

REASONABLE OFFICERS VS. REASONABLE LAY PERSONS
IN THE SUPREME COURT'S *MIRANDA* AND FOURTH
AMENDMENT CASES

by
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This Article examines the role of the reasonable person as it applies to the Supreme Court's investigative criminal procedure jurisprudence. The Article first explores the Court's concept and use of the reasonable person in the context of Miranda and the Fourth Amendment. The Article then highlights how the Court's view of the reasonable police officer compares to its treatment of the reasonable lay person. Specifically, the Article notes how, in many circumstances, the Court affords the reasonable police officer more room for imperfection in her perceptions, knowledge, emotions, and behaviors; comparatively, the reasonable lay person is far more frequently expected to check her identity and experiences at the door. This Article concludes that the Court's differing applications of the reasonable person allow it to balance interests covertly. However, more forthright treatment of the interests at stake would be healthier for the criminal justice system.

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* Professor of Law, Lewis & Clark Law School. Many thanks are due to the participants in the *Who Is The Reasonable Person?* Symposium and to John Parry for thoughtful input and suggestions. I am also indebted to Jenny Eadie and Gabrielle Richards for invaluable research assistance. Any errors or other problems are, of course, my own.

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I. INTRODUCTION

Who is the “reasonable person”? That question crops up frequently in cases where the Supreme Court determines the validity of police investigative procedures. This Article examines the way the Court uses the concept in applying rules and standards to custodial interrogation¹ and search and seizure.² In doing so, it focuses upon an aspect of the “reasonable person” that has not been emphasized in the existing literature.

It is no secret that the Court is inconsistent in investigative procedure cases, shifting among a focus on the reasonable police officer, the reasonable suspect, and the reasonable general member of society.³ In addition, other writers have commented on the Court’s tendency to treat “reasonable” lay people as though certain personal characteristics, such as gender, age, and ethnicity do not matter, thus blinking the reality of the situations that people with these characteristics often face.⁴ The problem I will address includes this disinclination to “customize” the reasonable person for such widely shared, immutable characteristics but goes even further: In the Court’s view, the reasonable lay person—even a mature, white male—lacks basic human emotions, understandings, and

¹ In these cases, the Court is applying rules developed in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). See *infra* Part III.A for an overview of the cases.

² In these cases, the Court is applying rules developed in accordance with the Fourth Amendment to the United States Constitution, in particular police activity in the absence of a warrant and therefore judged under the Fourth Amendment’s “reasonableness” clause. See *infra* Part III.B, for an overview of the cases.

³ See, e.g., Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71 (2007) (demonstrating inconsistency and suggesting lack of principled basis for it). Kinports notes the Court’s shift between subjective and objective approaches and among the perspectives of the officer, defendant, and people in general. She demonstrates that the Court’s doctrines are not consistent with the announced purposes of the exclusionary rule or with the reasons the Court gives for shifting perspectives. See also, e.g., Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL OF RTS. J. 677, 677–78 (1998) (discussing the Court’s changing perspectives); Peter B. Rutledge, *Miranda and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1012 (2005) (noting that the Court “has not charted an entirely consistent path” on use of objective versus subjective approaches). Cf. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 204 n.10 (1993) (citing examples of commentators taking this approach). Cloud asserts that the apparent inconsistencies are resolved by recognizing that the Court is consistently taking a pragmatic approach to analysis. *Id.* at 205.

⁴ E.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 996 (2002); Kinports, *supra* note 3, at 137. See also sources cited *supra* note 3.

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expectations that the Court accepts as valid for the reasonable law enforcement officer. That is, a reasonable officer is allowed to have average perceptions, knowledge, emotions, or behavior even when these are flawed in some way. The reasonable lay person, however, is not allowed to have such flaws or weaknesses; on the contrary, this person must be a paragon of self-control and rationality, living up to an ideal standard that most people could not meet. The result is a sort of “heads I win, tails you lose” approach to determining the validity of investigative procedures in which the interests of law and order usually prevail. More importantly than this bottom line, however, the “air of unreality” in the Court’s opinions⁵ masks the considerations that are actually driving the decisions and creates bigger systemic problems for the administration of criminal justice.

This is not to say that the Court always comes to a contentious conclusion. There are plenty of cases where the Court’s view of reasonableness probably jibes with that of most observers.⁶ This Article will not focus on those cases. Instead, it will highlight the cases where many observers read the Court’s analysis and shake their heads in amazement. In addition, this Article will read these cases for all they’re worth, perhaps even caricaturing the Court’s approach, in an attempt to make a point about the type of society the Court’s “reasonable people” inhabit. It does so with the full realization that others could interpret at least some of the cases differently.

This Article will take no position on whether the Court’s bottom line in any particular doctrine is good or bad. Some may think that a default in favor of law and order is a good thing, while others may think that the Court has us teetering on the brink of a police state. This Article does, however, urge that whatever one’s view of the bottom line, there are more principled—or at least more transparent—ways to call doubts in favor of law and order.

This Article will proceed in four steps. Part II will provide a brief overview of aspects of the “reasonable person” construct that are central to this discussion. Part III will look at the Court’s use of the “reasonable police officer” in the context of *Miranda* and the Fourth Amendment,

⁵ United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting) (noting an “air of unreality” in the Court’s reasoning). See also, e.g., Bacigal, *supra* note 3, at 722 (noting that “[l]ike medieval scholasticism, Fourth Amendment jurisprudence has become an enclosed discipline no longer anchored in reality”); Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1789 (1994) (noting that “the Court’s opinions in this area often have an air of unreality to them”).

⁶ E.g., Florida v. Jimeno, 500 U.S. 248, 249 (1991) (consent to search car for drugs includes consent to open brown paper bag); New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (reason to believe student had violated school rules); Schmerber v. California, 384 U.S. 757, 770–71 (1966) (reasonable to think blood alcohol level could dissipate in time necessary to obtain warrant; reasonable to use a blood test administered by a medical professional).

including the issue of qualified immunity in civil rights cases that raise Fourth Amendment challenges. This last coverage is important because the cases involve officers who have (or are alleged to have) made a mistake in searching or seizing, and the question is whether the mistake was reasonable;⁷ in addition, where police conduct is merely negligent (that is, unreasonable), a civil rights lawsuit may soon be the only remedy available for the victim of that misconduct.⁸ Part IV will contrast the Court's view of the "reasonable" law enforcement officer with its treatment of the "reasonable" lay person. And Part V will explore the consequences of the Court's disparate treatment of these standards.

II. THE VARIOUS ROLES OF THE REASONABLE PERSON

The reasonable person plays a variety of roles in American law. Sometimes the reasonable person serves as circumstantial evidence of what some actual person is thinking. At other times, the reasonable person reflects the average. At still other times, though, the reasonable person reflects an ideal. This Part examines each of these roles.

First, the law often asks fact-finders to determine what some person was actually thinking, feeling, or planning. It is impossible to see inside another person's head, of course. Even that person's own declaration is merely circumstantial evidence of what is in the person's mind: The declaration could be a lie. Thus, fact-finders are allowed to imagine how a reasonable person would view a situation and then use that image as circumstantial evidence of a real person's state of mind.⁹ Sometimes courts apply this approach by asking whether a reasonable person would believe that a witness's testimony was honest or accurate.¹⁰ When the reasonable person is used in this manner, the actual inquiry is subjective—what was actually in the witness's mind.¹¹ In the realm of investigative criminal procedure, the Court occasionally adopts a subjective approach in which the reasonable person might be used as

⁷ See *infra* notes 91–92 and accompanying text.

⁸ See *Herring v. United States*, 129 S. Ct. 695, 702 (2009) (implying that the exclusionary rule will not be available for merely negligent violations of the Fourth Amendment). See also Chris Blair, Hudson v. Michigan: *The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 756–57 (2007); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI. KENT L. REV. 191, 192, 207 (2010).

⁹ E.g., *Austin v. Disney Tire Co.*, 815 F. Supp. 285, 288 (S.D. Ind. 1993) (holding that "reference to what a reasonable person would have perceived may aid in" the determination of the subjective mental state of obduracy and distinguishing this from using the evidence to establish negligence, "an objective determination").

¹⁰ E.g., *Aguirre v. City of Miami*, No. 04-23205-CIV, 2007 WL 2700579, at *3 (S.D. Fla. Sept. 12, 2007) ("[A] decision maker's disavowal of knowledge alone does not create un rebutted evidence where there is circumstantial evidence that may lead a reasonable person to infer that the decision maker's testimony is inaccurate." (citation omitted)).

¹¹ E.g., *Austin*, 815 F. Supp. at 288.

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circumstantial evidence. Examples include the inquiry whether a person had an actual expectation of privacy,¹² whether a suspect was actually coerced into confessing,¹³ or whether a police officer misstated the facts in a search warrant affidavit knowingly, intentionally, or with reckless disregard for truth.¹⁴ However, the Court has outrightly rejected looking into a police officer's actual motivation for making a traffic stop,¹⁵ and it refrains from using a subjective approach in the other areas of interest to this Article.¹⁶

Despite the occasional reference to a person's actual state of mind, most of the time the law uses the reasonable person as an objective concept. However, there are two variations on this usage. In the first, courts often embrace the concept of the reasonable person as a way to express a view—or to urge a fact-finder to develop a view—of how an average person would act, perceive, or think.¹⁷ Jurisdictions often adopt this approach in setting standards for a variety of criminal law issues such

¹² See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹³ E.g., *Davis v. North Carolina*, 384 U.S. 737, 741–52 (1966) (examining defendant's educational level and mental retardation in addition to the circumstances of the investigation); *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) (judging whether the 15-year-old defendant's confession was voluntary by taking his age into account as well as the circumstances of his interrogation).

¹⁴ See *Franks v. Delaware*, 438 U.S. 154, 165, 169 (1978).

¹⁵ *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the “constitutional reasonableness of traffic stops” does not depend upon “the actual motivations of the individual officers involved” because “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”). Contrast the Court's willingness to permit an inquiry into the actual motivations of a police department or other official agency. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 81–84 (2001) (examining programmatic purpose of giving urine tests to addicted pregnant women); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (examining the “primary purpose” of the city's automobile checkpoint program).

¹⁶ See *infra* Part III. An exploration of the Court's choice to use an objective rather than a subjective approach in most cases is beyond the scope of this Article. For treatments of this issue, see, for example, Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 Miss. L.J. 339 (2006); Kinports, *supra* note 3, at 71; Rutledge, *supra* note 3, at 1012. In addition, this Article will not explore the lack of clarity in the Court's use of terms such as “subjective” and “objective” with regard to mental state. E.g., *Brower v. County of Inyo*, 489 U.S. 593, 596, 598 (1989) (saying that seizure of a moving vehicle “requires an intentional acquisition of physical control” and that “the detention or taking itself must be willful” but “[i]n applying these principles . . . we do not think it practicable to conduct such an inquiry into subjective intent”). See also Bacigal, *supra* note 3, at 692 (bemoaning the Court's treatment of mental state in *Brower* and *Whren*).

¹⁷ E.g., *Pinkus v. United States*, 436 U.S. 293, 300 (1978) (equating the reasonable person and the average person in discussing jury instructions in case regarding obscenity); *United States v. Johnson*, 581 F.3d 320, 326–27 (6th Cir. 2009) (referring to “the perspective of the average, reasonable person” in discussion of a hearsay exception (citing FED. R. EVID. 804(b)(3))), *cert. denied*, 130 S. Ct. 3409 (2010).

as adequate provocation in the heat of passion,¹⁸ extreme emotional disturbance,¹⁹ self-defense,²⁰ or foreseeability in the context of accomplice liability.²¹ A person being judged against this standard is at fault for not acting, perceiving, or thinking as the average person would. So, for example, if the average person would be weak, confused, or emotional, the person being judged is also legally allowed to be weak, confused, or emotional.

There is a second sense in which the reasonable person is used objectively, however. In this approach, the reasonable person is also used normatively, but the standard to live up to is higher than that of the average person in the community. The reasonable person becomes aspirational in an idealized sort of way, a paragon whose characteristics may not be attainable by some (or many) average people:

Devoid, in short, of any human weakness, with not one single saving vice, *sans* prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.²²

The common law defense of duress in criminal cases illustrates this third approach. In general, a person who committed a criminal act can defend by showing that

(1) another person threatened to kill or grievously injure the actor or a third party . . . ; (2) the actor *reasonably* believed that the threat was genuine; (3) the threat was 'present, imminent, and impending' at the time of the criminal act; (4) there was no *reasonable* escape from the threat except through compliance with

¹⁸ *E.g.*, *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991) (holding that "[f]or provocation to be 'adequate,' it must be 'calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason'" (quoting *Carter v. State*, 505 A.2d 545, 548 (Md. 1986))).

¹⁹ *E.g.*, *State v. Shumway*, 63 P.3d 94, 97 (Utah 2002) (noting that "a person suffers from an extreme emotional disturbance 'when he is *exposed* to extremely unusual and overwhelming stress' such that 'the average reasonable person under that stress would have an extreme emotional reaction to it'" (quoting *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988))).

²⁰ *E.g.*, *Jones v. State*, 39 So. 3d 860, 865 (Miss. 2010) (citing precedent for the rule that "[i]n order for a homicide to be justified as self-defense, the actor's apprehension of danger must appear objectively real to a reasonable person of average prudence").

²¹ *E.g.*, *State v. Williams*, 653 A.2d 902, 905 (Me. 1995) (noting that "[t]he 'reasonably foreseeable consequence' requirement with respect to accomplice liability sets forth an *objective* criterion, *i.e.*, what the average reasonable person would foresee in all the circumstances" (quoting *State v. Kimball*, 424 A.2d 684, 693 n.4 (Me. 1981))).

²² A.P. HERBERT, *UNCOMMON LAW* 4 (7th ed. 1952), *cited in* Randy T. Austin, Comment, *Better Off with the Reasonable Man Dead, or the Reasonable Man Did the Darndest Things*, 1992 BYU. L. REV. 479, 484 (1992); Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1, 5 (2008).

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the demands of the coercer; and (5) the actor was not at fault in exposing herself to the threat.²³

Through incorporation of the notion of reasonableness, the defense seems to reflect the average person's perceptions and ability to withstand pressure, positing that if the average person would succumb to the pressure, the actor should not be found guilty of the crime.²⁴ However, under the common law, a defendant cannot claim duress as a defense to murder.²⁵ This means that even if an average person would commit murder under the circumstances of the case, the actor will not be able to take advantage of that fact; on the contrary, the actor will be guilty for not living up to a standard that most people, by definition, also could not meet. There may, of course, be good policy reasons for withdrawing the defense from even average people.²⁶ The point here is that manipulation of the reasonable person concept is the method used to attain whatever policy goals are involved.

In other situations, the law creates a standard that is unattainable by some smaller segment of the population. Assume, for example, that a 100-pound woman uses a gun to repel an attack by a 190-pound, unarmed man. The law requires the fact-finder to determine whether she believed using a gun was required to prevent deadly force from being used against her and, if so, whether her belief was reasonable.²⁷ If the defendant is judged by the standard of the average adult male, she will likely lose (absent extraordinary facts) because the situation involved a weaponless fight between evenly matched opponents.²⁸ However, it might be entirely reasonable for a 100-pound woman to believe that she risked death if she tried to ward off her attacker without using a weapon. That

²³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 23.01, at 303 (5th ed. 2009) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW] (footnotes omitted). See also ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1059–65 (3d ed. 1982).

²⁴ E.g., PERKINS & BOYCE, *supra* note 23, at 1065 (“If under all the circumstances a reasonable person would have been impelled to avoid such threatened harm by doing what was done by the defendant, the defense should be recognized—otherwise it should not.”).

²⁵ E.g., DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 23, § 23.01, at 303, § 23.04, at 309; PERKINS & BOYCE, *supra* note 23, at 1059.

²⁶ George Fletcher made a similar observation in comparing the German and common law approaches to duress, noting that “the standard of the reasonable person provides a substitute for inquiries about the actor’s character and culpability.” George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1290 (1974). “Is the reasonable person cowardly? Is he selfish?” he continued, “If he were, our two [cowardly and selfish] allegedly coerced actors would have good defenses. Common law courts would obviously hold that the reasonable man is neither cowardly nor selfish. Why? Because these are traits that men can be fairly expected to surmount to save the life of another or to protect other vital interests.” *Id.* at 1291.

²⁷ See, e.g., DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 23, § 18.01, at 223.

²⁸ See, e.g., *State v. Wanrow*, 559 P.2d 548, 558 (1977) (en banc).

is, if the “average” reasonable person is a man—and the average man weighs 190 pounds²⁹—the reasonable person becomes an ideal standard that the 100-pound woman cannot attain. Unless the fact-finder is allowed to “customize” the reasonable person to account for gender or size differences, average women will be defenseless in both the physical and the legal sense.

In fact, criminal law casebooks are replete with examples of courts struggling to find the right approach to such customization problems.³⁰ The law often talks about the reasonable person in the actor’s situation or circumstances, and so the issue of “customizing” the reasonable person often arises in the context of asking what the situation encompasses.³¹ Which are the traits for which customization is valid or even required for justice to be served? It may be warranted, for example, to customize for age or gender, if only in the context of certain legal issues. On the other hand, assume that lawmakers conclude that mentally healthy persons behave and perceive the world more realistically than do persons with mental illness. In that case, given that the task is to articulate a standard to live up to, and unless we are distinguishing among people with psychiatric disorders, it is probably never valid to talk about the reasonable mentally ill person.

The law’s willingness or unwillingness to articulate the characteristics and circumstances that define the “reasonable person” can determine how high the objective bar is being set. To the extent that the “reasonable person” has characteristics similar to those of the person being judged—and to the extent that the fact-finder understands how the world looks to someone with those characteristics—the concept is more likely to reflect an average norm that most people with similar characteristics can meet. If the “reasonable person” has characteristics not shared by the person being judged, and those characteristics set the bar, it will be harder for that person to live up to the standard. If the “reasonable person” is a paragon with characteristics shared by almost no one, almost no one will measure up. If the law indicates use of the concept without specifying the “reasonable person’s” characteristics, it

²⁹ Robert Longley, *Americans Getting Taller, Bigger, Fatter, Says CDC*, ABOUT.COM: US GOVERNMENT INFO, <http://usgovinfo.about.com/od/healthcare/a/tallbutfat.htm>.

³⁰ E.g., JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 270–88 (4th ed. 2007) (section on “Who Is the ‘Reasonable Man?’”); *id.* at 504–43 (exploring the “reasonable person” concept in self-defense); *id.* at 690–739 (exploring the feasibility of “new defenses”).

³¹ See, e.g., *Wanrow*, 559 P.2d at 557 (determining that the circumstances must include defendant’s knowledge of events allegedly occurring prior to the incident in question); MODEL PENAL CODE § 2.02(d) (1962) (“A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”).

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leaves a void that fact-finders are likely to fill intuitively, using themselves as the model that is tempered by whatever concept they have of what justice demands.

In the realm of investigative procedure, the issues involved in use of the reasonable person standard do not have to be viewed through the filter of jury instructions and the black box of jury deliberations. Judicial opinions let us know exactly which approach a court is taking.³² As the discussion in Part IV will show, the Court often talks about the “reasonable person” in general terms; however, its application shows that its concept of reasonableness differs depending on whether the person at issue is an officer or a lay person. As Part V will discuss, what is missing from this approach is a clear sense of why the Court believes that its choices further the ends of justice.

III. CUSTODIAL INTERROGATION, SEARCHES, AND SEIZURES: THE UBIQUITOUS REASONABLE PERSON

The reasonable person is a common figure in the Supreme Court’s investigative procedure cases. At times, the Court uses terms like “reasonable person,” “reasonable officer,” and “reasonable suspect.” Alternatively, the Court sometimes talks of “reasonableness” generally without attaching the concept to a “person.”³³ Our discussion will treat all of these practices as examples of the “reasonable person” approach.

Section A will trace the Court’s basic use of the concept in *Miranda* cases, while Section B will focus on search and seizure. Part IV will address the Court’s alteration between the “average” and “ideal” reasonable person.

A. Custodial Interrogation

Custodial interrogation is governed at the federal level by *Miranda v. Arizona* and the numerous cases implementing it.³⁴ *Miranda* rights, grounded in the Fifth Amendment protection against self-incrimination, have an unusual constitutional status:

The *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are “not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.” Requiring *Miranda*

³² Cf. Rutledge, *supra* note 3, at 1013 (noting that lack of jury input distinguishes the *Miranda* context from torts and substantive criminal law).

³³ See, e.g., *infra* notes 38–44 and accompanying text.

³⁴ 384 U.S. 436 (1966). The major cases implementing the decision are reviewed in this Section.

warnings before custodial interrogation provides “practical reinforcement” for the Fifth Amendment right.³⁵

While the protocol “sweeps more broadly than the Fifth Amendment itself,”³⁶ the requirements are based on the Fifth Amendment.³⁷

The cases implementing *Miranda* make plentiful use of the reasonable person. First, an officer must give so-called *Miranda* warnings whenever engaging in custodial interrogation of a subject,³⁸ unless the questioning was “reasonably prompted by a concern for the public safety.”³⁹ Custody normally exists when, given the circumstances, a “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.”⁴⁰ However, some situations that meet this standard do not qualify as “custody” based on the Court’s sense that people in general would not experience police coercion in the situation.⁴¹ Interrogation exists if there is “express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect”;⁴² in most situations, application of this standard requires analysis of how a reasonable suspect would respond.⁴³ Prior to custodial

³⁵ *New York v. Quarles*, 467 U.S. 649, 654 (1984) (footnote omitted) (citations omitted).

³⁶ *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

³⁷ *See Dickerson v. United States*, 530 U.S. 428, 438–41 (2000).

³⁸ *Miranda*, 384 U.S. at 444.

³⁹ *Quarles*, 467 U.S. at 656.

⁴⁰ *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). *See also, e.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 436–38, 442 (1984) (asking whether a reasonable person stopped for a traffic violation would know he would be allowed to leave soon and was not at the complete mercy of the police and noting that the “relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation”). However, the Court does not always use the “reasonable suspect” approach to determine custody. *See, e.g.*, *California v. Beheler*, 463 U.S. 1121, 1123–25 (1983) (announcing straightforwardly that, in the totality of circumstances, Beheler was not in custody); *Orozco v. Texas*, 394 U.S. 324, 326–27 (1969) (holding that Orozco was “deprived of his freedom of action in [a] significant way” when four officers entered his bedroom at 4 a.m. and questioned him (emphasis omitted) (quoting *Miranda*, 384 U.S. at 477)).

⁴¹ *See Illinois v. Perkins*, 496 U.S. 292, 296 (1990). *See also Maryland v. Shatzer*, 130 S. Ct. 1213, 1224–25 (2010) (holding that “custody” did not continue for *Miranda* purposes when Shatzer was released back into the general prison population after charges were dropped because prison was his normal living situation and thus did not impose the type of coercive pressure needed to trigger *Miranda*). The *Shatzer* Court also indicated that after being released, a reasonable person would continue to feel the effects of “custody” for two weeks, but not longer. *Id.* at 1223–24.

⁴² *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

⁴³ The *Innis* Court noted that “[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” *Id.* The issue, in other words, is not how the suspect would view the officer’s behavior, but *how the reasonable officer should think* the suspect would view it. The court makes it clear that if the officer has special knowledge about the defendant, those facts must

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interrogation, the officer must give the warnings so that a reasonable person can understand them.⁴⁴

If, after receiving the warnings, the suspect says nothing, there is no evidence to introduce or suppress.⁴⁵ At the other extreme, if the suspect talks without asserting *Miranda* rights, a court must determine whether the suspect voluntarily, knowingly, and intelligently waived those rights.⁴⁶ Whether there was a waiver at all—and whether the standard is met—is a subjective inquiry,⁴⁷ and thus one in which the reasonable person can serve as circumstantial evidence.

In between these extremes, when a suspect claims to have asserted one of the *Miranda* rights, a court must first ask whether a reasonable officer would experience the defendant's behavior as such an assertion. The assertion must be unambiguous,⁴⁸ so courts must first determine whether a reasonable officer would perceive that the suspect was asserting one or both rights.⁴⁹ If the suspect successfully asserted one or

be considered when determining what response the officer reasonably should know is likely. *Id.* If the officer has no special knowledge, however, the test logically boils down to how the reasonable officer would think a reasonable suspect would be likely to respond. *Id.* at 303.

⁴⁴ *E.g.*, Florida v. Powell, 130 S. Ct. 1195, 1203 (2010); Duckworth v. Eagan, 492 U.S. 195, 201 (1989).

⁴⁵ *See* Doyle v. Ohio, 426 U.S. 610, 611 (1976) (holding that prosecution may not use post-warning silence to impeach credibility when defendant testifies to exculpatory story at trial). *But see* Greer v. Miller, 483 U.S. 756, 763–64 (1987) (holding no barrier to impeachment use of defendant's unwarned silence); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (same).

⁴⁶ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65, 468 (1938)).

⁴⁷ *Johnson*, 304 U.S. at 464 (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”). The Court has, however, found both express and implied voluntary, knowing, and intelligent waiver in the face of confusion, misunderstanding, trickery, and a certain degree of pressure. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523, 525, 527, 529 (1987) (finding waiver despite suspect's confusion about significance of spoken, as opposed to written, statement); Colorado v. Spring, 479 U.S. 564, 574 (1987) (finding waiver despite police trickery regarding which crime was of interest); *Fare v. Michael C.*, 442 U.S. 708, 726 (1979) (finding waiver despite a certain amount of pressure brought to bear on a 16 ½-year-old suspect); North Carolina v. Butler, 441 U.S. 369, 376 (1979) (allowing implied waiver).

⁴⁸ *Berguis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010) (discussing both the right to counsel and the right to silence).

⁴⁹ Invocation of the *Miranda* right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*” *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) (holding that invocation of the Sixth Amendment right to counsel at a bail hearing does not also invoke the *Miranda* right to counsel at custodial interrogation). The use of the passive voice (“can reasonably be construed”) may seem ambiguous, but the Court must mean to ask whether the

both of the rights, courts ask some questions prior to addressing the issue of voluntary, knowing, and intelligent waiver.

If the suspect asserted the right to silence but then talked anyway, the court must determine whether the suspect's right to "cut off questioning" was "scrupulously honored."⁵⁰ Courts determine this by looking at the nature of the interrogation context, not the perceptions of the individual being questioned, and so are using the reasonable person as some sort of standard.⁵¹

Similarly, if the suspect asserted the *Miranda* right to counsel, interrogation must cease immediately.⁵² However, police may resume interrogation in the absence of counsel if a reasonable officer would think that the suspect initiated further conversation about the crime.⁵³

B. Search and Seizure

The reasonable person also plays a prominent role in the Court's search and seizure analysis.⁵⁴ To begin with, the Fourth Amendment applies only if the government activity at issue is a "search" or a "seizure." The activity is a "search" if it violates a person's reasonable expectation of privacy as determined from the perspective of society in general.⁵⁵ The

police officer giving the warnings reasonably believes the suspect has asked for a lawyer. Who else, after all, has to construe the suspect's words?

As to the right to silence, the *Miranda* Court indicated that a suspect could assert this right by "indicat[ing] in any manner, at any time prior to or during questioning, that he wishes to remain silent . . ." 384 U.S. at 473–74. In *Berguis*, the Court held that the standards applicable to the *Miranda* right to counsel also apply to assertions of the right to silence. 130 S. Ct. at 2260 (holding that merely remaining silent is not an unambiguous assertion of the right to silence).

⁵⁰ *Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975) (quoting *Miranda*, 384 U.S. at 474).

⁵¹ *Id.* at 104.

⁵² *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

⁵³ *Oregon v. Bradshaw*, 462 US 1039, 1045–46 (1983) (holding that suspect's question—"Well, what is going to happen to me now?"—could be taken as a desire to initiate further conversation about the crime).

⁵⁴ See also, e.g., *Cloud*, *supra* note 3, at 265 (listing areas where the Court has used an objective test from the officer's perspective to resolve Fourth Amendment issues).

⁵⁵ The Court asks whether a suspect had an actual expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable. *Id.* This articulation is often reduced to the "reasonable [or legitimate] expectation of privacy" test. See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191 (1986). The Harlan test was a summary of the Court's conclusion: "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Katz*, 389 U.S. at 353. When government

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Court uses this reasonable person—by implication or in so many words—as circumstantial evidence of whether a particular suspect had a subjective expectation of privacy.⁵⁶ It also uses this reasonable person to determine whether society “is prepared to recognize” that expectation as reasonable.⁵⁷ At times, the Court has held that *no one* can have a reasonable expectation of privacy under the circumstances.⁵⁸ In most cases, however, whether the privacy expectations being asserted are reasonable is judged under the circumstances of the case. Such “circumstances” are normally confined to the person’s relationship to the

agents intrude into the interior of a home, the Court assumes that the householder had a subjective expectation of privacy. See *Kyllo v. United States*, 533 U.S. 27, 34 (2003). This assumption seems to be based on how people in the United States in general have historically viewed the home. *Id.* See also *United States v. Karo*, 468 U.S. 705, 714 (1984) (noting that “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant”). Note that in both cases the Court also declared that expectation of privacy to be reasonable. *Kyllo*, 533 U.S. at 34; *Karo*, 468 U.S. at 714.

⁵⁶ *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (“Telephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.”); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (“One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”).

The Court also occasionally judges a suspect’s subjective expectation of privacy by noting the subject’s actions. In *California v. Ciraolo*, for example, the Court held that it was not a “search” for officers to fly over the suspect’s curtilage in a fixed-wing aircraft at 1000 feet and observe plants growing there. 476 U.S. 207, 215 (1986). The Court noted that although Ciraolo manifested a subjective expectation of privacy by building a ten-foot fence around his yard, this expectation of privacy was unreasonable. *Id.* at 211. Note, however, that the Court sometimes assumes, *arguendo*, that the suspect had a subjective expectation of privacy and gets right down to explaining why society is not prepared to recognize that expectation as reasonable. See, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell”).

⁵⁷ *Katz*, 389 U.S. at 361.

⁵⁸ *E.g.*, *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (holding no one has a reasonable expectation of privacy in garbage left on the curb for collection); *Ciraolo*, 476 U.S. at 215 (holding no one has a reasonable expectation of privacy from surveillance by fixed-wing aircraft within legally navigable airspace even when in one’s backyard); *Oliver v. United States*, 466 U.S. 170, 178 (1984) (holding no one has a reasonable expectation of privacy in “open fields”); *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (observing that “it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”).

place searched,⁵⁹ but on rare occasions the Court will consider the person's gender or age.⁶⁰

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property" by a government agent.⁶¹ While the Court has not overtly referred to the reasonable person in determining whether interference is "meaningful," its discussions reflect the Court's sense of how an average person would view the situation.⁶² On the other hand, the Court's use of the reasonable person is prominent when addressing the seizure of persons. A seizure of a person exists if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"⁶³ or, in some situations, if a reasonable person would not feel free "to disregard the police and go about his business."⁶⁴

⁵⁹ *E.g.*, *Minnesota v. Olson*, 495 U.S. 91, 97–100 (1990) (holding overnight guest has a reasonable expectation of privacy in host's home); *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (holding petitioner lacked reasonable expectation of privacy in casual acquaintance's purse); *Rakas v. Illinois*, 439 U.S. 128, 148–50 (1978) (finding passenger in car who did not assert property or possessory interest in the auto or the items seized lacked reasonable expectation of privacy).

⁶⁰ *E.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641 (2009) (discussing the reasonableness of the student's expectation of privacy in terms of the experiences and reactions of other girls of her age).

⁶¹ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

⁶² *E.g.*, *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (holding seizure occurred when sheriff's deputy aided in removing trailer home from lot because "[w]e fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment"); *Hudson v. Palmer*, 468 U.S. 517, 544 (1984) (holding officials seized inmate's property when they destroyed it because "[f]rom the citizen's standpoint, it makes no difference what the government does with his property once it takes it from him; he is just as much deprived of his possessory interests when it is destroyed as when it is merely taken"); *Segura v. United States*, 468 U.S. 796, 822–23 (1984) (holding that when agents excluded petitioners from access to their apartment they also seized the contents in the way that officers seize contents when they take custody of a car or a person carrying personal effects). *But see* *United States v. Karo*, 468 U.S. 705, 712–13 (1984) (holding no meaningful interference occurred when agents placed a beeper in a can of ether that was transferred to Karo because "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way. At most, there was a technical trespass on the space occupied by the beeper.").

⁶³ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

⁶⁴ *E.g.*, *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (asking whether a reasonable person would feel free "to disregard the police and go about his business"); *Mendenhall*, 446 U.S. at 554 (holding that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). The subjective intent of the officer is irrelevant unless it is communicated to the suspect. *Id.* at 554 n.6.

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If a person gives a valid consent to a search⁶⁵ or to what would otherwise be a seizure,⁶⁶ the Fourth Amendment is not implicated. Whether the suspect did consent is a question of fact.⁶⁷ If the suspect consented, the focal issue becomes whether the consent was given voluntarily. This is nominally⁶⁸ a subjective inquiry⁶⁹ and therefore one for which the reasonable person might be used as circumstantial evidence. Consent given by a third person who did not have actual authority to consent will be valid if a reasonable officer in those circumstances would believe such authority existed.⁷⁰ Similarly, the scope

⁶⁵ *E.g.*, *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (holding voluntary consent of occupant validates search but lack of consent from physically present co-occupant makes search unreasonable in absence of warrant or exception to warrant requirement); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (stating that validity of search depended upon suspect's consent, that State has burden of proving consent was freely and voluntarily given, and that burden "is not satisfied by showing a mere submission to a claim of lawful authority"). *See generally* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 261 (2006) (asserting that consent is "perhaps *the* dominant" search exception to the warrant requirement).

⁶⁶ Regarding seizure of property, see, for example, *Soldal*, 506 U.S. at 66 (indicating that consent will validate a "plain view" seizure); *Washington v. Chrisman*, 455 U.S. 1, 9–10 (1982) (finding seizure of marijuana lawful where suspect gave valid consent). Regarding seizure of persons, see, for example, *Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (*per curiam*) (declining to find consent to seizure of person where suspect acquiesced to show of authority and did not struggle); *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984) ("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest.").

⁶⁷ *Florida v. Bostick*, 501 U.S. 429, 432 (1991).

⁶⁸ *But see, e.g.*, DRESSLER & MICHAELS, *supra* note 65, at 266 (noting that "[i]n reality, the concept of 'voluntariness' is a normative one"). Dressler asserts that "[t]he real issue for courts is whether the police methods of obtaining consent are morally acceptable to us in view of law enforcement goals." *Id.*

⁶⁹ *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (noting that the "ultimate test" of voluntariness is whether the suspect's action or decision was "the product of an essentially free and unconstrained choice by its maker[, that is, one that] he has willed"). In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, *e.g.*, *Haley v. Ohio*, 332 U.S. 596, 599 (1948); his lack of education, *e.g.*, *Payne v. Arkansas*, 356 U.S. 560, 562, 567 (1958); or his low intelligence, *e.g.*, *Fikes v. Alabama*, 352 U.S. 191, 193 (1957); the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis v. North Carolina*, 384 U.S. 737, 741 (1966); the length of detention, *e.g.*, *Chambers v. Florida*, 309 U.S. 227, 239 (1940); the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143, 148–49 (1944); and the use of physical punishment such as the deprivation of food or sleep, *e.g.*, *Reck v. Pate*, 367 U.S. 433, 441 (1961). In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961).

⁷⁰ *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

of the search validated by the consent is determined from the perspective of a reasonable officer.⁷¹

If there is no valid consent, a search or seizure will pass constitutional muster if authorized by a validly issued criminal warrant. The warrant must be based on probable cause.⁷² Although the issuing magistrate is the one who must draw conclusions,⁷³ the perspective of the reasonable officer is central to the inquiry.⁷⁴ In swearing to an affidavit to get a warrant, an officer can make negligent (i.e., unreasonable), but not reckless or purposeful mistakes of material fact.⁷⁵ On its face, a warrant must state with particularity the place to be searched and the persons or items to be seized.⁷⁶ If the warrant is facially valid but the description of the place to be searched does not match the reality of the scene, police are allowed to resolve the ambiguity in a reasonable manner based on their own observations.⁷⁷ Similarly, although the Constitution requires officers to knock and announce their presence before entering premises pursuant to a warrant,⁷⁸ the requirement is waived if, from the perspective of a reasonable officer at the scene, there is danger to police or to the integrity of evidence.⁷⁹

Of course, some searches and seizures are reasonable even in the absence of a valid warrant. For many of the doctrines supported by the Fourth Amendment's "reasonableness clause,"⁸⁰ the search or seizure

⁷¹ *E.g.*, *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car.").

⁷² U.S. CONST. amend. IV.

⁷³ *E.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁷⁴ *E.g.*, *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983) (noting that law enforcement officers are permitted to form common-sense conclusions about human behavior and asserting that the evidence "must be seen and weighed... as understood by those versed in the field of law enforcement"). The Court also occasionally makes incidental references to how people in general would see things. For example, in *Gates*, the Court implied that reasonable people—those who exercise "common sense"—would also interpret innocent behavior criminally in the situation presented by that case. *Id.* at 231–32.

⁷⁵ *Franks v. Delaware*, 438 U.S. 154, 171 (1978). *See also* *United States v. Leon*, 468 U.S. 897, 923 (1984) (noting that notwithstanding the "good faith" exception, suppression of evidence is warranted if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth").

⁷⁶ U.S. CONST. amend. IV.

⁷⁷ *Maryland v. Garrison*, 480 U.S. 79, 81, 88 (1987).

⁷⁸ *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995).

⁷⁹ *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (setting the standard for these exceptions at reasonable suspicion). *See also* *United States v. Banks*, 540 U.S. 31, 38 (2003) (holding that "after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they" failed to make a forcible entry).

⁸⁰ U.S. CONST. amend. IV (establishing, in the first clause, that searches and seizures may not be "unreasonable").

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must be supported by probable cause or, in some situations, by reasonable suspicion, both determined from the perspective of the reasonable officer.⁸¹ The Court also calls upon the perspective of the reasonable officer in applying other aspects of “reasonableness clause” doctrines such as the existence of an exigency that excuses the lack of warrant⁸² and whether an officer used excessive force to make an arrest.⁸³ However, in addressing the scope of a particularized school search⁸⁴ the Court asked of what the official “must have been aware”; the Court declined to allow the official to rely on generalities about students of that age, requiring specific knowledge about the student searched or at least about student practices at that particular school.⁸⁵

⁸¹ For probable cause, examples include: warrants: U.S. CONST. amend. IV; vehicle searches: *Chambers v. Maroney*, 399 U.S. 42, 47–48 (1970) (allowing stop and search of car mobile on highway with probable cause to believe it contained evidence of crime); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (allowing stop and search of car mobile on highway with probable cause to believe it contained contraband); search or seizure of closed containers: *California v. Acevedo*, 500 U.S. 565, 580 (1991) (allowing search of closed container in vehicle with probable cause something seizable was in the container); “hot pursuit”: *Warden v. Hayden*, 387 U.S. 294, 298–99, 310 (1967) (noting, in outlining “hot pursuit” doctrine, that police had probable cause to believe suspect had committed a crime and was in the house searched); plain view seizures: *Horton v. California*, 496 U.S. 128, 142 (1990) (allowing seizure of item in plain view by officer lawfully in a place to access it, with probable cause to believe it to be contraband, evidence, or instrumentality of crime); arrests: *United States v. Watson*, 423 U.S. 411, 423–24 (1976). Police also may need probable cause to believe in the existence of an exigent circumstance such as imminent destruction of evidence, the need to prevent a suspect’s escape, or the need to prevent harm to police or others. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

The most prominent example of searches and seizures justified by reasonable suspicion is the “stop” and “frisk” sanctioned in *Terry v. Ohio*, 392 U.S. 1 (1968). *See also Michigan v. Long*, 463 U.S. 1032 (1983) (applying the *Terry* doctrine to the “frisk” of a vehicle).

⁸² *E.g.*, *Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009); *United States v. Banks*, 540 U.S. 31, 43 (2003); *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997); *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984); *Schmerber v. California*, 384 U.S. 757, 770–71 (1966).

⁸³ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . [T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” (citations omitted)).

⁸⁴ Contrast the situation in which schools are allowed to conduct random drug tests not based on suspicion particular to any specific student if the policy is reasonable. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

⁸⁵ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642 (2009) (addressing a “strip search” of a 13-year-old girl for prescription drugs).

The reasonable person concept also may affect whether an individual whose Fourth Amendment rights were violated will have a remedy. For example, the exclusionary rule will not apply if an officer reasonably relies on a warrant that is invalid, and reliance is reasonable unless the invalidity is extremely obvious.⁸⁶ In that situation, before exclusion can apply, the warrant must be so facially insufficient “that the executing officers cannot reasonably presume it to be valid,” or the magistrate had to have “wholly abandoned his judicial role.”⁸⁷ The Court has extended this “good faith” approach to reasonable reliance on databases,⁸⁸ and it has hinted that it may remove the exclusionary remedy completely, when an individual officer (as opposed to the police organization generally) negligently (i.e. unreasonably) violated the Fourth Amendment.⁸⁹ In cases where the exclusionary rule does not apply, the only judicial remedy left is a civil suit against the officers or agency involved in the violation. However, the reasonable officer plays a crucial role in whether a victim of a Fourth Amendment violation may succeed in a federal civil rights suit against the officers involved.⁹⁰ That is, the suit will not get past summary judgment if the officer’s actions were objectively reasonable “in light of the legal rules that were ‘clearly established’ at the time” the action was taken.⁹¹ The bottom line is

⁸⁶ *United States v. Leon*, 468 U.S. 897, 923 (1984).

⁸⁷ *Id.*

⁸⁸ *Herring v. United States*, 129 S. Ct. 695, 698 (2009); *Arizona v. Evans*, 514 U.S. 1, 14 (1995).

⁸⁹ *Herring*, 129 S. Ct. at 700–02. The Court asserted that

[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 702.

⁹⁰ The reasonable officer is not at issue in a federal civil rights suit against the police agency itself, as the department is liable only for its own official policies or customs, not for the constitutional torts of its employees. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691–94 (1978).

⁹¹ *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Two steps are needed to assess qualified immunity: first, “whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established . . .” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Courts must approach the second inquiry from a fairly specific level of generality. *Anderson*, 483 U.S. at 639–40 (noting that “[t]he operation of this standard, however, depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified” and finding that the Court of Appeals did not sufficiently focus on the application of the Fourth Amendment to the facts of the case). However, courts are free to address these two steps in reverse order. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

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whether a reasonable officer in the situation at issue would have known he or she was violating constitutional rights.⁹²

* * *

The reasonable person plays a prominent role in doctrines applying both *Miranda* and the Fourth Amendment protection against unreasonable searches and seizures. It therefore is important to know how the Court formulates and applies that concept. Does the “reasonable person” reflect an average, or an ideal? What characteristics, if any, does the Court articulate as elements of the “reasonable person’s” circumstances? The next Part explores these issues.

IV. THE REASONABLE ORDINARY PERSON VERSUS THE REASONABLE PARAGON: THE DIFFERENCE BETWEEN LAW ENFORCEMENT OFFICERS AND THE REST OF US

The doctrinal summaries in Part III indicate that in the Supreme Court’s investigative procedure cases the reasonable person is sometimes a police officer, sometimes a suspect, and sometimes a member of the general population. Others have addressed whether this basic change in perspective makes sense.⁹³ Our concern is a more nuanced shift that occurs when the Court uses a less demanding concept of reasonableness for police officers than it does for the rest of us. That is, the cases show that in its use of the “reasonable person” concept, the Court frequently posits a reasonable officer who resembles the average, emotional, unperceptive, and otherwise flawed individuals who inhabit our daily existence; on the other hand, the Court’s reasonable suspects and lay people in general are paragons of stoicism, self-control, knowledge, and understanding, the likes of which are rarely encountered in real life.

This Part will trace the Court’s different treatment of reasonableness along several sometimes overlapping dimensions: whether, when dealing with difficult situations, reasonable people rely on their personal experiences and those of their colleagues; whether reasonable people succumb to stress, anxiety, disorientation, or pressure; and how reasonable people resolve doubts and ambiguities. The Part will end with an examination of the Court’s sense of the social expectations held by reasonable innocent people in our society.

A. *Learning from Experience*

In evaluating a new situation and assessing how to address it, it is logical to draw upon one’s knowledge of how things generally work in

⁹² *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (“In this case, the appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.”).

⁹³ *See* sources cited *supra* note 3.

the community in question. It arguably makes sense, therefore, for the Court to allow officers to draw upon such knowledge in determining reasonable suspicion or probable cause to search or seize. In *Terry v. Ohio*,⁹⁴ for example, the Court held that the officer had reasonable suspicion that a daytime robbery was afoot, based in large part on the officer's work background and the nature of his routine habits:⁹⁵ "It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."⁹⁶

While cases like *Terry* focus on the experiences of a single officer, the Court also recognizes that the collective experience of police can provide a basis for determining a course of action. In cases dealing with facts—such as those involving probable cause—the Court validates reliance on collective knowledge when it allows police to make logical leaps in connecting the dots. In *Illinois v. Gates*, for example, the Court considered it reasonable for police to draw inculpatory inferences from outwardly innocent facts corroborated by officers and interpreted through a general law enforcement sense of how drug dealers operate.⁹⁷ Similarly, when collective law enforcement knowledge is compiled into training materials or guidelines such as a "drug courier profile," police may rely on that knowledge as a basis for reasonable suspicion or probable cause.⁹⁸ In fact, even when it comes to establishing that a reasonable officer would not know that the law prohibits certain behavior, the Court allows an officer to call upon the experiences of other police.⁹⁹

⁹⁴ 392 U.S. 1 (1968). *See also, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (the "totality of circumstances" inquiry at issue in determining reasonable suspicion "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'"); *Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("a police officer may draw inferences based on his own experience in deciding whether probable cause exists" even if a lay person would draw no significance from the same facts).

⁹⁵ *Terry*, 392 U.S. at 4 (mentioning that the officer had been a policeman for 39 years, a detective for 35 years and present in that neighborhood for 30 years).

⁹⁶ *Id.* at 23.

⁹⁷ *Illinois v. Gates*, 462 U.S. 213, 243 (1983). The Court noted that the facts obtained through the independent investigation . . . at least suggested that the Gateses were involved in drug trafficking. In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs. . . . Lance Gates' flight to West Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a prearranged drug run, as it is of an ordinary vacation trip.

Id. (citations omitted).

⁹⁸ *United States v. Sokolow*, 490 U.S. 1, 10 (1989).

⁹⁹ *Wilson v. Layne*, 526 U.S. 603, 616 (1999) (noting, among other things, that a reasonable officer could have believed it legal to bring members of the media into a

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When it comes to lay people, however, the Court is unwilling to allow them to draw upon an individual or collective sense of how things generally work. Instead, the Court requires lay people to adopt an innocent interpretation even if it conflicts with experience. This tendency is most apparent in cases that deal with racial or ethnic minorities. Take, for example, an immigration investigation at a workplace, staffed largely by Hispanic workers, that involved agents stationed at outside doors while others roamed the building asking for identification information or papers. It would seem logical to assume that Hispanic workers in a community might exchange information about experiences with immigration officers and, calling upon such information, reasonably not feel free to leave at will when confronted with this situation. In *I.N.S. v. Delgado*, however, the Court rejected any reliance on such communal experience, asserting that the reason workers felt compelled to stay came from their sense of obligation to their employer.¹⁰⁰ When one worker pointed to her knowledge of a specific incident in which agents attempted to prevent a worker in a similar situation from leaving, the Court said that “[a]n ambiguous, isolated incident such as this fails to provide any basis on which to conclude that respondents have shown an INS policy entitling them to injunctive relief.”¹⁰¹ (Note the emphasis on the INS policy, not the worker’s sense of collective experience.) Rather than being able to rely on an arguably rational interpretation of the situation, workers would have to subject themselves to questioning by immigration officers, refuse to answer, and force the officers to assert overt force before the Court would admit that there was a seizure.¹⁰²

In *Delgado*, the Court acknowledged the workers’ Hispanic identity but discounted its relevance. Another way that the Court dismisses the collective experience of some groups is to decide the legal issue without reference to the suspect’s group identity at all. By acting as if the suspect lacked that characteristic, the Court requires the person to react based on the collective experience it believes would be true of people who also lack that characteristic. So, for example, if the Court believes that officers generally treat people with respect and restraint regardless of their race, the Court will assume that the generic reasonable lay person has nothing to fear from asserting rights during a casual encounter with officers. However, it is by now commonplace to note that many members of certain racial groups in the United States experience discrimination or even physical violence at the hands of police during encounters that start

home during the execution of an arrest warrant because media ride-alongs had been common).

¹⁰⁰ 466 U.S. 210, 218 (1984) (noting that “[o]rordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers’ voluntary obligations to their employers” and applying this observation to the situation at issue).

¹⁰¹ *Id.* at 218 n.6.

¹⁰² *Id.* at 216.

out as casual in nature, or at least widely perceive that this is so,¹⁰³ and studies show disproportionate use of violence by police toward Blacks who challenge police authority.¹⁰⁴ How can a member of such a group react to confrontation with an officer without calling upon that collective knowledge? In fact, evidence supports this intuitive sense that members of the community draw upon their own experiences with police and those of their friends and acquaintances¹⁰⁵ (much as police draw upon the collective knowledge of officers).

Thus, it would seem logical that a young black woman approached by narcotics agents on an airport concourse might assume that she would get into trouble if she tried to walk away and thus feel unable to do so freely. Nevertheless, in *United States v. Mendenhall*,¹⁰⁶ the Court rejected this conclusion, discussing the “totality of circumstances” without even mentioning that Mendenhall was black.¹⁰⁷ It was only when addressing subsequent police behavior—asking her to enter the DEA office—that the Court admitted that her race (as well as her age and lack of high-school degree) was “not irrelevant.”¹⁰⁸

The bottom line is that the Court finds people like Delgado and Mendenhall to be *unreasonable* when they call upon their own experiences or those of their communities as a basis for determining how to act. Instead, the Court requires them to act as if they belonged to a completely different community, one whose experiences with government officials leads to the conclusion that it is safe to assert one’s rights.¹⁰⁹ In taking this approach, the Court essentially penalizes individuals for failing to live up to an external ideal of how one should interact with police.

It is instructive to compare the outcome when the Court is (as it is with police) willing to consider the collective experience of the person’s

¹⁰³ See, e.g., Bacigal, *supra* note 3, at 727; Carbado, *supra* note 4, at 952; Kevin R. Johnson, *How Racial Profiling in America 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); Cynthia Lee, “*But I Thought He Had a Gun*”: *Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1 (2004); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005).

¹⁰⁴ See generally, e.g., Lee, *supra* note 103; Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991). Of particular interest are the examples Maclin gives of black males who were arrested, threatened with arrest, or subjected to abuse by police merely for asking questions or remaining silent. *Id.* at 251–52, 254.

¹⁰⁵ E.g., Lee, *supra* note 103, at 22; Maclin, *supra* note 104, at 255, 276.

¹⁰⁶ *United States v. Mendenhall*, 446 U.S. 544 (1980).

¹⁰⁷ *Id.* at 555–56.

¹⁰⁸ *Id.* at 558 (holding, nevertheless, that Mendenhall voluntarily accompanied the agents).

¹⁰⁹ See, e.g., Maclin, *supra* note 104, at 248–49 (asserting that in its cases regarding seizures of persons “the Court hides behind a legal fiction” and citing *Delgado* and *Mendenhall*, among others, as examples).

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particular sub-group. A dramatic illustration involves a different Fourth Amendment issue: the existence of a reasonable expectation of privacy. In *Safford Unified School District No. 1 v. Redding*,¹¹⁰ the Court addressed the validity of a school nurse “strip searching” a 13-year-old, middle-school girl whom they suspected of illicitly possessing prescription drugs:¹¹¹

The reasonableness of her expectation [of privacy] (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.¹¹²

The Court held that the school officials did not have the facts needed to support such a search.¹¹³ Similarly, in *Kaupp v. Texas*,¹¹⁴ the Court mentioned the suspect’s age (17) in deciding that he was under arrest at the time he confessed.¹¹⁵ In contrast, in *Yarborough v. Alvarado*¹¹⁶ the Court declined to take the suspect’s age (17) and inexperience with law enforcement into account in deciding he was not in custody for *Miranda* purposes;¹¹⁷ the outcome might have been different had it done so.¹¹⁸

¹¹⁰ 129 S. Ct. 2633 (2009).

¹¹¹ *Id.* at 2637. The Court labeled as a “strip search” a procedure in which the child was made to undress to her underwear and pull out her bra and panties so that the nurse could ensure that drugs were not hidden there. *Id.* at 2641–42.

¹¹² *Id.* at 2641–42 (citations omitted).

¹¹³ *Id.*

¹¹⁴ 538 U.S. 626 (2003).

¹¹⁵ *Id.* at 631.

¹¹⁶ 541 U.S. 652 (2004).

¹¹⁷ *Id.* at 668.

¹¹⁸ The Court of Appeals, in deciding for the suspect, did take his age into account. *Id.* at 660, 666. More importantly, Justice O’Connor, who provided the necessary fifth vote but wrote a concurring opinion, said:

There may be cases in which a suspect’s age will be relevant to the ‘custody’ inquiry under *Miranda v. Arizona*. In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority. Even when police do know a suspect’s age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave. That is especially true here; 17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults. Given these difficulties, I agree that the state court’s decision in this case cannot be called an unreasonable application of federal law simply because it failed explicitly to mention Alvarado’s age.

Unfortunately for Mr. Alvarado, the Court is usually unwilling to consider a layperson's individual or group experience. Police officers and other government officials, on the other hand, are deemed to be reasonable when they call upon this easily available—and logically obvious—resource in evaluating the situations they confront.

B. Succumbing to Stress, Anxiety, Disorientation, or Pressure

Some of life's situations inherently produce feelings of stress, anxiety, disorientation, or pressure. Being a police officer in a fast-developing law-enforcement situation is likely to be one of those situations; so is being the suspect. Thus, it is significant that the Court allows reasonable officers to succumb to these emotions but requires reasonable suspects to steel themselves and overcome the feelings.

One example on the officer side is *Graham v. Connor*,¹¹⁹ a section 1983 "excessive force" case. The police officer ignored input that the suspect's disturbing behavior was the result of a diabetic condition. In an apparent rush of adrenalin, the officer used force that ended up causing the totally innocent suspect a broken foot, cuts, a bruised forehead, an injured shoulder, and a continuing loud ringing in the ears.¹²⁰ In establishing an "objective reasonableness" standard for judging whether the force was excessive, the Court said:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . 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 situation.¹²¹

Another example of this approach is found in *New York v. Quarles*, where the Court created an entire exception to *Miranda* based on the notion that the stress of a "public safety" situation required solicitude for the officer's inability to follow normal rules.¹²² Shortly after midnight, a woman reported to officers that she had been raped by a black male. There is no indication in the opinion that she mentioned accomplices or even onlookers.¹²³ She reported that the man was armed and had entered

Id. at 669 (citation omitted). Note, however, that *Kaupp* is a postconviction case, which may have contributed to the Court's approach.

¹¹⁹ 490 U.S. 386 (1989).

¹²⁰ *Id.* at 389–90. The Court seemed to accept the obvious injuries but tempered its reporting on the ringing in the ears by stating that the plaintiff "claims" this to be true. *Id.* at 390.

¹²¹ *Id.* at 396–97. The Court remanded the case for application of the proper standard. *Id.* at 399. The outcome on remand is not reported.

¹²² *New York v. Quarles*, 467 U.S. 649 (1984).

¹²³ *Id.* at 651.

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a nearby supermarket.¹²⁴ The officers entered the market and saw the man, who ran to the back of the store; after losing sight of him briefly, one officer found him again.¹²⁵ By this time “more than three other officers had arrived at the scene,” meaning that there were at least five officers on site.¹²⁶ The officers took the suspect into custody¹²⁷ and, when they saw that his shoulder holster was empty, asked him where the gun was; he responded, and they found it.¹²⁸ They had not given him *Miranda* rights, and he moved to suppress both the statement and the gun. The Court used this as an opportunity to create a “public safety exception” to the requirement of *Miranda* warnings.¹²⁹ The Court said:

In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives¹³⁰

After some further discussion, the Court continued:

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: *an accomplice might make use of it, a customer or employee might later come upon it.*¹³¹

However, as noted above, there was no indication in the facts of any accomplice; furthermore, the Court’s recital of facts does not indicate that there were any customers in the store and does not mention the number of store personnel present at 12:30 a.m.. What the record does indicate is that there were five or more officers present who could have secured the scene. Once the suspect was in custody, there was nothing to prevent a search for the weapon to protect customers and employees who might be in the aisles later on. Finally, the Court does not actually say that the officer who asked the question feared for customers or employees, merely that it would be reasonable to have entertained such

¹²⁴ *Id.* at 651–52.

¹²⁵ *Id.* at 652.

¹²⁶ *Id.*

¹²⁷ *Id.* at 652, 655.

¹²⁸ *Id.* at 652.

¹²⁹ *Id.* at 655.

¹³⁰ *Id.* at 656.

¹³¹ *Id.* at 657 (emphasis added).

fears. In any case, the reasonableness of these real or imagined emotions was enough to validate custodial interrogation without *Miranda* warnings.

In contrast to the Court's understanding of the effects of stress on police officers, the Court seems either to reject the notion that suspects feel stress or to expect suspects to rise above those feelings. Thus, in *Rhode Island v. Innis*,¹³² where the issue was whether the officers' conversation amounted to "interrogation" for *Miranda* purposes, the Court seemed to think that the murder suspect would feel no stress, remorse, or compassion. The officers had expressed concern that a handicapped little girl might find the missing shotgun and harm herself.¹³³ The Court held that a reasonable police officer would not expect this to be a statement to which a reasonable suspect would respond with information.¹³⁴ The only possible conclusion is that the Court thinks that the average lay person suspected of committing a murder is so hard-hearted—or if not, so able to control the emotions of being taken into police custody—as to be completely inured to appeals regarding the safety of innocent children.

The Court's approach is similar in the Fourth Amendment seizure context where the issue is whether a person feels free to terminate an encounter initiated by police. While this has already been discussed regarding members of certain ethnic or racial minority groups,¹³⁵ others approached by police may undoubtedly feel strong emotions as well.¹³⁶ However, the Court seems to think that people approached by police with a request to talk or to consent to a search of belongings will remain calm and cool enough to realize they can walk away or decline the officer's requests and, what is more, to politely assert those rights.¹³⁷

One example of the Court's tendency to dismiss a lay person's rational fears is *Berkemer v. McCarty*.¹³⁸ The issue was "whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered 'custodial interrogation'" for purposes of

¹³² 446 U.S. 291 (1980).

¹³³ *Id.* at 294–95.

¹³⁴ *Id.* at 303. Police in *Innis* had no special knowledge that the suspect was susceptible to concerns about handicapped girls. *Id.* at 302. Thus, they would have based their sense of whether he would respond on notions about how a reasonable person in his situation would react. See *supra* note 43 and accompanying text.

¹³⁵ See *supra* Part IV.A.

¹³⁶ Maclin, *supra* note 104, at 256 (noting that "when whites are stopped by the police, they too feel uneasy and often experience fear"). Maclin suggests that even laypersons who are not Black or Hispanic might not "feel free to walk away from a typical police confrontation" but that the Court's approach is even less realistic when the layperson belongs to a minority group. *Id.* at 249–50. The difference is that whites who do not feel free to leave also do not feel threatened with violence if they question police authority. *Id.* at 254 n.48, 256.

¹³⁷ See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *United States v. Mendenhall*, 466 U.S. 544 (1980).

¹³⁸ 468 U.S. 420 (1984).

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Miranda.¹³⁹ *Miranda* indicated that custody exists “whenever ‘a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,’”¹⁴⁰ and the Court acknowledged “that a traffic stop significantly curtails the ‘freedom of action’ of the driver,” that in most states “it is a crime either to ignore a policeman’s signal to stop one’s car or, once having stopped, to drive away without permission,” and that “few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.”¹⁴¹ Nevertheless, purporting to view the issue from the perspective of a reasonable person in the situation,¹⁴² the Court held that such a driver was not in custody because the situation did not involve the type of inherent police coercion against which *Miranda* warnings were meant to protect:

First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. . . . Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse.¹⁴³

While it is no doubt true that some drivers experience no anxiety upon being pulled over by a police officer, it is common knowledge that even a routine traffic stop raises the pulse rate of many. And, in fact, routine traffic stops can lead to arbitrary behavior on the part of police.¹⁴⁴ Indeed, drivers stopped for traffic offenses do get shot and even killed by

¹³⁹ *Id.* at 435.

¹⁴⁰ *Id.* (emphasis omitted) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

¹⁴¹ *Id.* at 436 (citations omitted).

¹⁴² *Id.* at 442.

¹⁴³ *Id.* at 437–38 (footnote omitted).

¹⁴⁴ *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (involving woman who was taken into custody for failure to use a seatbelt for her child).

police officers.¹⁴⁵ The Court, however, denies or severely discounts the normal anxiety and sense of coercion attendant upon being singled out by police for even a relatively minor reason.¹⁴⁶

Alternatively, the Court sometimes recognizes that the suspect feels stress or some other similar feeling, but deems that it is not the right *kind* of emotion to merit consideration in the constitutional calculus. Thus, for example, in *Oregon v. Elstad*,¹⁴⁷ the defendant confessed without having been given required *Miranda* warnings; he was later warned and repeated the confession.¹⁴⁸ The Court acknowledged that the second confession resulted, in large part, from the suspect's sense of hopelessness upon realizing that he had "let the cat out of the bag" the first time he talked.¹⁴⁹ However, the Court did not suppress the second confession. Instead, it allowed police to take advantage of the situation because it viewed the suspect's stress as having been caused by internal emotions despite it being related to the first, unwarned (and thus inherently coerced¹⁵⁰) custodial interrogation: "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."¹⁵¹ Another example is found in *Illinois v.*

¹⁴⁵ See, e.g., Robert Crowe & Mike Glenn, *HPD Attributes Fatal Shooting to Self Defense/Witness Says Man in Handcuffs Before Being Shot*, HOUS. CHRON., Jan. 9, 2007, at B1; Brad W. Gary, *Friend Reflects on Fatal Traffic Stop*, LEWISTON MORNING TRIB., May 25, 2010; Erica Molina Johnson, *Use of Deadly Force Draws Scrutiny: Ex-Officer Indicted After Multi-Agency Inquiry*, EL PASO TIMES, Dec. 22, 2008; Victoria Kim, *Death Spurs Police Reforms*, L.A. TIMES, Feb. 6, 2010, at 4; Sunita Vijayan, *DA Files Charges Against Ex-Salinas Cop*, THE CALIFORNIAN, July 25, 2009 at 1.

¹⁴⁶ Cf. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 201-03 (2002) (reviewing survey of motorists asked to consent to search of car upon being stopped for traffic violation).

Of the 49 motorists who agreed to let police search their cars, all but two said that they were afraid of what would happen to them if they did not consent. Their fears included having their trip unduly delayed, being searched anyway, incurring property damage to their car if they refused and police searched anyway, being arrested, being beaten, or being killed.

Id. at 202 (footnotes omitted).

¹⁴⁷ 470 U.S. 298 (1985).

¹⁴⁸ *Id.* at 301-02.

¹⁴⁹ *Id.* at 299.

¹⁵⁰ See *supra* note 34 and accompanying text; *infra* note 288 and accompanying text.

¹⁵¹ *Id.* at 312. The Court went on to point out that:

[a more] expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself. When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

Id. (citations omitted).

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Perkins.¹⁵² The Court held that “custodial” pressures do not exist when an inmate is talking to another inmate who happens to be an undercover agent, and thus *Miranda* warnings are not required when the agent engages in interrogation.¹⁵³ There was plenty of coercive pressure in the situation, as the undercover officer was essentially interviewing the defendant about his criminal activities to see if he was tough enough to help undertake an escape from jail.¹⁵⁴ The Court could easily have created an exception to *Miranda* on the straightforward policy grounds that requiring warnings in this situation would make undercover work impossible. However, the Court chose to discount the type of coercive pressure rather than face the policy issue head-on.¹⁵⁵

The bottom line is that, as noted above with regard to drawing upon experience,¹⁵⁶ the Court treats reasonable officers differently from reasonable laypersons. Officers may succumb to stress, anxiety, disorientation, or pressure, while the Court expects laypersons to rise above such emotions

C. Resolving Ambiguities

Investigative situations often present both officers and suspects with ambiguities that must be resolved before deciding what actions to take. The Court requires more of reasonable lay people in this type of situation than it does of reasonable officers. The Court finds it reasonable for officers to resolve doubts or ambiguities in favor of their own (or the government’s) interests. In essence, a reasonable officer may assume the worst case scenario. This is true, at times, even when there is little or no factual basis for the officer’s inference that police action is needed. Suspects, on the other hand, must put on their rose colored glasses and assume the best interpretation of the situation in which they find themselves. This Section will review a number of cases that illustrate this trend.

The Court’s recent Fourth Amendment case, *Michigan v. Fisher*, exemplifies this approach.¹⁵⁷ Responding to “a disturbance,” police were directed “to a residence where a man was ‘going crazy’”:¹⁵⁸

¹⁵² *Illinois v. Perkins*, 496 U.S. 292 (1990).

¹⁵³ *Id.* at 296 (noting that the context was not a “police-dominated atmosphere”).

¹⁵⁴ *Id.* at 302.

¹⁵⁵ *See id.* at 297 (indicating that when the suspect does not know he is dealing with a government agent, pressure from “[q]uestioning by captors” does not exist). The Court noted, “[w]hen the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.” *Id.* Of course, the undercover officer did have power over the defendant, that is, the power to include him in a jail break that would release him from the “captors” for whom the officer was working.

¹⁵⁶ *See supra* Part IV.A.

¹⁵⁷ *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

¹⁵⁸ *Id.* at 547.

Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house.¹⁵⁹

At this point, the officer saw that Fisher was pointing a gun at him, and this provided the basis for the charges against Fisher.¹⁶⁰ The Court did not validate the search (the officer's entry into the house) on the ground that the officer had probable cause to think a crime was being committed in Fisher's house. On the contrary, the Court upheld the search on the basis of "the need to assist persons who are seriously injured or threatened with such injury."¹⁶¹ The Court noted that this rationale requires "an objectively reasonable basis for believing' . . . that 'a person within [the house] is in need of immediate aid.'"¹⁶² Pointing to the "tumultuous situation in the house," "signs of a recent injury, perhaps from a car accident, outside," and "violent behavior inside," the Court found the case to be a "straightforward application of the emergency aid exception":¹⁶³

Although Officer Goolsby and his partner did not see punches thrown, . . . they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, we find . . . that the officer's entry was reasonable under the Fourth Amendment.¹⁶⁴

Note that there was absolutely nothing in the facts recited by the Court to indicate the presence—or even the suspicion of the presence—

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 548 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

¹⁶² *Id.* (quoting *Stuart*, 547 U.S. at 406; *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)).

¹⁶³ *Id.* at 548–49.

¹⁶⁴ *Id.* at 549.

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of another person in Fisher's house. There is nothing in the law that prevents a person from screaming and throwing things in his own home; assuming the blood observed on the truck and its contents indicated that Fisher was injured, the law does not require him to accede to medical attention. The officers did not, of course, see the gun until after they had conducted the search by opening the door against Fisher's wishes.¹⁶⁵ One might conclude, therefore, that there was no basis for forcibly entering the home and that the police were overreacting. Nonetheless, according to the Court the officer's assumption of the worst case scenario was reasonable.

The Court's approach also allows officers to interpret ambiguity in favor of searching or seizing when they do suspect criminal behavior.¹⁶⁶ *Illinois v. Gates*¹⁶⁷ provides a good example. An anonymous informant sent a letter to police with allegations of both innocent and criminal behavior by the Gates couple.¹⁶⁸ The innocent behavior, notably ambiguous, was corroborated by police.¹⁶⁹ The allegations of criminal behavior were not corroborated. The Court agreed with the Illinois Supreme Court that the anonymous letter alone did not provide probable cause to search the Gates's house and car.¹⁷⁰ However, under the "totality of circumstances" approach (an approach first adopted in this case),¹⁷¹ probable cause is a fluid concept.¹⁷² This approach allowed police to resolve the ambiguity inherent in the corroborated innocent behavior by viewing it through the lens of the uncorroborated criminal allegations. Thus viewed, the

¹⁶⁵ Even if officers had prior knowledge that Fisher possessed a gun, possession of a handgun is common in our society, *Staples v. United States*, 511 U.S. 600, 610 (1994), and now, to some degree, a federal constitutional right. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

¹⁶⁶ The observations here overlap with those in Part IV.A, as the Court also allows officers to use their experience to give a suspicious gloss to otherwise innocent behavior. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273–75 (2002). The Court explained that the "totality of circumstances" approach allows a court to find reasonable suspicion for an investigatory stop based on an accumulation of innocent behaviors. *Id.* at 273. Also:

We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). [The officer] was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.

Id. at 275–76.

¹⁶⁷ 462 U.S. 213 (1983). *See also supra* note 97 and accompanying text (discussing *Gates* in the context of learning from experience).

¹⁶⁸ *Gates*, 462 U.S. at 225.

¹⁶⁹ *Id.* at 226.

¹⁷⁰ *Id.* at 227.

¹⁷¹ *Id.* at 230–39.

¹⁷² *Id.* at 232.

information provided enough basis for the warrant.¹⁷³ The innocent allegations “at least suggested” drug dealing,¹⁷⁴ and the corroboration of some of the innocent allegations “indicated, albeit not with certainty, that the informant’s other assertions also were true.”¹⁷⁵

It is important to clarify that the issue is not whether law enforcement officers should be able to clarify ambiguity. Of course they should. When a situation is truly ambiguous, clarification is warranted and desirable. The issue is whether police should be allowed to treat clarity as ambiguity or should call doubts in favor of the interpretation that harms the suspect—and whether courts should validate these practices.

These issues also arise in the confessions context. In *Davis v. United States*,¹⁷⁶ for example, the defendant waived his *Miranda* rights and responded to questions for an hour and a half. At that point he said, “[m]aybe I should talk to a lawyer.”¹⁷⁷ The law requires officers to cease questioning immediately when a suspect asserts the *Miranda* right to counsel.¹⁷⁸ However, the Court treated Davis’s comment as too ambiguous to be an assertion of that right, allowing the officer to “clarify”¹⁷⁹ the situation such that Davis agreed to continue the interview, sans counsel, for another hour before making a request for counsel that was honored.¹⁸⁰ On the surface, it might make sense to allow an officer to clarify the situation.¹⁸¹ However, imagine that the Court had found that

¹⁷³ *Id.* at 241–44. *See also* *Draper v. United States*, 358 U.S. 307, 309–10 (1959) (affirming finding of probable cause under old test in situation in which more innocent details were corroborated).

¹⁷⁴ *Gates*, 462 U.S. at 243.

¹⁷⁵ *Id.* at 244. *See also, e.g., Arizona v. White*, 496 U.S. 325, 326–27 (1990) (upholding finding of reasonable suspicion based on anonymous tip that defendant would leave a specified apartment at a certain time in a described vehicle and go to a particular motel in possession of cocaine, where police corroborated the apartment, the time, and the vehicle, and that she was heading in the direction of the motel).

¹⁷⁶ 512 U.S. 452 (1994).

¹⁷⁷ *Id.* at 455.

¹⁷⁸ “[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.” *Id.* at 458 (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

¹⁷⁹ The officer testified,

“[We m]ade it very clear that we’re not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren’t going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [‘]No, I’m not asking for a lawyer,’ and then he continued on, and said, ‘No, I don’t want a lawyer.’”

Id. at 455 (alterations in original) (citation omitted).

¹⁸⁰ *Id.* at 455. Davis’s second request was, “I think I want a lawyer before I say anything else.” *Id.*

¹⁸¹ *But see* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 *Yale L.J.* 259, 308–15 (1993) (explaining the dangers to rights that flow from allowing police to clarify allegedly ambiguous assertions of

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Davis's "maybe" statement was, in fact, an assertion of his right to counsel. The Court would then have been faced with the issue of whether the officer's "clarification" constituted pressure to waive the right, an issue on which the law (so far) is more favorable to the suspect.¹⁸² A similar dynamic is found in *Oregon v. Bradshaw*,¹⁸³ where the issue was whether after having just asserted his right to counsel, the defendant reinitiated conversation about the crime.¹⁸⁴ "Either just before, or during, his trip from [the police station to the jail in a town ten or fifteen miles away], respondent inquired of a police officer, 'Well, what is going to happen to me now?'"¹⁸⁵ The officer evidently considered this question to indicate a desire to discuss the crime, as he warned Bradshaw that he did not have to do so.¹⁸⁶ When Bradshaw said he understood, a discussion ensued in which the officer suggested that Bradshaw take a polygraph examination; Bradshaw did so the next day, which led to the statements at issue in the motion to suppress evidence.¹⁸⁷ The Court found that Bradshaw's question about what would happen now was ambiguous, and indicated that a reasonable officer could interpret it as an initiation of conversation about the crime investigation.¹⁸⁸

In contrast to this approach taken to law officers, the Court will not allow suspects to resolve ambiguities by assuming the worst even when the assumption might be quite realistic. Take, for example, *Florida v. Powell*,¹⁸⁹ a case about the adequacy of *Miranda* warnings. *Miranda* requires a suspect to be told of "the right to consult with a lawyer and to have the lawyer with him during interrogation."¹⁹⁰ Powell was informed

Miranda rights). See also *id.* at 276–86 (describing characteristic speech patterns of powerless people that might make assertions appear to be ambiguous).

¹⁸² To establish a valid waiver of *Miranda* rights, the State must show that the waiver was knowing, intelligent, and voluntary. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010). Whether the waiver was made voluntarily is a subjective inquiry. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990).

¹⁸³ 462 U.S. 1039 (1983).

¹⁸⁴ "[A]fter the right to counsel ha[s] been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Id.* at 1044 (citing *Edwards*, 451 U.S. at 485). However,

[t]here are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Id. at 1045.

¹⁸⁵ *Id.* at 1042.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1045–46.

¹⁸⁹ *Florida v. Powell*, 130 S. Ct. 1195 (2010).

¹⁹⁰ *Id.* at 1199 (quoting *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)).

that, among other things, he had the right “to talk to a lawyer *before answering* any of our questions.”¹⁹¹ Powell argued that the warnings given did not adequately inform him that the lawyer could be present during the interrogation.¹⁹² The Court rejected this interpretation because police

informed Powell that he had “the right to talk to a lawyer before answering any of [their] questions” and “the right to use any of [his] rights at any time [he] want[ed] during th[e] interview.” The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.¹⁹³

The Court concluded that it was unrealistic for Powell to be concerned that the lawyer would not be present during interrogation:

To reach the opposite conclusion, *i.e.*, that the attorney would not be present throughout the interrogation, the suspect would have to imagine an unlikely scenario: To consult counsel, he would be obliged to exit and reenter the interrogation room between each query. A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney’s advice. Instead, the suspect would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.¹⁹⁴

The Court added, “It is equally unlikely that the suspect would anticipate a scenario of this order: His lawyer would be admitted into the interrogation room each time the police ask him a question, then ushered out each time the suspect responds.”¹⁹⁵ However, Powell’s interpretation was not, in fact, far-fetched: The “unlikely scenario” he may have imagined is precisely the routine a lawyer and client must adopt when the client is a witness before a federal grand jury.¹⁹⁶ Yet the Court

¹⁹¹ *Id.* at 1200 (emphasis added). The entire warning, on a printed form, read: You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Id.

¹⁹² *Id.*

¹⁹³ *Id.* at 1204–05 (alterations in original) (citations omitted).

¹⁹⁴ *Id.* at 1205 (footnotes omitted).

¹⁹⁵ *Id.* at 1205 n.6.

¹⁹⁶ The Sixth Amendment right to counsel attaches at the commencement of formal proceedings against the suspect; the right to counsel required by *Miranda* protects a suspect’s Fifth Amendment privilege against self-incrimination in

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evidently assumed that a suspect would be unaware of that fact or, even if knowledgeable about grand jury practice,¹⁹⁷ would anticipate the best case scenario for custodial interrogation. The bottom line is that Powell was unreasonable in resolving the ambiguity in a way that his lawyer, once he got one, could use to further Powell's legal interests.

Again, as above,¹⁹⁸ the Court treats officers with more solicitude than it provides to laypersons. Reasonable officers easily find ambiguity in situations they face, and they may resolve it in ways that benefit the prosecution in subsequent legal actions. Reasonable laypersons, on the other hand, must either ignore the ambiguity in situations or, if allowed to acknowledge it, must resolve it in ways that hurt their legal positions if legal proceedings should ensue.

D. The Reasonable (Innocent) Person's Expectations and Responses

In developing the Fourth Amendment and *Miranda* doctrines that focus on persons other than officers, the Court purports to assume the perspective of the reasonable *innocent* person.¹⁹⁹ The Court's reasonable innocent person, however, inhabits a society that would be unrecognizable to many of us,²⁰⁰ a society where people routinely violate one another's private places and personal affairs and where individuals willingly sacrifice privacy and convenience to aid officials in their law-enforcement efforts. The result is a construct that makes it easy for the Court to discount individual rights and allow officers broad investigative powers. Because innocent people would not object to the law enforcement activity at issue, it takes no additional analysis to conclude that reasonable officers would engage in that activity. The predicate assumptions behind this reasoning are, however, open to question.

inherently coercive settings. Thus, a grand jury witness has no right to counsel under either of these approaches. In addition, federal grand jury proceedings are not considered to be inherently coercive, so a witness "before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel." *In re Groban*, 352 U.S. 330, 333 (1957). *See also* *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (a witness is not permitted to have counsel present inside the grand jury room). The courts are split, however, as to how often a witness may consult counsel outside the grand jury room during proceedings. *See, e.g., United States v. Kennedy*, 372 F.3d 686, 692 (4th Cir. 2004) ("[I]t is sufficient that a witness is allowed to have an attorney present outside the grand jury room and to consult with the attorney before answering any question."); *In re Lowry*, 713 F.2d 616, 617-18 (11th Cir. 1983) ("[n]or does a witness have a constitutional right to disrupt the grand jury's proceedings by leaving the room to consult with his attorney after every question"). The Supreme Court has not addressed this issue.

¹⁹⁷ In other contexts the Court has assumed that the suspect is quite familiar with the ins and outs of the criminal justice system when that assumption works against the suspect's legal interests. *E.g., Parke v. Raley*, 506 U.S. 20, 37 (1992).

¹⁹⁸ *See supra* Parts IV.A and B.

¹⁹⁹ *See Florida v. Bostick*, 501 U.S. 429, 438 (1991).

²⁰⁰ *See* sources cited *supra* note 5

Take, for example, the cases addressing whether there was a “search” for Fourth Amendment purposes. An intrusion is a “search” if it violates a subjective expectation of privacy that society is willing to recognize as “reasonable.”²⁰¹ If society finds the expectation to be unreasonable, in other words, the Fourth Amendment does not apply and the officer can act without any judicial oversight or constitutional prerequisites. In determining whether an officer violated a “reasonable expectation of privacy,” the Court aims to equate the officer with any average person, implying that if average people behave in a certain manner, reasonable innocent people should not object to the behavior.²⁰² However, in adopting this approach, the Court focuses on the type of behavior an individual *could* engage in as opposed to the type of behavior most individuals *do* engage in. Thus, society (that is, reasonable innocent people) will not recognize an expectation of privacy in garbage left at the curb for collection because “animals, children, scavengers, snoops, and other members of the public”—not to mention the garbage collectors themselves—*could* rummage through it.²⁰³ Society will not respect certain property interests in land, finding trespass to be acceptable even when fences, signs, or plantings manifest a desire that others keep out because people *could* enter anyway;²⁰⁴ on the other hand, if someone erects a fence that is difficult to scale, the outcome might be different.²⁰⁵ There is no reasonable expectation of privacy in the details of one’s canceled checks and phone records because employees of the bank or phone company *could* rummage through these documents at will.²⁰⁶ The Fourth Amendment is not implicated when government agents hover over a

²⁰¹ See *supra* notes 55–60 and accompanying text.

²⁰² See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983) (finding no “search” when officers used electronic monitoring to observe what anyone could see with the naked eye). However, the officers could not use electronic monitoring without a warrant to track an item inside a private residence, a place an ordinary person could not go either. *United States v. Karo*, 468 U.S. 705, 717 (1984). See also *Florida v. Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (citing precedent for proposition that “[a]s a general proposition, the police may see what may be seen ‘from a public vantage point where [they have] a right to be’”).

²⁰³ *California v. Greenwood*, 486 U.S. 35, 40 (1988) (footnotes omitted). *But see id.* at 53 (Brennan, J., dissenting) (noting that such intrusions are “isolated”).

²⁰⁴ See *United States v. Dunn*, 480 U.S. 294, 296–97 (1987) (finding no reasonable expectation of privacy in most of a 198-acre property despite a perimeter fence, several ranch-type interior fences, and distance from the public road); *Oliver v. United States*, 466 U.S. 170, 173–74, 178 (1984) (finding no reasonable expectation of privacy despite a locked gate, “No Trespassing” sign, plantings, and distance from the road).

²⁰⁵ See *Dow Chem. Co. v. United States*, 476 U.S. 227, 236–37 (1986) (noting that entry from the ground presents a different Fourth Amendment question than aerial surveillance when an industrial complex is “elaborately secured” to prevent ground intrusions).

²⁰⁶ *Smith v. Maryland*, 442 US 735, 744 (1979) (pen register installed by phone company); *United States v. Miller*, 425 U.S. 435, 442 (1976) (checks and bank records).

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backyard in a helicopter because anyone who happened to be riding in such a vehicle *could* do so as well.²⁰⁷

Note that the Fourth Amendment issue here is not whether officers can engage in the behavior in question: the issue is whether they must have a warrant or an exception to the warrant requirement before doing so.²⁰⁸ The bottom line is that reasonable innocent people who want judicial protection from certain kinds of intrusions must manifest their expectation of privacy dramatically and unusually, depriving themselves of many conveniences of modern life like easy trash collection, a home that does not resemble a fortress, a non-cash commercial life, and personal telephones.²⁰⁹

The Court's use of unrealistic reasonable people is also evident in Fourth Amendment "seizure" cases. Here, the Court seems to assume that the reasonable person will want to cooperate with any police investigation, ignoring or discounting reasons why innocent people may not want to do that. So, for example, when officers want to see if anyone on an interstate bus possesses drugs—even when there has been no indication that drugs are present—"bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."²¹⁰ The assumption that reasonable innocent people will always cooperate with police means that people who do not want to cooperate must go to great lengths to manifest that resistance.²¹¹ However, being so assertive to police may be difficult, and so even people who do not want to cooperate can get trapped by the Court's assumption that cooperation is the norm. Thus, the Court readily accepts that bus passengers who actually have drugs will cooperate in a

²⁰⁷ *Riley*, 488 U.S. at 449–50 (plurality opinion) (noting that air travel is routine and helicopter use not unknown in that area and relying on *California v. Ciraolo*). In *Ciraolo*, the Court considered aerial surveillance of domestic curtilage from a fixed-wing aircraft and noted,

Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

476 U.S. 207, 213–14 (1986).

²⁰⁸ *See, e.g., Sundby, supra* note 5, at 1791 (noting that the Court's approach does not address consequences of finding intrusions to be outside the scope of the Fourth Amendment).

²⁰⁹ *Id.* at 1789–90 (providing an "Anne Tyler"-type tourist guide to maintaining privacy).

²¹⁰ *United States v. Drayton*, 536 U.S. 194, 205 (2002). Note that passenger safety was never at issue under the facts in *Drayton*. *See id.* at 198–99.

²¹¹ *Cf. Richard Delgado, Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 819–20 (1992) (discussing the lengths a female rape victim must expend to register the desire not to have sexual intercourse and thus prevent the "reasonable man" from successfully claiming consent).

police search of their possessions,²¹² that persons who have been charged with one offense will agree to discuss the details of another offense,²¹³ and that a person with incriminating evidence in his car would care so much about his own convenience that he would not object to the extra intrusion of having his car towed to a police lot.²¹⁴

While the cases discussed in this Part do not provide a contrast with the Court's treatment of police, they are nevertheless instructive of the Court's approach to treating reasonable laypersons as ideal paragons, not as normal human beings. These cases contribute to the air of unreality that pervades the Court's Fourth Amendment and *Miranda* opinions.²¹⁵ As already noted, the Court treats officers and other government actors as real, flawed, human beings.²¹⁶ The next Part addresses why the Court's disparate treatment of officers and laypersons matters.

V. CONSEQUENCES OF THE COURT'S DISPARATE TREATMENT OF LAW ENFORCEMENT AND ORDINARY PEOPLE

The material in Part IV illustrated the Court's tendency to label officers as reasonable despite their flaws and shortcomings, but to withhold that label from lay people who do not live up to extraordinary perceptive and behavioral standards. Reasonable officers may draw upon their own experiences and those of colleagues, but reasonable lay people cannot.²¹⁷ Reasonable officers succumb to stress, anxiety, disorientation, or pressure, but lay people must lack or overcome these emotions to be considered reasonable.²¹⁸ Reasonable officers may resolve ambiguities by assuming the worst, but reasonable lay people must assume the explanation most helpful to the government.²¹⁹ Finally, the Court expects

²¹² *Drayton*, 536 U.S. at 204 (noting that "[t]here were ample grounds for the District Court to conclude that 'everything that took place between Officer Lang and [respondents] suggests that it was cooperative'").

²¹³ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) ("One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution."). The Court did note, however, that suspects might actually be motivated not by the desire to cooperate, but by the belief "that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions." *Id.* The Court does not explain why this motivation would not also apply to the offense already charged, however.

²¹⁴ *Chambers v. Maroney*, 399 U.S. 42, 52 n.10 (1970) ("All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.").

²¹⁵ See *supra* text accompanying notes 5 and 200.

²¹⁶ See *supra* Parts IV.A–C.

²¹⁷ See *supra* Part IV.A.

²¹⁸ See *supra* Part IV.B.

²¹⁹ See *supra* Part IV.C.

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lay people willingly to sacrifice significant aspects of privacy and autonomy when doing so serves the interests of law enforcement.²²⁰

The Court's approach has important consequences for individuals who assert their *Miranda* and Fourth Amendment rights in judicial proceedings and, in addition, equally important consequences for the criminal justice system. The material in this Part explores these consequences for both individuals and society as a whole.

We can start by observing that the Court does not acknowledge the demanding, ideal nature of its view of the reasonable lay person.²²¹ Instead, the Court acts as though it is reflecting reality when it declares that society does not recognize certain expectations of privacy, that people welcome police intrusions, that people understand the criminal justice system, and that people can overcome both socialization and confusion, fright, uncertainty, anxiety, and other disorienting and debilitating feelings and so be clear and assertive in dealing with police investigations.²²² It may, of course, be true that Supreme Court justices have these ideal characteristics.²²³ However, intuition tells us that most common people do not share them,²²⁴ and studies bear this out.

As far as expectations of privacy go, data "strongly suggest that some of the Court's decisions regarding the threshold of the Fourth Amendment and the warrant and probable cause requirements do not

²²⁰ See *supra* Part IV.D.

²²¹ The author has no quarrel with the notion that police officers start out, at least, as "average" people with common flaws and weaknesses. In addition, they certainly confront difficult situations. See, e.g., Bacigal, *supra* note 3, at 706–07. However, police do undergo professional training, and so the issue is whether they should be held to a higher standard than that applied to untrained, normal lay persons. See *infra* at note 248 and accompanying text.

²²² See Nadler, *supra* note 146, at 166–67 (assuming that the Court is attempting to present a realistic view of how people perceive events and behave). But see Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 743 (1993) (noting that "the Supreme Court has frequently refused to consider empirical information, or has given it short shrift").

²²³ See Nadler, *supra* note 146, at 166 (criticizing the Court for its chosen method of "thinking hard about each specific circumstance that characterized the encounter and then answering, based on the Justices' own imagined thoughts and feelings of a reasonable person").

²²⁴ The problem may be even more serious for members of ethnic minorities whose culture, socialization, or language skills result in it being even harder for them to be assertive or speak in a manner that is understood by police or courts as an assertion of rights. See, e.g., Delgado, *supra* note 211, at 818; Florallynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1 *passim* (1999); Kinports, *supra* note 3, at 140 (noting that "the evidence is overwhelming that minority-race defendants experience the criminal justice system and interactions with the police very differently than white defendants" and citing authority).

reflect societal understandings.”²²⁵ That is, people in general find expectations of privacy reasonable more often than the Court acknowledges to be true. Similarly, when dealing with police people are less inclined to be civic-minded than the Court assumes. In this regard, it is important to remember that although we might agree that the correct standard is that of the reasonable innocent person,²²⁶ in police-encounter situations we are dealing with a “reasonable (innocent) person *who is the target of police suspicion*.”²²⁷ Thus, research indicates that people do consent to police activity and waive their rights, but not out of a sense of civic duty or relief that they are being protected; reasonable people go along with police requests because of such factors as an automatic reaction of compliance with authority figures when under pressure, the inclination to go along with the crowd, an understanding of the real message behind polite language, physical discomfort in the investigative situation, time pressure, or fear that negative consequences will flow from a lack of cooperation with police. This same research also suggests that the Court is incorrect in thinking that reasonable innocent people can get a grip and overcome the confusion, emotions, and anxiety of being suspected of committing a crime or refusing an overt or implied official request to cooperate.²²⁸

The police interrogation context provides similar disconnects between the Court’s view of how people behave and how people really do behave. For example, the Court appears to believe that it is easy for people to make unambiguous assertions of their *Miranda* rights to silence and counsel.²²⁹ However,

Sociolinguistic research has demonstrated that discrete segments of the population—particularly women and ethnic minorities—are far more likely than others to adopt indirect speech patterns. An indirect mode of expression is characteristic of the language used by powerless persons, both those who are members of certain

²²⁵ Slobogin & Schumacher, *supra* note 222, at 732, 739–42 (reporting on results of empirical research). The authors report that respondents agreed with the Court regarding the intrusiveness of some police methods but strongly disagreed as to others. *But see id.* at 743–50 (pointing out weaknesses in their study).

²²⁶ See *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

²²⁷ Nadler, *supra* note 146, at 199.

²²⁸ *Id.* at 173–97 (reviewing empirical studies) and 201–09 (reviewing survey evidence). “[T]he processes that lead to compliance with an authority when we are under pressure to make a decision are fast, automatic, and unconscious. Complying with authorities is something that we do quickly, on the spot, without conscious deliberation.” *Id.* at 174 (footnote omitted). Similarly, “[t]he officer’s request for consent to search . . . places the citizen on the horns of a dilemma: either accede to a request that you would prefer to refuse, or refuse the request and incur the (unknown) consequences of being ‘uncooperative.’” *Id.* at 211 (citing reference to the particular dilemma experienced by members of racial minorities).

²²⁹ *E.g.*, *McNeil v. Wisconsin*, 501 U.S. 171, 180 (1991) (“If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings.”).

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groups that have historically been powerless within society as well as those who are powerless because of the particular situation in which they find themselves. Because criminal suspects confronted with police interrogation may feel powerless, they will often attempt to invoke their rights by using speech patterns that the law currently refuses to recognize.²³⁰

In short, the Court's view of the reasonable lay person is truly an ideal that few people can attain. Contrast this with the Court's view of the reasonable officer as a normal human being. The consequences of this disparate treatment are significant both on an abstract level and for individuals who become subjects of police investigations.

First, the decision to treat law enforcement officers as average but to require lay people to live up to an ideal has significant consequences for the jurisprudence of search and seizure and *Miranda*. To understand those consequences it is useful to place the Court's "reasonable person" analysis in the broader context: an approach to investigative procedure rights in which the Court purports to balance the needs of law enforcement against society's interests in the individual rights at issue.²³¹ At times, the Court articulates the interests and their comparative merits in a relatively forthright manner. Take, for example, *United States v. Mendenhall*,²³² where the Court declined to adopt a rule that every encounter between an officer and an individual is a seizure. The Court asserted that individual interests are implicated at a constitutional level:

only when, by means of physical force or a show of authority, [a person's] freedom of movement is restrained. . . . The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred

²³⁰ Ainsworth, *supra* note 181, at 261.

²³¹ Indeed, this is the Court's current approach to many issues of constitutional law. See, e.g., Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 955–63 (2004); Cloud, *supra* note 3, at 223 (listing balancing as a major approach); *id.* at 226–35 (discussing overt balancing in the Fourth Amendment context).

²³² 446 U.S. 544 (1980).

to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws.²³³

While *Mendenhall* and other cases²³⁴ involved the decision to adopt a rule, the Court at times also uses straightforward balancing when applying a standard to a particular fact situation.²³⁵

When the Court uses the “reasonable person” approach, however, the balancing is less transparent. This is so because bald assertions about the nature of reasonable people substitute for, or at least strongly affect, one or both sides of the balance. Instead of articulating the real factors, the Court creates the illusion of a realistic assessment of the interests on each side of the scale.²³⁶ Because the assertions about the reasonable person serve as a substitute, the approach allows the Court to engage in balancing covertly.

So, for example, reasonable officers are evidently not able to “make difficult judgment calls about whether the suspect in fact wants a lawyer.”²³⁷ The inability to do this strengthens the law enforcement side of the balance because it makes officers needier. A suspect’s right to counsel can outweigh the law enforcement interest only if its assertion was so overwhelmingly clear that even an unperceptive officer would understand the request.²³⁸ Similarly, it is reasonable that police officers in a “kaleidoscopic situation” might not be able to follow the *Miranda* rules.²³⁹ This need for slack is so great that it overwhelms all considerations about the effect of custodial interrogation on a suspect’s

²³³ *Id.* at 553–54 (citation omitted) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

²³⁴ *E.g.*, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (holding it reasonable to order passengers out of car at traffic stop and assessing danger to officers and intrusion on passengers without mentioning the reasonable person); *California v. Acevedo*, 500 U.S. 565, 575–80 (1991) (explaining why distinction between probable cause to search car and probable cause to search container in car makes no sense); *New Jersey v. T.L.O.*, 469 U.S. 325, 339–41, (1985) (explaining why the Fourth Amendment should apply to children in school but why the requirements of a search warrant and probable cause are inappropriately applied to searchers who are school officials); *Terry v. Ohio*, 392 U.S. 1, 26–27 (1968) (explaining why the needs of law enforcement make it reasonable to reject a probable cause requirement for an investigatory stop).

²³⁵ *E.g.*, *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (holding that circumstances made it reasonable for police to break into the room instead of knocking and announcing).

²³⁶ Morgan Cloud observes that the law provides no inherent objective measure of the appropriate weight to assign to the competing interests on each side of the balance when determining constitutional issues. Cloud, *supra* note 3, at 239. By acting as though its assessment of officer and lay perceptions and behavior reflects reality, the Court can assign weights to these interests.

²³⁷ *Davis v. United States*, 512 U.S. 452, 461 (1994).

²³⁸ *Id.* (noting that if an officer has to cease interrogation when a suspect might want a lawyer, “clarity and ease of application would be lost”).

²³⁹ *New York v. Quarles*, 467 U.S. 649, 656 (1984).

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ability to exercise Fifth Amendment rights, and thus calls for a blanket exception to the *Miranda* requirements.²⁴⁰

A complementary dynamic exists in the Court's treatment of the individual rights side of the balance. Here, the Court's use of the reasonable person as paragon minimizes the weightiness of the interest in individual rights.²⁴¹ Take, for example, *McNeil v. Wisconsin*, where the Court rejected a rule that an in-court assertion of the Sixth Amendment right to counsel suffices to assert the *Miranda* right to counsel for custodial interrogation about another offense:²⁴²

Petitioner's proposed rule has only insignificant advantages. If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event *Edwards* would preclude initiation of the interview). The proposed rule would, however, seriously impede effective law enforcement.²⁴³

The Court treats the reasonable lay person as a paragon in other *Miranda* decisions and Fourth Amendment cases as well. Thus, the "ideal" reasonable person is self-sacrificing when it comes to convenience and autonomy and is tough and assertive when dealing with police.²⁴⁴ It would take extreme police misconduct to put this person's rights in jeopardy.

The result of the Court's use of the "reasonable person" in balancing interests is a lack of transparency. The Court uses the term "reasonable" for both officers and lay persons but applies the term differently. It labels an officer's behavior "reasonable" when the officer reflects an average human response; because average humans are imperfect, they are, by definition, needy. However, the Court labels a lay person's behavior "reasonable" only when it lives up to a high ideal standard; by definition, an average human response would be unreasonable, and thus not deserving of weight in the balance. With the interests stacked in this way,

²⁴⁰ *Id.* at 657.

²⁴¹ Daniel J. Solove, "I've Got Nothing to Hide" and Other Misunderstandings of *Privacy*, 44 SAN DIEGO L. REV. 745, 747 (2007) (noting that the argument that people who have nothing to hide need not be concerned about privacy "[i]n its most compelling form . . . is an argument that the privacy interest is generally minimal to trivial, thus making the balance against security concerns a foreordained victory for security"). See also Cloud, *supra* note 3, at 232 (noting that the Court in *Terry* does not even address the suspect's side of the balance); *id.* at 233 (noting the Court's use of a "three-sided balance" that helps to minimize individual rights).

²⁴² 501 U.S. 171 (1991).

²⁴³ *Id.* at 180.

²⁴⁴ See *supra* Part III.

the individual rights side of the balance can almost never equal, let alone outweigh, the law enforcement interests. In essence, the Court has already balanced the interests and has slapped a label—"reasonable" or "unreasonable"—onto its conclusion.²⁴⁵ However, the Court never really explains or justifies how it arrives at its conclusion of reasonableness or unreasonableness.

The Court does not explain, for example, why it is reasonable for police to succumb to stress, confusion, disorientation, pressure, and similar emotions.²⁴⁶ In fact, persuasive reasons might exist, at least in some situations.²⁴⁷ However, it is important to remember that law enforcement officers are (or should be) carefully selected and trained.²⁴⁸

²⁴⁵ Bacigal, *supra* note 3, at 712 ("[W]hen the Court states that an officer acted reasonably (appropriately), the Court has announced its ultimate conclusion, not a methodology or perspective from which to assess constitutionally reasonable searches."); Nadler, *supra* note 146, at 156 (concluding that "the Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence"). Cf. Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 78, 92–93 (2007) (illustrating similar hidden balancing in the Court's use of the term "voluntary" in the Fourth Amendment context).

²⁴⁶ In *New York v. Quarles*, the Court said it did not want to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

467 U.S. at 657–58. However, this explanation is also premised on the officer's inability to act professionally in a volatile situation. As to professionalism, see *infra* note 248.

²⁴⁷ Even trained professionals might succumb to stress when directly faced with the threat of death or serious bodily harm. See, e.g., Bacigal, *supra* note 3, at 706 (noting that "police are entitled to our commiseration when they confront an increasingly violent class of criminal in modern-day America"). However, note that the *Quarles* Court did not limit the *Miranda* exception to situations where police or someone else was immediately threatened with violence. Another reason, as Bacigal suggests, is that it is difficult "to formulate clear rules for addressing the myriad of situations in which police intrude upon privacy and security." *Id.* at 710. However, the Court could have formulated a standard that required more of police than is required of untrained lay people. Bacigal notes that "[b]y equating reasonableness as a process of logical thought with reasonableness as a standard of constitutionally permissible behavior, the protections of the Fourth Amendment are reduced to a prohibition against irrational police actions." *Id.* at 711. Bacigal would like to see "a fuller explanation" of why the Court chooses a perspective that judges police merely on the basis of common sense. *Id.* at 706–07.

²⁴⁸ See, e.g., POST COMMISSION ON PEACE OFFICER STANDARDS & TRAINING, <http://www.post.ca.gov/>; CONNECTICUT POLICE OFFICER STANDARDS AND TRAINING COUNCIL, <http://www.ct.gov/post/site/default.asp>; NEW HAMPSHIRE POLICE STANDARDS AND TRAINING COUNCIL, <http://www.pstc.nh.gov/>; Kinports, *supra* note 3,

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Apart from complete rookies, they have experience in dealing with stressful, volatile situations. Imagine how the balancing equation might play out if, to be considered “reasonable,” officers actually had to live up to professional standards. If such were the case, officers would have fewer needs and the law enforcement side of the balance would be less weighty. Instead, the Court allows officers to be unskilled at dealing with normal, recurring law enforcement tasks such as engaging in custodial interrogation in fast-moving situations; at the same time, it requires lay people to overcome the reactions normal people are bound to feel when under stress.²⁴⁹ In adopting this approach, the Court puts a thumb on one side of the balance scale. Thus, it is instructive that when the officer’s training or experience strengthens the prosecution side of the balance, the Court is eager to include that background in the equation.²⁵⁰

So why should police not be held to higher standards suitable to the trained professionals they presumably are? Why should lay people be held to an ideal standard instead of being judged as normal human beings? The cynical answer is that lower courts would be more likely to find a Fourth Amendment or *Miranda* violation if police were held to a higher standard and if lay persons were held to a lower standard than is currently the case. If this cynical explanation is true, however, why worry about transparency? If, in fact, the Court is using the “reasonable person” disparately to arrive at a predetermined result, it would probably find a way to come to the same bottom line by balancing the interests forthrightly.²⁵¹ Nevertheless, it would be better for the Court to do this in a more transparent fashion. There are at least two interrelated reasons why this is so. First, transparency is important because the Court’s decisions have real consequences for real people. And second, it is important because of the Court’s role in a national dialogue about government power and human rights.

at 141 (noting that “cultural competence training . . . is considered an important element of police training” and citing authority).

²⁴⁹ See also Bacigal, *supra* note 3, at 707 (seeing the Court’s approach as a lack of empathy with suspects).

²⁵⁰ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting that the approach it adopts “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person’” (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981))); *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (taking officer’s experience into account in deciding he had reasonable suspicion to stop defendant).

²⁵¹ Morgan Cloud, for example, argues that the Court’s Fourth Amendment cases reflect a preference for pragmatism that rejects a view of rights as an abstract good. Cloud, *supra* note 3, at 202, 205. *Cf. id.* at 208–14 (explaining legal pragmatism). See also Rutledge, *supra* note 3, at 1017 (noting that the operation of balancing tests varies according to the value choices of those doing the balancing).

Transparency is important, first of all, because the Court's decisions have real consequences for real people.²⁵² In essence, the Court's use of the reasonable person is prescriptive. That is, lay people are unreasonable and thus either have no rights or do not assert them adequately unless they live up to the demanding ideal set by the Court.²⁵³ This means that the Court's approach to reasonable lay people eliminates investigative procedural rights for large numbers of Americans.²⁵⁴ To see why this is so, assume that there is a class of people who are highly knowledgeable about the workings of the criminal justice system, can keep their emotions in check when under stress, always articulate their desires unambiguously, and have the wherewithal to fortify their living spaces, use only pay phones, and live on a cash basis. If any of these people become targets of criminal investigations they will have the benefit of full Fourth Amendment and *Miranda* protections. But just stating the situation in these terms highlights the absurdity of the proposition.

In fact, most people who become involved in criminal investigations do not share the characteristics just outlined. Of course, there may be some wealthy or sophisticated suspects who have the ability to protect their rights fully. But for the most part, those who take precautions, understand the system, and can control their reactions are likely to be the hardened criminals and sociopaths. Other targets of police investigative practices are simply out of luck because, in a real sense, they lack complete Fourth Amendment and *Miranda* rights. In essence, the Court has created a new underclass: average people whose human flaws, weaknesses, ignorances, and inadequacies are now completely at the mercy of the emotional, disoriented, unperceptive, and (because the standard is low) unprofessional police officers with whom they come in contact. By holding that it is unreasonable to be average, the Court makes most lay people constitutionally irrelevant, and it has failed to explain why this should be so.²⁵⁵

²⁵² In this vein, Bacigal notes that treating an individual suspect as "a non-person who exists only to the extent that he or she affects the social welfare as viewed from the perspective of a pseudo-scientific balancing of government and individual interests" results in the "ideal of justice, which incorporates a theory of individual rights, [ceasing] to be a weighty factor in the Court's Fourth Amendment discourse." Bacigal, *supra* note 3, at 724–25.

²⁵³ The Court is also setting norms for police, of course; it is just setting them lower.

²⁵⁴ The word "American" is being used for convenience. Non-citizens also enjoy investigative procedural rights under the Constitution, at least when they have entered the United States legally. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing authority). Some protections probably also apply to undocumented persons physically present in the United States. *See* Einesman, *supra* note 224, at 8–9.

²⁵⁵ *Cf. Cloud, supra* note 3, at 241–42 (noting that many believe that disguised value choices in balancing have "had the effect of devaluing individual rights and promoting government power").

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This observation brings us to the second related reason why transparency is important even if the Court would take the same parsimonious approach to investigative rights using straightforward balancing. If the Court were candid about what it is doing and why, it would be easier for Americans to assess the wisdom of the Court's approach to police powers. People might agree that the Court has correctly balanced such powers against individual privacy rights.²⁵⁶ However, when fully aware of the considerations on each side of the balance, it is possible that Americans might disagree with the Court's policy choices and push their legislators or state courts for more protection from government intrusion.²⁵⁷

By using the "reasonable person" metaphor, the Court insulates most people from the desire or ability to engage in this type of evaluation. Understanding why this is so is a two-step process. The first step is to acknowledge that many, if not most, civically engaged citizens are already distanced from many realities of government intervention into privacy and security. The second involves the way the "reasonable person" approach increases that distance.

In the first place, membership in the group of people with no operational Fourth Amendment or *Miranda* rights is largely determined by cultural, social, and economic factors.²⁵⁸ For example, we are all subject to the Court's stingy definitions of what constitutes a "search,"²⁵⁹ a "seizure,"²⁶⁰ or "custodial interrogation."²⁶¹ However, the reality is that many people will never experience these procedures firsthand:

The very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority . . . will see their privacy materially diminished

²⁵⁶ For example, people might agree that it makes sense not to require undercover officers posing as cellmates to give *Miranda* warnings. See *supra* note 155.

²⁵⁷ The Oregon Supreme Court, for example, adopted a definition of "search" under article I section 9 of the Oregon Constitution that provides more protection from government intrusion than does the United States Supreme Court's "reasonable expectation of privacy" test. See *State v. Tanner*, 745 P.2d 757, 761 (Or. 1987) (holding that "[t]he extent to which actions by state officials are governed by section 9 is defined by the general privacy interests of 'the people' rather than by the privacy interests of particular individuals" and finding the defendant's privacy interests to have been violated by search of a house in which the defendant, not present at the time, had stored stolen property). The "reasonable expectation of privacy" test is discussed *supra* at notes 55–60 and accompanying text.

²⁵⁸ The group of those lacking full rights overlaps, but is both broader and narrower than the racial and ethnic minorities who are often noted as the focus of a disproportionate amount of investigative focus. As to racial and ethnic discrimination, see *supra* notes 103–04.

²⁵⁹ See *supra* notes 55–60, 201–09 and accompanying text.

²⁶⁰ See *supra* notes 61–64 and accompanying text.

²⁶¹ See *supra* Part III.A.

There's been much talk about diversity on the bench, but there's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live. Yet poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. Whatever else one may say about Pineda-Moreno, it's perfectly clear that he did not expect—and certainly did not consent—to have strangers prowl his property in the middle of the night and attach electronic tracking devices to the underside of his car. No one does.

When you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep. But the Constitution doesn't prefer the rich over the poor; the man who parks his car next to his trailer is entitled to the same privacy and peace of mind as the man whose urban fortress is guarded by the Bel Air Patrol. The panel's breezy opinion is troubling on a number of grounds, not least among them its unselfconscious cultural elitism.²⁶²

For those who are functionally immune from such official attention, the lack of operational Fourth Amendment or *Miranda* rights remains abstract.

Even for people who are not as privileged as those described in the excerpt, many privacy and security issues remain abstract, as it is tempting to think of Fourth Amendment and *Miranda* rights as being important only to criminal defendants. The “reasonable person” approach—for those who are aware of it—widens the distance an average person is likely to feel from the problem of loss of rights. This is because the tendency of most people, even if they can imagine themselves in a confrontation with police, is to consider themselves as reasonable. A simple syllogism illustrates the dynamic in the context of one-on-one interactions with police: A suspect lacks or forfeits rights by being unreasonable. Most people think: “I am a reasonable person. Thus, if I am ever the target of police investigation I will retain my constitutional

²⁶² United States v. Pineda-Moreno, No. 08-30385, 2010 WL 3169573, at *3–*4 (9th Cir. Aug. 12, 2010) (Kozinski, J., dissenting from denial of rehearing en banc) (citation omitted). See also Bacigal, *supra* note 3, at 719–20 (noting that justices cannot call upon personal experience of much knowledge of the community's shared understandings in determining the kinds of behavior that comport with an invasion of a reasonable expectation of privacy); Nadler, *supra* note 146, at 155–56 (noting that “empirical evidence . . . suggests that observers outside of the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse. Members of the Court are themselves such outside observers, and this partly explains why the Court repeatedly has held that police-citizen encounters are consensual and that consent to search was freely given”); *id.* at 168–72 (setting out the evidence for the actor-observer bias).

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rights.” A similar dynamic might produce this sense of security in the search context as well. “Although we are all potentially vulnerable to searches of our open fields and bank records, if I have nothing to hide, why worry? If I have committed no crimes, I am unlikely to be the subject of such intrusions.”²⁶³ People who feel this way are unlikely to examine investigative procedure doctrines critically or to take steps to counter the federal constitutional limits with proposals for more rights against government intrusion.

The Supreme Court may also succumb to the urge to identify Fourth Amendment and interrogation rights with criminals, and not with law-abiding people.²⁶⁴ This is because the Court usually confronts Fourth Amendment and confession issues in the context of a criminal defendant’s appeal of a denial of a motion to suppress evidence. The daunting legal barriers to bringing a federal civil rights suit combined with the realities of getting legal representation when damages are negligible,²⁶⁵ mean that few other people affected by police search-and-seizure practices will air their complaints in court; *Miranda* violations do not provide a basis for a federal civil rights action.²⁶⁶ Thus, the cases the Court sees usually involve people who have been found guilty of crimes.²⁶⁷ Of course, at the time the investigation is conducted—before the search or the questioning—police do not know for sure that they will find evidence.²⁶⁸ They may not know whether the suspect is factually guilty of any wrongdoing, let alone whether the prosecution can prove guilt beyond a reasonable doubt in court.²⁶⁹ But still, by the time the Supreme Court gets the typical case, everyone—the Court included—can act as if these investigative rights matter only to criminals who do not “deserve” to be treated as reasonable.

²⁶³ See Solove, *supra* note 241, at 746–47 (noting “many people believe that there is no threat to privacy unless the government uncovers unlawful activity, in which case a person has no legitimate justification to claim that it remain private”).

²⁶⁴ It is, of course, possible to argue that such a conclusion should make the Court more vigilant about individual rights. As head of the counter-majoritarian branch of the federal government, the Court might see its role as that of protecting unpopular minorities. See, e.g., Cloud, *supra* note 3, at 284–85 (noting that “there is no political lobby for criminals”).

²⁶⁵ See, e.g., Nadler, *supra* note 146, at 213 (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)).

²⁶⁶ *Chavez v. Martinez*, 538 U.S. 760, 770–73 (2003).

²⁶⁷ See also Bacigal, *supra* note 3, at 707–08 (discussing why the Court shows little consideration for the plight of some suspects); Cloud, *supra* note 3, at 243 (noting the problems this posture presents).

²⁶⁸ See Nadler, *supra* note 146, at 156 (noting that a consequence of the Court’s Fourth Amendment jurisprudence is “suspicionless searches of many thousands of innocent citizens who ‘consent’ to searches under coercive circumstances”).

²⁶⁹ See, e.g., *id.* at 209 (noting the routine nature of suspicionless “consent” searches done by police).

Thus, it is good to remember that the Court's approach affects non-criminals as well as criminals.²⁷⁰ For one thing, innocent relatives, friends, acquaintances, and strangers also get caught up in traditional police investigations,²⁷¹ or hear about them after the fact. In addition, government has increasingly adopted search techniques that do not depend on individualized suspicion at all, let alone probable cause, and so are applied to people who are not suspected of a crime.²⁷² And, of course, police do make mistakes.²⁷³

But even more importantly, the constitutional limits on police powers define the relationship of government to all citizens. That Fourth Amendment and confession issues are raised mainly through motions to suppress in criminal cases means that the rest of us must rely on those charged with crimes to be our surrogates in asserting the limits of government power.²⁷⁴ The bottom line is that the Court's "reasonable person" approach has resulted in a lowering of barriers to government intrusions into privacy and autonomy, a change that has the potential to affect everyone. Treating law-enforcement officers as average while holding everyone else to a higher standard expands government's powers.²⁷⁵ Indeed, it expands them to the evidently low limits of a police

²⁷⁰ Bacigal, *supra* note 3, at 708 (noting that "[i]n its rush to condemn the guilty, the Court has overlooked the fact that the standards it has fashioned . . . apply equally to the detention of the innocent" and citing examples); Nadler, *supra* note 146, at 208–10 (noting the "sheer number of innocent people affected by the police practice of consent searches").

²⁷¹ *E.g.*, *Muehler v. Mena*, 544 U.S. 93, 95 (2005) (involving innocent co-occupant of house removed from her bed at gunpoint and detained in handcuffs under guard for two to three hours while police executed a search warrant); *Graham v. Connor*, 490 U.S. 386, 389 (1989) (involving friend who watched helplessly as police handcuffed and injured diabetic suspect mistakenly suspected of casing convenience store). *See also* *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (regarding stops of motorists at checkpoint set up to discover information about earlier crime).

²⁷² *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 198 (2002) (regarding questioning of passengers on interstate bus); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995) (regarding random drug testing of high-school athletes); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (regarding highway sobriety checkpoints); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 659–60 (1989) (regarding drug testing of employees applying for promotion to certain positions).

²⁷³ *E.g.*, *Graham*, 490 U.S. at 389.

²⁷⁴ *See* Bacigal, *supra* note 3, at 707 ("Does the Court's choice of perspective really come down to sorting out the good guys from the bad guys in each case? If so, the Fourth Amendment is in deeper trouble than previously recognized because the champions of our Fourth Amendment rights are often the least sympathetic characters in existence."); Cloud, *supra* note 3, at 284 (noting that "the people asserting fourth amendment rights are the least appealing advocates of liberty").

²⁷⁵ *Cf. e.g.*, Cloud, *supra* note 3, at 277–79 (discussing the Court's techniques generally). Cloud asserts that the expansion of executive-branch power and "devaluing [of] individual liberty and judicial power" is purposeful on the part of the current Court. *Id.* at 283–84.

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officer's "reasonableness."²⁷⁶ If there are compelling reasons for this result—or for the methods the Court uses to reach it—these ought to be spelled out clearly.

This need for clarity exists even though the Court has the last word on what the Constitution requires, whether or not its reasoning is transparent or even correct.²⁷⁷ Of course, to have the last word, the Court must be in a position to review the legal issue in question. Ironically, because the conclusion is often that there is no "search," "seizure," or "custodial interrogation," the Court's "reasonableness" approach takes police and other executive-branch decisions out of the scope of judicial review. However, when the Court can and does address an issue, a Supreme Court opinion is a sort of advocacy.²⁷⁸ Even though the Supreme Court does not have to convince a higher court of the correctness of the decision, the author must convince enough other justices to form a majority. Beyond that, if the holding is to be followed faithfully and not misunderstood²⁷⁹ or evaded, the majority must convince lower federal court and state court judges. Finally, to maintain credibility, the Court must convince a critical mass of others—both lawyers and non-lawyers—who might read the opinion or hear about it through the media.²⁸⁰

In fact, the need for clear explanation is vital because the Court plays a prominent role in a national dialogue about government power and individual rights. At least since the 1960s, when most protections in the

²⁷⁶ See Bacigal, *supra* note 3, at 712 (noting that "judicial adoption of the police perspective reverts to a form of pragmatic utilitarianism in which the identity of the decision maker has been blurred").

²⁷⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See generally, William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969) (pointing out the analytical errors in *Marbury*).

²⁷⁸ See Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 71, 96 (2003) (noting that "the judicial opinion 'is an essay in persuasion. The value of an opinion is measured by its ability to induce the audience to accept the judgment.'" (quoting James D. Hopkins, *Notes on Style in Judicial Opinions*, 8. TR. JUDGES' J. 49, 50 (1969))); Roderick A. Macdonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 162 (1997) (asserting that "[a] judicial opinion is an exercise in persuasion: it is a subtle interweaving of a statement of a legal norm and the justification for both the content of its normative pith and the form in which it is stated"); Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (with Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 108 (1997) (noting that "[a] judicial opinion is, of course, an advocacy piece. The author of a judicial opinion uses her opinion to argue the wisdom and legitimacy of the particular result she has reached."). See also Cloud, *supra* note 3, at 247 (asserting that the balancing approach has lost the ability to persuade).

²⁷⁹ See Nadler, *supra* note 146, at 156 (noting that "the Court's repeated insistence that citizens feel free to refuse law enforcement officers' requests to search creates a confusing standard for lower courts"); *id.* at 214–15 (asserting that the Court's "sham" approach has led to disagreement in the lower federal courts).

²⁸⁰ See, e.g., Kapgan, *supra* note 278, at 96 (and sources cited therein).

Bill of Rights were applied against the states,²⁸¹ the Court has, through its opinions, set the agenda and moderated the national conversation about what power government should have to intrude on the privacy and autonomy of persons in the United States. However, these opinions, and the constitutional protections they define, do not necessarily set a ceiling on the limits to government power. Congress, state legislatures, and state constitutions can afford people more protection from government than the Constitution provides. All of these institutions—and the voters who elect their functionaries²⁸²—would benefit from understanding the factors that truly affect the Court’s decisions about where to draw constitutional lines. For example, in some states, voters, through the initiative process, have required state judges to limit state constitutional protections in some criminal matters to those afforded by the United States Constitution.²⁸³ Of course “people may vote to abandon some of their liberties,”²⁸⁴ but increased transparency in Supreme Court opinions would help ensure that they were doing so consciously.

To this end, more candid opinions should include evaluation of factors that are currently hidden when the Court relies on the “reasonable person.” A big factor, of course, is the exclusionary rule that normally eliminates from the prosecution’s case in chief evidence obtained in violation of *Miranda* or the Fourth Amendment.²⁸⁵ If the officer is reasonable but the lay person is not, no violation has occurred, and the court need not exclude the evidence. There is no need, in that

²⁸¹ See, e.g., CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 3–4 (5th ed. 2008) (listing Warren Court decisions applying federal constitutional protections to states).

²⁸² The voters matter even when state judges interpret state constitutions. See, e.g., Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 721 (2010) (citing support for the conclusion that “[f]or over a century, the great majority of states have chosen to select or retain judges through popular elections”).

²⁸³ This occurred in California in 1990 when the voters approved Proposition 115. See William N. Eskridge, *Forward: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CAL. L. REV. 1785, 1835–36 (2009); Robert F. Utter, *State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 34–35, 40 (1989); *2008 California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173, 177 (2009). But see *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990) (declaring a provision of a measure unconstitutional because the changes were too far-reaching to accomplish through the initiative process). Voters in Florida added a similar provision to the Florida Constitution. See FLA. CONST. art. I, § 12.

²⁸⁴ Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984) (alluding to the California and Florida initiatives).

²⁸⁵ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 312 (1985); DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 23, at Ch. 20 (summarizing the law regarding the Fourth Amendment exclusionary rule); *id.* § 24.12 (summarizing the law regarding the *Miranda* exclusionary rule).

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case, to integrate the costs and benefits of the exclusionary rule into the balance regarding any specific *Miranda* or Fourth Amendment issue.²⁸⁶

In addition, the solicitousness for police implies that the Court wants to give officers the leeway needed to do their jobs,²⁸⁷ a commendable goal. And it is tempting to think that increasing the power of police keeps law-abiding citizens safer from crime (and that being law-abiding keeps one safe from police). However, this equation, when unexamined, may be simplistic. First, protection from criminals is enhanced when criminal investigations are accurate. Accuracy is an issue in the *Miranda* context. The premise behind *Miranda* is that custodial interrogation is inherently coercive and that when police give the warnings and respect the suspect's assertion of rights, this inherent coercion is neutralized.²⁸⁸ If this premise is valid (and nothing in the Court's more recent cases belies the assumption), then the Court's approach puts the accuracy of confessions at issue. That approach makes it harder to find custody, harder to find interrogation, harder to find an assertion of rights, and easier to find that those rights were relinquished.²⁸⁹ To the extent that real suspects do not reflect the Court's ideal reasonable person, the odds increase that they are coerced into making admissions and confessions that are not trustworthy.²⁹⁰

On the other hand, accuracy is not an issue in the search context, as the evidence speaks for itself.²⁹¹ In addition, some would argue that the

²⁸⁶ On occasion, however, the Court has addressed costs and benefits of the exclusionary rule outright. *E.g.*, *Herring v. United States*, 129 S. Ct. 695, 700–03 (2009) (expanding the “good faith” exception to the Fourth Amendment exclusionary rule); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (holding that evidence obtained after a knock-and-announce violation need not be excluded as a result of a *Miranda* violation); *United States v. Leon*, 468 U.S. 897, 907 (1984) (establishing a “good faith” exception to the Fourth Amendment exclusionary rule); *Rakas v. Illinois*, 439 U.S. 128, 137 (1978) (determining that passengers lack a legitimate expectation of privacy in the glove compartment of a car); *Franks v. Delaware*, 438 U.S. 154, 170–71 (1978) (allowing defendant to challenge veracity of search warrant affidavit in some situations).

²⁸⁷ *See, e.g., supra* note 155 and accompanying text (discussing the needs of undercover police work).

²⁸⁸ *See Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (explaining adoption of the warnings because “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice”); *id.* at 468 (asserting that “such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere”).

²⁸⁹ *See supra* Part III.A.

²⁹⁰ *See Nadler, supra* note 146, at 178 (noting that “in some situations very little pressure is needed to induce innocent people to confess to a transgression they did not commit”).

²⁹¹ *See, e.g., Williams, supra* note 245, at 79 (noting distinction between accuracy concerns in search and confession cases). Any claim that the evidence was planted or belongs to someone other than the defendant is, of course, outside the scope of a Fourth Amendment claim.

state has a stronger claim to possessing real evidence of crime than it has to possessing a confession.²⁹² Whether or not one accepts this latter position—and to the extent that balancing is valid at all²⁹³—the balance of interests is different in search and seizure than it is in confessions because society may want to give police more leeway in one context than in the other. The details and considerations involved in this contrast would be more likely to emerge if the balancing were overt.

Perhaps, however, the Court's "reasonable person" approach furthers an interest in efficiency.²⁹⁴ To the extent that police activity is neither a "search," a "seizure," nor "custodial interrogation," police can proceed without judicial supervision, thus saving time and other resources for police, prosecutors, defense attorneys, and courts. Similarly, even when a pre-trial hearing occurs, both trial and appellate courts enjoy efficiencies to the extent that it is easy to dismiss a suspect's claim that rights were infringed. While the Court's maximization of law-enforcement needs through use of the reasonable person approach may be motivated by an interest in efficiency, however, the Court does not make a case for efficiency as an overriding value. Instead of explaining and justifying why gains in efficiency trump individual rights, the Court writes as though no individual rights are at stake because reasonable people would not feel that any were violated.²⁹⁵

²⁹² *E.g.*, *id.* at 79–80 ("The entitlement to evidence bearing on guilt belongs to the sovereign, whether unearthed by subpoena, judicial warrant, police action predicated on reasonable suspicion or probable cause, or mere acquiescence couched in terms of 'consent'" whereas "human dignity" concerns are more in the forefront with confessions.).

²⁹³ *But see* Cloud, *supra* note 3, at Part III (exploring a rule-based approach to Fourth Amendment issues in lieu of balancing).

²⁹⁴ *See, e.g.*, Cloud, *supra* note 3, at 256 (noting that the Court's "reasonable expectation of privacy" approach in "open fields" cases "may be explained in part by its concern for . . . efficient law enforcement"); *id.* at 279 (suggesting that a "unifying principle" in the Court's Fourth Amendment caselaw is "a value choice favoring efficient law enforcement"); Kinports, *supra* note 3, at 123 (suggesting that the Court's use of an objective, rather than a subjective, standard might be motivated by efficiency concerns); Nadler, *supra* note 146, at 163 (suggesting that the Court's unrealistic approach to the reasonable layperson masks an "unstated concern—that the police be permitted to engage in suspicionless seizures and consentless searches so long as they avoid abusive or overly coercive tactics"); Rutledge, *supra* note 3, at 1014–16 (suggesting that ease of administration is a factor in *Miranda* doctrine). *See also* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 162 (1968) (positing the "crime control" model of trusting administrative processes in criminal procedure). *Cf.* Cloud, *supra* note 3, at 270 (suggesting that clear rules are a better way of achieving efficiency than the Court's "pragmatic" approach). *But see id.* at 271 (noting that with a rule-based approach efficiency decreases in "complex situations, or those arising at the margins of the relevant rules' coverage").

²⁹⁵ Nadler, *supra* note 146, at 156 ("Perhaps the systematic suspicionless searching of innocent citizens is a worthwhile price to pay in exchange for effective law enforcement, but the Court has not engaged in this analysis in any of its Fourth Amendment consent search or seizure cases.").

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The “reasonable person” trope also allows the Court to omit consideration of factors on the rights side of the balance. For example, by speaking in terms of a single “reasonable person,” the Court avoids having to deal with the cumulative effect that certain police methods, such as electronic surveillance or lack of privacy in open spaces, might have on citizens in a free society.²⁹⁶

There are no doubt a great many costs and benefits that could be amassed on both sides of the balance if the issues were addressed forthrightly.²⁹⁷ However, it is worth mentioning one additional cost of the current approach that the Court also seems to have ignored. That cost involves the reaction that may result when people read or hear of the Court’s views of how “reasonable lay people” feel and behave, or when they experience or hear about judicial tolerance of what may be perceived as police abuses. To the extent that people expect police to be professional and suspects to be average, the Court’s use of the opposite dynamic to expand government power risks producing cynicism and disrespect for the criminal justice system.²⁹⁸ If the disconnect between social expectations and the reality of the law leads to an erosion of respect for the criminal justice system, even among a minority of citizens, there is reason to be concerned. The Court’s “reasonable person” approach leaves no room to consider the erosion of faith and trust in government, and so does not count the possibility of such erosion as a

²⁹⁶ See, e.g., *State v. Campbell*, 759 P.2d 1040, 1047 (Or. 1988) (holding that “[a] privacy interest, as that phrase is used in this court’s Article I, section 9, opinions, is an interest in freedom from particular forms of scrutiny”). The Court disapproved use of an electronic device to track the public movements of an automobile. The Court observed,

Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny The limitation is made more substantial by the fact that the radio transmitter is much more difficult to detect than would-be observers who must rely upon a sense of sight. Without an ongoing, meticulous examination of one’s possessions, one can never be sure that one’s location is not being monitored by means of a radio transmitter. Thus, individuals must more readily assume that they are the objects of government scrutiny.

Id. at 1048.

²⁹⁷ See, e.g., *Williams*, *supra* note 245, at 89–90 (noting the impracticality of asserting “fair bargaining” into non-custodial street encounters between police and lay persons).

²⁹⁸ See, e.g., *Nadler*, *supra* note 146, at 211–12 (noting survey that people “whose consent was requested from the Ohio Highway Patrol . . . felt afraid and reported that their respect for the police had diminished”); *id.* at 218–21 (discussing how the Court’s consent search cases contribute to diminished respect for the law); *Sundby*, *supra* note 5, at 1777; see also *Bacigal*, *supra* note 3, at 725 (“Judicial indifference to the individual’s perspective sends a message that individuals are not valued or trusted, and that they ultimately are powerless to prevent intrusions on their autonomy because intrusions need not be based on their individual conduct.”).

cost to balance against any benefit involved in allowing police to take an unskilled approach to investigation.²⁹⁹

VI. CONCLUSION

The concept of the reasonable person can be used in three ways: as circumstantial evidence of a person's actual state of mind; as a standard that reflects the way an average person behaves or views the world; or as a standard that departs from the average but, instead, reflects a type of behavior or perception that few people can attain. In its Fourth Amendment and *Miranda* cases, the Supreme Court rarely makes a subjective inquiry, and so the reasonable person does not often appear in that context. On the other hand, the Court frequently applies an objective standard in its Fourth Amendment and *Miranda* jurisprudence. When it does so, it allows the reasonable officer to be all too human, indeed often flawed, but requires the reasonable lay person to be a paragon of astute awareness, control of emotions, and sacrifice for the greater good. This approach affects the Court's balancing of interests as it formulates and applies tests and standards to be used to resolve issues that arise in these investigative contexts. By using the metaphor of the "reasonable person"—and by using that concept differently for officers and for lay persons—the Court avoids a forthright assessment of the factors it balances in deciding the constitutional limits on government investigative powers. Such an approach does not further a realistic assessment of the effect of government power on individual rights and hampers the ability of citizens and their elected representatives to determine whether to buttress those rights through legislation or state constitutions.

²⁹⁹ Sundby, *supra* note 5, at 1784.