*, PEW RES. (Aug. 18, 2014), <http://www.people-press.org/2014/08/18/stark-racial-divisions-in-reactions-to-ferguson-police-shooting>.

<sup>81</sup> Tracy Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 29 VAL. U.L. REV. 243, 243–45 (1991) (highlighting the problem of police violence directed towards African Americans and how it can force some individuals to acquiesce out of fear); *id.* at 268–69 (arguing that race should be considered in determining whether a police encounter constitutes a seizure under the Fourth Amendment).

[S]ome black men go out of their way to be calm and extremely congenial when approached by a police officer. A black man's silence in the face of police demands should not be interpreted as cooperation, however. His silent exterior masks a complex reaction of fear, anger and distrust that must be kept under wraps in order to avoid a more violent and intense confrontation than history has too often shown places the black man in an overmatched and vulnerable position.<sup>82</sup>

In other words, according to Maclin, African Americans and other minorities have a profoundly different relationship with the police than do white Americans. If we accept Professor Maclin's premise that sometimes African Americans either only appear to consent or acquiesce out of fear of violence, then it follows that the Fourth Amendment seizure analysis for African Americans should incorporate this crucial information.<sup>83</sup> While this Note agrees with Professor Maclin's conclusion and ultimately accepts his premise, the social science evidence he marshals to support his claim is insufficient.<sup>84</sup> Therefore, this Note proceeds by highlighting the strengths and weaknesses of *Black and Blue's* social science research, and attempts to shore up those weaknesses by applying data and logic from other social science research and related fields.

### A. Analysis of the *Black and Blue* Methodology

Professor Maclin highlighted the problem of police violence directed towards African Americans and how it can force some individuals to acquiesce out of fear.<sup>85</sup> To the extent that it raises awareness of an issue and applies a complex set of ideas to a legal problem, Maclin's work is very successful.<sup>86</sup> The problem of police brutality is widely known, but its real-world effects on Fourth Amendment seizure jurisprudence have received very little scholarly attention. The methodology employed in Maclin's article satisfactorily illustrates the problem of racial bias and police brutality; however, the link between brutality and acquiescence received no social science support. Consequently, the major hole in the social science research in this field is the link between well-documented brutality and the practice of acquiescence due to a minority's fear of violence. Social science has

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<sup>82</sup> *Id.* at 278.

<sup>83</sup> *See id.* (claiming that African Americans appear to acquiesce out of fear of violence).

<sup>84</sup> Courts cannot rely on mere conclusions and anecdotes when forming or clarifying the law, which could partially explain the reluctance of courts to explicitly discuss race in their seizure analyses.

<sup>85</sup> Maclin, *supra* note 81, at 243–45.

<sup>86</sup> Since it appears that this piece was designed primarily to raise awareness and highlight the problem of race in the seizure context, the critiques that follow only relate to problems associated with using the work as a piece of social science evidence, not the work's overall merit.

shown that African Americans, as a group, likely should be more fearful or concerned during an interaction with police; it has not yet shown, however, that this fear actually translates into a feeling of being “seized” in more scenarios.

The following section discusses Maclin’s analysis of police brutality against African-Americans. In laying out this half of his argument, Maclin’s article relies on empirical data and survey responses to capture the state of police brutality and perceptions of African-Americans. With regard to this crucial argument, his methodology appears to be relatively sound. Maclin sampled a wide variety of police reports, newspaper stories, and surveys.<sup>87</sup> However, some components of his methodology should be improved in order to produce a more accurate and reliable view of attitudes across races.

### *i. Reliance On Christopher Commission*

The first major piece of social science evidence on which Maclin relies involves internal surveys and reviews of police departments, namely the *Report of the Independent Commission on the Los Angeles Police Department*.<sup>88</sup> This Commission, created in response to and just four months after the Rodney King beating and the subsequently heightened racial tensions in Los Angeles,<sup>89</sup> was tasked to provide a “full and fair examination of the structure and operation of the LAPD” and headed the Commission.<sup>90</sup> The “Christopher Commission,” as it was later called, reviewed sixteen months of internal use-of-force reports and transmissions between squad cars and police stations.<sup>91</sup> The Commission also conducted a survey of 960 officers.<sup>92</sup> The officers were asked whether they believed “racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.”<sup>93</sup> 25.4% agreed with this statement, 55.4% disagreed, and 20.1% had no opinion.<sup>94</sup> Additionally, 27.6% of officers agreed that “an officer’s prejudice towards the suspect’s race may lead to the use of excessive force,” while 15% expressed no opinion and 57.3% disagreed.<sup>95</sup>

Though the Christopher Commission succeeded in shedding some

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<sup>87</sup> While Maclin used many different scholarly sources, this note discusses the most important and problematic pieces.

<sup>88</sup> INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991) [hereinafter “Christopher Commission”].

<sup>89</sup> *Id.* at (ii).

<sup>90</sup> *Id.* at 73.

<sup>91</sup> *Id.* at 45.

<sup>92</sup> *Id.* at 65.

<sup>93</sup> Christopher Commission, *supra* note 88, at 69.

<sup>94</sup> *Id.* at 68–70.

<sup>95</sup> *Id.* at 49.

much-needed light on the problems associated with police activities in Los Angeles, there are two problems with using the Christopher Commission as the basis for empirical analysis. The first issue arises from an inherent problem in the Commission itself; and the second arises from attempts by Professor Maclin to apply the results of the commission to the views and opinions of African Americans.<sup>96</sup>

The Commission was independently created and did not involve LAPD personnel, but it still suffered from bias; it was convened specifically in response to the Rodney King beatings.<sup>97</sup> Designers of the study and those reading the police report were undoubtedly primed by the recent, shocking police brutality that spurred the Commission's creation.<sup>98</sup> For instance, when reviewing a squad-car-to-police-station transmission, the researcher's view of certain words or phrases may have been framed with the Rodney King incident in mind.<sup>99</sup> However, if the Commission had been convened well after the incident, or as part of a routine audit of police procedures, the outcome might have been different. Researchers would have been further removed and might have been able to view the department less prejudicially.<sup>100</sup> Researchers could not have been completely free of bias; however, this bias issue should have been addressed, especially since analyzing touchy and amorphous subjects like racial bias and police responses can depend to varying degrees on the researcher's frame of mind.<sup>101</sup>

Likewise, reports and transcripts of police conversations are poor proxies for measuring racial bias among police. These reports only show one side of the interaction. If police are the people we are trying to monitor,<sup>102</sup> then it is problematic to look to their account of the story when assessing behavior. This shortcoming is somewhat tempered by the

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<sup>96</sup> Maclin, *supra* note 81, at 252–56.

<sup>97</sup> Christopher Commission, *supra* note 88, at (ii).

<sup>98</sup> See *id.* (“Our commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful . . .”).

<sup>99</sup> Christopher Commission, *supra* note 88, at (iii) (“Our staff has reviewed the Mobile Digital Terminal communications (MDTs) of the Department’s patrol cars for six sample months drawn from a sixteen month period.”); but see *id.* (“Our work has been informed by nine major computer-aided studies of documents and statistics that yield their own truths independent of after-the-fact opinions or reconstruction.”). However, given the vast literature on implicit bias and the fact that researchers were tasked with analyzing the reports of a department who *had* engaged in racial violence, it is unlikely that bias was wholly absent.

<sup>100</sup> However, the researchers are likely to still be influenced by response bias. Response bias refers to a cognitive bias that occurs when a respondent believes he is supposed to give a certain answer. In this case, the Commission was convened to find racial bias. For a discussion of response bias and its effect on survey results, see Kathleen Mazor, *A Demonstration of the Impact of Response Bias on the Results of Patient Satisfaction Survey*, 37 HEALTH SERVS. RES. J. 1403 (2002) (researching response bias in patient satisfaction surveys and finding that response bias may significantly impact the results of patient satisfaction surveys). The researchers may have felt compelled to either not find racial bias or to find instances of racial violence to weed out.

<sup>101</sup> Unfortunately, there is no information about traits of the researchers that might affect bias, such as whether they lived in L.A. at the time of the incident, were white or black, or had any experience with police violence. See Christopher Commission, *supra* note 88, at Appendix II, 1–3 (including information on the participants of the study, but lacking information on the authors of the report).

<sup>102</sup> Christopher Commission, *supra* note 88, at i–iv.

fact that the Commission also reviewed reports from civil cases in which the victims of violence claimed injury in excess of \$15,000 as a result of police brutality.<sup>103</sup> Though the researchers would get two sides of the story, this process suffers from selection bias and some problems with perspective. First, in order to file an effective claim an individual generally has to be able to consult a civil lawyer to which he has no constitutional right;<sup>104</sup> thus, in order to acquire a lawyer who works on commission, the plaintiff must have a good chance of winning, and the plaintiff's damages must be significant enough to provide an attractive fee for the plaintiff's attorney (who often is paid on a contingency fee basis).<sup>105</sup> Therefore, these claims will only reflect the views of those with enough money to afford an attorney or with strong enough evidence to ensure a decent settlement or verdict award. However, neither of these variables has anything to do with the moral or legal merit of the claim itself.

For instance, if the victim was isolated during the assault and there were no witnesses, then it is more likely that a lawyer would not be willing to accept the case, even if the police brutality was especially bad. Similarly, the individual would have to know his rights to obtain an attorney and also not fear repercussions from the police. Thus, these civil claims will not show the whole picture of police violence in Los Angeles. In fact, since the victims of the most extreme police abuse will also be the most fearful of incurring the wrath of the police by filing a civil claim against his aggressors, this method might miss the very claims researchers are trying to find, to say nothing of the countless claims that would be necessarily excluded from the Commission's \$15,000 damage threshold.

Also, it is likely that both sides would harbor severe perspective bias. The Commission looked at both sides of the story in a manner similar to the way a court might.<sup>106</sup> However, both sides have an incentive to misrepresent and may simply not remember the events as clearly as they should. Importantly, these stories would not have the benefit of cross-examination—the tool employed to bring out the “truth.”<sup>107</sup> Thus, the researchers would have been forced to piece together the events based on biased data.

In addition to some flaws in the methodology that could have led to overestimating or underestimating racial violence, there are significant problems with importing these kinds of analyses into Maclin's broader theory. Maclin's argument relies on the survey results from the

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<sup>103</sup> *Id.* at 52–54.

<sup>104</sup> The courts do not pay for indigent defense in civil cases. Therefore, most indigent defendants can never get a civil lawyer.

<sup>105</sup> See 42 U.S.C. § 1988(b) (West 2014) (allowing for “reasonable attorney’s fees” for proceedings in vindication of civil rights, but only if the party wins).

<sup>106</sup> See Christopher Commission, *supra* note 88, at 155 (discussing the level of evidence required for the deposition).

<sup>107</sup> LARRY S. POZNER, CROSS-EXAMINATION: SCIENCE AND TECHNIQUE (1993).



Commission, which were intended to capture the opinion of law enforcement about the level of police brutality and whether this brutality was racially motivated.<sup>108</sup> By contrast, Maclin's overarching theory focuses on the state of mind of African Americans when confronted by the police. While officer opinion shows the level of perceived violence from the perspective of the police, there may be a disconnect between these responses and the opinion of the African-American community that Maclin never fully bridges. In addition to the problems of utilizing the Christopher Commission to show racial bias, the empirical data currently employed is flawed.

## ii. *Reliance on Empirical Data*

Empirics are useful in showing us what actually happens in the world. However, if the data compiled in an empirical study is not directly relevant to the ultimate conclusion, the data does not accurately reflect the world around us. Instead, a flawed dataset will create an incomplete picture or present a picture that may be skewed by irrelevant data. Specifically, any collection of empirical data must take into account perspective, and must also control for selection bias; *Black and Blue* does neither.

First, Maclin compiles stories from police department reports and media sources of violence against African Americans that focus on police tactics in response to specific instances of violence, such as brutality in response to a murder committed by a black man against a white man in Boston.<sup>109</sup> While this data would be useful for understanding how police respond to these *specific* scenarios and perhaps in examining how African Americans view law enforcement during these *specific* time periods, it is difficult to extrapolate from this dataset how African Americans view law enforcement generally, in all times and in all places. For instance, police brutality might be more or less likely after specific important events. These events would affect how individuals view certain police interactions.<sup>110</sup> More importantly, the "average" interactions with the police occur in the times between major events. Even if the empirical analysis included data not skewed by temporal difficulties, it would only be useful in examining the state of police violence generally. But the average individual responds based on his perceptions of police and his expectations of violence, not on police brutality statistics. Thus, even if the empirics created an accurate picture

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<sup>108</sup> Maclin, *supra* note 81, at 243 n.2.

<sup>109</sup> *Id.* at 252.

<sup>110</sup> The availability heuristic refers to a psychological phenomena wherein a person makes judgments about the likelihood that certain events occurred based on prior experience and recent examples. For a discussion of this form of bias, see Amos Tversky et al., *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208–10 (1973).

of police violence against minorities, it is unclear whether this picture of violence actually reflects the *feeling* of being seized for minorities or any other group.

Second, by relying on newspaper accounts,<sup>111</sup> the piece fails to capture the effect of violence on the African-American community. As with the data examined by the Christopher Commission, *Black and Blue*'s data does not directly address how or whether blacks perceive police differently than other racial groups; rather, it reflects how journalists understand and perceive the violence.<sup>112</sup> While such reports would tend to suggest that blacks *should* be more concerned about the police (and these reports may, themselves, shape how African Americans view the police), they do not serve as an effective proxy for actual opinion. In other words, Maclin fails to connect the dots between police violence and black perceptions of police behavior when they are approached by police.

The Maclin study, while helpful in demonstrating and legitimizing the fear and sense of subordination felt by African Americans interacting with police, has several methodological flaws. However, despite these flaws, Maclin's paper represents the type of research that the courts should draw on in justifying the use of race as a relevant factor in its Fourth Amendment seizure analysis. Even with the empirical weaknesses addressed above, *Black and Blue* confirms what most Americans might already suspect: African Americans and other minorities have a profoundly different relationship with the police than do whites. In that sense, Maclin's study is a profound and positive step forward and suggests both a need for more rigorous study and for recognition by the courts of the integral role that race can play in an individual's opinion as to whether or not he has been "seized."

## B. How Courts Can Create a Racially-Sensitive Seizure Test

As mentioned above, Maclin's work is important because it begins to lay part of the theoretical framework for changing Fourth Amendment seizure law. However, its utilization of social science evidence leaves much to be desired. Any future study will need to do what *Black and Blue* did not: bridge the gap between question and operationalization, thereby finding a more accurate and convincing means of assessing the views of minorities with respect to police encounters in everyday life. To further this goal, this Note identifies the most significant stumbling blocks in effectively examining the seizure questions that Maclin's piece failed to address. The studies must first work to establish a baseline

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<sup>111</sup> Maclin, *supra* note 81, at 250–51, 250 n.32.

<sup>112</sup> This data looks only at the reports of violence committed by police and the claims of police brutality issued to the department.

which would predict how a reasonable man should respond before examining how the response of different racial groups measure up against this baseline.

### *i. Establishing a Baseline*

The ultimate question in the Fourth Amendment context, which has not been adequately addressed in any “race and the Fourth Amendment” literature, is the extent to which the feelings of the African American population might differ from the general population when confronted by police. Relative subordination bears directly on the question of whether an average African American will feel more or less “free to leave” than the average person. Thus, only by first determining a baseline is it possible to assess whether or not African Americans feel more pressured to comply than the “average” person.<sup>113</sup> Without a baseline standard, it is impossible to say whether the reasonable person standard disadvantages minorities or advantages any other group.

The following analysis demonstrates the two most important factors affecting an individual’s response to police interactions: obedience to authority figures and intimidation. If a person remains and complies with law enforcement because he feels that he generally should obey authority figures, then he is not seized.<sup>114</sup> However, if an individual remains with the police because he feels intimidated by them or restrained by the threat of force or violence, then he has been seized for Fourth Amendment purposes.<sup>115</sup> Thus, the new methodology should first nail down how the race-neutral reasonable man should be expected to feel around law enforcement on the street.

### **a. Obedience to Authority Figures**

The decision to consent to searches or to terminate interactions with law enforcement is affected by many factors; however, a person’s

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<sup>113</sup> Justice Breyer noted this problem during oral arguments in *Brendlin v. California*:

So what do we do if we don’t know? I can follow my instinct. My instinct is he would feel he wasn’t free because the red light’s flashing. That’s just one person’s instinct. Or I could say, let’s look for some studies. They could have asked people about this, and there are none . . . what should I do? . . . Look for more studies?

Oral Argument at 43:00, *Brendlin v. California*, 551 U.S. 249 (2007) (No. 06-8120), available at [http://www.oyez.org/cases/2000-2009/2006/2006\\_06\\_8120](http://www.oyez.org/cases/2000-2009/2006/2006_06_8120).

<sup>114</sup> *Brendlin*, 551 U.S. at 254–55 (seizure occurs when “the officer, by means of physical force or show of authority, terminates or restrains [a person’s] freedom of movement through means intentionally applied.”).

<sup>115</sup> See *id.*

obedience to authority is perhaps the most salient. The social science data demonstrated that many individuals, when given a request by authority figures, will simply comply, even if compliance is against their own self-interest.<sup>116</sup> In an article reviewing social science evidence on coercion, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, Professor Janice Nadler analyzes the actual behavior of individuals when confronted by authority figures.<sup>117</sup> The most relevant component of her piece for this Note's purpose is the analysis of compliance research.<sup>118</sup>

Professor Nadler found that "persons with [police] authority exert an enormous amount of influence over our decisions."<sup>119</sup> Since police officials appear to "possess information and power that is greater than our own . . . the extent to which we feel free to refuse to comply under situationally-induced pressures . . . is extremely limited."<sup>120</sup> From an early age, individuals learn that taking the advice of authority figures "is beneficial for us, both because of their ability to enlighten us and because we depend on their good graces."<sup>121</sup> Therefore, Nadler reasons, when facing a request from the police, Nadler reasons, individuals typically see compliance as being in their best interests, for either personal or social reasons.<sup>122</sup>

The major study on which Nadler relies comes from the now infamous Stanley Milgram experiments, which investigated the level to which individuals comply with authority requests.<sup>123</sup> In this study, individuals who volunteered to participate were told to assume the role of either "teacher" or "learner."<sup>124</sup> The teachers were informed that their task was to teach a series of words to the learners.<sup>125</sup> However, the teacher was also told to administer shocks to the learners each time they made an error in recalling the word.<sup>126</sup> If the subject questioned the administration of shocks, the experimenters were simply told, "please continue" with the shocks.<sup>127</sup> If the subject (teacher) insisted that the experiment must end, the experimenter told him, "you have no other choice; you must go on."<sup>128</sup> Even though the teachers believed the shocks

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<sup>116</sup> Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 202 SUP. CT. REV. 153, 200 (2002).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 173; see also Robert Cialdini & Melanie Trost, *Social Influence: Social Norms, Conformity and Compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 168 (Daniel T. Gilbert et al. eds., 1968).

<sup>120</sup> Nadler, *supra* note 116, at 173.

<sup>121</sup> *Id.* at 174.

<sup>122</sup> *Id.* at 174–76.

<sup>123</sup> Stanley Milgram, *Behavioral Study of Obedience*, 19 J. ABNORMAL PSYCHOL. & SOC. PSYCHOL. 371 (1964).

<sup>124</sup> *Id.* at 373.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* 373–374.

<sup>127</sup> *Id.* at 374.

<sup>128</sup> Milgram, *supra* note 123, at 374–75.

were real, 100% of subjects continued shocking the learner after the learner protested that he was in pain.<sup>129</sup> However, even more surprisingly over 65% of the subjects continued administering shocks until the very end of the experiment, even after the warning: “danger: severe shock.”<sup>130</sup>

The Milgram study highlights some horrifying facts about individuals and compliance with authority, some of which can apply to the Fourth Amendment context. First, the experimenters in white lab coats strongly resembled the police with badges.<sup>131</sup> Like police uniforms, white coats suggest a high position in the social hierarchy and specialized knowledge, perhaps leading individuals to believe that compliance is in their best interests. Similarly, beliefs that police have more information and that compliance is better for the individual have led to false confessions in other contexts.<sup>132</sup> Since complying with a simple request is a less extreme response than the well-documented practice of false confessions, it stands to reason that an individual’s obedience to authority would factor heavily in the seizure calculus.<sup>133</sup> Second, in both situations the individuals do not have a solid understanding of the science or law at play; therefore, they are more likely to comply with the advice of the expert.

However, there are some difficulties with importing this analysis into the Fourth Amendment context, many of which the study itself acknowledges. Namely, the instructions “you must” and “you have no choice,”<sup>134</sup> when used in the context of a police interaction, would certainly indicate that the police have seized an individual and have intentionally coerced him. Therefore, nearly all of these situations would count as a seizure under existing Fourth Amendment law.<sup>135</sup> The Milgram study also contained a selection bias: in order to participate, individuals had to be willing to shock other people. This selection bias would help explain why every single participant was willing to obey and shock someone.<sup>136</sup> Finally, the study did not have a control group. For instance, half the participants could have been asked to do the shocks without being subjected to any kind of authority; the instructions could have been in the form of an instruction manual or pre-recorded tape. If these uncoerced people were less likely to give shocks, then the study would more strongly support the idea that authority influence matters.

Despite the few significant problems identified above, the results of

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<sup>129</sup> *Id.* at 376.

<sup>130</sup> Nadler, *supra* note 116, at 176.

<sup>131</sup> *See id.* at 177.

<sup>132</sup> *See* Saul Kassin & Katherine Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996).

<sup>133</sup> *See id.*

<sup>134</sup> Milgram, *supra* note 123, at 848–52.

<sup>135</sup> *See id.*

<sup>136</sup> This selection bias is similar to the bias in death-qualified juries. By picking only those who are openly receptive to giving the death penalty, these trials are significantly skewed in favor of the prosecution. *See* George L. Jurow, *New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

the Milgram study are astounding and tend to suggest that individuals often feel compelled to comply simply because of societal pressures or other pressures inherent in interactions with the government. However, further research is required to isolate the effects of authority on individual compliance. Until the effect of authority is isolated, it is difficult to even say what the race-neutral reasonable person would do in certain situations.

## b. Intimidation

In his article *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, David Kessler employs an empirical study to analyze the conditions under which average individuals feel free to leave and under which conditions they do not, or do feel seized.<sup>137</sup> This empirical analysis provides an important contribution to the field of criminal law and enforcement, especially because it is one of the only studies of its kind.<sup>138</sup> The study included 406 randomly selected people in the Boston area and presented them with a series of three-part questions.<sup>139</sup> The first part set out two police interaction scenarios: on the street and on the bus.<sup>140</sup> After reading the prompt, the individuals indicated whether they felt free to leave the situation on a scale of 1 (not free to leave or say no) to 5 (completely free to leave or say no).<sup>141</sup>

The second part of the questionnaire involved the same scenarios, asking respondents to indicate which of four different options described their legal rights on both the sidewalk and the bus.<sup>142</sup> The answers were set on a range from 1, the greatest legal obligation to comply, to 4, the lowest legal obligation to comply).<sup>143</sup> Importantly, 4, was the doctrinally correct answer.<sup>144</sup> Finally, the survey captured ages, genders, races, and whether the police had stopped the individual before; however, it did not comprehensively consider or control for the effects of these factors.<sup>145</sup> This failure is significant because each of these factors might influence whether an individual feels free to leave, thus skewing the ultimate result.

The average free to leave score for the sidewalk scenario was 2.61,

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<sup>137</sup> David Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 53 (2009).

<sup>138</sup> *Id.* ("This Article presents the first set of empirical evidence that addresses whether or not actual people would feel free to terminate simple encounters with law enforcement officers.").

<sup>139</sup> *Id.* at 69.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Kessler, *supra* note 137, at 70.

<sup>143</sup> *Id.* at 68–73.

<sup>144</sup> *Id.* at 70.

<sup>145</sup> *Id.* at 71.

and for the bus, 2.52.<sup>146</sup> Thus, people were likely to feel more obligated to comply with the police requests than they doctrinally should.<sup>147</sup> Importantly, even people who knew they were legally able to leave responded that they still did not feel free to leave.<sup>148</sup> Based on these findings, Kessler's paper demonstrates that the average person often feels compelled to comply with a police officer's request, even when they know they have a constitutional right not to.

These survey results tend to show that there is a significant disconnect between an individual's understanding of his legal rights and feeling compelled to obey. Kessler's study is also very useful in that it provides empirical support for the claim that individuals are intimidated into not exercising their constitutional rights during encounters with law enforcement. Thus, one could argue that the "reasonable person" is someone who is already at least non-trivially influenced by the intimidation aspect of law enforcement or simply does not understand his rights.

However, several issues in this study make it difficult to wholly import it into the seizure analysis. First, the survey itself suffers from considerable bias. The sampled group of 406 is probably large enough to yield a statistically significant result; however, the individuals in the group are not representative of the general population.<sup>149</sup> All of the people interviewed lived in Boston and the immediately surrounding area; as such, they may have had biases that people living in urban areas, the Northeast, or Boston might tend to have. While it is hard to precisely define these biases, geographical and urban/rural variables seem to, at least occasionally, correlate with views toward things like government authority and that, therefore, should have been controlled for.<sup>150</sup> Similarly, as the study recognized, all of the researchers asking the questions were Harvard University students, and all but one were white.<sup>151</sup> As a result, the sample may have been shaped by inherent or unrecognized biases in the researchers, affecting who they were more likely to approach. Since the methodology should aim to examine the effects of race and other variables, this is a very significant problem. Another problem could stem from a different selection bias: the respondents were all individuals who, when approached by a researcher, stopped and filled out the long questionnaire for free. These people might inherently be the type of people who are more likely to feel pressured into doing things. In fact, it seems that people who are most likely to feel either intimidation or pressure in police interactions would stop and

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<sup>146</sup> *Id.* at 74.

<sup>147</sup> Kessler, *supra* note 137, at 70, 74.

<sup>148</sup> *Id.* at 74–76.

<sup>149</sup> *See id.* at 53–54.

<sup>150</sup> *See, e.g.,* Ralph Ioimo, et al., *Comparing Urban and Rural Police Views of Bias-based Policing*, 6 PROF. ISSUES CRIM. JUST. 53, 54–59 (2011) (discussing the difference between urban and rural police officers in awareness of racial bias in policing).

<sup>151</sup> Kessler, *supra* note 137, at n.110.

engage with a researcher upon being requested to do so.

A second problem with the survey is the very fact that it is a survey. Researchers are trying to capture how people react when intimidated by police.<sup>152</sup> While someone might be very self-aware<sup>153</sup> or have past experiences with the police and can recall how intimidating these experiences were, the vast majority of people will have no idea how pressured they would feel in an actual encounter with police.<sup>154</sup> Similarly, the hypothetical scenario cannot recreate the sense of pressure or intimidation that a uniformed, usually armed, officer can exert when stopping someone on the street.<sup>155</sup> Instead of being confronted by police, respondents were approached by nicely-dressed Ivy League students asking if they had a few minutes to spare.<sup>156</sup> Thus, the phenomenon researchers were trying to understand is not even present when the information is gathered.<sup>157</sup>

A more appropriate study might ask individuals who had recently or at some point been stopped and questioned by the police whether they felt free to leave in that situation. While this process sacrifices the control over input that the hypotheticals in the survey provide, the real-world examples would provide a more realistic scenario: the respondents would have actually faced the stressor of police intimidation. In the world of police encounters, context matters. Therefore, the ability of a survey to operationalize the feelings of vulnerability, uncertainty, and fear that accompany a police encounter is simply too limited. Any future study using this approach would have to create some sort of quantification method for analyzing the police action objectively. Since each police action is unique, this process would involve a wide variety of inputs, and thus the sample size would have to be much larger.

A middle ground solution could be to have a simulated police interaction in which an actor playing an officer confronts volunteers. While this process would miss the true intimidation relationship that exists in a real police action (because participants would know that the encounter is fictitious), the simulated interaction would at least be able to replicate some aspects of a police encounter that give rise to intimidation, such as physical proximity. Moreover, the actors can read from the same script in every case, providing a very controlled input.

Despite these flaws, the evidence strongly suggests that intimidation and obedience to authority play a significant role in the feelings of most individuals, regardless of race. Therefore, any study of how African Americans feel around police must account for widely held

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<sup>152</sup> *Id.* at 57.

<sup>153</sup> Nadler, *supra* note 116, at 146 ("Research confirms the difficulty of accurately imagining the extent to which situational constraints shape our behavior.").

<sup>154</sup> See Kessler, *supra* note 137, at 61.

<sup>155</sup> *Id.* at 68–71.

<sup>156</sup> *Id.* at 72.

<sup>157</sup> *Id.* at 68.



beliefs that affect every person's feelings and responses. Yet, the state of the literature regarding the average person's reaction to a possible seizure setting is still unsettled and needs further study. Research like that conducted by Nadler and Kessler provides examples of the types of empirics needed to accurately measure a baseline. However, as explained above, these papers also suffer from some flaws. Studies of how different races react to certain scenarios will be the most valuable when we can look at the average reaction for the general population and compare it to the reaction for each race. Still, studies that compare the reactions of different races without a baseline remain useful.

*ii. Moving Away from the Baseline: Race*

After establishing a baseline, the next difficulty is gauging how far away from that baseline each group's reactions fall. Specifically, studies need to analyze either how African Americans and other racial groups respond in this situation or pull from other social science research on similar issues. These studies will need to control for variables that are often closely associated with, but not inherently tied to, race.

While racial characteristics clearly have no intrinsic impact on a person's ability to understand his rights or willingness to end interactions with law enforcement, minority status is closely related to poverty and educational attainment levels.<sup>158</sup> Therefore, any study analyzing the effects of race on a person's willingness to disobey law enforcement would need to control for any other factors that similarly correlate with race. While there are many factors that could affect results, this Note focuses on socio-economic status.

Since race is so closely linked with socio-economic status, any study of racial decisions should control for its effects.<sup>159</sup> Indeed, many of the problems that affect minorities at a greater rate in modern society might actually stem from the problems associated with poverty or poor educational opportunities—or at least a combination of these—and experiences with discrimination.<sup>160</sup> For instance, the problem of the massive over-incarceration of African Americans stems from a variety of practices, such as discriminatory police actions and the fact that many young African Americans live in poor and heavily targeted neighborhoods.<sup>161</sup> While each variable is an important factor, it is

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<sup>158</sup> POVERTY RATE BY RACE/ETHNICITY, HENRY J. KAISER FAMILY FOUNDATION (2012), available at <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (stating the rate of poverty across races).

<sup>159</sup> See, e.g., David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, 896 U. MICH. INST. SOC. RES. 173 (1999).

<sup>160</sup> Of course, this problem with socio-economic status may exist largely because of racism and discrimination.

<sup>161</sup> See e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF*

practically impossible to determine which factor is the most significant or even precisely isolate the effect of any one variable.

However, in the Fourth Amendment 'seizure context, low socioeconomic status could manifest itself in two major ways: first, more frequent interactions with the police due to "economic profiling" and *Terry* stops; and second, lack of education or a decreased understanding of the legal system.

**a. Increased Interactions with the Police:  
Individually and at the  
Community Level**

Unfortunately, significant amounts of violence and drug-related arrests occur in areas suffering from poverty,<sup>162</sup> and it could be argued that poverty, not race, is a crucial factor in determining whether a person is seized under the Fourth Amendment. Vacant homes can be ideal stash houses; the best option for unemployed and uneducated people may often be to sell drugs; police tend to devote more of their resources to arresting people who are forced to live in these areas; and public resources for things like adequate lighting and after-school programs are often not "wasted" on the poor neighborhoods. This perfect storm of factors often makes poverty-stricken communities synonymous with "high crime areas."<sup>163</sup> As a result, these areas are heavily policed and, due to the Court's opinion in *Terry v. Ohio* and its progeny (which make it much easier for law enforcement to search people in high crime areas),<sup>164</sup> indigent people have many more interactions with police than the average population.<sup>165</sup>

However, increased police interactions might have different effects when viewed at the individual or community level. If a community is suffering from excessive *Terry* stops, the general population in that community might feel fatigued and more compliant, thus less likely to exercise their rights to walk away. On the other hand, the general community might feel outraged and less compliant. For instance, if the police have been harassing the community with a significant amount of *Terry* stops, one individual might be much less likely to comply with the

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COLORBLINDNESS (2012); CRIMINAL JUSTICE FACT SHEET, NAACP, <http://www.naACP.org/pages/criminal-justice-fact-sheet> (stating that 58% of all prisoners are minorities).

<sup>162</sup> See David Aaronovitch, *Could Poverty Lead Students to Prostitution and Drugs*, THE INDEPENDENT, (June 4, 1998), <http://www.independent.co.uk/voices/could-poverty-lead-students-to-prostitution-and-drug-dealing-1162774.html>.

<sup>163</sup> See Jeff Grabmeier, *Poverty, Not Race, Tied to High Crime Rates in Urban Communities*, OHIO ST. U. (April 2, 2013), <http://researchnews.osu.edu/archive/badcomm.htm> (arguing that poverty-stricken communities are often synonymous with high-crime areas).

<sup>164</sup> *Id.*; see also Jeffrey Fagan & Garth Davis, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L. J. 457 (2000).

<sup>165</sup> See *id.*

police out of anger, regardless of his race. Either way, individuals in the community can have different responses to the same stimulus, and the poverty factor could skew results either toward or away from compliance. Studies should focus on whether a person who experiences more frequent police interaction tends to become more legally savvy or less intimidated by the police, or whether the opposite is true.

However, one important difference in the seizure context that makes the effect of frequent police conduct less pronounced is that the Fourth Amendment inquiry focuses solely on whether the individual felt free to leave. Since this inquiry looks to the individual's mindset and whether he felt free to exercise his rights at a specific time, the fatigue or outrage issue might be somewhat less important. If someone complies because he has merely given up, and not because he felt forced to comply, then he probably has not been seized for Fourth Amendment purposes at all.<sup>166</sup> Therefore, though the actual decision to comply will be heavily influenced by the high number of interactions with police, a person's feelings as to whether or not he has the right to leave will be less affected. In fact, it seems that the two major effects of police contact that affect the seizure calculus will only be either increased or decreased fear of the police or an increased understanding of the legal system.

### **b. Understanding of the Legal System**

As discussed above, frequent police contact might make a person more legally savvy and more likely to terminate his interactions with the police. However, poverty has an adverse effect on this variable as well. Individuals growing up in poverty are less likely to have a college degree or any training in law.<sup>167</sup> Accordingly, these individuals tend to have a lesser understanding of their constitutional rights, and are less likely to invoke them during police encounters.

However, if the new research method uses the police actor with a pre-recorded script as suggested above, researchers can actually test people's legal understandings of specific scenarios. When respondents are asked to participate, they can also be asked to include their income and educational status and whether (either in the affirmative or using a sliding scale) they were legally free to leave in that situation. In this way, the study could compare whether there is a relationship between poverty and legal knowledge. Furthermore, this additional metric would help to reinforce existing studies that seek to examine whether there is a meaningful disconnect between someone knowing they possess a

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<sup>166</sup> This person would still be free to leave, but has consented to stay.

<sup>167</sup> See, e.g. Helen Ladd, *Education and Poverty: Confronting the Evidence*, J. POL'Y ANALYSIS & MGMT. 203, 205 (2012) (stating that there is a correlation between income and reading and math scores).

constitutional right and whether that same person will feel free to exercise it during a police interaction.

### c. Expected Impact of the Controlled Variables

While race correlates with socio-economic status, and socio-economic status is often linked to demographic variables like education or familiarity with the police, it is likely that the effects of poverty will only have a marginal impact on the results of the study. Again, the study should seek to understand whether the internal process of feeling free to terminate interactions with law enforcement is affected by race; thus, whether someone chooses to terminate the interaction for reasons of fatigue or anger is largely irrelevant because he still felt free to leave. Since the effects of poverty most strongly affect the *decision* to leave and not the *feeling* of seizure, poverty is not likely to be very important in this calculus. Instead, the most important consideration is whether the individual *felt* intimidated, *felt* coerced, or actually expected violence.

In a *New York Times* article, Don Wycliff, a civil rights activist, observed that a black man's economic success, business acumen, or position in the community often has little impact on how he is treated by law enforcement:

Even black men who share no other problem with the black underclass share this one. The most successful, respectable black man can find himself in a one-sided confrontation with a cop who thinks his first name is 'Nigger' and his last name is 'Boy.'<sup>168</sup>

This admittedly anecdotal evidence suggests that interactions with law enforcement are sometimes shaped by only one characteristic: race.

The most comprehensive study on African American views of police, which also controls for social status, came from social scientists Geoffrey Alpert and Roger Dunham.<sup>169</sup> In their work, entitled *Policing Multiethnic Neighborhoods*, the authors examined attitudes of people of different races in the Miami-Dade area with respect to law enforcement.<sup>170</sup> In their study, Alpert and Dunham interviewed members of different races to ascertain their feeling toward law enforcement.<sup>171</sup> They found that race was a key determinant in a person's views of law enforcement.<sup>172</sup> After randomly selecting respondents in the greater

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<sup>168</sup> Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at 22.

<sup>169</sup> GEOFFREY P. ALPERT & ROGER G. DUNHAM, *POLICING MULTIETHNIC NEIGHBORHOODS* 125-26 (1988).

<sup>170</sup> *Id.* at 125.

<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

Miami area, researchers asked respondents opened-ended questions about their attitudes toward law enforcement.<sup>173</sup> The major strength of this study is that it asked a wide variety of questions and allowed for open-ended responses, which prevented the surveyed respondents from being restricted in their answer choices.<sup>174</sup> Moreover, it minimized the effects of any bias in a single question or group of questions.<sup>175</sup> Additionally, the data was representative of the community it was attempting to understand, with respondents coming from middle-class black neighborhoods, government-subsidized housing projects for low-income African Americans, two large neighborhoods with substantial Cuban populations from a variety of socio-economic backgrounds, and a Caucasian neighborhood with wide varieties of economic backgrounds.<sup>176</sup> The study found that wealth was not an important factor in a person's views of law enforcement to black people:

Even though there are important differences between blacks in the middle-class neighborhood and the poor blacks, overall they are much more negative and suspicious toward the police than [other ethnic groups.] [African Americans] do not view the police as their agents of social control, and perceive a disjuncture between the formal control system and their system of informal control. Rather, they tend to view the police as representatives of the majority class. This is an especially interesting finding in light of the numerous differences between the two black neighborhoods. In spite of their different views on specific issues, they share this general conflict orientation.<sup>177</sup>

In other words, poverty seems to have little effect on feelings toward police;<sup>178</sup> instead, the study suggests that the person's race influences his feelings toward the police. Indeed, as Professor Gates' example illustrated, during police interactions, even wealthy and educated men can be defined largely by their race.

Therefore, it makes sense that certain racial groups experience a similar reaction to law enforcement situations regardless of their wealth or status—race is a more clearly visible factor than wealth or education level. After all, police typically cannot immediately determine whether a person is educated or wealthy; they typically can, however, immediately determine his race. Since expectations of violence or actual intimidation are most likely determined by race, it seems as if economic status will

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<sup>173</sup> *Id.* at 41–42.

<sup>174</sup> See ALPERT & DUNHAM, *supra* note 169.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 125–29.

<sup>177</sup> *Id.* at 125.

<sup>178</sup> See *id.* at 125–26.

not be the most important variable.<sup>179</sup>

### C. Expected Results of the Study

The above analysis demonstrates that studies on the reasonable person and race will have to control for socio-economic status and create a baseline for determining how the average person reacts in a situation. After looking at the theoretical literature, this author anticipates that any empirical study of African Americans in the seizure situation will reveal that this group is more likely to feel seized. The legacy of violence by police against African Americans—from the Rodney King incident<sup>180</sup> to beatings in post-Katrina New Orleans<sup>181</sup>—is likely to be in the forefront of an African American's mind when he or she is stopped by the police.<sup>182</sup> These expectations of violence, coupled with the mass incarceration of black males, undoubtedly leads to a sense of helplessness that is not present in law enforcement interactions with whites. Therefore, the courts should take account of an individual's race when determining whether a person has been "seized."

## V. DIFFICULTIES WITH APPLICATION

Despite the influence of race, it is clear that the formal consideration of race raises certain problems. For instance, not all minorities will have similar feelings or reactions to the same situation. Moreover, it will be hard to know to what degree race factors into feelings of "seizure," since perceptions of treatment based on race will vary across geographic regions and economic circles. The consideration of race can also create a substantial line-drawing problem, and the courts must still grapple with the complicated issues that the consideration of race will create. However, the uniformity of enforcement, line drawing, and pragmatic concerns are less problematic than the current regime.

### A. Uniformity

The courts have assumed that the reasonable person is a law-

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<sup>179</sup> BAYLEY & MENDELSON, *supra* note 6, at 91.

<sup>180</sup> Lynn Elber, *Rodney King Video of Beating Helped Drive Revolution*, HUFFINGTON POST, June 18, 2012, [http://www.huffingtonpost.com/2012/06/18/rodney-king-video-of-beat\\_n\\_1607177.html](http://www.huffingtonpost.com/2012/06/18/rodney-king-video-of-beat_n_1607177.html).

<sup>181</sup> Trymain Lee, *Tales of Post-Katrina Violence Go from Rumor to Fact*, N.Y. TIMES, Aug. 26, 2010, <http://www.nytimes.com/2010/08/27/us/27racial.html?pagewanted=all>.

<sup>182</sup> See Cross, *supra* note 52, at 407.

abiding individual, but little else is known about this fictitious person. The Supreme Court has refused to examine whether the person's race should matter, and has opined only that the person's age and gender are "not irrelevant." Perhaps this refusal has been guided by the desire to achieve uniform treatment under the Fourth Amendment. After all, the chief benefit of a "race-blind" reasonable person standard is that it ensures consistency of outcomes for all citizens. Since the standard appears uniform and objective on its face, no white person can complain that the doctrine is unfair to him because of his race.

However, the issue is that African Americans, victims of historic and wide-spread discrimination, are not getting equal treatment. Under the current system, a white person, who is the least likely to feel seized because of his race, will receive the beneficial protection of a reasonable person standard that also takes into account the reactions of groups that have been discriminated against and are more likely to feel seized due to race. Thus, this standard will be skewed to find that a white person has been seized, even if a reasonable *white* person would not feel seized because he/she is less fearful of police. On the other hand, the general reasonable person standard applied to African Americans will significantly discount the importance of the views of people in their community; it will be heavily skewed toward the reasonable white person's perceptions.<sup>183</sup> Since the Fourth Amendment seizure analysis, as articulated by the Court, seeks to determine whether a person feels that he is seized, and a person's race can affect how he will feel, the consideration of race actually promotes uniformity and fairness.

## **B. Line-Drawing Problems and Over-Inclusiveness**

The intricacies that arise when attempting to understand all facets of the "reasonable person" analysis appear overwhelming. Naturally, courts will have to demarcate more salient traits, as the Court did with age and gender, from less salient ones. However, race has become so inextricably intertwined with attitudes toward police and police attitudes toward individuals that it surely is *as* relevant as factors like age and gender. Therefore, the consideration of race will not create line drawing problems because it is already above the "line" created by the Court in other contexts.

Still, most people of a certain race do not have the exact same experiences and views toward law enforcement. Indeed, many white Americans in certain communities will have substantially more run-ins and negative experiences with police than the average minority American. Similarly, many African Americans are members of law

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<sup>183</sup> A consideration of race might actually make it less likely that a white individual will receive the benefits of Fourth Amendment protections.

enforcement, or otherwise have a more positive relationship with the police. Naturally, for these individuals, race will be less likely to drive their view of police. However, the presence of a few outliers, or even of relatively large numbers of African Americans whose “seizure” views are not colored by their race, does not indicate that race should be ignored in the seizure context.

First, the reasonable person standard has routinely considered a variety of issues, each of which, on its own, might be indeterminate. Second, the presence of outliers has never prevented courts from considering traits that usually affect determinations or understanding. For instance, the age of a defendant is considered in the *Miranda* custody analysis.<sup>184</sup> While youth does not always mean immaturity, it is largely suggestive of immaturity in most cases. Similarly, courts consider the relevant training and education of defendants in negligence cases to determine how that person should be expected to act. However, every individual’s ability to learn, understand, and respond to training is heavily influenced by intensely personal characteristics such as IQ, education, and work ethic. Despite the possibility that some highly trained individuals will still not be skilled, the reasonable person standard explicitly considers advanced training.<sup>185</sup>

### C. Pragmatic Concerns

In addition to the theoretical issues, consideration of race presents a possible practical problem. Since race tends to make it more likely that a person will be seized and receive Fourth Amendment protection, adoption of the standard will result in more inadmissible evidence and fewer convictions. The consent search is a valuable tool for law enforcement and, if race is indeed a factor in the seizure calculus, consent might be a substantially less potent tool against African Americans defendants.

Importantly, this Note does not advocate anything as drastic as a blanket ban on consent searches for African Americans or always finding seizure in such cases, it merely argues that the shared and common experiences of police brutality and racial profiling should be considered before the court decides that the defendant voluntarily allowed himself to be seized and searched. Race will become less significant as the police continue to improve their record in equal treatment.

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<sup>184</sup> See, e.g. *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011); Christopher Jackson, *J.D.B. v. North Carolina and the Reasonable Person*, MICH. L. REV. ONLINE 1, 3 (2010).

<sup>185</sup> *Cervelli v. Graves*, 661 P.2d 1032, 1037 (Wyo. 1983).



## VI. CONCLUSION

Race plays a non-trivial role in interactions with police. Police, who are not immune to the effects of implicit and explicit racial biases, often react differently when dealing with minorities. From the gruesome Rodney King beating to the everyday indignities of the New York stop and frisk campaign, African Americans in particular have suffered the effects of these biases. This legacy of violence and disparate treatment has shaped and molded the expectations, fears, and concerns of African Americans in a unique way. If the courts turn a blind eye to the effect that these shared experiences and memories have on a minority's feelings of intimidation when confronted by the police, then it is ignoring a profoundly influential and important trait of the reasonable person.

Social scientists and legal scholars should work to produce a meaningful body of literature that measures the precise role that race might play in an individual's willingness to terminate a voluntary interaction with law enforcement. While some scholars have begun to lay the foundation for thinking about these issues, much work needs to be done. This Note attempts to add to the doctrinal debate by critiquing and analyzing the current literature and providing guidance for future studies. Such studies should also attempt to determine a baseline level of willingness to leave against which race-based studies can be compared. Only by producing such empirical data will scholars enable the courts to properly consult an accurate "reasonable person" standard for all Americans against which they can compare the decisions of other subsets of Americans, especially racial groups.

However, scholarly debate and social science studies are only the beginning of the push for a race-conscious seizure analysis. If future studies show that African Americans, because of their race, are more likely to comply with a policeman's request than the average white person, then advocates should introduce this social science evidence during all trials in which race might have played a factor. Since the value of race in this context is an uncharted territory, advocates for the consideration of race should argue for considerations that are as robust as possible. Moreover, they should focus on highlighting the legacy of violence, discrimination, and oppression that make an African American's interaction with law enforcement unique.