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CHOOSING PERSPECTIVES IN CRIMINAL PROCEDURE

Ronald J. Bacigal*

In this Article, Professor Bacigal examines the Supreme Court's use of various perspectives in examining the reasonableness of searches and seizures. Although the Supreme Court purports to rely on a consistent method of constitutional analysis when rendering decisions on Fourth Amendment issues, the case law in this area indicates that the Court is influenced sometimes by the citizen's perspective, sometimes by the police officers' perspective, and sometimes by the perspective of the hypothesized reasonable person.

After identifying the role of perspectives in a number of seminal Court decisions, Professor Bacigal discusses the benefits and limitations of the Court's reliance on the various perspectives prevalent in criminal procedure cases. He notes that over time the Court increasingly has viewed cases solely from the police officers' perception of the reasonableness of their actions and thus that the Court has weakened the protection of citizens' Fourth Amendment rights.

Professor Bacigal advocates a principled approach to choosing perspectives and assesses several such approaches. He concludes by asking both the Court and its critics to find ways to enhance the Court's ability to balance social interests with the individual's "right to be let alone." To adequately protect this right, Professor Bacigal suggests that the Court display increased sensitivity to the individual's perspective in search and seizure cases.

* * *

At Center Court Wimbledon it is entertaining to watch the ball shift back and forth between the opponents. It is less captivating to observe constitutional analysis in which the United States Supreme Court appears to hide the ball, or at least makes it difficult to appreciate the nature of the game being played, as it shifts between objective and subjective perspectives of citizens, police officers, and hypothesized reasonable people. Unlike tennis, where stroke and counterstroke are the essence of the game and visible for all to see, constitutional analysis often obscures the fact that it is highly dependent upon the Court's vacillating choice of perspectives, and concomitantly, the identification of the appropriate decision maker. Although most

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Supreme Court cases center on whether a particular outcome is constitutional, this question is uniquely related to the questions of who should decide what is constitutional, and who should decide who decides. Of course the Court is always the final decision maker when interpreting the Constitution, but there are times when the Court defers to the decisions of police, reasonably prudent people, or individual citizens by adopting their perspectives.

Consider the diverse perspectives the Court applies to a seemingly simple scenario that begins with a police officer approaching a pedestrian and stating, "Please stop, I'd like to talk to you." The initial question for the Court is whether the officer's actions constitute a Fourth Amendment seizure of the pedestrian.¹ That question is answered by an objective assessment of the situation as viewed through the eyes of a reasonable person: Would such a hypothetical person have felt free to leave?² At this point, it is constitutionally irrelevant whether the citizen subjectively believed that he or she had to submit to the request to stop,³ or whether the officer subjectively intended to prevent the citizen from walking away.⁴

If application of this objective standard were to indicate that a reasonable person would not have felt free to leave, the Court would then discard the perspective of a hypothetical person and would examine the way this particular citizen responded to the police officer.⁵ Submission to the officer's request could constitute a Fourth Amendment seizure, but resistance would reduce the officer's request to a mere "attempted seizure," which is beyond the coverage of the Amendment.⁶ Submission, however,

¹ "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Florida v. Royer*, 460 U.S. 491, 498 (1983). "[W]here the [F]ourth [A]mendment is inapplicable, the law does not give a constitutional damn about noncompliance." Charles E. Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of 'So What'?*, 1977 S. ILL. U. L.J. 75, 76.

² "[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." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

³ The *Mendenhall* rule which governs seizures of a person, "looks, not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter that may suggest whether a reasonable person would have felt free to leave." *California v. Hodari D.*, 499 U.S. 621, 640 (1991) (Stevens, J., dissenting).

⁴ "[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent." *Mendenhall*, 446 U.S. at 554 n.6.

⁵ See *Hodari D.*, 499 U.S. at 628; see also *Woodson v. Commonwealth*, 429 S.E.2d 27, 29 (Va. 1993) ("[T]he issue . . . [is] not what a reasonable person would have assumed under the circumstances, but what the accused actually did in response to the police officer's show of authority.").

⁶ "[N]either usage nor common-law tradition makes an *attempted* seizure a seizure."

does not end the Court's inquiry because the encounter also must be examined from the officer's perspective. If the officer did not seize the citizen through "means intentionally applied,"⁷ there would be, at most, an "accidental seizure," which, like an attempted seizure, falls outside the scope of the Fourth Amendment.⁸

The interplay between objective and subjective perspectives continues if the citizen were to stop and face the officer, who then asks, "May I see some identification?" If the citizen were to comply by producing his wallet, the Court must then discern whether the wallet was surrendered voluntarily,⁹ or whether there was mere acquiescence to a police command that left the citizen no choice.¹⁰ Consent is determined by employing a subjective perspective that takes into account all surrounding circumstances, including the citizen's personal characteristics (characteristics that are irrelevant when defining a seizure of the person according to the objective perception of a reasonable person).¹¹ The applicable standard shifts once again, however, if

Hodari D., 499 U.S. at 626 n.2; see *infra* text accompanying note 54.

⁷ "[A] Fourth Amendment seizure . . . [occurs] only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower v. Inyo County*, 489 U.S. 593, 597 (1989).

⁸ See Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145 (1994) (discussing both attempted and accidental seizures).

⁹ See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); see also *United States v. Maragh*, 894 F.2d 415, 420 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 880 (1990). The circuit court cautioned that the lower court had "treated the tests for seizure and voluntary consent as identical. Although there is overlap in these tests, they are *not* identical." *Id.*

¹⁰ The prosecution's burden to prove free and voluntary consent to a search "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); see also *Sibron v. New York*, 392 U.S. 40, 63 (1968) (discussing "a show of . . . authority which left [the suspect] no choice"); *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (denouncing an encounter in which "[t]he citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence").

¹¹ In *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992), *cert. denied*, 507 U.S. 1033 (1993), the court held that the initial approach by the police toward the suspect was governed by the standard for seizures of the person—"an objective test, not a subjective one." *Id.* at 124. Thus, the fact that the particular suspect "thought, based on his experience with Moroccan police, that he would be restrained or even tortured should he try to leave" was irrelevant. *Id.* The court, finding no seizure, held that the subsequent request to search the suspect's vehicle was governed by the standard for consensual searches—"a factual question determined in light of the totality of the circumstances." *Id.* at 125. Consequently, it was relevant that the defendant was "24 years old . . . had . . . graduated from high school and had attended some college . . . appeared intelligent, [and] articulated his views and positions well . . ." *Id.*; see also *United States v. Wilson*, 895 F.2d 168, 171 (4th Cir. 1990) ("[T]he determination of consent to search is subjective.").

the officer were to misperceive the citizen's subjective intent. For example, suppose the citizen voluntarily surrendered his wallet for the limited purpose of allowing the officer to examine the citizen's identification papers, but the officer scanned the papers and then opened other compartments of the wallet. At this point, the Court would discard the citizen's subjective intent and turns to the perspective of an objectively reasonable officer: Could such an officer have believed that he had obtained consent to examine the entire wallet?¹²

The same shifting of perspectives becomes relevant in a Fifth Amendment context if the encounter were to continue with the officer commenting on the contents of the wallet. For example: "This bag of white powder looks like cocaine." Although at this point the citizen may have been seized for Fourth Amendment purposes, this seizure is not equivalent to custody, a necessary prerequisite for the *Miranda* warnings.¹³ For purposes of *Miranda*,¹⁴ custody is determined from the vantage point of "how a reasonable man in the suspect's position would have understood his situation,"¹⁵ and by examining whether the particular suspect was subjectively aware that he faced a police officer.¹⁶

The Court's inquiry must continue, however, because custody alone does not trigger *Miranda*; there also must be police interrogation.¹⁷ In order to define interrogation, the Court switches perspectives to that of a reasonable police officer, asking whether an officer would know that his comment about the cocaine was "reasonably likely to elicit an incriminating response from the suspect."¹⁸ As an added complication, this particular use of the reasonable person perspective incorporates the subjective perceptions of both the officer and the suspect.¹⁹

¹² See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?") (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183-89 (1990)).

¹³ See *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984).

¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁵ *Berkemer*, 468 U.S. at 442.

¹⁶ In *Illinois v. Perkins*, 496 U.S. 292 (1990), the issue was whether *Miranda* applied to a situation in which a police undercover agent, feigning to be a cellmate, questioned a suspect in his jail cell. The Court found that, because the suspect subjectively did not know he was being interrogated by the police, the suspect was not under coercion, and thus *Miranda* did not apply. See *id.* at 300.

¹⁷ See *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980).

¹⁸ *Id.* at 301 (citation omitted).

¹⁹ "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302 n.8.

Suppose that this encounter were to conclude with the citizen attempting to flee after the officer referred to cocaine. The officer thwarted the escape by producing his weapon, shoving the citizen against a wall, and roughly patting him down while giving the *Miranda* warnings. The citizen then stated, "It's not my cocaine, I'm holding it for a friend." The admissibility of the citizen's statement hinges upon a determination that the statement was voluntary and obtained after the suspect waived his *Miranda* rights to remain silent and to have the assistance of counsel.²⁰ Voluntariness would be assessed from the suspect's perspective in order to determine whether the self-incrimination was the product of the suspect's free and voluntary decision to speak, or whether the suspect's free will was overborne by the officer's use of physical force.²¹ In contrast to the subjective aspects of voluntariness, however, an objective standard is employed to determine whether the suspect waived his *Miranda* rights.²²

The above scenario could be extended to include booking procedures at the police station, further interrogation of the defendant, and possible use of a lineup, all of which involve additional Fifth and Sixth Amendment considerations; however, we have given the Court enough rope, and it has already entangled itself in a dozen variations of subjective and objective perspectives of real and hypothetical people. To wit:

1. A reasonable person's perception of the officer's initial approach.
2. The suspect's actual response to the officer's approach.
3. The officer's intent to seize the person through means intentionally applied.
4. The suspect's subjective intent to consent to a search of his wallet.
5. A reasonable officer's perception of the scope of the consensual search.
6. A reasonable person's perception of whether he was in police custody.
7. The suspect's subjective knowledge that he was addressing a police officer.
8. A reasonable officer's perception of whether his comment was likely to elicit an incriminating response from the suspect.
9. Any unusual susceptibility of the particular defendant to covert persuasion.

²⁰ See *Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

²¹ See *Colorado v. Connelly*, 479 U.S. 157 (1986).

²² The standard for waiver is unsettled. In *Connelly*, the Court spoke of waiver as a question of voluntariness (a subjective analysis). See *id.* at U.S. 169. In its most recent discussion of the issue, however, the Court stated that the question of whether a suspect waived or invoked *Miranda* rights would be assessed from the standpoint of whether "a reasonable police officer in the circumstances would understand the [accused's] statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994).

10. The officer's actual knowledge of the suspect's unusual susceptibility.

11. The suspect's subjective ability to make a free and voluntary statement.

12. An objective assessment of whether the suspect waived his *Miranda* rights.

The Court uses and discards these perspectives at random, rarely pausing to articulate a rationale for choosing a particular perspective in a specific case.²³ This piecemeal approach has hampered judicial development of a coherent scheme for applying the various perspectives to the Fourth, Fifth, and Sixth Amendment problems that arise.²⁴ A comprehensive examination of all three amendments is beyond the scope of a single law review article, or at least beyond the capacity of this author to address in any concise manner. As a more modest start toward reconciling judicial use of interpretive perspectives, this Article utilizes the Fourth Amendment as a touchstone for examining the particular choices the Court has made, and for suggesting the type of fundamental principles that should guide the Court's choices.²⁵

I. THE COURT'S DECISIONS

The current Court's preferred method for determining reasonable searches and seizures is the assessment of the totality of the circumstances,²⁶ an approach that helps obscure the underlying choice of perspectives. A complete examination of the totality of the circumstances necessarily factors in all perspectives—the subjective perspective of both the defendant and the police officer, as well as the perspective of a hypothetical reasonable person.

²³ See *Scott v. United States*, 436 U.S. 128, 137 (1978).

Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.

Id.

²⁴ The Sixth Amendment applies to interrogation occurring after the commencement of adversarial proceedings. See *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). When defining interrogation for Sixth Amendment purposes, the Court examines whether an officer "deliberately and designedly set out to elicit information" from the defendant. *Brewer*, 430 U.S. at 399. For a discussion of the differing definitions of "interrogation" under the Fifth and Sixth Amendments, see Jonathan L. Marks, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 MICH. L. REV. 1073, 1077 n.27 (1989) ("*Massiah* turns solely on the underlying intent of the government's agents.>").

²⁵ "It is both regrettable and surprising that the courts have said so little of any substance about the principles of the [A]mendment . . ." Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1976).

²⁶ See *Tennessee v. Garner*, 471 U.S. 1 (1985).

Although this approach is cumbersome to apply, it is difficult to fault the Court's desire to consider all relevant factors. The problem arises when the Justices opt to discard certain perspectives and rely exclusively on a single perspective in assessing constitutional reasonableness. This approach allows the Court to abdicate responsibility for determining the constitutionality of searches and seizures by adopting, and thus deferring to, the decisions of police, reasonably prudent people, or individual citizens. The origins of this flawed approach can be traced to the Court's analysis of seizures of a person in *Terry v. Ohio*.²⁷

A. *Seizures of a Person*

1. *The Reasonable Person's Perspective*

Prior to the seminal decision in *Terry v. Ohio*, seizures of the person were equated with full custodial arrests.²⁸ *Terry*, however, extended the scope of the Fourth Amendment to encompass temporary detentions falling short of arrest, that is, government interference with a citizen's "freedom to walk away" unencumbered by any restraint imposed by a police officer.²⁹ The right-to-walk-away test for a Fourth Amendment seizure easily was applied to the facts of *Terry* because the officer grabbed Terry, spun him around, and patted him down for weapons.³⁰ The Court had no need to address various perspectives because from any viewpoint, Terry was not free to leave.

In contrast to the obvious seizure in *Terry*, subsequent cases required the Court to address police-citizen encounters in which the officer did not so forcefully and unilaterally impose physical control over the citizen. For example, *United States v. Mendenhall*³¹ and *Florida v. Royer*³² involved situations in which law enforcement officials approached a suspected drug courier in an airport concourse and asked if the suspect was willing to stop and answer questions. Unlike the situation in *Terry*, the facts in *Mendenhall* and *Royer* required the Court to choose a perspective from which to assess whether the police-citizen encounter was consensual or whether it amounted to a Fourth Amendment seizure.

²⁷ 392 U.S. 1 (1968).

²⁸ See, e.g., *id.* at 10-11.

²⁹ See *id.* at 16-17.

³⁰ See *id.* at 7. "[T]he officer 'seized' Terry and subjected him to a 'search' when he took hold of him, spun him around, and patted down the outer surfaces of his clothing." *United States v. Mendenhall*, 446 U.S. 544, 552 (1980).

³¹ 446 U.S. 544 (1980).

³² 460 U.S. 491 (1983).

When analyzing police-citizen encounters, the Court starts from the premise that “[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.”³³ The Court has fleshed out this rudimentary principle of Fourth Amendment jurisprudence by articulating its vision of the type of police-citizen encounter that constitutes a nonseizure: It is one in which a reasonable person would not perceive any restraint of his freedom of movement, and thus would voluntarily submit to a police request to stop and answer questions.³⁴ The Court’s adoption of the reasonable person’s perspective has much to recommend it, but the Court has never explained why this perspective is preferable to the citizen’s subjective perception of government restraint or to the police officer’s subjective intent to restrain the citizen.

Any of the perspectives raised by the facts of *Mendenhall* and *Royer* could have been incorporated into existing schools of constitutional analysis. For example, had the Court chosen to adopt the citizen’s perspective, the Court could have drawn upon its earlier pronouncements regarding a citizen’s waiver of constitutional rights.³⁵ A “consensual” police-citizen encounter thus might require that a citizen knowingly and intelligently have waived his rights to privacy and liberty.³⁶ This result, however, was not preordained because in *Schneekloth v. Bustamonte*,³⁷ the Court applied a “diluted form of ‘waiver’”³⁸ to consensual searches of *property*. In *Schneekloth*, the Court’s concern over the truth-defeating aspects of the Fourth Amendment exclusionary rule³⁹ led it to distinguish consensual searches of property from knowing and intelligent waivers of other constitutional rights that “protect a fair trial and the reliability of the truth-determining process.”⁴⁰ What is unexplained in *Mendenhall* and *Royer* is why the Court did not follow *Schneekloth* by applying the same diluted form of waiver to consensual seizures of both property and person. The language of the Fourth Amendment, which equally prohibits unreasonable searches and seizures of persons, houses, papers, and effects, does not support a distinction between consensual seizures of a *person* and consensual searches and seizures of a person’s *property*.⁴¹ The language in *Schneekloth* may have

³³ Florida v. Bostick, 501 U.S. 429, 439 (1991).

³⁴ See *id.* at 434 (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.”).

³⁵ See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938) (defining waiver in the context of the Sixth Amendment right to counsel).

³⁶ Waiver ordinarily requires “an intentional relinquishment or abandonment of a known right or privilege.” *Id.* at 464.

³⁷ 412 U.S. 218 (1973).

³⁸ *Id.* at 245.

³⁹ See *infra* text accompanying notes 92-94.

⁴⁰ *Schneekloth*, 412 U.S. at 236.

⁴¹ The gap between the Court’s discussions of consensual seizures of the person or

"diluted" the rigorous standard for knowing and intelligent waiver of constitutional rights, but even the diluted standard remains a form of waiver that inherently focuses on the citizen's subjective perspective, that is, the citizen's actual belief as to whether he freely permitted or prohibited a search of property;⁴² yet, when addressing seizures of a person, the Court in *Mendenhall* and *Royer* discarded this perspective without even mentioning *Schneckloth*.

Mendenhall and *Royer* are equally opaque in their sub silentio rejection of the police officer's perspective, that is, whether the officer subjectively intended to restrain the suspect. Examining the officer's perspective would have been consistent with the Fourth Amendment goal of regulating the use and abuse of government power,⁴³ a goal the Court in *Terry* cited when it reaffirmed the judiciary's "traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security."⁴⁴ By claiming fidelity to *Terry* and the Fourth Amendment's central purpose of regulating government power,⁴⁵ the Court in *Mendenhall* might have insisted that an officer not act on his intent to detain a citizen

of property may be narrowing. In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court stressed the difference between seizures of the person and seizures of property, see *infra* text accompanying note 62, but the Fourth Circuit recently suggested that, "in light of the Court's evolving views on the relevancy of common law in defining Fourth Amendment 'seizures,' it is at least plausible that . . . [*Hodari D.*] may ultimately be held to extend to objects as well as persons." *United States v. Letsinger*, 93 F.3d 140, 143 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2437 (1997). For a discussion of the *Letsinger* decision, see *infra* text accompanying notes 249-58.

⁴² "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229.

⁴³ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 368 (1974) (stating that the Fourth Amendment is best viewed as a regulatory canon).

⁴⁴ *Terry*, 392 U.S. at 15; see also Shirley M. Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. ASS'N B. CITY N.Y. 546, 552 (1971) (stating that government conduct not classified as a search or seizure is immunized from scrutiny, even though it resulted from such illegitimate, or even malicious, motives as governmental curiosity, a desire to gather and report interesting information, or personal distaste for the political philosophies or lifestyles of certain citizens).

⁴⁵ The Framers of the Fourth Amendment were concerned with indiscriminate government intrusions, which

expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against *unjustified* searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown.

Amsterdam, *supra* note 43, at 411.

unless the officer has good cause to do so.⁴⁶ Instead, the Court disregarded the officer's intent and accorded constitutional status to a hypothetical construct (the reasonable person test) while overlooking the fact that a citizen is not free to leave when an officer intends to block any effort by the citizen to terminate the encounter.⁴⁷

In the end, *Mendenhall* and *Royer* ignored the states of mind of both the citizen and the officer in favor of a focus on the perceptions of a hypothetical reasonable person. This focus is not clearly wrong, because the Court has a legitimate concern for the proper allocation of judicial resources and for the potentially futile and costly effort of inquiring into subjective states of mind.⁴⁸ Although the Court has expressed its concern for the potential costs of inquiring into a citizen's or police officer's subjective intent; there has been no serious attempt to assess the actual costs and benefits of such an inquiry, nor has there been any attempt to distinguish other situations in which the Court has attached constitutional significance to a citizen's or officer's subjective state of mind.⁴⁹ As to the potential futility of inquiring

⁴⁶ Interpreting state constitutional law, the Supreme Court of Hawaii stated:

We cannot allow the police to randomly "encounter" individuals without any objective basis for suspecting them of misconduct and then place them in a coercive environment in order to develop reasonable suspicion to justify their detention. This investigative technique is based on the proposition that an otherwise innocent person, who comes under police scrutiny for no good reason, is not innocent unless he or she convinces the police that he or she is. Such a procedure is anathema to our constitutional freedoms.

State v. Quino, 840 P.2d 358, 365 (Haw. 1992), *cert. denied*, 507 U.S. 1031 (1993).

⁴⁷ "The Fourth Amendment . . . [is] not directed at some hypothetical government agent and what he might or would have done. [It] exist[s] to regulate the actual conduct of actual government agents in actual cases." Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1335 (1994); *see also* John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1133 (1988-89) ("The danger in reasoning from hypothetical to actual results is that if the supposed facts are not true to life, the judgment drawn from them will be equally artificial.").

⁴⁸ *See Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) (proclaiming that the inquiry into the subjective state of mind of police officers would be a costly "misallocation of judicial resources").

⁴⁹ *See Franks v. Delaware*, 438 U.S. 154 (1978) (holding that a defendant may be entitled to a hearing on the accuracy of an affidavit upon a showing that police made a deliberate falsehood); *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (noting situations in which the motivation of the officer is to perform "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"); *United States v. Colkley*, 899 F.2d 297 (4th Cir. 1990) (holding that *Franks* requires subjective bad faith). *See generally* Ronald J. Bacigal, *An Alternative Approach to the Good Faith Controversy*, 37 MERCER L. REV. 957 (1986) (arguing that recognition of both good and bad faith by police officers as relevant factors in the totality of circumstances is consistent with the Court's overall

into subjective intent, the Court recently announced that its prior decisions were not based on "the evidentiary difficulty of establishing subjective intent."⁵⁰

What is futile, however, is to read the *Mendenhall* and *Royer* opinions in hopes of discovering an assessment of the relevant merits of the various perspectives, or some hint of the justification that prompted the Court to adopt the reasonable person's perspective. The closest the Court has come to explaining its choice of perspectives has been a terse statement in *Michigan v. Chesternut*:⁵¹ "This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."⁵² The Court did not explain why, in *Schneckloth*, it accepted this type of variation when dealing with consensual searches of property, but did not accept the same variation when dealing with seizures of the person. Perhaps it is the failure to identify some guiding principle for defining consensual searches and seizures that led the Court to graft two additional perspectives onto the reasonable person standard.⁵³

2. *The Citizen's Perspective*

Mendenhall's focus on the perceptions of a reasonable person was subsequently identified by the Court as "a *necessary*, but not a *sufficient* condition for seizure"⁵⁴ An additional necessary condition is the citizen's actual submission to a show of authority that had objectively communicated that the citizen was not free to leave. The Court announced this additional requirement in *California v. Hodari D.*,⁵⁵ in which the defendant's flight at the approach of a police car prompted pursuit, in the course of which the defendant discarded a small quantity of crack cocaine subsequently retrieved by the police.⁵⁶ The California court held that the officer's pursuit would cause a reasonable person to believe that he was not free to leave, thus

balancing approach to Fourth Amendment jurisprudence).

⁵⁰ *Whren v. United States*, 116 S. Ct. 1769, 1775 (1996).

⁵¹ 486 U.S. 567 (1988).

⁵² *Id.* at 574.

⁵³ Consent "is a particularly open concept, which refers to both an 'internal' state of mind and an 'external' performance; consent is unequivocal and unquestioned only when it includes both." Weinreb, *supra* note 25, at 55.

⁵⁴ 499 U.S. 621, 628 (1991). "The narrow question before us is whether, with respect to a show of authority . . . a seizure occurs even though the subject does not yield. We hold that it does not." *Id.* at 626.

⁵⁵ 499 U.S. 621, 629 (1991).

⁵⁶ The lower court suppressed the cocaine as the fruit of the illegal seizure of *Hodari* because there was no reasonable suspicion for pursuit. See *In re Hodari D.*, 265 Cal. Rptr. 79, 86 (App. Dist. Ct. 1989).

satisfying the *Mendenhall* test for a Fourth Amendment seizure.⁵⁷ The Supreme Court, however, held that no seizure occurs until a defendant actually yields to the police due to his perception that he is not free to leave.⁵⁸

Unlike the Court in *Mendenhall*, which ignored the perceptions of the actual defendant in favor of the perceptions of hypothesized people, *Hodari D.* ignored the consideration of how such hypothesized people would, should, or might react to an unwelcome encounter with the police. Instead, the Court focused exclusively on the way a specific defendant actually responded to the police officer's show of authority. In *Hodari D.*, the Court justified its focus on the defendant's actions by invoking the common-law definition of arrest: "An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."⁵⁹ If *Mendenhall* reflects the Court's sphinx-like silence when choosing among various perspectives, *Hodari D.* offers little more than a confusing and unexplained choice between common-law precedents.

The dissent in *Hodari D.* pointed out that *Terry* and *Katz v. United States*⁶⁰ had expanded the constitutional definition of a seizure beyond common-law concepts.⁶¹ The *Hodari D.* majority, however, insisted that the dissent failed to grasp the distinction between seizures of property and seizures of a person.

The dissent is correct that *Katz v. United States*, "unequivocally reject[s] the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment." . . . But we do not assert that it defines the limits of the term "seizure"; only that it defines the limits of a *seizure of the person*. What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed.⁶²

⁵⁷ See *Hodari D.*, 499 U.S. at 629.

⁵⁸ *Hodari D.* thus negated one of the justifications for the reasonable person test, which "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). In contrast, the Court in *Hodari D.* focused "on the suspect's subjective reaction, which an officer cannot possibly predict." Bruce A. Green, *Power, Not Reason*, 70 N.C. L. REV. 373, 401 (1992).

⁵⁹ *Hodari D.*, 499 U.S. at 626.

⁶⁰ 389 U.S. 347 (1967).

⁶¹ The Court in *Terry* "concluded that the word 'seizure' in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest." *Hodari D.*, 499 U.S. at 635 (Stevens, J., dissenting).

⁶² *Id.* at 627 n.3 (first alteration in original) (citations omitted). The essence of *Katz*

In response, the dissent urged the majority to look “not to the common law of arrest, but to the common law of attempted arrest,”⁶³ which focuses on the officer’s subjective intent to apprehend the defendant.⁶⁴ The majority countered, however, that “neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.”⁶⁵

The *Hodari D.* dissent’s two-pronged effort to place attempted seizures within the coverage of the Fourth Amendment was thwarted by the majority’s facility for using each prong to trump the other. Common-law concepts of attempted arrests could not expand constitutional interpretation of unreasonable seizures of the person; yet, at the same time, the common-law concept of completed arrests constricted the Fourth Amendment prohibition against such seizures.⁶⁶ Once again, the Court appeared to be hiding the ball⁶⁷ when it failed to identify the fundamental principle that led it to

is the Court’s recognition that the Fourth Amendment protects people, not places or things. The Amendment thus protects items that are not subject to seizure at common law because they might qualify as extensions of a person’s protected privacy interests. It is difficult to comprehend the way the Court can maintain that the Amendment protects extensions of the person (for example, conversations) against incorporeal intrusions (for example, eavesdropping) but does not protect the person himself against such intrusions. If physical trespass is no longer the essence of Fourth Amendment seizures of property, physical restraint should not be regarded as the benchmark for defining seizures of the person. Once the Court recognizes that government action that falls short of physical trespass can threaten privacy interests in personal items, it would seem axiomatic to claim that government action that falls short of physical restraint could threaten personal liberty interests.

⁶³ *Id.* at 632 (Stevens, J., dissenting).

⁶⁴ The common law recognized that “an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other.” Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 201 n.3 (1940); see also *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992) (“The distinction between an arrest and an attempted arrest at common law reflected the difference between battery and assault. . . . [W]e are persuaded that the dichotomy between an attempted arrest and an arrest ‘should not take on constitutional dimensions.’”) (quoting *Hodari D.*, 499 U.S. at 631 (Stevens, J., dissenting)).

⁶⁵ *Hodari D.*, 499 U.S. at 626 n.2.

⁶⁶ Justice Scalia, the author of the majority opinion in *Hodari D.*, previously had stated that the Fourth Amendment “should not become less than” the common law. *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting). In *Hodari D.*, Justice Scalia seemed to assert that the Fourth Amendment can never mean more than the common law.

⁶⁷ See Green, *supra* note 58, at 403-04.

Given the uncertainty of the relevant common-law analogue, one might again suspect that the Court’s decision was dictated by something other than the princi-

adopt the common-law definition of a completed seizure while rejecting common-law recognition of attempted seizures.⁶⁸ If, as the Court in *Michigan v. Chesternut*⁶⁹ maintained, the reasonable person test was adopted to ensure that Fourth Amendment protection “does not vary with the state of mind of the particular individual being approached,”⁷⁰ then why did *Hodari D.* make Fourth Amendment protection contingent on the unpredictable responses of individual defendants?

3. *The Police Officer’s Perspective*

If a defendant successfully navigates through the Court’s use of the first two perspectives—reasonable perceptions and actual submission—then he must navigate a third perspective, that of the seizing officer. In *Brower v. Inyo County*⁷¹ the Court stated:

It is clear . . . that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement . . . , nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*.⁷²

ple that common law determines the scope of the term ‘seizure.’ . . . [T]he Court sounded a theme . . . [that] the law should be fashioned to encourage cooperation with law enforcement authorities. This consideration clearly explains the outcome in *Hodari D.*; reliance on common law does not.

Id. (citation omitted).

⁶⁸ Recognition of a common-law arrest as “the quintessential ‘seizure of the person’ under our Fourth Amendment jurisprudence,” *Hodari D.*, 499 U.S. at 624, does not mean that the Court must banish common-law prohibitions of attempted arrests to the trash bin of peculiar historical practices that cannot be “elevated to constitutional proscriptions.” *Id.* at 626 n.2. After all, intrusion into residential dwellings is the prototypical search specified in the Constitution. See *Payton v. New York*, 445 U.S. 573, 585-90 (1980). The Court, however, has extended Fourth Amendment coverage to commercial premises, See *v. City of Seattle*, 387 U.S. 541, 546 (1967); automobiles, *California v. Carney*, 471 U.S. 386, 390 (1985); and quasi-public areas like telephone booths, *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁶⁹ 486 U.S. 567 (1988).

⁷⁰ *Id.* at 574.

⁷¹ 489 U.S. 593 (1989).

⁷² *Id.* at 596-97.

The difficulty of translating this cumbersome language into a comprehensible third perspective is exacerbated by the Court's failure to clarify the type of intent required of the officer. The facts of the *Brower* case were classified as a seizure of the person because the suspect crashed into a police roadblock erected for the very purpose of stopping the suspect.⁷³ In contrast, however, the Court explained that there was no seizure in *Galas v. McKee*,⁷⁴ in which a fleeing motorist lost control of his vehicle and crashed during a high-speed chase by the police. In distinguishing the police intent in *Brower* and *Galas*, Justice Scalia utilized a number of terms connoting a subjective state of mind: for example, "willful" detention; results that are "desired," "sought," and "meant;" and "designed" and "selected" means.⁷⁵ Having authored an opinion replete with allusions to the police officer's subjective state of mind, Justice Scalia then proclaimed that he did not think it "practicable" to inquire into subjective intent.⁷⁶ The concurring Justices commended their colleague for avoiding inquiries into subjective intent, although they questioned his introduction of the "concept of objective intent" as a standard for determining Fourth Amendment seizures.⁷⁷ It is not clear, however, that Justice Scalia was formulating a concept of objective intent in *Brower*, because he neither employed the term in his majority opinion, nor contested or endorsed the concurring opinion's use of the term. Again one searches in vain for some explanation or precedent for the Court's focus on this form of the officer's perspective. As one lower court lamented, "[t]he reported cases all seem to look to subjective intent. However, the distinction between subjective and objective intent was not in issue in any of those cases."⁷⁸

The Court failed to clarify matters in its latest consideration of a police officer's subjective intent. In *Whren v. United States*,⁷⁹ the Justices were asked to condemn pretext seizures, that is, situations in which objective facts justify a seizure, but the police officer had actually seized the suspect as a result of the officer's impermissible motives. The Court refused to condemn pretext seizures because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."⁸⁰

Whether one agrees or disagrees with the ultimate decision in *Whren*, the opinion lucidly addresses the distinction between objective facts upon which a reasonable officer *might* have acted (a hypothetical construct) and

⁷³ See *id.* at 599.

⁷⁴ 801 F.2d 200 (6th Cir. 1986), discussed in *Brower*, 489 U.S. at 595.

⁷⁵ *Brower*, 489 U.S. at 596-99.

⁷⁶ See *id.* at 598.

⁷⁷ *Id.* at 600 (Stevens, J., concurring).

⁷⁸ *Keller v. Frink*, 745 F. Supp. 1428, 1431 (S.D. Ind. 1990).

⁷⁹ 116 S. Ct. 1769 (1996).

⁸⁰ *Id.* at 1774.

the subjective factors that *in reality* motivated an individual officer.⁸¹ In contrast, *Brower's* distinction between subjective and objective intent remains elusive because of the general understanding that the term "intent" betokens an existing state of mind rather than a hypothetical construct.⁸² To make matters worse, Justice Scalia, the author of the majority opinions in both *Brower* and *Whren*, appeared to abandon efforts to define objective intent⁸³ while invoking a new phrase—"virtual subjectivity"—which he disparagingly referred to as speculation "about the hypothetical reaction of a hypothetical constable."⁸⁴

The Court's tendency to coin a new phrase to resolve each new or difficult case leaves the contours of objective intent, subjective intent, and virtual subjectivity in doubt. At a minimum, however, it is clear that in *Brower*, the Court adopted some form of the police officer's perspective; however, the reason the Court chose this perspective remains enigmatic. The sole justification the Court in *Brower* offered for focusing on the officer's intent was the observation that "[t]he writs of assistance that were the principal grievance against which the Fourth Amendment was directed . . . did not involve unintended consequences of government action."⁸⁵ The Court's characterization of the writs of assistance controversy is accurate, but falsely suggests that the Framers of the Fourth Amendment equated the reasonableness of searches and seizures with the absence of malicious intent.⁸⁶ The Court's parsimonious reading of history ignores our nation's Founders' desire for protection against both intentional misconduct by government officials and the arbitrary exercise of governmental power.⁸⁷ In a nation

⁸¹ See *id.* at 1774-76.

⁸² See Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 841 (1991) ("*Brower* demonstrates that the intent to seize is measured objectively but does not specify how that is to be done.>").

⁸³ During oral arguments in *Hodari D.*, Justice Scalia "asked counsel what he thought the words 'intentional acquisition of control' in [*Brower*] meant." [Arguments Heard:] *California v. Hodari D.*, 48 Crim. L. Rep. (BNA) 3131 (U.S. Feb. 6, 1991).

⁸⁴ *Whren*, 116 S. Ct. at 1775.

⁸⁵ *Brower*, 489 U.S. at 596 (citations omitted).

⁸⁶ See *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.>").

⁸⁷ One of the most "odious features of writs of assistance [was] the unbridled discretion given public officials to choose targets of the searches." Shirley M. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487 (1979); see also *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."); *Amsterdam*, *supra* note 43, at 417 ("A paramount purpose of the [F]ourth

that cherishes the “right to be let alone,”⁸⁸ the Fourth Amendment compels the Court to articulate constitutional standards that protect the individual from arbitrary or intimidating police conduct, whatever the officer’s actual intent. The *Brower* opinion fails to persuade because it focuses on a specific historical practice (writs of assistance) while refusing to address the fundamental purposes underlying the Fourth Amendment and the role that the officer’s perspective plays in furthering or frustrating those purposes.

In summary, the Court’s seizure-of-the-person decisions in *Mendenhall*, *Hodari D.*, and *Brower*, evoke the rationale often given to the student who questions why he or she received less than an “A” on his or her examination: “It’s not that what was said is wrong, it’s what wasn’t said. The fault lies in the failure to adequately address all aspects of the question.”

B. *Consensual Searches of Property*

1. *The Citizen’s Perspective*

The essence of the *Mendenhall* test for a seizure of the person is the possibility of choice, that is, whether a reasonable person would have understood that he or she was free to leave. The possibility of choice is also the essence of determining a suspect’s consent to a search of his or her property, but here the choice must be that of the actual suspect, not a hypothetical person. In *Schneckloth v. Bustamonte*,⁸⁹ all the Justices agreed that the determinative factor was the citizen’s subjective decision to consent to a search of his property.⁹⁰ The only controversy in the case centered on whether the citizen’s “consent” must be a knowing and intelligent waiver of the right to be free from unreasonable searches, or whether the consent need only be voluntary in that there was no impermissible police coercion.⁹¹ The *Schneckloth* majority concluded that the waiver standard was limited to

[A]mendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.”); Arnold H. Loewy, *The Fourth Amendment As a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1236 (1983) (“Virtually every significant prerevolutionary search or seizure involved a nonspecific or arbitrarily obtained warrant.”).

⁸⁸ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁸⁹ 412 U.S. 218 (1973).

⁹⁰ “[A]ccount must be taken of . . . the possibly vulnerable subjective state of the person who consents.” *Id.* at 229.

⁹¹ Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 66 (1989). Although writing of the voluntariness of confessions, Professor Benner’s observation applies equally to voluntary consent to search. “The central teaching of *Connelly* [479 U.S. 157 (1986)] is that voluntariness simply entails the absence of official coercion, and does not otherwise require ethical conduct or fairness in dealing with the accused.” *Id.*

those constitutional rights that "protect a fair trial and the reliability of the truth-determining process."⁹² The strict requirement for knowing and intelligent waiver thus should not be applied to the Fourth Amendment because its protections "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."⁹³

Having relegated the Fourth Amendment to less exalted status than those constitutional rights serving truth and justice,⁹⁴ the Court in *Schneckloth* sought a less stringent standard for measuring consensual searches. The appropriate standard conveniently was found in the Court's approach to the voluntariness of confessions.⁹⁵ As is the case with confessions, voluntariness of a consent to search turns upon whether the consent is the product of a person's free and unconstrained choice, or whether the will of the individual searched was overborne and his capacity for self-determination critically impaired.⁹⁶ With respect to both confessions and searches, voluntariness thus is determined by examining the totality of the circumstances, including a defendant's personal characteristics.

The Court's decision in *Schneckloth* to substitute voluntariness for knowing waiver, and the Court's refusal to extend *Miranda*-style warnings to the Fourth Amendment,⁹⁷ is revisited in Part II of this Article.⁹⁸ Justice

⁹² *Schneckloth*, 412 U.S. at 236.

⁹³ *Id.* at 242. The dominance of the exclusionary rule in *Schneckloth* was even more apparent in Justice Powell's concurring opinion, which sought to limit the Court's habeas corpus review of Fourth Amendment violations. *See id.* at 250 (Powell, J., concurring). Justice Powell maintained that federal habeas corpus review of Fourth Amendment violations did not serve "the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an *unjust* incarceration. . . . Prisoners raising Fourth Amendment claims collaterally usually are quite *justly* detained." *Id.* at 257-58 (Powell, J., concurring).

⁹⁴ *See, e.g.,* *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position.").

⁹⁵ "The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment." *Schneckloth*, 412 U.S. at 223.

⁹⁶ *See id.* at 225.

⁹⁷ According to the Court in *Schneckloth*, the basis for the *Miranda* decision "was the need to protect the fairness of the trial itself." *Id.* at 240. Although borrowing freely from the Court's confession cases, the Court in *Schneckloth* refused to follow the progression of that line of cases to *Miranda*. A defendant's subjective knowledge of a right to refuse consent is thus one relevant circumstance in determining voluntary consent, but "knowledge of a right to refuse is not a prerequisite of a voluntary consent." *Id.* at 234.

⁹⁸ *See infra* text accompanying note 147.

Marshall's dissent in *Schneekloth* pointed to one underlying theme that might guide the Court's choice of perspectives when interpreting the Fourth Amendment. According to Justice Marshall: "The Constitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose, . . . [and] the capacity to choose necessarily depends upon knowledge that there is a choice to be made."⁹⁹ Even without Justice Marshall's endorsement of a broad right to free choice, *Schneekloth* remains the high-water mark for judicial adoption of the citizen's perspective because all the Justices agreed that the citizen's subjective state of mind should govern consensual searches of property.¹⁰⁰ In *Schneekloth*, however, the Court foreshadowed its inability to maintain a focus on the defendant's subjective perspective by suggesting that "a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third-party consents.'"¹⁰¹

2. A Third Party's Perspective

As *Schneekloth* suggests, the issue of third-party consent is paradoxical if conceived of as one person waiving another person's constitutional rights.¹⁰² The third-party consent cases that troubled the Court in *Schneekloth*, however, were only tangentially related to a third party's perspective. Two of those cases, *Chapman v. United States*¹⁰³ and *Stoner v. California*,¹⁰⁴ stand for the unsurprising proposition that landlords and hotel clerks (or other third parties with limited property-law claims to the

⁹⁹ *Schneekloth*, 412 U.S. at 277 (Marshall, J., dissenting) (alteration in original) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result)).

¹⁰⁰ The Court's focus on voluntariness in *Schneekloth* was reaffirmed in *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

¹⁰¹ *Schneekloth*, 412 U.S. at 245.

¹⁰² "To conclude that a [F]ourth [A]mendment right to privacy may be lost because a person with no or little stake in the outcome decides to throw it away is bizarre." Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 180 (1991).

¹⁰³ 365 U.S. 610, 617 (1961) (explaining that vesting the landlord with authority to consent "would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]") (alterations in original) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

¹⁰⁴ 376 U.S. 483, 489 (1964) ("It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent."). The Court in *Stoner* also discounted the police officer's perspective because "there [was] nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." *Id.*

premises being searched) cannot consent to a search of their tenants' residences.¹⁰⁵ The remaining third-party consent case, *Frazier v. Cupp*,¹⁰⁶ is inconsistent with a waiver theory, but it is best viewed as a precursor to the Court's shift toward the police officer's perspective. In *Frazier*, the defendant's cousin consented to the search of a duffel bag owned by the defendant but jointly used by both the defendant and the cousin. Despite this mutual access to the duffel bag, the defendant informed the Court that the cousin had permission to use only one compartment of the bag and thus lacked authority to consent to a search of the other compartments in which the incriminating evidence was found. The Court ridiculed this contention as a "metaphysical subtlety" and stated that the defendant "must be taken to have assumed the risk that [the cousin] would allow someone else to look inside."¹⁰⁷

Frazier is a case that cries out for consideration of the officer's perspective. A reasonable officer, dealing with what appears to be a simple duffel bag, would have had no way of knowing about the secret subjective limitations on the suspect's apparently total control of the bag. It is in this sense that the defendant's argument becomes a metaphysical subtlety contrasting secret subjective intentions with objective manifestations of control. *Frazier* would have been an easy decision if the Court had been prepared to apply the officer's perspective, but it would take another twenty years before the Court would do so.¹⁰⁸

Frazier was not a mere misstep on the Court's path to adopting the police perspective. *Frazier* and subsequent third-party consent cases actually reinforced the citizen perspective (so long as one discards the Court's superficial reference to assumption of risk). In theory and practice, third-party consent does not rest upon an explicit or implicit delegation of authority by defendants who, as a general rule, never pondered the possibility or risk of a third-party sanctioning a search or seizure.¹⁰⁹ The proper justification for such consent is the third party's independent right to admit police to proper-

¹⁰⁵ In *Chapman*, the government argued that, by using his rented house as an illegal distillery, the defendant "forfeited" his rights as a tenant; thus the landlord had a common-law right to enter and to bring police officers with him. See *Chapman*, 365 U.S. at 616.

¹⁰⁶ 394 U.S. 731 (1969).

¹⁰⁷ *Id.* at 740.

¹⁰⁸ See *infra* text accompanying note 115.

¹⁰⁹ The clearest case of third-party consent would be a situation in which the defendant explicitly authorized an agent to consent to a search. Fourth Amendment rights may be waived "by word or deed, either directly or through an agent." *Stoner*, 376 U.S. at 489. It is not surprising that the Court has never encountered such a case "because people living agreeably together usually do not arrive at explicit, regular practices; they proceed by understandings that are most satisfactory if they are imprecise, flexible, and unstated." Weinreb, *supra* note 25, at 63.

ty that he or she jointly controls. As *United States v. Matlock*¹¹⁰ subsequently recognized, "any of the co-inhabitants [of a residence] has the right to permit the inspection *in his own right*"¹¹¹

In third-party consent cases, the proper question for the Court is whether the third party "possessed common authority over or other sufficient relationship to the premises"¹¹² so that command over admitting the police necessarily accompanies such control. In short, the landlord and hotel clerk in *Chapman and Stoner* did not have this power, while the co-inhabitant in *Matlock* did. One may quibble over the degree of control that necessarily conveys authority to admit the police, but this is a legal question for the Court, not a choice consciously or unconsciously made by the defendant.¹¹³ Assumption of risk is thus a pure fiction masquerading as a concern for the defendant's perspective. Once the Court recognizes that a certain degree of lawful physical control vests a third person with authority to admit the police, the Court may apply the third party's perspective notwithstanding the defendant's wishes. For example, if two co-tenants fully control access to shared premises, each may admit anyone. In so doing, one tenant is not waiving the rights of the other, but merely is exercising his own power to do as he or she pleases with the property. Viewed in this light, third-party consent does not involve a separate and distinct perspective. It is still the citizen's perspective, though it is not the citizen who ultimately winds up as the criminal defendant.

3. *The Police Officer's Perspective*

After ignoring the police officer's perspective in *Frazier*, and expressly reserving ruling on the issue in *United States v. Matlock*,¹¹⁴ the Court adopted the police officer's perspective in *Illinois v. Rodriguez*¹¹⁵ by upholding a search based on apparent authority as viewed from the officer's standpoint. The consent in *Rodriguez* was given by a woman who referred to the defendant's apartment as "our" apartment, and who informed the

¹¹⁰ 415 U.S. 164 (1974).

¹¹¹ *Id.* at 171 n.7 (emphasis added).

¹¹² *Id.* at 170.

¹¹³ The relationship between the consentor, the defendant, and the areas searched is not a factual question, but "an inherently legal one." *United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997) (quoting *United States v. Hamilton*, 792 F.2d 837, 844 (9th Cir. 1986)). An appellate court thus conducts a de novo review in order "to 'consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests.'" *Id.* (quoting *Hamilton*, 792 F.2d at 844 (quoting *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir. 1982) (en banc), *cert. denied*, 469 U.S. 824 (1984))).

¹¹⁴ 415 U.S. at 178 n.14.

¹¹⁵ 497 U.S. 177 (1990).

police that she had clothes and furniture there. In fact, the woman had vacated the apartment a month before the search, and the Court conceded that she had no actual authority over the premise. Nonetheless, the Court held that the Fourth Amendment does not require factual accuracy on the part of the police.¹¹⁶

The *essential purpose* of the proscriptions in the Fourth Amendment is to impose a standard of “reasonableness” upon the exercise of discretion by government officials. The only basis for contending that the constitutional standard could not possibly have been met here is the argument that reasonableness must be judged by the facts as they were, rather than by the facts as they [appeared to the officer].¹¹⁷

Rodriguez’s endorsement of the police viewpoint reflects the Court’s emerging view of the fundamental purpose of the Fourth Amendment: What is demanded of police “is not that they always be correct, but that they always be reasonable.”¹¹⁸

The Court reinforced this emphasis on the reasonable officer’s perspective in *Florida v. Jimeno*,¹¹⁹ in which the officer’s perception of appearances was extended beyond third-party consent situations and applied to the scope of consent given by the defendant. In *Jimeno*, the defendant consented to a search of his vehicle, but the lower court ruled that the consent did not extend to the officer’s separate act of opening a container found within the vehicle.¹²⁰ According to the trial court, “if the police wish to search closed containers within a car they must separately request permission to search each container.”¹²¹ The Supreme Court, however, found this approach to be in conflict with “the Fourth Amendment’s basic test of objective reasonableness,”¹²² which *Jimeno* referred to as “the touchstone of the Fourth Amendment.”¹²³ The Court held that “the standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood

¹¹⁶ See *id.* at 185.

¹¹⁷ *Id.* at 186 n.1 (emphasis added).

¹¹⁸ *Id.* at 185.

¹¹⁹ 500 U.S. 248 (1991).

¹²⁰ See *State v. Jimeno*, 550 So. 2d 1176 (Fla. Dist. Ct. App. 1989) (declaring that consent to a general search for narcotics does not extend to sealed containers within the general area agreed to by the defendant).

¹²¹ *Jimeno*, 500 U.S. at 252.

¹²² *Id.*

¹²³ *Id.* at 250.

by the exchange?"¹²⁴ As in *Rodriguez*, what is demanded of police "is not that they always be correct, but that they always be reasonable."¹²⁵

Rodriguez's and *Jimeno's* endorsement of the police officer's perspective rests upon the Court's use of the word "reasonable" in two distinct manners. The Court used reasonableness as a term of art synonymous with constitutionality, and, at the same time, a description of the searching officer's rational analysis of the situation. This approach conceptualizes the Fourth Amendment as a limited guarantee that although "subjective good-faith belief would not in itself justify"¹²⁶ a governmental intrusion upon individual privacy, at least some searches and seizures are constitutional when based on "understandable," excusable mistakes by the police;¹²⁷ however, the history of the Fourth Amendment teaches that constitutionality hinges on more than individual ad hoc decisions, no matter how reasonable, understandable, or excusable they may have appeared to the searching officer. The full implications of this and other views of the Fourth Amendment, and their effect on choosing perspectives, are considered in the next section.

II. A PRINCIPLED APPROACH TO CHOOSING PERSPECTIVES

When setting out to structure a principled process for judicial adoptions of interpretive perspectives, the first question that arises is: At what level of generality should the Court operate?¹²⁸ Should the Court settle on some fundamental constitutional principle that favors a particular perspective? Should the Court even concern itself with consistency, foolish or otherwise, when choosing among various perspectives? One solution to such broad questions is to abandon them in favor of a narrower, pragmatic approach that merely asks which perspective works best in each unique situation. In other words, instead of judging legal principles according to their logical consistency, "it is much more important to study their social operation and the effects which they produce."¹²⁹ This form of pragmatic utilitarianism¹³⁰ discounts any inherent value in favoring the viewpoint of a citizen, police officer, or hypothetical person, because these perspectives are

¹²⁴ *Id.* at 250-51.

¹²⁵ *Rodriguez*, 497 U.S. at 185.

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting *Maryland v. Garrison*, 480 U.S. 79, 88 (1987)).

¹²⁸ "The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves." Amsterdam, *supra* note 43, at 377.

¹²⁹ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912).

¹³⁰ See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) (comparing legal formalism with pragmatism).

seen merely as tools to be utilized in serving the public welfare as perceived from a broad social perspective. Pragmatic utilitarianism propels the Court to the forefront, where it decides what is best for society without deferring to other decision makers.

A. *Pragmatic Utilitarianism from the Court's Perspective*

Nineteenth-century legal formalism dominated American judicial thought when the Supreme Court encountered its first important Fourth Amendment case, *Boyd v. United States*.¹³¹ Legal formalism in its most rigorous manifestation espoused the view that adjudication proceeds by deduction from virtually absolute legal principles rooted in natural law and enshrined in both the common law and the Constitution. Pursuant to this view, constitutional rights and the rules enforcing them were to be "applied rigorously even if this produced results that conflicted with important social goals, such as efficient law enforcement."¹³² Legal formalism led the Court to conclude in *Boyd* that the Fourth Amendment is to provide absolute protection of private papers no matter how reasonably the government were to proceed in obtaining a warrant or subpoena satisfying the probable cause and particularity requirements of the Amendment.¹³³

By the time the Court encountered a sizable body of search-and-seizure cases during the prohibition era, legal formalism came under heavy attack from the more pragmatic and relativist vision of law associated with the legal realists. The legal realists derided formalism's pretensions of objectivity, while insisting that the Court must weigh social policies and assess all the facts and circumstances of a case in order to determine the most just or socially desirable outcome.¹³⁴ This relativistic debate over sound social policy came to the forefront when the issue of government wiretapping arose in *Olmstead v. United States*.¹³⁵

In eloquent language that appeals to Americans as diverse as laissez-faire business men and paramilitary cults, Justice Brandeis's dissent in *Olmstead* put forth Brandeis's view of the contribution the Fourth Amendment makes to our society:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized

¹³¹ 116 U.S. 616 (1886).

¹³² See Cloud, *supra* note 130, at 566.

¹³³ *Boyd*, 116 U.S. at 634-35.

¹³⁴ "The Fourth Amendment is to be construed . . . in a manner which will conserve public interests as well as the interest and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925).

¹³⁵ 277 U.S. 438 (1928).

the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment.¹³⁶

Justice Holmes, who was at times another leading proponent of legal realism, straightforwardly confessed that he approached the issue in *Olmstead* by balancing the “two objects of desire . . . that criminals should be detected . . . [and] that the Government should not itself foster and pay for other crimes.”¹³⁷ For Holmes, it was “less evil that some criminals should escape than that the Government should play an ignoble part.”¹³⁸

Much of modern-day constitutional jurisprudence has embraced the type of pragmatic interest balancing championed by Justices Brandeis and Holmes. The most militant of today's pragmatists reject the notion that individual rights can trump social policies, and instead insist that constitutional rights must justify themselves in terms of their contribution to total social welfare.¹³⁹ The Fourth Amendment, because of its socially costly

¹³⁶ *Id.* at 478 (Brandeis, J., dissenting).

¹³⁷ *Id.* at 470 (Holmes, J., dissenting).

¹³⁸ *Id.* Perhaps the most revealing description of this pragmatic approach is Justice Cardozo's merger of the legislative and judicial functions:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and [the judge's]. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921).

¹³⁹ “[T]he undeniable message is that those calling for greater protection of a ‘right’ had better be prepared to explain how the protection benefits not only the individual claimant but all of society.” Scott E. Sundby, “*Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 *COLUM. L. REV.* 1751, 1765

“remedy” of suppressing relevant evidence, has suffered most from this form of pragmatic interest balancing.¹⁴⁰ Handicapped by the current Court’s hostility to the harmful effects of the exclusionary rule, *Boyd*’s formalistic view of the Fourth Amendment has given way to “consequential reasoning that emphasizes not individual rights but the instrumental use of the law to achieve social and government policy goals.”¹⁴¹ Balancing competing societal interests such as crime prevention and deterrence of police misconduct thus has emerged as the keynote of the Court’s interpretation of the Fourth Amendment.¹⁴²

In the past few decades, judicial attempts to balance individual rights against community interests have tended to ride roughshod over the individual’s perspective.¹⁴³ The *Jimeno* majority, for example, adopted the officer’s perception that he had a broad grant of authority to search the defendant’s vehicle because “the community has a real interest in encouraging consent.”¹⁴⁴ In turn, encouraging consent serves the laudable social goal of protecting the innocent, “for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.”¹⁴⁵ In dissent, however, Justice Marshall saw a far different social policy at work because he viewed adoption of the police officer’s perspective as encouraging the police to exploit “the ignorance of a citizen.”¹⁴⁶ Justice Marshall rejected the *Jimeno* majority’s view of what was in the community’s interest and the type of community the Fourth Amendment seeks to preserve:

(1994).

¹⁴⁰ See *Stone v. Powell*, 428 U.S. 465 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that Fourth Amendment issues may not be raised in federal habeas corpus petitions unless the state denied the defendant a full and fair hearing on the issue). *Stone* and *Schneckloth* present the most striking examples of the way the Court has relegated the Fourth Amendment, and its socially costly exclusionary rule, to some lower class of constitutional rights. The Court has not provided this class of rights with the deference reserved for constitutional rights that further truth, justice, and the American way.

¹⁴¹ *Cloud*, *supra* note 130, at 598.

¹⁴² “[T]he balancing of competing interests [is] the key principle of the Fourth Amendment.” *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

¹⁴³ See Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 202 (1993) (“Fourth Amendment pragmatism produces outcomes that diminish the scope of individual liberty while increasing government power . . .”).

¹⁴⁴ *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 255 (Marshall, J., dissenting).

[T]he majority is claiming that “the community has a real interest” not in encouraging citizens to consent to investigatory efforts of their law enforcement agents, but rather in encouraging individuals to be duped by them. This is not the community that the Fourth Amendment contemplates.¹⁴⁷

Today, those who advocate Justice Marshall’s concern for individual rights “must address why, in a world plagued by terrorism, drug cartels, and drive-by-killings, the Court’s definition of ‘unreasonable searches and seizures’ should not give deference to heightened law enforcement needs”¹⁴⁸ The preordained failure of such advocacy is obvious in such cases as *Pennsylvania v. Mimms*¹⁴⁹ and *Maryland v. Wilson*,¹⁵⁰ in which the Court was asked to rule on a police practice of ordering all motorists out of their vehicles “as a matter of course whenever they had been stopped for a traffic violation.”¹⁵¹ In *Mimms* and *Wilson*, the Court addressed this uniform practice without inquiring whether the individual police officer had any suspicion that the particular motorist was likely to be armed and dangerous.¹⁵² The Court concluded that uniform treatment of motorists as a class was justified by statistical evidence “that a significant percentage of murders of police officers occurs when the officers are making traffic stops.”¹⁵³ Regardless of the particular facts of a given case, the generalized

¹⁴⁷ *Id.* at 256 (Marshall, J., dissenting). The same type of conflicting views of the good society and the pragmatic way to achieve it are apparent in the Court’s refusal in *Schneekloth* to graft *Miranda*-style warnings onto the Fourth Amendment because such warnings were “thoroughly impractical.” *Schneekloth*, 412 U.S. at 231. Justice Marshall again saw the issue differently:

When the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights.

Id. at 288 (Marshall, J., dissenting).

¹⁴⁸ Sundby, *supra* note 139, at 1771.

¹⁴⁹ 434 U.S. 106 (1977).

¹⁵⁰ 117 S. Ct. 882 (1997).

¹⁵¹ *Mimms*, 434 U.S. at 110; *see also Wilson*, 117 S. Ct. at 884.

¹⁵² *See Mimms*, 434 U.S. at 109; *Wilson*, 117 S. Ct. at 886. The state conceded in *Mimms* that “the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior.” *Mimms*, 434 U.S. at 109; *see also Wilson*, 117 S. Ct. at 886.

¹⁵³ *Mimms*, 434 U.S. at 110; *see also Wilson*, 117 S. Ct. at 883. This time it was Justice Stevens who contended that the majority’s view in *Mimms* was not faithful to the community that the Fourth Amendment contemplates: “[W]hether viewed from the standpoint of the officer’s interest in his own safety, or of the citizen’s interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of

governmental interest in protecting police from attack by armed motorists was deemed to outweigh the generalized privacy interest of motorists as a class.¹⁵⁴

Whether dealing with a class of the citizenry such as motorists, or an individual citizen confronted by a solitary police officer, the Court employs the same pragmatic balancing of governmental and individual interests to resolve all Fourth Amendment issues.¹⁵⁵ Taken to its logical end, the Court's pragmatic utilitarianism reduces all Fourth Amendment deliberations to two related fundamental inquiries: (1) How much and what type of privacy or liberty does a reasonably free society require, and (2) how much and what type of intrusion upon privacy or liberty is required to further a reasonably well-ordered society?¹⁵⁶ If the Court must grapple with such ques-

traffic stops that occur every year are not fungible." *Mimms*, 434 U.S. at 120-21 (Stevens, J., dissenting). To Justice Stevens, the majority's willingness to manipulate individual motorists for the general good of society fulfilled the legal realists' view that "the law does undoubtedly treat the individual as a means to an end [J]ustice to the individual is rightly outweighed by the larger interests on the other side of the scales." OLIVER WENDELL HOLMES, *THE COMMON LAW* 40-41 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881).

¹⁵⁴ Cf. *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997) (rejecting a per se rule that would eliminate the need for knock and notice in all felony drug investigations).

[W]hile drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. . . . If a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Id. at 1421.

¹⁵⁵ "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. *In each case* it requires a balancing of the need for the particular search against the invasion of the personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (emphasis added). Balancing "has the danger of becoming a sort of universal solvent, operating as a technique for resolving all constitutional questions without much regard for the choices authoritatively expressed in the language of that document itself." James White, *The Fourth Amendment As a Way of Talking about People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 171.

¹⁵⁶ "[T]he practical calculus evident in the search and seizure corpus is to decide how much individual liberty is compatible with the social interest in security." Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 859 (1989); see also *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring) (noting that the Constitution and Bill of Rights can be seen as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself"); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 13 (1966) (claiming that issues raised under the Fourth Amendment "bring into sharp focus the classic dilemma of order vs. liberty in the democratic state").

tions in order to formulate a grand scheme for the good society,¹⁵⁷ it seems almost impertinent to point out that the Court has neglected the issue of choosing perspectives and has been inconsistent in the choices that it has made. Understandably, the Court is concerned primarily with the far weightier criticism of the undemocratic nature of judicial utilitarianism. Told by countless commentators that the Court has no legitimate claim to making moral and political decisions based on its conception of a good society,¹⁵⁸ it is not surprising that the Court has thrown up its hands and confessed:

The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions . . . and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.¹⁵⁹

One certainly can empathize with the Court's frustration when called upon to justify whether its decisions meaningfully contribute to building a utopia.¹⁶⁰ After all, professors can ignore tough cases or postpone meaningful consideration until the next sabbatical, but the Court must decide real cases that affect real people.¹⁶¹ Forced to act in an imperfect world, the Court is understandably tempted to pass on its burden to others.¹⁶² As Pro-

¹⁵⁷ One rather strident comment on the death of legal formalism and the rise of legal realism contended: "No longer could the judiciary hide behind the facade of essentially indeterminate deductions from so-called absolute moral principles in order to force upon society its own values and thereby obstruct progress toward maximum social efficiency." Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 966 (1977).

¹⁵⁸ "The presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good." *New Jersey v. T.L.O.*, 469 U.S. 325, 370 (1985) (Brennan, J., dissenting).

¹⁵⁹ *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973).

¹⁶⁰ See John B. Mitchell, *What Went Wrong with the Warren Court's Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35, 42-43 (1992) (suggesting that the Court must rethink the Amendment in terms of keeping with some basic vision of America).

¹⁶¹ "Authority cannot be conceded to persons because they are right—the authority must preexist their right or wrong judgment and must survive it too—and judges decide cases by virtue of their authority, and not because they are any more likely to be right than other people." Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 761 (1963).

¹⁶² "[G]iven the magnitude of the type of societal problems that governmental intru-

fessor Tribe suggested, “[a]bdicating responsibility for choice, then, is a characteristic sin of the current Court.”¹⁶³ At times, the Court’s burden has been passed to police, hypothetical reasonable people, or individual citizens, whose perspectives are utilized to resolve Fourth Amendment issues.

B. Reasonableness from the Police Officer’s Perspective

If the Court merits our compassion as it grapples with molding the law to serve society, the police are entitled to our commiseration when they confront an increasingly violent class of criminal in modern-day America. For example, an officer’s sense of danger during street encounters may be both real and accurate, yet difficult to reconstruct and articulate in some concrete fashion.

We have all seen people so hard or mean in appearance that they make us feel uncomfortable, perhaps to the point of crossing the street or moving our seat on the subway. We have confidence in such judgments, and act on them ourselves, yet how could we explain them in a court of law? How can we ask an officer to do so?¹⁶⁴

In an imperfect world where correct answers are uncertain, a “pragmatic” Court recognizes that it must muddle through to the best of its ability, and that it can hardly ask more from the police. Thus, the Court often determines the constitutionality of police conduct “by resorting to a malleable ‘objective’ test of reasonableness viewed from the police officer’s perspective,”¹⁶⁵ and “any police conduct that is ‘understandable’ in the circum-

sions will address—such as weapons possession, drunk driving, drug use, and gang activity—judicial review increasingly will defer to the government’s judgment that the intrusion was necessary.” Sundby, *supra* note 139, at 1768-69.

¹⁶³ Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 170 (1984).

¹⁶⁴ White, *supra* note 155, at 199.

¹⁶⁵ Cloud, *supra* note 143, at 265; see also Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 477 (1991):

Although the [F]ourth [A]mendment conveys to “the People [the right] to be secure in their persons, houses, papers, and effects,” the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person’s rights were violated. This approach endorses retrospective evaluations of police behavior rather than prospective protections.

(footnote omitted) (quoting U.S. CONST. amend. IV.).

stances according to common sense [will] be judged 'reasonable' for purposes of assessing the constitutionality of police intrusions."¹⁶⁶

Although the Court's adoption of the officer's viewpoint is defensible, once again one may ask for a fuller explanation of the way the Court chose this perspective. Why did the Court choose to empathize with the officer's plight while turning a deaf ear to citizens of Spanish descent who were singled out at roadblocks,¹⁶⁷ or to international travelers who were held incommunicado for twenty-four hours in a "dry cell" until they furnished a bowel sample?¹⁶⁸ The distasteful answer may be that in the actual cases that reach the Court, the defendants usually are guilty of some serious crime. The obvious guilt of the balloon-swallowing drug smuggler in *United States v. Montoya de Hernandez*,¹⁶⁹ allowed the Court to brush aside the defendant's twenty-four hour confinement in a "dry cell" by noting that the "detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country."¹⁷⁰ 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.¹⁷¹ If Fourth Amendment cases turn on the relative blameworthiness of police and defendants, cynics are correct in suggesting that the inconsistency in the Court's reasoning disappears when the true unifying principle is recognized—the government wins!¹⁷²

¹⁶⁶ Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 52-53 (1991); see, e.g., *United States v. Ventresca*, 380 U.S. 102, 109 (1965) ("[C]ourts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.").

¹⁶⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹⁶⁸ See *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

¹⁶⁹ 473 U.S. 531 (1985).

¹⁷⁰ *Id.* at 544.

¹⁷¹ "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). "One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply." *Kopf v. Skyrn*, 993 F.2d 374, 379-80 (4th Cir. 1993).

¹⁷² "If the Court can identify any plausible goal or reason that promotes law enforcement interests, the challenged police intrusion is considered reasonable and the constitutional inquiry is over." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 200 (1993).

In its rush to condemn the guilty, the Court has overlooked the fact that the standards it has fashioned to govern the ferreting out of the guilty apply equally to the detention of the innocent. Empirical data indicates that the sins of the few weigh heavily on the blameless. According to the dissent in *Montoya*, “[o]ne physician who at the request of customs officials conducted many ‘internal searches’—rectal and vaginal examinations and stomach pumping—estimated that he had found contraband in only 15 to 20 percent of the persons he had examined.”¹⁷³ Other estimates suggested that “only 16 percent of women subjected to body-cavity searches at the border were in fact found to be carrying contraband.”¹⁷⁴

The ability to look beyond the obvious guilt of a particular defendant requires judicial foresight, discipline, and courage, and it may be impossible for judges to completely ignore the severity of the crime committed by a defendant.¹⁷⁵ At a minimum, judges are painfully aware of the tension between protecting rights and knowing that some will abuse those rights and act irresponsibly.

The First Amendment is the constitutional shelter for progressive visionaries, but it is also the refuge of those who preach hatred. And while the Fourth Amendment erects a barrier from government intrusion for those who wish to live peacefully, it is also a barrier behind which the drug smuggler will try to hide.¹⁷⁶

In a society simultaneously fearful of crime and resentful of “jack-booted” government authorities, there is no avoiding the inevitable tension between security *against* the government and security that *depends* on government efforts to control crime.

In the final analysis, however, even the guilty are entitled to protection against overbearing government intrusions, and to some extent we must take the Court at its word that it strives to “prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure.”¹⁷⁷ What then, oth-

¹⁷³ *Montoya*, 473 U.S. at 557 (Brennan, J., dissenting).

¹⁷⁴ *Id.*

¹⁷⁵ See *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting): I should candidly strive hard to sustain [a roadblock without probable cause] . . . because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

¹⁷⁶ *Sundby*, *supra* note 140, at 1808.

¹⁷⁷ *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976); see also *United States v. Di Re*, 332 U.S. 581, 595 (1948) (A Fourth Amendment entry of a home cannot “be made legal by what it turns up. In law it is good or bad when it starts and does

er than the comparative moral worth of police and criminal defendants, motivates the Court to adopt the police officer's perspective? Professor LaFave has suggested that Fourth Amendment doctrine

is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."¹⁷⁸

At times, the Court has embraced Professor LaFave's approach by announcing that "the first principle" of Fourth Amendment interpretation is that the constitutional standard must be "workable for application by rank-and-file, trained police officers;"¹⁷⁹ however, formulating rules that are clear in application says little about the substance of those rules.¹⁸⁰ "Don't search on Thursdays" is a clear rule furthering privacy interests; "search all teenagers who are in public after 11 p.m." is a clear rule diminishing privacy. Does the Fourth Amendment have nothing to say about the desirability of these equally clear rules? Once the Court settles on the conditions under which a search or seizure may occur, we would all hope that the Court will be as lucid as possible in defining the contours of such reasonable searches. This is as fundamental as mom and apple pie; the police are not unique in preferring clarity over ambiguity.¹⁸¹ If, however, clarity is all that the police want, one very clear rule would be "when in doubt, don't search," or at

not change character from its success.").

¹⁷⁸ Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures:" *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (citations omitted).

¹⁷⁹ *Illinois v. Andreas*, 463 U.S. 765, 772 (1983).

¹⁸⁰ Professor LaFave did not advocate clarity as the sole or dominant consideration, but instead argued that clarity plays a role in the calculus of balancing government and individual interests. He suggested that a rule, theoretically correct only 95% of the time, but understandable in virtually all cases, is preferable to a rule that is 100% theoretically correct, but which police could apply correctly only 75% of the time. See Wayne LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9, 30 n.76 (1972).

¹⁸¹ "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 186 (1920).

least don't search until the doubt is resolved. This was the essence of the lower court's holding in *Jimeno* that police cannot open containers found in a defendant's automobile unless they obtain permission to search not just the vehicle, but the particular container.¹⁸² The Supreme Court, however, rejected this clear rule in favor of an uncertain inquiry into how a reasonable officer might interpret permission to search an automobile.

The Court's vacillation between vague and well-defined standards¹⁸³ may stem from its realization that the quest for clearly stated, determinative rules is futile. "[A]ny attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles."¹⁸⁴ For example, in *Hodari D.*,¹⁸⁵ the Court sought to make the constitutional criteria for seizures of the person contingent upon factual predicates that police officers can readily understand—submission to authority or physical touching. In *Hodari D.*, the Court announced a seemingly absolute rule that a seizure may be "accomplished by merely touching, however slightly, the body of the accused"¹⁸⁶ However, in the very next seizure-of-a-person case, *Florida v. Bostick*,¹⁸⁷ the Court was asked to apply this absolute rule to a situation in which the police officer "physically touched the defendant's foot to get his attention."¹⁸⁸ The *Bostick* opinion's failure to address this contention suggests that the "absolute rule" announced in *Hodari D.* had been modified to recognize that certain forms of touching are insufficient for a seizure.¹⁸⁹

The inability to formulate clear rules for addressing the myriad of situations in which police intrude upon privacy and security increasingly leads the Court to adopt one overarching rule for the police; just use your common sense and act reasonably. As formulated in *Terry v. Ohio*, the standard is whether "the facts available to the officer at the moment of the seizure or

¹⁸² See *supra* text accompanying notes 120-21.

¹⁸³ See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 22 (1988) (illustrating that the Court has failed to explain why it sometimes uses balancing and sometimes uses rigid rules).

¹⁸⁴ Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2 (1986).

¹⁸⁵ 499 U.S. 621 (1991).

¹⁸⁶ *Id.* at 625 (quoting A. CORNELIUS, SEARCH AND SEIZURE 163-64 (2d ed. 1930)).

¹⁸⁷ 501 U.S. 429 (1991).

¹⁸⁸ [Arguments Heard:] *Florida v. Bostick*, 48 CRIM. L. REP. (BNA) 3161, 3163 (U.S. Mar. 6, 1991).

¹⁸⁹ See *United States v. Burrell*, 286 A.2d 845, 846 (D.C. 1972) (holding that physical contact is acceptable if it is "a normal means of attracting a person's attention"); see also *United States v. Zapata*, 18 F.3d 971 (1st Cir. 1994) (holding that an officer who placed his hand on a defendant's back for two or three seconds effected a seizure, but not an arrest).

the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."¹⁹⁰ In *Terry* however, the Court was misguided in its suggestion that a police officer could strike the constitutionally appropriate balance between conflicting governmental and privacy interests by employing a common-sense, seat-of-the-pants assessment.¹⁹¹ The Court's endorsement of the police officer's perspective in *Terry* rests upon using the word "reasonable" as a term of art synonymous with constitutionality, and, at the same time, a description of the searching officer's rational analysis of the situation. By 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. As Justice Stevens recently charged, the Court acts "on the assumption that the constitutional protection against 'unreasonable' seizures requires nothing more than a hypothetically rational basis for intrusions on individual liberty."¹⁹²

If taken seriously, adoption of the police perspective is "an invitation to reviewing courts to treat a police intrusion as 'reasonable' if any explanation for the police conduct can be given."¹⁹³ This approach admittedly requires something more than whimsy or caprice by police officers,¹⁹⁴ but even a five-percent likelihood that seizable items are present in the place to be searched would establish that the basis for the search is rational and not wholly arbitrary. Allowing police to act on such minimal suspicion, however, would lead to an unacceptable number of unnecessarily invasive and harassing searches and seizures. The cost to the victims of such unnecessary

¹⁹⁰ 392 U.S. 1, 21-22 (1968).

¹⁹¹ The Court's statement in *Terry* regarding a belief "that the action taken was appropriate," *id.* at 22, is a meaningless generality to the police officer on the street. See Wayne R. LaFare, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 64 (1968). In *New York v. Belton*, 453 U.S. 454 (1981), the Court eschewed balancing based on the particular facts and adopted a "single familiar standard" to guide police officers because officers "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 458.

¹⁹² *Maryland v. Wilson*, 117 S. Ct. 882, 890 (1997) (Stevens, J., dissenting).

¹⁹³ *Davies*, *supra* note 166, at 57; see also *Sundby*, *supra* note 139, at 1769 (arguing that importing balancing into the Fourth Amendment shifted "control from the individual over the 'facts' justifying the government's power to intrude (by not engaging in behavior giving rise to probable cause) to the government's ability to forge a 'reasonable' policy justification"). Some lower courts have taken the Supreme Court at its word and have concluded that the Fourth Amendment requires only "some basis from which the court can determine that the [intrusion] was not arbitrary or harassing." *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966).

¹⁹⁴ See *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (acknowledging that customs inspectors had more than an "inchoate and unparticularized suspicion or hunch") (quoting *Terry*, 392 U.S. at 27).

intrusions is obvious, but the state also has an economic interest because "[t]he lower the level of certainty required for a search and seizure, the more state resources will be wasted in conducting it, since more mistakes will occur."¹⁹⁵

Deferring to an officer's exercise of common sense also conflicts with the Court's view that the Fourth Amendment's reasonableness standard requires a delicate balance between the government interest and the individual interest in privacy or liberty. The very idea of balancing implies that each side has some merit, that some privacy interests outweigh some government interests, and that all forms of privacy cannot be set aside merely because the government offers a modicum of rational justification for an intrusion. All searches are not equal; thus, "[t]he more intrusive an investigative technique is, the more assured we want to be that it will result in the discovery of probative evidence before we allow the police to undertake it."¹⁹⁶ Determining which justifications are sufficient for which types of intrusions requires something other than ostensibly value-free objective rationality on the part of police officers.¹⁹⁷ The Fourth Amendment is, after all, a reflection of our society's system of values, and striking the proper balance between government and individual interests ultimately rests on a value-laden assessment of the comparative social utility of allowing or prohibiting the intrusion in question.

When the ultimate test of reasonableness is seen to be dependent upon the social utility of the challenged search or seizure, judicial adoption of the police perspective reverts to a form of pragmatic utilitarianism in which the identity of the decision maker has been blurred. If the judiciary measures the social utility of a search or seizure, then invoking the officer's perspective is flimsy camouflage because it is the Court, not the police officer, who functions as the decision maker. Thus, when 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. In such situations, the Court employs its own version of judicial utilitarianism, and "'reasonableness' is merely a grab-bag of

¹⁹⁵ Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 61 n.196 (1991).

¹⁹⁶ *Id.* at 49-50.

¹⁹⁷ The police officer in *Tennessee v. Garner*, 471 U.S. 1 (1985), acted rationally, but unreasonably in the constitutional sense, by following the well-established police practice of using deadly force against fleeing felons, a practice recognized at common law and adhered to by a majority of modern police departments. By prohibiting the use of deadly force to apprehend nondangerous felons, the Court recognized that an individual's right to life, and society's interest in a fair adjudication of guilt, outweighed society's interest in effective law enforcement.

idiosyncratic judicial choices about what kinds of police conduct are good for society and what kinds are not."¹⁹⁸

This covert form of judicial utilitarianism can be avoided only if the Court truly forgoes its own evaluation of reasonableness in favor of deferring to the officer's decision (so long as the officer acts rationally).¹⁹⁹ If this is the thrust of embracing the officer's perspective, one can echo Professor Maclin's query of "Whose Amendment Is It, Anyway?"²⁰⁰ Is it plausible that the Framers of the Fourth Amendment intended the Reasonableness Clause to insure merely that the police had some minimally rational basis for exercising their power? Professor Davies has answered this query:

It seems unlikely the Framers would have accepted that the government can bestow generalized discretionary authority on a police officer through the credential of a metal police badge . . . when they clearly would not have allowed the same officer to be given the same generalized discretionary authority in the form of a paper general warrant.²⁰¹

It is also unlikely that the Framers would have agreed with the Court's decision in *Rodriguez*²⁰² that it was reasonable for the police to search the defendant's dwelling without a warrant and without probable cause merely because the police were confused about who lived where. Allowing the police to search on the basis of a reasonable, but mistaken, perception of apparent authority encourages them to maximize their discretion to act as they think best; however, "if the Framers had this much confidence in executive branch officials, they probably would not have written the Fourth Amendment at all."²⁰³

¹⁹⁸ Davies, *supra* note 166, at 61.

¹⁹⁹ "[I]t is not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgement dictates, following the arrest." *Washington v. Chrisman*, 455 U.S. 1, 7 (1982) (emphasis added).

²⁰⁰ Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 669 (1988).

²⁰¹ Davies, *supra* note 166, at 53 n.203.

²⁰² See *supra* text accompanying notes 116-18.

²⁰³ Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 812 (1992); see also Eric F. Saunders, Case Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U. L. REV. 831, 843 (1972):

If the [F]ourth [A]mendment were premised on the good faith and self-restraint of police, its controls would be superfluous. Instead, it functions as a check on abuses of authority and the worst tendencies of government which courts should anticipate whenever the police are given an unrestricted license to [investigate] . . .

In the days before pragmatic balancing of interests dominated the Court's analysis of searches and seizures,²⁰⁴ the Warrant Clause was viewed as recognizing that the Amendment was not intended to enshrine the decision-making power of the police, subject only to ex ante review of a police officer's rationality. A basic goal of the Warrant Clause is the desire to disable the police as decision makers by avoiding the need for them to make judgments as to the propriety of searches and seizures.²⁰⁵

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.²⁰⁶

The danger of police overzealousness infects all situations in which they act without a warrant, particularly when they act upon apparent or ambiguous consent. The appropriate question in *Rodriguez*,²⁰⁷ therefore, was not whether the police must be perfectly accurate in assessing facts, but whether they "should be allowed to enter a home on the basis of *their own assessment* of a third-party's status and authority when they are not allowed to enter on the basis of their own assessment of probable cause."²⁰⁸ In *Jimeno*,²⁰⁹ the appropriate question was, "Whose Amendment Is It, Anyway?" and that question should have been answered by giving the citizen,

²⁰⁴ See Ronald J. Bacigal, *Dodging a Bullet, But Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597 (1986) (discussing the Court's vacillation between the Reasonableness Clause and the Warrant Clause as the dominant concern of the Fourth Amendment).

²⁰⁵

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.

United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (citations omitted).

²⁰⁶ Johnson v. United States, 333 U.S. 10, 13-14 (1948); see also *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.").

²⁰⁷ See *supra* text accompanying notes 116-18.

²⁰⁸ Davies, *supra* note 166, at 70.

²⁰⁹ See *supra* text accompanying note 119.

not the police, the benefit of any doubt about the scope of consent to search containers in an automobile.

Although the Warrant Clause serves to check police overzealousness, prior judicial approval in the form of an arrest or search warrant often is impossible to obtain. The Court is thus compelled to identify exigent circumstances that excuse the absence of a warrant. Adjusting Fourth Amendment standards to account for emergencies, however, does not justify the Court's leap to assessing the propriety of all intrusions according to a police officer's mistaken, but forgivable, view of the circumstances. For example, in *Rodriguez*, the Court claimed that assessing a person's authority to consent to a search of another's residence "is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably."²¹⁰ The Court took as a given that the police must make this judgment, but the Warrant Clause suggests that the judgment properly lies with a judicial official authorized to issue search warrants. If there are no exigencies requiring prompt action, the police should be told that they act at their peril if they choose to bypass the warrant procedure by relying on questionable consent.²¹¹ In such situations, it seems "reasonable" to require that the police be both rational *and correct*, because the lack of valid consent negates their sole justification for intruding upon an individual's privacy or liberty.²¹² In the absence of an emergency, submitting questions of valid consent to a magistrate transfers decision-making power from the police to the judiciary, an approach that is faithful to at least one view of the Framers' intent.²¹³

The other view of the Framers' intent insists that the Warrant Clause was designed to eliminate general warrants, while the Reasonableness Clause was to be the sole measure of the constitutionality of warrantless searches.²¹⁴ Even this view, however, does not indicate that the Framers

²¹⁰ *Rodriguez*, 497 U.S. at 185.

²¹¹ "Police officers, when faced with the choice of relying on consent by a third party or securing a warrant, should secure a warrant and must therefore accept the risk of error should they instead choose to rely on consent." *Id.* at 193 (Marshall, J., dissenting).

²¹² Valid consent to the intrusion provides a source of legal authority for the intrusion that would be lacking otherwise. See *infra* text accompanying note 278.

²¹³ See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 43 (1937) (arguing that the Warrant Clause defines and emphasizes the Reasonableness Clause by identifying "the kind of search that is *not* unreasonable"—one carried out with judicial approval).

²¹⁴ See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41-44 (1969) (arguing that the Fourth Amendment was intended as a condemnation of general warrants and a preference for special warrants, and that the Framers expressed no view on warrantless searches other than that they be reasonable).

intended to give police a general amnesty for all reasonable errors. If the Warrant Clause does not define reasonableness, we are left with the highly dubious conclusion that the Framers endorsed the Reasonableness Clause as a "blank check" to be filled in according to the Court's assessment of conflicting social interests.²¹⁵ If such was the Framers' intent, it remains doubtful that they expected the Court to pass this blank check on to law enforcement officials who would decide if they had acted responsibly (though erroneously) under the circumstances; however, the Court need not rest on attempts to discern the Framers' "original intent" because the Court's blanket approval of reasonable police errors is unfaithful to its own balancing approach to reasonableness. In keeping with the flexible nature of this balancing approach, why hasn't the Court recognized that certain invasions of privacy (for example, the entry of a dwelling or the seizure of a personal diary) are so serious that even reasonable mistakes cannot be tolerated? The Court's rejection of court-ordered surgery to obtain evidence in *Winston v. Lee*²¹⁶ suggests that certain intrusions upon privacy are prohibited no matter how reasonably the government might act. If the Fourth Amendment forbids the government's "reasonable" reliance on a court order for compulsory surgery, how can that same Amendment defer to ad hoc decisions, even "reasonable" ones, by individual police officers?

By way of summary, the Court's adoption of the police perspective is unsatisfactory because, in theory, it runs contra to the Framers' distrust of police discretion and, in practice, it blurs the responsibility for determining which searches and seizures are constitutionally reasonable. We thus are left with two troublesome but inescapable realizations: (1) To the extent that the Court makes an independent assessment of the propriety of an officer's actions, the individual officer's perception is not the defining measure of constitutional reasonableness, but merely one factor in the multifaceted application of judicial utilitarianism; and (2) to the extent that the Court defers to the officer's assessment of reasonableness, the Court trivializes the citizen's interests in privacy and liberty, which properly operate as counterweights to the police interest in searching. By deferring to the police, "the Court has adopted the outlook of the fox in defining the rules that will govern the henhouse."²¹⁷

²¹⁵ It is "clearly wrong" to view the Framers as commissioning "the judiciary to develop a common law of search and seizure as time goes by and as circumstances demand." Bradley, *supra* note 156, at 851.

²¹⁶ *Winston v. Lee*, 470 U.S. 753 (1985). "Notwithstanding the existence of probable cause," *id.* at 761, and the state's full compliance with the procedures required by the Warrant Clause, the Reasonableness Clause demands "a more substantial justification" for this serious intrusion into the defendant's body, *id.* at 767.

²¹⁷ Maclin, *supra* note 200, at 675.

C. *The Reasonable Person's Perspective*

On one level, the reasonable person perspective is but a variation on the police perspective. If we accept the premise that Fourth Amendment reasonableness is a rational, commonsensical determination, then all reasonable people, whether police officers or civilians, can make this determination.²¹⁸ The primary objection to the use of the police perspective is not that police are incapable of applying logic to the totality of the circumstances, but that their one-sided view of law enforcement skewed their objectivity. As between equally rational police officers and hypothetical people, we should prefer the judgment of those better suited to appreciate the importance of both law enforcement and individual liberty.²¹⁹

As between hypothetical people and impartial judges, however, the reasonable person perspective is meaningless so long as the Court adheres to the position that Fourth Amendment reasonableness is a rational, commonsensical determination. Judges are rational people who can apply their common sense directly to a situation without the superfluous step of filtering it through the perceptions of a reasonable person. After all, by invoking the reasonable person perspective, a judge is not saying, "I am going to decide this case reasonably, in contrast to my normal practice of acting irrationally." If there is an objectively correct constitutional interpretation to be derived from rational analysis, the identity of the decision maker searching for the answer makes little difference. Except for fools, knaves, and "overzealous" police officers, all reasonable decision makers can be guided, pushed, or prodded toward the demonstrably correct answer. When Fourth Amendment interpretation is reduced to the simple process of applying logic to facts, judges need not adopt any perspective but their own. One rational person will do as well as another.

²¹⁸ For example, Justice Scalia conceded that when a judge resolves the reasonableness of a search or seizure by invoking "nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-81 (1989). Justice Scalia volunteered his inclination "to leave that essentially factual determination to the lower courts," *id.* at 1186, and questioned why the next logical step would not be to leave the question to the jury, *see id.* at 1188. For a consideration of the use of juries to resolve Fourth Amendment issues, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994).

²¹⁹ *See United States v. Corral-Franco*, 848 F.2d 536, 540 (5th Cir. 1988) (defining the term "reasonable person" as one who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances") (quoting *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988)).

The perspective of the decision maker becomes crucial, however, if Fourth Amendment reasonableness is seen as a matter of political, not merely logical, choice as to the appropriate balance of government and individual interests. Under this view, the Court's references to simple common sense must be put aside in order to focus on that which is unique about the reasonable person perspective. It is not the innate common sense of the universal man that provides unique guidance to the Court. Rather, the collective wisdom of reasonable and political people living together in a society strikes a real, not a hypothetical, accommodation between an interest in law enforcement and an interest in personal autonomy. This accommodation sometimes takes the form of public debate over the latest Supreme Court decision or proposed legislation affecting privacy interests. More often, the accommodation is worked out quietly in day-to-day living conditions that reflect our realization that, although we may all wish to be let alone, we do not expect this to happen in any absolute sense. Like life itself, the Fourth Amendment is a compromise that reflects our "*societal* understanding" that certain aspects of our lives are within the public domain, while "certain areas deserve the most scrupulous protection from government invasion."²²⁰ When pushed hard enough, the Court drops the facade of equating reasonableness with common sense, and concedes that Fourth Amendment law may turn on "understandings that are recognized and permitted by society."²²¹ To the extent that the Court relies on what "society is prepared to recognize as 'reasonable,'"²²² the constitutional standard is a normative one. The reasonable person's understanding of current social conventions thus *describes* the existing social compromise rather than *prescribes* some ideal utilitarian society. In this way, the Fourth Amendment's Reasonableness Clause is like the Eighth Amendment's cruel and unusual punishment clause, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²²³

A good deal of the Court's current Fourth Amendment doctrine can be explained in terms of a search for conventional morality: All things considered, have the police comported with the community's moral intuitions?²²⁴ The meaning of Fourth Amendment reasonableness thus derives

²²⁰ *California v. Greenwood*, 486 U.S. 35, 43 (1988) (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)); see also *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (noting that, although not all subjective expectations of privacy are legitimate, those based on property rights are likely to be).

²²¹ *Rakas*, 439 U.S. at 144 n.12.

²²² *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²²³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²²⁴ See Christopher Slobogin & Joseph 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, 732 (1993) ("If one takes the Justices at their word, a sense of how (innocent) U.S. citizens gauge the im-

from the culture in which “we the people” live, and the Court views society as the ultimate arbiter of Fourth Amendment reasonableness. Of course, society speaks with many voices, but, at least in theory, the reasonable person perspective constitutes a form of “virtual representation” in which the hypothesized reasonable person stands for all citizens because they are “envisioned as a fungible collection with characteristic insights and outlooks.”²²⁵ If we wish to wax dramatic, the reasonable person epitomizes the universal soldier in the struggle for democracy, standing as a rough proxy for the people, “feeling and thinking just as the people do in all their plurality, acting just as the people would if actually present.”²²⁶ This sounds plausible enough in theory until we consider the methodology the Court is to employ when discerning the characteristic insights and outlooks of the common man. If a process of intuitive appraisal was at work in *Montoya*,²²⁷ which Justice instinctively captured our shared understandings? On one side stood Chief Justice Rehnquist, who concluded that reasonable people understand and expect that they are subject to intense scrutiny when crossing international borders.²²⁸ On the other side stood Justice Brennan, who maintained that international travelers do not “‘expect’ to be thrown into locked rooms and ordered to excrete into wastebaskets, held incommunicado until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures—all on nothing more than the ‘reasonable’ suspicions of low-ranking enforcement agents.”²²⁹

If the Justices cannot agree on some rough intuitive appraisal of the reasonable person’s understanding of privacy and autonomy, perhaps the Justices are to rely on their personal experiences. If so, they may lack the tools required for the task. Unlike the police who are too caught up in the heat of the chase, judges are too detached from the realities of search and seizure because they are unlikely to have experienced any type of police intrusion,²³⁰ much less the type of intrusion they were asked to analyze in

pact of police investigative techniques on their privacy and autonomy is highly relevant to current Fourth Amendment jurisprudence.”).

²²⁵ Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 3, 51 (1986).

²²⁶ *Id.* at 53.

²²⁷ 473 U.S. 531 (1985).

²²⁸ *See id.* at 537-41.

²²⁹ *Id.* at 560 (Brennan, J., dissenting).

²³⁰ *See* Dorothy K. Kagehiro, *Psycholegal Research on the Fourth Amendment*, 1 PSYCHOL. SCI. 187, 188 (1990). Because judges are post hoc observers of the situation, [t]his difference in perspective may result in differences in perceived voluntariness of consent and perceived “coerciveness” in the phrasing of the search request. Attribution theory and research suggest that there may be differences in the degree of choice (i.e., voluntariness of consent) attributed to the consentor-actor by a judicial observer, based on differences in perspective.

Montoya. Unable to draw upon their own experience and lacking direct access to the community's shared understandings, the Justices will not often find that a hypothesized reasonable person's assessment of Fourth Amendment reasonableness differs from the Justices' own assessment. "[T]he distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more."²³¹

There is also little hope for a Justice who puts aside personal values and experiences while searching for objectivity in empirical evidence of society's shared understandings. Preliminary attempts to identify these understandings indicate that the Court is out of touch with society's evaluations of "the privacy and autonomy interests implicated by searches and seizures."²³² For example, in *Whren v. United States*,²³³ the Court maintained that the subjective motivation underlying a police intrusion is irrelevant so long as there is an objective basis for the arrest.²³⁴ In a survey of citizens' perceptions, however, Professors Slobogin and Schumacher demonstrated that police motivation is an important factor in assessing the intrusiveness of their actions. A preliminary sampling of citizens' perceptions found that a frisk to detect and deter hijacking or terrorism at an airport was viewed as beneficial and that citizens felt genuinely grateful for the government intervention designed to protect them.²³⁵ In light of the Court's refusal in *Whren* to examine the officer's motivation for an intrusion upon privacy, citizens understandably are skeptical of all government intrusions in which the officer's motivation is unknown or ambiguous.

Although Professors Slobogin's and Schumacher's preliminary attempts to discern social conventions are helpful, we must not allow such efforts to create false hope that, with more refined techniques, the Court will be able to correctly read community consensus. For example, consider the belief that the Court would not need to speculate on the perceptions of a hypothesized reasonable person if there were direct and instantaneous access to the populace via some futuristic computer network.²³⁶ Even if future technolo-

²³¹ BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 110 (1921). The Supreme Court has noted that an unstructured determination of reasonableness often is merely a statement of personal values. See *Chimel v. California*, 395 U.S. 752, 764-65 (1969).

²³² Slobogin & Schumacher, *supra* note 224, at 760.

²³³ 116 S. Ct. 1769 (1996); see *supra* text accompanying note 79.

²³⁴ See *supra* text accompanying note 83.

²³⁵ See Slobogin & Schumacher, *supra* note 224, at 767.

²³⁶ The Court has attempted to determine society's views on reasonableness by such means as reference to a telephone book. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 741-46 (1979) (noting that society would not recognize a reasonable expectation of privacy in numbers dialed from the defendant's phone because the telephone book in-

gy were to allow the Court to identify that which is usually done in the community, and thus what is reasonable in a normative sense, determinations of Fourth Amendment reasonableness still would involve value judgments and political choices about what *ought* to be done.²³⁷ As the Court recently noted, “[i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment.”²³⁸

When contrasts arise between matters of principle and social policy, between individual rights and collective interests,²³⁹ the concern no longer is about which methodology, as an empirical matter will better identify community consensus. The primary concern is whether a democratic majority may impose its will on the minority. Although the constitutional Framers may have placed great trust in the citizenry’s judgment, the Framers also recognized that certain individual rights must be shielded from the popular will.²⁴⁰ “The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.”²⁴¹ This original intent, coupled with *Marbury v. Madison*²⁴² and the adoption of the Fourteenth Amendment,²⁴³ indicates that Fourth

formation pages disclosed that the phone company could identify the origin of phone calls). However roughly a survey or computer voting might approximate society’s views, the techniques are superior media for societal conventions as compared to the abstruse information contained in the pages of a telephone directory.

²³⁷ See generally *Amsterdam*, *supra* note 43, at 384-85. The Fourth Amendment does not “ask . . . what we expect of government. [It] tell[s] us what we should demand of government.” *Id.* at 384.

²³⁸ *Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 n.4 (1997).

²³⁹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1977) (explaining that individuals have rights apart from those given them by law); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 366-67 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (3d ed. 1698) (noting that government is limited by the individual rights that people reserved to themselves when they created the government); JOHN RAWLS, *A THEORY OF JUSTICE* 3-6 (1971) (emphasizing personal rights and protection against majoritarian tyranny).

²⁴⁰ Discussing the Bill of Rights, James Madison stated:

The prescriptions in favor of liberty ought to be levelled against that quarter where the greater danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or the Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

1 *ANNALS OF CONG.* 437 (Joseph Gales ed., 1789).

²⁴¹ *Furman v. Georgia*, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).

²⁴² 5 U.S. (1 Cranch) 137 (1803) (establishing the Court’s preeminence in interpreting the Constitution).

²⁴³ See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1281 (1992) (arguing that the Fourteenth Amendment placed heavy

Amendment rights are not entirely dependent on the popular will.²⁴⁴

In summary, the reasonable person perspective is either meaningless or anathematic to the Constitution. Judges are as rational as anyone else; therefore, it is useless to speak of the reasonable person's rational assessment of Fourth Amendment reasonableness in contrast to a judge's rational assessment. Invoking the reasonable person's perception of community consensus goes beyond mere rational analysis, but community consensus should not be the sole measure of Fourth Amendment reasonableness unless we reject the very concept of constitutional rights as a limitation on the tyranny of a democratic majority. At most, the reasonable person's perception of community consensus stands as one factor to be included in the Court's multifaceted balancing of governmental and individual interests.

D. *The Citizen's Perspective*

After reviewing the Court's approach to Fourth Amendment seizures, Professor Williamson concluded that "the perception rather than the fact of a restriction of freedom of movement" determines whether a person has been seized.²⁴⁵ Professor Rotenberg, focusing primarily on consensual searches of property, insists that "[w]hat *is* counts; not what is perceived."²⁴⁶ This debate resurrects a classic query of beginning students of epistemology: If a tree falls in an unoccupied forest, has there been a sound? The answer, of course, depends entirely upon one's choice of perspective. In the forest of the Fourth Amendment, adoption of the reasonable person's perspective means that no matter how deeply felt by the individual, some intrusions upon personal autonomy do not exist until they are perceived by a hypothesized person.

The danger in ignoring an individual's subjective perspective in favor of hypothesized perceptions is that the Court replaces real life experience with a pseudo-scientific perspective that claims to be neutral and objective.²⁴⁷ Like medieval scholasticism, Fourth Amendment jurisprudence has become an enclosed discipline no longer anchored in reality. Consider the esoteric result that occurred in *United States v. Letsinger*,²⁴⁸ when the Fourth Circuit Court of Appeals attempted to bridge the gap between *Mendenhall's*

reliance on federal judges to protect minority rights).

²⁴⁴ *But see* Bradley, *supra* note 156, at 817 ("The Reasonableness Clause, properly understood, . . . exists to affirm legislative supremacy over the law of search and seizure.").

²⁴⁵ *See* Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 814 (1982).

²⁴⁶ Rotenberg, *supra* note 102, at 177.

²⁴⁷ *See* Laurence H. Tribe, *supra* note 163 at 156-58.

²⁴⁸ 93 F.3d 140 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2437 (1997).

reasonable person test and *Hodari D.*'s focus on subjective submission to a show of authority.²⁴⁹ In *Letsinger*, members of a federal drug task force confronted the defendant on a train leaving Union Station. When the officers asked for permission to search the defendant's suitcase, the defendant responded that he had personal papers in the bag.²⁵⁰ The officers informed the defendant that they were "going to detain his bag," that "he could retrieve it later, and that otherwise he was 'free to do whatever he wanted to do.'"²⁵¹ Without touching the bag, the officers continued to converse with the defendant, who acknowledged that he had a small amount of marijuana in the bag.²⁵² Following this admission, the officers searched the bag and found a large amount of crack cocaine.²⁵³ The government maintained that no seizure took place until the officers physically touched the bag, which occurred only after the defendant's incriminating statement gave them probable cause to seize and search the bag.²⁵⁴ The defendant, however, contended that a seizure occurred at the point when the officers stated their intent to detain the bag—when they made a show of authority sufficient to effectuate a Fourth Amendment seizure.²⁵⁵ The Fourth Circuit adopted the government's position and held that the seizure of the defendant's bag "did not occur until the officers actually took physical possession of the bag, and not when they merely announced their intention to do so."²⁵⁶ According to the court, the officers' "simple statement that they were 'going to detain his bag' was calmly uttered during an ongoing, casual, consensual conversation. It was not phrased as an 'order,' e.g., 'give me your bag,' or even as a present-tense declarative sentence, e.g., 'your bag is hereby seized.'"²⁵⁷

Viewed from the lofty heights of Fourth Amendment theory, the reasoning in *Letsinger* may be defended as a sophisticated attempt to reconcile conflicting definitions of a seizure.²⁵⁸ The final decision, however, violates

²⁴⁹ The Fourth Circuit recognized that *Hodari D.* "specifically addressed the seizure of persons," but that "in light of the Court's evolving views on the relevancy of common law in defining Fourth Amendment 'seizures,' . . . [*Hodari D.*] may ultimately be held to extend to objects as well as persons." *Id.* at 143.

²⁵⁰ *See id.* at 142.

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See id.* at 143.

²⁵⁵ *See id.*

²⁵⁶ *Id.* at 145.

²⁵⁷ *Id.* at 144.

²⁵⁸ In *Letsinger*, the Court applied the *Hodari D.* approach to seizures of a person to seizures of property. The Court did not address *Brower's* additional consideration of "intentional" seizures. *See supra* text accompanying notes 71-72. Consider the facts of *State v. Johnson*, 696 So. 2d 880 (Fla. Dist. Ct. App. 1997). During an encounter with the police, a nervous defendant placed his hands in his pockets. *See id.* at 882. When the police told him to remove his hands from his pocket, the defendant responded by

common sense. One wonders how the Fourth Circuit would deal with a bank robber who were to pull a gun and hand a teller a note with the message "I'm going to rob this bank. Don't make any trouble." According to the Fourth Circuit's reasoning, such a note merely would express the robber's intent to act in the future, and thus no robbery would occur unless the robber were to utter "a present-tense declarative sentence," such as "I hereby commence the robbery of this bank." Confronted by armed officers who announced that they were going to seize the bag and that the defendant could retrieve it *later*, the defendant in *Letsinger*, or anyone else in the real world, could only perceive that, at that point, the bag was under the control of the officers.²⁵⁹ In the rarified world of the Fourth Amendment, however, the individual is told that his perception is irrelevant. As Professor White has suggested, this is only a small step from telling the individual that he himself is irrelevant.

[Judicial discourse can function] as an important force of social definition and cohesion, placing the individual or official in a comprehensible public world in ways that he can respect. But to the extent that the individual or official faces a public world defined by a language he cannot speak, in which he cannot locate himself, which does not deal in intelligible ways with claims he regards as important, the discourse can be said to be one of authority rather than community, its force divisive rather than cohesive.²⁶⁰

In the Supreme Court's Fourth Amendment discourse, an individual defendant becomes 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. This neglect of the citizen's perspective conflicts with one of the fundamental moral tenets of Western society, that governments must recognize the human dignity and uniqueness of each individual.²⁶¹ In Justice Kennedy's words: "The distin-

removing not only his hands, but also the contents of his pockets, which included illegal drugs. *See id.* The court did not consider whether this was the type of "accidental seizure" that *Brower* placed outside of the Fourth Amendment's coverage.

²⁵⁹ "Announcement of the officers' intent to detain luggage is the seizure, because at that point the traveler's unrestricted liberty to call off the encounter and go unimpeded about his business ends." *Letsinger*, 93 F.3d at 146 (Hall, J., dissenting) (citation omitted). The dissent also argued that "the essence of submission is generally the absence of physical resistance." *Id.* at 147 (Hall, J., dissenting).

²⁶⁰ White, *supra* note 155, at 167.

²⁶¹ The Fourth Amendment embodies a

commitment to treating persons who come before the law on the basis of their individual, particular, uncommon, and odd property and attributes. Juristic proce-

guishing feature of our criminal justice system is its insistence on principled, accountable decision making in individual cases."²⁶² Without individuality, we become fungibles to be manipulated by the government. Judicial decisions no longer are about a real person, but concern an abstraction. Individuals are no longer valued for their individuality; instead they are reduced to instruments of science freely exploited by the judiciary (the cost-benefit managers) in an effort to maximize the total pie for society. In short, the ideal of justice, which incorporates a theory of individual rights, has ceased to be a weighty factor in the Court's Fourth Amendment discourse.

This pretension of scientific objectivity is purchased at a high price. It requires the Supreme Court Justices to anaesthetize their hearts²⁶³ and detach themselves from the real human being who stands before them and, more importantly, from all citizens a defendant represents.²⁶⁴ 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.²⁶⁵ Professor Sundby makes a telling point about trust and power in an article entitled, "Every Man's Fourth Amendment."²⁶⁶ Whether intentional or not, Sundby has provided one answer to Professor Maclin's query as to "Whose Amendment Is It, Anyway?"²⁶⁷

Professor Sundby conceptualizes the question of choosing perspectives as an issue of who to trust and who should be given control. His starting point for Fourth Amendment interpretation is that citizens are to be trusted to act responsibly and are entitled "to be let alone" unless they forfeit this right by engaging in suspicious conduct.²⁶⁸ Grounding the Fourth Amend-

dures which help show the unique characteristics of individuals and actions to the decision-maker provide the factual evidentiary base for legal judgments which avoid abstract moral structures and remain useful as explanations of external phenomena.

Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality Is Lost?*, 11 CREIGHTON L. REV. 1077, 1082 (1977); see also EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* xiii (1948) (stating that the struggle for liberty against government is "the oldest theme which underlies the history of American constitutional law"); Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965) ("The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen.").

²⁶² *Maryland v. Wilson*, 117 S. Ct. 882, 890 (1997) (Kennedy, J., dissenting).

²⁶³ Professor Tribe cautioned against using the passive voice, which "makes it look as though someone out there, unspecified, is doing it to us. Admit that it's *we* who are doing it." Tribe, *supra* note 163, at 170.

²⁶⁴ See *supra* text accompanying note 173.

²⁶⁵ See *supra* text accompanying note 157.

²⁶⁶ Sundby, *supra* note 139, at 1767.

²⁶⁷ See *supra* note 200 and accompanying text.

²⁶⁸ "So long as a person does not engage in behavior arising to probable cause of a

ment in the reality of citizens' actual conduct thus allows citizens to maintain control over their fate by giving them the opportunity to structure their conduct in a manner that denies the government any justification for intruding upon their autonomy. Citizens lose control, however, when the Court announces, for example, that the police need no justification for approaching citizens and posing questions to them.²⁶⁹ In such situations, citizens are powerless to avoid intrusions unless they forego a legal activity such as walking a public street where they might encounter police.

Adopting the individual citizen's perspective would not require the Court to surrender control of searches and seizures to the individual in all situations. Professor Maclin's query—"Whose Amendment Is It Anyway?"—nicely captures the essence of the debate over perspectives, but it is not an all-or-nothing choice. When the government bases its action on some factual justification such as probable cause or reasonable suspicion, the Fourth Amendment is neither exclusively the government's nor exclusively the citizen's. Without claiming exclusivity, however, the citizen legitimately may ask that the Court be more sensitive to the individual's perspective when balancing the government's and the individual's conflicting interests. One need not undertake a sophisticated ethical or legal analysis to understand that intrusiveness must be viewed from the perspective of the individual upon whom an intrusion was made because privacy and autonomy are intimate, subjective, and experiential constructs.

In common parlance, privacy is "I know when I see it," an elusive construct that has unclear and probably idiosyncratic limits. Indeed, privacy (more precisely, invasion thereof) may be described better as "I know when I feel it." A gut sense of personal violation may be the tie that binds such disparate events as being subjected to a body search, being the subject of gossip, having one's mail read, being asked one's income, or having one's house entered without permission. It should come as no surprise that such an intensely personal construct is difficult to define. . . . In short, common experience tells us that privacy is a subjectively important, even critical, aspect of our lives²⁷⁰

criminal violation, individual privacy cannot be invaded." Sundby, *supra* note 139, at 1768.

²⁶⁹ See *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.").

²⁷⁰ Gary B. Melton, *Respecting Boundaries: Minors, Privacy and Behavioral Research*, in *SOCIAL RESEARCH ON CHILDREN AND ADOLESCENTS* 65 (Barbara Stanley & Joan E. Sieber eds., 1992).

A court with heightened sensitivity to the citizen's perspective will expand the concepts of privacy and autonomy to include the citizen's subjective concern with freedom from harassment and fear of being stigmatized by government officials who single out the individual for unequal treatment.²⁷¹ This stigmatizing often rests on the unpleasant reality that race affects many encounters between police and citizens. It is no accident that the chief critic of the Court's neglect of the individual's perspective was Justice Thurgood Marshall, the sole African-American to serve for most of the Court's history.²⁷²

What separated Justice Marshall from other members of the Court was his "citizen perspective." His Fourth Amendment opinions display a "candor that cut through legal abstractions to the social reality" that exists on the street. He scrutinizes police claims of necessity and practicality, instead of assuming that the police are always a "friend."²⁷³

Justice Marshall knew that race colors most situations in which whites and blacks interact, yet the current Court insists on a color-blind approach "when a color-conscious approach would lend perspective to the situation of a black participant in the legal process."²⁷⁴ For example, in *Hodari D.*, Justice Scalia suggested that the lower court may have erred by not having realized that the suspect's flight upon sighting the police cruiser amounted to suspicious behavior that justified a stop and frisk.²⁷⁵ This viewpoint ig-

²⁷¹ When two individuals are treated differently, the officer should be able to point to some distinction between the two cases which it is permissible for him to consider. . . . [H]e must at least be able to show . . . that cases treated differently were in fact different in some relevant respect—that is, that he is following some sort of rational, non-discriminatory rule. If he cannot make such a showing, his different treatment of the two cases is irrational or invidious, and hence violative of equal protection.

J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 594 (1972) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969)). Although Judge Wright was referring to prosecutors, his observation applies equally to police officers.

²⁷² See Maclin, *supra* note 203. Professor Maclin suggests that Marshall's citizen perspective was based on personal experience: "'A dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States.' Even a black man who becomes a Justice on the United States Supreme Court can recall such an encounter." *Id.* at 723 (quoting Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at A22).

²⁷³ *Id.* at 799 (quoting Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES, June 29, 1991, at L23).

²⁷⁴ Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 80.

²⁷⁵ "The wicked flee when no man pursueth." *Hodari D.*, 499 U.S. at 623 n.1 (quot-

nored the fact that Hodari, a black youth, may have had other reasons for wanting to avoid the police. Perhaps *Hodari D.* shared a viewpoint expressed in the aftermath of the race riots in Los Angeles in 1991:²⁷⁶ "When black people in Los Angeles see a police car approaching, . . . '[t]hey don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them.'"²⁷⁷

Asking the Court to be more sensitive to the individual perspective, including the racial aspects of police-citizen encounters, would help equalize the weights on either side of the balancing equation. As long as the Court adheres to its balancing of interests approach, however, Fourth Amendment issues will continue to be assessed from multiple perspectives because the police, the individual, and collective society all have a stake in the outcome. There is, however, a situation in which the Fourth Amendment becomes uniquely and exclusively the citizen's amendment and the individual's perspective rises to a controlling role. When the police purport to rely on a citizen's cooperation, the individual need not *ask* that the Court be sensitive to his perspective; the individual may *demand* that the Court recognize the individual's subjective perspective as paramount "because the sole validating source of police authority to intrude on a premier constitutional right is the individual's grant of permission."²⁷⁸

Why should the citizen's decision to grant or withhold cooperation be assessed in terms of objective reasonableness or social welfare? When the police ask for cooperation to which they are not entitled, the individual should retain the power to grant or withhold cooperation at the individual's discretion—rational or otherwise. When the police purport to rely on citizen cooperation to justify an intrusion, the right to personal autonomy must not be set aside by judicial fictions that a reasonable person would somehow approve of what the government did when, in fact, the actual defendant vehemently denies that he gave any approval or voluntary cooperation. If the intruding officer thus cannot point to any objective facts justifying the

ing *Proverbs* 28:1).

²⁷⁶ The rioting was sparked by the acquittal of four Los Angeles police officers whose beating of black motorist Rodney King was captured on videotape for all the world to see. The rioting resulted in 60 deaths, more than 16,000 arrests, and nearly one billion dollars in property damage. See Seth Mydans, *Tape of Beating by Police Revives Charge of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18.

²⁷⁷ Richard W. Stevenson, *Los Angeles Chief Taunted at Hearing; U.S. Plans Wide Inquiry on Brutality*, N.Y. TIMES, Mar. 15, 1991, at A16. See generally Tracey Maclin, "Black and Blue Encounters"—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991) (discussing whether race should be taken into account when considering reactions of black Americans in arrest situations).

²⁷⁸ Rotenberg, *supra* note 102, at 177.

intrusion, and if the officer's sole claim is that the citizen agreed to the intrusion, then the only relevant perspective is that of the individual citizen, who must be taken as the officer finds him—subjective warts and all.

If exclusive reliance on the individual perspective seems to unduly impugn the legitimacy of the government's and society's interests, we must remember that the preeminence of the individual perspective is limited to situations in which the government can formulate no independent justification for intruding on the citizen's right to be let alone. A recurring problem in the Court's analysis of searches and seizures is its tendency to treat consent as one of the many exceptions to the requirements of probable cause and a warrant; but it is the citizen's freedom to choose that renders consent searches unique among exceptions to the Fourth Amendment requirements of probable cause and a warrant. Most of the exceptions are based on the overriding needs of law enforcement to react to exigent circumstances that make it impractical to obtain a warrant or to wait until full probable cause develops. Consent searches and consensual police-citizen encounters, however, have nothing to do with the overriding needs of law enforcement because probable cause to search or seize may be totally lacking. Consensual intrusions upon personal autonomy are permitted "not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights."²⁷⁹ A society that "presupposes the capacity of its members to choose"²⁸⁰ must recognize that an individual is free to grant or withhold cooperation requested by government officials.²⁸¹

The fundamental right of individuals to control their own fate by exercising or waiving constitutional rights must take precedence over a police officer's mistaken perception of consent, no matter how objectively reasonable or understandable the mistake may have been. From the police perspective, the only sensible guide is that

they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper.²⁸²

²⁷⁹ *Schneekloth v. Bustamonte*, 412 U.S. 218, 283 (1973) (Marshall, J., dissenting).

²⁸⁰ *Id.* at 277 (Marshall, J., dissenting) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result)).

²⁸¹ "[A]n individual through the exercise of will, a personal power, [may or may not supply] the police with the keys to his kingdom." Rotenberg, *supra* note 102, at 179.

²⁸² Weinreb, *supra* note 25, at 64. Compare the conduct of the police officer in *Ohio*

The police may use the reasonable person perspective as circumstantial evidence of a defendant's subjective state of mind, just as they often use circumstantial evidence to prove premeditation in a murder prosecution in which the defendant denies such an intent.²⁸³ Considering what a reasonable person would have intended constitutes evidence of what the defendant actually intended, but the ultimate test for a consensual search or seizure remains subjective, not objective.

The commitment to a "society of free choice"²⁸⁴ also means that when addressing consensual searches and seizures, the individual perspective must take precedence over society's interests. For example, in *Jimeno*, the Court broadly interpreted the scope of the defendant's consent because of the community's interest in "encouraging consent."²⁸⁵ This assertion is either misleading or misguided. The community may encourage consent all it wishes, but the final decision to accept or reject such entreaties must remain with the individual unless we have moved from "encouraging" consent to imposing the community's will on the individual. In the absence of an immediate crisis threatening society's well being, the autonomy of the individual remains paramount. Consensual searches and seizures thus comprise one of the rare areas in constitutional law in which an absolute rule is appropriate. Any consent obtained must be true subjective consent, rendered only after the individual has made a knowing and intelligent waiver of the right to be let alone. It is in this sense that the Fourth Amendment is exclusively the citizen's, and thus the individual citizen's subjective perspective is the appropriate viewpoint from which to assess government claims of consent.

III. CONCLUSION

There are few absolutes in constitutional law, and an unqualified right to be let alone is not one of them. In most cases there is no escaping a pragmatic approach to reconciling societal interests with individual rights because, in some situations, social concerns may override what were previously regarded as absolute rights. Our faith in treating individuals as ends in themselves can be tested by posing a hypothetical: Assume that torture, or some form of intrusion upon the personal autonomy of a terrorist, would disclose the location of a pirated atomic bomb threatening the lives of mil-

v. Robinette, 117 S. Ct. 417 (1996), who "routinely requested permission to search automobiles he stopped for traffic violations. . . . He requested consent to search in 786 traffic stops in 1992" *Id.* at 422 (Ginsburg, J., concurring in the judgement).

²⁸³ Being professionally trained and having initiated the encounter with the citizen, "the police are better able than the private person to plan the encounter so that if consent is given, proof of it will be available." Weinreb, *supra* note 25, at 57.

²⁸⁴ *Schneekloth*, 412 U.S. at 277 (Marshall, J., dissenting) (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result)).

²⁸⁵ *Jimeno*, 500 U.S. at 252; see *supra* text accompanying note 122.

lions. This classic dilemma for a democratic society may be resolved either by adopting society's interest as paramount to individual rights, or by allowing individual rights to prevail over societal concerns. The dilemma cannot be resolved from any other perspective, certainly not from the perspectives suggested by the Court—not by asking whether the police officers had a rational basis for concluding that torture was appropriate; not by canvassing the community to determine whether a majority approve of torture; and not by speculating as to whether a hypothesized reasonable person would prefer torture to the loss of millions of lives.

In a constitutional democracy in which neither individual autonomy nor collective security may completely dominate the other, reconciling or accommodating the conflict between government and individual interests is a daunting task. What we may ask from the Court is that it face the task in a forthright manner by forsaking what Professor Tribe described as a tendency to “[a]bdicat[e] responsibility for choice.”²⁸⁶ The Court's claim that the perspectives of citizens, police officers, or hypothetical people can resolve constitutional questions is disingenuous. The Court, however, may ask that its critics temper their attacks on its use of balancing tests. Unless the academy can offer the Court a superior replacement, we are obliged to help the Court refine and improve all forms of judicial interest balancing. This Article attempts to meet this obligation by suggesting that the Court must display increased sensitivity to the individual's perspective when interpreting the Fourth Amendment, and by suggesting that the Court may utilize a “small absolute” (the individual's subjective perspective) when assessing consensual searches and seizures.

IV. POSTSCRIPT

The task for another day is to assess the role that various perspectives play in the interpretation of the Fifth and Sixth Amendments. For example, in *Colorado v. Connelly*,²⁸⁷ the Court held that a psychotic defendant who suffered from a compulsion to confess could nevertheless voluntarily waive his *Miranda* rights and make a voluntary confession. The Court's path to *Connelly* closely parallels the evolving view of Fourth Amendment perspectives addressed in this Article. A decade after the Court in *Boyd v. United States*²⁸⁸ utilized legal formalism to interpret individuals' Fourth Amendment rights, the Court in *Bram v. United States*²⁸⁹ interpreted the Fifth Amendment by focusing on the individual's perspective and his capacity to make a voluntary statement. Like the right to be secure against unreasonable

²⁸⁶ Tribe, *supra* note 163, at 170.

²⁸⁷ 479 U.S. 157 (1986).

²⁸⁸ 116 U.S. 616 (1886); see *supra* text accompanying notes 131, 133.

²⁸⁹ 168 U.S. 532 (1897).

searches and seizures, freedom from self-incrimination initially was characterized as the inherent right of the citizen to individual dignity, self-preservation, and self-determination. In *Connelly*, however, the Court eliminated any consideration of a defendant's capacity for self-determination,²⁹⁰ while focusing exclusively on the police officer's perspective. According to *Connelly*:

The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word.²⁹¹

As is true of the Court's Fourth Amendment analysis, the Court's Fifth Amendment analysis increasingly has adopted the officer's viewpoint by asking whether the officer acted "appropriately." Little concern has been given to the individual's perspective and the underlying issue of empowering individuals to control their own fate. The issue of empowerment was of foremost importance to Justice Marshall, who urged the Court to recognize that the Fourth Amendment embodies our commitment to a "society of free choice."²⁹² In a similar vein, Justice Brennan bemoaned the majority's refusal, in *Connelly*, to acknowledge free will as a value of constitutional consequence.²⁹³ There are many other similarities between the Court's approach to Fourth and Fifth Amendment issues, but at this point any detailed effort to resolve the conflict of perspectives presented in cases like *Connelly* is postponed.²⁹⁴ This brief comment on *Connelly* is offered merely to illustrate that the approach used in this Article points the way toward a principled choice of perspectives that can be applied to all aspects of criminal procedure. Finding the correct perspective on the relationship between individual free will and collective state power is the essence of criminal procedure.

²⁹⁰ "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State." *Connelly*, 479 U.S. at 166-67.

²⁹¹ *Id.* at 170 (citations omitted).

²⁹² See *supra* note 273 and accompanying text.

²⁹³ *Connelly*, 479 U.S. at 176 (Brennan, J., dissenting).

²⁹⁴ For a discussion of *Connelly*, see Benner, *supra* note 91, at 66.