OBJECTIVE ENOUGH: RACE IS RELEVANT TO THE REASONABLE PERSON IN CRIMINAL PROCEDURE

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There is overwhelming evidence that an individual's race affects how police treat them during a police encounter, and that Black Americans have substantial cause to worry about the consequences of ignoring or walking away from law enforcement. Accordingly, when courts determine whether a "reasonable person" feels free to decline, leave, or end an interaction with police, race is a relevant consideration. When applying the "reasonable person" standard in criminal procedure, however, courts pledge adherence to objectivity, avoiding any consideration of subjective factors such as an individual's characteristics, motivations, or experiences. In three related criminal procedure contexts, the adherence to traditional objectivity—which declines to consider race of the "reasonable person" —varies significantly, without a principled justification for the differing approaches.

Consent searches, seizure analysis, and custody for the purpose of Miranda *are different criminal procedure doctrines; yet each address a common underlying question about the coerciveness of police-citizen interactions. Since finding forty years ago that race is relevant to the voluntariness of an individual's consent to search, the Supreme Court has not reiterated that conclusion.[1] For the determination of whether a reasonable person is in custody, the Court has permitted the consideration of age, but not other demographic factors such as race in several decades.[2] And in December 2021, the Court declined the opportunity to address circuit conflict over whether race may ever inform when a reasonable person has been seized by police pursuant to the Fourth Amendment.[3]*

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1. United States v. Mendenhall, 446 U.S. 544, 558 (1980).
2. J.D.B. v. North Carolina, 564 U.S. 261, 281 (2011).
3. United States v. Knights, 989 F.3d 1281 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021).

The Court's approach to considering race for the "reasonable person" of these three criminal procedure doctrines is inconsistent and flawed, particularly when it denies the relevance of race to the coerciveness of a police-citizen encounter. Race does not fit neatly into the traditional objective/subjective framework for the reasonable person, but it should be a relevant consideration within the totality of circumstances for each of these analyses.

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INTRODUCTION

Late at night on January 26, 2018, in Tampa, Florida, Anthony Knights, a

young Black man, was sitting in his parked car with a friend. Two officers patrolling in a marked police car saw them, drove past, but then swung around to approach, crossed the median and parked their patrol car against the flow of traffic in a manner that boxed in Mr. Knights's car and constrained his freedom of movement.[4] Then, both police officers emerged shining flashlights. One unsuccessfully pursued Mr. Knights's friend, who left the parked car and entered the residence without having any police interaction, and then returned towards Mr. Knights, sitting in his parked car. At that point, the two officers stood on either side of Mr. Knights's parked car and targeted him for interrogation, despite his efforts to signal that he did not wish to engage.

The magistrate judge in the case—the judge who heard the testimony and evidence—concluded upon consideration of the totality of the circumstances that Mr. Knights had been seized within the meaning of the Fourth Amendment without considering his race.[5] Following the government's appeal and further review, however, the Eleventh Circuit concluded that Mr. Knights had not been seized, and instead that "[i]n this encounter, a reasonable person would have felt free to leave."[6] Compounding its surprising conclusion that Mr. Knights's encounter with law enforcement was consensual, the Eleventh Circuit held upon rehearing that lower courts were precluded from ever considering an individual's race among the totality of circumstances they consider when making the Fourth Amendment seizure determination.[7] Despite the inexorable conclusion that race can influence whether a reasonable person feels free to leave a police encounter, the Eleventh Circuit singled out race and excluded it from the totality of the circumstances analysis. In December 2021, the Supreme Court declined to address the circuit split over whether race can be considered in the reasonable person analysis for the seizure determination.

Upon stepping back from *Knights* and surveying the role of race in seizure and related doctrines, the reality is that a Black man may feel that it is *unreasonable* for him to deny consent to a search, to leave an interrogation, or to terminate a police encounter. Excising that racial reality from the set of factors included in a trial court's post hoc determination using the "reasonable person"

4. Petition for Writ of Certiorari, Knights v. United States, 142 S. Ct. 709 (2021) (No. 21-198), 2021 WL 3563561, at *4-5. I was privileged to represent Anthony Knights in the appeal of his motion to suppress and conviction, and some of the research cited here has been adapted from the briefs that I filed on his behalf in the Eleventh Circuit and United States Supreme Court. I am thankful to Jeffrey Fisher the students in Stanford Law School's Supreme Court Litigation Clinic, whose partnership on the Petition for Certiorari included important discussions about the role of race in the search doctrine that ultimately influenced this scholarship, and whose extraordinary collaboration led to the best advocacy we could provide Mr. Knights. I am deeply grateful to Mr. Knights for his permission to write about a personally devastating night, and I remain motivated by his patience and resilience.

5. United States v. Knights, No. 8:18-cr-100-T-33AAS, 2018 WL 4237695, at *2 (M.D. Fla. Sept. 6, 2018).

6. *Knights*, 989 F.3d at 1286.

7. *Id.* at 1289 ("So we may not consider race in deciding whether a seizure has occurred, and the objective circumstances of Knights's encounter with the police remain dispositive.").

standard merely distorts each of these criminal procedure analyses.

The paper deconstructs three criminal procedure doctrines where the Supreme Court has traditionally preferred to use an "objective" reasonable person: consent to a search, seizure analysis (when a consensual encounter becomes a seizure), and custody for the purposes of *Miranda.*[8] In Part I, I review some of the accumulated data showing why racial minorities, and especially Black males, "reasonably" fear interactions with law enforcement; present the current conflicting approaches to treating race under these doctrines; and summarize the primary critiques of the "reasonable person" in criminal procedure. Part II details the doctrines, showing that despite a preference for objectivity, characteristics that the Court sometimes considers "subjective"—regarding an individual's traits—have been permitted in two of these three. In Part III, I argue that these three doctrines address a common question about the coerciveness of interactions between individuals and law enforcement. Race may not be included in what has been traditionally considered "objective" factors for each of these analyses, but it is nonetheless highly relevant to the evaluation of how a "reasonable person" responds to police encounters. Excluding race perpetuates a "reasonable person" that is divorced from reality for many Americans, and, at a minimum, there is no reasoned basis to insist on an "objective" reasonable person for one of the three doctrines but not the others.

BACKGROUND

The concept of the "reasonable person" pervades the law of "murder, duress, provocation and self-defense."[9] In criminal procedure, the reasonable person is used to evaluate an individual's actions and as a lens through which to assess the constitutionality of law enforcement behavior.[10] The "reasonable person" measures the individual being stopped, searched, or questioned by police: what would that hypothetical person, going about their business, believe and do in response to a police action? For consent, courts decide whether a person's consent to an officer's request to search was voluntary, or whether a reasonable person in those circumstances would have felt coerced such that their consent is invalid.[11] In seizure analysis, courts determine whether, in view of all of the circumstances surrounding a police encounter, a reasonable person would have believed that they were free to ignore the police, in which case they were not

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

9. Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33 (2008).

10. For example, when determining whether an individual has been seized by law enforcement, the Supreme Court asked whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Brendlin v. California, 551 U.S. 249, 255 (2007) (quoting United States v. Mendenhall, 446 U.S. 554, 554 (1980)).

11. *Mendenhall*, 446 U.S. at 557.

seized.[12] And when determining whether a person was in custody such that *Miranda* warnings were required, courts ask if a reasonable person would have felt that they were at liberty to end the police questioning and leave.[13]

The "reasonable person" inquiry typically purports to be an objective analysis, but in some other contexts it brings in subjective qualities of an individual.[14] For example, in the law of self-defense, a court asks whether a defendant's actions were objectively reasonable, but the analysis includes subjective factors—was the defendant a short woman in a dark alley and the victim a large man approaching her?[15] For that particular context, the doctrine uses reasonableness to make a universal, objective definition of "reasonable person," yet considers subjective characteristics relevant to the individual situation.[16] Similarly, in the law of provocation, an objective standard asks whether the victim's provocation was such that "an ordinary, reasonable person [would] be overcome with emotion."[17] Yet every case where someone asserts self-defense necessarily evaluates the particular circumstances of the altercation.

To be sure, the concept of reasonableness is the "touchstone of Fourth Amendment" doctrine.[18] Reasonableness is the standard written in the text, which prohibits only the searches and seizures deemed to be "unreasonable."[19]

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12. *Brendlin*, 551 U.S. at 255.

13. Yarborough v. Alvarado, 541 U.S. 652, 663 (2004).

14. *See, e.g.*, George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 448-58 (2006) (addressing ways that subjective intent is relevant to Fourth Amendment reasonableness); Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 343 (2006) (criticizing the objective approach).

15. Various state statutes provide examples of reasonableness standards. *E.g.* MISS. CODE ANN. § 97-3-15 (2022):

> (1) The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases: . . . (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished[.]

People v. Goetz, 68 N.Y.2d 96 (1986), is a classic example of a case in which both subjective and objective components of the individual were analyzed when determining whether the shooting was reasonable in self-defense.

16. For example, where a defendant asserts a defense of self-defense to a murder charge, if there is sufficient evidence justifying the self-defense instruction, the burden is on the government to disprove self-defense *either* by negating the defendant's subjective actual belief or objective reasonableness. *See* Bryant v. United States, 148 A.3d 689, 702 (D.C. 2016).

17. State v. Felton, 329 N.W.2d 161, 172 (Wis. 1983).

18. Ohio v. Robinette, 519 U.S. 33, 39 (1996); *see* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

19. U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

Reasonableness pervades Fourth Amendment doctrine, including reasonable expectations of privacy, reasonable suspicion, and reasonable person standards. Reasonableness is traditionally considered an *objective* standard: reflecting some communal, neutral agreement that transcends subjective viewpoints of particular individuals.[20] For example, the *Katz* test asks first, if an individual has a subjective expectation of privacy, and second if that expectation is one that society is prepared to recognize as objectively reasonable.[21] Both the probable cause standard for an arrest, and the reasonable suspicion standard for an investigative stop lean heavily on the idea of objective interpretation of facts from a police officer's perspective.[22] For the purposes of most of these analyses, "objectivity" means prioritizing a universal, non-specific standard of human behavior and "subjectivity" is equated with inclusion of an individual's particular characteristics or motivations that affect the behavior in question.

Yet even though it is ubiquitous throughout criminal law and procedure, the reasonable person standard has been criticized for various reasons.[23] In an effort to maintain a predictable reasonable person, labeled as "objective," courts reject contextual, historical, and non-universal characteristics. This paper argues that excluding an individual's race from each of three criminal procedure determinations contributes to a reasonableness standard which is increasingly unmoored from reality and subjectively marginalizes groups, particularly Black men.

> shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

20. Los Angeles County v. Rettele, 550 U.S. 609, 614 (2007) (per curiam) ("The test of reasonableness under the Fourth Amendment is an objective one."); *see* Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 329 (1992) (arguing reasonableness in law is meant to embody a societal consensus superimposed on individual behavior and guide courts' decisions).

21. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (establishing a two-part test for whether police violated an individual's "constitutionally protected reasonable expectation of privacy").

22. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996):

> We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband of evidence of a crime will be found . . . . The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.

23. *See infra* Section I.A.

I. Racial Minorities Reasonably Fear Interactions with Law Enforcement

Over the past three decades but especially over the past several years, the invidious problem of racial bias in policing and its effects have been at the forefront of public and scholarly debate. "It is no secret that people of color are disproportionate victims"[24] of suspicionless stops by police. Statistical studies documenting racial bias in policing have been accumulating, and such "evidence of racial bias in our criminal justice system isn't just convincing—it's overwhelming."[25] In the summer of 2021, President Biden acknowledged that there was "absolutely" systemic racism in law enforcement.[26] The unfortunate reality is that racial disparities persist both in the frequency of police-citizen encounters and the instances of police use of force in those encounters.[27]

The scope of individual encounters with police is vast: there are millions of encounters between citizens and police each year. In 2018, the Bureau of Justice Statistics estimated that about 28.9 million U.S. residents experienced contacts initiated by police.[28] The Bureau further estimated that 3,528,100 of those contacts were stops where police approached individuals in a public place or near a parked vehicle.[29] Because the vast majority of these encounters reveal no incriminating evidence, most are not subject to judicial review for the existence of suspicion constitutionally required.[30] But these stops may be unconstitutional,

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24. Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (citing Michelle Alexander, The New Jim Crow 95-136 (1st ed. 2010)).

25. Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist: Here's the Proof*, Wash. Post (June 10, 2020), https://perma.cc/ND2K-SUGV (cataloging studies of racial bias in the criminal justice system, including 46 peer-reviewed studies demonstrating racial bias in policing and profiling over the prior five years). *See, e.g.*, U.S. Dep't of Just., *Investigation of the Ferguson Police Department* at 4 (2015) (concluding that African Americans were "more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables"); Floyd v. City of New York, 959 F. Supp. 2d 540, 573-74 (S.D.N.Y. 2013) (finding that over 80% of the individuals forcibly stopped by New York City Police between 2004 and 2012 were Black or Hispanic).

26. *See* Kathryn Watson, *Biden Says There is "Absolutely" Systemic Racism in Law Enforcement and Beyond*, CBS News (June 10, 2020), https://perma.cc/VC3E-6SZF. President Biden continued: "It's real. It's genuine. It's serious. And it is — it is able to be dealt with. Look, not all law enforcement officers are racist; my lord, there are some really good, good cops out there. But the way in which it works right now is we've seen too many examples of it." *Id.*

27. Frank R. Baumgartner et al, Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race (2018).

28. Erika Harrell & Elizabeth Davis, Bureau Just. Stat., Contacts Between Police and the Public, 2018 – Statistical Tables 3 (Dec. 2020), https://perma.cc/G65P-N8T5.

29. *Id.* at 4 tbl.2.

30. *See, e.g.*, *Floyd*, 959 F. Supp. 2d at 558 ("[I]n 98.5% of the [NYPD's] 2.3 million frisks [from 2004-2012], no weapon was found."); Emma Pierson et. al, *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736, 739 (2020) (showing that in tens of millions of vehicle stops from 2011 to 2018, less than one-fifth of municipal patrol searches turned up contraband). There is also small

and traumatic for the individual, all the same.[31] As "[c]ommon experience and common sense confirm," "conscious and unconscious prejudice persists in our society."[32] Those prejudices include the "powerful racial stereotype" "of [B]lack men as violence prone,"[33] "morally inferior," and more likely to commit crimes.[34] Race matters to all three of the criminal procedure doctrines discussed in this article because these "racial biases, sympathies, and prejudices still exist."[35] Police-citizen encounters reflect this unfortunate reality.

To be sure, Black Americans in the U.S. have long experienced disproportionate violence resulting from their interactions with law enforcement.[36] And the data confirms that this reality persists: despite accounting for 13.6 percent of the population,[37] Black people comprise 21 percent of all individuals involved in police-civilian encounters,[38] 38.4 percent of the federal prison population,[39] and 27 percent of all people shot and killed by police.[40] In a recent analysis of police-civilian encounters, officers aimed or shot a gun at Black individuals at eight times the rate of white individuals, and threatened force or engaged in physical contact against Black individuals at four times the rate of white individuals.[41] Compounding the higher rate at which this group is stopped by police is the fact that "historically . . . [B]lacks who have walked, run or raced away from inquisitive police officers have ended up beaten and battered and sometimes dead."[42] Indeed, studies demonstrate that for Black men in

likelihood of civil consequence. As Judge Calabresi has noted, "no more than a handful" of searches that "tur[n] up nothing" will "get to court" as § 1983 suits. United States v. Weaver, 975 F.3d 94, 109 (2d Cir. 2020) (Calabresi, J., concurring).

31. *See, e.g.*, Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2324 (2014).

32. Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring).

33. Buck v. Davis, 580 U.S. 100, 121 (2017) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)).

34. *Turner*, 476 U.S. at 35.

35. Flowers v. Mississippi, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting) ("[T]his is not a matter of assumptions," but "a matter of reality.").

36. The Supreme Court recognized this disproportionate treatment in 1968. Terry v. Ohio, 392 U.S. 1, 14-15 (1968) (recognizing "wholesale harassment" of Black individuals "by certain elements of the police community").

37. *QuickFacts*, U.S. CENSUS BUREAU (2019), https://perma.cc/WS3G-25XH.

38. Harrell & Davis, *supra* note 28, tbl.1.

39. *Inmate Race*, FED. BUREAU PRISONS, https://perma.cc/TPF6-3PD2 (Apr. 17, 2021).

40. Julie Tate et al., *Fatal Force*, WASH. POST (Apr. 20, 2021), https://perma.cc/U52H-CVQR.

41. Harrell & Davis, *supra* note 28, at 7, tbl.5.

42. Commonwealth v. Hart, 695 N.E.2d 226, 228 (Mass. App. Ct. 1998). Indeed, Black men who are perceived as "disrespecting police" have an increased chance of suffering physical violence. *See, e.g.*, C.R. DIV., U.S. DEP'T OF JUST. ET AL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 146 (Jan. 13, 2017) (Black youth are routinely called "n****r," "animal," "monkey," or "pieces of shit" by CPD officers, according to reports from both residents and officers); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 91-92 (2016), https://perma.cc/G3HX-JHMB; *see also* Rob Voigt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PNAS 6521, 6521 (2017) (body camera footage reveals that "[p]olice officers

particular, police violence can feel like a real possibility during any encounter with law enforcement.[43] As the D.C. Circuit recently explained, "[b]eing innocent is not the same as being perceived to be innocent, and "[e]ven the innocent person . . . might well fear that he is perceived with particular suspicion by hyper-vigilant police officers," a fear that "is particularly justified for persons of color."[44]

The impact of race on police encounters in the U.S. is so established and extensively reported that it cannot be ignored in the legal determinations concerning these encounters. "It seems as if the news has a daily accounting of the tragic consequences that can result if a minority citizen should in fact make any indication that he or she will not cooperate" with the police.[45] The president of a leading association of police chiefs recently explained that the "dark side of our shared history has created a multigenerational—almost inherited—mistrust between many communities of color and their law enforcement agencies."[46] Black Americans are undoubtedly aware of this reality: as Justice Sotomayor famously explained, in many Black families, the fear of being the victim of sudden, unexpected police violence has even given rise to the common—indeed, intergenerational—practice of Black parents "giv[ing] their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."[47]

To be clear, race informs the everyday reality of police encounters for all Black Americans, from children and university professors to army officers, a Senator, and even the former President.[48] Indeed, a recent national study found

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speak significantly less respectfully to black than to white community members in everyday traffic stops, even after controlling for officer race, infraction severity, stop location, and stop outcome").

43. Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIM. & PUB. POL'Y 71, 88 (2007) (finding that "violence at the hands of the police . . . happened enough to convince [Black youth] that it was a real possibility during *any* encounter with police officers").

44. Dozier v. United States, 220 A.3d 933, 944 (D.C. 2019); *see* Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (finding that, in light of "a pattern of racial profiling of [B]lack males in the city of Boston," Black Bostonians without any "consciousness of guilt" might "be motivated [to avoid officers] by the desire to avoid the recurring indignity of being racially profiled").

45. Scott E. Sundby, *The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. REV. 690, 725 (2018).

46. Tom Jackman, *U.S. Police Chiefs Group Apologizes for 'Historical Mistreatment' of Minorities*, WASH. POST (Oct. 17, 2016, 2:26 PM), https://perma.cc/HR8H-XYUE.

47. Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

48. *See, e.g.*, Eliza Shapiro, *Students of Color Are More Likely to Be Arrested in School. That May Change*, N.Y. TIMES (June 20, 2019), https://perma.cc/3R9M-3HBQ; Mike Ives & Maria Cramer, *Black Army Officer Pepper-Sprayed in Traffic Stop Accuses Officers of Assault*, N.Y. TIMES, https://perma.cc/At7K-3B5G (Apr. 16, 2021); Tim Scott, *GOP Sen. Tim Scott: I've Choked on Fear When Stopped by Police. We Need the JUSTICE Act.*, USA TODAY, https://perma.cc/9USA-LCUV (June 18, 2020); BARACK OBAMA, A PROMISED LAND, 395

that Black Americans are five times more likely than white Americans to report that they "worry a lot" about harm from a police encounter.[49] Disrespectful police treatment of Black people and disrespect for their legal rights is a long-documented and enduring problem.[50] For example, in a 2008 study of Chicago residents, Black individuals reported "more fear of the police than Whites."[51] It is therefore plainly reasonable that "Black people often tread more carefully around law enforcement," reasonably believing—based on "pervasive" and "persuasive" evidence—that "contact with the police can itself be dangerous."[52]

Consequently, for many "reasonable persons" in the United States, race bears a great deal on how they assess the extent of their rights and freedoms during interactions they have with police. To be clear, majorities of both Black *and* white Americans believe that Black citizens are treated less fairly than white ones in their dealings with police.[53] While one person deciding whether they're free to walk away from an inquisitive officer may be reasonable in their belief that it would be appropriate and safe to do so, another individual may be reasonable in their concern that attempting to leave the same encounter could mean being hit, shot, or violently arrested in the process. The reasonableness of those respective thoughts may depend on an individual's race and the nature of the collective experiences their communities have had with law enforcement.

Race is a factor that clearly influences a "reasonable person's" judgment of whether they are free to end a police encounter and walk away, or whether they are in custody, or whether their consent to a search is voluntarily given. As such, race is certainly a relevant factor contributing to the common questions about human behavior underlying consent to search, seizure analysis, and custody for the purposes of triggering *Miranda*. The heart of these three determinations is a question about how a reasonable person will feel in the face of police questioning and interrogation. Considering the extensive social science documenting racial

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(Crown, 1st ed. 2020).

49. Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS & OFFENDERS 549, 557 (2020).

50. *See, e.g.*, Ronald Weitzer, *Citizens' Perception of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819, 823-24 (1999) ("In 1991, 28 percent of the [B]lacks polled and 16 percent of the whites reported that an officer had shown disrespect or had used insulting language toward them at some time.").

51. Amie M. Schuck et al., *The Influence of Race/Ethnicity, Social Class and Neighborhood Context on Residents' Attitudes Towards Police*, 11 POLICE Q. 496, 509 (2008). Additionally, a recent national study found that Black Americans are five times more likely than white Americans to report that they "worry a lot" about being the victim of police violence. Graham, *supra* note 49.

52. United States v. Knights, 989 F.3d 1281, 1297 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021) (Rosenbaum, J., concurring); Illinois v. Wardlow, 528 U.S. 119, 132 (2000) (Stevens, J., concurring).

53. Drew DeSilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), https://perma.cc/76XA-4PVX ("84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites; 63% of whites said the same. Similarly, 87% of blacks and 61% of whites said the U.S. criminal justice system treats black people less fairly.").

disparity in police citizen encounters, our courts "cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing but are based on experiences and expectations."[54] In applying each of these standards, the reality of racial bias in law enforcement cannot be cast aside.

A. Critiques of the "objective" reasonable person

It must be emphasized that defining reasonableness has always been elusive. The Supreme Court acknowledges that "[w]hat is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus paper test."[55] The Court concedes that the reasonable person test is "necessarily imprecise" and requires lower courts "to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."[56]

In a recent article, Professor Orin Kerr persuasively argues that the "Fourth Amendment's objective façade has begun to crack."[57] Although the Court has traditionally ignored an officer's subjective intent, and instead focused on what the officer actually does,[58] Kerr explains that reliance on an officer's subjective intent "is sprinkled throughout Fourth Amendment doctrine."[59] Kerr's analysis reviews the Court's recognition of police officers' subjective intent, details the advantages and challenges of identifying an officer's state of mind, and offers judgments on the law's choices between objective and subjective tests.[60] Kerr details areas where Fourth Amendment doctrine claims "objectivity" but the Supreme Court has condoned consideration of an officer's state of mind.[61] Upon

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54. Dozier v. United States, 220 A.3d 933, 945 (D.C. 2019).

55. United States v. Rabinowitz, 339 U.S. 56, 63 (1950); *see also* Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) ("[The Fourth Amendment] recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures.'").

56. Michigan v. Chesternut, 486 U.S. 567, 573 (1988).

57. Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 447 (2021).

58. Professor Kerr provides several examples of the Supreme Court's stated preference for objectivity in the Fourth Amendment. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding that an officer's true reason for initiating a traffic stop must "play no role" in the Fourth Amendment analysis); Brigham City v. Stuart, 547 U.S. 398, 405 (2006) (holding that when determining whether an emergency justified an officer's entry into a home, "[i]t therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers [acted] to gather evidence against them or to assist the injured and prevent further violence").

59. Kerr, *supra* note 57, at 449.

60. *Id.* at 451.

61. For example, in *Florida v. Jardines*, the Court reasoned that the scope of an implied license to search is determined by the officer's intent when he approached the front door, and "is limited not only to a particular area but also to a specific purpose." 569 U.S. 1, 9 (2013). Upon considering whether a Fourth Amendment search occurs when an officer walks up to the front door of a private home with a drug-sniffing dog to see if the dog will alert to the smell

describing several contexts where an officer's particular state of mind has become relevant, he concludes that "Fourth Amendment law is not unquestionably objective. It is a mix, and the Justices choose in each case whether a particular doctrine is appropriately objective or subjective."[62] Kerr does not address the variable objectivity of the "reasonable person" in criminal procedure—the individual encountering law enforcement. Just as the Supreme Court traditionally eschewed subjectivity in analysis of law enforcement actions, it historically insisted that the Fourth Amendment's "reasonable person" test be objective.[63] I believe that Kerr's observation about the weakening objectivity of the Fourth Amendment generally applies to the ubiquitous "reasonable person."

This article builds upon the scholarship of Tracey Maclin and Devon Carbado, who have each discussed racial bias in policing and the resulting problems for criminal procedure doctrines.[64] Scholars recognize the role that racism plays in the problem of mass incarceration.[65] Decades ago, after two Supreme Court decisions expanded the scope of citizen-police encounters that were considered "consensual," and excluded from Fourth Amendment protection, Maclin observed that construing the reasonable person without considering race "is naive, it produces distorted Fourth Amendment rules and ignores the real world that police officers and black men live in."[66] And more recently, Carbado powerfully explained that the Supreme Court's omission of race from its Fourth Amendment reasonable person deepens the disconnect between the law and reality of police-citizen encounters.[67] There is increasing

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of drugs inside, Justice Scalia explained that officer intent was relevant to the question of the extent of the implied license.

62. Kerr surveys reasonableness doctrines that assess subjective beliefs of police officers, including: the special needs doctrine, inventory search doctrine, the scope of *Terry* frisks, and probation and parolee searches. For example, the Court has held that those on probation and parole can have limited Fourth Amendment rights if the courts have imposed search provisions on their release. *United States v. Knights*, 534 U.S. 112, 122 (2001). Although the Court has not addressed the issue of whether an officer needs to know an individual's status to rely on the diminished constitutional protections, Kerr notes that "lower courts are uniform that the officer's subjective understanding controls." Kerr, *supra* note 57, at 461.

63. For example, the Court traditionally insisted upon objective rules for the reasonableness of a search or seizure because "the Fourth Amendment regulates conduct rather than thoughts" and such objectivity "promotes evenhanded, uniform enforcement of the law." Ashcroft v. Al-Kidd, 563 U.S. 731, 736 (2011).

64. *See* Tracey Maclin, *Race and the Fourth Amendment,* 51 VAND. L. REV. 333 (1998); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1002-03 (2002); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 141-42 (2017).

65. *See, e.g.*, Alexander, *supra* note 24, at 6; Valeria V. Weis, *Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DEPAUL J. SOC. SCI. 1, 1-2 (2017); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1272-73 (2016); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1050 (2010).

66. Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991).

67. Carbado, *(E)racing the Fourth Amendment*, *supra* note 64, at 1002-03 (2002). *See*

scientific evidence that Black men, in particular, are conditioned to assume that asserting their constitutional rights in a police encounter will increase the likelihood of their arrest, and the risk of physical harm.[68] Thus, according to Professor Carbado, the Fourth Amendment's reasonable person includes an implicit assumption—that a reasonable person knows they can deny consent to a police officer. That is erroneous for Black men.[69]

As discussed, substantial empirical evidence confirms that race informs how an individual perceives and experiences the coerciveness of a police encounter. And considering the accumulated social science, these fears are unquestionably "reasonable." With this empirical knowledge, excluding race from the "reasonable person" standard ignores an objective reality—that certain people are more likely to be stopped, harassed, detained, and killed by police officers.[70] Accordingly, scholars, advocates, and some judges have recognized that the standard fails to adequately protect racial minorities, particularly Black men.

Relatedly, Professor Scott Sundby argues that a "rugged individual" archetype is deeply woven into the Fourth Amendment's "reasonable person," and the resulting legal standards imagine someone who "unflinchingly stands up to government authority."[71] Sundby reasons that the Supreme Court, when faced with the question of how a person should behave in an encounter with law enforcement, repeatedly perpetuates an idealized person who "possesses the constitutional resolve to stand up to the government and actively assert his or her rights, unafraid of the consequences."[72] This "rugged individual" archetype—who asserts his rights to a police officer in real time—is incompatible with the reality of systemic racism in policing and the resulting fears about repercussions from behaving with law enforcement in this manner. Indeed, as courts recognize, "an African-American man facing armed policemen would reasonably be especially apprehensive,"[73] and "[t]he fear of harm" at "the hands of police," and "resulting protective conditioning to submit to avoid harm," are tied to the experiences of Black Americans and may be "relevant to whether there [is] a seizure."[74] As detailed herein, these doctrines devise a reasonable person who is

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also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1087 (1991).

68. Carbado, *(E)racing the Fourth-Amendment*, *supra* note 64, at 1014 n.274.

69. *Id.* at 1013-14.

70. *See* U.S. Dep't of Just., *supra* note 25, at 4 (2015) (concluding that African Americans were "more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race variables"); Floyd v. City of New York, 959 F. Supp. 2d 540, 573 (S.D.N.Y. 2013) (finding that over 80% of the individuals forcibly stopped by New York City Police between 2004 and 2012 were Black or Hispanic).

71. Sundby, *supra* note 45, at 690.

72. *Id.* at 716-17. When defining what constitutes a seizure under the Fourth Amendment, the Supreme Court used the "rugged individual archetype to define the right's operation." Citing four consensual encounter cases, Sundby explains how the Court decided that a "reasonable person would have felt free to refuse to cooperate and 'go about one's business.'"

73. Dozier v. United States, 220 A.3d 933, 944 (D.C. 2019).

74. *Id.*

always willing to exercise their constitutional rights when interacting with police officers.[75]

For similar reasons, an "objective" reasonable person has been criticized from a feminist perspective. The critiques most relevant to this project have attacked the purported "universality" of the reasonable person as actually perpetuating a privileged, male and white norm. From the feminist perspective, Dana Raigrodski, Catherine MacKinnon and Josephine Ross has each noted that to the extent the "reasonable person" in criminal procedure attempts universal applicability, this excludes consideration of a female perspective.[76] Raigrodski argues that "the Court maintains a male discourse of objectivity and reasonableness, which serves to subordinate individuals encountering the police and exclude them from legal discourse and the criminal justice system."[77] Put simply, the "objectivity" of a reasonable person perpetuates the unstated white, male, and privileged norm.[78] Accordingly, these scholar explain how the "reasonable person" actually incorporates subjective beliefs of maleness, while purporting to be universal. Excluding these contextual, historical, and gender related factors leads to a reasonableness standard that subjectively marginalizes women and other subordinated groups.[79]

Finally, Professor Jamelia Morgan has drawn attention to the ways in which disability mediates a person's interactions with law enforcement. Morgan argues that the existing "reasonable person" renders disabled individuals, meaning those with visually discernable differences, and those with physical limitations, cognitive impairment, and psychiatric disabilities that are invisible to others, especially vulnerable to police coercion and violence.[80] Morgan adds that the "reasonable person" standard in these criminal procedure contexts "provides inadequate protection for disabled people, particularly those with intellectual and cognitive disabilities, who may interpret any show of force or authority as inherently coercive."[81] Employing a "reasonable person" that cannot account for disability when measuring the coerciveness of a police encounter will diminish

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75. *See infra* Section II.

76. Dana Raigrodski provides effective feminist critique of the reasonable person in Fourth Amendment procedure. Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. (2008); *see also* CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 170 (1989); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 n. 188 (1992). In her recent book, Josephine Ross critiques the law of police stops from a feminist perspective. JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS (2020).

77. Raigrodski, *supra* note 76, at 157.

78. *Id.* at 166.

79. There are many examples of these feminist-based critiques of the "objective" reasonableness standard. *See, e.g.*, PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 8-9 (1991); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 80 (1994).

80. Jamelia Morgan, *Disability's Fourth Amendment*, 22 COLUM. L. REV. 489, 519-20 (Mar. 2022).

81. *Id.*

the constitutional protection afforded individuals with disabilities.

With these critiques of the reasonable person standard in mind, I explore three interrelated uses of the "reasonable person" in criminal procedure.

B. Courts' conflicting treatment of race in reasonable person analyses

As discussed, the Supreme Court has repeatedly recognized racism in our criminal legal system, and the ubiquity of prejudice against Black men in the criminal legal context.[82] Within the context of criminal procedure determinations, the Court explicitly permits consideration of an individual's race when determining whether their consent to a search by police was voluntary.[83] In *Mendenhall*, the Court acknowledged that a Black woman's race and gender were relevant to whether she "felt unusually threatened by officers" and thus whether her consent to a prolonged encounter with federal agents was voluntary.[84] The consent to search analysis considers "the totality of all the circumstances" to determine whether "duress or coercion" bore on the individual's ability to terminate an encounter or deny a police request.[85] Critically, *Mendenhall*'s discussion of the defendant's race suggests that race is relevant to the voluntariness of consent not because of the defendant's particular experience, but rather because of the *objective* import of race. Indeed, given "Black Americans' shared historic experience in police encounters, purported 'consent' is less likely to be truly voluntary when attributed to Black individuals."[86]

Given that basis for the relevance of race, "it is difficult to understand why that same shared experience would not be equally relevant to whether a Black citizen truly feels 'free to leave' a police encounter."[87] In fact, the Court has emphasized that consent to search and seizure tests "turn on very similar facts," and "the question of voluntariness pervades both . . . inquiries."[88] For these reasons—the similarity between the two inquiries and classification of race as an objective factor—some lower courts read *Mendenhall* to suggest that "race is 'not irrelevant'" to the Fourth Amendment seizure analysis as a whole.[89] The Court's pronouncement that race is relevant to the voluntariness of consent supports the argument, adopted by many circuit courts of appeal, that an

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82. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring); Buck v. Davis, 580 U.S. 100, 102 (2017); Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion); Flowers v. Mississippi, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting).

83. United States v. Mendenhall, 446 U.S. 544, 558 (1980).

84. *Id*.

85. *Id.* at 557.

86. United States v. Knights, 989 F.3d 1281, 1298 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021) (Rosenbaum, J., concurring).

87. *Id*.

88. United States v. Drayton, 536 U.S. 194, 206 (2002).

89. United States v. Smith, 794 F.3d 681, 688 (7th Cir. 2015); State v. Ashbaugh, 244 P.3d 360, 369 (Or. 2010).

individual's race can be considered as an objective factor within the totality of circumstances of a police encounter, and can be relevant to when that encounter becomes a seizure protected by the Fourth Amendment.

Custody, for the purposes of triggering *Miranda* warnings, is tantamount to a formal arrest,[90] whereas a Fourth Amendment seizure need not be so restraining.[91] But both tests ask the question of whether a reasonable person would feel free to terminate a police encounter.[92] In the analysis of custody triggering the *Miranda* warnings, the Court held that an individual's age can be considered within the totality of the circumstances analysis, but has not explicitly addressed race.[93] The Court explained that individual characteristics like age and disability can be relevant to whether a reasonable person would feel free to leave police questioning. Courts recognize that Fourth Amendment seizure analysis tracks the *Miranda* custody analysis, differing only in "degree."[94] A "reasonable child subjected to police questioning," the Court explained, "will sometimes feel pressured to submit when a reasonable adult would feel free to go," and accordingly held that "the *Miranda* custody analysis includes consideration of a juvenile suspect's age"—alongside other "undeniably personal characteristics," such as "whether the individual being questioned is blind."[95]

Although the role of race in the seizure analysis has been percolating throughout the courts for nearly three decades, the Supreme Court has been silent and recently declined to address the deepening circuit split.[96] There is therefore an entrenched conflict on whether courts may consider an individual's race when determining whether he was seized within the meaning of the Fourth Amendment.[97] Without direction, federal and state courts are divided on the question, and their analyses demonstrate that race does not fit into an objective/subjective dichotomy.

In *United States v. Knights,* the Eleventh Circuit adopted a new, categorical rule: "the race of a suspect is never a factor in seizure analysis."[98] Conceding that

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90. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam).

91. *See* Berkemer v. McCarty, 468 U.S. 420, 436-37 (1984).

92. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4 (6th ed. 2020) (acknowledging that after *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) the "analogous" Fourth Amendment seizure inquiry likely also "requires consideration of some known unique characteristics of the suspect (e.g., his youth)").

93. *See J.D.B.*, 564 U.S. at 275 (holding age has an "objectively discernible relationship to a reasonable person's understanding of his freedom of action").

94. United States v. Ortiz, 781 F.3d 221, 229 (5th Cir. 2015).

95. *J.D.B.*, 64 U.S. at 268, 272.

96. As early as 1992, Judge Mack of the D.C. Court of Appeals argued that a defendant's race could appropriately inform the seizure analysis. *In re* J.M., 619 A.2d 497, 512 (D.C. 1992) (Mack, J., dissenting).

97. The Eleventh Circuit held that individual characteristics such as "age, education, and intelligence" are relevant to the totality of the circumstances inquiry, as to whether a "reasonable person would feel free to terminate the encounter." United States v. Knights, 989 F.3d 1281, 1286 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021). Yet the court concluded that race could never be considered in that determination. *Id.* at 1288.

98. *Id.*

"race can be relevant in other Fourth Amendment contexts," and that "the suspect's age, education, and intelligence" are relevant factors to the seizure analysis, the court held that race should be excluded from the seizure analysis because it does "not lend [itself] to objective conclusions" and could not be taken into account in a "rigorous" or "systematic" way.[99] The Tenth Circuit adopted a similar rule in 2018.[100] In *Easley,* Drug Enforcement Administration (DEA) agents boarded a Greyhound bus, questioned all the passengers, and searched their belongings. The agents then asked Ms. Easley, the only Black passenger, to step off the bus for a second round of questioning.[101] After "consider[ing] [her] race as one of several factors in assessing the totality of the circumstances surrounding her encounter," the district court concluded that the DEA agents seized Ms. Easley when they first questioned her on the bus.[102] The Tenth Circuit reversed, holding that the "categorical consideration of race in the reasonable person [seizure] analysis is error."[103] Though both the Tenth and Eleventh circuits accept the relevance of an individual's age to the seizure determination, they "distinguish race" because "there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures."[104]

The Fourth Circuit has implemented the same approach. The Charlottesville police, searching for a Black suspect, approached 190 young Black men to request a DNA sample.[105] Larry Monroe, a Black man, gave the sample but later argued, in a suit under 42 U.S.C. § 1983, that the officers' visit to his home and DNA request was a seizure. Mr. Monroe contended that a reasonable person would not have felt free to terminate the police encounter, given, among other relevant factors, the "state of relations between law enforcement and members of minority communities."[106] Rejecting this argument, the Fourth Circuit dismissed any discussion of his race and characterized Mr. Monroe's "subjective beliefs about" the effect of police-minority relations as "irrelevant facts" that have no place in the seizure inquiry.[107] This article will unpack these conclusions, arguing that individual race is objective enough to include in the totality of circumstances considered for the "reasonable person."

In contrast, the Ninth and Seventh Circuits, along with the D.C. Court of Appeals, have declined to exclude race from, at a minimum, the seizure analysis.

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99. *Id.* at 1286, 1288-89.

100. United States v. Easley, 911 F.3d 1074, 1074 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1644 (2019).

101. *Id.* at 1078.

102. United States v. Easley, 293 F. Supp. 3d 1288, 1307 (D.N.M. 2018).

103. *Easley*, 911 F.3d at 1082.

104. *Id*. The Tenth Circuit recently reaffirmed this holding in *United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021).

105. Monroe v. City of Charlottesville, 579 F.3d 380, 382 (4th Cir. 2009), *cert. denied*, 559 U.S. 992 (2010).

106. *Id.* at 386.

107. *Id.* at 387. As a result, the Fourth Circuit held that Mr. Monroe had failed to state a claim for a Fourth Amendment violation. *Id.*

These circuits hold that race, like other objective factors, should be considered in the totality-of-the-circumstances test where it is relevant to the dynamics of a particular seizure. In *United States v. Washington*, the Ninth Circuit held that a late-night encounter between two police officers and a Black man sitting in his parked car escalated into a seizure governed by the Fourth Amendment.[108] Late one evening on a Portland street, a police officer approached Bennie Washington's car by shining a flashlight into the car.[109] The officer asked Mr. Washington if he would agree to be searched, and, when he agreed, the officer asked him to step out of his car. At that point, a second officer arrived, asked for consent to search Mr. Washington's car, searched the car, and found a firearm that served as the basis for firearm possession conviction.[110] In concluding that the encounter had escalated into a seizure before the officers found the firearm, the Ninth Circuit considered "the total circumstances present in Washington's case," including the "publicized shootings by white Portland officers of African-Americans."[111]

Similarly, the D.C. Court of Appeals held that a defendant's race can inform the totality-of-the-circumstances seizure analysis.[112] In *Dozier,* four police officers, driving at night in a "high crime area," observed Samuel Dozier, a Black pedestrian, near a secluded alley.[113] After parking their car, two officers followed Mr. Dozier into the alley and repeatedly asked to "talk" to him.[114] Their requests "escalat[ed]," culminating with a "request" for Mr. Dozier "to put his hands on the wall for a pat-down."[115] In determining whether Mr. Dozier had been seized, the D.C. Court of Appeals explained that Black Americans' "fear of harm" at "the hands of police," and "resulting protective conditioning to submit to avoid harm," may be "relevant to whether there [is] a seizure.[116] In the secluded alley that night, the court explained, Mr. Dozier "reasonably could have feared that unless he complied with the police requests, he would be vulnerable to police violence."[117] Accordingly, the court held that Mr. Dozier had been seized.[118]

Finally, the Seventh Circuit acknowledges that race can be relevant in the seizure inquiry. In *United States v. Smith,* the court held that officers seized Dontray Smith, a young Black pedestrian, when they cycled past him in an alley, swung around to face him, pedaled toward him, and posed a "single, accusatory question": "Are you in possession of any guns, knives, weapons, or anything

108. United States v. Washington, 490 F.3d 765, 767 (9th Cir. 2007).
109. *Id.* at 767-68.
110. *Id.* at 768.
111. *Id.* at 772-73.
112. Dozier v. United States, 220 A.3d 933, 944 (D.C. 2019).
113. *Id.* at 938, 943.
114. *Id.* at 938.
115. *Id.* at 941, 947.
116. *Id.* at 944.
117. *Id.* at 945.
118. *Id* at 947.

illegal?"[119] Mr. Smith argued that, as a young Black male approached by multiple police officers in a confrontational manner, he reasonably did not feel free to walk away.[120] The Seventh Circuit acknowledged "the relevance of race in everyday police encounters with citizens in Milwaukee and around the country," and that race can sometimes properly inform the Fourth Amendment seizure analysis.[121] Since *Washington, Dozier*, and *Smith,* several federal district and state intermediate courts have embraced the reasoning of the Seventh and Ninth Circuits and the D.C. Court of Appeals.[122]

A few state supreme courts recognize that an individual's race is properly included in the reasonable person seizure analysis, while acknowledging the lacuna of guidance from the Supreme Court.[123] In June of 2022, the Washington Supreme Court held that courts must consider an individual's race as part of the totality of circumstances when determining whether that individual has been seized by a police officer.[124] Like the Fourth Amendment, Washington's constitutional provision requires that the determination be objective—upon consideration of all the circumstances, was the individual free to leave, refuse a request, or otherwise terminate the police encounter.[125] Upon concluding that trial courts must consider the race and ethnicity in the totality of circumstances when deciding whether there was a seizure, a unanimous Washington Supreme Court "formally recognize[d] what has always been true: in interactions with law enforcement, race and ethnicity matter."[126] Specifically, a reasonable person in seizure analysis means one "familiar with patterns of policing in America and

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119. United States v. Smith, 794 F.3d 681, 685 (7th Cir. 2015).

120. *Id.* at 687-88.

121. *Id.* at 688.

122. *See* United States v. Perkins, No. 4-17-CRW-00474 -SNLJ, 2019 WL 1026376, at *4 (E.D. Mo. Jan. 16, 2019) (acknowledging defendant's argument that a "reasonable person would not believe that he was free to leave upon being handcuffed—particularly when the person handcuffed is African American and the officer is Caucasian"); United States v. Hill, CR 18-458, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019) (similar); Doe v. City of Naperville, No. 17-CV-2956, 2019 WL 2371666, at *1 (N.D. Ill. June 5, 2019) (analyzing seizure from perspective of "a reasonable twelve-year-old, African American child"); State v. Johnson, 440 P.3d 1032, 1042 n.5 (Wash. Ct. App. 2019) (declining to "assert that race could never be a factor"); *In re* D.S., 2021 WL 212363, at *6 (Md. Ct. Spec. App. Jan. 21, 2021) (explaining that courts can consider "perceptions about race-related risks in interacting" with police).

123. *See, e.g.*, Commonwealth v. Evelyn, 152 N.E.3d 108, 121 (2020). Though "factors other than race" sufficed to establish that the defendant in *Evelyn* had been seized, the court recognized that "African-Americans, particularly males, may believe that they have been seized in situations where other members of society would not," and "agree[d] that the troubling past and present of policing and race are likely to inform how African-Americans . . . interpret police encounters." *Id.* at 120.

124. State v. Sum, 511 P.3d 92, 110 (Wash. 2022).

125. The Washington Supreme Court explicitly considered this question under state law, given it is "well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution." State v. Rankin, 92 P.3d 202, 204 (Wash. 2004) (quoting State v. Jones, 45 P.3d 1062, 1064 (Wash. 2002)).

126. *Sum*, 511 P.3d at 109-10.

the risks a person of color takes in walking away from or disregarding police interaction."[127] With that decision, Washington joined New Hampshire, whose highest court also recently held that "race is an appropriate circumstance to consider in conducting the totality of the circumstances analysis."[128] In *State v. Spears*, the South Carolina Supreme Court noted the circuit split regarding race in the seizure analysis, and did not resolve whether "race is a factor to be considered" because the defendant had not preserved the argument.[129] Two justices, however, authored opinions to explain that courts *must* be allowed to consider a defendant's race in the seizure analysis, in light of the totality of circumstances approach combined with the reality of police citizen interactions. Given "the dynamics between marginalized groups—particularly African-Americans—and law enforcement," Chief Justice Beatty explained, "it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics."[130]

The Tenth and Eleventh Circuits reject any consideration of race from the reasonable person partially because of the conception of race as a subjective factor that varies between individuals too much to be considered for the determination. In contrast, the various courts that recognize race is a relevant factor in the reasonable person standard in criminal procedure, an individual's race is *objective enough* to be considered when answering questions about the coerciveness of law enforcement encounters with civilians.

Having reviewed the primary critiques of the "reasonable person" in criminal procedure and existing judicial conflicts regarding the role of race in the reasonable person analysis, I explore three doctrines more closely to understand the variable objectivity among their "reasonable persons."

II. THE VARIABLE REASONABLE PERSON IN THREE CRIMINAL PROCEDURE DOCTRINES

The Supreme Court varies in its demand for objectivity of the "reasonable person" in these criminal procedure doctrines. Each of these analyses is made after an individual interaction with police and each address questions about the coerciveness of such encounters. Thus, the variable adherence to "objectivity" among these three "reasonable persons" is perplexing.

A. The dwindling consideration of demographic traits in evaluating the

127. Supplemental Brief of Petitioner at *1, State v. Sum, 2022 WL 1651511 (Wash. Jan. 14, 2022) (No. SC997306).

128. State v. Jones, 235 A.3d 119, 126 (N.H. 2020)

129. State v. Spears, 839 S.E.2d 450, 460-61 (S.C. 2020) (contrasting *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015) with *United States v. Easley*, 911 F.3d 1074, 1074 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1644 (2019)).

130. *Spears*, 839 S.E.2d at 463 (Beatty, C.J., dissenting).

"voluntariness" of consent

When an individual challenges the fruits of a police search, and law enforcement claims that they had valid consent to conduct that search, a court makes a voluntariness determination. The court decides whether, under the totality of circumstances, the person consented voluntarily or whether a reasonable person would have felt coerced under those circumstances.[131] The most common warrantless searches, known as consent searches,[132] have long been endorsed by the Supreme Court.[133] When the subject of a search is not in custody, the state can justify a search on the basis of consent by showing that the individual's consent was "freely and voluntarily given."[134] Consent to a warrantless search is sometimes conceptualized as a waiver of the Fourth Amendment right to be free from unreasonable searches, but the Court categorizes consent as an exception to the Fourth Amendment warrant requirement.[135] Many observers have questioned the entire premise—whether any individual would truly consent to a search that could criminally implicate him, and why the Court is willing to find voluntary consent where it is implausible.[136]

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131. United States v. Mendenhall, 446 U.S. 544, 545 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

132. *See* Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE 275 (3d ed. 2002) (citing an estimate that more than 98% of warrantless searches are justified on "consent" grounds); Joshua Dressler & George C. Thomas III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 317-18 (4th ed. 2010) (stating that the pervasive use of consent searches by police "suggests that consent issues are of profound importance in the 'real world' of searches and seizures").

133. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250-51 (1991) ("Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."); *Schneckloth*, 412 U.S. at 222 ("[A] search authorized by consent is wholly valid."). *See also* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

134. *Schneckloth*, 412 U.S. at 222. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 497 (1983) (noting that the state did not provide such proof).

135. *Schneckloth*, 412 U.S. at 227 (holding that knowledge of one's right to refuse consent is a relevant but not required factor in determining whether consent was voluntary, and the government does not need to prove that the person who gave consent to search knew of the right to refuse consent under the Fourth Amendment).

136. *See* John M. Burkoff, *Search Me?*, 39 TEX. TECH. L. REV. 1109, 1114 (2007):

> How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to *really* consent—"freely and voluntarily"—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?;

Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (describing one of the Supreme Court's findings of voluntary consent as "absurd").

In *Schneckloth*, the seminal case reflecting the Court's approach to consent, an officer stopped a car because its headlight and license plate light were burned out.[137] The driver and four of his passengers, including the defendant, could not produce a license, but one passenger that gave the officer his driver's license, said that the car was his brother's, and when the officer asked to search the vehicle he answered, "[s]ure, go ahead."[138] Describing consent as an exception to the Fourth Amendment's search warrant requirement, the Court held that the voluntariness of consent must be determined in light of the totality of the circumstances, and an individual's knowledge of their right to refuse consent was merely one fact within that inquiry.[139]

Upon determining whether an individual's consent was voluntary, courts assess "both the characteristics of the accused and the details of the interrogation."[140] When an individual challenges the search by moving to suppress the contraband found, the state does not need to show that the individual *knew* they could deny the officer's request to search. Although the language of consent emphasizes voluntary choice, some argue that the Court has repeatedly found voluntariness where it is wholly improbable.[141] Even the *Schneckloth* dissent insisted that, considering the power imbalance between individuals and police, the conception of consent was illusory, and consent is not actually voluntary unless officers are required to notify the reasonable person of their right to refuse.[142]

Nevertheless, the Court consistently justifies consent searches:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or

137. 412 U.S. at 220.

138. *Id.*

139. *Id.* at 227, 249. *See also* United States v. Drayton, 536 U.S. 194, 206 (2002); Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

140. *Schneckloth*, 412 U.S. at 226.

141. *See* Simmons, *supra* note 136, at 773-74 (explaining that the Supreme Court's consent doctrine "fails to acknowledge the complexities of police-civilian interaction and runs against the traditional standard of the Fourth Amendment").

142. 412 U.S. at 275 (Douglas, J., dissenting) ("I agree with the Court of Appeals that 'verbal assent' to a search is not enough, that the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed."); *Id.* at 277 (Brennan, J., dissenting):

> The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.

> her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.[143]

Justice Marshall, and early critic of "consent" searches, believed that "consent is ordinarily given as acquiescence in an implicit claim of authority to search."[144] Marshall insisted that "the holding [in *Schneckloth*] confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few."[145] Marshall believed that no court could truly affirm an individual's "consent" to a search as a valid warrant exception without proof that it was informed consent.[146]

Similarly, legal observers reason that consent is unlikely to be "voluntary" when contraband or damaging evidence is discovered.[147] Precedents necessarily arise from situations where an individual had contraband and then moved to suppress that evidence pursuant to the Fourth Amendment right to be free from unreasonable searches. But the conditions that a court considers to be "voluntary" expressions of consent are fundamentally societal judgments about our expectations in particular scenarios.[148] In other words, for every situation, judges look at an officer's set of actions and the individual's precise scenario to decide whether—in those circumstances—the consent given could have truly been voluntary.

Schneckloth held that an individual's personal characteristics are relevant factors that courts consider when evaluating the voluntariness of consent. The Court explained that: "[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[149] For the voluntariness of consent determination, the Court explicitly sanctions "tak[ing] into account" an individual's age, level of education, intelligence, and evidence of their knowledge of their constitutional

143. *Drayton*, 536 U.S. at 207.

144. 412 U.S. at 289 (Marshall, J., dissenting).

145. *Id.*

146. *Id.* at 277-90

147. *See, e.g.*, Ric Simmons, *supra* at note 136, at 773-74; 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, 98 (1991) (stating that the Court's decision in *Florida v. Bostick*, 501 U.S. 429 (1991) pushed "the notion of 'voluntary' consent into the realm of fantasy").

148. For examples of scholars that criticize the entire premise of voluntary consent, *see* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion,* 202 SUP. CT. REV. 153, 155 (2003) ("What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent . . . ."); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134-41 (2003) (arguing that the Court's consent-search jurisprudence shows that the Court is "blinking" at reality).

149. *Schneckloth*, 412 U.S. at 226.

rights as relevant factors in the reasonable person analysis.[150]

Schneckloth embraced consideration of individual characteristics when determining whether consent was voluntary.[151] Then in *Mendenhall,* the Court reiterated that determining the voluntariness of consent requires considering "the totality of all the circumstances" to see if "duress or coercion" bore on the individual's ability to terminate an encounter or deny a police request.[152] There, federal agents identified Ms. Mendenhall at an airport as a potential drug courier, took her to the Drug Enforcement Agency (DEA) office in the airport, and discovered upon searching that she was carrying false identification.[153] The Court acknowledged that a Black woman's race and gender were relevant to whether she "felt unusually threatened by officers," and thus whether her consent to accompany the officers to the DEA office and be searched was "voluntary."[154] Critically, Ms. Mendenhall's status as a Black female was not relevant to the court's consideration of the voluntariness of her consent because of *her own* particular feelings or past police interactions, but because of the Court's belief about universal interactions between police officers and Black women. For the plurality, "race is 'not irrelevant'" to voluntariness of consent because of any individual defendant's subjective experience as a Black woman informs her consent, but because of the objective, universal import of race and gender as an experience.[155]

Schneckloth and *Mendenhall* establish that race is objective enough to be relevant for the assessment of whether a reasonable person's consent was

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150. *Id.*:

> Some of the factors taken into account have included the youth of the accused; his lack of education; or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.

(internal citations omitted).

151. *Id.*

152. United States v. Mendenhall, 446 U.S. 544, 557 (1980).

153. *Id.* 547-48.

154. *See Id.* at 554:

> It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant . . . neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.

(citing *Schneckloth*, 412 U.S. at 226).

155. *See* United States v. Knights, 989 F.3d 1281, 1288-91, 1298 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021) (Rosenbaum, J., concurring in the judgment) (given "Black Americans' shared historic experience in police encounters, purported 'consent' is less likely to be truly voluntary when attributed to Black individuals.").

voluntary. The Court's subsequent consent decisions, however, have moved away from individual characteristics in favor of a more "objective" reasonable person.[156] In *Rodriguez*, the Court addressed a challenge to a search where consent was given to police officers by a woman who had previously cohabitated with the defendant, but no longer did at the time of her consent.[157] The Court clarified that "reasonableness" within most Fourth Amendment contexts does not require factual accuracy: when a warrant issues pursuant to probable cause, for example, the search does not violate the Constitution just because the house does not have the contraband officers sought. Instead, "in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."[158] There, the "reasonable person" for consent to search is an objective construct imposed upon a police officer, not the individual granting consent: "[a]s with other factual determinations bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . "warrant a man of reasonable caution in the belief"' that the consenting party had authority over the premises."[159] *Rodriguez* held that the Fourth Amendment is not violated when officers search a residence after consent is granted from a person that they reasonably but erroneously believed had authority.[160] *Rodriguez* permits consent to be obtained from a third-party occupant who police reasonably believe shares authority over the area, thus demanding objectivity and shifting the "reasonable person" to a police officer deciding whether the consent was voluntary.[161] Critics of the decision abounded.[162]

Then, in *Jimeno*, the Court addressed whether an individual's consent to search his car included permission to open containers within his car.[163] The Court reasoned that given the officer informed Mr. Jimeno that he was searching for drugs, and because Mr. Jimeno did not explicitly limit his consent to the search,

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156. *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (holding that when there is common authority over a space, it is reasonable to recognize that any of the co-inhabitants can permit the inspection and that the others have assumed the risk that the common areas could be searched).

157. *Rodriguez*, 497 U.S. at 179. The question was whether the warrantless search was valid where consent was given by a third party whom the police reasonably believed possessed common authority over the apartment but did not.

158. *Id.* at 185-86.

159. *Id.* at 188 (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

160. *Id.* at 187-88.

161. *Id.* at 183-89.

162. *See, e.g.*, Davies, *supra* note 147; William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 778 (1989) (observing that critics of the Court's Fourth Amendment jurisprudence misunderstand the role of waiver in constitutional adjudication).

163. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (holding that the scope of an individual's consent to a search is based on objective reasonableness, meaning that which a reasonable person would have understood by the exchange between the officer and the suspect).

a reasonable person would understand consent to include searching the car as well as containers within the car that could contain drugs.[164] After reiterating the Court's approval of consent based searches,[165] Justice Rehnquist shifts away from subjective intent to an objective reasonable person, explaining that "[t]he standard for measuring the scope of a suspect's consent . . . is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[166] In *Jimeno*, the "reasonable person" functionally limits the individual granting consent and the police officer determination of what is reasonably included in the scope of that consent.[167] Both Mr. Jimeno's intended scope of consent and the officer's actual perception thereof are excluded from the reasonable person test as too subjective.[168]

Even though *Rodriguez* addresses the reasonableness of third-party consent and *Jimeno* addresses the reasonable scope of consent to a search, *Jimeno's* demand for "objective reasonableness" seems to undermine *Schneckloth*'s acknowledgment that an individual's personal characteristics are relevant to the determination of voluntariness of consent.

In *Drayton*, the Court was presented with another drug interdiction where multiple police officers boarded petitioners' bus, one officer positioned at the front and one at the rear while a third moved through the aisles to question individual passengers.[169] After determining that petitioners were not seized within the meaning of the Fourth Amendment, the Court addressed whether their subsequent consent to a warrantless search was voluntary.[170] Reiterating its reliance on the totality of circumstances, the Court analyzed the voluntariness of the defendants' consent:

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164. *Id.*; *see* Kerr, *supra* note 57; Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 532-33 (2015); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 177 (1991) ("In the context of the consent search, the subjective view seems required because the sole validating source of police authority to intrude on a premier constitutional right is the individual's grant of permission.").

165. *Jimeno*, 500 U.S. at 250-51 ("[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so.")

166. *Id.* at 251 (citing *Rodriguez*, 497 U.S. at 183-89 (1990)).

167. *See id.* at 250-52.

168. *Id.* at 251; *Rodriguez*, 497 U.S. at 183-89.

169. United States v. Drayton, 536 U.S. 194, 194-98 (2002).

170. *Id.* at 206. Critically, the Supreme Court recognized that challenges to the voluntariness of consent and to the seizure were highly related. *Id.* at 206:

> We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, *i.e.*, whether their consent to the suspicionless search was involuntary. In circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.

> [As] the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.[171]

The *Drayton* dissent insisted that given the officers' show of coercive authority – by boarding the bus, the bus driver yielding to all three of them, and all of the passengers complying with their requests – "[i]t is very hard to imagine that either [defendant] would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether."[172] For Justice Souter, "[n]o reasonable passenger could have believed that [they could deny consent], only an uncomprehending one."[173] Yet for Justice Kennedy, author of the majority opinion, the presence of many strangers on a bus should have made a reasonable person *more confident* to withhold consent.[174] Without citation to empirical studies, Kennedy asserts that the act of asking a reasonable person for permission to search their luggage in and of itself advises the person of their right to refuse.[175] Since *Drayton*, a "reasonable person" seemingly understands that the act of asking for consent implies that denial is an acceptable and safe response.

Following *Jimeno*, *Rodriguez*, and *Drayton*, the ability to consider demographic characteristics such as age and race in the voluntariness of a "reasonable person's" consent is on shaky ground. Without Supreme Court direction in decades, lower courts are unclear as to whether *Schneckloth*'s test

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171. *Id.* at 206. *Drayton* held that the officers were not required to inform passengers of any right to refuse:

> And, as the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.

(citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

172. *Drayton*, 536 U.S. at 212 (Souter, J., dissenting).

173. *Id.*

174. *Id.* at 204 ("[B]ecause many fellow passengers are present to witness police officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police.").

175. *Id.* at 207.

for voluntariness of consent permits consideration of an individual's particular characteristics.[176]

A few examples illustrate this problem. In *United States v. Sims*, the defendant argued that his consent was involuntary partly due to his deteriorating brain function caused by progressive dementia.[177] Citing *Schneckloth*, the Tenth Circuit reiterated that an individual need not know they can deny consent to search.[178] Although finding that the defendant's mental condition was the "most troubling issue," the Court reasoned that it had never required a perfect mental ability to find consent was voluntary, and that Mr. Sims did not present evidence "of the extent of his impairment at the time of his consent to search."[179] The Tenth Circuit recently repeated this requirement that a particular mental infirmity be proven in court with specific evidence, holding that an elderly man's dementia did not render his consent involuntary because there was no specific evidence of the extent of his impairment at the time of the search, "no aspect of [the defendant's] dysfunction was apparent to [officers]," and there was no evidence that the officers attempted to exploit any of these vulnerabilities.[180] The court signals that while a reasonable person *could be* cognitively impaired such that their consent was involuntary, proving such deviation from the "objective" reasonable person requires a strong evidentiary showing that their incapacitation was extreme, and even detectable by a reasonable officer.

In another case evaluating the voluntariness of purported consent, defendants argued that any consent was involuntary and merely in response to officers' threats, such as the threat that if they denied consent, they would be made to wait for seven or more hours in a police car for officers to obtain a warrant.[181] The officers denied any threats or misconduct. The district court noted that the voluntariness of defendants' consent required the court's "determination on the credibility of the witnesses."[182] Having found that the defendants were credible and that consent was involuntary, the court reiterated *Jimeno*'s call for objectivity, finding that even if defendants' consent had been voluntary, the scope of the search should be determined by an "objective reasonableness standard, rather than the subjective beliefs of either the defendant or the officer."[183] And in this case, the scope of the search— even if consent had been provided voluntarily—exceeded the objective reasonable person

176. Morgan, *supra* note 80, at 537 (forthcoming 2022); David John Housholder, Note, *Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 VAND. L. REV. 1279, 1293-94 (2005).

177. 428 F.3d 945, 951-52 (10th Cir. 2005).

178. *Id.* at 953.

179. *Id.*

180. United States v. Quezada-Lara, 831 F. App'x 371, 377 (10th Cir. 2020) (citing *Sims*, 428 F.3d at 953).

181. United States v. Cucci, 892 F. Supp. 775, 784, 791-92 (W.D. Va. 1995) (concluding, after a suppression hearing, that Mr. Cucci's consent was the product of express police coercion and not his free will).

182. *Id.* at 792.

183. *Id.* (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991)).

standard.[184]

As illustrated, the voluntariness of an individual's consent is practically analyzed as part of a credibility determination following live testimony of the parties. That a trial court engages in this highly particularized, subjective assessment of consent undermines the doctrinal conception of a universal, objective "reasonable person" voluntarily consenting to a warrantless search. Instead, a court evaluates the totality of circumstances and the credibility of the parties, and then decides whether consent was voluntary in that case. Perhaps the complicated particularity of evaluating the voluntariness of an individual's consent is what led Justice Marshall to conclude that a court could not genuinely affirm voluntariness without proof that the individual had been informed of their right to deny consent.[185] And surely, as scholars have argued, it is hard to imagine that an individual, knowing they have contraband, is every truly voluntarily consenting to a police officer's search.[186] Nevertheless, and despite these pervasive questions, to the extent that the Supreme Court has discussed the relevance of race to the voluntariness of consent, it has approved of that factor in light of it being so universally relevant as to be objective enough in the consent inquiry.

B. Determining when a consensual encounter becomes a seizure traditionally demands an "objective" reasonable person

A consensual encounter is any interaction between law enforcement and an individual where a reasonable person, in view of all of the circumstances surrounding the incident, would have felt that he was free to leave and disregard police presence.[187] To determine whether a seizure occurred, the Court asks "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter."[188] A consensual encounter requires no suspicion of criminal behavior and is excluded from Fourth Amendment protection.[189] Like the voluntariness of consent determination, seizure analysis considers "the totality of all the circumstances" to decide whether "duress or coercion" bore on the

184. *Cucci*, 892 F. Supp. at 792.

185. Schneckloth v. Bustamonte, 412 U.S. 218, 277 (1973) (Marshall, J., dissenting).

186. *See,* Simmons, *supra* note 136, at 773; *see* Nadler, *supra* note 148, at 155 ("What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent . . ."); Saltzburg, *supra* note 148, at 134-41 (arguing that the Court's consent-search jurisprudence shows that the Court is "blinking" at reality).

187. United States v. Mendenhall, 446 U.S. 544, 554 (1980). Encounters between law enforcement and citizens are grouped into three broad categories: exchanges lacking coercion or detention, known as "consensual encounters," brief investigatory detentions known as *Terry* stops, and full arrests. Terry v. Ohio, 392 U.S. 1, 26-27 (1968).

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

189. California v. Hodari D., 499 U.S. 621, 627-28 (1991) (citing *Mendenhall*, 446 U.S. at 554).

individual's ability to terminate an encounter.[190] Indeed, the Supreme Court explains that the seizure test and consent test "turn on very similar facts," and "the question of voluntariness pervades both . . . inquiries."[191]

Whether a police seizure has occurred—and what circumstances are relevant to that inquiry—are "fundamental question[s]" of "real importance" at the heart of the Fourth Amendment.[192] The *Mendenhall* plurality lists circumstances indicating seizure that include, but are not limited to: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[193]

The Court established that this is an "objective standard" that "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."[194] At the same time, however, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."[195] No fixed set of factors comprise the totality of circumstances for the "free to leave" seizure analysis, nor is any factor assigned a particular weight.

1. The expanding orbit of what a reasonable person considers to be a consensual encounter with police.

Over time, the Court developed *Mendenhall*'s definition of when a reasonable person would feel "free to leave" a police encounter, thereby reducing the percentage of encounters protected by reasonable suspicion. In *Florida v. Royer*, the Court concluded that Mr. Royer was not seized when two undercover officers approached him in the Miami airport because he fit the drug courier profile: a young man, casually dressed, carrying heavy luggage.[196] The Court held that an individual is not seized, and the Fourth Amendment not implicated, when the police approach and ask him questions—even with reason to suspect wrongdoing.[197] *Royer* reasoned that an encounter only rises to a seizure if, under the totality of the circumstances surrounding the encounter, a reasonable person

190. *Id.*, 446 U.S. at 557.
191. United States v. Drayton, 536 U.S. 194, 206 (2002).
192. LaFave, *supra* note 92, at 576.
193. *Mendenhall*, 446 U.S. at 554.
194. Michigan v. Chesternut, 486 U.S. 567, 574 (1988).
195. *Id.* at 573.
196. Florida v. Royer, 460 U.S. 491, 501 (1983).
197. *See id.* at 497 ("These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'") (citing *Mendenhall*, 446 U.S. at 554). The seizure did not occur until "the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart." *Id.* at 501.

would not have felt free to leave.[198]

The Court expanded the consensual encounter further in *I.N.S. v. Delgado*, concluding that respondents were never "seized" where Immigration and Naturalization Services (INS) agents searching for undocumented workers systematically questioned the entire workforce at two factories, while some of the agents stood at the factory exits.[199] Recognizing that it had not held whether police questioning, without more, can amount to a Fourth Amendment seizure, *Delgado* relied upon on *Royer*'s finding that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."[200] *Delgado* reasoned that when people are at work, their freedom of movement has already been restricted by "voluntary obligations to their employers,"[201] and therefore the immigration officers posted at every exit of the factory "posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments."[202] Justice Brennan fervently disagreed, writing that "what is striking about today's decision [that respondents were not seized] is its studied air of unreality."[203]

In *Chesternut*, the Court concluded that an individual was not seized even after a police car followed him and then drove parallel to him as he ran away.[204] The Court reasoned that the police officer's "brief acceleration to catch up" and the "short drive alongside [respondent]" were not "so intimidating" that respondent would reasonably believe "he was not free to . . . go about his business" as he continued walking.[205] Notably, *Chesternut* lauds the objectivity of the "reasonable person" for the seizure determination, explaining that "consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police" would be useful for law enforcement to predict what conduct would violate the Fourth Amendment.[206] The Court indicates that an objective reasonable person for seizure analysis will enable consistent and effective law enforcement.

Hodari D. presented the question of whether a Fourth Amendment seizure occurs where the individual does not yield to the officer's demands.[207] In order

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198. *See id.*, 460 U.S. at 502 ("These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.") (quoting *Mendenhall*, 446 U.S. at 554).

199. *See* I.N.S. v. Delgado, 466 U.S. 210, 220-21 (1984).

200. *Id.* at 216.

201. *Id.* at 218.

202. *Id.* at 219.

203. *Id.* at 226 ("At first blush, the Court's opinion appears unremarkable. But what is striking about today's decision is its studied air of unreality. Indeed, it is only through a considerable feat of legerdemain that the Court is able to arrive at the conclusion that the respondents were not seized.") (Brennan, J., concurring in part and dissenting in part).

204. *See* Michigan v. Chesternut, 486 U.S. 567, 576 (1988).

205. *Id.*

206. *Id.* at 574.

207. *See* California v. Hodari D., 499 U.S. 621, 625-26 (1991). Several teenagers were standing next to a parked car when they saw an unmarked police car approaching them, and

for the encounter to be a seizure, Justice Scalia explained, a show of authority must be accompanied by either physical restraint or an individual's yielding to the show of the authority.[208] After *Hodari*, a person is seized only if there is a show of police authority coupled with *either* physical restraint of the individual or their submission to the authority.[209] What it looks like for a reasonable person to submit to the officer's authority remains an open question.[210]

The same year that it decided *Hodari*, the Court extended the consensual encounter doctrine to bus searches aimed at drug and weapons interdictions, on which passengers are clearly not free to leave because they are on a moving bus.[211] Addressing the interdiction of a Black man traveling on an interstate bus, in *Bostick*, Justice O'Connor recognized that for someone who "has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."[212] In such cases, where *Mendenhall's* test does not work, the inquiry becomes whether the officers' behavior "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter," or, alternatively, if he was "at liberty to ignore the police presence and *go about his business*."[213] Although the "cramped confines of a bus are one relevant factor," a court must consider all the circumstances to determine whether the police conduct would have communicated to a reasonable person that they were not free to decline the officers' requests or otherwise terminate the encounter.[214] *Bostick* exemplifies the Court's simultaneous instruction to look at the totality of the circumstances of a particular police-citizen encounter, while maintaining an objective "reasonable person" that ignores even relevant

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the minors, including Mr. Hodari, took flight. The officers gave chase, one running after Hodari:

> Looking behind as he ran, [Hodari] did not turn and see [the officer] until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, [the officer] tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

Id. at 623.

208. *See id.* at 626 (holding that an arrest requires the application of physical force, or "where that is absent, *submission* to the assertion of authority.").

209. *See id.* at 626, 631.

210. *See* Torres v. Madrid, 141 S. Ct. 989, 994 (2021). *Hodari* was revisited in 2021, when the Supreme Court reviewed the appellate court's determination that petitioner was not seized when two officers fired thirteen bullets into her moving car, and struck her twice, because she was able to continue driving away—to a hospital.

211. *See* Florida v. Bostick, 501 U.S. 429, 439-40 (1991).

212. *Id.* at 435-36.

213. *Id.* at 439, 437 (emphasis added) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). The Court rejected Florida's per se rule that bus interdictions were seizures, and the case was remanded for proceedings consistent with the holding that they are not. *Id.* at 440.

214. *Id.* at 439.

particular individual characteristics.

And in *Drayton,* the Court revisited the suspicionless drug interdiction.[215] Despite the presence of several of the *Mendenhall* factors indicating police coercion,[216] *Drayton* held that the defendants had not been seized.[217] For example, the Court minimized the import of one police officer showing passengers his badge while questioning them.[218] The majority also rejected reliance on one officer's position at the front of the bus, citing *Delgado* for the conclusion that it "does not tip the scale in respondents' favor."[219] Upon reviewing the totality of circumstances, *Drayton* concluded that nothing the officers said to petitioners would suggest to a "reasonable person" that they must respond or that they could not end the encounter.[220]

2. Grappling with whether the "objective reasonable person" in seizure analysis permits the consideration of race.

In light of the Supreme Court's simultaneous insistence that the seizure determination use an objective reasonable person but also depend on the totality of circumstances of a particular encounter, it is not surprising that this doctrine is extensively criticized.[221] First, the consensual encounter is based on the supposition that when a person agrees to a police request to engage in conversation, this can be—potentially—a volitional act and not a submission to a "show of authority."[222] Despite this implicit assumption about human behavior, there is no question that the aim of many "consensual encounters" is to develop, through questioning and possibly through an individual's consent to search,

215. United States v. Drayton, 536 U.S. 194, 194-97 (2002).

216. *See id.* at 210-11 (Souter, J., dissenting). For example, the presence of multiple officers, the display of their badges, and language and tone indicated compliance might be compelled.

217. The Eleventh Circuit, upon reviewing the circumstances, concluded that a reasonable person in the defendants' situation "would *not* have felt free to disregard the officers' requests without some positive indication that consent could be refused." United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000) (emphasis added) (quoting United States v. Washington, 151 F,3d 1354, 1357 (11th Cir. 1998)) *rev'd*, 536 U.S. 194 (2002).

218. *See Drayton*, 536 U.S. at 204-05:

> And while neither Lang nor his colleagues were in uniform or visibly armed, those factors should have little weight in the analysis. Officers are often required to wear uniforms, and, in many circumstances, this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

219. *Id.* at 205.

220. *Id.* at 204.

221. *See* Aliza Hochman Bloom, *Long Overdue: Confronting Race in the Fourth Amendment's Free to Leave Analysis,* 65 HOWARD UNIV. L.J. 1 (2021).

222. California v. Hodari D., 499 U.S. 621, 625-26 (1991).

enough incriminating information to generate the reasonable suspicion required for a *Terry* stop, or even to make an arrest.

Justices have criticized the "reasonable person" for the seizure and consent determinations interchangeably. Justices Marshall, Blackmun, and Stevens dissented in *Bostick*, disagreeing that the stop was consensual and intimating that race played a role: "[i]t does not follow . . . that the approach of passengers during a [bus] sweep is completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach."[223] In *Delgado,* Justice Brennan criticized the expanding consensual encounter, insisting that the notion that immigration officers posted at every exit of a factory "posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments" contained the "studied air of unreality."[224] As discussed, the *Drayton* dissent reasoned that it was highly improbable that either defendant would have believed they could refuse to cooperate with police without suffering severe consequences.[225] The dissenting justices in *Mendenhall*, *Bostick*, *Delgado* and *Drayton* believed that the reasonable person determinations—for both seizure and consent—underestimated the inherent coerciveness of police encounters, especially for marginalized individuals.

Scholars also criticize the reasonable person in the consensual encounter analysis for failing to incorporate power dynamics with police in general, and particularly those related to race.[226] Because a consensual encounter requires no level of suspicion, and can be initiated for any reason, observers worry that it is "a fertile field for the racial stereotyping that is, unfortunately, prevalent in every area of unregulated police discretion."[227] In the common case, where an individual is approached in a position where they have "no desire to leave," such as a bus, or sitting on a bench, he is seized within the meaning of the Fourth Amendment where "a reasonable person would feel free" to "terminate the encounter," "taking into account all of the circumstances."[228] For each of these consensual encounter cases, the Court insists upon an objective reasonable

223. Florida v. Bostick, 501 U.S. 429, 429 n.1 (Marshall, J., dissenting) (citing United States v. Williams, 916 F.2d 714 (1990), *vacated*, 501 U.S. 901 (1991)).

224. *See* I.N.S. v. Delgado, 466 U.S. 210, 226 (1984) (Brennan, J., concurring in part and dissenting in part) ("At first blush, the Court's opinion appears unremarkable. But what is striking about today's decision is its studied air of unreality. Indeed, it is only through a considerable feat of legerdemain that the Court is able to arrive that the conclusion that the respondents were not seized.").

225. *See Drayton*, 536 U.S. at 212 (Souter, J., dissenting).

226. Carbado and Maclin have written about the elimination of race from the reasonable person standard. *See* Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 141-42 (2017); Maclin, *supra* note 66, at 248.

227. Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 509 (2001).

228. *Bostick*, 501 U.S. at 436-37.

person, eschewing consideration of demographic characteristics such as race, gender, or an individual's prior experience with law enforcement.

Despite the criticism of an objective reasonable person from within and without the Supreme Court, just in 2021 the Court reaffirmed the "objectivity" of a Fourth Amendment seizure analysis, reiterating that an officer's subjective intent, as well as the individual's, are irrelevant to deciding whether they have been seized.[229] To determine whether an individual has been seized, "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context."[230] The focus, explained the Court, is assessing the objective intent to restrain, for which the amount of force is important, but the seizure does not "depend on the subjective perceptions of the seized person."[231] Thus in the Court's most recent case addressing seizures, it reiterated the insignificance of whether a particular individual felt seized.

Despite the Court's repeated focus on an *objective* reasonable person, lower courts adhere to the requirement that the totality of circumstances test be fluid enough to determine whether a reasonable person would feel free to leave. Indeed, courts look to many factors, including the "threatening presence of several officers," the "use of forceful language or tone of voice," the "location in which the encounter takes place,"[232] and even routinely consider other demographic characteristics, such as age and alienage, in the free to leave analysis.[233] And, as discussed, both the Ninth Circuit and the D.C. Court of Appeals have expressly held that a defendant's race can inform the seizure analysis, and the Seventh Circuit has endorsed that approach.[234] In *Washington*, the Ninth Circuit considered whether an at-first voluntary search had "escalated into a seizure."[235] The court articulated the question as whether "in the total circumstances a reasonable person in Washington's shoes would not have felt at liberty to terminate the encounter with the police and leave."[236] Relying upon its governing test for "determining if a person was seized," and evaluating the

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229. *See* Torres v. Madrid, 141 S. Ct. 989, 998-99 (2021) (holding that a seizure by force requires an intent to restrain, evaluated objectively, and absent submission by the individual, lasts only as long as the application of that force). In this case, the officers seized Ms. Torres for the purposes of the Fourth Amendment for the instant that the bullets struck her.

230. *Id.* at 989 (citing Nieves v. Bartlett, 139 S. Ct. 1715, 1724-25 (2019)).

231. *Torres*, 141 S. Ct. at 999; *see also id.* at 998 ("Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.") (quoting Michigan v. Chesternut, 486 U.S. 567, 574 (1988)).

232. United States v. Smith, 794 F.3d 681, 684 (7th Cir. 2015) (quoting United States v. Clements, 522 F.3d 790, 794 (7th Cir. 2008)) (explaining that no one set of factors is "exhaustive nor exclusive").

233. *See, e.g.*, Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2015) (holding a suspect's age is relevant to whether they feel free to leave during questioning); United States v. Moreno, 742 F.2d 532, 536 (9th Cir. 1984) (holding the defendant's status as a foreigner and limited English fluency contributed to the coercion present).

234. *See supra* Section I.

235. United States v. Washington, 490 F.3d 765, 772 (9th Cir. 2007).

236. *Id.*

totality of the circumstances, the Ninth Circuit held:

> In sum, under the totality of the circumstances— . . . [including] the publicized shootings by white Portland police officers of African Americans, [and] the widely distributed pamphlet [published in response to these shootings] with which Washington was familiar, . . . —we conclude that a reasonable person would not have felt free to . . . leave the scene.[237]

Like *Washington*—and many other cases raising seizure questions—*Dozier* involved an initially consensual encounter that escalated into a seizure. The D.C. Court of Appeals' determination of when that seizure occurred, again, was governed by the objective, totality-of-the-circumstances test.[238] And the court explicitly considered the defendant's race as a circumstance bearing on whether a "reasonable person" in his position would believe that he was free to leave: "As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive" in the defendant's situation, having been "perceived with particular suspicion by hyper-vigilant police officers expecting to find criminal activity in a particular area."[239] That "fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police," the court continued, "is relevant to whether there was a *seizure*."[240] After considering the totality of the encounter, including defendant's race, the court concluded that the defendant "was seized within the meaning of the Fourth Amendment."[241]

In *United States v. Smith*, the Seventh Circuit expressly acknowledged "the relevance of race in everyday police encounters with citizens in Milwaukee and around the country" and "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system."[242] The Seventh Circuit accordingly concluded that "race is 'not irrelevant' to the question of whether a seizure occurred."[243] Since *Smith,* at least one district court in the Seventh Circuit has interpreted this language as authorizing the consideration of race, where relevant, as part of the seizure inquiry.[244]

While expressly permitting consideration of race and gender in determining the voluntariness of consent since *Mendenhall,* the Supreme Court has not

237. *Id.* at 773-74.

238. Dozier v. United States*,* 220 A.3d 933, 940 (D.C. 2019).

239. *Id.* at 944.

240. *Id.*

241. *Id.* at 947.

242. United States v. Smith, 794 F.3d 681, 688 (7th Cir. 2015).

243. *Id.* (citing United States v. Mendenhall, 446 U.S. 544, 558 (1980)).

244. *See* Doe v. City of Naperville, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (citing *Smith*, 794 F.3d 681 for proposition that "plaintiff was seized if a reasonable twelve-year-old, African American child in his situation would not have felt free to leave").

addressed whether race is "objective enough" to be considered within the totality of circumstances in seizure analysis. And in December 2021, the Court declined to review this question upon which courts are divided—whether an individual's race can ever be relevant to the consensual encounter analysis.[245] In the absence of direction, courts of appeal and state supreme courts remain divided over whether an individual's race can be considered in the Fourth Amendment seizure analysis, and as a result, marginalized groups such as Black men receive less constitutional protection.[246]

C. Deciding whether a "reasonable person" is in custody for *Miranda* purposes encompasses individual characteristics.

The Fifth Amendment prohibits compelled self-incrimination. Since 1966, any statements made by a defendant during custodial interrogation by the police are precluded from use in the prosecutor's case-in-chief, unless the state can prove that the defendant understood his right against self-incrimination and knowingly, voluntarily, and intelligently waived those rights.[247] "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[248] Nevertheless, various studies show that even after individual suspects are informed that they need not talk with officers, most waive their rights and agree to speak with investigating officers.[249] This suggests that the dynamic of a police interrogation is coercive even with *Miranda* warnings envisioned by doctrine to protect constitutional rights.

Setting aside whether *Miranda* warnings are effective, these safeguards are only required when an individual is in "custodial interrogation," and the trial court determines at what moment a "reasonable person" believes themselves to be in custody.[250] *Miranda* and its progeny have consistently defined custodial interrogation as "questioning initiated by law enforcement officers after a person have been taken into custody or otherwise deprived of his freedom of action in any significant way."[251] The Court recognizes that, naturally, any police interview of an individual suspected of having committed a crime has "coercive aspects to it."[252] Yet the Court has demarcated interrogations that occur when a suspect is in police custody "heighte[n] the risk" that statements obtained are

245. United States v. Knights, 142 S. Ct. 709, 709 (2021).

246. *See infra* Section I.

247. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

248. Dickerson v. United States, 530 U.S. 428, 443 (2000).

249. *See* Richard A. Leo, *Miranda's Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009 (2001) (noting that as many as 80% of those being interrogated waive their rights); Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 379-80 (2011).

250. 384 U.S. at 436.

251. *Id*. at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 436-37 (1984); California v. Beheler, 463 U.S. 1121, 1123 (1983) (per curiam).

252. Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

coerced, and not the product of free choice.[253] Because *Miranda* warnings are provided to protect individuals from the coercive nature of custodial interrogation, they are constitutionally required when there "has been such a restriction on a person's freedom as to render him 'in custody.'"[254]

Critically, the Court has "repeatedly emphasized" that the determination of whether a suspect is in custody for *Miranda* purposes is an "objective inquiry" that, like the first two criminal procedure determinations, depends on the totality of the circumstances.[255] A court must decide:

> [F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.[256]

Just like the voluntariness of consent and seizure analyses, the custody determination requires law enforcement and courts to "examine all of the circumstances surrounding the interrogation," and decide how a *reasonable person* "would perceive his or her freedom to leave."[257] And like the others, this custody analysis excludes any consideration of the "actual mindset" of a particular suspect subjected to police questioning.[258] Indeed, the particular, subjective views of either the interrogating police officers or the individual being questioned are irrelevant.[259] As the Fifth Circuit explained, the "reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances."[260] This balance is, of course, hypothetical. Given the case law develops when a criminal defendant objects to the inclusion of his statements without adequate *Miranda* warnings, it is necessarily developed where the individual was adjudicated guilty. If they had not been found guilty of criminal conduct, of course, they would not be exercising their Fifth Amendment right to challenge to custody without *Miranda* warnings. Thus the determination of whether a person is in custody such that *Miranda* warnings are required it one

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253. *Dickerson*, 530 U.S. at 435.

254. Stansbury v. California*,* 511 U.S. 318, 322 (1994) (citing *Mathiason*, 429 U.S. at 495) (internal quotations omitted).

255. J.D.B. v. North Carolina, 564 U.S. 261, 270-71 (2011).

256. Yarborough v. Alvarado, 541 U.S. 652, 663 (2004) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

257. *Stansbury*, 511 U.S. at 322, 325.

258. *Alvarado*, 541 U.S. at 667.

259. United States v. Ortiz, 781 F.3d 221, 229 (5th Cir. 2015.

260. *Id.*

built upon cases where the defendant had reason to feel scared, coerced, and without options to ignore police questioning.

Because the *Miranda* custody determination asks when a reasonable person would have felt compelled by an interaction with police officers, it is clearly related to the Fourth Amendment doctrines of consent to search and consensual encounters. And like the first two, the custody analysis employs an objective reasonable person "designed to give clear guidance to the police."[261]

1. Age is "objective" and relevant to whether a reasonable person is in custody

In 2004, the Supreme Court held that an individual's age and inexperience with the criminal justice system could not be considered when determining whether a reasonable person in their circumstances was in "custody," because these were not objective factors.[262] The Court reasoned that "[t]he *Miranda* custody inquiry is an objective test," meant to ensure that police do not need to guess as to the circumstances at issue before determining how to interrogate a suspect.[263] The Court explained that a person's history with law enforcement was unlikely to be known by officers, and the relationship between any individual's experiences and the likelihood that a reasonable person with that experience would feel compelled "will be speculative."[264] *Alvarado* epitomizes the Court's preference to exclude subjective factors from the determination of whether a reasonable person would have been in a "custodial interrogation" for the purposes of *Miranda* warnings.

But seven years later the Court reversed course, deciding that an individual's age is relevant and objective enough to be considered for the "reasonable person" in the *Miranda* custody determination.[265] First, *J.D.B. v. North Carolina* reaffirmed that the custody determination is "objective:"

> By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind.[266]

261. *Alvarado*, 541 U.S. at 668.

262. *Id.* at 667. In *Alvarado*, the Court reasoned that the state court's failure to consider the defendant's age and inexperience with law enforcement when making the custody determination was not an unreasonable application of law.

263. *Id.* (citing *Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984)).

264. *Alvarado*, 541 U.S at 668.

265. *See* J.D.B. v. North Carolina, 564 U.S. 261, 271-72 (2011) (holding that the minor defendant was in custody for the purposes of triggering *Miranda* warnings).

266. *Id.* at 271.

In other words, a major rational for employing an objective reasonable person it to avoid the "idiosyncrasies of every individual suspect" for the custody analysis will ease the police burden of predicting when someone reasonably believes that they are in custody. Critically, the Court decided that the characteristics of youth, or a suspect's age, are objective enough to be relevant to the reasonable person. A "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[267] Even though age will not be determinative for every custody determination, if an individual's age would have been apparent to a reasonable officer, it is properly considered in the *Miranda* custody analysis.

J.D.B.'s classification of age as an "objective" factor is significant for my argument that race is objective enough to be considered in each of these criminal procedure determinations. The Court explained: "[n]ot once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial 'brighter.'"[268] The Court distinguished between subjective factors that are "contingent on the psychology of [an] individual suspect"—like his prior history with law enforcement—and factors that "yield[] objective conclusions" relating to "a reasonable person's understanding of his freedom of action"—like age.[269] Whereas age had previously been listed as a subjective factor, when determining whether consent to a search was voluntary, *J.D.B.* characterizes age at the time of the police encounter as objective enough to be relevant to custody.[270] After *J.D.B.,* custody determinations employ an objective reasonable person that depends on the totality of circumstances.

Race, like age, can help generate "commonsense" inferences about whether a reasonable person would feel free to leave.[271] The *J.D.B.* Court reasoned that "the *Miranda* custody analysis includes consideration of a juvenile suspect's age" alongside "undeniably personal characteristics," such as "whether the individual being questioned is blind."[272] The Court defines "subjective factors" as those that are "contingent on the psychology of [an] individual suspect"—like prior history with law enforcement. It differentiates between those and factors that "yield[] objective conclusions" relating to "a reasonable person's understanding of his freedom of action"—such as age.[273]

Race falls squarely on the latter side of this divide. Understanding the effects of race does not require examining the psychology of individual suspects; rather, courts need only acknowledge the "commonsense conclusions about behavior

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267. *Id.* at 272.
268. *Id.* at 280.
269. *Id.* at 275 (quoting *Alvarado*, 541 U.S. at 668) (internal quotations omitted).
270. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1972); *see J.D.B.*, 564 U.S. at 272. *See supra* Section I.
271. *J.D.B.*, 564 U.S. at 264-65.
272. *Id.* at 268, 278.
273. *Id.* at 275 (quoting *Alvarado*, 541 U.S. at 668) (internal quotations omitted).

and perception" that race "broadly" "generates."[274] And just as the Court reasoned that concern about "gradations among children" "cannot justify ignoring a child's age altogether,"[275] the fact that there is no uniform life experience for persons of color does not justify ignoring race altogether. *J.D.B.'*s reasoning confirms what is clear when deconstructing consent and seizure doctrines— individual characteristics, including age, race and gender, are, in the aggregate, objective enough to be relevant to deciding whether a "reasonable person" facing particular circumstances would feel free to leave police presence.[276]

III. The Variable Objectivity Among Reasonable Person Analyses Is Unjustified

A. These three doctrines rely upon similar assumptions about human behavior

These criminal procedure doctrines—the voluntariness of consent, the seizure determination, and custody for the purpose of *Miranda*—are distinct but address a common question about when interactions between individuals and police become coercive.

> (1) Consent is treated as an exception to the Fourth Amendment warrant requirement, which the government must prove was voluntarily given. Reviewing courts determine, upon considering the totality of circumstances, whether an individual consented to the search voluntarily, or if a *reasonable person* would have felt coerced under those circumstances.[277]
>
> (2) An individual is seized within the meaning of the Fourth Amendment if "in view of all the circumstances surrounding the incident, a *reasonable person* would have believed that he was not free to leave."[278]
>
> (3) An individual is in "custody" such that the *Miranda* warnings are required, when, in view of the totality of the circumstances, a

274. *Id.* at 272 (quoting *Alvarado*, 541 U.S. at 674 (Breyer, J., dissenting) (internal quotations omitted). Indeed, the Supreme Court could limit this finding as it did in *J.D.B.,* by holding that police need consider race only when, like age, it is "known to the officer" or would be "objectively apparent to a reasonable officer." *Id.* at 274.

275. *Id.* at 279.

276. *See* LaFave, *supra* note 92, at 588 (recognizing that after *J.D.B.*, the "analogous" Fourth Amendment seizure inquiry likely also "requires consideration of some known unique characteristics of the suspect (e.g., his youth)").

277. *See* United States v. Mendenhall, 446 U.S. 544, 557 (1980).

278. Brendlin v. California, 551 U.S. 249, 255 (2007) (quoting *Mendenhall*, 446 U.S. at 554) (emphasis added).

> *reasonable person* would have felt that he was not at liberty to terminate the interrogation and leave.[279]

There are important commonalities between these three determinations. First, all three doctrines reveal a common world view about individuals' responses to law enforcement presence and/or questioning. Each of the tests assume that a reasonable person can exercise their options when confronted with police, and that when they act, they are exercising a preferred option. Pursuant to this view, a reasonable person stays to answer a police officer's questions even when she feels that she could decline them without consequence, and she chooses to have officers search her belongings because she wants to help, and not because she believes that she has no choice to comply or face consequences.

For example, in *Drayton*, petitioners argued that the fact that nearly all the bus passengers consented to being searched was evidence that people felt that they *had no choice* but to comply with the officers. But the Court rejected that argument, explaining instead that the high level of passenger cooperation was evidence that people know their constitutional right to decline consent, are able to exercise their rights, and do so by choice.[280] *Drayton* reasoned: "bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."[281]

These assumptions about human behavior pervade all three criminal procedure doctrines. Each one shares the following question: does the reasonable person in this police interaction know that they can decline the officer's request, refuse to answer a question, or disregard their presence? Scholars observe that while the premise of consent and consensual encounters is that individuals are free to decline an officer's request, almost everyone "consents" in the manner defined by the precedent.[282] In light of what is perceived as a common legal fiction, many have addressed these doctrines interchangeably,[283] but the underlying questionable assumptions about police interactions are shared with the custody determination as well. For each doctrine, the Court assumes that a reasonable person has the capacity to say "no" in response to an officer's request or interrogation, and none of the doctrines require law enforcement to inform the reasonable person of their constitutional right to decline or leave.[284]

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279. *Alvarado*, 541 U.S. at 667.

280. United States v. Drayton, 536 U.S. 194, 203-05 (2002).

281. *Id.* at 305.

282. *See, e.g.*, Oren Bar-Grill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1662 (2012) ("[P]eople consent so often that it undermines both the meaningfulness of the consent and the believability that the police are really respecting the doctrine"); Simmons, *supra* note 136, at 773 ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.").

283. Burke, *supra* note 164, at 512.

284. *Miranda* warnings are only required with a custodial interrogation, which assumes up until that "custody" point the individual is free to decline and leave. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion). As discussed, critics of the

Indeed, critics argue that for Fourth Amendment doctrines, "the Court appears to treat coercion and content cooperation as the only possible explanations."[285] In the context of consent searches, Professor Ric Simmons argues that the Court treats coercion and voluntary consent as a false binary—all consent that is not coerced by improper police conduct was supposedly happily and freely given.[286] But the Court recognized that because consensual encounter analysis is closely tied to consent, reasoning that "where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts."[287] *Mendenhall* and *Royer* both address whether and when the individual was seized, and then whether their consent was voluntary, in consecutive paragraphs with similar analyses. The Court's world view applies to the custody determination as well—wherein the assumption is that people consent to police questioning, even when they may have the option of leaving, out of a desire to help the police investigate crimes.

Second, the definition of "voluntary behavior," or behavior that is free from coercion, necessarily depends on our collective, normative judgments about police officer expectations and how people respond.[288] For each of these doctrinal evaluations, courts are contrasting a police officer's actions and words with the reactions of an individual, and then assessing voluntariness or lack of coercion as some sort of reflection of the officer's behaviors and actions.

But there is some empirical evidence refuting the Supreme Court's world view and implicit assumption about human behavior. Studies indicate that people do not know their constitutional options to decline cooperation with police. Relatedly, there is social science showing people lack the internal ability to decline police requests, even if they realize that they can. Indeed, several scholars have disputed the notion that people know they have a right to refuse search,

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consensual encounter doctrine argue that the Supreme Court attributes a greater ability in an average person to walk away from police than most people possess. *See* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2008); *Mendenhall*, 446 U.S. at 544 (plurality opinion).

285. *See* Burke, *supra* note 164, at 525 (pointing to a good example of this assumption in *Sibron v. New York*, 392 U.S. 40, 63 (1968), where the Supreme Court did not determine whether the defendant had been seized but noted that the record was "barren of any indication whether Sibron accompanied [the officer] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation.").

286. *See* Simmons, *supra* note 136, at 785 (noting the Supreme Court's false binary between coercion and voluntariness, in which consent is voluntary when police have not used "coercive" tactics to obtain that consent.).

287. United States v. Drayton, 536 U.S. 194, 206 (2004).

288. *See* Nadler, *supra* note 149, at 155 ("What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent . . . ."); Saltzburg, *supra* note 148, at 134-41 (arguing that the Court's consent-search jurisprudence reveals that the Court is "blinking" at reality); Marcy Strauss, *Reconstructing Consent,* 92 J. CRIM. L. & CRIMINOLOGY 211, 221 (2001) (criticizing the Court's application of a voluntariness test because "it fails to acknowledge the simple truism that many people, if not most, will always feel coerced by police 'requests' to search").

questioning and investigation.[289] Various studies show reasonable people feel compulsion to consent to police requests and question whether compliance with such requests may accurately be classified as "voluntary."[290] Encounters with police "pose real dangers to the individual stopped," as well to the officers, and reasonable people are aware of that when they consider appropriate options in response to police action.[291]

The "reasonable person" in these three criminal procedure determinations involves common questions about individuals' interactions with law enforcement, and each rests upon common assumptions about human behavior. There is growing evidence that these assumptions are similarly flawed. At a minimum, excluding the consideration of a characteristic such as race from the totality of circumstances that are considered for these three determinations only further distorts their relevance to the reality of criminal investigations.

B. Race eludes a traditional objective vs. subjective dichotomy

Having deconstructed the "reasonable person" within these criminal procedure doctrines, three points become clear. First, there is significant empirical evidence that racial minorities, particularly Black males, are *reasonably* apprehensive about denying police requests for consent, assistance, or investigation.[292] Second, these doctrines illustrate that an individual's race does not fit neatly as an objective or a subjective factor for any of the three—voluntariness of consent, freedom to leave, or custodial interrogation. And third, it is illogical to permit judges weighing *ex-post* evidentiary challenges to consider an individual's race for some, but not all, of these three determinations.

An individual's race affects both how they perceive interactions with law enforcement and how they are perceived by law enforcement. Race cannot be neatly described as either objective or subjective. Yet considering the reality that race plays in policing and law enforcement, any true consideration of the totality of the circumstances affecting a reasonable person in these three criminal procedure contexts necessarily encompasses an individual's race.[293] To the extent that each of these determinations seeks to account for predictive, objective realities, they cannot ignore the role that race plays, alongside other factors, in

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289. *See, e.g.*, Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 465-66 (2004) (recommending warnings, like those rejected in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1972), requiring police to inform people they have a right to refuse consent); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH. L. REV. 1171, 1177 (2007) (encouraging states to use their own constitutions to implement several consent search reforms, including warnings about the right to refuse consent).

290. Kessler, *supra* note 284; *see also* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962-2009 (2019);

291. United States v. Delaney, 955 F.3d 1077, 1084 (D.C. Cir. 2020).

292. *See supra* Section I.

293. State v. Spears, 839 S.E.2d 450, 464 (S.C. 2020) (Beatty, J., dissenting).

amplifying the coercive nature of a confrontation. A reasonable person, in deciding whether he is free to leave a police encounter, consent to a search, or in an interrogation, reasonably considers the distinct experiences of Black individuals with police, especially within a particular community—and the potential consequences of making the wrong choice.

On the other hand, ignoring the reality that a Black man's race may make him *reasonably feel* less free to terminate a particular police encounter, or most likely to feel in a custodial interrogation is to write into law that the Constitution permits police interactions with Black individuals to be more coercive than those with others. That approach cannot be squared with the Fourth Amendment's guarantee that people of all races are equally entitled to protection against unreasonable seizures, or the Fifth's guarantee of equal protection under the law.

There are a few responses to the most frequent contrary argument — that race is subjective and therefore has no place in the reasonable person analysis.

First, police officers take account of race for several legitimate purposes in conducting routine police work.[294] For example, after the government argued that it would "affront common sense to expect that . . . skin color would play no part in arousing [border officers'] suspicions,"[295] the Supreme Court agreed, holding that an individual's "Mexican appearance" could contribute to reasonable suspicion.[296] In the context of attempting drug interdictions of Mexican Americans near the Texas border, the Supreme Court decided that it was reasonable to use an individual's ethnicity within the sum total of reasonable suspicion required for a stop. To be sure, *Brignoni-Ponce* is often criticized by critics of Fourth Amendment doctrine, but the Court in that case clearly permitted police officers to consider race of an individual as one factor that is objective enough to be readily identified by law enforcement officers patrolling the roads, and is relevant to reasonable suspicion contributing to routine stops at the border.[297] Today, some police department manuals today describe race as a "discernible personal characteristic,"[298] supporting the notion of race as objective. Similarly, some police departments require officers to note the "races of the persons involved" in their reports.[299]

Indeed, law enforcement officers routinely draw inferences from race on the

294. *See* Brown v. City of Oneonta*,* N.Y., 221 F.3d 329, 333-34 (2d Cir. 2000) (holding that police officers can act on race- and gender-based "description[s] without violating the Equal Protection Clause").

295. Reply Br. for the United States at 12, in United States v. Ortiz, 422 U.S. 891 (1975) (No. 73-2050).

296. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

297. *Id.* at 884-86 (holding that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purposes for the stop). The Court found that the interference with Fourth Amendment interests in these stops was "modest," whereas the inquiry served significant law enforcement needs. *Id.* at 879-80.

298. Seattle Police Dep't Manual § 5.140 (Aug. 1, 2019), https://perma.cc/KH5Z-JRKD; *see also* Baltimore Police Dep't Pol. 317 (Feb. 9, 2021), https://perma.cc/4KWA-GY9T.

299. *See, e.g.*, Eddie Garcia, *Dallas Police Department General Orders §204.02*, DALLAS POLICE DEP'T (Aug. 4, 2017), https://perma.cc/VQ4T-UTPH.

frequent occasions when a person consents to a search or prolonged police encounter. As discussed, under existing precedent, police in those situations must ensure that consent is truly voluntary and untainted by unique pressures the person may feel on account of her race.[300] It would "thus only add confusion" to allow officers to initiate police-civilian encounters without this same awareness.[301]

Courts are likewise capable of incorporating personal characteristics, particularly race, in other criminal law contexts. The Supreme Court has made clear that courts are competent to consider race to ensure that defendants receive fair trials. Although the *Batson* procedure for peremptory challenges is flawed, courts routinely factor race into decisions about whether juror strikes are permissible.[302] And even before a court evaluates an attorney's peremptory challenges of juror, trial courts consider race of the potential jury pool during *voir dire*. A defendant accused of a violent crime belongs to a different racial or ethnic group than the alleged victim, trial judges are "required to 'propound appropriate questions designed to identify racial prejudice'" during *voir dire* of the jury pool.[303] Voir dire plays a critical role in assuring a criminal defendant that her right to an impartial jury, as guaranteed by the Sixth Amendment, will be enforced by the trial court.[304] The analysis of why trial courts must make this inquiry when requested by a defendant accused of a violent crime against an individual of a different racial or ethnic group is instructive. In a previous decision, in a case involving a Black defendant accused of murdering a white policeman, the Court held that failing to inquire into jurors' potential racial prejudice was reversible error because there was a reasonable possibility that racial prejudice would influence the jury.[305] And in *Rosales-Lopez*, the Court acknowledged that the reality of racial prejudice requires this questioning of

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300. United States v. Mendenhall, 446 U.S. 544, 558 (1979).

301. *Cf.* J.D.B. v. North Carolina, 564 U.S. 261, 279 (2011) (finding that police officers are "competent to evaluate the effect of relative age" and "[t]he same is true of judges").

302. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that courts must consider race in assessing whether counsel used impermissible grounds in making juror strikes).

303. Rosales-Lopez v. United States, 451 U.S. 182, 191-92 (1981) (holding that trial judges are "required to 'propound appropriate questions designed to identify racial prejudice'" during voir dire when a defendant accused of a violent crime requests the inquiry) (quoting Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976)); *see also* Ham v. South Carolina, 409 U.S. 524 (1973).

304. *See* U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

305. Aldridge v. United States, 283 U.S. 308 (1931); *But see Ristaino*, 424 U.S. 589 (holding that, in this case involving a Black defendant accused of attempted murder of a white uniformed university security guard, the constitution did not require questions specifically about racial prejudice in the circumstances of the case).

potential jurors where a defendant accused of a violent crime against someone of a different racial or ethnic group asks the trial judge to do so. The Court explained that "[i]t remains an unfortunate fact in our society that violence crimes perpetrated against members of other racial or ethnic groups often raise such a possibility [of prejudice]."[306] In other words, it is the general prevalence of racial stereotypes and/or racist attitudes in society—not the attitudes of these potential jurors— that requires this questioning to protect a defendant's Sixth Amendment rights.

Third and most importantly, courts are competent to consider race in these three determinations. Courts employ tests that consider race, including tailored-reasonable-person and totality-of-the-circumstances tests, in several other non-criminal contexts.[307] For example, courts evaluating civil employment discrimination claims consider hostile-work-environmental claims from the perspective of a reasonable person of the of the plaintiff's race.[308] Similarly, courts providing self-defense instructions employ a reasonable woman standard.[309]

An individual's race is equally relevant to the totality of circumstances considered in determining how a "reasonable person" would respond to each of these described citizen-police interactions. Excluding any consideration of race perpetuates a "reasonable person" standard that is increasingly unmoored from reality. At a minimum, considering their doctrinal and conceptual similarities, there is no reasoned basis to insist on a traditionally "objective" reasonable person for one of these three criminal procedure doctrines. For example, prohibiting courts from considering race in the seizure inquiry, when it is technically permitted in consent and not discussed in the custody inquiry, operates to make race a one-way rachet: police officers can permissibly rely on

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306. *Rosales-Lopez*, 451 U.S. at 192.

307. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2339 (2021) (considering race in the Voting Rights Act § 2 totality-of-circumstances analysis); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (explaining that, in a hostile-work-environment suit, "[b]y considering . . . discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff"); State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (applying reasonable-woman standard for self-defense instruction), *superseded by statute*; Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (applying reasonable-woman standard for sexual harassment cases), *superseded by statute*; *cf.* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) ("All American jurisdictions accept the idea that a person's childhood is a relevant circumstance" in tort law's objective reasonable person test) (quoting RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (AM. L. INST. 2005));

308. *McGinest*, 360 F.3d at 1116 (explaining that, in hostile-work-environment suit, "[b]y considering . . . discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff"); *cf.* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (applying reasonable-woman standard for sexual harassment cases).

309. *See Wanrow*, 559 P.2d at 548 (applying reasonable-woman standard for self-defense instruction), *superseded by statute*.

race when deciding whether to initiate a traffic encounter, but in any ensuing proceeding a defendant would be barred from introducing race in her defense as part of the totality-of-the-circumstances arguing that she had been seized. Surely, it is an "anomalous result to hold that race may be considered when it harms people, but not when it helps them."[310]

CONCLUSION

In a country where Black Americans have long experienced disproportionate and well-publicized violence in law enforcement encounters, a reasonable person who is a young, Black male, for example, is more likely to pause before declining a police officer's request or attempting to leave the officer's presence. In light of substantial evidence documenting racial bias in law enforcement and the objective reality facing young Black men in particular during police-citizen interactions, "a true consideration of the totality of the circumstances" for each of these three related criminal procedure determinations must be permitted to encompass a defendant's race.[311] Indeed, any rule that endeavors to account for objective realities—and "the whole" of a police encounter,[312] cannot ignore the role that race plays, alongside myriad other factors, in amplifying the coercive nature of a police confrontation.

When assessing the voluntariness of consent, the existence of a seizure, or custody for the purposes of *Miranda*, an individual's race is relevant to the totality of circumstances courts consider. Conversely, prohibiting any consideration of race further distorts the "reasonable person" from reality and, as a result, provides diminished constitutional protection to already marginalized groups.

310. United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000).
311. State v. Spears, 839 S.E.2d 422, 463 (S.C. 2020) (Beatty, J., dissenting).
312. *See* Michigan v. Chesternut, 486 U.S. 567, 574 (1988).