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The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court

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THE RETURN OF REASONABLENESS: SAVING THE FOURTH AMENDMENT FROM THE SUPREME COURT

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I. INTRODUCTION

The term "reasonable" means rational, "[n]ot excessive or extreme,"[1] "not demanding too much."[2] Behaving reasonably, therefore, requires conduct "[w]ithin the bounds of common sense."[3] The acts of a reasonable person are "not absurd"; they are "not ridiculous."[4] Reasonable people act "by fair or sensible standards of judgment; rightly or justifiably."[5]

Although the Fourth Amendment centers on "reasonableness," the Court's Fourth Amendment jurisprudence has been anything but. A prominent legal scholar once described the Court's jurisprudence as "an embarrassment."[6] As part of his explanation, he said:

> [S]ensible rules that the Amendment clearly does lay down or presuppose—that all searches and seizures must be

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1 THE AMERICAN HERITAGE DICTIONARY 1031 (2d College ed., 1982).

2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1981).

3 THE AMERICAN HERITAGE DICTIONARY, *supra* note 1, at 1031.

4 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 2, at 1892.

5 THE OXFORD AMERICAN COLLEGE DICTIONARY 1132 (2002).

6 Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

> reasonable . . . —are ignored by the Justices. Sometimes. The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.[7]

Maybe "embarrassment" is too harsh. But, when the Court assesses "reasonableness," the floor protection guaranteed by the Fourth Amendment,[8] the Court has certainly rendered some inconsistent, seemingly result-oriented, common-sense-defying opinions[9] that have, in effect, undermined the primary purpose of the Amendment—to protect the people from undue government intrusions on privacy and liberty.[10]

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[7] *Id.* at 758.

[8] *See* Samson v. California, 547 U.S. 843, 855 n.4 (2006) (describing reasonableness as the "touchstone" of the Fourth Amendment).

[9] *See, e.g.*, Amar, *supra* note 6, at 758 ("[T]he result [of Fourth Amendment jurisprudence] is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504–05 nn.9–10 (2007) (citing numerous scholars who criticize the Court's jurisprudence and indicating that the "reasonable expectation of privacy test" is a "mystery of Fourth Amendment law" and that "no one seems to know what makes an expectation of privacy constitutionally 'reasonable'"); Erik Luna, *The* Katz *Jury*, 41 U.C. DAVIS L. REV. 839, 840, 846 (2008) (noting "the dismay that can accompany class discussions about warrantless perusal of personal bank records . . . or agents trespassing on private land" and arguing that "[s]ometimes it appears that the Court is engaged in a form of outcome-based jurisprudence, reaching a conclusion first and then reasoning backward to justify it. . . . More generally, there is an 'uncanny resemblance' between the purported privacy expectations of society and those of the Justices themselves, producing a most 'self-indulgent test.'" (quoting Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring))); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 ("[T]he Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence."); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (criticizing the Court's consent jurisprudence and arguing, based on *United States v. Drayton*, 536 U.S. 194 (2002), that "[t]he idea that the[] defendants acted voluntarily is at once absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence. It is absurd because no outsider viewing the interaction would conclude that the defendants voluntarily consented to a search when surrounded by police at close quarters, especially if the defendants knew (as they must have) that giving the consent would ultimately result in serious criminal charges being filed against them."); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 69 & n.1 (2007) (acknowledging that "[n]o one seems to have a good word to say about [the Court's] consent-search jurisprudence" or its Fourth Amendment jurisprudence generally).

[10] The Fourth Amendment provides:

> 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 shall issue, but upon probable cause, supported by Oath or affirmation, and

This Article contends that the Court's most perplexing Fourth Amendment outcomes occur in one category of Fourth Amendment cases and that an additional faulty habit of the Court is exacerbating the Court's problematic results. More precisely, the integrity of the Court's cases suffers when Supreme Court Justices assess issues of Fourth Amendment reasonableness by critiquing the "reasonable" beliefs and actions of ordinary citizens ("citizen reasonableness")—issues that juries should decide.[11] In addition, the Court sometimes oversteps its traditional, law-declaring role[12] to decide issues of pure fact.

This Article ultimately proposes a solution that would more accurately assess Fourth Amendment issues of citizen reasonableness and restrict the Court's evaluation of fact-laden Fourth Amendment questions. At a minimum, the Supreme Court should acknowledge distinct kinds of Fourth Amendment reasonableness: Legal Reasonableness; Factual Reasonableness; and Mixed Reasonableness. Legal Reasonableness includes Fourth Amendment issues that can be fairly characterized as requiring a declaration of law. Factual Reasonableness includes issues that require an assessment of who did what and whom to believe. Finally, Mixed Reasonableness includes

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> particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. *See also* Morgan Cloud, *The Dirty Little Secret*, 43 Emory L. J. 1311, 1343 (1994) (asserting that the Supreme Court's "malleable notion of [Fourth Amendment] reasonableness" has in application "tended to defeat the core purposes of the Fourth Amendment" by increasing government power to search and seize while shrinking individual liberty and privacy).

[11] *See* Sparf v. United States, 156 U.S. 51, 65 (1895) ("[A]s, on the one hand, it is presumed that juries are best judges of facts, it is, on the other hand, presumable that the courts are the best judges of the law."); *see also* Amar, *supra* note 6, at 761 (arguing that the Court's Fourth Amendment jurisprudence should be altered "to draw[] on the participation and wisdom of, ordinary citizens—We the People, who in the end must truly comprehend and respect the constitutional rights enforced in Our name"); Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791, 825 (1981) [hereinafter Bacigal, *A Case for Jury*] ("To the extent that the expression 'reasonable expectation of privacy' connotes common sense and community consensus, it is suggested that the jury can 'do the job better.'" (footnote and citation omitted)); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 364 (1994) [hereinafter Bacigal, *Putting the People Back*] (proposing a "structure for Fourth Amendment decisionmaking that returns the jury to its former prominence").

[12] In this Article, law means general, legal rules. "Law consists of 'those rules and standards of general application by which the state regulates human affairs.' These rules and standards should be 'generally and uniformly applicable to all persons of like qualities and status and in like circumstances' . . . ." Mark A. Bross, Comment, *The Impact of* Ornelas v. United States *on the Appellate Standard of Review for Seizure Under the Fourth Amendment*, 9 U. PA. J. CONST. L. 871, 874–75 (quoting Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 901, 904 (1943)).

issues requiring the application of facts to law. The Supreme Court should critically assess issues of Mixed Reasonableness to determine whether a judge or jury is better-positioned to decide them fairly and accurately. Some mixed issues should be assigned to a "government subset" and others to a "citizen subset." The government subset will include "mixed" issues calling for the application of facts to law that warrant broad, bright-line rules to guide the conduct of law enforcement officers, as well as issues strongly tied to law enforcement policies and procedures. In contrast, the citizen subset should encompass mixed issues of fact and law that are heavily dependent on the actions, beliefs, and perspectives of prudent, ordinary citizens. Trial judges should continue to decide all issues within the government subset, and the Supreme Court should review the majority of these questions using a de novo appellate review. But juries should resolve the issues in the citizen subset, and the Court should review those jury determinations only for clear error. This Article contends that this proposed change of process will return some reasonableness and credibility to the Court's Fourth Amendment jurisprudence.

A. Failings of the Court's Assessment of Reasonableness.

The Fourth Amendment was not crafted to regulate the behaviors and actions of the American people.[13] Instead, it was created to protect "the people," their homes, and "effects" from unreasonable searches and seizures by the police and other government agents.[14] But, in giving meaning to the safeguards that the Fourth Amendment assures, the United States Supreme Court has not only proclaimed that law enforcement officers must act "reasonably" whenever they search or seize,[15] it has gone much further, demanding reasonableness

[13] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (recognizing that the Fourth Amendment "does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative"); Burdeau v. McDowell, 256 U.S 465, 475 (1921) (asserting that the Fourth Amendment protects only against "activities of sovereign authority").

[14] In this regard, the text of the Fourth Amendment is straightforward. *See* U.S. CONST. amend. IV; *see also* New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (indicating that the Fourth Amendment restraints apply to governmental acts, whether undertaken by civil or criminal authorities); *id.* (stating that the "'basic purpose of th[e Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials'" (quoting Camara v. Mun. Court, 387 U.S. 523, 528 (1967))); *Burdeau*, 256 U.S. at 475 (noting that "the purpose of the Fourth Amendment [was] to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property").

[15] *See* Samson v. California, 547 U.S 843, 855 n.4 (2006) (describing reasonableness as the "touchstone of the Fourth Amendment").

from citizens[16] too.[17] In this vein, the Court has routinely evaluated the "reasonableness" of drivers, passengers, employees, suspects, and others who interact with police.[18] When ordinary citizens are approached by the police, the Court requires them to behave as a hypothetical "reasonable" man[19] in similar circumstances "would have" behaved. If the Court decides that a person has not met the Court's idiosyncratic expectations of "objective" citizen reasonableness, the Court declares that the citizen lacks Fourth Amendment protection. Thus, when five or more Justices conclude that a driver, passenger, employee, or other citizen acted with less savvy, intellect, or fortitude than the "reasonable person" should, the Court holds that the person and his belongings were never "seized," that there was no "search," or that the citizen "consented" to the

[16] The reference to "citizens" in this Article is not intended to distinguish American citizens, born or naturalized, from undocumented persons or "aliens." It is intended to differentiate government actors from non-government persons.

[17] *See, e.g.*, United States v. Drayton, 536 U.S. 194, 203–05 (2002) (evaluating the reasonable beliefs and actions of a commercial bus passenger); INS v. Delgado, 466 U.S. 210, 212, 218–20 (1984) (assessing the reasonable behaviors and beliefs of factory workers who were subject to police interrogation while confined by their work duties and holding that such workers were not "seized"); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (explaining that a person is "seized" when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"); *see also* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 732 (1993) ("[I]f one takes the Justices at their word, a sense of how (innocent) U.S. citizens gauge the impact of police investigative techniques on their privacy and autonomy is highly relevant to current Fourth Amendment jurisprudence.").

[18] *See supra* note 17; *see also* Brendlin v. California, 127 S. Ct. 2400 (2007) (evaluating whether a reasonable automobile passenger would feel free to terminate the encounter with police when the car in which he is riding is subjected to a traffic stop); Florida v. Bostick, 501 U.S. 429, 434 (1991) (considering whether a reasonable bus passenger would feel free to "'disregard the police and go about his business'" (quoting California v. Hodari D., 499 U.S. 621, 628 (1991))); Smith v. Maryland, 442 U.S. 735 (1979) (analyzing whether installation of a pen register constitutes a search, and hinging the analysis on whether the person who was subject to the pen register exhibited an actual (subjective) expectation of privacy and whether the individual's expectation of privacy was one that society would recognize as reasonable).

[19] The reference to a male person is not accidental. The Court claims to apply an "objective" reasonable person test. This test appears to assume, however, that everyone, regardless of age, gender, race, intellectual ability, or ethnicity, should conform his or her behavior to that of a "reasonable" white male. *See* Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues from Initial Law Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153, 1155 n.5 (1994) (asserting a problem with the Fourth Amendment reasonable person test, explaining that "in applying an objective reasonable person test, [the Court] may be applying a test reflective of the reasonable white male law-abiding citizen, rather than a test truly reflective of the reasonable African-American, Hispanic, or Asian-American citizen"); *see also* Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988) (contending that the Supreme Court has "construct[ed] a highly artificial 'reasonable person' who is much more assertive in encounters with police officers than is the average citizen").

search or seizure. Once the Court finds that the government neither searched nor seized, it resolves that the government did not infringe a Fourth Amendment interest in privacy, liberty, or personal security, concluding that Fourth Amendment rights never attached.

In addition to evaluating the conduct and beliefs of citizens, the Supreme Court is prone to re-assess facts already decided in the courts below. Juries routinely decide questions of fact in both civil and criminal cases,[20] but in Fourth Amendment matters, trial judges decide all issues, whether of fact, law, or a mixture of both. And, although the Supreme Court has consistently articulated a willingness to defer to the judge's assessment of facts, announcing that it will review such findings only for clear error,[21] in reality, the Court sometimes reviews facts de novo. Because the Justices are not present to see, hear, and receive factual evidence first-hand, the Court's cases appear result-oriented when the Court re-assesses facts that were decided by decision makers who did see and hear the evidence.

B. A Proposal.

This Article urges a re-evaluation of who should conduct Fourth Amendment reasonableness assessments and contends that juries of reasonable citizens, not Supreme Court Justices, should decide issues of citizen reasonableness. Thus, the Supreme Court will take its first step toward returning reasonableness to its Fourth Amendment jurisprudence when it: 1) Allows juries to decide those "mixed" questions of Fourth Amendment law that require an evaluation of how reasonable citizens think and behave,[22] and 2) Enforces a fact/law dichotomy in which the Court restricts its assessment of Fourth Amendment facts to a clear-error, deferential review.

To promote the proposed approach, the Supreme Court should divide Fourth Amendment issues into distinct groups and assign whole groups to judges or juries, depending on which body is best-suited to decide the entire group. Using its current balancing formula,[23] the Court should continue to decide those types of issues

[20] *See* Sparf v. United States, 156 U.S. 51, 64, 66–67, 84–86 (1895); U.S. Const. Amend. VII; discussion *infra* note 29 and accompanying text.

[21] *See* Ornelas v. United States, 517 U.S. 690, 698 (1996).

[22] *See* Miller v. Fenton, 474 U.S. 104, 114 (1985) (indicating that generally the Supreme Court's designation of issues as fact questions or mixed questions "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"); *see also* Bacigal, *A Case for Jury*, *supra* note 11, at 824–25 ("To the extent that the expression 'reasonable expectation of privacy' connotes common sense and community consensus, it is suggested that the jury can 'do the job better.'" (footnote and citation omitted)).

[23] The Court "'assess[es], on the one hand, the degree to which [a search or seizure]

that require the declaration of general principles of law and those that turn on broad policy judgments about the protections the Fourth Amendment does and does not offer. It should also decide those issues requiring an evaluation of how reasonable law enforcement officers act given specific facts and circumstances. But the Court should defer to citizen juries on issues of how reasonable citizens think and behave, and to fact-finding bodies on issues of fact and on questions that hinge on the credibility of witnesses. Sometimes, the fact-finding body will be a judge (as it currently is in all Fourth Amendment cases); other times, a jury should be impaneled to evaluate fact-laden issues.[24]

Even though judges currently decide all Fourth Amendment suppression issues, there are persuasive arguments for permitting juries to decide *at least* some Fourth Amendment questions.[25] The reasons are particularly strong for allowing juries of reasonable citizens to assess the actions and beliefs of other "reasonable" citizens.

Allowing juries to decide citizen reasonableness may result in more substantive Fourth Amendment protection for the American people by reducing the number of cases in which the beliefs of seemingly reasonable people are declared to be unreasonable.[26] If, for instance, juries prove to be more likely to find that a reasonable person in a suspect's circumstances would feel obligated to answer police questions or constrained to reject a law enforcement officer's requests to search his or her person or belongings, then the number of Fourth Amendment rights-protecting cases will increase, and the

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intrudes upon an individual's privacy [or liberty] and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" Samson v. California, 547 U.S. 843, 848 (2006) (quoting United States v. Knights, 534 U.S. 112, 118–19 (2001)).

[24] *See* Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 38–39 (2006). Three traditional reasons have been given for favoring jury determinations.

> First, juries are good at finding facts: twelve people who listen to evidence and then deliberate together over what they have heard are more likely to get things right than is a single fact-finder deciding an issue alone. Second, juries, particularly in criminal cases, serve as a check on the government: criminal juries watch out for the rights and interests of the individual defendant, and, as a result, safeguard liberty . . . . Third, juries legitimize outcomes: the general public is more likely to respect decisions reached by ordinary citizens.

Id.

[25] *See* Bacigal, *A Case for Jury*, *supra* note 11, at 824–25.

[26] *See* Slobogin & Schumacher, *supra* note 17, at 740, 742 (revealing empirical data suggesting that ordinary citizens consider certain law enforcement infringements on their privacy and autonomy highly intrusive, while the Supreme Court's rulings about the same conduct assert minimal intrusiveness).

Fourth Amendment will provide greater protection for the individual. But even if juries comprised of ordinary citizens raise or maintain the standards for citizen reasonableness, the Court's process will improve. At a minimum, allowing juries to decide these issues will promote a respect for the Court's cases by: 1) Reducing the appearance that the Court's Fourth Amendment decisions are result-oriented; 2) Increasing the transparency and democracy of the process by including "the people" in Fourth-Amendment-rights-protection; and 3) Lending some integrity to all rulings that label citizen conduct or expectations as "unreasonable."[27]

Nay-sayers to this proposed change in process are sure to criticize the proposal as undermining predictability for law enforcement officers, who must fulfill a duty of crime prevention and resolution, while trying to comply with the Fourth Amendment. But predictability is not mandated by the Fourth Amendment. Although predictability of Fourth Amendment rules is, admittedly, a worthy goal, the Constitution does not suggest that predictability trumps individual rights. Furthermore, as the Court's past decisions illustrate, except when the Court declares broad, bright-line rules identifying the reasonableness floor, no matter who evaluates reasonableness, the process involves subjectivity and an inherent unpredictability, because it demands an assessment of the unique circumstances of each case.[28] Therefore, there may be no significant increase in the unpredictable outcomes when fact finders (including juries) are substituted for appellate judges.

Furthermore, the proposed change in process will not inhibit the Supreme Court from continuing to provide extensive guidance to the police by announcing bright-line, black-letter rules of law declaring the floor protections the Fourth Amendment guarantees. Such straight-forward rules will continue to provide predictability and uniformity in Fourth Amendment cases that do not rest on highly fact-specific situations or hinge on the perspectives of ordinary people. Finally, because the proposal argues that the Court should continue to

[27] *See* Simmons, *supra* note 9, at 775 ("It is no exaggeration to say that the nearly unanimous condemnation of the Court's rulings on consensual searches is creating a problem of legitimacy which threatens to undermine the integrity of judicial review of police behavior.").

[28] The Supreme Court has expressly recognized the difficulty in quantifying the abstract prohibition against unreasonable searches and seizures. It has said: "Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task . . . ." Camera v. Mun. Court, 387 U.S. 523, 528 (1967). The Court has also said, "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536–37.

assess, de novo, issues of law enforcement reasonableness, and issues turning on how reasonable officers behave in response to specific factual catalysts, the Court will continue to provide bright-line rules in many cases. The proposal will impact only the small percentage of cases that assess citizen behaviors and beliefs, and it is those cases that deserve a change in process because they currently defy logic and common sense.

II. THE SUPREME COURT'S EVALUATION OF FOURTH AMENDMENT REASONABLENESS.

Historically, juries have decided questions of fact in both criminal and civil cases.[29] In contrast, judges, particularly appellate judges, have announced general principles of law.[30] Consistent with the fact-finder role for juries and the separate, law-declarer role for judges, "appellate courts 'accep[t] findings of fact that are not

[29] *See* Sparf v. United States, 156 U.S. 51, 64, 66–67, 84–86 (1895) (recounting Chief Justice Jay and Chief Justice Marshall's view that "the [C]ourt could speak authoritatively as to the law, while the function of the jury was to respond as to the facts"); *see also* U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States . . . ."); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 444–45 (2001) (Ginsburg, J., dissenting) ("'An essential characteristic of [the federal court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.'" (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996))); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (reiterating, in the context of sentencing, that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt'" (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999))); Castillo v. United States, 530 U.S. 120, 131 (2000) (noting, in the context of interpreting a federal statute to determine the meaning of the term "machine gun," that "if after considering traditional interpretive factors, we were left genuinely uncertain as to Congress' intent in this regard, we would assume a preference for traditional jury determination of so important a factual matter"); *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[30] *Sparf*, 156 U.S. at 64 (observing that "'on questions of law it is the province of the court to decide'" (quoting Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794))); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Law scholars have added that "[l]aw declaration involves 'formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms.'" Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (brackets and ellipses in original) (quoting HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374–75 (tentative ed. 1958)).

"clearly erroneous."'"[31] But reviewing courts "'decid[e] questions of law *de novo*.'"[32]

Generally, mixed questions, those requiring an application of facts to known or developing legal principles,[33] have been more difficult for the Court to assign. The Court has treated mixed questions inconsistently, sometimes allowing juries to decide them, other times reviewing the issues de novo, "depending upon essentially practical considerations."[34]

In deciding Fourth Amendment issues, however, the Court has not adhered to its usual method of allocating issues between judges and juries. The Court treats Fourth Amendment cases differently in two significant ways. First, the Court decides *all* mixed questions[35] without considering whether a fact finder could do a better job. Second, the Court reviews some issues of pure fact, de novo, as if they were legal issues. Because both types of issues—fact and mixed—turn on fact-laden, circumstance-specific factors, the Court's case outcomes often appear result-oriented.[36] And, by refusing to assign some mixed issues to juries, the Court has failed to follow its

[31] Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995)) (brackets in original) (stating that reviewing courts should review findings of historical fact only for clear error); *see also* Hernandez v. New York, 500 U.S. 352, 364 (1991) ("[P]ure issue[s] of fact are subject to review under a deferential standard . . . ."); Pullman-Standard v. Swint, 456 U.S. 273, 287–88 (1982) (noting that in the civil context, Rule 52(a) of the Federal Rules of Civil Procedure demands a clearly erroneous standard for pure questions of fact); United States v. Campbell, 486 F.3d 949, 953 (6th Cir. 2007) (reiterating that when reviewing a ruling on a motion to suppress, an appellate court reviews a district court's legal determinations "de novo" but sets aside the trial court's factual findings "only if they are clearly erroneous" (citing United States v. Long, 464 F.3d 569, 572 (6th Cir. 2006))).

[32] *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting) (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995)) (brackets in original).

[33] Thompson v. Keohane, 516 U.S. 99, 110 (1995) ("'So-called mixed questions of fact and law [are those] which require the application of a legal standard to the historical-fact determinations.'" (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963))).

[34] *Ornelas*, 517 U.S. at 700 (Scalia, J., dissenting) ("[The Court has] in the past reviewed some mixed questions of law and fact on a *de novo* basis, and others on a deferential basis . . . ."). "[T]here is no rigid rule with respect to mixed questions." *Id.* at 701.

[35] *See, e.g.*, *id.* at 697, 699 (majority opinion) (holding that determinations of reasonable suspicion and probable cause will be reviewed de novo by the Court); Ford v. United States, 273 U.S. 593, 604–05 (1927) (finding that issue of whether, given all of the circumstances, seizure was authorized by applicable treaty "was for the judgment of the trial court," not a jury); Steele v. United States, 267 U.S. 505, 506, 510–11 (1925) (rejecting the defendant's argument in favor of allowing a jury to decide whether "there was probable cause to issue the warrant"); *see also* Bacigal, *Putting the People Back*, *supra* note 11, at 382 (discussing "the Court's somewhat illusory distinction between law and fact").

[36] *See, e.g.*, Luna, *supra* note 9, at 846 ("[T]he Court is engaged in a form of outcome-based jurisprudence, reaching a conclusion first and then reasoning backward to justify it."); Nadler, *supra* note 9, at 156 ("[T]he Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence.").

own practice of assigning issues to the decision maker best-positioned to do a good job.

A. The Court Decides All Mixed Questions, Including Law Enforcement Reasonableness and Citizen Reasonableness.

The Court has described "mixed" questions as those in which "'[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'"[37] Like fact finding, "law application is situation-specific."[38] In non-Fourth Amendment contexts, the Supreme Court has sometimes said that mixed "question[s] of fact and law [are] for the court and not for the jury."[39] In other cases, the Court has contradicted that rule. In *Sparf v. United States*, the Court expressly recognized a role for fact finders, including juries, in deciding mixed questions, commenting:

> [T]he jury must of necessity often pass upon a question, 'compounded of fact and law,' their duty, when considering the evidence, was to apply the law, as given by the court, to the facts proved, and, *thus applying the law*, return a verdict of guilty or not guilty as their consciences might direct.[40]

In any event, juries do decide mixed issues in non-Fourth Amendment contexts. For instance, juries decide issues of negligence, and juries decide whether a criminal defendant reasonably believed that imminent danger supported an act of self defense.[41]

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[37] *Ornelas*, 517 U.S. at 696–97 (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19 (1982)) (second and third brackets original); *see also Thompson*, 516 U.S. at 110 (1995) ("'So-called mixed questions of fact and law [are those] which require the application of a legal standard to the historical-fact determinations.'" (quoting *Townsend*, 372 U.S. at 309 n.6 (1963))); Monaghan, *supra* note 30, at 236 ("Law application . . . involves relating the legal standard of conduct to the facts established by the evidence.").

[38] Monaghan, *supra* note 30, at 236.

[39] *Steele*, 267 U.S. at 511.

[40] Sparf v. United States, 156 U.S. 51, 67 (quoting with approval comments of Chief Justice Marshall); *see also* 28 U.S.C. § 2254(d) (2000) (providing statutorily that in habeas corpus setting, state-court findings of fact are due great deference); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) ("[C]onsiderations involved in the Rule 11 context are similar to those involved in determining negligence, which is generally reviewed deferentially."); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (addressing findings of intent to discriminate as subject to the clearly erroneous standard of review).

[41] One legal scholar, Erik Luna, contends that juries routinely decide mixed questions. According to Luna, "juries inevitably interpret the law in *every* case, regardless of whether officials acknowledge this bit of realism. Not only is the fact-law divide 'a fiction that seldom corrals the behavior of actual jurors,'" but it is "'a gross oversimplification of our trial system.'"

But in Fourth Amendment cases the Court reserves all mixed questions for itself. For example, the Court treats the inquiry into the voluntariness of someone's consent as a purely legal question for de novo review by the Court.[42] Likewise, the Court has declared that "the competency of the evidence of seizure under [a] search warrant" is a mixed question appropriate for its de novo review.[43] And, the Court has held that "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal" because they are mixed questions.[44] Accordingly, in Fourth Amendment suppression cases, neither fact-finding judges nor citizen juries are ever permitted to definitively decide issues of reasonableness. In fact, juries are excluded altogether from Fourth Amendment suppression decisions.

1. The Court decides mixed questions of police reasonableness and probable cause.

In giving meaning to the safeguards that the Fourth Amendment assures, the Supreme Court has proclaimed that law enforcement officers must act reasonably whenever they search or seize.[45] Thus,

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Luna, *supra* note 9, at 857 (quoting JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 64 (1994); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 64 (2003)), (providing a string of citations to law review articles discussing the jury's role in finding facts and determining law); *see also* Bacigal, *A Case for Jury*, *supra* note 11, at 794–808; Bacigal, *Putting the People Back*, *supra* note 11, at 364–80.

[42] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (analyzing the voluntariness of a defendant's consent to search); *see also* Miller v. Fenton, 474 U.S. 104, 116–17 (asserting in a non-Fourth Amendment criminal procedure context that "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness'" and that a "state-court judge is not in an appreciably better position than the federal habeas court to make that determination").

[43] *Steele*, 267 U.S. at 506, 511 (rejecting the defendant's argument that a jury should decide whether "there was probable cause to issue the warrant"); Ford v. United States, 273 U.S. 593, 605 (holding that issue of whether seizure was authorized by applicable treaty "was for the judgment of the trial court," not a jury).

[44] Ornelas v. United States, 517 U.S. 690, 699 (1996). Although the Court treats the evaluation of reasonable suspicion as a mixed issue, the Court has simultaneously urged a hybrid appellate review for these questions. In this regard, the Court has said that a reviewing court must still "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers" when it conducts its "de novo" review. *Id.*; *see also* United States v. Arvizu, 534 U.S. 266, 273–74 (2002) (quoting *Ornelas*, 517 U.S. at 699, with approval). Notice, the Court has never said that deference of any sort is due the inferences that suspects and citizens draw from their circumstances.

[45] *See* Samson v. California, 547 U.S 843, 855 n.4 (2006) (describing reasonableness as the "touchstone of the Fourth Amendment"); s*ee also* Los Angeles County v. Rettele, 127 S. Ct. 1989, 1993 (2007) (per curiam) (finding that a law enforcement officer acted reasonably, as required by the Fourth Amendment, although he ordered naked people out of bed in the process of executing a search warrant); Scott v. Harris, 127 S. Ct. 1769, 1779 (2007) (finding that an officer acted reasonably, as required by the Fourth Amendment, when he rammed the bumper of

when an officer applies physical force to a person, executes a search warrant, searches a suspect's home or body, conducts a traffic stop or a "Terry" frisk, she must behave "reasonably," as interpreted by the Supreme Court.[46] The Court also decides how much evidence equates to probable cause or reasonable suspicion when deciding whether a search or seizure complied with the Fourth Amendment.[47]

(a) Police reasonableness.

Two recent cases—*Brigham City v. Stuart*[48] and *Los Angeles County v. Rettele*[49]—typify how the Court decides mixed questions of police reasonableness. In *Stuart* the Court responded to a split in the federal circuits by announcing a new, general principle of law: "[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[50] But the Court did not stop there. It also declared that the officers' particular conduct fell within the ambit of the newly-announced rule. After repeating some of the facts from the trial-court record,[51] the Court drew inferences from those facts, including: "In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning."[52] The Court decided: "Here, the officers were confronted with *ongoing* violence occurring *within* the home."[53] Thus, concluded the Court, "the officers' entry here was plainly reasonable under the circumstances."[54]

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a fleeing motorist, causing the car to spin out of control); *Samson*, 547 U.S. at 846 (evaluating an officer's search of a parolee without a warrant or probable cause to determine if the officer acted reasonably); Illinois v. Rodriguez, 497 U.S. 177 (1990) (holding that the Fourth Amendment is not violated if law enforcement officers reasonably believe that a third party without power to consent maintained actual authority to permit search).

[46] *See* cases cited *supra* note 45; Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

[47] *See* Maryland v. Pringle, 540 U.S. 366 (2003); *Terry*, 392 U.S. 1.

[48] 547 U.S. 398 (2006).

[49] 127 S. Ct. 1989 (2007) (per curiam).

[50] 547 U.S. at 403.

[51] The basic facts of the case were these: At 3:00 a.m., four officers responded to a call complaining about a loud party. *Id.* at 406. Once at the home, the officers heard shouting inside and walked to the backyard to look through a screen door and windows to investigate further. *Id.* In the kitchen, they saw an altercation involving four adults and a juvenile. *Id.* The adults were attempting to restrain the young person, but the juvenile "[broke] free," swung a fist and "[struck] one of the adults in the face." *Id.* Once the officers saw the altercation, an officer entered the house through an open screen door, calling out his presence as he entered. *Id.*

[52] *Id.*

[53] *Id.* at 405.

[54] *Id.* at 406.

Even more recently, in *Los Angeles County v. Rettele*,[55] the Court decided that officers acted reasonably when they obtained and executed a warrant to search a house for suspects who had vacated the home three months earlier, even though in executing the warrant officers ordered innocent residents (of a race different than the suspects) out of bed, making them stand nude for several minutes.[56] In ruling that the officers acted reasonably, the Court reversed a decision from the Ninth Circuit Court of Appeals, which had held that "'a reasonable jury could conclude that the search and detention were "unnecessarily painful, degrading, or prolonged."'"[57] In rejecting the Ninth Circuit's conclusions, the Supreme Court drew competing inferences from the same facts in the record. The Court seemed to visualize a reasonable explanation for the officers' flawed search, declaring:

> The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity.[58]

As the Court's opinions in *Stuart* and *Rettele* show, the Court regularly evaluates the reasonableness of police conduct to determine if the Fourth Amendment was breached. In undertaking this analysis, the Court engages in the type of fact-to-law application that in other legal contexts the Court divides between judges and juries, depending essentially on who is in the better position to decide the issues accurately and fairly.[59]

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[55] 127 S. Ct. 1989 (2007) (per curiam).

[56] *Id.* at 1990, 1994.

[57] Rettele v. Los Angeles County, 186 Fed. App'x 765, 766 (9th Cir. 2006) (quoting Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994)).

[58] *Rettele*, 127 S. Ct. at 1992. The Court also remarked: "The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies." *Id.* at 1993.

[59] The Court's active assessment of mixed Fourth Amendment issues is not new. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 16, 19 (1968) (finding that the "Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house," that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," and that the officer in that particular case, Officer McFadden, acted reasonably when he forcibly stopped the suspect and searched his outer clothing).

(b) Probable cause and reasonable suspicion.

The Supreme Court also decides whether a search or seizure was supported by the requisite evidence, reasonable suspicion or probable cause. The Court assesses the sufficiency of the evidence using a reasonable-citizen yardstick. The Court has described "reasonable suspicion" as "an objective standard," which asks "would the facts available to [an] officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[60] Although the standard considers how an ordinary citizen "of reasonable caution" would view the evidence, it also takes into account "the circumstances [of the officer]."[61]

The probable cause standard is similar to reasonable suspicion in that it restricts officers from searching or seizing without a reasonable basis.[62] The Court has said, "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[63] The Court has admitted experiencing difficulty in quantifying probable cause, remarking: "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."[64] Unable to quantify the term in percentages, the Court has described probable cause as "a '"practical, nontechnical conception"' that deals with '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'"[65] Justice Scalia has expressly acknowledged the "extremely fact-bound nature" of

[60] Terry v. Ohio, 392 U.S. 1, 16, 21–22, 27 (1968) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (stating that when deciding whether or not reasonable suspicion supports a limited "*Terry* frisk" or "*Terry* stop," the Court inquires "whether a reasonably prudent man in the circumstances [of the officer] would be warranted in the belief that his safety or that of others was in danger.").

[61] *Id.* at 21–22.

[62] In fact, Fourth Amendment reasonableness is often equated with probable cause. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002) ("In the criminal context, reasonableness usually requires a showing of probable cause."). A warrant issues only upon a showing of probable cause. *See* Groh v Ramirez, 540 U.S. 551, 557 (2004). And, most searches and seizures (including arrests) require probable cause to comply with the Fourth Amendment. *See* Kaupp v. Texas, 538 U.S. 626, 631–32 (2003) (noting that arrests require probable cause or judicial authorization).

[63] Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (alterations in original).

[64] Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983); *Brinegar*, 338 U.S. at 175.

[65] *Pringle*, 540 U.S. at 370 (quoting *Gates*, 462 U.S. at 231 (quoting *Brinegar*, 338 U.S. at 175–76)).

probable cause and reasonable suspicion determinations.[66] Former Chief Justice Taft, too, noted that probable cause assessments involve extensive "issue[s] of fact."[67]

Despite the admittedly nebulous, non-technical, fact-bound nature of the reasonable suspicion and probable cause benchmarks, which are judged from the perspectives of prudent *men*, not prudent *jurists*, the Supreme Court evaluates these mixed issues de novo.[68]

2. The Court decides mixed questions of citizen reasonableness too.

In addition to evaluating the actions of police to decide whether the government has breached the Fourth Amendment and whether officers based their search or seizure on sufficient evidence, the Supreme Court decides some Fourth Amendment cases by critiquing citizen behaviors and beliefs for reasonableness ("citizen reasonableness"). Arguably, the Supreme Court should not be assessing citizen reasonableness at all. The text of the Fourth Amendment demands reasonableness only from government actors.[69] But the Court's legal precedent in this area is well-established, requiring someone to evaluate citizen thoughts and actions for reasonableness.[70] Therefore, the relevant question becomes—who should conduct the evaluation and decide how rational citizens think and behave when approached and questioned by police?

An average person who hears that she must act "reasonably" probably thinks that she should act sensibly, prudently, and with the common sense, care, and deliberation that a typical, thoughtful person confronted with similar circumstances would and should use.[71] In the Fourth Amendment context, acting sensibly and prudently may not be enough to protect your rights.[72] Although the United States Supreme

[66] *See* Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting) (criticizing the majority's holding that probable cause and reasonable suspicion determinations should be reviewed de novo on appeal).

[67] *See* Steele v. United States, 267 U.S. 505, 510–11 (1925).

[68] See, for example, *Pringle*, 540 U.S. at 367–68, in which the Supreme Court held that there was probable cause to arrest Pringle, who was one of three men riding in a car stopped for speeding. Pringle was riding in a front passenger seat. An officer found cash in the car's glove compartment and five glassine baggies of cocaine in a back-seat armrest. *Id.* The officer arrested the driver, Pringle, and a back-seat passenger. *Id.*

[69] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989).

[70] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980); discussion *infra* Part II.A.2.(a).(i).

[71] *See* THE OXFORD AMERICAN COLLEGE DICTIONARY, *supra* note 5, at 1132 (defining "reasonably" as "in a fair and sensible way—by fair or sensible standards of judgment; rightly or justifiably"). When "reasonableness" is judged by a typical American citizen, the standard is no slouch—one empirical study indicates that typical citizens hold other citizens to high standards. *See* Nadler, *supra* note 9, at 155–56.

[72] The Supreme Court's standards of reasonableness in consent cases are virtually

Court purports to require this sort of common-sense reasonableness,[73] in applying this standard to citizens and suspects, the Court condemns many actions and beliefs that seem perfectly sensible to ordinary citizens. [74]

When citizens are approached by the police, the Court evaluates their behaviors and beliefs using an "objective" measure of reasonableness. Although the Court has said that a suspect's unique circumstances might matter in the reasonableness calculation,[75] in practice, any frailties they suffer from rarely count. As Professor Tracey Maclin contends, there is no "average, hypothetical person."[76] Race, education, sophistication, culture, age, and infinite other factors affect how prudent people behave. Nevertheless, if, and usually when, the Court decides that a suspect or defendant has failed to satisfy the Court's expectations of citizen reasonableness, the Court declares that the citizen lacks any Fourth Amendment protection. The Court holds

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impossible to meet:

> Ever since the Court first applied the 'totality of the circumstances' standard to consent search issues in *Schneckloth v. Bustamonte* in 1973, it has held in case after case, with only a few exceptions, that a reasonable person in the situation in question either would feel free to terminate the encounter with police, or would feel free to refuse the police request to search. By contrast, empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures.

Nadler, *supra* note 9, at 155 (footnote omitted).

[73] *See, e.g.*, Brendlin v. California, 127 S. Ct. 2400, 2407 (2007) (describing as "sensible" a reasonable car passenger's belief that he is not free to come and go during a traffic stop). Interestingly, the *Brendlin* case is one of the few in which the Court concluded that the defendant had fulfilled the hypothetical-person standard of Fourth Amendment reasonableness. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980), discussed *infra* Part II.A.2.(a).(i); United States v. Drayton, 536 U.S. 194 (2002), discussed *infra* pp. Part II.A.2.(a).(iii); and INS v. Delgado, 466 U.S. 210, 212 (1984).

[74] *See* Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 27–28 (2008) (noting the bewilderment of law students each semester when they learn how the Supreme Court has interpreted voluntariness in the Fourth Amendment context). I, too, have experienced this student surprise in every semester I have taught Fourth Amendment law. Students seem shocked at the fortitude the Court expects of typical citizens. One of my students asked, "Shouldn't the Court presume that a person acted reasonably, in the absence of other evidence?" *See also* Nadler, *supra* note 9; Slobogin & Schumacher, *supra* note 17, at 739 (outlining the results of an empirical study finding citizen disagreement with the holdings of the Supreme Court regarding the types of police investigative actions that implicate privacy or autonomy).

[75] *See Mendenhall*, 446 U.S. at 558 (indicating that the facts that suspect was young, black, and had not graduated from high school "were not irrelevant" but neither were they decisive).

[76] Tracey Maclin, "*Black and Blue Encounters" — Some Prelinimary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Va. U. L. Rev. 243, 248 (1991) [hereinafter Maclin, *"Black and Blue Encounters"*].

that the person and his belongings were never "seized" or that the citizen "consented" to a search.[77] Once the Court finds that the government neither searched nor seized, it resolves that the government did not infringe upon a Fourth Amendment interest in privacy, liberty, or personal security, and concludes that the Fourth Amendment was never implicated.

The Court directly and expressly assesses citizen reasonableness when it decides whether a person was "seized" by police. In addition, the Court implicitly considers the perspectives of ordinary citizens in two other types of Fourth Amendment cases: 1) those assessing whether a "search" occurred; and 2) those in which the police contend that consent authorized a search. The Court decides all three types of issues, treating them as purely legal questions.

(a) The Court decides when a citizen is seized.

Three cases—*United States v. Mendenhall*,[78] *Brendlin v. California*,[79] and *United States v. Drayton*[80]—illustrate the Justices' scrutiny of ordinary citizens when the Court decides whether a person is "seized."

(i) Sylvia Mendenhall, not a reasonable suspect.

In *United States v. Mendenhall*, the Court was asked to decide whether officers had sufficient reason to detain a twenty-two-year-old black female, Sylvia Mendenhall.[81] Mendenhall flew from Los Angeles to the Detroit airport on a commercial flight.[82] Once inside the airport, two white male Drug Enforcement Agency agents approached her, identified themselves as law enforcement agents, asked for her identification and her plane ticket, posed a few more questions, and then asked Mendenhall to accompany them to a more

[77] *See, e.g.*, United States v. Drayton, 536 U.S. 194 (2002) (evaluating the reasonable beliefs and actions of a commercial bus passenger); INS v. Delgado, 466 U.S. 210, 212, 218–20 (1984) (assessing the reasonable behaviors and beliefs of factory workers who were subject to police interrogation while confined by their work duties and holding that such workers were not "seized"); *Mendenhall*, 446 U.S. at 554 (explaining that a person is "seized" when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

[78] 446 U.S. 544 (1980).

[79] 127 S. Ct. 2400 (2007).

[80] 536 U.S. 194 (2002).

[81] 446 U.S. at 547.

[82] *Id.*

isolated room in the terminal.[83] The agents suspected Mendenhall of illegally transporting drugs.[84]

To answer Fourth Amendment issues, two Justices, Stewart and Rehnquist, analyzed whether Mendenhall was "seized."[85] In doing so, Justice Stewart explained: "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."[86] Justice Stewart emphasized that "a person has been 'seized' within the meaning of the Fourth Amendment only if, *in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave*."[87] After providing this explanation, Justice Stewart implicitly found that, if Mendenhall subjectively felt constrained by the DEA agents, her reaction was "unreasonable."

> On the facts of this case, no "seizure" of [Mendenhall] occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon [Mendenhall] to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see [Mendenhall]'s identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. [Mendenhall] was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.[88]

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[83] *Id.* at 548.

[84] *Id.* at 547.

[85] Because the Fourth Amendment is only implicated during a search or seizure, this was a threshold issue. Three of the Justices—Chief Justice Burger, Justice Blackmun, and Justice Powell—did not reach the seizure issue. *Id.* at 560–66 (Powell, J., concurring in part and concurring in judgment).

[86] *Id.* at 554 (Part II-A, opinion of Justice Stewart, joined only by Justice Rehnquist).

[87] *Id.* (emphasis added).

[88] *Id.* at 555. In dissent, Justice White emphasized that the Supreme Court was the first to decide that Mendenhall was not "seized." Justice White explained:

> There is no indication that the Government on appeal, before either the original panel of the Court of Appeals or the en banc court, ever questioned the understanding that the stop of Ms. Mendenhall constituted a "seizure" requiring reasonable suspicion. Neither the majority of the en banc court nor the dissenting judge questioned the District Court's acknowledgment that reasonable suspicion was

Accordingly, two of the nine justices undertook their own evaluation of Mendenhall's behavior and beliefs, deciding that she was never "seized" and, therefore, lacked protection from the Fourth Amendment.[89] After the decision in *Mendenhall*, the Court adopted Justice Stewart's test as determinative of when a citizen is seized.[90]

(ii) Bruce Brendlin, a reasonable car passenger.

Recently, in *Brendlin v. California*, the Court ensured Fourth Amendment protection for car passengers when it decided how reasonable car passengers feel and react during traffic stops. The Court decided, as a matter of law, that a passenger is "seized" whenever a law enforcement officer subjects the car in which she is riding to a traffic stop.[91] To reach this conclusion, the Court applied

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required to justify the initial stop of Ms. Mendenhall.

Id. at 568 n.1 (White, J., dissenting).

[89] Chief Justice Burger and Justices Blackmun and Powell concluded that any intrusion on Mendenhall's liberty and privacy interests was "quite modest." *Id.* at 562–63 (Powell, J., concurring in part and concurring in the judgment). Evaluating the severity (or value) of the intrusion element, the Justices remarked:

> The intrusion . . . was quite modest. Two plainclothes agents approached [Mendenhall] as she walked through a public area. [Mendenhall] was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One officer asked [Mendenhall] why her airline ticket and her driver's license bore different names. . . . [Mendenhall] was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, [Mendenhall] could not reasonably have felt frightened or isolated from assistance.

Id. at 562–63.

The circuit courts of appeal have relied on *Mendenhall* in holding citizens to very high standards of "reasonableness." For instance, in United States v. Campbell, 486 F.3d 949 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 819 (2007), the United States Court of Appeals for the Sixth Circuit reversed a district court judge's ruling, which had granted a defendant's motion to suppress as clearly erroneous and held that the defendant was not seized—even though an officer lacking probable cause repeatedly asked the defendant to supply his name, social security number, birth date, and to produce identification that the defendant said he did not have—based on the circuit court's conclusion that a reasonable person would not have felt constrained from walking away.

[90] *See* Brendlin v. California, 127 S. Ct. 2400, 2405–06 (2007) (explaining that the Court adopted Justice Stewart's "touchstone" in California v. Hodari D., 499 U.S. 621, 627 (1991), but later added that "when a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter'" (quoting Florida v. Bostick, 501 U.S. 429, 435–36 (1991))).

[91] 127 S. Ct. at 2405–07. The Supreme Court's decision was unanimous, but the courts below were anything but. The trial court rejected the defendant/passenger's claim that the traffic stop constituted an unlawful seizure of his person. *Id.* at 2404. The California Court of Appeals reversed, holding that the passenger was seized. *Id.* In a close decision, the Supreme Court of California reversed again, finding that a passenger is not seized during a typical traffic stop "'in

the same test of seizure that was first announced by Justice Stewart in *Mendenhall*:[92] "[W]hether a reasonable person in [the passenger's] position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself."[93] The Court's answer? "We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission."[94] The Court in *Brendlin* reasoned:

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.[95]

Although in *Brendlin* the Court reached an opposite conclusion about citizen reasonableness than did the Justices in *Mendenhall*, the case reiterates the Court's practice of making its own judgments about the behaviors and beliefs of "reasonable" citizens. The Court's view of whether a citizen's actions and thoughts are reasonable determines when a person is "seized," implicating the Fourth Amendment.

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the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the . . . officer's investigation . . . .'" *Id.* at 2404–05 (quoting People v. Brendlin, 136 P.3d 845, 846 (Cal. 2006), *vacated*, 127 S. Ct. 2400 (2007)).

[92] *See* discussion *supra* Part II.A.2.(a)(i).

[93] *Brendlin*, 127 S. Ct. at 2406 (quoting *Bostick*, 501 U.S. at 436).

[94] *Id.* at 2406–07. The Court in *Brendlin* also declared that passengers are reasonable in believing that a police officer at the scene of a crime, arrest, or investigation will not let people move around freely. *Id.* at 2407 (citing Maryland v. Wilson, 519 U.S. 408 (1997) (holding that during a traffic stop, an officer is permitted to order a passenger out of a car for the officer's safety) and Pennsylvania v. Mimms, 434 U.S. 106 (1977) (holding that an officer could order a driver from a car in a traffic stop)). The announcement of reasonableness in *Brendlin* rested on the Court's assumption that officers would limit movement to protect officer safety. *Id.* at 2406.

[95] *Id.* at 2407.

(iii) Christopher Drayton, an unreasonable commercial bus patron.

Although the Court concluded that a reasonable passenger in a private car would feel constrained from leaving the scene of a traffic stop without police permission, the Court has held that a passenger on a Greyhound bus is not subject to such restrictions during a "bus sweep." In *United States v. Drayton*, the Court held that two patrons were not seized and were, therefore, unprotected by the Fourth Amendment, despite oppressive police behaviors that occurred in the cramped confines of a Greyhound bus.[96] Officers conducted a "bus sweep," looking for passengers who might be transporting drugs, although they had no reason to suspect anyone on the bus of criminal conduct.[97] Three officers entered the bus. One knelt on the driver's seat to watch passengers;[98] the second officer positioned himself at the back of the bus, also to observe passengers;[99] the third officer walked slowly from the back of the bus forward, asking passengers about their travel plans and luggage.[100]

When the third officer reached Christopher Drayton and his traveling companion, Brown, the officer noticed that they "were wearing heavy jackets and baggy pants despite the warm weather."[101] He leaned over Drayton's shoulder, displayed his badge, said that he was attempting to "deter" the transportation of illegal drugs and guns, and asked to "check" their luggage.[102] Drayton and Brown "agreed" to a search of the bag. The search uncovered neither drugs nor guns.[103] Undeterred, the officer asked Brown if he could "check" his person. When Brown "agreed," the officer patted Brown's upper thighs and found drugs.[104] The officer then arrested and handcuffed Brown and removed Brown from the bus.[105] Next, the officer asked Drayton, "Mind if I check you?"[106] When Drayton's body language

[96] United States v. Drayton, 536 U.S. 194, 200–01 (2002). *See also* INS v. Delgado, 466 U.S. 210, 212, 218–20 (1984) (assessing the reasonable behaviors and beliefs of factory workers who were subject to police interrogation while confined by their work duties and holding that such workers were not "seized").

[97] *Drayton*, 536 U.S. at 197.

[98] *Id.*

[99] *Id.* at 198.

[100] *Id.* As he moved up the aisle of the bus, the third officer asked passengers to identify their luggage stored in overhead racks. *Id.*

[101] *Id.* at 199.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

suggested acquiescence, the officer searched Drayton and found drugs taped to his thighs also.[107]

Before trial, both defendants moved to suppress the cocaine found taped to their legs, arguing that the drugs were uncovered as a result of an unreasonable and, therefore, unlawful seizure. When the suppression issue reached the Supreme Court, it ruled, as a matter of law, that neither Drayton nor Brown was "seized" when he consented to the officer's search of his luggage and body, and that the defendants' consent to these searches was completely voluntary.[108] The Court reiterated that if a reasonable person would feel free to terminate an encounter with police, then he or she is not seized.[109] The Court resolved:

> [W]e conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.[110]

Thus, a majority of the Court summarily decided that a "reasonable" passenger on a commercial bus feels unconstrained to refuse an officer's request to identify and open his luggage and equally free to say "no" when the officer asks to "pat-down" his body and clothing. In fact, a majority of the Court declared that a reasonable bus passenger, under such circumstances, would feel empowered to leave the bus.[111]

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[107] *Id.*

[108] *Id.* at 200. *See* discussion of consent, *infra* Part II.A.2.(c).

[109] *Id.* at 201. According to the Court, in a bus encounter the "*Mendenhall*" seizure test is adapted—"[t]he proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Id.* at 202 (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)).

[110] *Id.* at 203–04. *See also* INS v. Delgado, 466 U.S. 210 (1984), in which the Supreme Court made a similar determination—that factory workers were not seized, implicating Fourth Amendment rights, even though armed law enforcement agents positioned themselves at the exits of a factory and other agents dispersed throughout the factory, questioning factory employees at their work stations.

[111] In an empirical study that evaluated the perceived intrusiveness of such bus sweeps, two professors found strong dissonance between the Court's view and the views of ordinary, "reasonable" citizens. Slobogin & Schumacher, *supra* note 17, at 742. The professors noted that, in *Florida v. Bostick*, the Supreme Court strongly suggested that police efforts to detect drug

In sum, the Court expressly and directly evaluates citizen reasonableness when it determines whether a person is "seized" within the meaning of the Fourth Amendment. In doing so, the Court has declared that a frightened twenty-two-year-old African-American female confronted by two white DEA agents is not seized; that a man wearing baggy pants, while traveling on a cramped Greyhound bus, who is repeatedly questioned by one of three white, armed officers "working" the bus is not seized; but that a passenger in a personal-use car, which is subjected to a typical traffic stop, is seized.

(b) The Court decides when a search takes place.

Although the Court does not expressly talk about citizen reasonableness when it decides whether police have conducted a search, Fourth Amendment search issues turn on societal expectations of privacy, which necessarily depend on the perspectives of ordinary citizens. The Court applies a two-part test to decide if the government has conducted a "search": 1) "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,'"[112] and 2) "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'"[113] Often the Court assumes that a citizen held an actual expectation of privacy and evaluates only the second part of the test, treating the inquiry as a question of law. Two cases—*Oliver v. United States*[114] and *Smith v. Maryland*[115]—illustrate the Court's de novo evaluation of societal expectations of privacy.

In *Oliver*, the Court considered whether a criminal defendant's subjective expectation of privacy—that his "highly secluded" farmland, protected by no trespassing signs and a locked gate[116]—was an expectation "'that society [wa]s prepared to recognize as "reasonable."'"[117] Without input from non-judicial members of

smuggling by singling out a passenger on a bus and asking to search his luggage either is not a seizure, or is only a minimally intrusive one, because such a person should normally feel free to "terminate the encounter." *Id.* (citing *Bostick*, 501 U.S. 429 (1991)). In contrast, results from their empirical study revealed that citizens view such intrusions as very invasive—much more invasive than being questioned on a public sidewalk for ten minutes. *Id.*

[112] Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz v. United States, 389 U.S. 347, 361 (1967)).

[113] Bond v. United States, 529 U.S. 334, 338 (2000) (quoting *Smith*, 442 U.S. at 740).

[114] 466 U.S. 170 (1984).

[115] 442 U.S. 735 (1979).

[116] *Oliver*, 466 U.S. at 173–74 (describing that the field was "bounded on all sides by woods, fences, and embankments and [could not] be seen from any point of public access").

[117] *Id.* at 177 (quoting Katz v. United States, 389 U.S. 347, 361 (1967)). Defendant Oliver had been growing marijuana in the secluded fields. *Id.* at 173.

society or other empirical data about society's views regarding the reasonable or unreasonable nature of Mr. Oliver's privacy expectations, the Court in *Oliver* concluded that, despite its secluded nature, the farmland was "an open field."[118] Thus, according to the Supreme Court, the government's warrantless "search" of the field was a "non-search," deserving of no Fourth Amendment protection.[119]

Similarly, in *Smith v. Maryland*, the Supreme Court held that installation and use of a pen register at the office of the telephone company, which recorded the phone numbers dialed by a specific customer, does not constitute a search implicating Fourth Amendment protections.[120] In *Smith*, the Court explained that whether the use of the pen register violates the Fourth Amendment turns on "whether the person invoking [Fourth Amendment] protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[121] The Court ultimately decided that there was no reasonable expectation of privacy. The Court seemed to speculate: "[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial."[122] The Court also made assumptions about what reasonable people do and think:

> All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills.[123]

As the *Oliver* and *Smith* cases illustrate, the purported legal standard for determining whether officers have conducted a search is a mixed question of law and fact turning on how society perceives such intrusions. Nevertheless, while the standard would seem to require an assessment of how reasonable citizens perceive a situation,

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[118] *Id.* at 177.

[119] *Id.* at 178, 181. *See also* California v. Greenwood, 486 U.S. 35, 40–41 (1988) (holding that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left outside the curtilage of a home because people who expose their garbage to the public "have . . . no reasonable expectation of privacy" in the garbage).

[120] 442 U.S. at 740.

[121] *Id.* (citing, *inter alia*, Rakas v. Illinois, 439 U.S. 128, 143 (1978)).

[122] *Id.* at 742.

[123] *Id. But see* Minnesota v. Olson, 495 U.S. 91, 99 (1990) (holding that an overnight house guest possesses legitimate expectations of privacy in host's home); Arizona v. Hicks, 480 U.S. 321, 325 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").

the Court treats these mixed questions as if they are purely legal issues and, therefore, subjects them to a de novo review, deciding for itself whether police conducted a "search."

(c) The Court decides whether a citizen consented to a search.

Although the Court does not necessarily describe such issues in terms of Fourth Amendment reasonableness, the Court often resolves disputed issues of consent. These issues present themselves as mixed issues that are dependent on whether the citizen voluntarily agreed or, conversely, felt undue pressure.[124] The Court determines the validity of consent in cases in which law enforcement officers relied on the consent of someone with authority to permit a search[125] and in cases in which an officer incorrectly, but "reasonably," believed that someone held that power.[126]

(i) Actual consent.

When someone voluntarily agrees to a search of his home, person, or property, the Court deems the subsequent search "reasonable" for Fourth Amendment purposes.[127] The Court resolves these fact-laden questions about the voluntariness of citizen consent by deciding whether the citizen was pressured into agreeing. The Court treats these fact-intensive, circumstance-specific mixed issues as if they were pure legal questions.[128] The Court reviews these issues de novo,

[124] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating that it is "well settled" that a search conducted with consent is an exception to the requirement of a warrant or probable cause).

[125] *Id.* at 221.

[126] Illinois v. Rodriguez, 497 U.S. 177, 187–89 (1990).

[127] Although the Fourth Amendment generally requires that law enforcement officers obtain a warrant before entering a person's home, *see* Payton v. New York, 445 U.S. 573, 586 (1980) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable."), law enforcement officers are excused from obtaining a warrant, if they obtain the voluntary consent of the person whose home is searched. *See Bustamonte*, 412 U.S. at 219. The consent of someone with "common authority" over the premises also permits law enforcement officers to enter and search without a warrant. *See* United States v. Matlock, 415 U.S. 164, 171 (1974). *But see* Georgia v. Randolph, 547 U.S. 103 (2006) (finding a search of a home unreasonable when conducted without a warrant and pursuant to the consent of one co-occupant over the objection of a second and present co-occupant). In the similar context of evaluating the voluntariness of a criminal defendant's confession, the Court has expressly labeled voluntariness a "legal question," not one of fact. *See* Miller v. Fenton, 474 U.S. 104, 110 (1985); *id.* at 118 (Rehnquist, J., dissenting) (asserting that "it is difficult to sensibly distinguish the determination that a particular confession was voluntary" (that the majority says "is not an issue of fact") from "the determinations which [the Court] ha[s] held to be entitled to a presumption of correctness under § 2254(d)").

[128] *See* United States v. Drayton, 536 U.S. 194, 204 (2002) (recounting many of the facts of the case, including the "cooperative" nature of the interaction between Drayton and the officer and the fact that there "'was nothing coercive [or] confrontational' about the encounter"

even though consent turns on the perspectives and beliefs of reasonable citizens and the circumstances of the person granting the permission.[129]

(ii) Apparent consent.[130]

Not only does the Court determine whether a citizen's consent was voluntary, but it also evaluates searches resting on the "permission" of someone who lacks the authority to agree to a search. In *Illinois v. Rodriguez*, the Court deemed "reasonable" such a "consent" search of a home.[131] The Court held that officers do not violate the Fourth Amendment when they conduct a warrantless search of a home based on the purported consent of a third person whom officers incorrectly, but reasonably, believe exercises common authority to permit the entry and search.[132] According to the Court: "What [an American] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"[133] Thus, according to the Court, it is the officer's reasonable impression of consent that matters, not a resident or property owner's reasonable behaviors or beliefs in giving or denying consent to search her home that counts.[134]

(brackets in original) (citation omitted)). *See also Randolph*, 547 U.S. at 111 (noting that Fourth Amendment reasonableness in consent cases rests on "the great significance given to widely shared social expectations").

[129] *See Randolph*, 547 U.S. at 103.

[130] Apparent consent cases are difficult to categorize as requiring an assessment of police reasonableness or as involving an analysis of citizen reasonableness. Although a common-sense interpretation of consent would lead to an inquiry into the actual and reasonable actions of the citizen who authorized the search, the Court's consent cases usually focus on the law enforcement officers' reasonable beliefs about whether someone consented (whether or not the person had authority to consent). *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"); *see also Rodriguez*, 497 U.S. at 187–89 (discussing apparent consent, which hinges on the reasonable beliefs of law enforcement officers).

[131] 497 U.S. 177 (1990).

[132] *Id.* at 179, 186. In *Rodriguez*, the defendant was arrested in his apartment and charged with unlawful possession of drugs. *Id.* at 179. The police entered the apartment with the purported consent of Rodriguez's former girlfriend, who had a key to the apartment but no right to be there. *Id.* at 179–80. The girlfriend had moved from the apartment several weeks earlier. *Id.* at 180–81. Her name was not on the lease; she did not pay rent; and she never had access to the apartment when Rodriguez was not home. *Id.*

[133] *Id.* at 183 (quoting U.S. CONST. amend. IV).

[134] *Id.* at 186, 189 ("[T]he Appellate Court found it unnecessary to determine whether the officers reasonably believed that [the third party/girlfriend] had the authority to consent, because it ruled as a matter of law that a reasonable belief could not validate the entry. Since [the Supreme Court] find[s] that ruling to be in error, [it] remands for consideration of that question.").

Accordingly, appellate courts, including the Supreme Court, decide these mixed questions of consent, despite the fact that consent centers (or should) on the perspectives of ordinary citizens.

B. The Court Sometimes Re-assesses Facts.

In addition to deciding mixed questions of Fourth Amendment reasonableness that rest on fact-intensive, circumstance-specific value judgments, the Court occasionally re-assesses facts decided in the courts below.

The Court has described facts as "'basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators."'"[135] Scholars have elaborated on the Court's description, explaining that fact questions are "case-specific inquir[ies] into *what happened here*."[136] In addition to questions of "pure" historical facts, the Court has sometimes said that when "an issue involves an inquiry into state of mind [that inquiry] is not at all inconsistent with treating it as a question of fact,"[137] and the Court has, in at least some contexts, declared that "[i]ssues involving credibility are normally considered factual matters."[138]

Historically, juries have decided questions of fact,[139] and appellate courts have accepted their factual findings, unless the findings are clearly erroneous.[140] But in Fourth Amendment matters, magistrate judges and other trial-level judges, not juries, act as fact finders.[141] Furthermore, although the usual standards of appellate review theoretically apply to the trial-judges' findings of fact,[142] as demonstrated below, the Court has, in practice, sometimes reviewed

[135] Thompson v. Keohane, 516 U.S. 99, 109–10 (1995) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)).

[136] Monaghan, *supra* note 30, at 235 (1985) (citing other scholars).

[137] Miller v. Fenton, 474 U.S. 104, 113 (1985).

[138] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1989); *see also Miller*, 474 U.S. at 114 ("When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight." (citing Patton v. Yount, 467 U.S. 1025 (1984); Wainwright v. Witt, 469 U.S. 412 (1985))).

[139] *See* Sparf v. United States, 156 U.S. 51, 64, 66–67, 84–86 (1894)*; see also* discussion *supra* Part II., introduction.

[140] *See* Ornelas v. United States, 517 U.S. 690, 699 (1996) (declaring that reviewing courts should review findings of historical fact "only for clear error"); *see also* Hernandez v. New York, 500 U.S. 352, 364 (1991) (acknowledging that "pure issue[s] of fact [are] subject to review under a deferential standard").

[141] *See* Luna, *supra* note 9, at 839 (proposing a thought experiment to ponder a change from judge decision makers to jury decision makers in Fourth Amendment suppression matters).

[142] *See Ornelas*, 517 U.S. at 694–95 n.3 ("'Clear error' is a term of art . . . and applies when reviewing questions of fact.").

the trial judge's findings of fact anew. Because the Supreme Court Justices are not present to see, hear, and receive factual evidence first-hand, the Court's decisions appear result-oriented when it rejects the reasonable conclusions of other seemingly rational decision makers who previously resolved the fact disputes with the benefit of first-hand evidence. A recent case—*Scott v. Harris*[143]—demonstrates this point.

In *Scott*, the Supreme Court evaluated the meaning of "reasonable force." *Scott* was a civil action[144] in which the driver of a fleeing car sued an officer pursuant to 42 U.S.C. § 1983.[145] The driver asserted that the law enforcement officer had applied excessive force in ramming the bumper of the driver's car, causing the car to spin out of control, and rendering the driver a quadriplegic.[146] The driver had not been suspected of a specific crime but caught an officer's attention by speeding.[147]

The officer moved for summary judgment, arguing that he was entitled to qualified immunity from suit.[148] The district court judge denied the officer's motion, and the Eleventh Circuit Court of Appeals affirmed that decision.[149] Both the trial court and the court of appeals concluded that the reasonableness of the officer's conduct was an issue for a jury.[150] Despite both lower-court rulings, the Supreme Court conducted its own analysis of the Fourth Amendment reasonable-force issue, re-assessed the "substantial and immediate risk" of physical injury to persons other than the driver, and determined that the law enforcement officer had acted reasonably, fulfilling his Fourth Amendment obligations, even though the officer exposed the driver to significant physical injury (or even death) by ramming the car.[151]

The outcome of the *Scott* case is unassailable. No one could persuasively dispute that (at least) sometimes a police officer acts reasonably even if he rams the bumper of a fleeing suspect's car to stop the suspect's escape.[152] But, should the Court have conducted its

[143] 127 S. Ct. 1769 (2007).

[144] The fact that *Scott* is a civil action is insignificant for purposes of this analysis because the standards of Fourth Amendment reasonableness are the same in actions pursuant to 42 U.S.C. § 1983 (2000) and in criminal suppression matters.

[145] *Scott*, 127 S. Ct. at 1773.

[146] *Id.*

[147] *Id.* at 1772.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 1779.

[152] Imagine if an officer bumps the car of an extremely dangerous, fleeing suspect and intentionally forces his car into a large field enclosed by a fence that neither the suspect nor the

own assessment of reasonableness in direct contradiction of the four lower-court judges?

In deciding that the officer acted reasonably and complied with his Fourth Amendment obligations, eight members of the Supreme Court relied on its typical balancing formula, weighing the nature and quality of the driver's Fourth Amendment interests and comparing that value to the need the Court perceived for the government's intrusion on the driver's rights.[153] In assigning values, the Court said that it considered "the risk of bodily harm that [the officer]'s actions posed to [the driver] in light of the threat to the public that [the officer] was trying to eliminate."[154] As part of its evaluation of the threat to the public, the Court took into account "not only the number of lives at risk, but also [the driver's and officer's] relative culpability."[155] In other words, the Court[156] made findings about the nature of the driver's conduct and his culpability, assessed the risks and benefits of his conduct in light of his perceived culpability, and made similar assessments about the law enforcement officer's actions and the need and desire for the police conduct.

Even though the Court made these findings about the specific facts of the case and assigned values to the opposing interests correlated with these facts, the Court expressly labeled its inquiry into reasonableness to be a "pure question of law."[157] In dissent, Justice Stevens contended: "Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable."[158] Notably, Justice Scalia,

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car could escape. Also assume that the contact does not endanger bystanders or animals and causes no permanent property damage. Few would rationally declare the officer's conduct "unreasonable" under that scenario. *See* Tennessee v. Garner, 471 U.S. 1, 4 (1985) (holding that officers may not use deadly force to prevent the escape of an apparently unarmed suspected felon unless the officers have probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officers or others).

[153] *Scott*, 127 S. Ct. at 1778 (explaining how the Court "'must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion'" (quoting United States v. Place, 462 U.S. 696 (1983))).

[154] *Id.*

[155] *Id.* The Court also remarked: "It was [the driver], after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the officer] confronted." *Id.*

[156] Justice Stevens dissented. *Id.* at 1781–85 (Stevens, J., dissenting).

[157] *Id.* at 1776 n.8 (majority opinion). In his dissent, Justice Stevens complained that the reasonableness of the officer's conduct should have been decided by the jury. *Id.* at 1784 (Stevens, J., dissenting) ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury."); *id.* at 1781 ("[T]he question of the reasonableness of the officer's actions should be decided by a jury . . . .").

[158] *Id.* at 1784.

who wrote for the majority, couched the *Scott* decision in language suggesting that the outcome turned on the case's procedural posture. In this regard, Justice Scalia quipped: "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction."[159]

If the majority actually evaluated the reasonableness issue exclusively to determine whether or not it survived the summary judgment standard, then the Court's method and conclusion were sound. After all, it is now well-established that a court has the authority to issue judgment in favor of a party as a matter of law, if the evidence "is so one-sided that one party must prevail" and no reasonable jury could decide otherwise.[160]

But a careful review of the majority's decision in *Scott* suggests that the Supreme Court went further and engaged in affirmative fact finding and inference drawing, including assessing the culpability of the chasing officer and the fleeing driver.[161] After watching videotapes from the record compiled in the trial court, the Justices commented on the quality of the plaintiff's driving and the number of other motorists the driver put at risk during his flight from the pursuing officer.[162] Only after watching the tapes and rejecting the lower courts' interpretation of the driver's conduct depicted in them, did the Court reverse the decision of the district court judge, who had viewed the same tapes.[163] Justice Scalia, writing for the majority, declared: "The videotape quite clearly contradicts the version of the story told by [the fleeing motorist] and adopted by the Court of Appeals."[164] In other words, the Court made its own credibility judgments.

Despite the majority's characterization of the decision as one mandated by the summary judgment standard, it is difficult to square such a conclusion with the Court's unconventional act of reviewing the tapes and then rejecting the observations and inferences drawn from them by the four lower-court judges—all of whom concluded

[159] *Id.* at 1776 (majority opinion).

[160] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986) (holding that summary judgment decisions turn on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

[161] This author is not the only one to reach this conclusion. *See* David K. Kessler, Comment, *Justices in the Jury Box: Video Evidence and Summary Judgment in* Scott v. Harris, 31 HARV. J.L. & PUB. POL'Y 423, 424, 434 (arguing that the Court in *Scott* "encroached on the jury's role" and that *Scott* "represents an improper invasion of judges into the jury box").

[162] *See Scott*, 127 S. Ct. at 1775.

[163] *See id.* at 1784 (Stevens, J., dissenting).

[164] *Id.* at 1775 (majority opinion).

that there was balanced evidence sufficient to allow a jury to decide the reasonable or unreasonable nature of the officer's (and arguably the driver's) conduct.[165]

The Court's handling of the *Scott* case demonstrates a significant flaw in the Court's process of judging reasonableness that lends fuel to those who criticize the Court's Fourth Amendment jurisprudence, describing it as "perverse," "a jumble," "contradictory," "a mystery," and "a fiction . . . for attaining the desired legal consequence."[166] Given the clear and well-established rule of deference to fact-finders' determinations, when the Court assesses or re-assesses facts on its way to deciding whether a search or seizure was reasonable, the Court's decisions appear result-oriented.[167]

C. The Court's Process of Judging Reasonableness Results in Unreasonable Fourth Amendment Outcomes.

1. The pitfalls of deciding all mixed issues.

Juries normally decide "reasonableness." For instance, juries determine whether someone acted negligently, which requires them to decide whether a person behaved reasonably given the circumstances.[168] Jurors award "reasonable" damages,[169] decide

[165] Interestingly, three professors recently conducted a study in which 1,350 Americans viewed the same video the judges saw in *Scott*. Although a majority of the viewers agreed with the Supreme Court's ultimate conclusions, "there were sharp differences of opinion along cultural, ideological, and other lines." Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming 2009) (manuscript at 1, *available at* http://ssrn.com/abstract=1081227).

[166] *See* sources cited *supra* note 9 and the accompanying quotations of a few of the many criticisms of the Court's Fourth Amendment decisions.

[167] The *Scott* decision is not unique. The Court has rejected fact-finders' Fourth Amendment conclusions before, even the conclusions reached by a citizen jury. *See, e.g.*, Muehler v. Mena, 544 U.S. 93, 98 n.1 (2005) (citing Ornelas v. United States, 517 U.S. 690, 697–99 (1996)) (vacating a jury verdict declaring that the Fourth Amendment was violated when officers detained a home's occupant for an extended period in handcuffs while officers conducted a search of the premises).

[168] For a discussion of negligence as a fact question, see Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (noting that negligence is a "traditional jury question"); Flannelly v. Del. & Hudson Co., 225 U.S. 597, 603 (1912) (stating that defense of contributory negligence is a fact question for a jury); Davidson S.S. Co. v. United States, 205 U.S. 187, 190 (1907) (finding that whether injury is a result of negligence and which party is responsible for the negligence, are questions of fact properly determined by a jury). For a discussion of the intersection of negligence with reasonable care, see Bailey v. Cent. Vt. Ry., 319 U.S. 350, 352 (1943) (finding that an action under the Federal Employers' Liability Act in which the Supreme Court found "sufficient evidence" should "go to the jury on the question whether . . . respondent was negligent in failing to use reasonable care in furnishing [an employee] with a safe place to work"); Preston v. Prather, 137 U.S. 604, 609 (1891) ("[T]he omission of the reasonable care required is the negligence which creates the liability; and

contract issues that hinge on "reasonableness,"[170] and regularly evaluate the reasonableness of a criminal defendant's behavior and beliefs to determine the defendant's substantive guilt or innocence.[171] Juries are asked to decide whether a criminal defendant's claim of provocation is reasonable[172] and whether a defendant was reasonable in believing that he was subject to an imminent threat, justifying an act of self-defense.[173]

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whether this existed is a question of fact for the jury to determine . . . ."); *see also* Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc., 414 F.3d 546, 550 (5th Cir. 2005) (finding that the question of whether injuries "were reasonably foreseeable . . . at the time of contracting" was a proper question for the jury to decide).

[169] *See* Konvitz v. Midland Walwyn Capital, Inc., 129 Fed. App'x 344, 347 (9th Cir. 2005) (unpublished) (describing a jury finding that a quantum meruit damages award was reasonable compensation for fraudulent breach of contract).

[170] *See* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 745 (D.C. Cir. 1998) (upholding a jury finding that an employee "'reasonably relied on the provisions of the employee handbook to his detriment'" (quoting United States *ex rel.* Yesudian v. Howard Univ., 946 F. Supp. 31, 36 (D.D.C. 1996), *aff'd in part, rev'd in part*, United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 745 (D.C. Cir. 1998))).

[171] *See* U.S. CONST. amend. VI (resting determinations of criminal guilt with the jury); Dunn v. United States, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."); *In re* Winship, 397 U.S. 358, 363 (1970) ("'No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'" (quoting Davis v. United States, 160 U.S. 469, 484, 493 (1895))); Maher v. People, 10 Mich. 212, 220–21 (1862) (indicating that the issue of whether a criminal defendant acted in response to "reasonable" or "adequate" provocation to mitigate murder to manslaughter is a question for a jury); *see also* COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, DIST. JUDGES ASS'N, SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS, § 6.05(2)(A) (2005) (instructing the jury on the defense of coercion, including telling the jury that to benefit from the defense, the defendant must have "reasonably" believed there was an imminent threat of death or serious bodily harm to himself or another); *id.* § 6.06 (2) (instructing that self-defense requires a jury to find that the defendant used only force that "reasonably" appeared necessary under the circumstances); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 270 (4th ed. 2007) ("The 'reasonable man' (or, sometimes, 'ordinary man') shows up throughout the criminal law and represents an objective standard by which the defendant's conduct is measured [by the jury]."); Bacigal, *Putting the People Back*, *supra* note 11, at 381 (asserting that juries typically resolve mixed issues in criminal cases when asked to decide "concepts like insanity, adequate provocation, self-defense, criminal negligence, or some more general aspect of the reasonable prudent person concept.").

Arguably, when the Court finds facts and evaluates certain mixed questions of law and fact that juries are equally or better equipped to find and make, the Court infringes on a criminal defendant's due process rights because, in the criminal law context, fact-finding functions are more appropriately assigned to a jury than a judge. But this last argument is beyond the scope of this Article, which seeks to identify the cause for the Court's unreasonable Fourth Amendment jurisprudence and to propose a modest solution to improve the Court's process.

[172] *See, e.g.*, *Maher*, 10 Mich. at 220–21.

[173] *See, e.g.*, Zachary v. State, 888 N.E.2d 343, 347 (Ind. App. 2008) ("A self-defense claim can prevail in a homicide prosecution only if the defendant had a reasonable fear of death or great bodily harm. The jury looks from a defendant's viewpoint when considering facts relevant to self-defense." (citation omitted)).

Thus, the Court usurps the typical role of the fact finder, including juries, when it decides reasonableness as if reasonableness were a purely legal question. The Court's current judge-only approach to Fourth Amendment cases conflicts with the jury's historic importance in search and seizure matters and in criminal cases in general. As Professor Ronald J. Bacigal has demonstrated in an article exploring the historic significance of the jury to Fourth Amendment concepts, "Colonial Americans were active participants in the tribunals that addressed early search and seizure law."[174] And even the modern Supreme Court, which allows juries virtually no input in Fourth Amendment matters, has expressly acknowledged the constitutional stature of juries in criminal cases. The Court has recognized "that trial by jury in criminal cases is fundamental to the American scheme of justice"[175] and that the proper workings of a jury protect the people against "arbitrary rule."[176] In fact, the Court has broadly declared: "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."[177] Furthermore, as the more recent decision in *Apprendi v. New Jersey* (and its progeny) establishes, the jury plays a constitutionally-mandated role even in the sentencing phase of criminal matters.[178] Despite the undeniable importance of juries in criminal cases, the Supreme Court maintains a monopoly over issues of Fourth Amendment reasonableness.

Moreover, when the Court weighs law enforcement needs against citizen interests to decide Fourth Amendment reasonableness, the Court relies on an inherently subjective process, though reasonableness purports to be an objective standard.[179] Because the

[174] Bacigal, *Putting the People Back*, *supra* note 11, at 360.

[175] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[176] *Id.* at 151. *See also* Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (acknowledging America's tradition of using juries "as instruments of public justice" and that juries support our country's "basic concepts of a democratic society and a representative government" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

[177] *Duncan*, 391 U.S. at 155 (citing Singer v. United States, 380 U.S. 24, 31 (1965); SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956)).

[178] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that any fact, "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime" must be proven to a jury beyond a reasonable doubt).

[179] *See* Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (asserting that the objective test for seizure, which looks "to the reasonable man's interpretation of conduct," guides the police by "allow[ing them] to determine in advance whether the conduct contemplated will implicate the Fourth Amendment" and "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"). *See also* United States v. Drayton, 536 U.S. 194, 202 (2002) (purporting to judge citizen beliefs by an

reasonableness standard is subjective, when the Court has weighed competing interests to decide reasonableness, it has often been unable to reach quantifiably rational outcomes.[180] The Court, too, has recognized that "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task."[181] The Court has occasionally even expressly admitted the imprecision that results when it assesses reasonableness. "The test [for determining whether a person is seized] is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."[182] Thus, while the Court's balancing process might appear logical, rational, and objective upon a cursory review, a closer analysis reveals the vast leeway inherent in its process of assigning values to liberty and privacy, on the one hand, and the need for law enforcement's intrusion on those rights, on the other.[183]

Furthermore, when the Court decides issues of citizen reasonableness, the Court often sets a benchmark for citizen and suspect behaviors according to a hypothetical reasonable person standard that is extremely demanding.[184] As numerous critics have

"objective," innocent-person measure); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (hinging a Fourth Amendment "seizure" on the beliefs of a "reasonable person" in view of "all of the circumstances surrounding the incident").

[180] *See* Nadler, *supra* note 9, at 154 (noting the "ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent, on the other"); *id.* at 166 (asserting that the Court relies on "the Justices' own imagined thoughts and feelings of a reasonable person"); *id.* at 165 ("[Justices] are trying to answer a question with a crucial empirical component using only intuitive reflections on their own experience and about the imagined experience of other citizens.").

[181] Camara v. Mun. Court, 387 U.S. 523, 528 (1967). The Court has also said that: 1) "the concept of reasonable suspicion is somewhat abstract," United States v. Arvizu, 534 U.S. 266, 274 (2002) (citing Ornelas v. United States, 517 U.S. 690, 696 (1996)); 2) "reasonable suspicion is not a 'finely-tuned standar[d],'" *id.* (quoting *Ornelas*, 517 U.S. at 696) (brackets in original); and 3) the requisite "cause 'sufficient to authorize police to stop a person' is an 'elusive concept,'" *id.* (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[182] *Chesternut*, 486 U.S. at 573.

[183] *See, e.g.*, *Arvizu*, 534 U.S. 266 (reversing the Ninth Circuit's decision finding a lack of reasonable suspicion for a traffic stop and correspondingly rejecting the Ninth Circuit's attempt to delineate individual factors in the case that influenced a finding of reasonable suspicion). As Professor Nadler has suggested, "the Court's Fourth Amendment . . . jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence." Nadler, *supra* note 9, at 156.

[184] *See* Maclin, *"Black and Blue Encounters," supra* note 76, at 248 (criticizing the Court for "construct[ing] Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers" and describing this notion as "naive" and contrary to "the real world that police officers and black men live in").

asserted, in some contexts the Court's measure of reasonable citizen behavior is too tough for real people to meet.[185] And the Court decides these citizen reasonableness issues based on nothing more than its own intuition about how reasonable bus passengers, travelers, and others think and behave in a hypothetical situation. There is no empirical or other evidentiary support for the Court's stiff standards.

In sum, the Court's case outcomes in cases involving mixed issues of reasonableness are inconsistent,[186] seemingly result-oriented, and they often defy common-sense notions of how reasonable citizens respond to police demands.

2. The pitfalls of assessing (and re-assessing) facts.

When the Supreme Court steps beyond its law-declaring expertise and re-assesses facts decided below, it reaches conclusions that appear result-oriented. Sometimes, like in *Scott*, the Court's case outcomes contradict the findings of other, seemingly reasonable decision makers in the courts below. When the Court substitutes its judgment for that of another decision maker who was in a better position to see, hear, and evaluate the persuasiveness of the witnesses and other evidence, the Court's decisions look contrived. Because fact-finding trial judges and jurors see and hear witnesses, they can evaluate demeanor and credibility first-hand.[187] Credibility cannot be

[185] *See* Nadler, *supra* note 9 (criticizing the Court's consent jurisprudence and the manner in which it determines what a reasonable person in the position of the searchee would think or believe); Simmons, *supra* note 9, at 747 (criticizing the Court's consent jurisprudence, as "at once absurd, meaningless, and irrelevant"); *see also* Butterfoss, *supra* note 19, at 439 (arguing that the Court relies on a "legal fiction" when evaluating whether a reasonable person would feel free to end an encounter with police and walk away, and urging that such citizens rarely feel such freedom).

[186] Notice that in *Brendlin v. California*, 127 S. Ct. 2400 (2007), which involved a passenger riding in a car, the usual type of transportation for an upper-middle-class white male, the Court unanimously agreed that a reasonable person would not feel free to leave the scene of a traffic stop. But in the cramped confines of a Greyhound bus on which you would find very few, if any, upper-middle-class white men, the Court decided that a reasonable bus passenger would feel free to leave the bus even while officers with badges and guns methodically interrogated other bus passengers. United States v.Drayton, 536 U.S. 194 (2002).

[187] When juries decide issues, they "typically try to construct a narrative that satisfactorily accounts for all of the credible evidence they have seen and heard." Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1629 (2007) (citing Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 994 (2001)). "In constructing those narratives, [jurors] draw heavily from their own past experiences." *Id.* at 1629–30 (citing Nancy Pennington & Reid Hastie, *Reasoning in Explanation-Based Decision Making*, 49 COGNITION 123, 126 (1993)). Because juries are made up of people with sometimes markedly different experiences, they have the benefit of different perspectives and inferences from the same bits of evidence. *Id.* at 1630. *See also* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) (suggesting that a diverse jury deliberates in a more thorough and valuable way). In short, jurors make decisions by relying on their own experiences

determined on a cold, written record. And witnesses, including law-enforcement-witnesses, sometimes lie.[188] As the Court has acknowledged in other contexts: "When . . . the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court [or jury] and according its determinations presumptive weight."[189]

Fact finders also benefit from an understanding of the local customs.[190] They know the community, including the peculiarities of the geography, the prejudices, the conflicts among relevant groups, and the like.[191] Appellate judges sitting far removed from the witnesses, evidence, topography, and societal happenings, cannot replicate these experiences and are, therefore, at a disadvantage to

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and by "focus[ing] their attention on those narratives that their experience-based common sense leads them to regard as plausible." Pettys, *supra*, at 1631; *see also id.* at 1628 (arguing that "demeanor" serves "as a reasonably reliable basis for determining whether a speaker is deceptive" and that observers can successfully detect lies by listening for an increase "in the pitch of one's tone of voice, increased hesitancy in one's speech, and an increase in the number of grammatical and other speech errors"); Bella M. DePaulo et al., *Deceiving and Detecting Deceit*, *in* THE SELF AND SOCIAL LIFE 323, 339 (Barry R. Schlenker ed., 1985) ("Liars blink their eyes more often, they have pupils that are more dilated, and they exhibit more adaptors (self-manipulating gestures, such as rubbing or scratching). They also give shorter, higher-pitched, and more hesitant answers that are cluttered with grammatical errors, repetitions, slips of the tongue, and other disfluencies.").

[188] *See* Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court, but Few Consequences*, N.Y. TIMES May 12, 2008, at B1 (detailing several instances in which trial-level judges determined that officers were lying about the happenings in a criminal case); *see also* Assoc. Press, *Jury Convicts Officer of Lying in Fatal Raid*, N.Y. TIMES, May 21, 2008, at A21 (reporting that an Atlanta jury convicted a police officer of lying to investigators after a "botched drug raid that resulted in the death of a 92-year-old woman").

[189] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[190] An empirical study by Harry Kalven and Hans Zeisel in the 1960s suggests that trial judges and juries (both of whom are present at trial and see and hear the witnesses and evidence) agree on approximately seventy-eight percent of criminal verdicts. NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY 101 (2002) (citing HARRY KALVEN, JR. & HANS ZEISEL et. al., THE AMERICAN JURY 58 (Univ. of Chicago Press 1971)). The study also revealed that in the cases in which the judge and jury disagreed on a verdict, in nineteen percent of these cases, the jury voted to acquit while the judge would have convicted. *Id.* at 102. In other words, whether a local judge or a local jury decides a criminal case, in the vast majority of instances, they will agree. But the jury has one strong advantage over a judge—juries are viewed as playing an important role in preventing "oppression by the government." Duncan v. Louisiana, 391 U.S. 145, 155 (1968); *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (describing the jury's role as guarding against the exercise of arbitrary power of prosecutors and judges and providing a common-sense judgment of the community). Furthermore, when juries are allowed to decide important issues, citizens feel more part of the democratic process. *See* Mazzone, *supra* note 24, at 39 (indicating that juries "legitimize outcomes" because the public is more respectful of decisions reached by other ordinary citizens).

[191] *See* Taylor v. Louisiana, 419 U.S. 522, 529 n.7 (1975) (citing legislative history of the Federal Jury Selection and Service Act of 1968 as demonstrating that "the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it" (quoting H. R. REP. NO. 90-1076, at 8 (1968))).

decide factual issues accurately and fairly. Thus, when the Justices substitute their value judgments about what happened in Fourth Amendment cases for other, better-positioned decision makers, their findings appear outcome-oriented.

D. The Court's Strength Is in Declaring Rules of Fourth Amendment Reasonableness.

In contrast to the problematic decisions the Court reaches when it analyzes Fourth Amendment issues that require an evaluation of competing facts or fact-laden, circumstance-specific scenarios involving ordinary citizens, the Court has reached rational, legally-supportable decisions about Fourth Amendment reasonableness when it has exercised its unique legal expertise to declare broad legal principles to guide all law enforcement officers and citizens.

When the Court announces bright-line, policy-based or precedent-required rules to guide a myriad of police conduct, it operates with maximum proficiency, highlighting the capability of appellate judges to establish what the law is and the floor protections afforded by the Constitution. For instance, the Court suitably stated a broad rule of law in *Terry v. Ohio*,[192] when it announced that it is reasonable for an officer to seize a person and subject him to a limited search for weapons on less than probable cause, if the officer has reason to believe that she is dealing with an armed and dangerous person.[193] Similarly, the Court acted appropriately in *Payton v. New York*,[194] declaring "a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."[195] And the Court capitalized on its expertise in *Oliver v. United States*, when it held that the Fourth Amendment does not protect "open fields."[196] Even in highly controversial cases[197]—such as *Thornton v. United States*[198] and *New*

[192] 392 U.S. 1 (1968).

[193] *Id.* at 27.

[194] 445 U.S. 573 (1980).

[195] *Id.* at 586 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 474–475 (1971)).

[196] 466 U.S. 170, 177 (1984).

[197] *See, e.g.*, Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 Tul. L. Rev. 77, 89 (2007) (asserting that after *Thornton*, commentators "decried the expansion of the Belton bright-line rule as unwarranted and ill-advised").

[198] 541 U.S. 615 (2004). In *Thornton*, the Supreme Court extended a bright-line rule previously established in *Belton*, permitting police to search the passenger compartment of a recently-occupied car even when police first make contact with a suspect after he has left his car and walked away from it. *Id.* at 622–24.

York v. Belton,[199] in which the Court declared bright-line rules effectively reducing the Fourth Amendment protections afforded to citizens by establishing rules supportive of police searches on less than probable cause—the Court acts consistently with its expertise and strengths when it declares what the legal rules of Fourth Amendment search and seizure are. Moreover, the declaration of broad, clear rules avoids the appearance that the Court is straining the facts of a case or faulting a citizen for behaving normally.

In sum, when the Court issues decisions establishing clear rules defining the threshold requirements of Fourth Amendment reasonableness, it provides the type of guidance that the Court has described as important for law enforcement officers in the field who must make split-second decisions about how to investigate crime without infringing upon Fourth Amendment rights.[200] But when it goes further—for example, second-guessing conclusions of fact finders and evaluating the reasonable beliefs of ordinary citizens—the Court reaches problematic results.

III. A PROPOSAL TO RETURN REASONABLENESS TO THE COURT'S FOURTH AMENDMENT JURISPRUDENCE.

The Court will produce more credible decisions that provide unambiguous guidance for law enforcement officers, while simultaneously declaring what protections the Fourth Amendment does and does not give "the people," if the Court confines itself to deciding purely legal issues of Fourth Amendment reasonableness and to evaluating only those "mixed" questions that require value judgments about how reasonable officers behave, given law enforcement policies, procedures, and typical investigation expertise. These are the issues the Court is qualified to evaluate.

The Court should never re-assess facts, especially credibility findings. Moreover, the Court should permit juries to assess mixed issues, which require a value judgment that will benefit from knowledge of local customs, community characteristics, and

[199] 453 U.S. 454, 462–63 (1981). In *Belton*, the Supreme Court declared a clear rule—that it was not a violation of the Fourth Amendment for an officer to conduct a search of the passenger compartment of a car incident to the arrest of a recent occupant of the car. *Id.*

[200] *See id.* at 181 (indicating the need for concrete rules because officers should not "have to guess before every search"); *see also Thornton,* 541 U.S. at 623 n.3 (expressing dissatisfaction with a rule that would force police officers to make "unworkable and fact-specific inquir[ies]" before searching the passenger compartment of a recent occupant's car); *Belton*, 453 U.S. at 458 ("In short, '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979))).

an understanding of how ordinary citizens respond to police questioning and police pressures. Accordingly, while issues of police reasonableness may rationally remain the purview of the appellate courts, juries of reasonable citizens are better-equipped to evaluate issues of citizen reasonableness and should be invited to make these value judgments.

To facilitate this more practical and realistic division of labor between fact finders (including juries) and appellate judges, the Supreme Court should recognize clear, rational, and predictable distinctions separating categories of Fourth Amendment issues.[201] If the Court properly allocates decision-making responsibilities between judges and juries in ways that maximize "the sound administration of justice,"[202] the Court will make strides toward returning reasonableness to its Fourth Amendment jurisprudence.

To foster the Court's fair and rational line drawing, this Article urges the Court to expressly recognize three major categories of Fourth Amendment reasonableness: 1) Legal Reasonableness; 2) Factual Reasonableness; and 3) Mixed Reasonableness. All issues that fall within the category of Legal Reasonableness should continue to receive de novo review from appellate courts, including the Supreme Court. Issues assigned to the Factual Reasonableness category should be reviewed on appeal only for clear error; thus, juries or fact-finding judges (not appellate judges) will determine these issues. Finally, the Mixed Reasonableness category will encompass Fourth Amendment issues that require further assessment. Issues of Mixed Reasonableness will be further subdivided, depending on whether appellate judges, trial judges, or juries are best-suited to fairly and accurately decide the questions.

A. Legal Reasonableness.

The Legal Reasonableness category will include Fourth Amendment issues that call for the Court to announce "rules and standards of general application."[203] As discussed in Part II.D., issues that fall within Legal Reasonableness can be found in *Terry v. Ohio*

[201] In the Fourth Amendment context, an intellectually compelling argument could be made for allowing juries to decide all Fourth Amendment issues, even issues declaring rules of law. *See* Bacigal, *A Case for Jury*, *supra* note 11, at 824–25. But, even more convincing than the argument for allowing juries to decide all Fourth Amendment issues is the need to allow juries and trial-level judges to decide Fourth Amendment facts and some mixed issues of fact and law, dividing duties in a way that reflects the respective strengths and weaknesses of those entities, so that case outcomes begin to reflect the ideals represented in, and demanded by, the Fourth Amendment.

[202] *See* Miller v. Fenton, 474 U.S. 104, 114 (1985) and discussion *supra* Part II., pp. 9–12.

[203] *See* Bross, *supra* note 12, at 874–75 (explaining the meaning of the word 'law').

and *New York v. Belton*, in which the Court considered, respectively: Whether an officer is ever authorized to conduct a pat-down search for weapons on less than probable cause?; and Whether the Fourth Amendment permits an officer to search the passenger compartment of a car in which an arrestee was recently sitting, if the occupant is lawfully arrested and the search is conducted incident to that arrest? There will be no change in the way the Court handles issues of Legal Reasonableness because the Court already reviews issues of pure law using a de novo standard.

B. Factual Reasonableness.

The category for Factual Reasonableness will encompass Fourth Amendment issues requiring the judge or jury to decide what happened and whom to believe.[204] Thus, for instance, a case turning on whether the defendant agreed or disagreed with an officer's request to search the defendant's person, car, or home, implicates purely factual issues of reasonableness, falling squarely within Factual Reasonableness.

In theory, the Court's treatment of issues within the Factual Reasonableness category should not change because, in numerous contexts, the Court has acknowledged that issues of pure, historic fact are for a jury (or other fact finder), and that courts should review such findings with great deference to the decisions of those who observed the demeanor of the witnesses, heard the live testimony, and personally received and reviewed the evidence in the first instance.[205] Nevertheless, the Court has sometimes resisted deference to fact finders in Fourth Amendment cases. The *Scott* case, discussed previously, is one example. There, a majority of the Court incorrectly branded an inquiry into whether law enforcement officers acted reasonably when applying deadly force to a suspect as "a pure question of law."[206] The Court's characterization of the nature of the inquiry was patently incorrect. Determining whether a law enforcement officer justifiably used deadly force on a suspect necessarily requires someone to find facts—what actions the suspect took; what actions (or inactions) the officer took; what the suspect did in response; the attendant circumstances (was it dark or mid-day, was

[204] *See* discussion *supra* Part II., pp. 9–11.

[205] *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts . . . ."); *Miller*, 474 U.S. at 111 ("[T]hat an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact.").

[206] Scott v. Harris, 127 S. Ct. 1769, 1776 n.8 (2007); *see also* discussion of *Scott supra* Part II. B.

the suspect known to the officer, had the suspect taken hostages, did the suspect have a long, known criminal history, indicating his dangerousness)—and then apply those facts to a general principle of law—that an officer may or may not use a gun; shoot a suspect in the back; shoot an unarmed suspect; ram a car at high speed; or take similar actions.

The solution for reasonableness proposed here requires the Court to strictly adhere to a fact/law dichotomy in which it exercises restraint and guards against treating issues of fact, which impact an analysis of reasonableness, as if they were questions of law. Correspondingly, Factual Reasonableness requires the Court to restrict its assessment of facts to a clear-error review. The Court's express acknowledgement of a distinction between Factual Reasonableness and Legal Reasonableness will lend credibility to all of the Court's Fourth Amendment decisions by reducing the appearance that the Court is re-assessing facts to skew case outcomes.

C. Mixed Reasonableness.

The big change in the way the Court evaluates Fourth Amendment issues will occur in this category. The Mixed Reasonableness category holds the key to renewed reasonableness in the Court's Fourth Amendment cases because it is in dealing with these types of questions that the Court has rendered faulty and common-sense-defying results. Applying the proposed change in procedure, the Court will separate these issues. Dividing issues, however, is just the beginning. Even after the Court correctly acknowledges an issue as "mixed," the Court will be left with considerable work to analyze whether judges or jurors are better-suited to decide whole categories of these hybrid, fact/law questions.

Until now, the Court has treated all Fourth Amendment mixed issues the same, reviewing them de novo and assessing reasonableness according to the Court's own, subjective balancing approach. But all mixed issues are not alike. As it has done in other contexts, the Court should subdivide these issues into groups that reflect which "judicial actor is better positioned . . . to decide [the whole category] in question."[207] Once the Court categorizes mixed issues in a logical and systematic way, it can reliably apply an appropriate level of judicial review to each subgroup.

To enhance the proper administration of justice, the Supreme Court should recognize at least two distinct subsets of mixed

[207] *See Miller*, 474 U.S. at 113–14; Monaghan, *supra* note 30, at 237.

questions: 1) a "government subset," and 2) a "citizen subset."[208] The government subset should encompass mixed issues that warrant a broad rule to guide law enforcement officers, who must make split-second decisions in the field, and will include other issues strongly tied to law enforcement policies and procedures. Issues in the government subset can sensibly be decided by trial-level judges in the first instance, as they are now, and most will continue to be reviewed de novo by the United States Supreme Court.

In contrast to the way the government subset will be handled, juries should decide all issues properly assigned to the citizen subset of Mixed Reasonableness.[209] Correspondingly, the juries' conclusions should receive strong deference on appeal. The citizen subset should include mixed issues that are heavily dependent on the actions, beliefs, and perspectives of typical, prudent, non-government citizens; those that significantly benefit from an understanding of local communities and customs; those hinging on credibility and witness demeanor; and those that turn on how normal, prudent people respond to fact-specific interactions with the police.

1. The "Government Subset."

(a) The government subset includes assessments of the reasonableness of an officer's conduct.

Although the Court confronts numerous mixed questions when it decides Fourth Amendment issues, the vast majority of Fourth Amendment cases that reach the Supreme Court require an assessment of police reasonableness.[210] This subcategory of mixed issues generally requires the Court to draw inferences and make generalizations about the thoughts and acts of experienced police officers. Because the reasonableness of an officer's conclusions

[208] There is no reason to believe that the Court could not draw even finer distinctions among mixed questions than this Article proposes, but two subsets are an absolute necessity to adequately reflect the different types of mixed Fourth Amendment issues the Court routinely confronts.

[209] *See* Recent Case, United States v. Washington, *490 F.3d 765 (9th Cir. 2007*), 121 HARV. L. REV. 1669, 1669 (2008) [hereinafter Recent Case] ("Although the choice of viewpoint is often left out of the [Fourth Amendment] story, much also depends on whose perspective—police officers' or civilians'—a judge employs for search and seizure determinations.").

[210] For instance, whether an officer acts reasonably in entering a home without a warrant or with a warrant, despite the fact that suspects moved out several weeks before, rests on the reasonableness of the officer's actions and her processing of available information. *See* Los Angeles County v. Rettele, 127 S. Ct. 1989, 1990 (2007); Brigham City v. Stuart, 547 U.S. 398, 400 (2006); *see also* Samson v. California, 126 S. Ct. 2193 (2006) (finding that an officer acted reasonably when he conducted a suspicionless search of a parolee on a public street).

necessarily rests on the credibility of the searching/seizing officer and routinely requires someone to draw inferences inextricably intertwined with such credibility findings—all tasks that juries are equipped to (and often do) perform in other contexts—juries could logically be asked to decide these questions.

But this subcategory of issues is more appropriately assigned to trial judges. Judges tend to have more exposure to, and experience with, law enforcement officers and law enforcement issues. For decades federal magistrate judges have evaluated warrants and conducted preliminary hearings; district court judges have reviewed petitions for wire taps; and both types of these judges have regularly observed dozens of agents who testify during trials and hearings. By their mere repeated exposure to issues relating to law enforcement policies, procedures, and habits, trial judges are arguably in a superior position to determine how well-trained and prudent law enforcement officers think and act during criminal investigations. Moreover, there is uniformity in the way officers are trained to behave. Officers undergo similar firearms training and schooling on arrest and interrogation techniques, and they are taught how to acquire and collect evidence, how to execute warrants, and similar skills. This uniformity in training and education makes it more realistic that judges will be able to apply an "objective" and generally uniform standard of police conduct when judges determine whether an officer acted "reasonably" given specific facts. Furthermore, because officers should not be required to guess about whether their conduct is constitutional, issues of police reasonableness call for broad, policy-based declarations about how objectively-reasonable officers should behave. The need for uniformity of precedents to guide law enforcement officers, who must execute the laws without violating the constitution, is strongest in these cases. Finally, there is no reason to think that citizen juries are *better* equipped than judges to evaluate reasonable police conduct.

Thus, mixed issues of police reasonableness—which necessarily turn on law enforcement training, procedures, and policies—and those issues requiring an announcement about how all prudent and competent officers should act, are best decided by fact-finding judges, not juries, even under the newly-proposed procedure. Accordingly, trial judges, not juries, should continue to evaluate cases like *Los Angeles County v. Rettele*, discussed in Part II.A.1, that declare policy-based rules for when and how an officer may execute a search warrant. They should evaluate cases like *Brigham City v. Stuart*, discussed in Part II.A.1, in which the Court is asked to declare a

general rule governing when officers can enter a home without a warrant. Judges should, likewise, decide whether an officer acted reasonably in searching or seizing without a warrant in cases such as *Terry v. Ohio*, in which someone had to evaluate the conduct of Officer McFadden, who physically stopped Terry and patted his outer clothing for weapons.

Assuming that trial judges will continue to decide issues of police reasonableness, what level of appellate scrutiny should their decisions receive? As expressed by the Supreme Court in *Ornelas v. United States*,[211] there is a strong need for continuity and consistency in certain Fourth Amendment decisions.[212] In some cases, "[a] policy of sweeping deference [to the trial judge] would permit, '[in] the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient . . . .'"[213] Because the policies in favor of providing bright-line guidance to law enforcement officers are at a zenith in situations where officers in the field must decide how to conform their actions to Fourth Amendment demands, a de novo appellate review is appropriate for those cases in which police conduct is evaluated for reasonableness.

Officers undertaking to search or seize in Kansas or Georgia should abide by the same constitutional standards as officers in Hawaii or Florida, especially given that reasonable police behaviors can be assessed according to relatively uniform standards of conduct and training. While there may be minor differences in the way state, local, and federal officers train, there are numerous similarities in police standards, making it possible for an appellate court to impose a relatively objective and standard review of police reasonableness. Thus, for sound policy and pragmatic reasons, issues of police reasonableness should be assigned to judges (as they are now) and reviewed de novo (as they are now). These mixed issues favor uniform standards of police conduct across the United States, and such standards are best announced by law-declaring judges.

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[211] 517 U.S. 690 (1996).

[212] *Id.* at 697 (holding that decisions about probable cause and reasonable suspicion should be reviewed de novo).

[213] *Id.* at 697 (quoting Brinegar v. United States, 338 U.S. 160, 171 (1949)) (last three sets of brackets in original). According to the Court, "[s]uch varied results would be inconsistent with the idea of a unitary system of law." *Id.*; *see also id.* at 697–98 (asserting that de novo review of probable cause and reasonable suspicion determinations will result in "a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement'" (quoting New York v. Belton, 453 U.S. 454, 458 (1981))).

(b) The government subset includes assessments of probable cause and reasonable suspicion.

Most searches and seizures require probable cause or reasonable suspicion. In turn, those standards hinge on whether "'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information'"[214] supported the action the officers took. Although this standard considers the officers' knowledge, that knowledge is viewed from a "non-technical" perspective.[215]

Because the reasonable suspicion and probable cause standards are non-technical, common-sense ones, juries could decide whether a search or seizure was supported by sufficient evidence. But, given that the non-technical standard is framed by the knowledge and beliefs of highly-trained officers whose experience and training shape how a prudent officer interprets whether a citizen's behaviors indicate that "crime is afoot,"[216] assessments of reasonable suspicion and probable cause will benefit from a decision maker who is familiar with law enforcement investigations. Moreover, at bottom, an evaluation of reasonable suspicion and probable cause requires value judgments about when officers' actions comply with the floor mandates of the Fourth Amendment and whether a reasonable officer would have searched or seized. Therefore, these issues fit best within the government subset and should be decided, in the first instance, by fact-finding judges, as they are now. For the reasons previously explained, judges will tend to have more exposure to information pertinent to the methods used by and inferences drawn by prudent, well-trained officers who conduct criminal investigations.

Presuming that determinations of probable cause and reasonable suspicion are decided by judges (as they are currently), not juries, should these issues also be reviewed de novo on appeal? No. Although these issues are well-suited to review by legally-trained decision makers, they also are highly fact-laden. Therefore, appellate courts, including the Supreme Court, should conduct a deferential review of the trial judge's decision on whether reasonable suspicion or probable cause supported a search or seizure. Despite the Supreme Court's holding to the contrary—that reasonable suspicion and probable cause should be reviewed de novo—even the Court

[214] Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (alterations in original) (describing probable cause); *see also* Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (stating a similar test for reasonable suspicion).

[215] Maryland v. Pringle, 540 U.S. 366, 370 (2003).

[216] *Terry*, 392 U.S. at 30.

has recognized that "the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, 'one determination will seldom be a useful "precedent" for another.'"[217] As the Court has admitted, "[a] trial judge views the facts of a particular case in light of the distinctive features and events of the community . . . . The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference."[218]

There is admittedly a need for uniform standards to announce how much evidence equates to probable cause or reasonable suspicion. However, these issues are so highly fact and circumstance dependent that deference must be shown to the judge who is not only familiar with how reasonable officers conduct their criminal investigations, but who also sees, hears, and evaluates the evidence first-hand in light of the "distinctive features and events of the community."

Although uniformity may admittedly suffer, the intensely fact-based nature of case-by-case decisions about probable cause and reasonable suspicion makes it unlikely that a savvy attorney will be unable to distinguish his case from appellate precedent. Therefore, the impact of case-by-case determinations on uniformity may not be significant. And to the extent the appellate courts perceive a weakness in uniformity, such weaknesses can be cured with strong and clear declarations of legal rules. For instance, if the Supreme Court perceives that trial judges are suppressing evidence in too many car search cases, or that trial judges are acting inconsistently in those cases, the Court can declare a new and broad rule of law, defining what the Fourth Amendment permits or proscribes when an officer seeks to search a car. The Court's holdings in *Belton* and *Thornton* did just that. In each case, the Court announced a broad, apply-to-all rule allowing police to search the passenger compartment of a recent occupant's car. Thus, after these cases, the police could be confident that they acted constitutionally when they searched the passenger compartment of a car, and any containers in that compartment, contemporaneous with a lawful arrest of the car's recent occupant.[219]

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[217] *Ornelas*, 517 U.S. at 698 (quoting Illinois v. Gates, 462 U.S. 213, 238 n.11 (1983)).

[218] *Id.* at 699; *see also id.* at 701, 703 (Scalia, J., dissenting) (noting that the "factual details bearing upon . . . determinations" of reasonable suspicion and probable cause favor deferential review and that reasonable suspicion determinations are "resistant to generalization"); *see also* Weiser, *supra* note 188 (detailing numerous cases in which trial judges assessed officers' testimony as false).

[219] *See* New York v. Belton, 453 U.S. 454, 462 (1981) (holding that when an officer makes a lawful custodial arrest of an occupant of a car, the Fourth Amendment allows the officer to search the passenger compartment and any containers in the passenger compartment incident to the lawful arrest). *See also* Thornton v. United States, 541 U.S. 615, 621 (2004) (extending the rule of *Belton* to situations involving a recent occupant of a car who has walked away from the car when officers first make contact with him).

2. The "Citizen Subset."

The primary reason for the Court's troublesome, even absurd, results in its Fourth Amendment jurisprudence is its usurpation of the role of the jury in a class of cases that the Supreme Court is mismatched (if not uniquely unqualified) to decide. Specifically, the Court reaches its most unreasonable, common-sense-defying outcomes in cases such as *Mendenhall* and *Drayton*, which depend on whether a reasonable person in the suspect's circumstances would feel free to decline to answer an officer's questions and walk away; those like *Bustamonte* and *Drayton*, in which the issue is whether the suspect "voluntarily" agreed to a search;[220] and cases like *Oliver*, *Smith*, and *Greenwood*, in which the Court, with no societal or citizen input, declares that a person's actual expectation of privacy is not one that society would recognize as reasonable.[221] All of these Fourth Amendment issues fall squarely within the citizen subset of Mixed Reasonableness. These issues should be decided by a jury and reviewed on appeal only for clear error.

(a) The citizen subset includes assessments of the reasonableness of a citizen's belief that he is constrained by an officer.

Currently, the Supreme Court decides when ordinary people would feel free to ignore questions posed by officers and whether citizens would feel empowered to deny officers' requests to search their bodies or belongings. Arguably, the Court should not be assessing citizen reasonableness at all because the Fourth Amendment demands reasonableness only from government actors.[222] But, the legal precedent in this area is now well-established. It requires someone, judge or jury, to evaluate citizen behaviors and thoughts.[223] Therefore, this Article urges the Court to allow juries to conduct these evaluations. The Court could make strides toward reaching reasonable outcomes in its Fourth Amendment jurisprudence, if it would allow citizen juries to evaluate the reasonableness of other citizens' beliefs and actions during their interactions and confrontations with police officers who seek to pressure the citizens (politely or more overtly) into submitting themselves to Fourth Amendment intrusions.

The nine Justices of the elite United States Supreme Court are uniquely unqualified to make these evaluations of reasonableness.

[220] *See* discussion *supra* Part II.A.2.(c).
[221] *See* discussion *supra* Part II.A.2.(b).
[222] *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).
[223] *See Mendenhall* discussion *supra* Part II.A.2.

Even a cursory review of any one of the Justice's personal and professional accomplishments reveals how unusual his or her background, experiences, and perspectives are compared to the typical citizen with whom the police interact. The Justices attended elite schools and benefit from tremendous intellect. They socialize in influential social circles and are financially established. The privileged circumstances and backgrounds of the nine Justices suggest a significant disconnect between the Court and the ordinary citizen. While almost all of the Justices are worth millions,[224] the ordinary citizen earns a very modest income.[225] And, while every Justice was educated at one of the most select colleges and law schools, finishing at the top of his or her class,[226] only twenty-nine percent of ordinary citizens even graduate from college.[227] No surprise, the Justices are beyond knowledgeable about their rights and their freedom to refuse an officer's inquiries and requests to search. But, the ordinary American feels compelled to comply with an

[224] *See* Bernie Becker, *Justices List Their Assets; Wide Range of Wealth*, N.Y. TIMES, June 7, 2008, at A12 (reporting the Justices "wealth" based on their annual disclosures, including a mention that Justice Thomas "received more than $1 million" in publication advances since 2003; that Justice Ginsburg reported "assets of at least $11 million"; that Justice Souter reported assets of more than $6 million; that Chief Justice Roberts reported more than $2 million; and that Justice Breyer, with the lowest reported assets, indicated assets "between roughly $350,000 and $750,000"). *Id.* (reporting the Justices annual salaries of $212,100 for the Chief Justice and $203,000 for the associate justices).

[225] *See, e.g.*, Reuters, State of the Union 2008: By the Numbers (Jan. 28, 2008), http://www.reuters.com/article/pressRelease/idUS15591+29-Jan-2008+PRN20080129 (reporting that the median income of African American households in 2006 was $31,969 and that the median income of White American households for the same period was $50,673). In fact, the public housing population in New York earns a meager $22,119 per household. Manny Fernandez, *Public Housing Residents Face Loss of Their Community Centers*, N.Y. TIMES, June 17, 2008, at B1.

[226] Justice Alito graduated from Princeton University before attending Yale Law School, where he served as an editor of the law review. Justice Breyer attended Stanford University, then the University of Oxford and finally Harvard Law School, where he served as an editor of the law review. Justice Ginsburg graduated first in her class from Cornell University and then attended Harvard Law School, where she was a member of the law review. She ultimately transferred to and graduated from Columbia Law School, where she also served on the law review. Justice Kennedy attended Stanford University, spent a year at the London School of Economics and then attended Harvard Law School. Chief Justice Roberts attended Harvard College and Harvard Law School, where he was a managing editor of the law review. Justice Scalia graduated first in his class from Georgetown University and then attended Harvard Law School, where he served as an editor on the law review. Justice Souter attended Harvard College and Harvard Law School. Justice Stevens attended college at the University of Chicago and then went to law school at Northwestern University, where he was Editor in Chief of the law review. Justice Thomas attended college at the College of the Holy Cross and law school at Yale University. Oyez: Roberts Court (2006–), http://www.oyez.org/courts/roberts/robt2/ (last visited Oct. 4, 2008).

[227] *See* Press Release, U.S. Census Bureau News, One-Third of Young Women Have Bachelor's Degrees (Jan. 10, 2008), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/011196.html (discussing highlights from the 2007 Current Population Survey's Annual Social and Economic Supplement).

officer's demands, no matter how polite.[228] From their perspective, to refuse such a demand may lead to a search anyway or, worse, harassment, or even brutality, depending on the circumstances.

The Justices' perspectives of reasonableness, as expressed in the Court's citizen-reasonableness decisions, prove that the Justices have little understanding of how ordinary people think and behave when they interact with police.[229] If common-sense is not proof enough, the limited empirical evidence available shows that the Justices are out of touch with the ordinary person's perspectives on Fourth Amendment autonomy and liberty.

Two professors conducted a study in which they described fifty different search and/or seizure scenarios to human subjects.[230] They chose the scenarios based on facts in cases decided by the Supreme Court or in lower court decisions interpreting the Supreme Court's Fourth Amendment opinions.[231]

> The participants were asked to assume, as dictated by the Supreme Court's caselaw, that the person who was searched or seized (or who possessed the property being searched or seized) was innocent. In addition, they were asked to assume

[228] Nadler, *supra* note 9, at 155. Nadler highlights these contrasting views:

> [S]ince the Court first applied the 'totality of the circumstances' standard to [Fourth Amendment] consent search issues in *Schneckloth v Bustamonte* in 1973, it has held in case after case, with only a few exceptions, that a reasonable person in the situation in question either would feel free to terminate the encounter with police, or would feel free to refuse the police request to search. By contrast, empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures. These situational pressures often are imperceptible to a person experiencing them; at the same time, they can be so overwhelming that attempts to reduce them with prophylactic warnings are insufficient.

Id. As a concrete example of how the Court's conclusions about the voluntariness of consent conflict with that of the ordinary citizen, Nadler references *United States v. Drayton*, 536 U.S. 194 (2002). Nadler, *supra* note 9, at 156 ("The majority opinion in *Drayton* is filled with assertions that are implausible in light of research on social influence (e.g., 'the presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon')." (quoting *Drayton*, 536 U.S. at 205)).

[229] *See* Simmons, *supra* note 9, at 773 (contending that in deciding Fourth Amendment consent cases "the Supreme Court remains mired in a paradigm that fails to acknowledge the complexities of police-civilian interaction and runs against the traditional standards of the Fourth Amendment."). *See also* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009), *available at* http://ssrn.com/abstract=1128721 (describing the results from an empirical study in which 406 Boston residents were surveyed, revealing that most people would not feel free to leave when questioned by police and that people under twenty-five years of age and women feel even more constrained than others).

[230] Slobogin & Schumacher, *supra* note 17, at 736.

[231] *Id.*

> that the search or seizure was conducted by government agents and that it was nonconsensual. They were then requested to rate, on a scale of 0 to 100, the extent to which they considered each method "an invasion of privacy or autonomy," with 0 representing "Not At All Intrusive" and 100 representing "Extremely Intrusive."[232]

Although the study found some areas in which the citizens' perspectives were generally consistent with the Court's case outcomes, the study also found that there was significant dissonance in other areas.[233] For instance, despite the fact that the Supreme Court had held that police entry onto fenced-in private property outside the curtilage of the home is not a search and that a "dog sniff" of a person does not implicate the Fourth Amendment, ordinary citizens find these actions quite intrusive.[234] And, although the Court's case law had held that "police efforts to detect drug smuggling by singling out a passenger on a bus and asking if his luggage may be searched either is not a seizure or is only a minimal one," the subjects in the study ranked the intrusiveness a "44," quite high on the intrusiveness scale.[235]

It should be no surprise that the perspectives of the Justices are out of touch. Extensive sociological research into how jurors make decisions shows that each juror relies on his or her own life experiences to organize information and evidence presented during a trial or hearing. The juror then organizes the information "into what for her is the most plausible account of what happened."[236] Because the Justices' experiences and perspectives are so different from those of the typical citizen, their organization of information and the inferences they draw from it will be very different from those of more ordinary people.[237] Thus, the Court's perspectives, as reflected in its case outcomes, are a poor indicator of the realities that ordinary citizens face when they interact with the police.

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[232] *Id.* (footnote omitted).

[233] *Id.* at 739–40.

[234] *Id.* at 740. In the study, "both of these police actions received fairly high rankings (R = 21 and R = 23, respectively)." *Id.*

[235] *Id.* at 742. *See also* Kessler, *supra* note 229 (reporting the results of an empirical study of 406 Boston residents, seeking to determine whether ordinary people feel free to leave when confronted by police, and showing that the Supreme Court's decisions are inconsistent with the beliefs of ordinary citizens).

[236] Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993).

[237] *See* Maclin, *"Black and Blue Encounters," supra* note 76, at 250 (contending both that the Supreme Court's decisions about the perspectives of the average, hypothetical person are "out of touch" and that an encounter between an officer and "a black male" are different from encounters between "the so-called" average person and the police).

As a result of the Court's atypical perspectives on how citizens respond to police, the Court reaches absurd case outcomes that any ordinary citizen, including thousands of law students each year who study criminal procedure for the first time, knows are factually baseless—like the one in *Mendenhall*[238] that says a reasonable twenty-two-year-old uneducated black woman would feel free to reject the "requests" of two armed white male law enforcement agents to answer questions and go with them to a private room in the airport.

Of course, there is no guarantee that the findings of every citizen jury will parallel how the average, ordinary citizen perceives a police event either. But, even if juries demand great fortitude from suspects and others,[239] allowing them to impose such strict standards will instill a confidence in a pronouncement of reasonableness that is lacking when nine elite Justices impose their view of reasonableness, while sitting far removed from the anxiety the typical citizen experiences when interacting with the police.[240] In any event, it is difficult to imagine that citizen juries could reach results that are more common-sense defying than many the Court has issued. Furthermore, juries will be able to assess the credibility of the citizen/defendant and the local officers first-hand, observing their demeanors and non-verbal signals for lies or truth.[241] Finally, juries

[238] Discussed *supra* Part II.A.2.(a).(i).

[239] Studies show that a typical citizen would hold others to high standards of reasonable behavior. *See* Nadler, *supra* note 9, at 168–72.

[240] *See, e.g.*, discussion of United States v. Drayton, 536 U.S. 194 (2002), and United States v. Mendenhall, 446 U.S. 544 (1980), *supra* Part II.A.2.(a).(i). & (iii); *see also* Andrew M. Levine, *The Confounding Boundaries of "*Apprendi-*land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 451 (2002) (contending that a jury is the "conscience of the community" in the context of discussing sentencing); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 178–79 (2007) (arguing for an increased role for juries to "resolve a particular defendant's knowledge of wrongfulness" because a jury has "a far broader range of views and life experiences" and because juries reflect more accurately the experiences of the community as a whole); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2338 (2008) (arguing for an increased role for the grand jury and contending that such an expanded role would comport with the ideals of the founders of the country by allowing citizens from the same community who faced similar circumstances and hardships to decide whether to charge a defendant with a crime); *id.* at 2340–41 (discussing the many benefits of citizen juries to the criminal justice system, including to 1) "imbue criminal justice with a democratic element;" 2) promote the "voice" and "pulse" of the community; 3) give the community "an important role in the provision of criminal justice;" 4) promote the community's "confidence" in the outcome of justice; and 5) and provide, maybe, "a better sense of justice than a judge" (citations omitted)).

[241] *See* Pettys, *supra* note 187, at 1629 ("When deciding which inferences to draw from the evidence and how to cast their votes, jurors typically try to construct a narrative that satisfactorily accounts for all of the credible evidence they have seen and heard." (citing Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991, 994 (2001))); *see also id.* at 1628 (arguing that "demeanor" serves "as a reasonably reliable basis for determining whether a speaker is deceptive" and that observers can successfully detect lies by listening for an increase "in the pitch of one's tone of voice, increased hesitancy in one's speech, and an increase in the

can and should take into account any community and societal factors that affect how citizens normally interact with the police. As the Supreme Court has previously acknowledged in other criminal contexts, the purpose of a citizen jury is "to make available the commonsense judgment of the community."[242]

A 2007 case from the Ninth Circuit illustrates the importance of unique societal and cultural influences in Fourth Amendment cases. In *United States v. Washington*, the Ninth Circuit took into account "[r]ecent relations between police and the African-American community in Portland[, Oregon]" in analyzing whether an African-American man was "seized" without probable cause or reasonable suspicion when he "consented" to a search of his car that revealed a gun.[243] In finding that the man's consent to the search was not voluntary, the court considered the "totality of the circumstances," including the fact that, "in the one and a half years before [the officer] initiated contact with [the suspect], there were two well-publicized incidents where white Portland police officers, during traffic stops, shot, and in one instance killed, African-American Portland citizens."[244] In other words, the Ninth Circuit correctly found pertinent the fact that racial tensions between the police and African-American citizens had spawned a publicity campaign urging African-Americans to comply with the directives of police, and that these facts contributed to the defendant's reasonable belief that he was not free to decline requests of the officer to consent.

Such facts and circumstances unique to the community or individual citizen are exactly the sorts of influences a citizen jury can evaluate better than the Supreme Court Justices, who must consider the encounter on a cold, written record far removed from the events of the day.

(b)The citizen subset includes assessments of consent.

Issues of Fourth Amendment consent also fall within the citizen subset; therefore, juries, not judges, should decide these citizen-based issues with accompanying deferential, clear-error review on appeal.

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number of grammatical and other speech errors").

[242] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

[243] 490 F.3d 765, 768 (9th Cir. 2007); *see also* Recent Case, *supra* note 209, at 1669 (describing the Ninth Circuit's consideration of the "racialized community-police tension" as "a subtle but significant step" toward bringing the court's analysis in line with important Fourth Amendment principles).

[244] *Washington*, 490 F.3d. at 768.

(i) Actual consent.

Juries should listen to testimony, make credibility determinations, and draw any necessary inferences about the voluntariness and the scope of a citizen or suspect's purported agreement to allow an officer to impinge on his Fourth Amendment freedoms. Juries are perfectly suited to set standards of reasonableness, reflecting the amount of pressure an ordinary person must endure before his or her "consent" is deemed to be coerced. As explained in Part III.C.2.(a), the Court's perspectives about the fortitude and savvy of ordinary citizens are out of touch.[245] And, consent cases make up about 90 percent or more of the Fourth Amendment searches in this country.[246] Thus, in a large part of Fourth Amendment cases, the Court is holding ordinary citizens to standards that typical, prudent people cannot meet.[247] The result? The purpose of the Fourth Amendment—to protect the people against undue government intrusions—is undermined when the Court inaccurately assesses the validity of consent, effectively denying Fourth Amendment protection to citizens.

(ii) Apparent consent.

Apparent consent cases are tough to classify as fitting within the government or citizen subset. As the Court's precedent stands now, the reasonableness of an officer's beliefs[248] is the key factor. If an officer reasonably believes that someone consented to a search, the search is valid, even if the person had no real authority to permit the search.[249] Therefore, apparent consent issues arguably fall within the government subset of Mixed Reasonableness because they require an

[245] *See* Nadler, *supra* note 9, at 188. Nadler argues that "[p]erceived coercion is determined by the speaker's authority and the speaker's language working together. Because authorities such as police officers direct the actions of others, the listener is likely to conclude that an utterance is in fact a directive, or an order to be followed." *Id.* Thus, Nadler explains that "citizens generally do not interpret 'Can I please see your license and registration?' as spoken by a police officer as a genuine request; it is a command, and everyone understands this."); *see also* Wilson v. United States, 162 U.S. 613, 624 (1896) ("When there is a conflict of evidence as to whether a confession is or is not voluntary, if the ceurt [sic] decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant.").

[246] Simmons, *supra* note 9, at 773.

[247] *See* Nadler, *supra* note 9, at 201–02 (recounting a survey in which motorists who had been asked to consent to a search of their cars after being stopped by police for a traffic violation reported an overwhelming amount of compliance, including that forty-nine out of the fifty-four respondents agreed to let the police search and only five refused (citing Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter (unpublished doctoral thesis))).

[248] *See* Illinois v. Rodriguez, 497 U.S. 177 (1990).

[249] *Id.*

assessment of whether a well-trained law enforcement officer acts reasonably by conducting a search based on information that he thought gave him lawful permission to search or seize without a warrant or legal cause. In reality, however, the Court should be evaluating the reasonableness of both the officer's belief that consent was given by someone with the power to agree, and the reasonable actions and beliefs of the citizen whose body or belongings were impacted.

A better approach would be for the Supreme Court to recognize that apparent consent cases require considerable evaluation of the reasonableness of citizen behaviors. For example, the *Rodriguez* case[250] looks anything but reasonable to an ordinary citizen, let alone to scholars of the Fourth Amendment and contracts law, because the Court should have considered whether a citizen subjected to the officer's Fourth Amendment intrusion was reasonable in believing that he was entitled to privacy, not simply whether a law enforcement officer reasonably believed that he was authorized to conduct a warrantless search without probable cause. In other words, because the purpose of the Fourth Amendment is to protect citizens against undue government intrusion, the Court should be concerned about whether the citizen had a reasonable expectation of privacy in the private space searched, given that he or she never gave the government permission to enter or search the premises. Because apparent consent cases are more citizen-oriented than the Court has acknowledged, this category of mixed issues should be assigned to the citizen subset and left to juries to determine with accompanying deferential review on appeal.

(c) The citizen subset includes assessments of whether an officer conducted a search.

When the Court decides whether a Fourth Amendment "search" has occurred, it asks: 1) "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,'" that is, whether he "has shown that 'he [sought] to preserve [something] as private;'"[251] and 2) "whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'"[252] While the first part of the test is a matter of Factual Reasonableness, the second inquiry is a matter of Mixed

[250] *See* discussion *supra* Part II.A.2.(c).(ii)..

[251] Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz v. United States, 389 U.S. 347, 351, 361 (1967) (second brackets in original)).

[252] Bond v. United States, 529 U.S. 334, 338 (2000) (quoting *Smith*, 442 U.S. at 740).

Reasonableness, which deserves further analysis because such questions could be answered by either trial judge or jury.

A jury could certainly speak to society's expectations of privacy to the extent that societal expectations are necessarily formed by citizens.[253] On the other hand, a jury's assessment of societal expectations will be influenced by the unique flavor of the specific community and culture where the jury sits, as well as the individual notions of the members of the particular jury. Differences between cultures and communities will tend to result in a patchwork of heterogeneous views about when expectations of privacy are reasonable.[254] Therefore, a jury will be less likely than appellate judges to render decisions reflecting a "national" and uniform view of societal expectations.

Ideally, "societal" expectations would reflect notions of all of society and be uniform enough for officers to decide what is and is not a search. Moreover, because decisions about whether police action impacts a reasonable expectation of privacy are "contingent upon value judgments and political choices about what *ought* to be done,"[255] assessments of reasonable expectation of privacy could logically be left to judges. The desire to set uniform and national standards to guide all law enforcement agents, whether they seek to search a seashore home in Bangor, Maine, or a country estate in Moultrie, Georgia, is understandable. The Supreme Court has certainly spoken favorably of such values and of the significance of bright-line rules to guide law enforcement officers.[256]

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[253] *See* Luna, *supra* note 9, at 840 (asserting that "[t]he sentiment is widely held" that "there is something wrong" with the Court's threshold measure for whether the Fourth Amendment is implicated and noting the "dismay that can accompany [law school] class discussions about warrantless perusal of personal bank records, for example, or agents trespassing on private land. It can be disconcerting to learn that such action may not even be a 'search' under the Fourth Amendment."); *id.* at 856 ("[J]uries would not be required to either guesstimate or mystically channel the expectations of society, as seems to occur at the Supreme Court. If jurors are drawn from a fair cross-section of the community—in terms of race, gender, socioeconomic background, and so on—their collective expectations, aggregated through a process of group decision-making, should represent those of society (or at least those of the relevant jurisdiction).").

[254] *See* Bacigal, *Putting the People Back*, *supra* note 11, at 410 ("Although the jury is an appropriate entity for identifying what is usually done in the community and thus what is reasonable, the jury has no preeminent claim to determining justifiable and legitimate expectations of privacy or liberty, because such determinations are contingent upon value judgments and political choices about what *ought* to be done.").

[255] *Id.*

[256] *See* New York v. Belton, 453 U.S. 454, 458 (1981) (noting the need for a "'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement'" (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 142)); *see also* Ornelas v. United States, 517 U.S. 690, 697 (1996) (noting the importance of uniform rules to "a unitary system of law").

Despite the apparent logic of allowing appellate judges (and ultimately the Supreme Court) to define societal expectations of privacy, in reality, the practice has failed. It has failed to protect citizens from unreasonable government intrusions of privacy and liberty, and it has led the Court to render numerous case outcomes that defy society's real expectations of privacy. Perhaps the best evidence of the Court's failings is found in the empirical study conducted by Christopher Slobogin and Joseph E. Schumacher, documenting that while the Supreme Court deems certain police actions—like dog sniffs and police entry onto fenced-in-private property outside the curtilege of the home—to be "non-searches" with no Fourth Amendment implications, ordinary citizens find these actions quite intrusive and, thus, contrary to reasonable expectations of privacy.[257]

Because the Court's test for defining a Fourth Amendment search necessarily depends on how ordinary, prudent citizens interpret reasonable expectations of privacy, juries of reasonable citizens should be assigned to give meaning to this standard on a case-by-case basis.

D. What the Critics May Say About the Proposal.

Like any proposal for a change in the way the Supreme Court processes cases, this Article is likely to draw criticism. Two arguments seem particularly likely. Nay-sayers are sure to contend that the proposal will undercut the bright-line guidance that police officers need to ensure their compliance with the Constitution, and they will probably worry that using juries will prove to be time consuming and expensive.

1. The murkier guidance argument.

The Court has often emphasized the need for bright-line rules to guide law enforcement officers who must decide in dynamic contexts whether their acts will violate the Fourth Amendment.[258] Arguably, the Court has stressed the importance of bright-line rules at the expense of substantive rights protection. After all, the Fourth Amendment guarantees citizens that the government will not engage in unreasonable searches, not that law enforcement officers will be free from tough choices about whether or not to search or seize. But,

[257] *See* Slobogin & Schumacher, *supra* note 17 at 740.

[258] *See, e.g.*, New York v. Belton, 453 U.S. 454, 459-60 (1981) (expressing a desire for a "straightforward rule" so persons can know the scope of their constitutional protections and officers can know the scope of their authority).

admittedly, to protect the rights of citizens, the Court must issue decisions that warn officers about what is and is not permissible.[259]

In most instances, the current proposal should not impair the Court's ability to afford plain directives about constitutional versus unconstitutional police behaviors. It merely shifts from Justices to juries some of the responsibility to decide the issues that are necessarily unpredictable. Because an evaluation of citizen reasonableness involves subjectivity and some level of unpredictability, no matter who evaluates the issues, predictability in these cases should not improve or suffer significantly. And, should too much inconsistency result, the Supreme Court can, in the appropriate case, declare a new, broad-based, apply-to-all rule of law to govern all subsequent cases presenting such issues.

Furthermore, even assuming some loss in consistency, the benefits of the proposed procedures arguably exceed the costs. Citizen juries assessing citizen reasonableness will have an important and much-needed positive impact on Fourth Amendment cases generally. The Court's credibility with the public will improve. No longer will the Court's citizen-based decisions defy common sense, appear result-oriented, and be described as "an embarrassment."[260] Thus, while predictability in most cases will neither improve nor suffer, and in others may suffer somewhat, other aspects of the Court's jurisprudence will benefit under the proposed change in process, minimizing the overall impact of the loss in predictable outcomes and maximizing other values of a fair system of criminal justice.

2. Juries are time consuming and expensive argument.

Critics are sure to say that juries will prove to be cumbersome, time consuming, and expensive. Use of a jury does not have to be either cumbersome or time-consuming, and the benefits of a citizen jury (even assuming additional monetary expense) outweigh a small or even a moderate increase in convenience and speed of decision. As Professor Bacigal and others have already suggested, "a single panel could consider pretrial motions to suppress in numerous cases, and except for the presence of a jury, the proceedings would otherwise resemble current motions to suppress."[261] The jury panels would resemble grand juries in that

[259] *See* New York v. Belton, 453 U.S. 454, 459–60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.").

[260] Amar, *supra* note 6, at 757.

[261] Bacigal, *Putting the People Back*, *supra* note 11, at 424 (citing George C. Thomas, III

they would convene to hear multiple cases and would gather expertise with each one. Thus, the cumbersome and time-consumption arguments are probably overblown, especially given that the criminal system already effectively uses citizen juries.

Admittedly, though, juries will cost more than the current non-jury suppression process. The short response to this criticism is that constitutional rights protection is worth the cost. The Court's Fourth Amendment jurisprudence has been described as "an embarrassment," and the citizens' privacy and liberty rights are suffering. The sole purpose of the Fourth Amendment—to protect the citizenry from unreasonable government searches and seizures—has been undermined using the current process. Such important rights are worth the added administrative expense. As the Supreme Court noted in evaluating the constitutionality of Michigan's college admission standards, "administrative challenges" don't excuse an otherwise unconstitutional process.[262] The same principle holds true for ensuring that citizens' fundamental Fourth Amendment rights are adequately protected with a fair and effective process.

IV. CONCLUSION

The Court applies a single balancing test to assess Fourth Amendment rights, regardless of whether the Court is evaluating the reasonableness of a well-trained and experienced police officer's actions and beliefs, or the reasonable thoughts and behaviors of a scared, twenty-two-year-old African-American female confronted by a group of white, armed DEA agents. Because the Court applies a one-size-fits-all approach to every Fourth Amendment reasonableness inquiry, the Court has sometimes reached results that are anything but.

Although there is no recipe for defining Fourth Amendment reasonableness, the Court produces its most anomalous Fourth Amendment outcomes when it decides "mixed" questions of

& Barry S. Pollack, *Saving Rights From a Remedy: A Societal View of the Fourth Amendment*, 73 B. U. L. Rev. 147, 182–83 (1993)). This Article does not seek to explore the particular makeup of the juries that would be assigned to hear Fourth Amendment suppression issues. Nevertheless, it will be important to ensure a large enough panel of jurors and limit the length of their service so that each suppression issue receives the full benefits of the citizen jury. One major benefit of the citizen jury is that its diversity brings with it broader perspectives and arguably better decision-making. A second major benefit of the citizen jury is that citizens will not be jaded on the issues nor biased (as a whole) for or against the police.

[262] Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

reasonableness, assessing issues that turn on how ordinary, prudent citizens think and behave. The Court treats these mixed issues, combinations of fact and law, as if they raise purely legal questons. But mixed issues are more complex and require someone to determine historical facts, apply those facts to principles of Fourth Amendment law, and consider the totality of the circumstances, including taking into account community and cultural influences. The Supreme Court will take its first step toward returning reasonableness to its Fourth Amendment jurisprudence by expressly, accurately, and consistently dividing "mixed issues" into subgroups and then assigning whole subgroups to judge or jury, depending on who can best decide the whole class of issues in a way that protects the interests represented by the Fourth Amendment.

Dividing mixed questions into identifiable sub-categories, a government subset and a citizen subset, is the key to returning reason to the Court's Fourth Amendment jurisprudence. Until now, the Court has reserved all mixed issues for itself, subjecting them to a de novo review on appeal. At a minimum, the Court should distinguish between questions that are strongly tied to law enforcement policies and procedures or dependent on the professional expertise of law enforcement agents and, in contrast, questions that require an evaluation of how a prudent and sensible suspect or citizen acts and thinks when he or she is confronted by the police.