

# The Constitution of Police Violence

Alice Ristroph



## ABSTRACT

Police force is again under scrutiny in the United States. Several recent killings of black men by police officers have prompted an array of reform proposals, most of which seem to assume that these recent killings were not (or should not be) authorized and legal. Our constitutional doctrine suggests otherwise. From the 1960s to the present, federal courts have persistently endorsed a very expansive police authority to make seizures—to stop persons, to arrest them, and to use force. This Article reveals the full scope of this Fourth Amendment seizure authority. Suspicion plays a critical and familiar role in authorizing seizures, but less attention has been given to the equally important concepts of resistance and compliance. Demands for compliance with officers and condemnations of resistance run throughout constitutional doctrine. Police are authorized to meet resistance with violence. Ostensibly race-neutral, the duty of compliance has in fact been distributed along racial lines, and may be contrasted with a privilege of resistance (also race-specific) protected elsewhere in American law. Tracing resistance and compliance helps reveal the ways in which the law distributes risks of violence, and it may help inspire new proposals to reduce and redistribute those risks. Instead of condemning all resistance, constitutional doctrine could and should protect certain forms of non-violent resistance both in police encounters and in later court proceedings. Embracing resistance could help constrain police authority and mitigate racial disparities in criminal justice, and surprisingly enough, it may yet reduce violence.

## AUTHOR

Professor, Brooklyn Law School; Visiting Professor, Harvard Law School (Fall 2017). For helpful comments, I am grateful to Vincent Chiao, Angela D'Souza, Chad Flanders, Rachel Harmon, Jameel Jaffer, Tariq Jaffer, Ted Mason, Sara Mayeux, Darrell Miller, Eric Miller, Melissa Murray, and participants in law faculty workshops at Berkeley, Brooklyn, Duke, and Vanderbilt.

## TABLE OF CONTENTS

INTRODUCTION.....	1184
I. THE SHORT BLUE LINE FROM STOP TO SHOTS .....	1191
A. What Counts as a Seizure .....	1193
B. What Makes a Seizure Reasonable: Suspicion.....	1199
C. What Makes a Seizure Reasonable: Nonsubmission .....	1203
1. The Basic Paradigm .....	1204
2. Nonsubmission as a Safe Harbor .....	1208
D. Force as a Concept, and a Continuum .....	1212
II. THE DISTRIBUTION OF (POLICE) VIOLENCE .....	1215
A. Race as a Burden.....	1217
1. Judicial Cognizance of Racial Burdens .....	1218
2. The Scholarly Veneration of Compliance.....	1223
B. Resistance as a Privilege.....	1227
1. The Foil: Procedural Perfectionism .....	1228
2. The Right to Resist Arrest.....	1230
3. Second Amendment Resistance Rights .....	1235
III. ESCAPE.....	1238
CONCLUSION .....	1244

## INTRODUCTION

Blue lights in the rearview mirror are familiar to every American with a driver's license. Most of us have obeyed the signal and pulled over, unhappy though we may be about it. A bullet from a service revolver, however, is not something that many of us ever expect to receive. Though police killings remain relatively rare events, they are arguably not rare enough, especially for persons of color.<sup>1</sup> Deaths of unarmed black men at the hands of officers have gripped the nation's attention for the past few years.<sup>2</sup> These killings are widely, though not universally, condemned. But the condemnations typically focus on the moment of killing—on the specific choice to use deadly force—and not on the police activity that preceded it. That narrow focus has contributed to the misconception that the killings are the anomalous, unauthorized acts of rogue officers. Against that view, this Article shows that the same legal framework that authorizes and normalizes the ordinary traffic stop also permits and even encourages killings of unarmed suspects.

One constitutional word—seizures—encompasses a wide range of police activity, from the brief investigative stop short of a full arrest, all the way to the killing of a suspect. And one other word—unreasonable—is all that the constitutional text itself offers to distinguish licit from illicit seizures.<sup>3</sup> Across the spectrum of police seizures from stops to shootings, reasonableness is doctrinally defined almost exclusively in terms of just two criteria: suspicion and nonsubmission.<sup>4</sup> Suspicion of any legal violation, even a civil offense, is sufficient to justify at least

- 
1. It is difficult to obtain reliable data on police killings. Investigations by the *Washington Post* and the *Guardian* identified, respectively, 965 and 1134 deaths at the hands of law enforcement officers in the United States in 2015. The *Post* study focused specifically on shootings, rather than all killings, which may account for the lower number. See Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000> [<http://perma.cc/L8XQ-Q7LQ>]; Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> [<http://perma.cc/4VR3-6H34>]. As the *Post* noted, its reported total is more than double the average number of annual police shootings reported by the Federal Bureau of Investigation (FBI), but the FBI and other federal agencies have conceded that their recordkeeping has been inadequate. See Kindy et al., *supra*. Black men constitute about six percent of the U.S. population, but they represented about 40 percent of the unarmed men shot by police in 2015. *Id.*
  2. See sources cited *supra* note 1.
  3. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”). This Article focuses on seizures of persons, but of course the Fourth Amendment also regulates seizures of property.
  4. See *infra* Parts I.B, I.C.

an investigative stop, and greater levels of suspicion justify longer or more intrusive seizures.<sup>5</sup> Once police have made an initial seizure, even if just a brief investigative stop, nonsubmission by the suspect gives the police authority to use force.<sup>6</sup> Indeed, actual nonsubmission is not even a prerequisite to the use of force. An officer who suspects nonsubmission—which may mean that the officer believes that the person seized may resist with violence, or otherwise may pose a danger to the officer or others, or simply isn’t cooperating—becomes empowered to use force against that person, even if the officer is mistaken.<sup>7</sup> Importantly, race is at once central and irrelevant to this suspicion and nonsubmission formula. It is central because officers’ beliefs that a person is suspicious (or nonsubmissive) seem at least partly determined by race in many instances.<sup>8</sup> But racialized motivations are mostly irrelevant to the formal authority to make a seizure. Whenever an officer can identify objective grounds for suspicion—a broken taillight, for example—the Fourth Amendment permits the seizure even if the officer’s choice to stop this particular driver is contingent on the suspect’s race.<sup>9</sup>

To make these general doctrinal rules more concrete, think of the now-familiar pattern that characterizes many highly publicized recent killings. The encounter begins with a seemingly minor police intervention: a traffic stop, an order by the officer to stop walking in the street, an arrest for a petty offense such as selling loose cigarettes.<sup>10</sup> The suspect is insufficiently cooperative, or perhaps

- 
5. See *Whren v. United States*, 517 U.S. 806, 810 (1996) (stating that suspicion of a civil traffic code violation is sufficient to justify a stop); see also *infra* Part I.A.
  6. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”); see also *infra* Part I.C.
  7. See, e.g., *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (holding that use of deadly force against an unarmed suspect who was trying to comply with police orders did not, as a matter of law, violate the Fourth Amendment, given the officer’s reasonable but mistaken belief that the suspect could be reaching for a gun); see also *infra* Part I.C.
  8. See *infra* Part II.A.
  9. *Whren*, 517 U.S. at 813; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) (finding unconstitutional a traffic stop based only on “apparent Mexican ancestry,” but stating that “Mexican appearance” could serve as one factor among others to establish reasonable suspicion of an immigration violation). As discussed in Part II.A, the U.S. Supreme Court has suggested that racially targeted policing may violate other provisions of the federal constitution, such as the Equal Protection Clause, even if such policing does not violate the Fourth Amendment. To date, though, most constitutional challenges to racial profiling have failed in court, regardless of the constitutional provisions invoked. See Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1278 (2004) (noting that “practically all constitutional challenges to racial profiling,” if actually adjudicated, have failed due to “technical legal distinctions”).
  10. In July 2014, Eric Garner was killed in New York City by Officer Daniel Pantaleo as Pantaleo tried to arrest Garner for selling loose cigarettes. The following month, Michael Brown was shot and

only apparently noncooperative.<sup>11</sup> The officer asserts greater authority, the seizure quickly escalates, and the officer concludes that he is in danger. He kills the suspect. Later it is discovered that the suspect was unarmed. In many cases, there is public condemnation of the officer, and in some cases, an effort to indict or prosecute. Even if a prosecutor does pursue charges, the officer is likely to avoid conviction.

As this pattern has repeated itself, there has been surprisingly little attention to the constitutional rules that set the boundaries of seizure authority. Some commentators have sought to understand why prosecutions of officers fail and what legal reforms might make prosecutions successful, but the proposed reforms take the constitutional framework for granted.<sup>12</sup> Other commentators have looked for alternative methods to reduce violence, such as training officers to de-escalate or to be aware of implicit biases that may distort the decision to use force.<sup>13</sup> Still other work simply attempts to determine whether racial bias actually drives use-of-force decisions.<sup>14</sup> These efforts to understand and address police

---

killed in Ferguson, Missouri by Officer Darren Wilson after Wilson had ordered Brown to stop walking in the street. In April 2015, Walter Scott was killed in North Charleston, South Carolina by Officer Michael Slager, who had pulled Scott's car over because it had a broken brake light. For further discussion of these cases, see *infra* Part I.

11. Garner, Brown, and Scott, discussed in *supra* note 10, each reportedly attempted to flee or resist in some way. Garner's resistance and Scott's flight are documented on bystanders' videos. Brown's resistance is more disputed; some witnesses described him as putting his hands up in apparent surrender just before he was shot. Other witnesses described an attempt to hit or charge at the officer, and the Department of Justice report on Brown's killing concluded that the evidence of resistance was at least good enough to preclude a prosecution of the police officer. See U.S. DEPT OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 27–36 (2015).
12. See, e.g., Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213 (describing legal barriers to investigations of police violence and interrogations of police officers, and suggesting ways in which tort and contract law could be used to challenge these barriers to investigation); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (applying conflict-of-interest principles to argue that local prosecutors should not have authority over prosecutions of police officers).
13. Funded by the U.S. Department of Justice, the Fair and Impartial Policing project aims to address and ameliorate implicit bias in federal and state law enforcement. See FAIR & IMPARTIAL POLICING, <http://www.fairandimpartialpolicing.com> [<http://perma.cc/8F83-SK72>]; see also FAIR & IMPARTIAL POLICING, TRAINING RESOURCES SECTION (2017), [https://static1.squarespace.com/static/54722818e4b0b3ef26cdc085/t/58759865e3df289e72236b94/1484101734777/Extended\\_About+FIP\\_2017%24.pdf](https://static1.squarespace.com/static/54722818e4b0b3ef26cdc085/t/58759865e3df289e72236b94/1484101734777/Extended_About+FIP_2017%24.pdf) [<https://perma.cc/VAT5-L9DQ>].
14. See, e.g., PHILLIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE (2016) (finding disproportionate use of force against blacks, even after controlling for arrest rates); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://www.nber.org/papers/w22399.pdf> [<https://perma.cc/6R7F-9ZS9>].

violence have, by and large, identified either individual officers or police departments as the most important decisionmakers; they have not focused on, or faulted, the constitutional doctrine that defines the scope of the officers' authority.<sup>15</sup> In other words, the usual critiques of police shootings operate on the underlying assumption that the officer who chose to shoot made a bad choice against a backdrop of reasonable, if somewhat indeterminate, legal guidelines.<sup>16</sup> Responsibility for the killings is placed with the officers (or, in the view of the officers' defenders, with the noncompliant suspects) and not with the constitutional doctrine that structures police authority, nor with the people who have crafted that doctrine, nor with The People on whose behalf the doctrine is said to be crafted.

This focus on the officer overlooks what it is sometimes called the constitutive function of constitutional law. The U.S. Constitution is literally constitutive in that it specifies the structure and powers of various institutions, calling them into being and shaping institutional actions in important ways.<sup>17</sup> And constitutional doctrine is constitutive in a slightly more metaphorical sense as well; it expresses core political principles and a narrative of political continuity.<sup>18</sup> It shapes our understandings of community and citizenship.<sup>19</sup> Consider these constitutive and

---

(finding blacks more likely to be subject to non-lethal force, but finding no racial bias in the use of deadly force).

15. A number of commentators urge more federal investigations of local police departments. This approach recognizes a problem that extends beyond individual "rogue officers," but still faults the police rather than other actors within the legal system. See, e.g., Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 122–25 (2016) (proposing ways to use new datasets to support federal civil rights investigations of police departments). For a rare commentary that links police killings to broader principles of constitutional doctrine, see Matthew Segal, *Beyond #BlackLivesMatter: Police Reform Must Be Bolstered by Legal Action*, GUARDIAN (July 27, 2016, 7:00 AM), <http://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action> [<http://perma.cc/9NFH-2F6B>].
16. For many years, beginning long before the recent spate of police killings, those who do examine the constitutional rules for the use of force have characterized them as indeterminate. See, e.g., Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008) (describing use of force doctrine as "unprincipled" and "indeterminate"); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002) ("Right now, Fourth Amendment law devotes an enormous amount of attention to the *fact* of searches and seizures, but almost none to how those searches and seizures are carried out.").
17. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 417 (2007).
18. See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 182 (1999) ("Constitutional law creates the people of the United States *as a people* by providing a narrative that connects us to everyone who preceded us.").
19. As Monica Bell observes, the stakes are high in Fourth Amendment jurisprudence, even higher than the individual liberty interests and law enforcement needs that courts typically recite. The stakes are high precisely because of the expressive function of constitutional law. "Because of the longstanding social, cultural, and symbolic meaning of the police among African Americans and in racially and socioeconomically marginalized communities, policing cases—more than others—send

expressive functions in relation to the police. As a formal matter, the Constitution does not itself empower (or even mention) police departments or police officers, but only sets limits to the powers granted to the police by state law or other sources.<sup>20</sup> As a practical matter, though, most American jurisdictions empower officers to the full limits of constitutional doctrine—and even when they do not, officers face few sanctions for conduct that violates state law but falls within the range of federal constitutional permissibility.<sup>21</sup> Thus doctrinal choices shape police practices, as courts are well aware. And the courts' role extends beyond setting the outer parameters of permissible conduct. Constitutional doctrine is rife with normative evaluations of the police, sometimes condemning officers but more often expressing gratitude to them, respect for the risks officers bear, and deference to the choices they make.<sup>22</sup> It is difficult to know whether judicial opining on the police has shaped any specific officer's decisions, but this much is clear: The officers who have killed unarmed black men in recent years have, in several instances, been engaged in exactly the kinds of policing anticipated and even celebrated by constitutional doctrine. Though constitutional doctrine is but one of many factors that shape American policing, it is a factor that cannot be overlooked by those who wish to understand and ameliorate police violence.

This Article thus resists the suggestion that constitutional rules for the use of force are too indeterminate to be relevant. The constitutional law of basic seizures, such as stops and arrests, is not indeterminate. Rather, the doctrine quite clearly authorizes these seizures when police have minimal levels of suspicion. If a suspect resists—if he flees, if he squirms, if he kicks, if he twists away—the authorization to escalate a basic seizure with a use of force is fairly explicit as well. When flight or resistance is coupled with a threat of danger (and flight or resistance is often treated as itself evidence of dangerousness), deadly force is permitted. Scholars have not confronted this aspect of seizure doctrine, but we

---

messages about social inclusion and, indeed, social citizenship.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2140 (2017).

20. Cf. *Ker v. California*, 374 U.S. 23, 37 (1963) (stating that lawfulness of an arrest by a state officer for a state offense is to be determined by state law, subject to federal constitutional limits). Police departments as we know them today did not exist at the time the U.S. Constitution and the U.S. Bill of Rights were drafted and adopted, and neither the Fourth Amendment nor any other constitutional provision was designed as an authorization or regulation of police officers. Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U.L. REV. 1555, 1557–58 (2015).
21. See *Virginia v. Moore*, 553 U.S. 164 (2008) (finding that an arrest in violation of state law does not necessarily violate the Fourth Amendment); *id.* at 174 (noting that Virginia has chosen “not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations”); see also *infra* Part I.
22. For examples, see *infra* Part I.

should: The constitutional law of police force is not indeterminate, but determinately permissive.

The law of police force is constitutive and permissive; it is also distributive. Laws that regulate violence—including self-defense doctrine, the laws of war, and the constitutional law of seizures—never eliminate violence entirely. Instead, these areas of law distribute or redistribute the risks of being subjected to violence, a point underscored by the contemporary refrains that Black (or Blue) Lives Matter. To elaborate with one example, a self-defense doctrine that grants private individuals broad prerogatives to use force against perceived threats may decrease the risks of violence to some persons but increase the risks that others—persons likely to be perceived as threatening—will suffer harm.<sup>23</sup> That was the observation of many critics after Bernie Goetz was acquitted for shooting unarmed black youths in a New York subway car, and the idea resurfaced after George Zimmerman was acquitted for shooting an unarmed Trayvon Martin.<sup>24</sup> Indeed, it was in response to Zimmerman’s acquittal, and not a police shooting, that “Black Lives Matter” was first introduced as a call for activism.<sup>25</sup> Importantly, the distributive effects of laws of violence are not necessarily zero-sum. That is, some legal rules may increase risks of violence on one group without a proportional decrease in risk to another group. It is doubtful whether Fourth Amendment doctrine’s permissiveness of police violence maximizes officer safety or public safety, and the broad authority to use force clearly puts suspects in peril.

- 
23. In a few recent papers, Aya Gruber has examined the distributive effects of criminal justice policies, focusing on the distribution of harms and benefits broadly defined rather than specifically on the distribution of violence. See Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1 (2010); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015). Beyond self-defense doctrine, another legal effort to redistribute violence is the soldier-civilian distinction that is central to the laws of war. It aims to decrease risks of violence to civilians, but it also increases risks to soldiers. The uniform requirement helps shield from violence those who do not wear uniforms, and at the same time marks those in uniform as legitimate targets. Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 117 (2010) (discussing “the tradeoff that the law seeks to induce—sacrificing the lives of soldiers to protect the lives of civilians”).
24. George Zimmerman shot Trayvon Martin, an unarmed black teenager, in Sanford, Florida in 2012, and was acquitted of homicide charges the following year. Audra D.S. Burch et al., *George Zimmerman Not Guilty in Murder of Trayvon Martin*, MIAMI HERALD (July 13, 2013, 10:04 PM), <http://www.miamiherald.com/news/state/florida/trayvon-martin/article1953237.html> [<http://perma.cc/S5TJ-LXD9>]; see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 783–84 (1994) (discussing the trials of Goetz and of the officers who beat Rodney King and suggesting that racial stereotypes underlie many determinations that fear of black males is “reasonable”).
25. See Alicia Garza, *A Herstory of the #BlackLivesMatter Movement by Alicia Garza*, FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2> [<http://perma.cc/KU89-HRDK>].

To reduce or redistribute the risks of violence during police encounters, it is probably necessary to rethink the two broad criteria for reasonable seizures: suspicion and nonsubmission. It is worth asking, for example, whether suspicion of any legal violation merits a forcible police intervention. Instead of prosecuting police officers, we might ask them to do less—to give up on protecting the country from the scourge of broken taillights, for example, and to focus more narrowly on addressing the most serious forms of criminal conduct. That suggestion is not novel; a number of critics have decried the ease with which suspicion thresholds are satisfied and the resulting broad scope of police discretion.<sup>26</sup> But this Article adds to prior critiques by showing that the costs of low suspicion thresholds are not merely the intrusions of stop-and-frisks, but also civilian lives, especially the lives of those civilians most likely to be deemed suspicious.

More controversial than a call to rethink the constitutional doctrine of suspicion, I suspect, will be this Article's recommendation to reevaluate the doctrinal significance of resistance or nonsubmission. Police officers should be obeyed, the orthodox view holds, and their authority should not be questioned except by after-the-fact litigation that gives courts, not suspects, the final word.<sup>27</sup> Especially in the wake of the murders of several Dallas and Baton Rouge officers in the summer of 2016, any allowance for resistance may seem unwise.<sup>28</sup> But today's blanket condemnation of resistance toward officers cloaks a more complicated national history, one that celebrates—selectively—individual rights to refuse compliance with oppressive state agents. When viewed alongside the common law right to resist unlawful arrest once widely recognized in the United States, and next to the recently resurgent Second Amendment right to bear arms, the Fourth Amendment's treatment of resistance as a license for officers to use force seems less self-evident, and perhaps, less defensible.<sup>29</sup> At the very least, we should identify and defend the distributive implications of our rules of resistance;

---

26. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) ("In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause . . . may mean almost nothing.").

27. Even after-the-fact litigation may not present opportunities to question police authority, since courts often defer to officers' judgments. See, e.g., *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) ("Courts must not judge officers with 'the 20/20 vision of hindsight.'" (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002))). For further discussion, see *infra* Part II.B.

28. See Joe Mozingo, *Deadly Attacks in Dallas and Baton Rouge Echo a More Dangerous Time for Police*, L.A. TIMES (July 17, 2016, 5:00 PM), <http://www.latimes.com/nation/la-na-baton-rouge-history-20160717-snap-story.html> [<http://perma.cc/2MGG-SFBQ>].

29. See *infra* Part II.B.

we should be honest about who has the privilege to resist and who bears the burdens of compliance, or the burdens of others' fears of noncompliance.

Part I of this Article introduces the constitutional law of police violence. It shows how the doctrine grants officers broad powers to stop or arrest, and how easily the power to stop becomes the power to use force, even deadly force. This Part focuses, as does the doctrine, on suspicion and nonsubmission, with particular emphasis on the concept of officer safety and the condemnation of all resistance to the police. Part II examines the ways these doctrinal rules affect the distribution of violence. This Part considers first race and then resistance, though each of these themes is bound up with the other. Two points bear emphasis. First, Fourth Amendment suspicion standards have been adopted, and lowered, with open acknowledgment of the burdens these standards will impose on persons of color. Second, the near-categorical demand for compliance with the police contrasts sharply with America's venerations of an individual right to resist government oppression, making the resistance right appear, still in the twenty-first century, as a race-specific privilege. Part III contemplates possibilities for escape via adjustments to the suspicion and nonsubmission framework. It will not be easy. Recent incidents of police violence are the products of deeply embedded constitutional choices—constitutive choices that shape the core political narratives of the nation. Rethinking those choices may prove even more difficult, though also more important, than convicting a police officer for killing a suspect.

### I. THE SHORT BLUE LINE FROM STOP TO SHOTS

In 1976, a Dallas police officer stopped a car for a simple safety violation and was rewarded with a fatal gunshot. At closing arguments in the subsequent murder trial, the prosecutor characterized the police as “the thin blue line” that separated civilized society from anarchy. With more than a touch of irony, filmmaker Errol Morris later used that phrase as the title of a documentary that explores claims that police and prosecutorial misconduct led an innocent man to be sentenced to death for the Dallas officer's murder.<sup>30</sup> But consider the phrase “the thin blue line” without irony. If police at their best should be understood as a necessary barrier separating safe, organized society from violent chaos, the implications may be unsettling. The image of the thin blue line suggests that police do not themselves operate wholly within democratic society. The police officer, like the

---

30. THE THIN BLUE LINE (American Playhouse 1988). After the release of Morris's documentary, the case was reexamined and the defendant, Randall Dale Harris, was eventually exonerated. See J. Michael Kennedy & Daniel Cerone, *Conviction Set Aside for Thin Blue Line Character*, L.A. TIMES, Mar. 2, 1989, at A1.

soldier or correctional officer or anyone else whose livelihood involves wielding physical force on behalf of the state, always stands at the periphery of civilized, law-bound society, and on that periphery, keeps one foot in a world of violence.

Thus, one implication of “the thin blue line” is a reminder that the modern police officer is an agent of violence. Using force is not, of course, the only thing that police do. Officers direct traffic and crowds, they patrol streets, they help people who have literally or metaphorically lost their way, and they, like the rest of us, do far too much paperwork. All the same, the power to use force is one of the defining attributes of the modern police officer.<sup>31</sup> What portion of police activity may be characterized as forceful or violent depends on the definitions of those terms. I shall suggest below that police violence is a far wider category than typically recognized. And even when an officer is not using force, he carries with him the authority to use it. That authorization colors even the gentlest police interactions with individuals, and it ensures that many of these interactions will quickly become ungentle.

The imagery of the thin blue line was almost certainly intended to emphasize not officers’ violence, but rather their vulnerability.<sup>32</sup> As this Part will show, however, the two are closely linked. Fourth Amendment law places great importance on officer safety, and its usual strategy to protect officers is to expand police authority to use force. An alternative approach, one that would protect officers by minimizing officer-civilian contacts and conflicts, is markedly absent from constitutional doctrine. Constitutional doctrine has steadily expanded the occasions in which it permits and even encourages police to interrupt, detain, and take custody of ordinary citizens. As police are asked to do more, they have been empowered to use more force, especially if they sense danger. The result is a different line, noticeable more for its shortness than its thinness—the line from an initial police-civilian encounter to an officer’s authorization to use deadly force. This Part traces that line, beginning with the doctrinal definition of a seizure and then examining the two simple criteria—suspicion and nonsubmission—that

---

31. Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 35 (Herbert Jacob ed., 1974) (“[P]olice work consists of coping with problems in which force *may have to be used*.”).

32. The phrase is a play on “the thin red line,” used to describe the British army at the Battle of Balaclava in the Crimean War, and referring more broadly to a vulnerable military unit standing fast. See JULIAN SPILSBURY, *THE THIN RED LINE: AN EYEWITNESS HISTORY OF THE CRIMEAN WAR* (2005). Metaphors got mixed—lines got crossed, as it were—in 2012 and 2013, when President Obama initially proclaimed that Syria would cross “a red line” and necessitate American military intervention if it used chemical weapons, but he later proved reluctant to commit arguably overstretched American forces to another war. See Dexter Filkins, *The Thin Red Line*, *NEW YORKER* (May 13, 2013), <http://www.newyorker.com/magazine/2013/05/13/the-thin-red-line-2> [<http://perma.cc/U3KN-V6A9>].

render a seizure reasonable. To put it simply, constitutional doctrine has simultaneously invited officers (1) to increase radically their potentially contentious investigative encounters, and (2) to prefer their own safety to the safety of the persons they investigate.

### A. What Counts as a Seizure

To the extent that police violence is regulated by the federal constitution, it is regulated by the Fourth Amendment's prohibition of "unreasonable seizures." As noted in the Introduction, the word seizure is applied to a wide range of police interventions, from short conversation to brutal beating to killing. It is important to understand how constitutional doctrine defines the term seizure—not only to see what counts as a seizure, but also to see what does not. Constitutional doctrine constructs police authority, and it sometimes accomplishes this end by declining to intervene in a contested police practice rather than by imposing constraints. The continuum that leads from initial intervention to deadly force often begins with encounters not formally classified as seizures at all.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." <sup>33</sup> To resolve a Fourth Amendment claim, a court can adjudicate the noun (search or seizure), or it can adjudicate the adjective (unreasonable). <sup>34</sup> The first kind of adjudication does not seem to require the court to make an all-things-considered assessment of the state conduct; it does not require explicit endorsement or condemnation. It is a category assessment, and if the challenged conduct falls outside the category, the adjudicative task ends. <sup>35</sup> Or so the linguistic structure of the Fourth Amendment suggests. In fact, however, Fourth Amendment decisions reveal that the classification of police conduct as a seizure is a normative choice,

---

33. U.S. CONST. amend. IV.

34. The Eighth Amendment's prohibition of "cruel and unusual punishments" creates a similar adjudicative structure. An Eighth Amendment claim may be dispensed with by finding that the state action does not constitute "punishment" at all, or by finding that the instant punishment is not "cruel and unusual." See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 163–70 (2006).

35. As a practical matter, judges may be more inclined to find that an action is not a seizure (or not a punishment), if they also believe the action is not unreasonable or cruel. Occasionally, though, we see judges using the constitutional noun to refrain from regulating otherwise objectionable conduct. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in judgment) (arguing that the Eighth Amendment should not apply to a prisoner-on-prisoner attack, since "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence").

one sometimes driven less by formalistic definitions than by a judgment that the police should be free to engage in the challenged conduct.

“[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”<sup>36</sup> So announced the U.S. Supreme Court in *Terry v. Ohio*,<sup>37</sup> the 1968 opinion that contemplates, and ultimately permits, brief investigative stops and the frisks for weapons that often accompany such stops.<sup>38</sup> *Terry* is famous for its authorization of police activity that is not justified by probable cause, and not for its definition of a seizure; later cases gave more specific content to *Terry*’s “restraint of freedom” standard.<sup>39</sup> But *Terry* was an important beginning to seizure doctrine nonetheless. As Chief Justice Warren’s opinion noted, some argued that a frisk did not amount to a search, nor a stop to a seizure, and on this view stops and frisks should not be prohibited nor even addressed by Fourth Amendment law at all.<sup>40</sup> The Court rejected this claim without much discussion, finding a stop to be a restraint of freedom and thus a seizure, and moving to what might be called adjectival analysis—a discussion of the circumstances under which a stop-and-frisk is reasonable.<sup>41</sup> Nominally, then, the Court purported to regulate stops and frisks, identifying the conditions of permissibility. As decades of experience have shown, however, “reasonable suspicion” as a regulatory standard has posed almost no obstacle to police officers.<sup>42</sup> *Terry* launched seizure doctrine with an illustration that the Fourth Amendment, and judicial review, could legitimize police activity rather than curtail it.

But the invitation extended in *Terry*—to permit or even endorse police activity by declaring it outside the Fourth Amendment altogether—was not forgotten. The Court took a rain check, and redeemed it in later cases that narrowed the definition of seizure and found some police conduct outside of that definition. Later decisions clarified that the “restraint of freedom” standard

---

36. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

37. *Id.*

38. *Id.* at 30–31. After observing two men pace around a store and speak to a third man, and believing them to be preparing to rob the store, Officer Martin McFadden approached the men, asked their names, and then frisked all three, finding guns on two of the three suspects. *Id.* at 5–7.

39. See *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality opinion of Stewart, J.).

40. *Terry*, 392 U.S. at 16 (“There is some suggestion in the use of such terms as ‘stop’ and ‘frisk’ that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution. We emphatically reject this notion.” (footnote omitted)).

41. *Id.* at 16–18. As later cases noted, the *Terry* Court focused primarily on the frisk, and did not offer much discussion of a stop as an independent police action. See *Mendenhall*, 446 U.S. at 552–53 (plurality opinion of Stewart, J.).

42. See, e.g., Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329, 355–56 (2013) (noting the concern that under *Terry*, “law enforcement officials will push any license to (or past) the limits of its logic,” and arguing that the concern is “validated by New York City’s stop-and-frisk experience”).

should take into account the totality of the circumstances and the perspective of a reasonable person: “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>43</sup> Furthermore, a seizure has a causation element: The subject’s perception that his freedom has been restrained must be the product of police force or a show of authority.<sup>44</sup> With this refined doctrinal standard, the Court effectively introduced a new classification of police activity, one I will call the near-seizure.

The near-seizure is a police-initiated encounter with an individual which the individual experiences as coercive, and which is designed to uncover criminal activity and lead to an arrest, but which courts find to lie completely outside the Fourth Amendment. To illustrate: A traveler is approached on an airport concourse by federal agents, who identify themselves, ask a few questions, and then ask the traveler to accompany them to a Drug Enforcement Agency office within the airport. In the office, agents ask to search the traveler’s person and bags, and ask her to remove her clothing. Drugs are discovered, of course, and when the traveler later alleges a Fourth Amendment violation, the Court finds that no seizure occurred, since a reasonable traveler would have felt free to decline the agents’ requests as soon as they approached her on the concourse, and throughout the encounter to the point of the strip search.<sup>45</sup> This is a near-seizure, and it is a category of police activity as important as the investigative stop.

Courts would probably resist the label “near-seizure.” As a formal doctrinal matter, these encounters lie beyond Fourth Amendment protection precisely because they are voluntary.<sup>46</sup> But a study of police force must take note of this type of interaction, because it is, by design and in practical effect, a typical precursor to the use of force. Again, the near-seizure is police-initiated, intended to furnish grounds for an arrest or at least a stop (either of which is a seizure, of course), and often experienced as coercive by the subject of investigation. The airport investigation described above fits this category, as do bus sweeps, which have become a

---

43. *Mendenhall*, 446 U.S. at 554 (plurality opinion of Stewart, J.). It is not clear that this standard can be applied in a race-neutral way, since the reasonable perception of freedom to leave may vary considerably among suspects of different races. See *infra* notes 128, 184–185 and accompanying text.

44. *Mendenhall*, 446 U.S. at 553 (plurality opinion of Stewart, J.).

45. This scenario occurred in *Mendenhall*. See *id.* at 555.

46. The line between what courts find to be voluntary and what they find to be a seizure is murky. *Mendenhall* denied that the DEA agents had seized the traveler. *Id.* at 558 (majority opinion). In another airport narcotics interdiction case with almost identical facts, a plurality of the Court found a seizure. *Florida v. Royer*, 460 U.S. 491, 501–02 (1983) (plurality opinion).

“routine drug and weapons interdiction” strategy.<sup>47</sup> In a typical bus sweep, police officers board a bus just before its scheduled departure and question passengers, usually seeking consent to search luggage. Like the airport interdictions, these sweeps mostly lie outside the Fourth Amendment now, since the Court has rejected the claim that the interaction is necessarily coercive.<sup>48</sup> The Court has specifically rejected a requirement that officers tell bus passengers of their right to refuse consent, holding that cooperation with the police can be “voluntary” even in the absence of such a warning.<sup>49</sup>

Bus sweeps illustrate that a judgment that police action is not a seizure may rest more on normative assessments of the desirability of the action and less on the formal doctrinal definition of a seizure. Indeed, the Court has sometimes acknowledged that passengers on a bus probably do not feel free to leave as an officer approaches them, but has said that this is due to the nature of bus travel and is not the product of government coercion.<sup>50</sup> It is hard to imagine why a drug courier would agree to be searched (as many do), knowing full well what the search will yield, unless he believed that he was not free to leave or resist. The Court’s response to this point—that the Fourth Amendment is concerned with the perspective of innocent persons<sup>51</sup>—is mostly nonresponsive, unless there is some reason to believe that law-violators are unusually and unreasonably deferential to police, which seems unlikely.<sup>52</sup> More plausibly, innocent and guilty alike

---

47. *United States v. Drayton*, 536 U.S. 194, 197 (2002). A third example of a near-seizure is the “factory survey,” or workplace raid, conducted by immigration enforcement officials in search of undocumented persons. *See, e.g., INS v. Delgado*, 466 U.S. 210 (1984).

48. *See Drayton*, 536 U.S. at 203–04 (finding no seizure after three armed officers boarded a bus, one officer stationed himself at each end of the bus, and the third officer questioned passengers individually about travel plans and asked permission to search luggage); *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (noting that passengers awaiting an impending bus departure are unlikely to feel “free to leave” regardless of police presence, and holding that whether a seizure occurred in the bus sweep context depends on “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”).

49. *Drayton*, 536 U.S. at 203–05.

50. *Bostick*, 501 U.S. at 436.

51. *Id.* at 437–38. As discussed further below, the Court’s frequent insistence that the Fourth Amendment is a protection for the innocent rather than the guilty stands in sharp contrast to Fifth Amendment doctrine, which cannot avoid the reality that a privilege against self-incrimination is a protection for those likely to incriminate themselves, including but not limited to the actually guilty.

52. A useful exercise is to imagine the same encounter, but remove both drugs/contraband and uniforms/badges. If a trio of private citizens were to board a bus, take positions at the front and rear, announce that they were looking for someone, and proceed to question passengers one at a time, it is at least possible that (fully innocent) passengers could perceive themselves to be held by force or threat. If the individuals accosting the bus passengers carry visible weapons, as police conducting bus sweeps typically do, the perception of force is even more likely. Now put the badges back—it seems possible and even likely that the officers’ status as police only increases the

experience bus sweeps as coercive, and reasonably so. Non-white suspects may be especially likely to feel that they are “not free to leave” when approached by law enforcement officer, on a bus or otherwise.<sup>53</sup> But bus sweeps have been characterized as “necessary” to the war on drugs—including in briefs and oral arguments to the Supreme Court.<sup>54</sup> The Court’s assertion that the demands of the war on drugs bore little on its classification of a bus sweep as a nonseizure seems to protest too much.<sup>55</sup>

Thus far, I have identified near-seizures that involve individuals who submit to the police and whose submission courts find to be voluntary. A second category of near-seizures involves individuals who do not submit, but rather attempt to flee. Even after police have issued a command to stop that would otherwise qualify as the initiation of a seizure, no doctrinally recognized seizure begins until the individual has submitted or the police have made intentional physical contact.<sup>56</sup> Of course, a reasonable person probably would not feel free to leave once an officer has commanded him to stop, but the Court has amended its initial definition to clarify that the reasonable person’s perception of a restraint on her freedom is a necessary, but not sufficient, condition of a seizure.<sup>57</sup> Thus, an individual who runs after a command to stop has not been seized within the meaning of the Fourth Amendment. One important practical consequence of this rule is that a suspect who discards evidence in flight cannot later suppress it,

---

degree to which passengers will feel compelled to submit. Cf. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 20 (1999) (discussing the coercion inherent in police encounters).

53. See Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–86 (2002) (discussing *Bostick* and racial minorities’ heightened vulnerability to police encounters).
54. See Petitioner’s Brief on the Merits, *Bostick*, 501 U.S. 429 (No. 89-1717), 1990 WL 10013127, at \*8. Though *Bostick* was not federal prosecution, the federal government was sufficiently invested in the outcome of the case to have Solicitor General Kenneth Starr participate in oral argument, and Starr emphasized the growing prevalence of bus sweeps as a “natural outgrowth” of airport drug interdictions. See Transcript of Oral Argument, *Bostick*, 501 U.S. 429 (No. 89-1717), 1991 WL 636581, at \*19.
55. See *Bostick*, 501 U.S. at 439.
56. *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding that even after a showing of police authority or exercise of force, no seizure occurs if the subject does not yield); *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989) (“[A] Fourth Amendment seizure does not occur . . . whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.”). Physical contact with a fleeing suspect creates a seizure only if police intend the specific form and manner of contact. Thus, a police vehicle’s high-speed pursuit of a motorcycle, which ended in a crash that killed a passenger on the motorcycle, was not a seizure. *County of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998). In contrast, a vehicle crash deliberately orchestrated by police is a seizure (and not necessarily an unreasonable one). See, e.g., *Scott v. Harris*, 550 U.S. 372, 381, 385–86 (2007).
57. *Hodari D.*, 499 U.S. at 628.

even if the police lacked any justification for the initial order to stop.<sup>58</sup> More broadly, the denial of Fourth Amendment protection to a fleeing suspect introduces the doctrinal disapproval of resistance. A suspect who fails to comply with an officer's command is penalized with the loss of the Fourth Amendment protection that would otherwise apply. And while flight denies the suspect constitutional protections in some circumstances, it nearly always expands the police officer's power. The very act of attempting to avoid police is a factor that helps establish the suspicion necessary to justify a stop, should the police not yet have that suspicion.<sup>59</sup> As discussed below, flight or resistance also gives the officer authority to use at least some degree of force.<sup>60</sup>

This last point takes us from the noun to the adjective: Once police activity is categorized as a seizure, the precise scope of police authority is a question of reasonableness, which in turn is determined by suspicion and nonsubmission. Before we examine those criteria in the next two sections, it is worth pausing to emphasize the implications of the narrow doctrinal definition of a seizure. This Subpart has shown that the label "seizure" applies only to encounters in which (1) a reasonable person would feel coerced, with reasonableness and coercion judicially determined, and (2) the target actually submits or is overpowered. Given this doctrinal definition, many police-civilian encounters are left outside the Fourth Amendment altogether. Federal courts have not been neutral or indifferent to those encounters; instead, they have repeatedly endorsed them. *Terry* and a long line of cases after it explicitly encouraged the police to approach people, to ask them questions, to seek permission to search their persons or their belongings—even in the absence of any reason to suspect them of wrongdoing.<sup>61</sup> In-

---

58. *Id.* at 629. The Court suggested that its ruling (no seizure until submission) was justified in part by the need to incentivize submission to police orders: "Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." *Id.* at 627.

59. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." (citations omitted)). Officers regularly cite evasive or furtive movements as the basis of reasonable suspicion, and have cited that factor more frequently over time. See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78–79 (2015).

60. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.").

61. See, e.g., *United States v. Drayton*, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means."); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (plurality opinion of Stewart, J.) (denying that police-citizen encounters are necessarily intrusive and claiming that to characterize every "street encounter" as a seizure would "impose wholly unrealistic restrictions upon a wide

deed, courts characterize these encounters as healthy collaborations rather than oppressive interventions.<sup>62</sup> Oppressiveness would render the encounter a seizure, of course, but in the judicial view, there is no inherent coercion or oppression when an officer interrupts a civilian with a request for cooperation. Consequently, in airports, buses, streets, and elsewhere, the volume of police-initiated encounters, from near-seizures to *Terry* stops, has expanded dramatically.<sup>63</sup> To understand police killings of civilians, it is important to begin at the beginning, with the initial police intervention, and to note how easily and often that intervention is made.

### B. What Makes a Seizure Reasonable: Suspicion

If we narrow our focus from all police-initiated encounters with civilians to the subset of those encounters formally recognized as seizures, the critical doctrinal word becomes the adjective. What makes a seizure reasonable? In the context of searches, “reasonable” used to be interpreted to mean “pursuant to a warrant,” but the warrant “requirement” or “preference” was never applied as consistently to seizures.<sup>64</sup> Absent warrant requirements, reasonableness is nominally assessed

---

variety of legitimate law enforcement practices”); *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (suggesting that it would be “poor police work indeed” to fail to stop Mr. Terry).

62. See, e.g., *INS v. Delgado*, 466 U.S. 210, 216 (1984) (“[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”).
63. The numbers are hard to verify because many jurisdictions do not track stops, let alone the near-seizures described in this Subpart. Even when officers are asked to record stops, underreporting is likely. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013). The frequency of police-civilian contact also varies sharply by geographic area. One survey estimated that about 26 percent of the U.S. population age sixteen and older had some face-to-face contact with a police officer in 2011, with the majority of the involuntary encounters being traffic stops. LYNN LANGTON & MATTHEW DUROSE, U.S. DEPT OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1–2 (rev. 2016), <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf> [<https://perma.cc/XK8R-27JD>]. In some urban areas, however, there are as many stops as residents, or more. A detailed dataset concerning stops in New York City revealed a concentration of stops in particular neighborhoods and toward persons of color. See CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012); see also Barry Friedman & Cynthia Benin Stein, *Redefining What’s “Reasonable”: The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 299–300 (2016) (describing the frequency of stops and bus sweeps in various jurisdictions). In one Brooklyn neighborhood between 2006 and 2010, data suggests that young black males were stopped an average of five times each per year. Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html> [<http://perma.cc/8VY6-TNA7>].
64. See, e.g., *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (“Logic . . . would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches. But logic sometimes must defer to history and experience.”). Today, though courts occasionally speak as though warrants are the default requirement, the vast majority of both searches and seizures are conducted without a warrant. Compare *Riley v. California*, 134 S. Ct.

with a balancing test that weighs the intrusiveness of a particular seizure against the government's justification for it. Balancing, however, suggests a more complex or nuanced analysis than that which actually structures seizure doctrine. Across the full gamut of seizures of persons, from stops to shootings, reasonableness is typically a matter of two simple criteria: suspicion and nonsubmission. This Subpart discusses suspicion, and the next addresses nonsubmission.

For the initial decision to seize a person, suspicion of unlawful activity is usually sufficient (though it is not always necessary).<sup>65</sup> I use the adjective unlawful rather than criminal deliberately, because police are permitted to make stops on suspicion of various civil and traffic violations; hence the familiarity of those blue lights on American roadways.<sup>66</sup> Fourth Amendment doctrine has identified two major suspicion thresholds: reasonable suspicion and probable cause. The *Terry* stop, as discussed above, requires only reasonable suspicion that the individual is engaged in or planning unlawful activity, or has already committed a felony.<sup>67</sup> Reasonable suspicion can be satisfied by a few standard formulas, such as “evasive”

---

2473, 2482 (2014) (“Our cases have determined that ‘[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995))), with Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1038 n.28 (2001) (citing evidence that the majority of searches, perhaps as high as ninety-eight percent, are conducted without a warrant).

65. The Supreme Court has said that suspicion that a person has relevant evidence and may be a “material witness” can constitute “individualized suspicion” for Fourth Amendment purposes, even in the absence of any reason to suspect that the individual has himself committed a crime. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 738 & n.2 (2011). Some lower courts have used the same reasoning to justify *Terry* stops of non-suspects. See, e.g., *State v. Pierce*, 787 A.2d 1284, 1287–88 (Vt. 2001). In addition, when police have sufficient suspicion to conduct a search of a given location, they have authority to seize persons on the premises for the duration of the search. See *Michigan v. Summers*, 452 U.S. 692, 705 (1981).
66. See Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 336–39 (2014) (explaining that the authority to arrest is not limited to criminal offenses).
67. Though *Terry* is understood to authorize stops based on “reasonable suspicion” based on “specific and articulable facts,” the *Terry* majority did not use the precise words “reasonable suspicion.” See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (referring to “specific and articulable facts”). The meaning (and mystery) of the phrase was discussed at oral argument. Justice Douglas used it in his *Terry* dissent, and the Court now uses the phrase regularly. *Id.* at 37 (Douglas, J., dissenting) (“The term ‘probable cause’ rings a bell of certainty that is not sounded by phrases such as ‘reasonable suspicion.’”); see also *United States v. Mendenhall*, 446 U.S. 544, 571 (1980) (White, J., dissenting). The Court extended the authority to make *Terry* stops to investigations of completed felonies in *United States v. Hensley*, 469 U.S. 221 (1985), but declined to decide whether a police officer may make a stop based on reasonable suspicion of a completed misdemeanor. *Id.* at 229.

or “furtive” movements combined with presence in an area classified by police as “high crime.”<sup>68</sup>

An actual public arrest—which usually involves not just detention and questioning on the street, but transport to a police station and a formal booking—requires probable cause to believe that the suspect has committed a crime.<sup>69</sup> Probable cause is always described as a more demanding standard than reasonable suspicion, but courts have refused to express either standard as a quantitative probability. Accordingly, it is not clear exactly what distinguishes the two types of suspicion.<sup>70</sup> One possible distinction is that reasonable suspicion does not appear to require suspicion of any particular crime—it is enough that the officer believes some kind of wrongdoing “may be afoot”—while courts often say that probable cause requires suspicion of a particular offense.<sup>71</sup> In any event, the distinction between a stop and an arrest, while potentially important to the individual suspect and his criminal record, is of limited importance to an analysis of police force. Authority to make either a stop or an arrest carries with it the authority to use some force if necessary to subdue the suspect.

How much force is an important question, but before we address that issue, it is worth clarifying the precise way in which suspicion renders a seizure of a person reasonable. A stop or arrest is reasonable when it is made in the presence of adequate grounds for suspicion. When such grounds are present, little else matters. In that sense, suspicion (either reasonable suspicion or probable cause) is a safe harbor: Once the grounds for suspicion are established, the legal inquiry is over.<sup>72</sup> Criteria of constitutionality are better understood as safe harbors than legal limitations, as Josh Bowers has explained, when they are “thresholds to permissive state action.”<sup>73</sup> Bowers identifies probable cause as one such safe harbor, noting

---

68. See Fagan & Geller, *supra* note 59.

69. See *United States v. Watson*, 423 U.S. 411, 415 (1976) (holding that the police may make a warrantless arrest in a public place based only on probable cause); cf. *Payton v. New York*, 445 U.S. 573, 576 (1980) (holding that the police need a warrant to make a routine felony arrest in the suspect’s home rather than in public).

70. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (stating that probable cause is not quantifiable); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (“Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible.”); *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause . . .”).

71. I am characterizing the way the two standards are treated by lower courts. The Supreme Court has not ruled directly on the question whether reasonable suspicion or probable cause requires suspicion of a specific, identified offense. See 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1(b), at 8 n.29 (5th ed. 2012); 4 *id.* § 9.5(c).

72. See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 1031–34 (2014).

73. *Id.* at 1031. As Susan Klein argues (apparently introducing the term “constitutional safe harbor”), another feature of a constitutional safe harbor rule is that it almost certainly protects some conduct

that it “does not so much constrain as it empowers.”<sup>74</sup> Probable cause is a standard so frequently and easily satisfied that the police could not possibly make a stop or arrest every time they have probable cause to do so. Instead, police have discretion to choose which instances of probable cause they will pursue, and in any given case, the fact of probable cause legitimates but does not necessarily determine or motivate the police action. The suspected violation can be a mere pretext for a stop designed to investigate the possibility of other crimes, crimes about which the officer has no legally cognizable suspicion at all.<sup>75</sup> Officers regularly use traffic stops to look for evidence of drug trafficking, for example. Additionally, a seizure’s reasonableness is not dependent on the need to prosecute the suspected offense. Nor does reasonableness turn on an accurate understanding of the underlying substantive criminal law; an officer who mistakenly (but reasonably) believes that it is illegal to drive with only one brake light may stop a motorist on that ground.<sup>76</sup> In short, the legality of the initial decision to make a seizure turns on one criterion—objectively reasonable grounds to suspect the person—and is decidedly not an all-things-considered reasonableness inquiry.<sup>77</sup>

So far, I have presented the doctrinal framework with barely a word about race. That is the way the Supreme Court usually discusses suspicion and its ability to legitimate seizures. Suspicion, as doctrinally relevant, means suspicion that a person has engaged in unlawful activity, even a minor or civil infraction. Racialized suspicion—an officer’s selection of a target on the basis of his or her race—is irrelevant if the officer can point to nonracial reasons to suspect an infraction.<sup>78</sup> Part II will examine the racial implications of seizure doctrine in more detail, but this basic point should be noted for now: Because suspicion operates as

---

that violates the underlying constitutional norm. *See Klein, supra* note 64, at 1033 (“A prophylactic rule potentially overprotects the constitutional clause at issue, while a safe harbor rule potentially underprotects it. . . . [T]he safe harbor rule will allow some government behavior that would otherwise be declared unconstitutional without the rule.”). For example, the rule that officers may always search an arrestee’s person and the immediately surrounding area, though justified as a mechanism to protect officer safety, almost certainly permits and even encourages many searches that the arresting officer knows to be unnecessary for safety. *See id.* at 1045 (discussing *Chimel v. California*, 395 U.S. 752 (1969), and its grant of authority to search area surrounding an arrestee as a safe harbor rule).

74. *Bowers, supra* note 72, at 1032.

75. *See Whren v. United States*, 517 U.S. 806, 812–13 (1996).

76. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

77. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47, 354 (2001) (acknowledging that an arrest was a “pointless indignity” imposed “by a police officer who was (at best) exercising extremely poor judgment,” but concluding nonetheless that the arrest was reasonable because the officer had probable cause to suspect a seatbelt violation).

78. I am hardly the first to observe this implication of the Fourth Amendment standard of objective reasonableness. *See, e.g., Andrew D. Leipold, Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559 (1998).

a safe harbor, and because it is very easy to satisfy the minimal Fourth Amendment suspicion thresholds and reach that safe harbor, racial bias in seizure decisions is nearly impossible to challenge.

### C. What Makes a Seizure Reasonable: Nonsubmission

Reasonableness governs not only the fact of a seizure but also the manner in which the seizure is carried out.<sup>79</sup> In this second dimension, nonsubmission is particularly important. Given the broad authority that the police have to make seizures, it is inevitable that some of their targets will attempt to flee or resist. This reaction then authorizes the officer to use as much force as is “objectively reasonable.”<sup>80</sup> Again, balancing is nominally the methodological approach. Individual interests are weighed against governmental ones. In theory, a balancing model suggests that the use of deadly force or even nondeadly weapons should require circumstances far more dire than those that justify mere arrest. In practice, if an officer acting on suspicion meets resistance from his target, the officer’s authority to use force expands rapidly and reaches a license to kill quickly. The target need not even actually resist. If the officer suspects nonsubmission—if he or she perceives a threat from the target—the officer becomes empowered to use force.<sup>81</sup> Even this does not quite capture the full scope of the doctrinal authorization, for Fourth Amendment reasonableness is an objective standard rather than a subjective one. To be precise, if factors exist that would lead a reasonable officer to suspect nonsubmission—whatever this officer believed—then the officer is empowered to use force. This is the short blue line that has led to the deaths of Eric Garner, Tamir Rice, Philando Castile, and other unarmed black men.

Long before those names became familiar, another unarmed black man named Dethorne Graham was beaten by police officers in Charlotte, North Carolina.<sup>82</sup> Graham was not killed by the officers, and his subsequent lawsuit led to a Supreme Court opinion that addresses the use of force broadly rather than deadly force in particular. Nevertheless, Graham’s experience and the judicial response can be seen as harbingers of more recent police killings. In *Graham v.*

---

79. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

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

81. As discussed below, the doctrine requires that the officer’s perception be reasonable, but courts usually defer to the officer and almost never conclude a perception of danger was unreasonable.

82. *Graham*, 490 U.S. at 389–90. The Supreme Court described Graham as “a diabetic” but did not mention his race. *See id.* at 388. Graham’s brief to the Court identifies him both as a diabetic and as “a black male employee of the North Carolina Department of Transportation.” Brief for the Petitioner, *Graham*, 490 U.S. 386 (No. 87-6571), 1988 WL 1025786, at \*3.

*Connor*,<sup>83</sup> more than in any decision focused specifically on deadly force, the Court constructed a second safe harbor for police, one that protects the use of violence rather than the mere fact of a stop or arrest. The details are instructive. This Subpart begins with a close study of *Graham* to reveal the role of nonsubmission in the constitutional authorization of police violence, then examines the *Graham* standard in operation and the development of a new safe harbor.

### 1. The Basic Paradigm

Dethorne Graham aroused a police officer's suspicion one day in 1984 by entering a convenience store and leaving again very quickly.<sup>84</sup> The officer followed and stopped Graham, but apparently did not believe Graham's explanation that he was a diabetic in search of orange juice to avoid an oncoming insulin reaction. Other officers arrived at the scene, and they handcuffed Graham, put him face down on the hood of a car, shoved his face into the hood, and later "threw him headfirst into the police car."<sup>85</sup> One officer said, probably using full epithets rather than the abbreviations that made it into the official record, "Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up."<sup>86</sup> Another told Graham to shut up when he asked the officers to look in his wallet for proof of his diabetes. When one of Graham's friends showed up with orange juice for him, the police refused to let him have it. Eventually, the officers learned that Graham had not committed any crime at the convenience store, and they released him. Graham suffered several injuries from the police, including bruises, cuts, a broken foot, and an injured shoulder.<sup>87</sup>

Graham sued for damages under 42 U.S.C. § 1983, alleging that the officers involved had used excessive force in violation of his constitutional rights.<sup>88</sup> The initial trial ended with a directed verdict for the police officers, after the trial court applied a substantive due process analysis that asked, among other things, if the officers had acted maliciously with the specific intent to harm.<sup>89</sup> Graham and

---

83. *Graham*, 490 U.S. 386.

84. *Id.* at 389.

85. *Id.*

86. *Id.*

87. *Id.* at 390.

88. *Id.*; see 42 U.S.C. § 1983 (2012).

89. *Graham*, 490 U.S. at 390–91. The four factors considered by the trial court were those articulated in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), to evaluate uses of force in jails; they were later applied in the prison context as well. See *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). The factors included "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose

amici perceived this intent inquiry as a bar to recovery for most victims of police violence.

On appeal, Graham argued that his claim should be adjudicated instead under the Fourth Amendment's standard of objective reasonableness without regard to the officers' subjective intentions, and the Supreme Court agreed.<sup>90</sup> The Court acknowledged that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."<sup>91</sup> In the absence of a precise test, the Court identified relevant factors to the reasonableness inquiry, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>92</sup> Instead of asking what the actual officer was thinking, the question was whether a hypothetical reasonable officer could have concluded that the circumstances justified the use of force.<sup>93</sup> And reviewing courts must not rely on "the 20/20 vision of hindsight," but rather must make "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."<sup>94</sup>

A few points about *Graham* bear emphasis. First, suspicion: The police became interested when Graham, a black man, entered a convenience store and left it again quickly. No other rationale for the stop—the initial seizure—was offered, and none was necessary. Second, nonsubmission: Though the Supreme Court didn't mention it (they were ruling for Graham, or at least, in favor of his proposed shift from due process to the Fourth Amendment), the lower court had described Graham as physically resisting the officers.<sup>95</sup> The Supreme Court did

---

of causing harm." *Glick*, 481 F.2d at 1033. Under this standard, the district and appellate courts both concluded that Graham had failed to establish a violation of his constitutional rights. *Graham*, 490 U.S. at 390–92.

90. *Graham*, 490 U.S. at 394–95; Brief for the Petitioner, *supra* note 82, at 23.

91. *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

92. *Id.*

93. *See id.* at 397.

94. *Id.* at 396–97.

95. *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986) ("The officers then attempted to place the Plaintiff in Officer Connor's patrol car and the Plaintiff vigorously resisted this effort, by kicking and otherwise attempting to keep from being placed in the car."), *aff'd*, 827 F.2d 945 (4th Cir. 1987), *cert. granted sub nom. Graham v. Connor*, 488 U.S. 816 (1988), *vacated*, 490 U.S. 386 (1989). The lower court opinions also mention another factor that, in this particular case, seems to have contributed to the police officers' decision to use force: "Meanwhile, a crowd had gathered around and Officer Townes testified that it appeared things were getting out of hand." *Id.* The gathering crowd calls to mind George Orwell's "Shooting an Elephant," as powerful an essay on police force as it is on colonialism:

not address that factual claim directly, but it identified attempts to resist or evade arrest as factors relevant to the objective reasonableness analysis. And this leads to the third key dimension of *Graham*: the shift from a subjective inquiry into the officer's state of mind to an objective analysis. As is true with the suspicion thresholds discussed in the previous Subpart, the doctrinal emphasis on objective reasonableness—on whether a hypothetical reasonable officer could have found adequate suspicion or could have believed the suspect likely to resist—produces a safe harbor in which police action actually motivated by bias, caprice, or some other non-constitutional criteria is constitutionally permissible.<sup>96</sup>

In 1989, the year the Supreme Court issued its opinion, it seemed to most commentators that *Graham* had won an important victory; it was assumed that Fourth Amendment reasonableness would prohibit more police violence than the substantive due process inquiry into officers' motivations.<sup>97</sup> In giving up the subjective motivation inquiry, however, the Court also abandoned other features of the substantive due process analysis: an inquiry into whether the force was necessary, and a direct proportionality inquiry that examined the relationship between the need for force and the degree of force used. To be sure, in 1989, scholars and practitioners might have thought that necessity was as much a component of Fourth Amendment analysis as it was of the due process standard; in 1985, the Court had seemed to say as much, at least in the context of deadly force, in *Tennessee v. Garner*.<sup>98</sup> But the *Graham* Court did not address the necessity of force except in passing, to defer to officers' judgments: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular

---

I glanced round at the crowd that had followed me. . . . I had got to shoot the elephant. I had committed myself to doing it when I sent for the rifle. A sahib has got to act like a sahib; he has got to appear resolute, to know his own mind and do definite things. To come all that way, rifle in hand, with two thousand people marching at my heels, and then to trail feebly away, having done nothing—no, that was impossible.

GEORGE ORWELL, *Shooting an Elephant*, in *THE ORWELL READER: FICTION, ESSAYS, AND REPORTAGE* 3, 6–7 (Harcourt, Brace & Co. 1956).

96. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397.
97. See, e.g., Glen Elsasser, *Police-Brutality Definition Is Widened by High Court*, CHI. TRIB., May 16, 1989.
98. 471 U.S. 1 (1985). "[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11–12 (emphasis added).

situation.”<sup>99</sup> And later, the Supreme Court would make clear that Fourth Amendment reasonableness does not require a showing that the force used was actually or even apparently necessary.<sup>100</sup>

In operation, the objective reasonableness standard did not seem to help Dethorne Graham as an individual, and it has not served as the constraint on police violence that commentators envisioned in 1989. Graham’s lawsuit was remanded for consideration under the Fourth Amendment standard, and though there is no opinion entered after the remand, Graham apparently lost at retrial, too.<sup>101</sup> Perhaps this result was thanks to the officers’ allegation that Graham had physically resisted them. But whatever the particular aspects of “the factbound morass of reasonableness”<sup>102</sup> that justified the beating of Graham, later decisions suggest that for police officers, the adjudication of the use of force under the Fourth Amendment has revealed not so much a morass as another safe harbor.

Dethorne Graham’s case is illustrative, but it may mislead in one respect: It may suggest that the nonsubmission that empowers officers to use force is the “vigorous resistance” to arrest attributed to Graham by the lower federal courts.<sup>103</sup> We know relatively little about whether Graham actually resisted the officers or how he did so. But it probably does not matter, because nonsubmission is a concept much broader than a physical struggle to avoid arrest. As explained further below, nonsubmission includes an attempt to run away, a passive refusal to do as the officer orders, or even the mere appearance of dangerousness—a failure to dispel the perception of possible attack, one might say. These various forms of nonsubmission do not authorize deadly force in every instance, but they all authorize some degree of force. That view is stated explicitly in federal court opinions, which routinely authorize low-level uses of force based on an officer’s perception of danger,<sup>104</sup> and it is reflected clearly in police departments’ use-of-force policies, discussed in Part I.D.

99. *Graham*, 490 U.S. at 396–97.

100. See *Scott v. Harris*, 550 U.S. 372, 382–83, 382 n.9 (2007) (rejecting an interpretation of *Garner* as creating “rigid preconditions,” including necessity, for the use of deadly force).

101. Eileen Sullivan, *Supreme Court Case to Shape Ferguson Investigation*, SALON (Aug. 22, 2014, 1:30 AM), [http://www.salon.com/2014/08/22/supreme\\_court\\_case\\_to\\_shape\\_ferguson\\_investigation2](http://www.salon.com/2014/08/22/supreme_court_case_to_shape_ferguson_investigation2) [<http://perma.cc/QFK9-GWYU>] (reporting that Graham lost his second trial).

102. After rejecting necessity and other “rigid preconditions” for the use of deadly force, the *Scott* Court declared, “[I]n the end we must still slosh our way through the factbound morass of ‘reasonableness.’” *Scott*, 550 U.S. at 382–83.

103. *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986) (stating that Graham “vigorously resisted” the police), *aff’d*, 827 F.2d 945 (4th Cir. 1987), *cert. granted sub nom.* 488 U.S. 816 (1988), *vacated*, 490 U.S. 386 (1989).

104. For example, lower federal courts have widely endorsed the routine practices of drawing weapons and handcuffing suspects during *Terry* stops, on the grounds that such stops are dangerous. See Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM

## 2. Nonsubmission as a Safe Harbor

Nonsubmission—broadly understood to include noncooperation, flight, and threats of harm as well as active resistance—has become the most important consideration in use of force analysis. Importantly, it is the objectively reasonable perception of nonsubmission that matters, thus creating another doctrinal safe harbor. As noted in Subpart I.B, reasonable suspicion and probable cause function as safe harbors for Fourth Amendment seizures, so that objectively reasonable indicia of these suspicion thresholds immunize decisions to seize from further scrutiny. Similarly, Fourth Amendment doctrine identifies relatively clearly for police a simple factor, nonsubmission, that will shield the use of force from a finding of unconstitutionality, whatever other particular facts may exist in a given case. As the *Graham* Court emphasized, “[a]n officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force.”<sup>105</sup>

Given courts’ frequent characterization of the use of force standard as a fact-specific, totality-of-the-circumstances inquiry, it is crucial to emphasize the controlling effect of nonsubmission.<sup>106</sup> Resistance or flight apparently makes unnecessary an independent inquiry into whether the suspect posed an immediate danger to officers or others.<sup>107</sup> Resistance to arrest is nearly a per se showing of danger to the officer, and flight from a stop or arrest, at least by car, is nearly a

---

L. REV. 715, 728–33 (1994) (discussing cases that expand the use of force permitted during a *Terry* stop).

105. *Graham v. Connor*, 490 U.S. 386, 397 (1989). The Court’s next claim—“nor will an officer’s good intentions make an objectively unreasonable use of force constitutional”—is questionable at best, as discussed below. *Id.* An officer’s intentions may not matter as a formal doctrinal matter, but an officer’s perceptions are the core of the analysis.

106. *See, e.g.*, *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015); *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008).

107. Numerous federal opinions reject excessive force claims on the grounds that the suspect fled or resisted officers in some significant way, even when other factors suggest that the force was not necessary or all-things-considered reasonable. *See, e.g.*, *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) (granting qualified immunity to officers who shot and killed a suspect immediately after a car chase, even though the suspect had stopped the car and allegedly had his hands in the air at time of shooting). Conversely, the rare excessive force claims that succeed tend to be those in which a claim of the suspect’s flight or resistance is implausible, such as an officer’s beating of a handcuffed or incapacitated suspect. *See, e.g.*, *Phelps v. Coy*, 286 F.3d 295, 301–02 (6th Cir. 2002) (affirming denial of summary judgment to officers who hit a handcuffed suspect); *see also* *Priester v. City of Riviera Beach*, 208 F.3d 919, 923–24 (11th Cir. 2000) (affirming the district court’s denial of judgment as a matter of law to police officers when evidence suggested that the officers ordered a canine to attack a prone, submissive suspect who had complied with the officers’ instructions).

per se showing of danger to the public.<sup>108</sup> The *Graham* Court's other enumerated factor—the severity of the suspected crime—is now mostly ignored, as illustrated by the decision not to indict the officer who killed Eric Garner while trying to arrest him for selling loose cigarettes.<sup>109</sup>

Two further points about nonsubmission bear repeating. First, constitutional doctrine does not require proportionality. The officer's force may far exceed the suspect's resistance; indeed, that is the point—to overcome resistance. If the suspect attempts to flee, the officer may use deadly force so long as the suspect may be said to pose a danger to the public.<sup>110</sup> To many officers, flight itself is sufficient to demonstrate that danger to the public, and juries have often accepted this argument.<sup>111</sup> Resistance without flight, if sufficient to put the officer in physical

- 
108. See *Scott v. Harris*, 550 U.S. 372, 385–86 (2007). The *Scott* majority denied Justice Stevens's contention that they had adopted a per se rule that any suspect fleeing the police posed a continuing danger to the public. The majority insisted, however, that such dangers might continue when a suspect flees, and in a car chase scenario with other drivers on the roadways, that possibility is apparently enough to justify a use of (deadly) force against the fleeing suspect. *Id.* at 385 n.11. In other words, it is difficult to imagine a flight from police by automobile that wouldn't qualify as dangerous, given the Court's analysis.
109. See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0) [<http://perma.cc/8EAD-24ZU>]; see also *Ames v. King County*, 846 F.3d 340, 348–49 (9th Cir. 2017) (“The first *Graham* factor speaks of the ‘severity of the crime at issue,’ but we think the district court applied this factor too narrowly when it focused on [the suspect’s] misdemeanor obstruction [of the police officer] rather than the nature of the ongoing emergency exacerbated by [the suspect’s] resistance.”).
110. “It is not better that all felony suspects die than that they escape,” the Supreme Court held in *Tennessee v. Garner*, thus suggesting that flight alone cannot authorize deadly force. 471 U.S. 1, 11 (1985). But the Court quickly added that flight under conditions suggesting dangerousness would warrant deadly force: “Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Id.* Note that the *Garner* Court framed the rule as a safe harbor: It identified a single factor—suspicion of dangerousness—that renders the use of force “not constitutionally unreasonable.” *Id.* There are probably relatively few fleeing suspects who are not plausibly characterized as dangerous, but Walter Scott may be one example. Stopped by a South Carolina police officer on the grounds that one of his taillights was not working, Scott attempted to flee the traffic stop on foot and was shot and killed by the officer. Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <http://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html> [<http://perma.cc/4PLP-C8TF>]. Scott did not have a history of violent crime, but owed several thousand dollars in child support payments. *Id.* The officer was later charged with murder, but the case ended in a mistrial. Mark Berman, *Mistrial Declared in Case of South Carolina Officer Who Shot Walter Scott After Traffic Stop*, WASH. POST (Dec. 5, 2016), [http://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm\\_term=.474fde81e4ba](http://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm_term=.474fde81e4ba) [<http://perma.cc/DJ47-GSXH>].
111. This view is illustrated by Lisa Mearkle, a Pennsylvania police officer who killed David Kassick in 2015 after Kassick fled from a traffic stop. “She could not let Kassick escape, she said, because someone who runs from an officer might be a danger to the community. ‘Something is wrong

danger, also authorizes deadly force. Once deadly force is authorized, officers are permitted and expected to “empty their guns”—to use as much force as they can muster until the suspect is thoroughly, unquestionably incapacitated.<sup>112</sup>

And second, the mere perception of nonsubmission will authorize an officer to use force, or more precisely, facts that would lead a hypothetical reasonable officer to perceive likely nonsubmission will generate the authority to use force. Actual nonsubmission is not required. In some tragic cases, the very effort to comply with a police command might provide the indicia of noncompliance that renders a use of force objectively reasonable: A suspect wearing headphones tries to turn off his music to better hear an officer, and the officer believes the suspect to be reaching for a weapon.<sup>113</sup> Or, as was reported with respect to the shooting of Philando Castile, the suspect reaches for his identification after the officer has asked for it, and the officer fears the suspect is reaching for a gun.<sup>114</sup> Thus, the language of objective reasonableness, exemplified by passages such as the *Graham* Court’s claim that an officer’s good intentions cannot alone render the use of force legal, is misleading.<sup>115</sup> It suggests that the legal standard is not one made by the officer himself. But (professed) intentions and (professed) perceptions are closely linked, and courts defer almost invariably to police officers’ later accounts of their perceptions of danger or resistance.<sup>116</sup> In other words, if an officer perceives a threat, or later claims to have perceived such a threat, his use of force will almost certainly be found authorized.

---

here,’ she testified, recalling her thinking at the start of the chase. ‘This is not normal for someone to flee the police.’” Kindy et al., *supra* note 1. Mearkle was charged with third-degree murder and manslaughter but was acquitted by a jury. *Id.*

112. See *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (“[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”).

113. *Anderson v. Russell*, 247 F.3d 125, 128 (4th Cir. 2001).

114. Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across the Nation*, STARTRIBUNE (July 8, 2016, 3:15 PM), <http://www.startribune.com/aftermath-of-fatal-officer-involved-shooting-in-falcon-heights-is-captured-on-video/385861101> [<http://perma.cc/VC9E-2BVF>].

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

116. Courts defer to officers, and prosecutors do, too. The usual federal standard for prosecuting excessive force as a criminal offense under 18 U.S.C. § 242 is even more stringent than the criteria for finding a simple Fourth Amendment violation. See 18 U.S.C. § 242 (2012). But the two laws of policing interact, and the protection of mistaken officers from prosecution contributes to the acceptance of their conduct as reasonable. The Department of Justice has apparently accepted the holdings of several federal courts that even wildly mistaken perceptions of nonsubmission are sufficient to immunize officers from federal civil rights charges. See, e.g., U.S. DEPT OF JUSTICE, *supra* note 11, at 79 (“Mistake, panic, misperception, or even poor judgment by a police officer does not provide a basis for prosecution under Section 242.”); see also Joseph Goldstein, *Is a Police Shooting a Crime? It Depends on the Officer’s Point of View*, N.Y. TIMES (July 28, 2016), <http://www.nytimes.com/2016/07/29/nyregion/is-a-police-shooting-a-crime-it-depends-on-the-officers-point-of-view.html>.

Perception should be distinguished from deception. The doctrine evaluates force by considering the hypothetical perceptions of a reasonable officer. One would not expect the law to countenance deception—outright lies about what the officer saw or feared. Some recent shootings have proven especially controversial because video evidence contradicts the officer’s account of the incident, or at the very least, provides members of the public a chance to form their own perceptions about whether the shooting victim was resisting or threatening violence.<sup>117</sup> Officers caught in deception are probably more likely to be prosecuted successfully, but that is due to extraconstitutional mores, not to constitutional doctrine.<sup>118</sup> Again, evil intentions—or duplicity—will not render unconstitutional an objectively reasonable use of force. As video becomes ubiquitous and more police violence is captured on video, perhaps the specific phenomenon of police deception (about uses of force) will decrease. But there is no reason to think that good faith violence—which includes mistakenly but genuinely panicked violence—will decrease. And if the video reveals any evidence of nonsubmission, even deceptive officers will continue to enjoy the safe harbor of objective reasonableness.

This Subpart has argued that, in the same way that a trivial, easily satisfied suspicion requirement creates a safe harbor in which stops are legal, an often trivial and easily satisfied nonsubmission inquiry creates a safe harbor for police violence. Of course, many instances of noncooperation do not lead to a beating, a Taser, or a gunshot, just as many instances of police-observed probable cause do not lead to an arrest. Many failures to cooperate are met with no violence at all, and many others are met with rough treatment that inflicts no permanent injury and does not register in official records.<sup>119</sup> Flight and resistance are not guarantees

---

117. After shooting an unarmed black motorist named Samuel Dubose, Cincinnati police officer Ray Tensing reported that Dubose had threatened him and dragged him with his car. These claims were contradicted by the video recorded by Tensing’s body camera, and Tensing was indicted for murder. Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html> [<http://perma.cc/2EFH-FN98>].

118. For example, Chicago police officer Jason Van Dyke was charged with murder after he killed Laquan McDonald, a black teenager. But the murder charges came over a year after the killing, almost simultaneously with the release to the public of a video that proved false many of initial reports about the incident from Van Dyke and his colleagues, including his claims that the teenager had approached him while swinging a knife in an “aggressive, exaggerated manner.” See Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015, 12:32 AM), <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison> [<http://perma.cc/VKP7-ADGG>].

119. Killings of suspects by police officers are becoming more closely documented and subject to at least some empirical analysis. But most instances of police force are much less dramatic, and there is little comprehensive data available on what Stuntz called “low-level” police violence. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1066 (1995)

that police will use violence; they are simply the boundaries of a safe harbor in which police are empowered to make that choice. How police make the choice—the specific ways in which they exercise their considerable discretion to use violence—is one of the most contentious policing issues today, and we turn to that issue in Part II.

#### D. Force as a Concept, and a Continuum

Constitutional doctrine draws a blueprint for police violence. It invites officers to interrupt civilians, sometimes with minimal suspicion or no suspicion at all. Once interrupted, the citizen must comply with the officer's requests or risk expanding the officer's authority.<sup>120</sup> Actual or perceived noncompliance rapidly ratchets up the officer's authorization to use force, and any noncompliance perceived to be dangerous empowers the officer to kill. In this way Fourth Amendment doctrine constitutes police violence, but the law is constitutive in another sense as well. The concepts of resistance and nonsubmission are so central to the legitimating structure of the law of police violence that they have come to define force itself. Increasingly, what counts as force is always already reactive, a response to resistance—and if it becomes necessary to project or imagine the resistance in order to explain the force, officers, courts, and many observers have demonstrated the ease with which that projection takes place.

From the perspective of police officers, a suspect's resistance is bound up with the very concept of force. This is the way officers are trained: Most law enforcement agencies instruct officers to follow a use of force continuum, a chart that describes degrees of resistance to police commands and the permissible responses. In a typical framework, verbal noncompliance from the suspect may be met with verbal commands.<sup>121</sup> But "passive resistance" (failure to comply with commands) may be met with "hands-on tactics" or pepper spray; active resistance (efforts to escape or avoid arrest that are unlikely to inflict injury) may be met with batons, Tasers, and other non-deadly force; and, in accordance with the doctrinal standards discussed above, any threat of death or serious bodily injury to

---

(describing "a kind of police behavior that happens all the time . . . and yet receives astonishingly little legal regulation: low-level violence against suspects").

120. Compulsory compliance, the flipside of disallowing nonsubmission, is worthy of independent consideration. I address Fourth Amendment compliance requirements at greater length in Part II.

121. These examples are based on the Orlando, Florida Police Department's "Resistance and Response Continuum" report, discussed and reproduced in part in Michael E. Miller, *Taser Use and the Use-of-Force Continuum: Examining the Effect of Policy Change*, POLICE CHIEF, Sept. 2010, at 72.

the officer or anyone else may be countered with deadly force.<sup>122</sup> The standard use of force continuum reflects and communicates the principle that disobedience is not to be tolerated, and force is the logical result of any resistance. It also sets the expectation of escalation: After the first resistance, force will escalate until the suspect is subdued or dead. And it is easier to step on that escalator than the official continuum suggests. In official policy, mere lack of respect for authority is not identified as a form of resistance that warrants a use of force. But in practice, many officers view a lack of respect in just that way,<sup>123</sup> so much so that it is standard to speak of arrests for the uncodified but very real offense called “contempt of cop.”<sup>124</sup>

Part I.C.2 addressed the various types of behavior that count as nonsubmission or resistance, but it is also worth considering what counts as force or violence. So far I have referred to police force without offering a definition, but the term does not go uncontested. “Use of force” typically includes physical contact, especially strikes or any contact likely to cause pain, and the use of weapons. But in the absence of the infliction of pain or injury, and in the absence of resistance, many agencies and police officials avoid the label of force. For example, one scholar identifies a “reasonable definition” of force in a federal consent order:

[A]ny physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds or hard hands; the taking of a subject to the ground; or the deployment of a canine. The term does not include escorting or handcuffing a person, with no or minimal resistance.<sup>125</sup>

Under this definition, an ordinary custodial arrest involves no use of force, even if the suspect is handcuffed and placed in the back of a police cruiser. He has been subject to physical contact that restricts his movement, but unless he resists,

---

122. *Id.*; see also *Jennings v. Jones*, 499 F.3d 2, 12 (1st Cir. 2007) (describing police training and the use-of-force continuum).

123. See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 102–03 (1993).

124. “Every trial judge in this state has seen cases where an officer has exercised the discretion to arrest for ‘contempt of cop.’” *State v. Suiter*, No. 25783, 2001 WL 1002069, at \*6 (Idaho Ct. App. Sept. 4, 2001) (Horton, J., concurring) (upholding, reluctantly, a conviction for disturbing the peace, after the defendant told a police officer to “fuck off”), *vacated*, 56 P.3d 775 (Idaho 2002) (reversing on First Amendment grounds).

125. Harmon, *supra* note 16, at 1125 n.14 (quoting Consent Judgment: Conditions of Confinement at 1–2, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich., July 18, 2003)).

no force has been used. Even minimal resistance is not enough; the arrestee must really fight back before the arrest is classified as forceful.<sup>126</sup>

Some police departments have sought to jettison the phrase “use of force” altogether; a favored replacement is “response to resistance.”<sup>127</sup> The violence or force of the police officer is not to be named as such, and at the same time, the purported justification for the violence is built into the rhetoric. It is a linguistic move reminiscent of the 1940s rebranding of the U.S. Department of War as the Department of Defense. Even among departments that retain the phrase “use of force,” though, resistance is at the core of the concept.

Thus, on the mainstream account resistance both defines and legitimizes force. The ordinary incidents of ordinary seizures—termination of freedom of movement, perhaps handcuffs—do not count as force in the absence of resistance. This exclusion is not consistent with the subjective experiences of suspects, who often perceive arrests as force, or with the ordinary use of language, in which a private individual who handcuffed and restrained another person would likely be seen as a violent criminal.<sup>128</sup> Nor is a resistance requirement as a component of police force entirely consistent with every aspect of constitutional doctrine. The Supreme Court has, at least in passing, characterized handcuffs as a use of force, even in the absence of resistance.<sup>129</sup> But the usual doctrinal reference to force does assume a response to resistance, and scholars also typically

---

126. There are echoes here of the erstwhile resistance requirement in rape law. To prove that sex had taken place “by force,” many jurisdictions once required proof that the victim had resisted. One infamous opinion called resistance the “sine qua non [of] the crime of rape,” and went on to explain that minimal resistance would not suffice for a conviction. *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906). The court held that the woman must give “her utmost” resistance; “there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person . . .” *Id.* Modern sexual assault laws have mostly jettisoned physical resistance requirements, recognizing that submission is a possible and even likely response to the use or threat of force. Quiet submission to an arresting officer may similarly indicate the presence, rather than the absence, of force. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607–08 (1986) (“[I]n the United States . . . most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk. They do not organize force against being dragged because they know that if they wage this kind of battle they will lose—very possibly lose their lives.”).

127. Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 *TOURO L. REV.* 569, 581 (2008).

128. Cf. Carbado, *supra* note 53, at 970 (advocating a shift to the “victim perspective” in Fourth Amendment doctrine, in which “victim” refers to the target of discriminatory police action); Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 79–91, 94 (2007) (describing a shift between objective and subjective perspectives in Fourth Amendment law and suggesting that the suspect’s subjective perspective may deserve more weight in the legal definition of a seizure).

129. See *Muehler v. Mena*, 544 U.S. 93, 99 (2005) (referring to the use of handcuffs as a “use of force”).

assume that resistance (or threat) is constitutive of force.<sup>130</sup> Resistance defines force, but of course it also legitimizes force, in the use of force continuum and in constitutional doctrine. It is not surprising, then, that illegitimate force—excessive force—almost disappears as a category. It is almost conceptually impossible.<sup>131</sup> Without resistance, what the police do is not force, and with resistance, their uses of force are legitimate.

The doctrinal exposition in this Part has been detailed, but the path to fatal violence that it reveals is relatively short and simple. Three simple principles legitimize the use of force, and even the use of deadly force, in mundane police encounters. First is the narrow definition of seizure, which leaves many police intrusions outside the purview of the Fourth Amendment altogether. If courts are able to view the encounter as one that a hypothetical reasonable person would feel free to terminate, police may interrupt, detain, and question at whim. Second, low and very easily satisfied suspicion thresholds allow police to detain individuals in the non-optional encounters formally labeled seizures. Finally, any form of nonsubmission, from passive non-cooperation to flight to physical resistance, can give an officer authority to use force, and any perceived threat of serious physical injury generates a license to use deadly force.

## II. THE DISTRIBUTION OF (POLICE) VIOLENCE

Given how easily officers gain the legal authority to kill, the most surprising feature of police killings may be that there are not more of them. That is not to say that police violence is rare—as other scholars have emphasized, “low level,” non-fatal police violence is common, relatively unnoticed by the media, and relatively unchecked by the law.<sup>132</sup> The force continuum—and indeed, the near-seizure/seizure continuum—in the previous Part should make clear that it is a mistake to study deadly force in isolation. In any case, what drives the current debate over police violence is less the sheer volume of that violence and instead the distribution of it. Though data is again hard to obtain and the numbers are contested, it appears that police officers use force against black men at higher rates than they use force against other demographic groups.<sup>133</sup> The distribution

---

130. See, e.g., Harmon, *supra* note 16, at 1121 (“[P]olice uses of force are both determined and imposed by persons who are under threat . . .”).

131. It is only almost impossible, because police occasionally take actions clearly classified as force—a physical beating, or use of a firearm—under circumstances in which flight or resistance is impossible, or when flight is implausibly characterized as dangerous. These are the rare instances in which police force is characterized as excessive. See *supra* note 107.

132. See *supra* note 102 and accompanying text; Stuntz, *supra* note 119.

133. See Swaine, *supra* note 1.

of police violence by race is addressed in Subpart II.A below, but that is not, I suggest, the sole important distributional question.

A much broader distributional issue is also critical, and remains mostly neglected in contemporary scholarly and public conversations about policing. This broader question concerns the distribution of various types of violence—official and authorized violence, official but illegal violence, private and authorized self-defense, private criminal acts—among all persons, police and civilian alike. The model, or myth, of the modern state is an entity with a monopoly on legitimate violence: The state claims authority to use violence for the purpose of controlling and reducing private violence. When Black Lives Matter protestors are chastised for failing to appreciate that police keep them safe, that distributional claim is front and center.

This Part explores the distribution of police violence as a subsidiary inquiry to the distribution of all violence. Of particular interest are the normative views that underlie the law's distributional choices. As useful and appealing as quantitative data is, it cannot fully guide the discussion here. That is partly because we lack good data on police violence, and partly because we do not yet know what data to collect.<sup>134</sup> We cannot measure excessive force without a clear conception of what counts as force, or as excessive. The previous Part revealed ways in which resistance informs the very concept of force, and renders it legitimate rather than excessive.<sup>135</sup> In this Part, I consider two other normative judgments that structure our constitutional framework. First, I show that the Supreme Court has long been aware of the burdens that Fourth Amendment doctrine imposes on persons of color. Instead of alleviating those burdens, the Court has directly increased them, effectively placing on minorities a duty of compliance with the police.

---

134. See *supra* note 1; see also Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 *passim* (2013); Fryer, *supra* note 14, at 2 (“[T]he current debate is virtually data free.”).

135. A recent study highly profiled in the media illustrates that quantitative research may itself be structured by, rather than independent of, the law's conceptual and normative judgments. Harvard economist Roland Fryer Jr., himself African-American and reportedly motivated by anger at Michael Brown's killing, conducted the study to understand racial differences in police violence. See Quoc Trung Bui & Amanda Cox, *Surprising New Evidence Shows Bias in Police Use of Force but Not in Shootings*, N.Y. TIMES (July 11, 2016), <http://www.nytimes.com/2016/07/12/upshot/surprising-new-evidence-shows-bias-in-police-use-of-force-but-not-in-shootings.html> (quoting Fryer as saying, “You know, protesting is not my thing. But data is my thing.”). To measure racial bias in the use of deadly force, Fryer constructed a dataset of police-civilian interactions “in which lethal force is more likely to be justified.” Fryer, *supra* note 14, at 3. More specifically, Fryer focused on arrests for assaulting or attempting to kill an officer, and arrests for resisting, evading, or interfering in arrest. *Id.* In other words, Fryer excluded from the outset ordinary police-civilian encounters, the near-seizures and *Terry* stops that have led to many recent killings of unarmed black men. Fryer, like the officers he studied, seems to have viewed police force as necessarily responsive to a suspect's resistance.

Second, this racialized burden of compulsory compliance directly contradicts other aspects of the American political narrative—especially, a right to resist oppressive government, once protected by a common law right to resist unlawful arrest and now celebrated in Second Amendment doctrine. The choice not to extend the privilege of resistance in some contexts must be evaluated against the backdrop of this political narrative.

### A. Race as a Burden

The doctrinal rules described in Part I are nominally race-neutral. Recall three key principles: First, police are empowered to interrupt and detain individuals for any reason at all, without constitutional restraint, so long as the encounter is one that a hypothetical reasonable person would feel free to terminate. Second, police are empowered to detain individuals in nonoptional encounters—seizures—so long as there exist minimal indicia of suspicion. And third, police are empowered to use force so long as there exist indicia of nonsubmission. In theory, these rules apply uniformly to police-civilian encounters regardless of the race of the officer or the suspect.

In practice, of course, every police encounter occurs in a world in which racial identity matters, especially to the determination of whether someone is suspicious enough to warrant further investigation.<sup>136</sup> In the supposedly consensual encounters on buses or in airport concourses, racial identity shapes both police actions and suspects' reactions. So too with flight as a near-seizure—racial minorities have both more reason to flee police and more to risk by flight. Once we cross the Court's threshold into what is officially labeled a seizure, empirical scholars have found race to affect both the initial decision to seize a person and what happens during the seizure.<sup>137</sup> The Court has only rarely mentioned race as

---

136. The literature on this issue is broad and deep. See, e.g., COLE, *supra* note 52; BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Carbado, *supra* note 53; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROBS. 71 (2003); Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998). For a recent study that identifies various racialized aspects of criminal justice that interact to produce police violence against African Americans, see Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

137. See, e.g., GOFF ET AL., *supra* note 14; Gross & Barnes, *supra* note 136, at 660 (stating that black and Latino drivers are more likely to be stopped for traffic offenses); Harris, *supra* note 136, at 92

it has promulgated the suspicion and nonsubmission formula, but evaluations of both suspicion and nonsubmission by police, courts, and the wider public are deeply affected by race. This Subpart examines the racially disparate effects of the condemnation of resistance and demand for compliance in Fourth Amendment doctrine.

### 1. Judicial Cognizance of Racial Burdens

Here, I want to review the rare mentions of race in seizure doctrine to make a simple point: This doctrine has been crafted with awareness of its burdens on persons of color. The issue is foresight, not intent—I do not argue that the constitutional rules were adopted with the specific aim to generate or legitimize racial bias in policing.<sup>138</sup> But the distributional impact of constitutional criminal procedure has been emphasized to, and occasionally acknowledged by, federal courts for decades.<sup>139</sup> More broadly, since their initial development, American police forces have often served to enforce racial hierarchies, from slavery to Jim Crow laws to the present.<sup>140</sup> The constitutional doctrine that purportedly regulates these police forces may not reflect racial animus, but it does reflect a normative judgment about the distribution of violence: The perceived gains in public safety

---

(presenting evidence that blacks and Latinos are much more likely to be searched after a traffic stop); Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. LEGAL F. 407, 410 (“Research shows that officers are more likely to perceive that black civilians are defiant or resistant, and are therefore more likely to use excessive force against black civilians . . . .”); Fryer, *supra* note 14, at 3–5.

138. There is a debate among moral theorists as to whether the foresight/intent distinction matters to an action’s moral permissibility. There are reasons to doubt the significance of the distinction in the context of state action, but I do not engage that debate here. *See generally* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1391–94 (2008) (discussing philosophical literature on foresight/intention).
139. By many scholars’ accounts, race is at the center of constitutional criminal procedure, in that the entire field developed as an effort to mitigate racial injustices in the criminal justice system. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). Without disputing those accounts, I wish to emphasize judicial awareness that certain ostensibly race-neutral rules would have disproportionate effects on minority communities. As Dean Kevin Johnson has recently put it, “[T]he use of racial profiling by law enforcement authorities in the United States has long been permitted and encouraged, if not expressly authorized, by U.S. constitutional law.” Johnson, *supra* note 136, at 1006.
140. *See* David S. Cohen, Note, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 172–183 (1996); *see also* HUBERT WILLIAMS & PATRICK V. MURPHY, PERSPECTIVES ON POLICING NO. 13, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW 1 (1990) <https://www.ncjrs.gov/pdffiles1/nij/121019.pdf> [<https://perma.cc/W893-SB3S>].

and “effective law enforcement” of expansive police authority are worth the costs that this authority imposes on persons of color.<sup>141</sup>

The most striking example may also be the earliest. When the Supreme Court endorsed investigative stops in *Terry v. Ohio*,<sup>142</sup> it did so with an acknowledgment of the “wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain.”<sup>143</sup> In a footnote, the Court quoted at length from the 1967 report of a presidential commission on law enforcement that identified the misuse of field interrogations as a source of friction between police and racial minorities.<sup>144</sup> The Court also noted that stop-and-frisks were sometimes used as an assertion of power and a tool of humiliation rather than as a genuine investigative effort.<sup>145</sup> But the *Terry* Court positioned itself as a rueful observer of these abuses, powerless to stop them. The Court implied that Fourth Amendment law could shape police behavior only through the exclusionary rule, and claimed that racial harassment would not be affected by the exclusion of evidence.<sup>146</sup>

There is reason to doubt that the exclusionary rule is the only means by which judges affect police behavior—or even that the rule does shape such behavior.<sup>147</sup> And indeed, in the very next section of the opinion, Chief Justice Warren abandoned discussion of the exclusionary remedy and emphasized the substantive and expressive importance of Fourth Amendment rules, rejecting the claim that stops and frisks were not seizures or searches at all.<sup>148</sup> The rule the Court adopted—classifying stops as seizures, but permitting them once the low threshold of reasonable suspicion was crossed—would allow the continued harassment of racial minorities, but that price was one the *Terry* Court was willing to pay for “effective crime prevention and detection.”<sup>149</sup>

In later cases, the Supreme Court announced that race could not serve as the sole basis for Fourth Amendment suspicion to justify a seizure, but also that non-race-based indicia of suspicion could immunize seizures from further scrutiny for

---

141. The phrase “effective law enforcement” appears often in criminal procedure cases, often operating to trump defendants’ constitutional claims. For examples and further discussion, see Ristroph, *supra* note 20, at 1603.

142. 392 U.S. 1 (1968).

143. *Id.* at 14.

144. *Id.* at 14 n.11.

145. *Id.*

146. *Id.* at 14–15.

147. See Ristroph, *supra* note 20.

148. *Terry*, 392 U.S. at 16–19.

149. *Id.* at 22.

racial bias.<sup>150</sup> In *Whren v. United States*,<sup>151</sup> the Court was invited directly to address racial profiling, and it declined to do so.<sup>152</sup> The case involved two young black defendants who had been stopped by District of Columbia vice officers, purportedly for remaining too long at an intersection.<sup>153</sup> Under local regulations, these particular officers were not authorized to make traffic stops except in cases of immediate danger, and the defendants argued that the traffic violation was a pretext to shield a racially motivated search for drugs.<sup>154</sup>

Writing for a unanimous Court, Justice Scalia did not mention the defendants' race in the initial description of the facts, but later acknowledged the racial dimensions of the case: "Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants."<sup>155</sup> In response, the *Whren* Court simply reaffirmed that an officer's actual motivations were irrelevant to Fourth Amendment analysis so that probable cause of any legal violation operated as a safe harbor for police.<sup>156</sup> Selective, racially motivated enforcement of the criminal law could violate the Constitution, the Court said, but such claims would have to be litigated under the Equal Protection Clause rather than the Fourth Amendment.<sup>157</sup> As one federal district judge has complained, one function of *Whren* is to "enlist the judiciary as an accomplice (albeit sometimes an unknowing one) to race or ethnicity-based police actions, by foreclosing even a detailed look, in a criminal case, into whether invidious race or [ethnic] discrimination played a role in police conduct."<sup>158</sup>

A final case worth noting was not litigated as a racial bias case; nor is it typically classified as a use-of-force case. Nevertheless, the implications of *Atwater v.*

---

150. See *Whren v. United States*, 517 U.S. 806, 813–16 (1996); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (finding that "Mexican appearance" was not, by itself, sufficient to establish reasonable suspicion of an immigration violation, but suggesting that Mexican appearance could be a relevant factor in conjunction with other indicia of suspicion).

151. 517 U.S. 806.

152. See *id.* at 813–15, 818–19.

153. *Id.* at 808, 810.

154. *Id.* at 815. The defendants' brief identified them as "young black men" and discussed the racially disparate use of traffic stops across the United States. Brief for the Petitioners at 2, 21–27, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758, at \*2, \*21–27.

155. *Whren*, 517 U.S. at 810.

156. See *id.* at 813.

157. *Id.* Equal protection doctrine requires proof of discriminatory intent and has been no more effective in constraining racial profiling. See Harcourt, *supra* note 9; Leipold, *supra* note 78.

158. *United States v. Uriostegui*, 420 F. Supp. 2d 1260, 1263 (M.D. Ala. 2006). Here, the court's opinion in the Federal Supplement is mistakenly reported to have used the word "ethnic" instead of "ethnic." See *id.*

*City of Lago Vista*<sup>159</sup> for the racial distribution of police force are important—and were identified in a strong dissenting opinion signed by four Justices.<sup>160</sup> *Atwater* involved the custodial arrest of a (white) so-called soccer mom for a seatbelt violation in Texas, an arrest characterized by the Court as a “gratuitous humiliation[] imposed by a police officer who was (at best) exercising extremely poor judgment.”<sup>161</sup> The *Atwater* majority repeated the argument, familiar from *Graham v. Connor*,<sup>162</sup> that the pressures under which police officers make decisions—the very pressures of time and circumstance that may lead police to make *bad* decisions—should render judges reluctant to second-guess those decisions.<sup>163</sup> Invoking *Whren*, the *Atwater* Court reaffirmed, again, that probable cause to suspect a legal violation—even a seatbelt violation not punishable with jail time—was sufficient to justify a seizure, including a custodial arrest.<sup>164</sup>

*Whren* had been decided unanimously five years earlier, but in *Atwater*, four Justices dissented with an opinion that demonstrates the importance of the seizure continuum—the line between the initial police-citizen encounter and subsequent uses of force—and the Court’s awareness of the racially disparate ways in which that continuum is likely to be traversed. To Justice O’Connor and the other dissenters, *Whren* did not resolve the issue in *Atwater* because *Whren* authorized at most the initial traffic stop. The dissent emphasized “significant qualitative differences between a traffic stop and a full custodial arrest,” including the longer duration of an arrest and an arrestee’s greater physical subordination and vulnerability.<sup>165</sup> The dissent did not specifically characterize an arrest as a use of force, but of course it involves acts that we would recognize as forceful or violent in other contexts: Gail Atwater was handcuffed,<sup>166</sup> detained in a police car, transported to the police station,<sup>167</sup> searched, and held in a jail cell for an hour.<sup>168</sup> When police wish to “escalate the seizure” in this way, the dissent argued they should have to

159. 532 U.S. 318 (2001).

160. *Id.* at 372 (O’Connor, J., dissenting). Justice Stevens, Ginsburg, and Breyer joined Justice O’Connor’s dissent. *See id.*

161. *Id.* at 346–47 (majority opinion). The arresting officer had apparently stopped the same woman previously on suspicion of a seatbelt violation but had, in the previous instance, realized he was wrong. *Id.* at 324 n.1.

162. 490 U.S. 386 (1989).

163. *Atwater*, 532 U.S. at 347; *see also Graham*, 490 U.S. at 396–97.

164. *Atwater*, 532 U.S. at 354.

165. *Id.* at 363–64 (O’Connor, J., dissenting).

166. As noted above, the U.S. Supreme Court has characterized the use of handcuffs as a use of force. *Muehler v. Mena*, 544 U.S. 93, 99 (2005).

167. “Ironically, [the arresting officer] did not secure Atwater in a seatbelt for the drive [to the police station].” *Atwater*, 532 U.S. at 369 (O’Connor, J., dissenting).

168. *Id.* at 324 (majority opinion).

identify “specific and articulable facts which . . . reasonably warrant [the additional] intrusion.”<sup>169</sup>

One seizure can easily lead to a more intrusive seizure, and the dissent would have required independent justification for any movement up the continuum. Such independent justification is particularly important given the ease with which officers step onto the continuum—that is, the ease with which an initial stop is justified. *Atwater* may have been a white woman, but the dissenters reminded their colleagues that the usual targets of stops are not. “[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.”<sup>170</sup> The majority’s decision only extended “the arsenal” available to an officer who made a racially motivated stop.<sup>171</sup> As the dissent recognized, *Atwater* protects punitive (or racially motivated) decisions to arrest by offering the safe harbor of probable cause. Other punitive (or racially motivated) decisions to use force are similarly protected in the safe harbor of suspected nonsubmission. Race has rarely been at the center of the doctrinal discussions that erected these safe harbors, but it has always been in the background.

Another lens through which to understand the distributional consequences of Fourth Amendment doctrine: Together, the permissibility of race-motivated seizure decisions and the prohibition of resistance create an affirmative race-specific duty to comply. On the surface, constitutional doctrine expects and even demands suspects’ compliance across the board, whatever the race of the suspect. But as early as *Terry v. Ohio*, the Court knew who the usual suspects would be and thus who would bear the burden of compliance. As discussed above, the *Terry* majority acknowledged the intrusiveness of a stop, its use as a tool of racial harassment, and the “strong resentment” that a stop might provoke.<sup>172</sup> But the majority apparently concluded that these were costs that reasonably suspicious persons must bear and said nothing about an individual’s ability to confine the intrusion or decline to cooperate. Justice White’s *Terry* concurrence did address the issue, emphasizing that police authority to stop an individual did not imply the individual’s duty to cooperate. “Of course, the person stopped is not obliged

---

169. *Id.* at 366 (O’Connor, J., dissenting) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

170. *Id.* at 372.

171. *Id.*

172. *Terry*, 392 U.S. at 14 (noting “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain”); *id.* at 17 (describing a stop as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”); *id.* at 25 (stating that a stop “must surely be an annoying, frightening, and perhaps humiliating experience”).

to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.”<sup>173</sup>

Over the next several decades, however, it has become clear that Justice White’s protection of noncooperation during a stop is at odds with official doctrinal standards. The Court eventually upheld a “stop-and-identify” statute that requires at least some cooperation with police during a *Terry* stop, dismissing Justice White’s assertion of a right not to comply as dicta.<sup>174</sup> And various federal courts have held that noncooperation can serve as a basis for increased suspicion, extended detention, and in some instances, the use of additional physical force.<sup>175</sup> The Supreme Court occasionally refers to a right to refuse to cooperate with police but only in the context of entirely suspicionless encounters.<sup>176</sup> Even in that context, noncooperation may serve as one factor among others that triggers the suspicion necessary to make a seizure.<sup>177</sup> And once police have that minimal suspicion (objectively determined, without regard for any actual or race-based motivations), noncompliance is no longer protected.

## 2. The Scholarly Veneration of Compliance

The demand for compliance that pervades both police department policies and constitutional doctrine is evident in scholarly work as well, especially in the

---

173. *Id.* at 34 (White, J., concurring).

174. *See* *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187, 190–91 (2004) (upholding a conviction for refusal to identify oneself during a *Terry* stop and characterizing Justice White’s claim as noncontrolling dicta and concluding that “[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop”).

175. *See, e.g., Koch v. City of Del City*, 660 F.3d 1228, 1246 (10th Cir. 2011) (finding in the qualified immunity context that, under a reasonable interpretation of the law, an individual has no right under the Fourth Amendment or other constitutional provisions to refuse to answer questions during a *Terry* stop and could be arrested for obstruction of justice); *Cunningham v. Burns*, No. 3:12-CV-1824-L, 2014 WL 4707391, at \*12 (N.D. Tex. Sept. 22, 2014) (finding that a suspect’s refusal to answer questions during a traffic stop justified lengthening the duration of the stop); *see also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

176. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 437 (1991) (“[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”); *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion) (“The person approached [by an officer who lacks reasonable suspicion] . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.”); *cf. Wright v. Georgia*, 373 U.S. 284, 291–92 (1963) (“[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.”). As discussed below, the Court once went so far as to recognize a right to resist unlawful arrest, but that right also belonged exclusively to the innocent. *See infra* Part II.B.2.

177. *See Wardlow*, 528 U.S. at 124; *Bostick*, 501 U.S. at 437.

substantial and influential literatures on procedural justice and community policing. Both sets of literature (which overlap, since some commentators see community policing as a way to operationalize principles of procedural justice) are framed as progressive theories of police reform—as arguments about how to make policing better.<sup>178</sup> To a striking degree, though, both theories emphasize the degree to which they will make *suspects* better by making them more compliant. Put differently, a major selling point of each theory, the value that each promises to add, is greater cooperation with the police. Tom Tyler, the founding dean of contemporary procedural justice scholarship, begins candidly with the question, why do people obey the law, and looks to procedures to foster more obedience.<sup>179</sup> On Tyler’s account, compliance is not simply an incidental benefit of fair procedures; it is the goal:

The key argument of the process-based approach is that, while the police can and often do compel obedience through the threat or use of force, they can also gain the cooperation of the people with whom they deal. Cooperation and consent—“buy in”—are important because they facilitate immediate acceptance and long-term compliance.<sup>180</sup>

Similarly, those who advocate community policing focus on the cultivation of compliance. In one early description, community-oriented policing is motivated by recognition of “the significance of community trust and cooperation.”<sup>181</sup> Another description emphasizes that the community policing model fosters “a two-way working relationship between the community and the police, in which

---

178. See, e.g., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015) [hereinafter TASK FORCE REPORT], [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [https://perma.cc/44TU-VCZ7] (endorsing increased emphasis on procedural justice and community policing).

179. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

180. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003). Tyler’s sometime co-author Tracey Meares has suggested that compliance is a mere incidental side benefit of an approach she calls “rightful policing,” or “policing that is both lawful and procedurally just.” Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1878–79 (2013). But procedural justice is defined as that which produces (sociological, not normative) legitimacy, and legitimacy is defined as the property of a rule or authority that leads people to feel obligated to obey. *Id.* at 1875. Obedience and compliance are central to Meares’s conception of ideal policing, not just byproducts of it.

181. JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* 10–11, 211 (1986).

the police become more integrated into the local community and citizens assume an active role in crime control and prevention.”<sup>182</sup>

To be sure, the champions of procedural justice and community policing seek *voluntary* compliance with the police, specifically distinguishing such compliance from submission motivated by fear. But these commentators seek voluntary compliance with *the police*—with the state agents who are the usual entry point into prosecution, conviction, and punishment. That we are asking individuals to cooperate in their own prosecutions and punishments is sometimes obscured, or deliberately minimized, in the literature, especially by community policing proponents. They frequently emphasize that police do much more than investigate crime and make arrests, and that is surely true.<sup>183</sup> But when police encounter criminality, whether because they are looking for it or because they stumble upon it while performing some other function, they are empowered and expected to do something about it. And doing something about it very frequently entails triggering the mechanisms of the criminal justice system. When we cultivate and celebrate compliance with the police, we cultivate and celebrate compliance with punishment.

That implication is not often emphasized—and again, is sometimes deliberately minimized—among procedural justice and community policing scholars, but at least some of those commentators would probably be untroubled by it. Both theories of policing reform take for granted the basic normative legitimacy of the criminal law and the punishments it imposes. If an individual is in fact guilty, we should want him to accept and even facilitate his own punishment, it might be argued. This view, of course, is not exactly adversarial, but that is the point. These theories are anti-adversarial; they advocate a system that will make crimes easier to detect, evidence easier to gather, suspects easier to apprehend and ultimately, easier to punish.

---

182. SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 532 (5th ed. 2005). Many advocates of community policing emphasize not just compliance with the police but “social compliance” more broadly. They thus often support “order-maintenance” policing and discretionary use of loitering, vagrancy, or panhandling laws to police noncompliance. See, e.g., Alafair Burke, *Policing, Protestors, and Discretion*, 40 *FORDHAM URB. L.J.* 999, 1011 (2013) (noting without endorsing the emphasis on “social compliance”).

183. For example, Debra Livingston distinguishes “community caretaking intrusions” (such as safety inspections, responses to missing person reports, or patrols of unsecured premises) from “the adversarial business of enforcing the criminal law.” Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 *U. CHI. LEGAL F.* 261, 286. Both the distinction and the phrasing are both potentially misleading. Most objections to “community caretaking” activities arise after police use information discovered while caretaking to initiate a criminal prosecution. Additionally, courts and officers often seem to deny that policing should be adversarial at all: suspects are expected to comply with the police and save their resistance for the courtroom.

Now put these calls for compliance in the context of America's existing criminal justice system. No doubt many of those who seek to foster greater compliance with police officers are acutely aware of, and critical of, problems in that system, from overcriminalization to racial bias to excessive punishment. Those who seek police reform are likely to endorse broader criminal justice reform as well. But note that existing imperfections in the criminal justice system are not viewed as a basis to refuse to cooperate with, evade, or resist the police. Instead, those most burdened by the racial bias of criminal law enforcement have the most to lose from noncompliance and thus the greatest duties of compliance.<sup>184</sup> Members of minority communities often understand this burden, even if they do not appreciate it. In recent years, black parents have emphasized publicly that “the talk,” a difficult conversation that parents must have with their maturing children, refers in black families not (or not only) to explanations of sex and sexual safety, but to explanations of police bias and advice for safety in police encounters.<sup>185</sup> The advice is: Do what they say, and don't argue.

But compliance with the police is not itself cost-free. In many instances, it is merely the less costly of two unattractive alternatives. As the discussion of near-seizures in Part I illustrated, cooperation with the police will often be taken as evidence that the entire encounter was consensual and thus not subject to Fourth Amendment suspicion requirements. A young black man approached by an officer on the sidewalk, airport concourse, or bus should comply to maximize his physical safety, but in doing so he may lose any hope of a successful subsequent constitutional challenge to the police encounter.<sup>186</sup> Compliance may also facilitate the suspect's own prosecution and punishment, and this is true for innocent suspects as well as guilty ones.<sup>187</sup> Finally, compliance may not even be enough to

---

184. “Never get into a verbal confrontation . . . Never! Comply with the officer. If it means getting down on the ground, then get down on the ground. Comply with whatever the officer is asking you to do.” KENNETH MEEKS, *DRIVING WHILE BLACK: WHAT TO DO IF YOU ARE A VICTIM OF RACIAL PROFILING* 138 (2000). Given this racial burden of compliance, the Supreme Court's ostensibly race-neutral test to determine whether a seizure has occurred—whether a reasonable person would have felt free to leave—will only magnify racial disparities. Black suspects will likely feel they must submit in situations that courts will later find to be nonseizures, precisely because a reasonable (white) person would have felt free to leave. *See supra* Part I.A.

185. *See, e.g.*, Geeta Gandbhir & Blair Foster, *A Conversation With My Black Son*, N.Y. TIMES (Mar. 17, 2015), <http://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html> [<http://perma.cc/SNF4-HJV4>].

186. *See supra* Part I.A. *See generally* Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483 (2007) (noting inconsistencies between the compliance that is widely expected of those who encounter the police and the resistance necessary to preserve one's rights under constitutional doctrine).

187. As Josh Bowers has shown, our criminal justice system often imposes punishment both on the legally innocent and the “normatively innocent,” and this punishment is often achieved with

protect physical safety, should the officer misinterpret compliance as resistance. Compliance may save a black man's life; it is unlikely to preserve his rights, dignity, or autonomy.

A sweeping demand for compliance with the police, and condemnation of resistance, thus pervades the police profession, constitutional doctrine, and much scholarly writing.<sup>188</sup> The next Part contrasts this view with a very different approach—not to endorse the alternative view, but to invite reassessment of contemporary attitudes toward resistance. The zero-tolerance approach to resistance, which shapes police training and is endorsed by Fourth Amendment doctrine, is deeply at odds with purported American commitments to individual agency and limited government. Moreover, given the pronounced racial disparities among the targets of police suspicion and the eventual recipients of punishment, a zero-tolerance approach to resistance also suggests indifference to very real complaints that might be lodged against the front line of the criminal justice system. No, worse than indifference—the zero-tolerance approach knowingly penalizes those who are already most burdened by the criminal law and who have the most reason to resist its enforcers.

## B. Resistance as a Privilege

Today, resistance to a police officer is not simply a green light for the officer to use force; it is also the target of widespread condemnation from the police and the public at large. A zero-tolerance approach to resistance underlies police training and ideology, and is also reflected in independent criminal offenses such as resistance to an officer or evading arrest. In many segments of American society, and in normative academic studies of criminal law and policing, the expectation is that individuals should comply with the police. Particular officers may be abusive or act unlawfully, it is acknowledged, but the remedy for such abuses should come

---

substantial cooperation from the innocent defendant. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008). Enterprising prosecutors have even argued that compliance with the police can itself establish probable cause to suspect the individual of criminal activity, but at least at the Supreme Court, this argument was rejected. *United States v. Di Re*, 332 U.S. 581, 594 (1948) (describing, and rejecting, the government's argument "that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station").

188. Some recent work has begun to question the celebration of compliance, especially as expressed by procedural justice theorists. See, e.g., Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (urging greater attention to, and protection of, contestation of police as a method of political participation).

from the state itself. Self-help against police authority is seen as itself a mark of bad character. Individuals are expected to trust that the state will fix its own mistakes down the road through post-arrest review.

But even as America condemns some forms of resistance by some people, other forms of resistance by other sorts of people are celebrated as central to American political traditions. This Subpart examines two independent venerations of resistance: First, a common law right to resist unlawful arrest was once recognized widely in American states. In addition, the recently resurgent Second Amendment right to bear arms is premised on the claim that the prospect of government tyranny allegedly necessitates an armed citizenry.<sup>189</sup> Each of these rights has, in at least some instances, appeared as a racial privilege, and each calls into question ostensibly race-neutral explanations for the disapproval of resistance in Fourth Amendment doctrine. Part II.B.1 examines those putative race-neutral explanations. Part II.B.2 considers the heyday and decline of the common law right to resist arrest, and Part II.B.3 evaluates the new embrace of Second Amendment resistance rights.

### 1. The Foil: Procedural Perfectionism

A certain political theory, one that could be characterized as a kind of procedural perfectionism, offers a race-neutral justification for this condemnation of resistance. Under this perfectionist view, the claim is not that the police are perfect or expected to become so, but that the state is perfect, or expected to become so, if given enough time, enough process, and enough opportunities to review and correct.<sup>190</sup> Individuals must never resist state agents, but rather must wait for the state to correct its own mistakes. We hear an appeal to this perfectionist view in the immediate aftermath of each police shooting when city officials and police

---

189. *See infra* Part II.B.3.

190. Among philosophers, perfectionism or liberal perfectionism often refers to the view that the state should promote a particular vision of the good (life), and should seek to inculcate virtue in citizens. *See, e.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 426 (1986) (“[P]erfectionist doctrine . . . holds the state to be duty-bound to promote the good life.”). This view is perfectionist in that the state should seek to perfect its citizens. I use the term perfectionism more consistently with its use among constitutional theorists, for whom perfectionism sometimes describes a state that seeks to, or does, perfect itself. Exactly what aspect of the state is to be perfected and how perfection is to be achieved are matters of dispute. In Ely’s process perfectionism, judicial review should seek to perfect the processes of representative government rather than adjudicate substantive values. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Proponents of substantive due process have been criticized for a different perfectionism in which they assume that the Constitution aligns with and enforces current understandings of substantive justice. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981).

leaders plead with citizens to remain calm, to wait for information, to “respect the process” and to await the state’s own conclusions about what, if anything, went wrong and what, if anything, should be done.<sup>191</sup>

In this race-neutral account, the directive to be patient and allow the state to correct its own racial injustices is the same directive that would be given to victims of any other official injustice. For example, unreasonable prohibitions in the substantive criminal law, prosecutorial bias, or excessive punishments should be addressed through formal political and legal processes. An individual should not engage in self-help by seeking to avoid contact with police altogether or by resisting an officer.<sup>192</sup> The state’s flaws are to be perfected by the state itself, on its own terms, on its own time. The individual must trust the process—including both the political process and the adjudicative one—to get it right eventually. Individuals should comply, even if compliance leads to injustice down the road, and simply trust that remedies for *that* injustice will lie still farther down the road. Indeed, individuals should comply even if compliance produces an immediate injustice—even if the police officer acts without legal authority. Again, the state must be given time to correct its own mistakes; the illegally arrested individual should seek relief through later judicial review of the officer’s actions. Of course, the perfectionist view does not emphasize the reality that judges often decline to “second-guess” an officer’s decisions, and that compliance by an individual may be viewed by courts as demonstrating that state agents never did anything wrong in the first place.<sup>193</sup>

Such perfectionism apparently underlies much of criminal procedure, and it underlies the procedural justice literature on police reform discussed in the previous Part. But before we conclude that the demand for compliance is the race-neutral product of our underlying political philosophy, we should notice this: The perfectionist view is deeply at odds with another view of the state, and individual rights

---

191. See, e.g., Goldstein, *supra* note 116 (“In a now-familiar refrain . . . the authorities pledge an impartial and thorough criminal investigation and beseech the public to be patient. Whatever the outcome, the authorities’ main message is that the public should ‘respect’ the process.”).

192. Nor, on the perfectionist view, should individuals practice self-help by thwarting state procedures. Without using the language of procedural perfectionism that I invoke here, many of the critiques of Paul Butler’s call for race-based jury nullification expressed similar perfectionist ideas. Butler famously proposed a kind of (non-violent) self-help among African Americans called for jury service, urging them to acquit African American defendants in at least some cases even when the evidence suggested actual guilt. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Critics charged that Butler’s proposal would only exacerbate racial tensions and would be less effective than prosecutorial or legislative reform. See, e.g., Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996) (arguing that Butler should champion legislative change directly).

193. See notes 186–187 and accompanying text for a discussion of compliance costs.

of resistance, that is arguably more familiar in American political narratives. On this alternative and decidedly nonperfectionist view, the only good government is limited government, and every government—even limited government—bears the potential of future oppression.<sup>194</sup> Consequently, individuals retain natural rights of resistance, and they must be vigilant should the occasion arise to exercise those rights. This narrative has occupied a prominent position in American self-understanding since the Revolution. It is the narrative that justifies the colonists' violent rejection of British authority and the principle that underwrites much of the federal constitution.<sup>195</sup>

The next two sections examine two incarnations of the nonperfectionist embrace of resistance that are especially important as we reflect on resistance and compliance with the modern police. First, a common law right to resist unlawful arrest was once recognized widely in American states. In addition, Second Amendment doctrine and discourse today are premised on the claim that the prospect of government tyranny allegedly necessitates an armed citizenry.<sup>196</sup> In light of these traditions of resistance, the perfectionist call for compliance with police is less convincing as a race-neutral explanation for existing doctrinal rules. It may be that the race-specific burden of compliance exists alongside a race-specific privilege of resistance.

## 2. The Right to Resist Arrest

Until the latter half of the twentieth century, most American states and the Supreme Court recognized and even celebrated a common law “right” to resist unlawful arrest.<sup>197</sup> This was not actually a right in the usual sense of a fully protected action, shielded from state interference. The practical import of the so-called right to resist unlawful arrest was typically limited to provocation

---

194. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 285–86 (2005).

195. Alexander Hamilton, a committed advocate of strong government, somewhat ingeniously invoked a natural right to resist oppressive government as an argument against constitutional limitations on Congress's power to make war. THE FEDERALIST NO. 28, at 205 (Alexander Hamilton) (David Wootton ed., 2003) (“If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government . . .”).

196. See *infra* Part II.B.3.

197. The American courts adopted an English common law right that some trace back to 1215 and the Magna Carta, a right that had been judicially vindicated at least since 1666. See Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129–32 (1969); Craig Hemmens & Daniel Levin, *“Not a Law at All”: A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1, 13–18 (1999). Each of these sources provides a thorough historical overview of the right to resist arrest, and I will not attempt to recreate a complete history here.

arguments in homicide cases. In that context, the fact that a defendant had been resisting an unlawful arrest might reduce murder charges to manslaughter.<sup>198</sup> But the conceptual framework around the right to resist unlawful arrest is noteworthy, especially in its contrast to the ideology of compliance so prominent in much contemporary doctrine and discourse.

The right to resist unlawful arrest first appears in judicial opinions as a claim to use altruistic violence—to stop the unlawful arrest of a third party. The first recorded case to recognize the right was a 1666 English decision addressing the criminal liability of men who had killed a state official trying to impress a third party into the King’s army. The target of the impressment, or arrest, had not himself resisted, but of the men who intervened on his behalf, the English court said, “[I]f a man be unduly arrested or restrained of his liberty . . . this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake.”<sup>199</sup> A similar sense of collective outrage is evident in a 1710 opinion, also reducing a murder charge to manslaughter after a constable was killed, reasoning: “[A] man ought to be concerned for Magna Charta and the laws; and if any one against the law imprisons a man, he is an offender against Magna Charta. We seven hold this to be a sufficient provocation . . . .”<sup>200</sup> Notably, in both these early right to resist opinions, the defendants who killed the arresting officer were not themselves the intended arrestees, eliminating, perhaps, the suggestion of self-interested efforts to avoid deserved punishment.

After independence, American states retained resistance to unlawful arrest as a rationale to reduce murder charges to manslaughter. And as in the early English cases, the primary rationale was that assertions of arbitrary or unjustified state power would provoke a reasonable man to act rashly. “So great . . . is man’s natural indignation at an unlawful infringement upon his liberty that it is the general rule in England and this country that, if a public officer be resisted and killed by a person whom he is attempting to illegally arrest without color or authority of law, the killing will be manslaughter only . . . .”<sup>201</sup> The Supreme Court recognized the right to resist unlawful arrest in a federal murder prosecution in 1900, also suggesting the need to accommodate those who kill in reaction to illegitimate assertions of authority. “[W]here the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the

---

198. *See, e.g.*, *Sanders v. State*, 61 So. 336, 339 (Ala. 1913) (“A person seeking unlawfully to arrest another is a trespasser; and the trespass is a ground of provocation sufficient to reduce the homicide of such person in resistance of the arrest from murder to manslaughter . . .”).

199. *Hopkin Huggett’s Case* (1666) 84 Eng. Rep. 1082, 1082 (K.B.).

200. *Queen v. Tooley* (1710) 92 Eng. Rep. 349, 353 (Q.B.); 2 Ld. Raym. 1296, 1301–02.

201. *People v. Scalisi*, 154 N.E. 715, 722 (Ill. 1926).

law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no such right.”<sup>202</sup>

Like almost every aspect of the American criminal justice system, the right to resist unlawful arrest was shadowed by race. At least some of the recognizably unlawful arrests were naked harassment of black citizens by white officials.<sup>203</sup> These defendants sometimes benefitted from a right to resist jury instruction and sometimes did not.<sup>204</sup> The reported opinions, most of which do not mention race at all, do not themselves reveal or preclude patterns of racial bias in the application of the right to resist unlawful arrest. But it is striking to see, in southern states during the era of Jim Crow, that courts at least sometimes recognized and accommodated violent resistance by black Americans against law enforcement officers.

Over time, some state courts began to explain the right to resist unlawful arrest as a branch of self-defense doctrine rather than as part of the traditional provocation framework.<sup>205</sup> This shift allowed some defendants to avoid criminal liability altogether (rather than merely reduce the degree of homicide), though courts imposed proportionality and necessity constraints on the use of deadly force to resist an arrest. The shift to self-defense altered the rhetoric, producing appeals to individual liberty, natural rights, and self-preservation that Cliven Bundy, Tea Party members, and Second Amendment enthusiasts could embrace today.<sup>206</sup> But such individualistic, libertarian rhetoric was a latter-day rationalization for a principle that originated in recognition of imperfections both political and personal. As first articulated in provocation doctrine, the right to resist unlawful arrest sought to understand the reasons for violent resistance without

---

202. *John Bad Elk v. United States*, 177 U.S. 529, 537 (1900).

203. In *Jones v. State*, 155 So. 430 (Miss. 1934), the Supreme Court of Mississippi found reversible error after a black defendant was denied a jury instruction on the right to resist unlawful arrest. The defendant’s home had been searched, without warrant and without cause, and his young brothers taken into custody by a constable named Mark Mason. *Id.* at 430. Mason subsequently threatened to tie rocks around the necks of the defendant’s brothers and throw them into a creek. *Id.* The defendant eventually returned home and went to bed, but later heard someone break into his front door. *Id.* He shot and killed the intruder, who turned out to be constable Mason. *Id.*

204. Compare *Jones*, 155 So. at 432 (reversing a black defendant’s conviction for murder of a white police officer on the grounds that the defendant had been resisting unlawful arrest), with *State v. Francis*, 149 S.E. 348 (S.C. 1929) (upholding convictions of six “colored” defendants for murder of a white police officer during the officer’s attempt to make an admittedly illegal arrest, on the grounds that the defendants had used disproportionate force to resist the arrest).

205. See, e.g., *Perdue v. State*, 63 S.E. 922, 923–25 (Ga. Ct. App. 1909).

206. See Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011) (examining connections between the common law right to resist unlawful arrest and the right of self-defense articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)).

celebrating its deadly results. A man facing an unlawful arrest might be sufficiently provoked to kill the arresting officer, and though the law did not exonerate him entirely, it mitigated the severity of the charge against him. Men are not perfect, but neither is the state. The right to resist unlawful arrest thus reflected some skepticism that the state would adequately fix its mistakes down the road. And it sought to accommodate, rather than punish, outrage at the exercise of arbitrary authority.<sup>207</sup>

Legal experts began to criticize the right to resist unlawful arrest in the mid-twentieth century. One expert commission promulgated a model statute, the Uniform Arrest Act, which directly prohibited any resistance to any arrest.<sup>208</sup> Additionally, the Model Penal Code, drafted in the 1950s by the American Law Institute and adopted in 1962, specifically excluded a right to resist unlawful arrest from its definition of self-defense.<sup>209</sup> The mid-century critics of the right portrayed it as a carryover from days of deplorable conditions in jails and prisons, a mechanism of self-preservation no longer necessary in a modern world with more humane places of detention.<sup>210</sup> Critics of the right also suggested that ex post judicial review would provide adequate remedies for illegal arrests.<sup>211</sup> Furthermore, a right to resist unlawful arrest could lead to resistance of any and all arrests, since suspects would often mistake lawful arrests for unlawful ones. Perhaps most powerfully, the critics argued that resistance to police officers would be futile for the suspect and dangerous for everyone—for the usually armed officers who would fire in return, for the suspect, and for any bystanders.<sup>212</sup> These arguments convinced courts and legislatures, and in the latter half of the twentieth century, the majority of states abolished the right to resist unlawful arrest.<sup>213</sup> The Supreme Court has not directly addressed the issue in decades—although it has

---

207. See Chevigny, *supra* note 197, at 1132.

208. See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942) (“If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.”).

209. See MODEL PENAL CODE § 3.04(2)(a)(i) (AM. LAW INST. 1985).

210. See Warner, *supra* note 208, at 330. More recent commentators point out that the common law cases recognizing a right to resist unlawful arrest did not discuss detention conditions at all but instead focused on an illegal arrest as an affront to dignity and justice. See Hemmens & Levin, *supra* note 197, at 9–11, 21–22.

211. See, e.g., *Commonwealth v. Moreira*, 447 N.E. 2d 1224, 1227 (Mass. 1983).

212. See Warner, *supra* note 208, at 330.

213. See Hemmens & Levin, *supra* note 197, at 24–25.

indirectly solved the problem of unlawful arrest by designating nearly all arrests as lawful.<sup>214</sup>

The pragmatic arguments against a right to resist unlawful arrest are strong, and it is perhaps more surprising that thirteen states retain the right than it is that so much of the country has renounced it.<sup>215</sup> And courts have emphasized that even where the right to resist unlawful arrest is recognized by state law, it has no bearing on Fourth Amendment reasonableness.<sup>216</sup> Notably, the last significant academic or public support for a right to resist arrest came during the 1960s and early 1970s, from those involved in or supportive of civil rights protests.<sup>217</sup> In many respects, though, what I have called perfectionist views prevailed both as to resisting

214. See *supra* Part I.B (discussing broad scope of arrest authority under *Whren v. United States*, 517 U.S. 806 (1996); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); and, *Heien v. North Carolina*, 135 S. Ct. 530 (2014)).

215. See Miller, *supra* note 206, at 953.

216. See, e.g., *Morris v. Town of Lexington*, 748 F.3d 1316, 1325 (11th Cir. 2014) (holding that a state right to resist unlawful arrest does not disrupt the Fourth Amendment authorization of an arrest for assaulting an officer, based on the same resistance to arrest); *Thompson v. City of Danville*, No. 4:10CV00012, 2011 WL 2174536, at \*7 (W.D. Va. June 3, 2011) (“Virginia’s common law right to resist an illegal arrest simply does not touch on the Fourth Amendment’s reasonableness analysis.”), *aff’d*, 457 F. App’x 221 (4th Cir. 2011).

217. See, e.g., Chevigny, *supra* note 197 (arguing, in 1969, for a right to resist unlawful arrest); Hemmens & Levin, *supra* note 197, at 30–32. Noteworthy here is *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968), originally scheduled to be argued before the Supreme Court during the same term as *Terry v. Ohio*, 392 U.S. 1 (1968). The case involved a young Tulane law student, stopped on the streets of New Orleans by police officers seeking a murder suspect (but apparently without adequate suspicion of the law student in particular). *Wainwright*, 392 U.S. at 600 (Warren, C.J., dissenting). The young student refused to cooperate and repeatedly tried to leave. *Id.* at 600–01. Police took him to the station and ordered him to remove his jacket so they could check whether he had tattoos matching the description of the suspect. *Id.* at 601. The student refused, crouching and crossing his arms, but police forcibly removed the jacket. (He had no tattoos.) *Id.* at 601–02. The student was charged and convicted for assaulting officers, resisting officers, and “reviling the police.” *Id.* at 602. On appeal he argued that the arrest had been unlawful and that the Fourth Amendment protected his (minimal) resistance to the officers’ efforts to remove his jacket. *Id.* at 603. One week after issuing its opinion in *Terry v. Ohio*, the Supreme Court dismissed the writ in *Wainwright* as improvidently granted. *Id.* at 598 (per curiam). Justice Douglas wrote a characteristically impassioned dissent, arguing that the facts showed the significant dangers of *Terry*:

I fear the long and short of it is that an officer’s ‘seizure’ of a person on the street, even though not made upon ‘probable cause,’ means that if the suspect resists the ‘seizure,’ he may then be taken to the police station for further inquisition. That is a terrifying spectacle . . . I fear that with *Terry* and with *Wainwright* we have forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, ‘democratic’ Formosa, and Franco Spain, with which we are now even more closely allied.

*Id.* at 614–15 (Douglas, J., dissenting). Chief Justice Warren, who had authored the majority opinion in *Terry*, also dissented in *Wainwright*. He argued that the arrest was unlawful, and that the state court mistakenly characterized the arrest as lawful and thus failed to consider Louisiana’s recognition of a right to resist unlawful arrest. *Id.* at 607–09 (Warren, C.J., dissenting).

arrest and as to civil rights reform more broadly: Any disobedience should be civil and nonviolent, accepting subsequent punishments; institutions should be reformed from within; and the state must be given time and opportunity to fix its past mistakes (“with all deliberate speed”).<sup>218</sup> Even beyond the arena of civil rights, the twentieth century saw significant shifts in attitudes toward government power; much of the country came to accept expansive regulatory and enforcement powers as necessary or even welcome.

### 3. Second Amendment Resistance Rights

The idea that government, especially big government, is fundamentally untrustworthy and prone to tyranny has never fully disappeared from American public discourse, however. The notion that individuals must be vigilant against government excess and prepared to resist it flourished in discussions of the right to bear arms throughout the twentieth century. And early in the twenty-first century, the Supreme Court endorsed this notion in *District of Columbia v. Heller*,<sup>219</sup> which found the Second Amendment to codify a “pre-existing” individual right to bear arms for self-defense.<sup>220</sup> Such a right would prove useful against private violence, of course, but private violence was not the primary threat identified by the *Heller* Court as the rationale for enshrining an individual right to bear arms in the Bill of Rights. Instead, seeking to explain why the Second Amendment’s reference to “a well-regulated militia” was not a limitation of the right to bear arms to those in official military units, the Court emphasized the need to protect against government tyranny.<sup>221</sup> “It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”<sup>222</sup> To be clear, the right to bear arms is a right to use them against the state itself should it become oppressive.

---

218. “[W]ith all deliberate speed” is the Supreme Court’s infamous recommendation for the integration of formerly segregated public schools. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955). To many racial minorities and civil rights activists, the integration process proved far too slow. See Charles J. Ogletree, Jr., Commentary, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*, 66 MONT. L. REV. 283 (2005).

219. 554 U.S. 570 (2008).

220. *Id.* at 592.

221. See *id.* at 598–600.

222. *Id.* at 599. Justice Scalia’s majority opinion went on to explain that at the time the Bill of Rights was adopted, most Americans probably saw the right to bear arms as most important for “self-defense and hunting.” *Id.* Nevertheless, the *Heller* majority argued, the rationale for codifying the right to bear arms in the new Bill of Rights was a concern about government oppression. *Id.*

In practice, the right to bear arms has been recognized in racially selective ways. After the Civil War, blacks were routinely denied a right to bear arms.<sup>223</sup> The *Heller* Court used this very selectivity, and critiques of it, to support the claim that the right to bear arms has always been understood as an individual right rather than a right of militia members.<sup>224</sup> Thus, a right of blacks to resist oppressive government was ostensibly part of *Heller*'s normative vision. Unsurprisingly, that aspect of the decision has been overlooked, as have the similar but more detailed arguments in *McDonald v. City of Chicago*,<sup>225</sup> which held that the Second Amendment constrained state and local governments as well as the federal government.<sup>226</sup> To establish the individual right to bear arms as "fundamental," and thus incorporated in the Fourteenth Amendment due process clause, the *McDonald* majority described at length post-Civil War efforts by state and local officials to disarm former slaves, which then prompted federal legislation designed to counter those race-based disarmament efforts.<sup>227</sup> It is easy to imagine that Justice Scalia delighted in this rhetorical strategy: Knowing that progressives would critique sharply a recognition of an individual right to bear arms, he portrayed that right as part of the nation's long struggle against racial injustice.<sup>228</sup>

Whatever Justice Scalia's contrarian tendencies, he apparently never contemplated the possibility that Second Amendment rights might cut into the broad authority granted police in Fourth Amendment doctrine, and he certainly did not call for armed resistance as a solution to racial bias in the criminal justice system. But if he did not notice these implications of *Heller*, others did.<sup>229</sup> A few commentators have observed that *Heller*'s resistance ideology is simply incompatible with Fourth Amendment doctrine and existing police practices.<sup>230</sup> For example, the Fourth Amendment emphasis on officer safety allows police to frisk for weapons and seize them during a *Terry* stop, but *Heller* might be read to protect a "right to remain armed."<sup>231</sup> One could eliminate at least some of the contradictions by curtailing Second Amendment rights, but there are risks with that

---

223. *See id.* at 614.

224. *Id.* at 614–16.

225. 561 U.S. 742 (2010).

226. *Id.*

227. *Id.* at 770–76.

228. Justice Scalia authored the *Heller* majority opinion, but merely joined Justice Alito's majority opinion in *McDonald*.

229. *See, e.g.*, Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695 (2015) (arguing that *Heller* and *McDonald* support a right to use force against abusive police officers).

230. *See, e.g.*, Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015); Miller, *supra* note 206; Sanders, *supra* note 229.

231. Bellin, *supra* note 230, at 6.

approach: The rights of armed resistance may be curtailed in ostensibly race-neutral but actually racially selective ways. Already *Heller* (and *McDonald*) obliquely preserved the possibility of at least some race-based disarmament by insisting that felons could be permissibly barred from possessing guns.<sup>232</sup> This may seem a race-neutral principle of disarmament, but to be a felon is not, of course, a naturally arising condition. Felon is a legal classification, and individuals are transformed into felons by the same law enforcement processes that subject blacks to higher levels of police surveillance, intrusion, and violence. Unsurprisingly, the American felony is disproportionately black.<sup>233</sup>

In application, then, rights of resistance are likely to prove no more race-neutral than the duties of compliance. This Part has juxtaposed resistance rights with compliance duties not to show that either ideology will yield racial equality, but rather to illustrate two perspectives on the distribution of violence. On the most generous interpretation, the principle of compulsory compliance discussed in Part II.A seeks to minimize overall violence by creating a monopoly on legitimate violence. In other words, when state officials are the only actors authorized to use violence, they will wield their powers in ways that prevent violence by private actors, and they will not use official violence unnecessarily (or in racially biased ways). The theory of resistance rights, in contrast, is predicated on a belief that to monopolize legitimate violence is to maximize violence, or at least, to run that risk. The resistance theory of *Heller* does not deny the normative legitimacy of some state violence, but it suggests that governments will abuse their authority to use force unless checked by individuals with the technological means and legal license to resist an oppressive state with counter-violence.<sup>234</sup>

This Article endorses neither strict requirements of compliance with police nor wide-ranging rights of violent resistance. Instead, the aim is to reveal ways in

---

232. See *McDonald*, 561 U.S. at 786 (plurality opinion of Alito, J.); *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

233. The overrepresentation of blacks among persons convicted of felonies in the United States has been widely examined in literature and litigation concerning felon disenfranchisement. See, e.g., JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT STATUTES IN THE UNITED STATES 2 (1998), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf> [<https://perma.cc/KP5Z-QR5L>].

234. Advocates of gun rights also often argue that to democratize violence—to grant private individuals legal license to bear and use weapons—will reduce overall levels of private violence (in addition to deterring excessive state violence). As National Rifle Association President Wayne LaPierre is fond of saying, “The only thing that stops a bad guy with a gun, is a good guy with a gun.” *NRA: Full Statement by Wayne LaPierre in Response to Newton Shootings*, GUARDIAN (Dec. 21, 2012, 11:43 AM), <http://www.theguardian.com/world/2012/dec/21/nra-full-statement-lapierre-newtown> [<http://perma.cc/B92N-DNPN>]. The NRA position is that the “good guy” cannot always be, and should not always be, an agent of the state. See *id.*

which rules of resistance and compliance distribute the risks of violence. If those risks are distributed unequally, we have reason to reassess the underlying rules of compliance and resistance.

### III. ESCAPE

Killings by police officers of unarmed black men have provoked substantial public outcry. In the calls for reform, there are several promising ideas. We could train police to deescalate conflicts rather than follow the use-of-force continuum to its logical conclusion.<sup>235</sup> We could train officers on implicit racial bias, in the hopes that they will learn to correct and control for it.<sup>236</sup> We could scale back the substantive criminal law, an enduring and unlikely proposal—but still a worthwhile pursuit that would decrease the police–suspect encounters that so easily escalate to violence. Along similar lines, we could limit the situations in which we authorize and expect officers to make stops or arrests.<sup>237</sup> To summon the political will to make these reforms or any others effective, however, we must be honest about how we got here. So far, the national conversation about police violence has condemned the violence without taking responsibility for it—without admitting that “the acts of the police, even when abusive, reflect the prevailing attitudes in the society.”<sup>238</sup>

Some reform proposals focus on failures to indict officers who kill, as occurred in Missouri after Michael Brown’s death and in New York after Eric Garner’s. Scholars argue that such grand juries are the wrong decisionmakers or that they reached the wrong conclusions.<sup>239</sup> It would not be surprising to find

---

235. See Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), [http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?\\_r=0](http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0) (discussing efforts to train police in de-escalation tactics).

236. This is the aim of the Fair & Impartial Policing program and a key recommendation of the President’s Task Force on 21st Century Policing. See TASK FORCE REPORT, *supra* note 178, at 10–11; see also *supra* note 13.

237. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016) (arguing for limitations on the power to arrest); Ian Ayres & Daniel Markovits, *Ending Excessive Police Force Starts With New Rules of Engagement*, WASH. POST. (Dec. 25, 2014), [http://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58\\_story.html?utm\\_term=.9b7efaeaa02](http://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html?utm_term=.9b7efaeaa02) [<http://perma.cc/77CJ-3SZP>] (arguing that the police should issue tickets, rather than make arrests, for minor offenses).

238. Alexander Nazaryan, *It’s Bad Cop, Worse Cop in ‘Police Power: Police Abuses in New York City,’* NEWSWEEK (Aug. 6, 2014, 10:34 AM), <http://www.newsweek.com/its-bad-cop-worse-cop-police-power-police-abuses-new-york-city-263210> [<http://perma.cc/PJC7-MPFQ>] (quoting Paul Chevigny).

239. See, e.g., Levine, *supra* note 12, at 1449 (referring to the nonindictments in the Garner and Brown cases as indicative of “the dysfunction of our local, adversarial justice system”); Ben Trachtenberg,

major flaws in the grand jury process. But punishing individual police officers may be the wrong goal. In fact, the focus on holding individual officers accountable is risky, for it allows courts, and the wider public, to avoid holding themselves accountable.

Constitutional doctrine is made by judges in the last instance, but we should not isolate a judge's vote or opinion any more than we should isolate an officer's decision to pull the trigger. Doctrinal rules emerge from appellate advocacy, and the specific rules that govern seizure authority are, for the most part, rules which prosecutors and other law enforcement officials have urged courts to adopt.<sup>240</sup> The prosecutors who have advocated for expansive police authority are, in turn, representatives of that broad and amorphous constituency called "the public," or, in the captions of many criminal cases, the People.<sup>241</sup>

The key point here is not that existing constitutional rules accurately reflect the collective will of the people.<sup>242</sup> The key point is that constitutional doctrine authorizes and legitimates much of the police violence of recent years, and this doctrine is purportedly crafted for the benefit of the people at large. The current crisis in American policing—it seems fair, after the summer of 2016, to characterize the situation as a crisis—is not a mere contest between black and blue. It is an occasion to reexamine the rules for official violence—specifically, the violence perpetrated for, tolerated by, and sometimes even demanded explicitly by the People themselves.

Thus, one aim of this Article has been to develop a claim of shared responsibility—to reveal judicial and public responsibility for the deaths of unarmed black men. These deaths are the logical result of doctrinal rules that courts have endorsed for decades. They are the logical result of policing practices that broad segments of the public have tolerated and sometimes demanded. The deaths are, at least in part, the product of the simple suspicion and nonsubmission formula

---

*No, You "Stand Up": Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099 (2015).

240. See *supra* Part I.

241. Many state courts caption criminal prosecutions as "The People vs. [Defendant]." See, e.g., *People v. Rutterschmidt*, 286 P.3d 435 (Cal. 2012). For a philosophical account of the prosecutor as representative of the people, see MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* (2009).

242. It is often debatable whether legislation itself reflects the collective will, even when it is produced by majoritarian bodies comprised of elected representatives. For example, political scientists often emphasize the influence of congressional committees on federal legislation, and the fact that particular committee members answer to a local constituency rather than the nation as a whole. Constitutional doctrine is not even designed or defended as an expression of the collective will, and is at least sometimes explicitly counter-majoritarian. Nevertheless, there are often discernible lines from doctrinal rules back to the arguments of prosecutors, and back further to the constituencies served by those (often elected) prosecutors.

that federal constitutional law uses to create a safe harbor for the use of force. To get different results, we need a different formula.

Two broad categories of reforms are worth pursuing, each quite different from the compliance-focused reforms of procedural justice and community policing theorists. The two strategies I have in mind do not glorify resistance to the police, but they respect the messages expressed by that resistance. The first strategy focuses on the suspicion element of the basic seizure formula. This strategy would seek to constrain police force *ex ante* by reducing the overall frequency of seizures (and near-seizures). This strategy could include the long-demanded reforms to the substantive criminal law mentioned above—straightforward decriminalization of many offenses, so that police have fewer reasons to seize persons. Beyond the substantive criminal law and within Fourth Amendment doctrine, *ex ante* constraints on the use of force would require, first, recognizing what I called “near-seizures” as seizures, and preventing police from using such practices free of judicial scrutiny.

If police lack suspicion of an individual, they should not approach that individual and single her out for questioning; at a minimum, they should begin any encounter by communicating clearly that the individual is free to decline engagement. Further, even when the police have individualized suspicion of some offense, they should make a seizure only when the particular offense warrants immediate detention and investigation. This would mean many traffic offenses—broken taillights, illegal lane changes—will be addressed simply by recording the license plate and sending the registered owner a notice of violation. Limiting near-seizures and traffic stops may not immediately seem important to those concerned with police killings, but we have traversed the continuum too many times; we know that the littlest intrusions turn into the biggest ones.

Already these proposals would make radical changes to existing criminal law enforcement practices. Among other things, they would deny to police the option to make the sweeps and pretextual stops that are key tactical maneuvers in the war on drugs. Perhaps it would make fighting the drug war more difficult, or more dangerous. As we have seen, Fourth Amendment doctrine distributes risks of violence, and major revisions could redistribute those risks.<sup>243</sup> But if we think the existing distribution is unjust, we must be willing to explore alternatives.

A second reform strategy focuses on the other part of the seizure formula, nonsubmission. Here I think more conceptual reorientation may be necessary.

---

243. See *supra* Part II. Cf. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999). Stuntz focused on the search doctrine, but the seizure doctrine of course has similar distributive effects.

The idea that suspicion thresholds are too low and too easily satisfied is already widely accepted among criminal law scholars. The idea that nonsubmission might be protected is less likely to win ready agreement. Except in rare instances—standoffs with white militia members, for example—resistance to law enforcement is not widely viewed as a principled or political act. It is framed as a bad guy trying to save his own skin, or harm an officer, or both.

This, I think, is something we need to reassess. Framed as a right to resist *unlawful* arrest, resistance was nominally a right of the innocent, not the guilty. But on the street, the distinction between the innocent and the guilty is as weak as the distinction between the right to resist unlawful arrest and the right to resist any arrest. Many defendants believe, inaccurately, that they didn't break any laws, or they believe, accurately, that they didn't break any laws that really should be laws. In still other cases, the individual knows he is guilty of some offense but nonetheless resists arbitrary treatment. He resists the officer who has selected him unfairly; or he resists the arrest record that will guarantee later discrimination; or he resists the excessive sentence he will have to serve.

Eric Garner's last words became famous—"I can't breathe," repeated eight times—but what he said to the police just seconds before is equally worth remembering: "Every time you see me, you want to mess with me. I'm tired of it. It stops today. . . . I'm minding my business . . . . Please just leave me alone."<sup>244</sup> Garner was not simply resisting one simple request to put his hands behind his back. He was resisting the burdens of being perennially suspicious. And to be clear, he was indeed suspicious, under the terms of criminal and constitutional law; there is little question that he engaged in petty offenses that, as a doctrinal matter, warrant police seizures. Once suspicious and nonsubmissive, he became a legitimate target. He was resisting all of this, and for that resistance he was killed.

In almost any place and era, it is entirely understandable that individuals facing punishment or other criminal justice intrusions would resist. In the United States in the early twenty-first century, it is especially understandable that African American men would resist contacts with police officers. To appreciate and understand that resistance is not to embrace anarchy. For example, the decidedly nonanarchist Thomas Hobbes defended a right to resist punishment as an implication of a right of self-preservation.<sup>245</sup> Of course, as a practical matter,

---

244. This was captured on video and widely quoted. For a transcript, see Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), <http://www.cnn.com/2014/12/04/us/garner-last-words> [<http://perma.cc/8JXX-S8XR>].

245. See Alice Ristoph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009) (discussing Hobbes's theory of punishment). Interestingly, Hobbes also denied a broader right to revolution—a right of "the people" to organize and overthrow a sovereign. THOMAS HOBBS, *LEVIATHAN* 122 (Richard Tuck ed., 1996). Arguably, Hobbes defended the reverse of pre-*Heller*

resistance to police officers today is more likely to destroy than to preserve oneself. Nonetheless there are expressive dimensions to contemporary resistance that Hobbes might recognize: It expresses a desire for self-preservation, for dignity, for liberation from intrusions perceived to be arbitrary or unjust. It is an expression of “natural indignation” at oppression, as American courts once recognized.<sup>246</sup> We should again acknowledge and respect these efforts to assert autonomy in a setting that has denied it.

There are at least two ways in which constitutional doctrine could and should respect resistance, neither of which embraces violence against police officers. First, it could protect nonviolent noncompliance in the moment of a police-civilian encounter. Individuals would have a right to walk away from an officer who has not made a formal seizure, or a right to refuse cooperation without inviting violent reprisals. To make this change, courts could no longer treat flight or evasiveness as criteria sufficient (or nearly sufficient) to establish suspicion and authorize a seizure.<sup>247</sup> And courts would need to restore and adhere to Justice White’s promise in his *Terry* concurrence: “[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest . . . .”<sup>248</sup>

A second way to respect resistance focuses not on the moment of encounter with the police officer, but on subsequent litigation. Quite simply, courts could begin to give truth to one of the key arguments raised against a right to resist unlawful arrest—they could fulfill the promise of ex post review of police seizures. In terms of resistance, this strategy would offer more meaningful forms of legal resistance in the hopes of discouraging physical resistance in the moment of the encounter with an officer. I have argued elsewhere that most constitutional claims raised by defendants, not only under the Fourth Amendment but under the Fifth and Sixth Amendments as well, are efforts to resist state coercion in various forms.<sup>249</sup> Courts and commentators know that defendants resist punishment, but seem uncomfortable acknowledging that dimension of constitutional criminal procedure, and so have framed the field as a project of police regulation in which defendants are mere bystanders.

---

Second Amendment doctrine, which had endorsed a collective right of resistance via state militias but not an individual right to bear arms. In Darrell Miller’s evocative terms, Hobbes saw at least some forms of retail rebellion as unavoidable, but he strongly denounced wholesale rebellion. See Miller, *supra* note 206.

246. See *supra* Part II.B.2.

247. See *supra* notes 171–173 (discussing *Wardlow*).

248. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

249. See Ristroph, *supra* note 20.

But courts are not entirely comfortable with their role as regulators, either. Thus, while there are many opinions addressing the constitutionality of seizures, creating the appearance of close judicial supervision of police, the substance of those opinions is typically a declination to review. To find an encounter not a seizure is to decline review. To identify reasonable suspicion or probable cause as a safe harbor is to decline any further review in the countless cases in which these minimal levels of suspicion will be present. And to identify flight and resistance as safe harbors for the use of force has, in practice, meant the declination to review the entirely unnecessary killings of unarmed men. Each of these declinations to review is worth questioning; on each issue, federal courts should reassert the power to enforce the Fourth Amendment.

As this Article has shown, federal courts have avoided reviewing the use of force closely, sometimes emphasizing that police officers decide to use force in tense and uncertain circumstances.<sup>250</sup> That is true, of course, and perhaps a reason to refrain from holding officers individually liable. But were our aim to protect individual rights, the fact that police make decisions in tense and uncertain circumstances would be an argument for closer *ex post* review—for an excessive force doctrine that is at least as protective of victims of force as self-defense doctrine, which demands that uses of force be necessary and proportionate to the threat.<sup>251</sup> Perhaps it makes sense that cities typically indemnify individual officers who are sued for excessive force; the officer's split-second decision to use force is not, in most circumstances, one for which he should be personally liable. We can separate the question of who pays for excessive force from the question of who decides whether it was excessive, however. The fact that the officer is not always the right party to pay damages does not mean that the officer's decision should be beyond review.

A final word on the distribution of violence. Crafted appropriately, these doctrinal changes are unlikely to significantly increase risks of physical harm to police officers. But they would make it harder to arrest individuals, harder to convict them, harder to punish them. That consequence, some will surely argue, may increase crime rates and thus increase risks to the public. Without endorsing the reactionary claim that any reduction in prosecutions and punishments will jeopardize public safety, I do want to urge transparency about the distributive judgments that inform policing policy and constitutional choices. With respect to the use of force, our law now embraces something close to the inverse of

---

250. See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

251. Rachel Harmon has proposed importing necessity, imminence, and proportionality standards from self-defense doctrine in criminal law into Fourth Amendment use of force doctrine. Harmon, *supra* note 16.

Blackstone's well-known punishment ratio of guilty men to innocent.<sup>252</sup> Fourth Amendment doctrine suggests, better ten (one hundred? one thousand?) suspects be unlawfully stopped, arrested, or subjected to deadly force than one officer be harmed or even disobeyed.<sup>253</sup> And in adopting this view, we have put the lives, bodies, and dignity of suspects—typically, young black men—on the line.

### CONCLUSION

Police violence is a timely subject in 2017, but perhaps it is equally a timeless one. With a slightly longer historical view, it becomes evident that at least since police departments became entrenched as American institutions, the use of force by police officers has captured the nation's attention about once a generation or so. After broad acceptance of police discretion during the Progressive Era, many began to worry about police abuses (including "the third degree") in the late 1930s.<sup>254</sup> New York reflected the concerns of many jurisdictions when it added constraints on police authority to its state constitution in 1938.<sup>255</sup> Strong critiques of police authority simmered primarily at the state level until the 1960s, when violent clashes between law enforcement and protesters (of the Vietnam War, or of racial inequality) prompted the appointment of a presidential commission and a close examination of police interactions with minority communities.<sup>256</sup> Though this commission identified the perception that police intrusions were disproportionately directed against racial minorities, the nation did little to address any imbalance.<sup>257</sup> Instead, the courts continued to expand police authority, until and

---

252. "[B]etter that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES \*358. Sir Matthew Hale may have actually uttered the phrase earlier than Blackstone, but it is now Blackstone who gets all the credit. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1706 n.147 (1994) ("I had rather through ignorance of the truth of the fact or the unevidence of it acquit ten guilty persons than condemn one innocent." (quoting Matthew Hale's diary)). Others have opined on the ideal ratio of freed guilty to punished innocents as well, offering options from 1:1 to more than 1000:1. See Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

253. Recall *Tennessee v. Garner*, 471 U.S. 1, 11 (1985): "It is not better that all felony suspects die than that they escape." *Id.* at 1. But is it better that they die than that they endanger anyone? The *Garner* Court seemed to believe so. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*

254. See Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 493 (2010).

255. See *id.* at 522–23.

256. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (also known as the Kerner Commission).

257. The Kerner Commission found that "Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police." See *id.* at 158. But just a few months after the

even after Rodney King's videotaped beating brought police violence to the headlines once again in the early 1990s. The King beating, and the subsequent acquittal of the officers involved, led to a flurry of academic critiques of police brutality.<sup>258</sup> But these critiques did not trace police violence to the underlying constitutional doctrine, and in the 1990s courts made no substantial efforts to constrain the authority to use force, much less the underlying authority to conduct seizures or near-seizures. Indeed, as this Article has shown, since the Warren Court first began to apply the Fourth Amendment to early stages of police-civilian interactions, the Supreme Court has steadily expanded the seizure authority, which of course includes the authority to use violence.

Thus, we should not view recent incidents of police violence as historical anomalies or as unfortunate but isolated acts of wrongdoing. The officers who have killed unarmed black men in Chicago, Ferguson, New York, and other American cities and towns are not bad apples whose removal will solve the problem of excessive force. Instead, police violence, including lethal violence against unarmed suspects, is the predictable consequence of Fourth Amendment doctrine. For decades, American cities and towns have expanded the numbers of police officers even as courts expand the authority held by each officer. At the same time, rights of noncompliance and resistance have withered, especially for those racial groups most likely to be monitored and investigated by the police.

Resistance is, supposedly, what necessitates police force. The mere prospect of resistance—even in its weakest, passive forms such as noncompliance or avoidance—licenses officers to use violence. It may seem paradoxical, then, to suggest that we could reduce police violence by acknowledging and protecting forms of resistance. But an honest appraisal of the functions of police as “violence specialists”<sup>259</sup> should lead to the realization that forms of resistance can serve as crucial constraints on these unique agents of state force. By protecting an individual's right to resist or avoid the very beginnings of a police encounter, and by heightening after-the-fact judicial scrutiny of those encounters, we may yet reduce police violence and its lethal results. At least as importantly, we create opportunities for those most often targeted by the police to reclaim a measure of autonomy, dignity, and respect.

---

Commission's report, the Supreme Court issued its opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), which acknowledged the racially disparate impacts of police investigations, but expanded police authority anyway. 392 U.S. 1 (1968); see also *supra* Part II.A.

258. See, e.g., SKÖLNICK & FYFE, *supra* note 123.

259. DOUGLASS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 30–31 (2009).