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CRIMINAL PROCEDURE IN PERSPECTIVE

KIT KINPORTS *

This Article attempts to situate the Supreme Court’s constitutional criminal procedure jurisprudence in the academic debates surrounding the reasonable person standard, in particular, the extent to which objective standards should incorporate a particular individual’s subjective characteristics. Analyzing the Supreme Court’s search and seizure and confessions opinions, I find that the Court shifts opportunistically from case to case between subjective and objective tests, and between whose point of view—the police officer’s or the defendant’s—it views as controlling. Moreover, these deviations cannot be explained either by the principles the Court claims underlie the various constitutional provisions at issue or by the attributes of subjective and objective tests themselves.

The Article then centers on the one Supreme Court opinion in this area to address the question of “subjective” objective standards, Yarborough v. Alvarado, 541 U.S. 652 (2004), where the Court intimates that a minor defendant’s age might not be a relevant factor in applying the objective “reasonable suspect” test used to define custody for purposes of Miranda. The Article criticizes the Court’s simplistic suggestion that considering any of a defendant’s characteristics may automatically turn an objective inquiry into a subjective one, and then discusses the issue of age that the Court faced in Alvarado as well as the questions of race that pervade our criminal justice system.

In the end, the Article does not advocate that the Court choose one perspective for all criminal procedure cases, or even necessarily for all cases interpreting a particular constitutional provision, but instead that the Court adopt a principled approach to the question of perspective based on the interests a particular constitutional protection is designed to further. The constitutional provisions intended to deter abusive police practices

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should focus on the party to be deterred, the police, and, in order to maximize their deterrent impact, ought to incorporate both subjective and objective considerations. On the other hand, the perspective that should control when interpreting constitutional doctrines whose goal is to promote voluntary decisionmaking and/or dispel coercion depends on whether one subscribes to the "consent model" or the "coercion model." The consent model views these constitutional doctrines as preserving the defendant's right to make a free and unconstrained choice, and therefore makes the defendant's point of view dispositive. The coercion model, by contrast, suggests that the doctrines are meant to discourage the police from using improperly coercive techniques and thus, like the deterrence-based constitutional rights, ought to focus on the police. Unless the Court takes the preliminary step of articulating a consistent position on the issue of perspective for criminal procedure cases, we can continue to expect oversimplified decisions like *Alvarado* rather than meaningful contributions to the controversies surrounding the reasonable person standard.

I. INTRODUCTION

The reasonable person has long been a fixture of this country's legal landscape, figuring most prominently in the law of torts but also in many other arenas, including substantive criminal law, employment discrimination, securities fraud, and constitutional tort litigation.\(^1\)

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Originally identified with the reasonable man, the standard has been hailed as the "personification of a community ideal of human behavior," which requires not only that "every man should get as near as he can to the best conduct possible for him," but also that he "come up to a certain height." Its detractors, on the other hand, have described the standard as "vague" and "a palpable fiction." Even after the reasonable man was replaced by the reasonable person, the standard continued to be surrounded with controversy, as critics have called for a more subjective measure of reasonableness, characterizing the reasonable person as a "legal abstraction[] [that] hide[s] [and] perpetuate[s] . . . social inequities," and a "naive" construction that "produces distorted . . . rules and ignores the real world."

This whole controversy has, for the most part, passed the Supreme Court's criminal procedure jurisprudence by. The Court was recently given an opportunity to join the fray in Yarborough v. Alvarado, where it was asked to apply the Miranda definition of custody—a standard focused on the defendant's position—to a seventeen-year-old suspect who had no prior experience with the criminal justice system. Instead of contributing meaningfully to the debate, the Court made the simplistic suggestion (contrary to the overwhelming weight of lower court authority) that the suspect's age might not be relevant because "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry."

In fact, the Supreme Court's criminal procedure jurisprudence is even further removed from the current debates surrounding the reasonable person.

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9 Donovan & Wildman, supra note 1, at 464.
13 Alvarado, 541 U.S. at 656.
14 See infra note 326 and accompanying text.
15 Alvarado, 541 U.S. at 668.
standard because the Court tends to shift opportunistically from case to case between subjective and objective standards and between whose point of view—the police officer's or the defendant's—it considers controlling. In making this claim, I examine the Supreme Court's Fourth Amendment search and seizure opinions as well as the Court's rulings on the admissibility of confessions (based on the Fifth Amendment interests protected by Miranda, the Sixth Amendment right to counsel, and the due process voluntariness test).

In its search and seizure decisions, the Supreme Court emphasizes the exclusionary rule's deterrent function, suggesting that the Fourth Amendment's primary purpose is to deter unconstitutional police behavior, and therefore focusing on the reasonable police officer.\(^6\) By contrast, the Court has indicated that the familiar Miranda warnings were designed to dispel the inherent coerciveness of custodial interrogation, and therefore the controlling perspective is that of the suspect, frequently the reasonable person in her position.\(^17\) The purpose of the Sixth Amendment right to counsel, on the other hand, is to protect the integrity of the adversary process, and the Supreme Court has therefore examined the subjective intent of the police in ruling on Sixth Amendment challenges to confessions.\(^18\) Finally, the reach of the due process ban on involuntary confessions has traditionally turned primarily on the subjective perspective of the suspect; nevertheless, the Court has raised the notion of deterrence in this context as well, requiring evidence of overreaching on the part of the police.\(^19\) Despite these generalizations, the Court has not adhered to a single approach in any of these areas, but instead has shifted between objective and subjective standards and between the perspective of the defendant and that of the police officer.

In sketching out my claims, Part II discusses the Supreme Court's Fourth Amendment jurisprudence,\(^20\) and Part III analyzes the confession cases.\(^21\) In each area, I find shifts in perspective that cannot be explained by the purposes the Court has told us underlie the particular constitutional provision at issue. Part IV examines the possibility that the inconsistencies described in the previous two sections might be attributable, at least in part, to the Court's views on the relative strengths and weaknesses of subjective and objective tests.\(^22\) After considering the comments the Court has made.

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\(^{16}\) See infra notes 28-29 and accompanying text.
\(^{17}\) See infra notes 113-18 and accompanying text.
\(^{18}\) See infra notes 189-91 and accompanying text.
\(^{19}\) See infra notes 220-30 and accompanying text.
\(^{20}\) See infra notes 28-110 and accompanying text.
\(^{21}\) See infra notes 111-242 and accompanying text.
\(^{22}\) See infra notes 243-306 and accompanying text.
about those tests in its criminal procedure rulings, however, I conclude that
the general attributes of subjective and objective standards cannot account
for the divergent perspectives found in the cases. Part V then addresses the
Court’s opinion in Yarborough v. Alvarado and the propriety of
incorporating an individual’s subjective characteristics into the reasonable
person standard, analyzing the question of age that the Court faced in
Alvarado as well as the issues of race that pervade our criminal justice
system.23

In the end, I do not advocate that the Court choose one perspective for
all criminal procedure cases or even necessarily for all cases interpreting a
particular constitutional provision.24 What I do maintain, however, is that
the Court should adopt a principled, consistent approach to the question of
perspective, based on the interests a particular constitutional protection is
designed to further. Taking the Court at its word as to what those purposes
are leads me to the following conclusions.

First, those constitutional provisions that are purportedly designed to
deter abusive police practices should focus on the party to be deterred—the
police. Given the Court’s emphasis on deterrence in the Fourth
Amendment context, most of the search and seizure cases clearly fall into
this category. The Sixth Amendment confession cases, which are aimed at
preserving the adversary process—i.e., ensuring that the police do not act to
prejudice the defendant’s right to a fair trial—likewise belong here. If the
Court is genuinely interested in encouraging proper police behavior in these
areas, deterrence theory suggests the importance of both subjective and
objective considerations. Thus, suppression motions raising Fourth
Amendment claims or challenging the admissibility of confessions on Sixth
Amendment grounds should be granted in cases where the police either
acted in subjective bad faith or failed to satisfy objective standards of
reasonable police behavior.

Second, the Supreme Court opinions interpreting constitutional
doctrines aimed at promoting voluntary decisionmaking and/or dispelling
coercion—for example, the Miranda and voluntariness due process cases,
the Fourth Amendment rulings governing the consent search exception, and
the decisions involving a suspect’s waiver of her constitutional
protections—are harder to categorize because the Court has not been

23 See infra notes 307-58 and accompanying text.
24 Cf. Anthony C. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 352 (1974) (observing that even “a monarchal, everlasting fourth amendment enforcer”
would have trouble devising “a single, comprehensive fourth amendment theory”); George
C. Thomas III, Remapping the Criminal Procedure Universe, 83 VA. L. REV. 1819, 1848-49
(1997) (“[T]he criminal procedure community has been right all along: There is no deep
fundamental structure to constitutional criminal procedure.”).
consistent even in identifying the basic premise underlying these doctrines. Although the terms "involuntary" and "coerced" may be "interchangeable," they arguably carry "subtly different" connotations, and in fact the Court has used them in two conflicting ways. On the one hand, the Court has at times indicated that the central purpose here is to preserve a criminal defendant's right to make a free and unconstrained choice. This line of reasoning—articulating what I call the "consent model"—suggests that the Court should focus on the defendant's perspective, applying a subjective standard and examining the decision made by the particular defendant to ensure that it was truly voluntary. The Court may prefer an objective "reasonable defendant" standard in some cases, in the interest of ensuring that the reach of constitutional rights "does not vary with the state of mind of the particular individual," but the emphasis should remain on the defendant's point of view.

On the other hand, the Court has also suggested that these constitutional doctrines are really aimed at preventing the police from coercing defendants. This rationale—what I call the "coercion model"—suggests that these rules are designed to regulate police behavior and specifically to deter the police from using improperly coercive tactics. In that sense, they are indistinguishable from the deterrence-based Fourth Amendment and Sixth Amendment doctrines. Under this model, then, the focus should instead be on the police, again taking into account both subjective and objective considerations in the interest of maximizing deterrence.

In short, while the Court has articulated various functions that each of the constitutional provisions governing police practices is meant to serve, its choice of perspective in its criminal procedure rulings has fluctuated widely in ways that undermine the interests it purports to be furthering. Until the Court takes the preliminary step of adopting a principled approach to the question of perspective, tied to the purpose underlying the particular constitutional guarantee it is interpreting, it cannot tackle the more difficult issues that surround the contemporary debate about the reasonable person standard. Simplistic decisions like Yarborough v. Alvarado are the inevitable result.

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II. THE SEARCH AND SEIZURE CASES

A. INTRODUCTION: THE PURPOSES OF THE FOURTH AMENDMENT

Over the past several decades, the Supreme Court has identified deterrence as the primary interest served by the Fourth Amendment’s prohibition of unreasonable searches and seizures. As the Court remarked succinctly in United States v. Leon, “[T]he exclusionary rule is designed to deter police misconduct.” Given that purpose, the Court has reasoned that the focus of Fourth Amendment jurisprudence should be on the objectively reasonable police officer. Again, to quote Leon, the exclusionary rule “cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”

Accepting deterrence as the starting point, the Court may be right that we cannot hope to deter objectively reasonable behavior—although that point is certainly not uncontroversial. Nevertheless, it does not follow, as the Court has been wont to say (though by no means consistently), that a police officer’s subjective intent is irrelevant and a purely objective standard is defensible. In fact, given the Court’s emphasis on the exclusionary rule’s deterrent function, the opinions in which it refuses to consider police officers’ subjective motivations seem somewhat counterintuitive. Despite the Leon Court’s assertion that “[g]rounding [Fourth Amendment doctrine] in objective reasonableness... retains the value of the exclusionary rule as an incentive” for the police to comply with constitutional dictates, criminal law teaches us that deterrence is easier to achieve when an individual acts with subjective bad faith than when her actions fail to satisfy an objective standard of reasonableness.

28 468 U.S. 897, 916 (1984); see also Hudson v. Michigan, 126 S. Ct. 2159, 2163 (2006) (calling the exclusionary rule “our last resort, not our first impulse,....[a]pplicable only....[w]here its deterrence benefits outweigh its substantial social costs”) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)). The Court’s single-minded focus on deterrence has displaced two additional purposes of the exclusionary rule recognized in Mapp v. Ohio, 367 U.S. 643 (1961): “the imperative of judicial integrity,” and the concern that without an exclusionary remedy Fourth Amendment rights would “remain an empty promise.” Id. at 659, 660 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

29 Leon, 468 U.S. at 918-19.


31 See infra text accompanying notes 42-47.


33 See MODEL PENAL CODE AND COMMENTARIES § 210.4 cmt. 3 at 86 (Official Draft and Revised Comments 1980) (describing the view that “inadvertent negligence is not a sufficient basis for criminal conviction, both on the utilitarian ground that threatened
Even the Court’s opinion in *Leon* quotes approvingly from prior rulings that seem to acknowledge as much: “The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in *willful, or at the very least negligent, conduct*.”

Thus, if the Court is really serious about deterring Fourth Amendment violations, it should continue to focus on the perspective of the police—but it should require that evidence be suppressed in any case where the police either subjectively acted in bad faith or failed to satisfy an objective standard of reasonable police behavior. The lone exception may come in the consent search context, where the consent model, as contrasted with the coercion model, calls for making the particular defendant’s subjective point of view controlling.

An examination of the Supreme Court’s search and seizure opinions reveals, however, wide variations in the Court’s use of perspective. A summary in table form of the Court’s choice of perspective in some key Fourth Amendment areas, though somewhat oversimplified, looks like this:

**Table 1**

<table>
<thead>
<tr>
<th>Police Officer</th>
<th>Defendant</th>
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<tbody>
<tr>
<td><strong>Objective</strong></td>
<td>Probable Cause/Reasonable Suspicion</td>
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<td></td>
<td>Good Faith Exception</td>
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<td>Excessive Force</td>
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<td>Consent: Apparent Authority</td>
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<td>Consent: Scope of Consent</td>
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<tr>
<td><strong>Subjective</strong></td>
<td>Administrative Searches</td>
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<td>Scope of Stop &amp; Frisk</td>
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<td>Fruits of the Poisonous Tree:</td>
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<td></td>
<td>Attenuation Exception</td>
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sanctions cannot influence the inadvertent actor and on the moral ground that criminal punishment should be reserved for cases involving conscious fault”); *see also* United States v. Henry, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting) (observing that “focusing on deliberateness” reaches “conduct that is most culpable . . . [and most susceptible to being checked by a deterrent”). *Cf. infra* note 306 and accompanying text (comparing tort law’s consideration of both subjective and objective factors).

34 *Leon,* 468 U.S. at 919 (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)) (emphasis added); *see also id.* (observing that if the exclusionary rule is intended to deter constitutional violations, it should apply “only if” the police “had knowledge, or may properly be charged with knowledge, that the search was unconstitutional”) (quoting United States v. Peltier, 422 U.S. 531, 542 (1975) (emphasis added)).

35 Another possible exception, discussed *infra* at notes 79-81 and accompanying text, is the Fourth Amendment definition of “seizure,” which, like the consent search exception, calls for an assessment about the voluntariness of a defendant’s interaction with the police.
As discussed below, this disparity works to undermine the Court's purported interest in encouraging proper police behavior.

B. OBJECTIVE (POLICE OFFICER)

As noted above, the Supreme Court's opinion in *United States v. Leon* emphasized the deterrent function of the exclusionary rule, adopting the perspective of the reasonable police officer. Thus, when *Leon* created the so-called "good faith" exception to the exclusionary rule, it defined the exception in objective terms, refusing to suppress evidence in circumstances where the police acted in reasonable reliance on a search warrant that turned out to have been issued erroneously without the requisite probable cause.36

This focus on the reasonable police officer can be seen in a number of other Fourth Amendment decisions. In articulating the quantum of suspicion needed to justify a Fourth Amendment intrusion (whether the probable cause required to search or the reasonable suspicion needed to stop), for example, the Court has instructed that the relevant inquiry is whether the "historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause."37 Likewise, in ascertaining whether the police used excessive force

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36 See *Leon*, 468 U.S. at 922.

37 *Ornelas v. United States*, 517 U.S. 690, 696 (1996); see also *United States v. Cortez*, 449 U.S. 411, 418 (1981) (noting, in defining reasonable suspicion, that "a trained officer draws inferences and makes deductions... that might well elude an untrained person," and that "the evidence... must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement").

The Court has often suggested that the particular officer's training and experience are relevant factors in making probable cause and reasonable suspicion determinations. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 275-76 (2002) (noting that certain behavior "might well be unremarkable" in one area "while quite unusual in another," and concluding that an officer is "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants"); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (observing that "a police officer views the facts through the lens of his police experience and expertise," and, therefore, "what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee"); *United States v. Cortez*, 449 U.S. 411, 421-22 (1981) (characterizing "the question" to be asked in evaluating reasonable suspicion as "whether, based upon the whole picture, [the officers], as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity"); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (admonishing that "due weight must be given... to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience"). Cf: Peter B. Rutledge, Miranda and Reasonableness, 42 AM. CRIM. L. REV. 1011, 1017 (2005) (pointing out that the Court is willing to engage in "a subjective inquiry" when "credit[ing] a particular officer's experience" in ascertaining reasonable suspicion, but uses an "objective inquiry" to
in making an arrest or investigatory stop, the Court indicated in *Graham v. Connor* that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer”—that is, whether the officers’ use of force was “objectively reasonable” given “the facts and circumstances confronting them,” irrespective of “their underlying intent or motivation.”

In *Whren v. United States*, however, the Court unanimously rejected the defendants’ proposed “reasonable police officer” standard—i.e., that “the Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given”—and held instead that a traffic stop is reasonable for constitutional purposes so long as it was based on probable cause. In so doing, the Court spoke disparagingly about the whole notion of objective standards, referring to them as “exercise[s]” in “virtual subjectivity” that call for “speculati[on] about the hypothetical reaction of a hypothetical constable.”

"Indeed," the *Whren* Court noted, “it seems to us somewhat
define a Fourth Amendment “seizure,” see *infra* notes 79-81 and accompanying text, with
the result that “[b]oth inquiries narrow the category of seizures that violate the Fourth Amendment”). *But see Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (rejecting as “arbitrarily variable” the notion that “the constitutionality of an arrest under a given set of facts will ‘vary from place to place and from time to time,’” or that “[a]n arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie in precisely the same circumstances would not”) (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)). For further discussion of the extent to which objective standards should incorporate an individual actor’s subjective characteristics, see *infra* notes 330-58 and accompanying text.

40 *Id.* at 815. But see David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 549-50 (1997) (observing that “the Court failed to acknowledge that the district court in *Whren* would not have needed to speculate” because the officers “clearly violated” D.C. police department regulations, see *supra* note 39, and, “thus, there is little doubt that their conduct was not what a reasonable officer in their department would do, at least assuming
easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act upon the traffic violation.”

The Court’s opinion in Whren likewise rejected as irrelevant to the Fourth Amendment analysis any inquiry into the subjective motivations of the law enforcement officials who stopped the defendants’ vehicle. Although the defendants made a very plausible argument that the stop was pretextual, the Court simply responded that the Fourth Amendment’s “concern with ‘reasonableness’” permits certain law enforcement actions “whatever the subjective intent” of the individual police officers involved. In concluding that traffic stops are reasonable whenever the police have probable cause of a traffic violation, the Court “flatly dismissed the idea

that a reasonable officer follows regulations”); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271, 309-10 (accusing Whren of engaging in “hyperbole,” given that “[i]nquiring into the objective reasonableness of a traffic stop is not nearly so daunting as Justice Scalia suggested, and a line between vehicle code enforcement and ordinary criminal enforcement would hardly be the fuzziest distinction drawn in criminal procedure”).

517 U.S. at 810. The Court also rejected the defendants’ proposed objective test on the ground that it was “driven by subjective considerations,” simply an “attempt[] to reach subjective intent through ostensibly objective means.” Id. at 814. Whren’s disapproval of subjective inquiries is addressed infra at text accompanying notes 42-44.

Finally, the Whren Court expressed the concern that Fourth Amendment protections should not “vary from place to place and time to time,” depending upon “trivialities” like “police enforcement practices” in a particular location. 517 U.S. at 815. The Court has cited such “trivialities,” however, in the context of warrantless inventory searches, which are permissible so long as they are “conducted according to standardized criteria.” Colorado v. Bertine, 479 U.S. 367, 374 (1987); see id. at 368 n.1 & 376 n.7 (analyzing inventory requirements found in Boulder, Colorado’s laws and police department regulations); see also supra note 37 (citing cases suggesting that existence of probable cause and reasonable suspicion may vary depending on particular time and location). For further discussion of the Court’s treatment of administrative inspection cases like Bertine, see infra notes 49-53 and accompanying text.

See Harris, supra note 40, at 550 & n.39 (noting that the primary officer testified he was “out there almost strictly to do drug investigations‘ and that he stop[ped] drivers for traffic offenses ‘not very often at all,’” and concluding “there was no doubt that their traffic enforcement actions were a pretext for drug investigation without probable cause or reasonable suspicion”) (quoting Transcript at 78, United States v. Whren, Nos. 93-cr00274-01 & 93-cr00274-02 (D.D.C. 1993)); Daniel Yeager, Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis, 74 MISS. L.J. 553, 591 (2004) (describing inconsistencies in the officers’ testimony concerning what traffic violations they observed and why they decided to stop the vehicle).

Whren, 517 U.S. at 814.
that an ulterior motive might serve to strip the agents of their legal justification.\footnote{In more recent cases, the Court has extended \textit{Whren} even to searches that are not based on probable cause. \textit{See} United States v. Knights, 534 U.S. 112, 122 (2001) (in upholding the warrantless search based only on reasonable suspicion of the apartment of a probationer—whose sentence of probation had been conditioned on his submission to a broad range of searches—the Court cites \textit{Whren} in concluding that there was “no basis for examining official purpose” in that case “[b]ecause our holding rests on ordinary Fourth Amendment analysis”); Bond v. United States, 529 U.S. 334, 337, 338 n.2 (2000) (citing \textit{Whren} in support of the more general proposition that a police officer’s “subjective intent... is irrelevant in determining whether that officer’s actions violate the Fourth Amendment,” and finding \textit{Whren} instructive in that case—where the issue was whether the “tactile examination” of a bus passenger’s luggage violated a reasonable expectation of privacy and therefore constituted a Fourth Amendment “search”—because “the issue is not [the officer’s] state of mind, but the objective effect of his actions”); \textit{See also} City of Indianapolis v. Edmond, 531 U.S. 32, 46 (2000) (acknowledging that “the analytical rubric of \textit{Bond} was not ‘ordinary, probable-cause Fourth Amendment analysis’” (quoting \textit{Whren}, 517 U.S. at 813)); Kathryn R. Urbonya, \textit{Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths}, 40 AM. CRIM. L. REV. 1387, 1423 (2003) (observing that \textit{Knights} “re-characterized” \textit{Whren} and “changed the line from probable cause to reasonable suspicion”). \textit{But cf.} Samson v. California, 126 S. Ct. 2193 (2006) (extending \textit{Knights} to permit even suspicionless searches of parolees based on similar search condition) (discussed \textit{infra} at notes 57-58 and accompanying text).}44

In addition to \textit{Whren}, the Court has refused to inquire into police officers’ subjective motivations in a number of other Fourth Amendment cases. In creating the good-faith exception in \textit{United States v. Leon}, for example, the Court emphasized that the relevant inquiry does not “‘turn on the subjective good faith of individual officers,’” but instead on “the objectively ascertainable question” whether “a reasonably well trained” police officer would have realized the search was unconstitutional.\footnote{4568 U.S. 897, 919 n.20, 922 n.23 (1984); \textit{See also} Illinois v. Krull, 480 U.S. 340, 355 (1987) (adopting the same standard in extending the good-faith exception to cases where the police reasonably relied on an unconstitutional state statute authorizing warrantless inspections).}45 Likewise, in \textit{Brigham City v. Stuart}, the Court held that the exigent circumstances exception to the warrant requirement applies so long as the police have “‘an objectively reasonable basis for believing that an occupant is seriously injured’”—“regardless of the individual officer’s state of mind.”\footnote{126 S. Ct. 1943, 1946, 1948 (2006).}46 The Court therefore refused to inquire whether the warrantless entry at issue there was “‘motivated primarily’” by the goal of safeguarding

\footnote{44 \textit{Id.} at 812; \textit{See also} Arkansas v. Sullivan, 532 U.S. 769, 771-72 (2001) (per curiam) (relying on \textit{Whren} in holding that custodial arrest for a “fine-only traffic violation,” which led to discovery of narcotics during the inventory search of the defendant’s vehicle, was not “‘rendered invalid by the fact that it was a mere pretext for a narcotics search’”) (quoting \textit{Whren}, 517 U.S. at 813).}
lives or instead by investigatory purposes unrelated to any purported exigency.\textsuperscript{47}

Thus, the Court has become increasingly reluctant to consider law enforcement officials' subjective motivations in Fourth Amendment cases, even though, as explained above,\textsuperscript{48} it undermines the exclusionary rule's deterrent function to consider only the objective reasonableness of police officers' behavior and not their subjective good faith as well. Nevertheless, as explained in the next section, there are some situations in which the Court has looked at police officers' subjective intent.

C. SUBJECTIVE (POLICE OFFICER)

Perhaps the most well-recognized instance of the Court's use of a subjective standard focused on the police is in the context of administrative searches. In administrative search cases, the Court has required evidence of some "'special needs, beyond the normal need for law enforcement,'" and therefore has refused to permit warrantless, suspicionless inspections "whose primary purpose was to detect evidence of ordinary criminal wrongdoing."\textsuperscript{49} Admonishing that "only an undiscerning reader" would find these administrative inspection rulings inconsistent with \textit{Whren},\textsuperscript{50} the Court has distinguished the two lines of cases on the grounds that "subjective intentions play no role in ordinary, probable-cause Fourth

\textsuperscript{47}Id. at 1948 (quoting respondents' brief); see also Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (concluding that the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"); Ohio v. Robinette, 519 U.S. 33, 38 (1996) (observing that a police officer's subjective reason for prolonging a traffic stop "does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action") (quoting \textit{Whren}, 517 U.S. at 813)); United States v. Robinson, 414 U.S. 218, 236 (1973) (emphasizing that "it is the fact of custodial arrest which gives rise to the authority to search" incident to arrest, and therefore "it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed").

\textsuperscript{48}See supra notes 30-34 and accompanying text.

\textsuperscript{49}City of Indianapolis v. Edmond, 531 U.S. 32, 37, 41 (2001) (striking down narcotics checkpoint on this ground (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995))) (emphasis added); see also Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001) (invalidating program for drug-testing pregnant women because the "policy plainly reveals that the purpose . . . is ultimately indistinguishable from the general interest in crime control") (quoting \textit{Edmond}, 531 U.S. at 44)); Colorado v. Bertine, 479 U.S. 367, 371-72 (1987) (distinguishing "'criminal investigations'" from "'routine administrative caretaking functions,'" and observing in upholding automobile inventory search that "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation" (quoting South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976))).

\textsuperscript{50}Whren, 517 U.S. at 811. For discussion of \textit{Whren}'s treatment of subjective inquiries, see supra text accompanying notes 42-44.
Amendment analysis” (like Whren), but that “programmatic purposes” may be relevant when evaluating the constitutionality of searches (like administrative inspections) conducted “pursuant to a general scheme absent individualized suspicion.” More recently, the Court described the distinction somewhat differently, driven perhaps by its extension of Whren beyond the context of “ordinary, probable-cause” searches. Thus, in Brigham City v. Stuart, the Court observed that the “special needs” inquiry examines “the purpose behind the program” and “has nothing to do with” the intent of the individual officer who performed the search.

Even if the Court can convincingly distinguish administrative searches on this ground, it has in fact evaluated the subjective motivations of individual police officers in contexts that do not involve the “programmatic purposes” of an administrative inspection scheme. For example, in holding that the consent search exception to the warrant requirement does not extend to dueling co-tenant situations where one co-tenant is present and objects to the search, the majority in Georgia v. Randolph dismissed the dissenters’ concerns about the opinion’s impact on domestic violence victims, noting that “[t]he undoubted right of the police to enter in order to protect a victim . . . has nothing to do with the question in this case.”

The Court injected subjective considerations into another portion of its opinion in Randolph as well when it observed that its decision applies only when the nonconsenting co-occupant is actually on the scene, absent evidence that the police “removed” that individual “for the sake of avoiding a

51 Edmond, 531 U.S. at 45-46 (quoting Whren, 517 U.S. at 813); see also Whren, 517 U.S. at 811-12 (distinguishing the reliance on subjective purpose in the administrative search context by noting that “the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes”).

52 See supra note 44.


54 But see Edmond, 531 U.S. at 51-52 (Rehnquist, C.J., dissenting) (analogizing the narcotics roadblocks at issue in Edmond to Whren, finding the roadblocks “objectively reasonable because they serve the substantial interests of preventing drunken driving and checking for driver’s licenses and vehicle registrations with minimal intrusion on motorists,” and concluding, “[b]ecause of the valid reasons for conducting these roadblocks, it is constitutionally irrelevant that petitioners also hoped to interdict drugs”); Stephen A. Saltzburg, The Supreme Court, Criminal Procedure and Judicial Integrity, 40 AM. CRIM. L. REV. 133, 154 (2003) (arguing that the Court’s distinction “cannot be persuasive,” and inferring that “[t]he most plausible explanation is that the Court itself is uncomfortable with the notion that law enforcement may take a tool that is provided for a legitimate purpose and use it to gather evidence it could not gather in an evenhanded approach to law enforcement”).

55 547 U.S. 103, 118-19 (2006) (emphasis added); see also id. at 118 (“No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence . . . .”) (emphasis added).
possible objection.”56 Likewise, in *Samson v. California*, the Court upheld suspicionless searches of parolees pursuant to a California statute that conditioned parole on submission to a wide variety of searches,57 responding to the dissenter’s criticism that the statute allowed unfettered police discretion by noting that it was not meant to permit searches “‘for the sole purpose of harassment.’”58 In each of these cases, the constitutionality of the search was determined, at least in part, by evaluating the reasons animating the particular police officers involved.59

Further illustrations of the Court’s reliance on the subjective motivations of individual officers can be found in several opinions analyzing the permissible scope of a *Terry* stop and frisk.60 In *Sibron v. New York*, one of the companion cases to *Terry*, the Court described the legal justification for a frisk in objective terms—requiring “constitutionally

56 *Id.* at 121 (emphasis added).
57 126 S. Ct. 2193, 2196 (2006) (requiring that “every prisoner eligible for release on state parole ’shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause’” (quoting CAL. PENAL CODE § 3067(a) (West 2000))).
58 *Id.* at 2202 (quoting CAL. PENAL CODE § 3067(d) (West 2000)) (emphasis added).
59 For other examples of Fourth Amendment cases examining the subjective intentions of individual police officers, see *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (ruling that judicial determinations of probable cause held within forty-eight hours of arrest will generally satisfy constitutional requirements, absent evidence of an “unreasonable delay”—for example, “delays for the purpose of gathering additional evidence to justify the arrest [or] a delay motivated by ill will against the arrested individual”) (emphasis added); *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (concluding that the officer’s action of moving stereo equipment was not justified by the plain view exception to the warrant requirement because it “constitute[d] a ‘search’ separate and apart from the search . . . that was the lawful objective of his entry into the apartment,” and that the officer was not “[m]erely inspecting those parts of the turntable that came into view during the latter search” but was taking “action . . . unrelated to the objectives of the authorized intrusion”) (emphasis added).

Even Justice Scalia, who penned the majority opinion in *Whren*, made what looks suspiciously like a pretext argument in his separate opinion in *Thornton v. United States*, 541 U.S. 615 (2004). In *Thornton*, the Court upheld the search of a car incident to the arrest of a “recent occupant” of the vehicle, who at the time of the search had been placed in a police car. *Id.* at 623-24. Rejecting the notion that the officer “should not be penalized for having taken the sensible precaution of securing the suspect in the squad car,” Justice Scalia explained that the “weakness of this argument is that it assumes that, one way or another, the search must take place.” *Id.* at 627 (Scalia, J., concurring). A search incident to arrest is not “the Government’s right,” Justice Scalia continued, but rather “an exception—justified by necessity—to a rule that would otherwise render the search unlawful.” *Id.* “Indeed,” Justice Scalia then observed—without mentioning *Whren*—“if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable precisely because the dangerous conditions justifying it existed only by virtue of the officer’s failure to follow sensible procedures.” *Id.* (first emphasis added).

adequate, reasonable grounds,” i.e., “particular facts from which [the officer] reasonably inferred that the individual was armed and dangerous.”

Nevertheless, in applying that standard and finding inadequate support for the frisk conducted there, the Court not only examined how the reasonable police officer would have viewed the situation (reasoning that the defendant’s acts did not create a “reasonable fear . . . on the part of the police officer”), but also looked at the particular police officer’s subjective intent. Specifically, the Court observed that Officer Martin never “seriously suggest[ed] that he was in fear of bodily harm and . . . searched Sibron in self-protection to find weapons,” but rather “made it abundantly clear” that he frisked Sibron because he “sought narcotics.”

More recently, in upholding the constitutional reasonableness of a “stop and identify” statute in Hiibel v. Sixth Judicial District Court, the Court observed that an arrest for violating the statute was permissible only if “the request for identification” was “reasonably related to the circumstances justifying the stop.” In concluding that asking Hiibel to disclose his name met the “reasonably related” standard because it was a “commonsense inquiry,” however, the Court did not apply an objective test. Rather, the Court’s sole explanation turned on the deputy sheriff’s subjective intent—that his request was “not an effort to obtain an arrest for failure to identify after a Terry stop yielded insufficient evidence.”

Some of the Supreme Court decisions governing the fruits of the poisonous tree doctrine provide a final example of the Court’s reliance on

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61 392 U.S. 40, 64 (1968).
62 Id.
63 Id. at 46, 64. Cf. United States v. Rowland, 341 F.3d 774, 783 (8th Cir. 2003) (noting that the federal courts of appeals are divided on the question whether the permissibility of a Terry frisk turns on “the searching officer actually fearing the suspect is dangerous” or on whether “a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous”). See generally 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.6(a), at 623 & n.36 (4th ed. 2004) (collecting conflicting cases on this issue); see also id. § 9.5(a), at 472 & n.22 (citing conflicting cases on similar issue arising in assessing reasonable suspicion to stop).
64 542 U.S. 177, 188 (2004).
65 Id. at 189.
66 Id. (emphasis added); see also Illinois v. Caballes, 543 U.S. 405, 408 (2005) (noting, in support of finding that a traffic stop was not unreasonably prolonged, that the state court “carefully reviewed the evidence to ascertain whether the officer “improperly extended the duration of the stop to enable the dog sniff to occur”) (emphasis added); Florida v. Royer, 460 U.S. 491, 504-05 (1983) (plurality opinion) (observing that “undoubtedly reasons of safety and security” permit the police to move a suspect during a Terry stop, but finding that police exceeded the permissible scope of Terry because there was “no indication . . . that such reasons prompted the officers to transfer the site of the encounter”; instead, their “primary interest” was searching the defendant’s luggage) (emphasis added).
police officers' subjective motivations. In interpreting the reach of the attenuation exception to the poisonous tree doctrine—which allows the prosecution to use the fruits of a constitutional violation sufficiently "attenuated" from the violation "to dissipate the taint"—the Court noted in Brown v. Illinois that the purpose and flagrancy of the official misconduct is a "particularly" relevant factor. Any other result, the Court reasoned, would "substantially dilute[]" the effectiveness of the exclusionary rule, "regardless of how wanton and purposeful the Fourth Amendment violation." Accordingly, in finding insufficient evidence of attenuation on the facts before it, the Brown Court considered the subjective intent of the police officers involved, observing that they acted "in the hope that something might turn up" and in a way "calculated to cause surprise, fright, and confusion."

Likewise, in Murray v. United States, the Court analyzed the scope of the independent source exception to the fruits of the poisonous tree doctrine, which allows the use of evidence the police have discovered through some means independent of the constitutional violation. In ruling on the admissibility of evidence initially seen during the unconstitutional entry of a warehouse, but seized only later—pursuant to a warrant obtained after the initial, illegal search—the Court observed that the applicability of the independent source exception depended not only on whether the police used any information found during the illegal entry to procure the warrant, but also on the subjective inquiry whether "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry."

These decisions make perfect sense in terms of ensuring that the police do not benefit from a constitutional violation and thus in advancing the Court's interest in deterring unconstitutional police behavior. They cannot, however, be reconciled with statements in numerous other Fourth Amendment opinions refusing to consider police officers' subjective

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67 The "fruits of the poisonous tree" doctrine, a term coined by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939), provides that the exclusionary rule applies "as well to the indirect as the direct" products of constitutional violations. Wong Sun v. United States, 371 U.S. 471, 484 (1963).
68 Nardone, 308 U.S. at 341.
69 422 U.S. 590, 603-04 (1975) (listing the "temporal proximity" between the constitutional violation and discovery of the particular evidence in question and "the presence of intervening circumstances" as the other two relevant factors).
70 Id. at 602.
71 Id. at 605 (emphasis added).
73 Id. at 542 (emphasis added).
74 See supra notes 30-34 and accompanying text (discussing deterrence of bad faith actions).
motivations—including, interestingly, the Court’s refusal to require an absence of bad faith in order to establish the third exception to the fruits of the poisonous tree doctrine, the inevitable discovery exception. This exception applies when derivative evidence, although actually found unconstitutionally, “ultimately or inevitably would have been discovered by lawful means.”\(^7\) Although it is “closely related” to the independent source exception, looking in essence for a “‘hypothetical independent source,’” the Court in \textit{Nix v. Williams} relied on a balancing test to reject the lower court’s good-faith requirement.\(^7\) Making arguments that might also have been made in \textit{Murray}, the \textit{Nix} Court reasoned that a good-faith requirement would place the police “in a worse position” than they would have been absent the constitutional misconduct and would entail “enormous societal cost[s]” in the form of lost evidence.\(^7\) The Court also explained that its decision to reject the lower court’s approach would not undermine deterrence because the police “will rarely, if ever, be in a position to calculate” whether evidence will later be discovered through some other means.\(^7\) Although \textit{Nix} is therefore consistent with the Court’s frequent admonition that judges should not consider police officers’ subjective intent in evaluating the constitutionality of searches and seizures, there are a number of situations described in this section where the Court itself has done precisely that.

\textbf{D. OBJECTIVE (DEFENDANT)}

Despite the Court’s adherence to the deterrence rationale of the exclusionary rule, and its tendency therefore to focus on the police, some Fourth Amendment standards turn on the perspective of the reasonable defendant. The primary example is the definition of a Fourth Amendment “seizure,” where the Court has adopted an objective standard controlled by the defendant’s point of view. The Court has repeatedly indicated that a


\(^7\) \textit{Id.} at 443, 438 (quoting \textit{State v. Williams}, 285 N.W.2d 248, 260 (Iowa 1979)).

\(^7\) \textit{Id.} at 455.

\(^7\) \textit{Id.} In \textit{Nix}, a confession taken in violation of the Sixth Amendment right to counsel led the police to the discovery of the victim’s body, but the inevitable discovery exception obviously applies in Fourth Amendment cases as well, and the opinion reads much like a Fourth Amendment ruling. In fact, the \textit{Nix} Court rejected the defendant’s efforts to distinguish the Fourth Amendment and to argue that the Court’s tendency in search and seizure cases to resort to a balancing test and consider “the societal costs” of excluding evidence should not extend to “the Sixth Amendment exclusionary rule,” which is “designed to protect the right to a fair trial and the integrity of the fact-finding process.” \textit{Id.} at 446. Just as in a Fourth Amendment case, the Court responded, using the Sixth Amendment to exclude “physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” \textit{Id.}
suspect has been "stopped" for purposes of Terry—and therefore seized—only if a reasonable person in her position would have felt she was "not free to leave," 79 "to decline the officers' requests or otherwise terminate the encounter." 80 In its recent decision in Brendlin v. California, the Court unanimously endorsed this test, holding that the relevant question in determining whether a passenger was seized during a traffic stop is "what a reasonable passenger would have understood." 81

Even here, however, the Court has deviated from this objective standard. In concluding in California v. Hodari D., for example, that a fleeing suspect who was being pursued by the police had not been seized "until he was tackled," the Court seemed more interested in the perspective of Hodari D. himself. 82 Presumably a reasonable person in his position—especially a reasonable innocent person 83 —would not have felt free to leave once the police gave chase. 84 Nevertheless, the Court explained that the "reasonable suspect" standard "states a necessary, but not a sufficient, condition," and it rejected the notion that "a seizure occurs even though the subject does not yield." 85

80 Florida v. Bostick, 501 U.S. 429, 438 (1991) (noting in addition that "the 'reasonable person' test presupposes an innocent person"). The Court's definition of a stop, and in particular its bus sweep cases—Bostick and United States v. Drayton, 536 U.S. 194 (2002) (holding that a bus sweep did not rise to the level of a Terry stop)—have engendered substantial criticism. See, e.g., Tracey Maclin, "Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 Miss. L.J. 471, 507 (2003) (referring to the reasonable person test as "a hoax" and "misguided," and arguing that the notion that reasonable people feel free to ignore the police "has never been supported by empirical evidence"); Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 201-03 (2002) (citing survey data showing that most people feel compelled to cooperate with police).

81 127 S. Ct. 2400, 2407 n.4 (2007) (expressly rejecting the state supreme court's reasoning that Brendlin was not seized because the police officer meant to investigate only the driver and, in fact, may not even have been aware of Brendlin's presence in the car).
83 See supra note 80.
84 See, e.g., Kathryn R. Urbonya, The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments, 35 St. Louis U. L.J. 205, 234 (1991) (observing that police exercise "psychological force" when pursuing suspects, "not only communicat[ing] a command to stop, but also that the police will continue to pursue until the individual stops").
85 Hodari D., 499 U.S. at 626, 628. The Court also refused to equate attempted seizures with the Fourth Amendment definition of a seizure, thereby apparently disclaiming any reliance on the police officer's subjective intent. See id. at 626 n.2. Subsequently, however, in County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Court seemingly did turn to the intent of the police officer in concluding that no seizure occurred when a high-speed police chase of a motorcycle led to the accidental death of the motorcyclist's passenger: "[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused
Given the Court's emphasis on deterrence in its Fourth Amendment rulings, its choice to focus on the perspective of the defendant rather than the police officer in this context may seem somewhat surprising. But if the definition of a seizure really turns on whether the suspect felt free to leave—i.e., on whether the interaction with the police was voluntary or coerced—the relevant question here is reminiscent of that asked in the consent search cases addressed in the next section, many of which do center on the defendant's point of view.

E. SUBJECTIVE (DEFENDANT)

In addition to most Fourth Amendment "seizure" cases, which as explained above apply a "reasonable defendant" standard, there are even some circumstances—most notably in the context of consent searches—where the Court has adopted a subjective standard focused on the defendant's point of view. Here again, however, the Court has not adhered to a single perspective. Rather, the Court has wavered between the consent model, analyzing whether the defendant's decision to consent was truly free and voluntary, and the coercion model, evaluating whether the defendant's consent was the product of police coercion.

In allowing the police to search without either a warrant or probable cause so long as they have the defendant's voluntary consent, the Court in Schneckloth v. Bustamonte borrowed the voluntariness test used in determining the admissibility of confessions—a totality of the circumstances standard that considers both the characteristics of the particular defendant and the conduct of the police. Although the Court

termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." Id. at 844 (quoting Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989)).

86 See Ronald J. Bacigal, Choosing Perspectives in Criminal Procedure, 6 WM. & MARY BILL RTS. J. 677, 684-85 (1998) (wondering why "the Fourth Amendment goal of regulating the use and abuse of government power" did not lead the Court to focus on the police officer's perspective in defining a Fourth Amendment seizure, or alternatively why the Court did not analogize "consensual seizures of a person and consensual searches and seizures of . . . property," and thus adopt a subjective standard in defining Terry stops); Stephen A. Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles?, 74 GEO. WASH. L. REV. 956, 988-89 (2006) (advocating a definition of seizure that focuses on the conduct of the police, given that "reasonable people may not feel free to terminate any encounter with the police" and the police "have no particular ability, education, or training . . . to predict how reasonable civilians would respond to [their] actions").

87 For further discussion of the voluntariness due process test, see infra notes 218-42 and accompanying text.

rejected the argument that consent to search operates as a waiver of Fourth Amendment rights, thereby triggering Johnson v. Zerbst's decidedly subjective conception of waiver as "an intentional relinquishment or abandonment of a known right or privilege,"89 the voluntariness standard the Court adopted for consent searches was essentially a subjective one. Thus, Schneckloth listed "the possibly vulnerable subjective state of the person who consents," "evidence of minimal schooling," and "low intelligence" among the factors relevant in assessing the voluntariness of consent.90

In Illinois v. Rodriguez, however, the Court deviated from this subjective standard and opted for an objective test focused on the perspective of the police, thereby seemingly endorsing the coercion model.91 Rodriguez upheld the validity of third-party consent searches on an apparent authority theory—where neither the defendant nor an authorized third party had actually consented, but the police "reasonably (though erroneously)" believed they had been given consent by someone with authority to do so.92 Reasoning that the Fourth Amendment requires only that the police be "reasonable," not that they be "factually correct," the Court picked up on Schneckloth's distinction between consent searches and

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89 304 U.S. 458, 464 (1938). The Court in Schneckloth found "a vast difference" between Fourth Amendment rights and "those rights that protect a fair criminal trial." 412 U.S. at 241. "The protections of the Fourth Amendment are of a wholly different order," the Court observed; they "protect[] the 'security of one's privacy against arbitrary intrusion by the police'" and "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." Id. at 242 (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)). But cf. George C. Thomas III, Terrorism, Race and a New Approach to Consent Searches, 73 Miss. L.J. 525, 545 (2003) (arguing that Schneckloth provided "a pretty thin justification" for ignoring precedent that analyzed consent searches as a form of waiver).

90 Schneckloth, 412 U.S. at 229, 248; see also United States v. Mendenhall, 446 U.S. 544, 558 (1980) (considering defendant's age, education level, race, and sex in applying Schneckloth's standard of voluntariness). But compare Schneckloth, 412 U.S. at 227 (equating "voluntary consent" with the absence of coercion by asking "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied"), with Schneckloth, 412 U.S. at 282-83 (Marshall, J., dissenting) (pointing out that "coercion" and "consent" are "subtly different concept[s].," and rejecting the notion that "a meaningful choice has been made solely because no coercion was brought to bear on the subject").

The consent search doctrine has come under heavy criticism. See, e.g., David Cole, The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction." 83 Geo. L.J. 2547, 2564-65 (1995) (observing that the consent search exception has a disparate impact based on both race and class); Thomas, supra note 89, at 541, 542, 557 (calling the consent search doctrine "an acid that has eaten away the Fourth Amendment" and "the handmaiden of racial profiling," and therefore advocating that consent searches be deemed unreasonable "outside the context of public safety requests for consent").


92 Id. at 186.
a criminal defendant’s waiver of “trial rights” (which must actually be knowing and intelligent). The Court then adopted an objective measure of consent centered on the police: “[W]ould the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?”

Likewise, in defining the permissible scope of a consent search in Florida v. Jimeno, the Court relied on an objective standard—“[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?” Although Jimeno has been interpreted as endorsing a “reasonable police officer” test, it is somewhat unclear from the Court’s language whether its objective inquiry turns on the perspective of a police officer or a third-party observer. What is more certain is that Jimeno, like Rodriguez, retreats from the consent model and its concomitant focus on the defendant’s point of view.

F. OBJECTIVE (THIRD PARTY)

Regardless of the Court’s intentions in Jimeno, the prevailing definition of a Fourth Amendment “search”—as something that intrudes on a reasonable expectation of privacy—is an objective standard tied neither to the reasonable defendant nor to the reasonable police officer. Unlike the

93 Id. at 183-84.
94 Id. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)) (omission in original).
96 See, e.g., Bruce A. Green, “Power, Not Reason”: Justice Marshall’s Valedictory and the Fourth Amendment in the Supreme Court’s 1990 Term, 70 N.C. L. Rev. 373, 383 (1992) (interpreting Jimeno as “adopt[ing] the officer’s perspective” and “equal[ing] ‘reasonableness’ from a constitutional perspective with ‘reasonableness’ from a police officer’s perspective”).
97 In support of the standard quoted in text, the Jimeno majority cited not only Illinois v. Rodriguez, 497 U.S. 177, 183-89 (1990), but also Justice White’s plurality opinion in Florida v. Royer, 460 U.S. 491, 501-02 (1983), and Justice Blackmun’s dissent in the same case, id. at 514 (Blackmun, J., dissenting). As described above, see supra note 79 and accompanying text, Royer involves the definition of Fourth Amendment “seizures,” an objective standard that turns on the suspect’s point of view. The sentence that immediately follows in Jimeno, however, seems to focus on the reasonable police officer: “The question before us, then, is whether it is reasonable for an officer to consider a suspect’s general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car.” Jimeno, 500 U.S. at 251. Cf. Georgia v. Randolph, 547 U.S. 103, 111 (2006) (analyzing how “a law enforcement officer or any other visitor” would interpret the situation in deciding that the consent search exception does not apply where one co-tenant objected to the search).

98 The reasonable expectation of privacy test has its origins in Justice Harlan’s concurring opinion in Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
CRIMINAL PROCEDURE IN PERSPECTIVE

G. CONCLUSION

In general, these varying perspectives can be found throughout the Supreme Court's Fourth Amendment rulings. Although the Court's

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99 See supra notes 79-81 and accompanying text.
100 California v. Greenwood, 486 U.S. 35, 39 (1988); see also Minnesota v. Carter, 525 U.S. 83, 88 (1998) (defining a reasonable expectation of privacy as "one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society'" (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978))).
102 543 U.S. 405, 408-10 (2005) (quoting United States v. Jacobsen, 466 U.S. 109, 122 (1984)). Some years after the Katz decision, Anthony Amsterdam warned that "[a]n actual, subjective expectation of privacy obviously has no place... in a theory of what the fourth amendment protects," and "can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection." Amsterdam, supra note 24, at 384. "If it could," Amsterdam reasoned, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television... that we were all forthwith being placed under comprehensive electronic surveillance." Id. Whether one views the Court's current doctrine as heeding Amsterdam's warning with a vengeance, or turning it on its head, that doctrine has come under criticism. See, e.g., 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) (concluding, based on empirical research, that "some of the Court's decisions regarding the threshold of the Fourth Amendment... do not reflect societal understandings").
103 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").
emphasis on the exclusionary rule's deterrent function leads it to focus on
the reasonable police officer in many cases, in others it inexplicably
switches to consider the perspective of the reasonable defendant or a
reasonable third party, or it adopts a subjective standard focused on the
particular police officer or defendant in question.

Conceding the starting point of deterrence, the Supreme Court
properly focuses on the point of view of the police officer, the actor to be
deterred, in most Fourth Amendment cases. If the Court is serious about
deterring unconstitutional searches and seizures, however, its choice of
perspective should not fluctuate. For example, evidence uncovered by
means of intrusions that a reasonable officer would not have made should
be suppressed so as to discourage the practice of pretext stops and
searches. Moreover, the Court's exclusive reliance on an objective
inquiry in many of its cases undermines its purported interest in deterrence.
As explained above, standard deterrence doctrine calls for suppressing
evidence where police officers subjectively act in bad faith as well as where
they fail to satisfy objective standards of reasonable police behavior.

Finally, even if most Fourth Amendment doctrines properly turn on the
perspective of the police, the consent model suggests that the defendant’s
point of view ought to be controlling when issues surrounding voluntariness
arise—i.e., in consent search cases and perhaps also in defining Fourth
Amendment "seizures." Although it may well be "reasonable for the
police to conduct a search once they have been permitted to do so," the
requisite "permission" is not forthcoming unless the defendant willingly
gives it. Thus, the consent model calls for answering questions
surrounding consent searches (like questions of waiver generally) by
evaluating the subjective intent of the defendant—not only in assessing the
voluntariness of her consent, but also in determining the scope of her
consent and the legitimacy of third-party consent searches. The Court may
prefer an objective test focused on the reasonable suspect in defining the
term "seizure" in order to make sure that "the scope of Fourth Amendment
protection does not vary with the state of mind of the particular individual

104 But see supra notes 39-41 and accompanying text (discussing Whren's rejection of
such a standard).
105 See supra notes 30-34 and accompanying text.
106 For a discussion of this issue, see supra notes 79-81 and accompanying text.
108 See, e.g., Bacigal, supra note 86, at 728-29 (observing that "[w]hen the police ask for
cooperation to which they are not entitled, the individual should retain the power to grant or
withhold cooperation," and therefore "the only relevant perspective is that of the individual
citizen").
109 For discussion of confession cases where issues of waiver arise, see infra notes 147-
55, 203-04 and accompanying text.
This concern does not apply to consent searches, however, because the consent model envisions a subjective notion of "voluntary" waiver and consent, which by definition does vary depending on the individual's state of mind. In any event, the consent model mandates that the focus not deviate from the defendant's point of view.

On the other hand, if the Court is intent on adopting the coercion model, the purpose of the inquiry shifts in each of these areas to deterring coercive police practices and the perspective of the police officer becomes dispositive, just as it is in other Fourth Amendment cases where deterrence is the goal. Again, however, both subjective and objective factors ought to be considered. Therefore, a warrantless search could not be justified based on consent if the police knew or reasonably should have known they did not have valid consent. Likewise, a Fourth Amendment seizure would occur if the police intended to restrain a suspect, or if they knew or should have known the suspect did not feel free to leave.

Whether the Court follows the consent or the coercion model, it ought to do so across the board—in all circumstances requiring an evaluation of whether the defendant's actions were freely chosen or the product of compulsion. More generally, accepting at face value the Court's repeated claims that deterrence is the principal goal of the exclusionary rule, the choice of perspective in Fourth Amendment rulings should be made in a principled and consistent way so as to further that purpose.

III. THE CONFESSION CASES

Confessions elicited from criminal defendants implicate three separate constitutional provisions: (1) the Fifth Amendment's self-incrimination privilege, which provided the basis for the Court's decision in *Miranda v. Arizona*;\(^{111}\) (2) the Sixth Amendment right to counsel; and (3) the Due Process Clause, which bans the use of involuntary confessions. Although each of these constitutional guarantees protects a distinct set of interests and therefore might reasonably be expected to depend upon a different point of view, shifts in perspective can be found even within each subset of Supreme Court opinions. These deviations are especially evident in the *Miranda* and voluntariness due process line of cases.

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A. THE MIRANDA CASES

1. Introduction: The Purposes of Miranda

The primary vehicle defendants use to challenge the admission of their incriminating statements is the Supreme Court’s landmark ruling in *Miranda v. Arizona*, which requires that certain warnings be provided to suspects prior to custodial interrogation.\(^{112}\) The Court described the paramount purpose of *Miranda* warnings as “dispel[ling] the compulsion inherent in custodial surroundings” and thereby preserving the suspect’s “free choice” as to whether or not to talk to the police.\(^{113}\)

Consistent with the coercion model, the Court has expressly relied on *Miranda’s* goal of alleviating compulsion to justify focusing on the defendant’s point of view—which it does reliably in some instances (defining custody, for example), but not in others (defining interrogation). Some of the Court’s *Miranda* decisions have maintained the focus on the defendant, but, citing the need for rules easily understood by the police, have adopted an objective “reasonable defendant” standard rather than a subjective one tied to the particular suspect. The Court has been far from predictable in raising these administrability concerns, however, and on other occasions, it has relied on similar reasoning to justify the use of a

\(^{112}\) Id. at 444.

\(^{113}\) Id. at 458 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”); *see also* Dickerson v. United States, 530 U.S. 428, 435 (2000) (noting that “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements”). Some commentators are skeptical, however, how successful *Miranda* warnings actually are in alleviating the coerciveness of custodial interrogation. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 894 (1995) (concluding that “intimidation is alive and well in the police station,” and criticizing the Court’s Fifth Amendment jurisprudence for “driv[ing] . . . underground” rather than “civilizing the interrogation process”); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 989, 1001, 1116-17 (1997) (pointing out that “[e]ither an innocent nor a guilty party is likely to appreciate the full significance of the *Miranda* warnings,” and that police “tend to introduce the *Miranda* advisement in a manner that is to their advantage” and to “encourage suspects to believe that answering their questions is relatively risk free”). Moreover, a number of studies have found that the overwhelming majority of suspects waive their *Miranda* rights. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 859 (1996) (finding an 84% waiver rate); Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 287 (1996) (putting the figure at 78%); George C. Thomas III, *Stories About* Miranda, 102 Mich. L. Rev. 1959, 1976 (2004) (finding a waiver rate of 68%, and noting that “[m]ore than 10 times as many suspects waived *Miranda* as invoked”).
"reasonable police officer" standard. With only a few exceptions, the Court has not explicitly invoked the coercion model and the notion of deterrence in the *Miranda* context, despite the theoretical similarity between *Miranda*’s goal of dispelling coercion and other contexts where the Court determines whether a defendant’s actions were voluntary or coerced.

A table summarizing the key *Miranda* opinions that have articulated a particular perspective therefore looks something like this:

**Table 2**

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<th>Miranda Cases</th>
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<td><strong>Police Officer</strong></td>
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In short, as detailed below, the Court’s *Miranda* opinions are characterized by the same fluctuations in perspective found in the Fourth Amendment cases.

2. **Objective (Defendant)?**

Given *Miranda*’s purported goal of dispelling coercion, it is not surprising that many of the standards the Court has adopted in interpreting the reach of *Miranda* focus on the perspective of the defendant. Thus, for example, in defining custody—one of the two factors that trigger a suspect’s right to *Miranda* warnings—the Court held in *Berkemer v. McCarty* that “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” In applying that standard and concluding that a defendant is not in custody during a traffic stop—even though the stop constitutes a “seizure” in Fourth Amendment terms—the *Berkemer* Court looked exclusively at the suspect’s point of

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116 See *Berkemer*, 468 U.S. at 436-37. This conclusion seems somewhat anomalous, however, given that the definition of a Fourth Amendment "seizure" is strikingly similar to
view. Specifically, the Court reasoned that "[a] motorist's expectations" are that a traffic stop will be brief, that she does not "feel[ ] completely at the mercy of the police" due to the public nature of the stop, and that a police officer's "unarticulated plan" to arrest a suspect has "no bearing" on the question whether she is in custody. The Court justified its decision to evaluate the defendant's perspective using objective rather than subjective means by citing the importance of articulating a standard that could easily be administered by the police.

In defining interrogation, however—the second factor that triggers a right to Miranda warnings—the Court's choice of perspective has been far less clear. Consistent with its rulings on custody, the Court has indicated that the concept of interrogation "focuses primarily" on the defendant, not the police, and thus that the police "do not interrogate a suspect simply by hoping that he will incriminate himself." Nevertheless, the Court has—without offering much in the way of explanation—declined to expressly adopt a standard, like the one used in defining custody, that focuses on a reasonable person in the suspect's position. Rather, Justice Stevens' dissenting opinion in Rhode Island v. Innis advocated a construction of interrogation more in line with the Court's approach to custody: Justice Stevens took the position that "any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question."

By contrast, the Innis majority defined interrogation as "express questioning or its functional equivalent," with the functional equivalent of express questioning meaning "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an
incriminating response.”\footnote{id. at 300-01 (majority opinion) (emphasis added).}

This standard seemingly turns on what the police “should know,” not how a reasonable person in the suspect’s position would feel. The Court immediately followed its definition with the observation that “[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police,” but this assertion is difficult to square with the literal language of the definition.\footnote{id. at 301. Adding further to the confusion, the Court observed in a footnote that the police officer’s intent is “not . . . irrelevant” and “may well have a bearing” on whether the Innis standard is met. Id. at 301 n.7. “In particular,” the Court continued, if the police intend to obtain a confession, “it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.” Id. Justice Marshall, in a dissenting opinion joined by Justice Brennan, read this footnote as suggesting that the majority’s definition of interrogation was “equivalent, for all practical purposes,” to his view that interrogation occurs “whenever police conduct is intended or likely to produce a response.” Id. at 305 (Marshall, J., dissenting) (emphasis added).\footnote{id. at 294-95 (majority opinion) (quoting police officer’s testimony).\footnote{id. at 302-03.\footnote{Although the comment was not “explicitly directed” at Innis, the officers were aware that he “would hear and attend to their conversation.” Id. at 306 (Marshall, J., dissenting).\footnote{481 U.S. 520 (1987).}}}}

Moreover, when the Court applied its standard to the facts of Innis, it adopted a very literal construction, focusing on what the police knew or should have known. Specifically, the Court concluded that Innis was not subjected to interrogation when one of the police officers riding in the car with him began to talk to another officer about the missing murder weapon and commented, “[T]here’s a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.”\footnote{id. at 306 (Marshall, J., dissenting).}

In finding that this statement did not constitute “interrogation,” the Court relied on the absence of evidence that the police were “aware” that Innis was “peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children” or that they knew he was “unusually disoriented or upset.”\footnote{id. at 302-03.}

Conspicuously absent from the Court’s analysis of the facts is any consideration of the suspect’s perception—of how Innis or a reasonable person in his shoes would have felt upon hearing the police officer’s statement.\footnote{Although the comment was not “explicitly directed” at Innis, the officers were aware that he “would hear and attend to their conversation.” Id. at 306 (Marshall, J., dissenting).\footnote{481 U.S. 520 (1987).}}

The Court’s subsequent opinion in Arizona v. Mauro indicated even more clearly that interrogation does not turn on the suspect’s perceptions.\footnote{481 U.S. 520 (1987). In that case, the Court found that Mauro was not interrogated when the police allowed his wife—who, like Mauro, was a suspect in the death of their son—to speak to him only with a police officer and tape recorder in the room. The Court explained that the police did not engage in any
"psychological ploy," there was no indication they "sent Mrs. Mauro in" to obtain a confession, and the officer's presence in the room was not "improper," but rather was justified by "a number of legitimate reasons— not related to securing incriminating statements." Only after examining the subjective motivation of the police did the Court note, "[f]inally," that "the weakness of Mauro's claim that he was interrogated is underscored by examining the situation from his perspective." The Court then grudgingly cited *Innis*—by way of a cf.—as "suggesting that the suspect's perspective may be relevant in some cases" in defining interrogation and concluded, "We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself." Despite this equivocal reference to the suspect, the *Mauro* Court's clear focus was on the perspective of the police. In fact, *Mauro* reflects a different vision of the fundamental premise of *Miranda*, effectively endorsing the coercion model. Instead of trying to dispel the coerciveness felt by the suspect, the *Mauro* Court focuses more on deterring the police, admonishing that in defining interrogation, "we must remember [that] the purpose of *Miranda* warnings is to "prevent[]" the police from "using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Nevertheless, the suspect's perceptions returned to the forefront three years later in *Illinois v. Perkins*, a case in which the two *Miranda* triggers seemed to be present. Perkins, a suspect in an unsolved murder, was incarcerated pending trial on unrelated charges, and he was asked an express question by an undercover police officer: "You ever do anyone?" Nevertheless, the Court decided that Perkins was not entitled to *Miranda* warnings, reasoning that "[c]oercion is determined from the perspective of the suspect," and Perkins, who did not realize he was speaking to a police officer, did not feel compelled to speak. The Court concluded that questioning by an undercover officer lacks the necessary "'interplay between police interrogation and police custody'" and need not be preceded

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129 *Id.* at 527-28.
130 *Id.* at 528.
131 *Id.* (citing *Innis*, 446 U.S. at 301) (emphasis added). Justice Stevens disagreed with this assessment, pointing out that the officers "brought [Mrs. Mauro] into the room without warning Mauro in advance," and "they expected that the resulting conversation 'could shed light on our case.'" *Id.* at 536 (Stevens, J., dissenting).
132 *Id.* at 529-30 (majority opinion).
134 *Id.* at 305 (Marshall, J., dissenting). The undercover officer actually asked a series of questions over a thirty-five-minute period. See *id.* at 304-05.
135 *Id.* at 296 (majority opinion) (citing *Innis*, 446 U.S. at 301).
by Miranda warnings. Thus, Miranda’s definition of custody focuses on the reasonable suspect and Perkins’s requirement of “interplay” between custody and interrogation likewise turns on the defendant’s perspective, but the Court has waffled in choosing a controlling point of view when defining interrogation.

3. Subjective (Police Officer)?

Similar ambivalence surrounds the Court’s recent decision in Missouri v. Seibert concerning the propriety of the “question-first” interrogation technique, a “practice of some popularity” whereby the police initially interrogate without giving Miranda warnings, and then later, after eliciting a statement inadmissible because of the Miranda violation, provide Miranda warnings, obtain a waiver, and “cover the same ground a second time” “until [they] get the answer that [the suspect] already provided once.” The Seibert plurality refused to analyze the case under the fruits of the poisonous tree doctrine and instead framed the relevant question as whether the delayed warnings “reasonably conve[y]” a suspect’s Miranda rights. Finding that this standard was not met and that Seibert’s two statements were “realistically seen as part of a single, unwarned sequence of questioning,” the plurality opinion contains a great deal of language adopting the perspective of the reasonable suspect. For example, the plurality noted, “a suspect would hardly think he had a genuine right to remain silent” in a question-first situation; rather, “[a] more likely reaction on a suspect’s part would be perplexity about the reason for discussing [Miranda] rights” so late in the game. On the facts before it, the plurality concluded, “[A] reasonable person in the suspect’s shoes would not have

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136 Id. at 297 (quoting Yale Kamisar, Brewer v. Williams, Massiah and Miranda: What Is “Interrogation”? When Does It Matter?, 67 GEO. L.J. 1, 63 (1978)).
137 542 U.S. 600, 611, 604, 606 (2004) (plurality opinion) (quoting police officer’s suppression hearing testimony). After Seibert was arrested and brought to the police station, the police made a “conscious decision” not to give her Miranda warnings. Id. at 605. She was initially questioned without warnings for about half an hour and then, after she made an incriminating statement and was given a break, the police “turned on a tape recorder, gave [her] the Miranda warnings, and obtained a signed waiver of rights from her.” Id.
138 The Seibert plurality did not quarrel with the decision in Oregon v. Elstad, 470 U.S. 298 (1985), which held that the fruits of the poisonous tree doctrine does not apply to consecutive-confession cases—i.e., those involving “the admissibility of a subsequent warned confession following an initial failure . . . to administer the warnings required by Miranda.” Seibert, 542 U.S. at 612 n.4 (quoting Elstad, 470 U.S. at 300).
140 Id. at 612 n.4.
141 Id. at 613.
understood [the Miranda warnings] to convey a message that she retained a choice about continuing to talk.

Nevertheless, passages in the plurality opinion also focus on the subjective intent of the police. In distinguishing Seibert from the Court's earlier decision in Oregon v. Elstad, the plurality observed that "it is fair to read Elstad" as involving "a good-faith Miranda mistake," whereas "the facts here . . . by any objective measure reveal a police strategy adapted to undermine the Miranda warnings." At this point, however, the plurality dropped a footnote purportedly discounting the importance of a police officer's subjective motivations: "Because the intent of the officer will rarely be as candidly admitted as it was here . . ., the focus is on facts apart from intent that show the question-first tactic at work."

Justice Breyer, who joined the plurality opinion but also filed a separate concurrence, endorsed a straightforward subjective test, requiring suppression of "the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." Justice Kennedy, who concurred in

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142 Id. at 617; see also id. at 621 (Kennedy, J., concurring in the judgment) (noting that the plurality's "test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations"); id. at 624-25 (O'Connor, J., dissenting) (applauding "[t]he plurality's rejection of an intent-based test" as consistent with the Court's Miranda jurisprudence, and observing that "[a] suspect who experienced exactly the same interrogation as Seibert, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give Miranda warnings, would not experience the interrogation any differently").

143 Id. at 615-16 (plurality opinion). In Elstad, a police officer had a brief conversation with the suspect in his living room, during which the officer said he "felt [Elstad] was involved" in a robbery and Elstad admitted that he was there. Elstad, 470 U.S. at 301. Although the Elstad Court assumed that this conversation violated Miranda, it observed that the officer's purported purpose was not to interrogate Elstad, but "to notify his mother of the reason for his arrest." Id. at 315. Refusing to apply the fruits of the poisonous tree doctrine to suppress a second statement Elstad made later at the police station following Miranda warnings, the Court held that his subsequent statement was admissible so long as it was "voluntarily made." Id. at 318. But cf. Joelle Anne Moreno, Faith-Based Miranda?: Why the New Missouri v. Seibert Police "Bad Faith" Test Is a Terrible Idea, 47 ARIZ. L. REV. 395, 410-13 (2005) (challenging the notion that Elstad was based on a distinction between good-faith and bad-faith violations of Miranda).

144 Seibert, 542 U.S. at 616 n.6 (plurality opinion); see also William T. Pizzi & Morris B. Hoffman, Taking Miranda's Pulse, 58 VAND. L. REV. 813, 832-33, 883 n.82 (2005) (describing Seibert as "creating a kind of bad faith exception to the Elstad exception," and noting that the plurality "specifically resisted the temptation to create a classic bad faith test focused on the subjective intent of police," but "a strange kind of bad faith seems to have crept into the plurality's opinion when it concluded the Missouri police engaged in 'a police strategy adapted to undermine the Miranda warnings'" (quoting Seibert, 542 U.S. at 616 (plurality opinion))).

145 Seibert, 542 U.S. at 617 (Breyer, J., concurring). Justice Breyer joined the plurality opinion because he "believe[d] the plurality's approach in practice will function as a 'fruits' test," given that "[t]he truly 'effective' Miranda warnings on which the plurality insists will
the judgment and provided the crucial fifth vote, also thought the intent of the police was critical. In his view, any statement a suspect made following a "deliberate" and "calculated" violation of *Miranda* should be excluded, absent "[c]urative measures . . . designed to ensure that a reasonable person in the suspect's situation would understand the import and effect" of *Miranda* warnings. Seibert thus adds to the confusion surrounding the controlling viewpoint in *Miranda* cases, not only because the Court was so fractured in that case, but also because of the conflicting signals given by even the Justices in the plurality.

4. Subjective (Defendant)?

In contrast to the cases described above, many of the Supreme Court opinions involving waiver and invocation of *Miranda* rights tend to focus on the subjective intent of the particular defendant. Thus, in *Miranda* itself, the Court observed that a valid waiver of *Miranda* rights must be made "voluntarily, knowingly and intelligently." In later cases, the Court elaborated on this standard, noting that it requires analysis of the totality of the circumstances, including such characteristics as the defendant's "age, experience, education, background, and intelligence." Likewise, *Moran v. Burbine* emphasized the subjective nature of the *Miranda* waiver inquiry, holding that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him" have "no bearing" on the validity of a waiver. In fact, the *Burbine* Court expressly rejected any reliance on the police officer's perspective, concluding that "the level of the police's culpability in failing to inform" Burbine that an attorney had tried to reach him did not have "any bearing" on the enforceability of his waivers. "[W]hether intentional or inadvertent," the Court explained, "the state of mind of the

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146 Id. at 622 (Kennedy, J., concurring). Justice Kennedy would continue to apply the ruling in *Elstad*, see *supra* note 143, "unless the deliberate two-step strategy was employed." 542 U.S. at 622 (Kennedy, J., concurring). The four dissenters, on the other hand, thought *Elstad* should control in all consecutive-confession cases, even where the police intentionally resort to the question-first strategy, so that Seibert's second confession was admissible unless it was "involuntary despite the *Miranda* warnings." *Id.* at 628 (O'Connor, J., dissenting).

147 *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see also *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (noting that a *Miranda* waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").


149 *Burbine*, 475 U.S. at 422.

150 *Id.* at 423 (emphasis added).
police is irrelevant to the question of the intelligence and voluntariness” of a Miranda waiver; “even deliberate deception of an attorney could not possibly affect a suspect’s decision to waive his Miranda rights unless he were at least aware of the incident.”

In another opinion issued the same year, however, the Court applied the coercion model and examined the intent of the police in ruling on the validity of a Miranda waiver. In that case, Colorado v. Connelly, the Court observed that the Fifth Amendment’s “sole concern” is “governmental coercion,” and thus the voluntariness of a Miranda waiver turns on “the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.” The Connelly Court upheld a Miranda waiver made by a man who believed the “voice of God” had forced him to confess, rejecting the notion that a waiver is involuntary “whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police.” Although Justices Brennan and Marshall, in dissent, pointed out that the majority’s focus on voluntariness left open the possibility that Connelly’s waiver might still be unenforceable on the grounds that it was not knowing and intelligent, the majority—at least with respect to the voluntariness of Miranda waivers—seemed to shift the focus away from the defendant.

The Court’s opinions dealing with the invocation of Miranda have tended—though not consistently—to turn on the subjective perspective of the particular defendant. Even though Miranda bundled the right to remain silent and the Fifth Amendment right to counsel, emphasizing the importance of an attorney’s presence in order to “protect[] the Fifth Amendment privilege” and specifically “to assure that the individual’s right to choose between silence and speech remains unfettered,” the Court has somewhat surprisingly drawn a distinction between suspects who invoke the right to silence and those who invoke the Miranda right to counsel.

In Michigan v. Mosley, the Court pointed out that a suspect has the “option to terminate questioning,” thereby enabling her to “control the time at which questioning occurs, the subjects discussed, and the duration of the

151 Id. (emphasis added).
153 Id. at 170.
154 Id. For discussion of Connelly’s treatment of the voluntariness due process test, see infra notes 223-30 and accompanying text.
155 See Connelly, 479 U.S. at 187-88 (Brennan, J., dissenting); see also 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 6.9(b), at 585 n.39 (2d ed. 1999) (citing lower court opinions picking up on this distinction).
interrogation.\textsuperscript{157} The Mosley Court then held that the appropriate inquiry in cases where a suspect invokes the right to silence is whether her “‘right to cut off questioning’ was ‘scrupulously honored.’”\textsuperscript{158} Although terms like “right,” “option,” and “control” refer to the suspect, the phrase “scrupulously honor” seemingly switches to the perspective of the police officer. Moreover, in applying its standard and concluding that Mosley’s rights were “scrupulously honored” on the facts there, the Court’s analysis centered on the police. The Court explained that the police had not “failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.”\textsuperscript{159} In addition, the Court hinted at an objective standard focused on the police when it observed that approaching Mosley to ask about a homicide investigation was “quite consistent with a reasonable interpretation” of his “earlier refusal” to discuss “unrelated” robbery charges.\textsuperscript{160}

By contrast, the line of cases involving suspects who invoke the right to counsel, beginning with Edwards v. Arizona,\textsuperscript{161} has not applied Mosley’s “scrupulously honor” test, but instead has adopted a different approach that focuses directly on the suspect’s point of view. Recognizing the importance of “‘preserving the integrity of an accused’s choice to communicate with police only through counsel,’”\textsuperscript{162} the Court has held that a suspect who invokes the right to counsel may not be interrogated “until counsel has been made available to him,”\textsuperscript{163} and in fact “unless . . . counsel [was actually] with him at the time of questioning.”\textsuperscript{164} In holding that these protections bar interrogation even about a different investigation, the Court’s decision in Arizona v. Roberson is laden with language focusing on the suspect’s perceptions:

Roberson’s unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. . . . Unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific. . . .

\textsuperscript{157} 423 U.S. 96, 103-04 (1975).
\textsuperscript{158} Id. at 115 (quoting Miranda, 384 U.S. at 474, 479).
\textsuperscript{159} Id. at 105-06.
\textsuperscript{160} Id. at 105.
\textsuperscript{161} 451 U.S. 477 (1981).
\textsuperscript{163} Edwards, 451 U.S. at 484-85.
\textsuperscript{164} Minnick, 498 U.S. at 153 (finding an Edwards violation even though the suspect had consulted with an attorney several times after invoking the right to counsel).
Further, to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.\textsuperscript{165}

Moreover, in the same opinion, the Court refused to recognize any sort of good-faith exception to the strict protections required by these cases. Noting that its precedents “focus[] on the state of mind of the suspect and not of the police,” the Court “attach[ed] no significance” to the fact that the officer did not realize Roberson had invoked the right to counsel and therefore may not have acted in bad faith.\textsuperscript{166}

5. Objective (Police Officer)

The Court’s unwavering focus on the defendant in the Edwards line of cases came to an abrupt end in Davis v. United States, where the Court switched perspectives and concentrated instead on the reasonable police officer.\textsuperscript{167} Davis held that the Edwards protections are triggered, and a suspect is deemed to have invoked the Miranda right to counsel (at least after an initial waiver of her rights), only if she “unambiguously request[s] counsel”—that is, if she “articulate[s] [her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”\textsuperscript{168} The Court adopted this “objective inquiry” in order to alleviate “difficulties of proof” and provide guidance to the police, but it did not explain why these “difficulties of proof” arise more frequently in defining “invocation” than in

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\textsuperscript{165} 486 U.S. 675, 684, 686 (1988) (emphasis added). The Roberson Court distinguished its prior decision in Mosley, which had not imposed a similarly strict rule when suspects who invoke the right to silence are interrogated about other investigations, on the ground that “a suspect’s decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer’s advice.” Id. at 683.

\textsuperscript{166} Id. at 687 (emphasis added).

\textsuperscript{167} 512 U.S. 452 (1994).

\textsuperscript{168} Id. at 459 (noting, on the other hand, that a suspect will not be deemed to have invoked Miranda, and the police need not discontinue interrogation, if she “makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel”). The lower courts have applied Davis to cases where suspects invoke the right to silence as well. See 2 LAFAVE ET AL., supra note 155, § 6.9(g), at 615-16 & n.171 (citing cases).

As commentators have observed, however, expecting suspects to make “direct, assertive, unqualified invocations of counsel” is not only inconsistent with Miranda’s basic premise that custodial interrogation is inherently coercive, but is also “a gendered doctrine that privileges male speech norms, . . . thus disadvantag[ing] women and other marginalized and relatively powerless groups in society, who are more likely to use less direct and assertive patterns of speech.” Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 259, 320 (1993).
\end{flushright}
cases raising other Miranda and Edwards issues. The Court likewise failed to justify its choice of an objective standard focused on the perceptions of the police rather than the defendant, the objective standard that is used in defining custody in order to assuage similar concerns about the administrability of Miranda. Perhaps the Court’s approach is more defensible if limited to cases where a suspect’s ambiguous reference to counsel comes after an initial waiver of Miranda rights, as was true in Davis. As the Court noted, a defendant who waives Miranda “has indicated his willingness to deal with the police unassisted.” Nevertheless, while the Court’s statement of its holding in Davis is so qualified, other language in the majority opinion is not so limited and a number of lower courts use the Davis standard even where no initial waiver occurred.

Moreover, Davis is not the only opinion in this area to stray from a focus on the defendant’s perspective. In an earlier decision, Oregon v. Bradshaw, the Court was asked to identify the circumstances in which a defendant who has invoked her Miranda right to counsel loses the Edwards

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169 Davis, 512 U.S. at 458-59.

170 The Davis Court did express a desire to avoid “needlessly prevent[ing] the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.” Id. at 460 (emphasis added). That concern does not, however, dictate a “reasonable police officer” standard here instead of the suspect-focused test used in other Miranda cases. Questions about custody, for example, turn on the defendant’s perspective, see supra notes 115-18 and accompanying text, even though “it is police officers who must actually decide” whether a suspect is in custody and therefore “whether or not they can question” her without Miranda warnings. Davis, 512 U.S. at 461.

171 Moreover, the approach that had been adopted by a majority of lower courts prior to Davis and that was endorsed by the four Justices in the minority—providing that in situations where the police are not sure about a suspect’s preferences, they simply “stop their interrogation and ask [the suspect] to make his choice clear”—would seem to assuage these fears. Id. at 466-67, 466 n.1 (Souter, J., concurring).

172 Davis, 512 U.S. at 460-61.

173 See id. at 461 (“We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.”).

174 See id. at 460 (acknowledging that its ruling “might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present,” but expressing the view that “the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves” and “‘[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process’” (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986))); id. at 461 (“Although Edwards provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.”)).

175 See 2 LAFAVE ET AL., supra note 155, § 6.9(g), at 615 & n.164 (citing cases).
protection by "initiating dialogue with the authorities." In finding that
the suspect had in fact come within this "initiation" exception, the
Bradshaw plurality at first concentrated on the defendant's subjective
intent: "[T]he respondent's question in this case . . . evinced a willingness
and a desire for a generalized discussion about the investigation; it was not
merely a necessary inquiry arising out of the incidents of the custodial
relationship." The plurality then switched in the following sentence to
the perspective of the reasonable police officer, observing that the
defendant's question "could reasonably have been interpreted by the officer
as relating generally to the investigation." In the sentence after that, the
plurality switched again and focused on the actual officer involved when it
remarked, "That the police officer so understood [the question] is apparent
from the fact that he immediately reminded the accused that '[you] do not
have to talk to me.'"

Whatever point of view is controlling in determining the reach of the
"initiation" exception, Davis's objective standard seems consistent with the
Court's opinion in New York v. Quarles. In Quarles, the Court created
the so-called "public safety exception" to Miranda and appeared to adopt a
test focused on the reasonable police officer. Specifically, the Court held
that police need not give Miranda warnings before asking questions
"reasonably prompted by a concern for the public safety."
The literal
terms of this definition suggest an objective inquiry, and the Court
expressly disclaimed any reliance on the subjective intent of the police
officers—indicating that the public safety exception "does not depend upon
the motivation of the individual officers involved." Nevertheless, the
Court seemed to vacillate somewhat on this point, commenting later in the
opinion, "We think police officers can and will distinguish almost
instinctively between questions necessary to secure their own safety or the
safety of the public and questions designed solely to elicit testimonial

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42, 46 (1982) (per curiam)).
176 Id. at 1045-46. The defendant's question was, "Well, what is going to happen to me
now?", an inquiry that the four dissenters pointed out "might well have evinced a desire for a
'generalized' discussion" if "posed by Jean-Paul Sartre before a class of philosophy
students," but here showed only a "desire . . . to find out where the police were going to
take him." Id. at 1053, 1055 (Marshall, J., dissenting).
177 Id. at 1046 (plurality opinion).
179 Id. at 656.
180 Id.
181 Id.
However Quarles is interpreted, the public safety exception clearly does not turn on the defendant's perspective—the Court in Quarles did not stop to ask how the defendant or a reasonable person in his position would have felt.\textsuperscript{183}

6. Conclusion

Similar equivocation can be found generally throughout the Supreme Court opinions interpreting the reach of Miranda; in fact, the Court has fluctuated widely in its choice of perspective in the Miranda line of cases. Although the Court has consistently indicated that the fundamental purpose of Miranda is to alleviate the inherent coerciveness of custodial interrogation, it is not always obvious whether the Court is subscribing to the consent model or the coercion model. Miranda itself seemingly endorsed the consent model and suggested the defendant's point of view should control when it spoke in terms of ensuring that a suspect's decision to speak with the police is "truly the product of free choice."\textsuperscript{184}

Subsequently, the Court's desire to ease the administrative burdens on the police led it to apply an objective standard in some situations—in defining custody, for example. Many of the waiver and invocation cases, however, likewise adhere to the consent model while focusing on the subjective intent of the particular suspect in question.

The definition of "interrogation" is more difficult to categorize because the Court's opinions have sent such conflicting signals as to whose point of view is paramount on that issue. The fact that the concepts of custody and interrogation play an identical role in Miranda jurisprudence—both necessary to trigger the right to warnings—calls for using comparable standards and focusing on similar perspectives in defining each term.

\textsuperscript{182} Id. at 658-59 (emphasis added); see also Marc Schuyler Reiner, Note, The Public Safety Exception to Miranda: Analyzing Subjective Motivation, 93 Mich. L. Rev. 2377, 2379, 2399 (1995) (taking the position that Quarles "actually contemplates and requires analysis of the officer's subjective motivation," and finding that "in practice most lower courts take into account an officer's subjective beliefs and purposes when applying the public safety exception"). But cf. Missouri v. Seibert, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) (describing Quarles as "reject[ing] an inquiry into the subjective intent of the police officer").

\textsuperscript{183} Rather, it was the Quarles dissenters who focused on the suspect. The dissent chided the majority for "expressly inviting police officers to coerce defendants into making incriminating statements," without making any pretense that public safety questions are "any less coercive" than interrogations generally. Quarles, 467 U.S. at 684, 686 (Marshall, J., dissenting).

\textsuperscript{184} Miranda v. Arizona, 384 U.S. 436, 457 (1966); see also id. at 469 (commenting on the importance of suspects making "unfettered" choices).
If the consent model prevails and the defendant’s point of view is therefore dispositive, using an objective standard in ascertaining, for example, whether a suspect was in custody and undergoing interrogation may be justified by the concern that constitutional doctrines should not vary depending on a particular suspect’s state of mind. The consent model envisions, however, that the concept of “voluntary” waiver will be a subjective one that may well vary from person to person. Therefore, questions surrounding waiver and invocation (the flip side of waiver in some sense) should turn on what the particular defendant intended to do.

When the Court instead centers on the police officer’s point of view in resolving *Miranda* issues, it is arguably switching to the coercion model, even though its opinions are typically not phrased in such terms. Under this model, the purpose of *Miranda* is to regulate police behavior—specifically, to deter the police from engaging in coercive interrogation techniques. The consent model is seemingly more true to the language and spirit of *Miranda*, but if the Court chooses to follow the coercion model, it should—as explained above—focus on the police officer’s perspective, taking into account both subjective and objective factors. Thus, for example, the term “interrogation” would encompass cases where the police intended to elicit a confession, or where they knew or should have known their tactics were likely to have that result. Similarly, they would be required to cease questioning if they knew or reasonably should have known the defendant had invoked her *Miranda* rights. The Court is obviously free to change its views about *Miranda*, but its habit of inexplicably shifting perspective from case to case—or of hiding the perspective it views as controlling—cannot be justified.

B. THE SIXTH AMENDMENT CASES

1. Introduction: The Purposes of the Sixth Amendment

Although defendants most frequently challenge the admissibility of confessions on *Miranda* grounds, the Sixth Amendment right to counsel provides a separate vehicle for suppression in cases where *Miranda* does not apply or where the police complied with the dictates of *Miranda*.

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186 See supra text accompanying note 110.
188 As discussed above, see supra notes 115-32 and accompanying text, a suspect is entitled to *Miranda* warnings only when she is in custody and subjected to interrogation.
The Supreme Court has identified preservation of the adversary process as the primary purpose of the Sixth Amendment right to counsel. As the Court explained in *Maine v. Moulton*:

> The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice. Embodying "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself," the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.  

Given this objective, the Court has refused to limit the right to counsel to the trial itself, but instead has interpreted the Sixth Amendment to guarantee defendants the right "to rely on counsel as a 'medium'" between themselves and the government at any "'critical' stage[] in the criminal justice process."  

Premised on different concerns than *Miranda*, which is aimed at dispelling the inherent coerciveness of custodial interrogation, the Sixth Amendment need not turn on the same point of view. In fact, outside the waiver and invocation context, the Court's Sixth Amendment cases tend to center on the subjective intent of the police. Thus, a table summarizing the Court's choice of perspective in key Sixth Amendment opinions looks like this:

### Table 3

*Sixth Amendment Confession Cases*

<table>
<thead>
<tr>
<th>Police Officer</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>Invocation: <em>Cobb</em> concurrence</td>
</tr>
<tr>
<td></td>
<td>&quot;Interrogation&quot;/Deliberately Elicit</td>
</tr>
<tr>
<td>Subjective</td>
<td>Waiver Invocation</td>
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Focusing on the police makes sense in light of the Sixth Amendment's interest in safeguarding the adversary process, an interest that in essence

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The Sixth Amendment, by contrast, guarantees a defendant the right to counsel at any "critical stage" of the prosecution, *Brewer v. Williams*, 430 U.S. 387, 404 (1977), once "adversary judicial proceedings" have begun. *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Thus, a defendant is protected by the Sixth Amendment even when she is not in custody. In addition, the Fifth and Sixth Amendment definitions of "interrogation" differ. *See infra* notes 192-95 and accompanying text.


190 *Id.* at 176, 170 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).
breaks down to the deterrence-based rationale of discouraging the police from “circumvent[ing] and thereby dilut[ing]” the right to counsel. Nevertheless, deterrence theory calls for abandoning the Court’s exclusive reliance on subjective standards and considering objective measures as well.

2. Subjective (Police Officer)

In deciding that “interrogation” is a “critical stage” of the prosecution, at which the Sixth Amendment guarantees criminal defendants the right to counsel, the Court has defined “interrogation” for Sixth Amendment purposes as “deliberately elicit[ing]” information from a suspect. In this context then, the intent of the police officer is controlling. Thus, in Brewer v. Williams, the Court found that Detective Leaming’s notorious Christian Burial speech violated the Sixth Amendment, reasoning that the officer acknowledged he “was sure hoping to find out where that little girl was.” By contrast, as noted above, the Court has indicated that a suspect is not interrogated for purposes of Miranda simply because the police are “hoping” to obtain information.

Miranda and the Sixth Amendment are not designed to serve the same goal, and therefore it is not surprising that the cases adopt differing perspectives. In fact, the Court recognized as much in Rhode Island v. Innis when it defined “interrogation” for Miranda purposes and noted that the Fifth and Sixth Amendment “definitions of ‘interrogation’” are “not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.”

191 Id. at 171.
193 430 U.S. at 399 (quoting trial testimony) (emphasis added). During a 160-mile car ride from Davenport to Des Moines, Detective Learning told Williams:

I feel that you yourself are the only person that knows where this little girl’s body is, . . . and, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered.

Id. at 392-93.
195 446 U.S. 291, 300 n.4 (1980), described supra notes 123-27 and accompanying text. In fact, the Innis Court noted that “the term ‘interrogation’” might not be “apt” in the Sixth Amendment context. Id. More recently, in Fellers v. United States, 540 U.S. 519, 524 (2004), the Court distinguished the Sixth Amendment’s “deliberate elicitation standard” from Miranda’s “custodial-interrogation standard,” rejecting the lower court’s conclusion that “the absence of an ‘interrogation’ foreclosed” Fellers’ Sixth Amendment claim. Thus, it is important to recognize the distinction between Miranda and Sixth Amendment challenges, whether one does so by restricting the term “interrogation” to Miranda and using the phrase [Vol. 98]
Given that the notion of preserving the adversary process in this context essentially means deterring the police from acting to circumvent it, it makes sense to focus on the police in interpreting the reach of the Sixth Amendment. While the deterrence theories explained above support the Court's decision to look at the police officer's perspective, they suggest the importance of considering not only the officer's subjective state of mind but also objective standards of reasonable police behavior. The Court has therefore set the bar too high in adopting a purely subjective standard and requiring proof of "deliberateness" on the part of the police. The adversary process can be equally short-circuited, and the defendant's ability to "rely on counsel as a medium" between herself and the government equally impaired, if the police knowingly or negligently circumvent the right to counsel.

Thus, the Court's very literal interpretation of the phrase "deliberately elicit" in Kuhlmann v. Wilson—which announced that the Sixth Amendment is violated only if government agents "took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"—was excessively narrow, leading the Court to the conclusion that there was no constitutional bar prohibiting the police from placing an undercover informant in the defendant's cell who "

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197 See supra notes 30-34 and accompanying text.
199 See Maine v. Moulton, 474 U.S. 159, 176-77 (1985) (holding that the Sixth Amendment prohibits the police from "knowingly circumvent[ing]" the right to counsel, and therefore finding a Sixth Amendment violation where the police recorded conversations between the defendant and his codefendant, who was acting as a police informant, explaining that even if the police were properly motivated by the desire to investigate other, uncharged offenses against Moulton, they "knew...Moulton and Colson were meeting for the express purpose of discussing the pending charges and planning a defense for trial" and "thus knew that Moulton would make statements that he had a constitutional right not to make" without a lawyer) (emphasis added).
200 See United States v. Henry, 447 U.S. 264, 274, 271 (1980) (concluding that the Sixth Amendment bars the police from "intentionally creating a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel," and thus finding a Sixth Amendment violation here, where the government placed an undercover informant in the defendant's cell, reasoning that "[e]ven if the [F.B.I. agent] did not intend that [the informant] take affirmative steps to secure incriminating information, he must have known that such propinquity likely would lead to that result") (emphasis added).
listened' to [the defendant’s] 'spontaneous' and 'unsolicited' statements.\footnote{Kuhlmann v. Wilson, 477 U.S. 436, 459-60 (1986) (quoting lower court).}

While this conclusion might make sense if the defendant’s point of view were controlling,\footnote{Cf. Illinois v. Perkins, 496 U.S. 292 (1990) (finding no violation of Miranda under similar circumstances because Perkins did not realize he was speaking to a government agent and therefore did not feel coerced). For further discussion of Perkins, see supra text accompanying notes 133-36.} it is inconsistent with the Sixth Amendment’s deterrent rationale and consequent focus on the police.

3. Subjective (Defendant)

The primary area in which Sixth Amendment jurisprudence deviates from focusing on the subjective intent of the police is in the waiver and invocation cases. Even more consistently than in its other waiver cases, the Court follows the consent model in analyzing waivers of the Sixth Amendment right to counsel, focusing on the subjective intent of the defendant and asking whether the defendant ""'intentional[ly] relinquish[ed] or abandon[ed] a known right.'\footnote{Brewer v. Williams, 430 U.S. 387, 404 (1977) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).} In other words," the Court explained in \textit{Patterson v. Illinois}, "the accused must ‘kno[w] what he is doing’ so that ‘his choice is made with eyes open.’\footnote{487 U.S. 285, 292 (1988) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).}"

The Sixth Amendment opinions analyzing invocation issues likewise seem to focus on the defendant’s subjective intent. As the Court indicated in \textit{Michigan v. Jackson}, "\textit{[W]e presume that the defendant requests the lawyer’s services at every critical stage of the prosecution.}"\footnote{475 U.S. 625, 633 (1986). The Court warned, however, that it was not "suggest[ing] that the right to counsel turns on such a request." \textit{Id.} at 633 n.6 (citing \textit{Williams}, 430 U.S. at 404 ("[T]he right to counsel does not depend upon a request by the defendant.").}, and \textit{Carnley v. Cochran}, 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."). Nonetheless, in \textit{Texas v. Cobb}, three Justices took the position that \textit{Jackson} should be overruled, or at least that \textit{Miranda}'s unambiguous invocation rule, which focuses on the perspective of the reasonable police officer, ought to apply to the Sixth Amendment as well. 532 U.S. 162, 174-77 (2001) (Kennedy, J., concurring); see also \textit{Davis v. United States}, 512 U.S. 452 (1994), described supra text accompanying notes 167-74. For further discussion of the Cobb concurrence, see infra notes 209-11 and accompanying text.} Accordingly, the Court held that Jackson’s request for appointed counsel at arraignment invoked his Sixth Amendment rights for purposes of subsequent interrogations as well and therefore barred the police from initiating further questioning.\footnote{See Jackson, 475 U.S. at 636.}
rights prior to interrogation, he did not thereby waive his Sixth Amendment right to counsel.\textsuperscript{207} The Court did come to the opposite conclusion in \textit{Patterson v. Illinois}, finding that the defendant’s waiver of \textit{Miranda} also constituted a waiver of his Sixth Amendment rights. The majority reasoned, though, that Patterson had never invoked his Sixth Amendment rights—he “at no time sought to exercise his right to have counsel present”—and distinguished \textit{Jackson} as “turn[ing] on the fact that the accused ‘ha[d] asked for the help of a lawyer’ in dealing with the police.”\textsuperscript{208} Despite the difference in outcome, the defendant’s intent was controlling in both cases.

In a concurring opinion written by Justice Kennedy in \textit{Texas v. Cobb}, however, three Justices suggested that the same “reasonable police officer” standard adopted in \textit{Davis v. United States}\textsuperscript{209} for determining whether suspects have effectively invoked their \textit{Miranda} rights ought to apply in the Sixth Amendment context as well.\textsuperscript{210} It is too early to predict whether these views will persuade a majority of the Court, and lower courts have differed in their response to Justice Kennedy’s suggestion.\textsuperscript{211}

Nevertheless, the focus on the reasonable police officer advocated in the \textit{Cobb} concurrence is arguably consistent with \textit{Nix v. Williams}, where the Court created the inevitable discovery exception to the fruits of the

\textsuperscript{207} See id. at 635-36.

\textsuperscript{208} \textit{Patterson}, 487 U.S. at 291 (quoting \textit{Jackson}, 475 U.S. at 631); see also id. at 290 n.3 (observing that Patterson “had not retained, or accepted by appointment, a lawyer to represent him” and therefore could not take advantage of the “distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship”). The other difference between the two cases was that Patterson, unlike Jackson, initiated the conversation with the police. See id. at 288.

The \textit{Patterson} Court left open, however, whether a waiver of \textit{Miranda} also waives the Sixth Amendment in cases where the defendant was not informed that she had been indicted, see id. at 295 n.8, and also warned that its decision did “not mean, of course, that all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under \textit{Miranda}.” Id. at 296 n.9 (explaining that “the Sixth Amendment’s protection of the attorney-client relationship . . . extends beyond \textit{Miranda}’s protection of the Fifth Amendment right to counsel,” and citing \textit{Moran v. Burbine}, 475 U.S. 42 (1986) (described \textit{supra} text accompanying notes 149-51), as a case where a valid waiver of the Sixth Amendment could not have been found).


\textsuperscript{210} \textit{Texas v. Cobb}, 532 U.S. 162, 175-77 (2001) (Kennedy, J., concurring); see also \textit{supra} note 205.

\textsuperscript{211} Compare \textit{United States v. Spruill}, 296 F.3d 580, 588 (7th Cir. 2002) (applying \textit{Davis} to the Sixth Amendment), with \textit{Bui v. DiPaolo}, 170 F.3d 232, 240 n.5 (1st Cir. 1999) (noting that “\textit{Davis} did not deal with the Sixth Amendment, but, rather, with the Fifth Amendment right to counsel articulated in \textit{Miranda}”).
poisonous tree doctrine when *Brewer v. Williams* returned to the Supreme Court for a second time.\(^{212}\) In *Nix*, the Court analogized its Sixth Amendment confession cases to the Fourth Amendment exclusionary rule, emphasizing the importance of deterring constitutional violations and ensuring the reliability of evidence presented at trial\(^{213}\)—concerns that have often led to an objective standard focused on the reasonable police officer in Fourth Amendment decisions.\(^{214}\) Whether the Court continues to take a consistent approach to the question of perspective in Sixth Amendment cases therefore remains to be seen.

4. Conclusion

Fewer of the Supreme Court’s Sixth Amendment rulings involve the admissibility of confessions, and its case law in this area is marked by a more uniform choice of perspective. The Court fairly reliably opts for a subjective standard focused on the police officer, except in the waiver and invocation context, where the defendant's point of view is dispositive.

Because the fundamental purpose of the Sixth Amendment is to protect the adversary process, the “deliberately elicit” definition of Sixth Amendment “interrogation” appropriately focuses on the police, on whether they have acted so as to short-circuit the adversary process and the fairness of the trial. Preventing the police from disrupting the adversary process is essentially a deterrence-based concept, however, and an exclusively subjective approach undermines the interest in deterrence. As explained above with respect to the Fourth Amendment,\(^{215}\) deterrence is maximized by incorporating both subjective and objective considerations. Confessions should therefore be suppressed not only in cases where the police intended to elicit an incriminating statement, but also where they knew or reasonably should have known they were likely to do so.

To date, the Court’s Sixth Amendment waiver and invocation cases—unlike comparable rulings in the Fourth Amendment and *Miranda* contexts\(^{216}\)—have consistently adhered to the consent model and therefore properly consider the subjective intent of the particular defendant to be controlling. The *Cobb* concurrence may foreshadow an eventual shift to the coercion model, but, if that change ultimately comes, the Court should not simply endorse the views expressed in that opinion wholesale. Rather, the Court should take into account both the subjective intent of the police and

\(^{213}\) See *id.* at 442-43, 446; see also *supra* notes 75-78 and accompanying text.
\(^{214}\) See *supra* notes 36-38 and accompanying text.
\(^{215}\) See *supra* notes 30-34 and accompanying text.
\(^{216}\) See *supra* notes 87-97, 147-77 and accompanying text.
the objective reasonableness of their actions in the interest of furthering the deterrent rationale that underlies the coercion model.  

C. THE VOLUNTARINESS DUE PROCESS CASES

1. Introduction: The Purposes of the Voluntariness Due Process Test

The original constitutional yardstick by which courts measured the admissibility of confessions was the Due Process Clause. Dating back to the Supreme Court’s 1936 opinion in *Brown v. Mississippi,* the use of an involuntary confession was deemed to violate a criminal defendant’s due process rights. Over the years, the Supreme Court’s voluntariness due process opinions have identified three rationales for excluding involuntary confessions: to enhance the reliability of confessions, to deter abusive interrogation methods, and to ensure that confessions are in fact an exercise of the defendant’s free will. Accordingly, the Court has traditionally defined voluntariness using a totality of the circumstances test that takes into account both the defendant’s subjective state of mind and the conduct of the police.

Beginning in the mid-1980s, the Court began to focus more heavily on the deterrent rationale, shunting to the side the other two interests protected by the voluntariness due process test. Again, however, the Court’s use of perspective has not been entirely consistent in the few due process cases it has decided during the past two decades. A table summarizing the choice of perspective made in some of the Court’s voluntariness due process rulings looks like this:

<table>
<thead>
<tr>
<th>Police Officer</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td></td>
</tr>
</tbody>
</table>
| Subjective     | *Colorado v. Connelly* | Traditional Totality of the Circumstances Test *Arizona v. Fulminante*

As the emphasis on deterrence has become more pronounced, the Court’s voluntariness due process cases have begun to adhere more closely

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217 See *supra* notes 110 & 186 and accompanying text.
218 297 U.S. 278 (1936).
to the coercion model, focusing more on the police and, in particular, on the subjective intent of the particular officer involved. Nevertheless, if deterrence is king here, as in the Fourth Amendment cases, both the subjective intent of the police officers and the objective reasonableness of their conduct ought to be relevant.

2. Subjective (Defendant)

The Court determines voluntariness by using a totality of the circumstances test, examining both the subjective characteristics of the particular defendant and the nature of the interrogation process. Consistent with the consent model, the inquiry “depend[s] on the actual mindset of a particular suspect”—that is, on whether “the defendant’s will was overborne,” a question that logically can depend on ‘the characteristics of the accused.” In addition to the length of the questioning and the coerciveness of the interrogation tactics employed by the police, the Court has therefore considered subjective factors—such as the defendant’s age, size, intelligence, education, mental and physical condition, and prior experience with law enforcement—in evaluating the voluntariness of her confession.

3. Subjective (Police Officer)

In *Colorado v. Connelly*, however, the Court departed from these principles, relying more heavily on the coercion model and therefore focusing on the police officer. Emphasizing only one of the three rationales for suppressing involuntary confessions—to “deter future

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221 *Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004) (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), and Schneckloth, 412 U.S. at 226); see also *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (acknowledging that “as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the ‘voluntariness’ calculus”).

222 See, e.g., *Alvarado*, 541 U.S. at 668; *Arizona v. Fulminante*, 499 U.S. 279, 286 n.2 (1991). See generally 2 LAFAVE ET AL., supra note 155, § 6.2(c), at 460-62. The voluntariness due process test has been characterized as “‘useless’ . . . ‘legal double-talk.’” *Miller v. Fenton*, 474 U.S. 104, 116 n.4 (1985) (quoting ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955); and Monrad G. Paulsen, The Fourteenth Amendment and the Third Degree, 6 STAN. L. REV. 411, 430 (1954)). It was in large part the Court’s dissatisfaction with the voluntariness due process approach that led to *Miranda’s quest for concrete constitutional guidelines for law enforcement agencies and courts to follow.* *Miranda v. Arizona*, 384 U.S. 436, 442 (1966); see also *Dickerson*, 530 U.S. at 442 (observing that the *Miranda* Court “concluded that something more than the totality test was necessary”).

223 479 U.S. at 163-67.
violations of the Constitution”—the Court held that a confession cannot be characterized as involuntary absent some evidence of “police overreaching” or “coercive police conduct.”\textsuperscript{224} The Court acknowledged that a defendant’s mental condition is “surely relevant to [her] susceptibility to police coercion,” but rejected a “free will” approach under which “a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional ‘voluntariness.’”\textsuperscript{225} In so doing, the Court rejected an involuntariness claim made by a defendant who approached an off-duty police officer to confess to the murder of a young girl, even though it turned out the defendant was “[r]eluctantly following” the “voice of God,” which had “instructed [him] to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver,” and then “either to confess to the killing or to commit suicide.”\textsuperscript{226} In concluding that the confession was nonetheless voluntary, the Court explained that “the police committed no wrongful acts.”\textsuperscript{227}

Not only does Connelly’s emphasis on deterrence ignore the other reasons for suppressing involuntary confessions, which turn more on the suspect’s perspective,\textsuperscript{228} but the Court’s failure to define police

\textsuperscript{224} Id. at 163, 164, 166. But cf. Sanchez-Llamas v. Johnson, 126 S. Ct. 2669, 2681 (2006) (mentioning also the concern for reliability as a factor motivating the suppression of involuntary confessions); Dickerson, 530 U.S. at 433 (noting likewise that “coerced confessions are inherently untrustworthy”).

\textsuperscript{225} Connelly, 479 U.S. at 165, 169, 164.

\textsuperscript{226} Id. at 161.

\textsuperscript{227} Id. at 165. The Court made reference to the state action doctrine in Connelly, noting that its holding was “entirely consistent” with the requirement that every constitutional claim involve governmental action. Id. Even if the majority correctly found an absence of state action on the initial facts of Connelly—when the defendant first “approached Officer Anderson and, without any prompting, stated that he had murdered someone and wanted to talk about it,” id. at 160—Justice Stevens pointed out that the officer had “a fundamentally different relationship” with Connelly after “elect[ing] to handcuff him and . . . take him into custody,” at which point “the custodial relationship was established” and the officer’s “questioning assumed a presumptively coercive character.” Id. at 172-73 (Stevens, J., concurring in part and dissenting in part). Moreover, in the dissent’s view, the state action requirement was satisfied because another state actor—the courts—admitted Connelly’s confession. See id. at 180 (Brennan, J., dissenting). Whether or not there was state action on the unusual facts of Connelly, the reach of the Supreme Court’s decision is not necessarily limited to cases where the police engaged in no action whatsoever to elicit a confession. See \textit{infra} note 229 and accompanying text.

“overreaching” has led some lower courts to find confessions voluntary even when the police actually interrogated suspects they knew or should have known were mentally unbalanced.\(^\text{229}\) If deterrence is the driving force in this area, just as it is in the Fourth Amendment context, it seems odd that the Court has not endorsed an objective definition of “overreaching” more in line with its Fourth Amendment jurisprudence—asking, for example, whether a reasonable police officer would have had qualms about the defendant’s mental fitness.\(^\text{230}\)

Despite Connelly’s focus on the police, the Court seemingly returned to the consent model and the defendant’s point of view five years later in Arizona v. Fulminante.\(^\text{231}\) Fulminante made incriminating statements to an undercover jailhouse informant who offered to protect him from threats of “rough treatment” he was receiving from other prisoners, but only if he admitted murdering his stepdaughter.\(^\text{232}\) In finding the confession involuntary, the Court cited Fulminante’s subjective characteristics.\(^\text{233}\) The Court also adverted to the perspective of the police when it found “a credible threat of physical violence,”\(^\text{234}\) but then turned back to the

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229 See 2 LAFAVE ET AL., supra note 155, § 6.2(c), at 463-64 (citing conflicting lower court cases on this point). Compare Welsh S. White, What Is an Involuntary Confession Now?, 50 RUTGERS L. REV. 2001, 2019 (1998) (maintaining that Connelly does not necessarily permit the police to “exploit[] a suspect’s known weaknesses” because Connelly “gave an unsolicited confession,” “the police exerted no pressure whatsoever . . . to confess,” and they “had no reason to be aware that he was suffering from a serious mental disability”), with Benner, supra note 228, at 138 (concluding that the police officer in Connelly did not act in good faith, and in fact was on notice that Connelly was mentally ill, because the officer “thought Connelly was a ‘crackpot’ and had a ‘feeling’ that he had been in a mental institution before”).

230 Cf. supra notes 36-38 and accompanying text (adopting such a standard in Fourth Amendment context).


232 Id. at 286. The informant told Fulminante, “You have to tell me about it . . . [f]or me to give you any help.” Id. at 283.

233 See id. at 286 n.2 (observing, for example, that Fulminante “possesse[d] low average to average intelligence[,] . . . dropped out of school in the fourth grade[,] . . . [was] short in stature and slight in build[,] [and] . . . [a]lthough he had been in prison before, he had not always adapted well to the stress of prison life”).

234 Id. at 288; see also id. at 287 (“Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient.”); id. at 286 (noting that the lower court concluded that “Sarivola’s promise was ‘extremely coercive’” (quoting State v. Fulminante, 778 P.2d 602, 608 (Ariz. 1989))).
defendant’s point of view in concluding that “it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess.”\(^{235}\) Fulminante therefore suggests that the Connelly Court can perhaps be taken at its word—that it intended only to require some evidence of coercive police conduct as “a necessary predicate” to a finding of involuntariness.\(^{236}\) If so, Connelly may not have completely shifted to the coercion model and moved the focus of the voluntariness due process inquiry away from the defendant’s subjective perspective.

If Fulminante can thereby be reconciled with Connelly, its relationship with Illinois v. Perkins, the factually similar Miranda case decided just a year earlier,\(^{237}\) remains to be considered. In Perkins, an opinion the Fulminante majority interestingly failed even to cite, the Court concluded that questioning by an undercover police officer did not violate Miranda.\(^{238}\) The four Fulminante dissenters predictably picked up on Perkins, complaining that “[s]ince Fulminante was unaware that Sarivola was an FBI informant, there existed none of ‘the danger of coercion resulting from the interaction of custody and official interrogation.’”\(^{239}\) Perhaps the cases were different in the minds of the four Justices who joined both majority opinions\(^{240}\) because they involved separate constitutional doctrines: Miranda (at issue in Perkins) is aimed at alleviating the coerciveness of custodial interrogation and therefore turns on the suspect’s perspective; Connelly suggests that the voluntariness due process test (at issue in Fulminante) is aimed at deterrence and thus focuses on the police. Distinguishing Fulminante from Perkins on those grounds, however, indicates that Connelly did in essence adopt the coercion model and substantially retreat from the Due Process Clause’s focus on the defendant, and the attempt above to square Fulminante and Connelly therefore breaks down. In the end, the cases, and the divergent perspectives on which they turn, cannot be reconciled.

4. Conclusion

Historically, the Court’s voluntariness due process cases have examined both the characteristics of the particular defendant and the

\(^{235}\) Id. at 288.


\(^{238}\) Perkins, 496 U.S. at 300.

\(^{239}\) Fulminante, 499 U.S. at 306 (Rehnquist, C.J., dissenting) (quoting Perkins, 496 U.S. at 297).

\(^{240}\) The four Justices were Justices White, Blackmun, Stevens, and Scalia.
interrogation tactics used by the police, with a clear emphasis on the
defendant's subjective point of view. By elevating the goal of deterrence,
and equating involuntariness with an absence of coercion, in some—but not
all—of its opinions, the Court has moved toward the coercion model and
shifted the focus more to the police.

Although the Court claimed in Fulminante that it has “used the terms
‘coerced confession’ and ‘involuntary confession’ interchangeably ‘by way
of convenient shorthand,’” the Court’s inconsistent treatment of
perspective in its voluntariness due process opinions reflects the same
disparities between the consent and coercion models found in other criminal
procedure cases that evaluate whether a defendant’s choice was compelled
or freely made. Here, as in those other areas, the Court inexplicably
shifts between the two models. If the voluntariness due process test is
intended to ensure that a defendant’s decision to confess was in fact made
willingly, the consent model is controlling and the focus should be on the
particular defendant’s subjective state of mind. On the other hand, the view
that the voluntariness due process test is meant to deter abusive police
interrogation techniques implicates the coercion model and its emphasis on
the perspective of the police. Again, however, ignoring either the
subjective intent of the officer or objective standards of reasonable police
behavior undermines the interest in deterrence, and therefore both
subjective and objective considerations should come into play if the
coercion model prevails.

IV. THE ATTRIBUTES OF SUBJECTIVE AND OBJECTIVE TESTS

The reasons motivating the Supreme Court to adopt such widely
divergent perspectives in its decisions governing search and seizure
questions and the admissibility of confessions are far from clear. As
discussed above, the shifts in perspective are not justified by the governing
principles purportedly underlying the various constitutional provisions at
issue. Thus, for example, while a Fourth Amendment jurisprudence aimed
primarily at deterrence might appropriately concentrate on the party to be
deterred—the police—the Court has not invariably adopted the perspective
of the police officer in its search and seizure decisions. Moreover, by
ignoring subjective considerations in some cases that do focus on the
police, the Court has acted to undermine its stated goal of deterrence.

241 Fulminante, 499 U.S. at 287 n.3 (quoting Blackburn v. Alabama, 361 U.S. 199, 207
(1960)).
242 See supra notes 79-81, 87-97, 147-55, 203-04 and accompanying text.
243 See supra notes 79-90 and accompanying text.
244 See supra notes 42-47 and accompanying text.
Similarly, while the Court’s claim that *Miranda* warnings are designed to dispel coercion has led it to focus, in some instances, on the party who feels coerced—the suspect—the Court has not always looked at the defendant’s perceptions in interpreting the reach of *Miranda*. Rather, in this and other contexts where the Court must assess whether a defendant’s decision was freely made or compelled by the police, the Court has switched between the consent and coercion models and the differences in perspective associated with them.

If the Supreme Court’s choice of perspective is not dictated by the interests the particular constitutional rights are designed to protect, perhaps at least its selection of an objective or subjective standard can be explained by the attributes of the tests themselves. Subjective tests have come under attack in other contexts on the grounds that “the impossibility of nicely measuring an individual’s subjective characteristics incurs ‘special costs.’” At times, such concerns can also be found in the Court’s criminal procedure opinions. Specifically, the Court has criticized subjective standards on three levels: subjective tests are difficult for courts to apply, subjective inquiries focused on the defendant provide little guidance to the police, and objective standards best serve the goal of even-handed law enforcement. As each of these objections is addressed below, it becomes clear that they cannot account for the varying perspectives found in the Court’s criminal procedure rulings.

A. EFFICIENT ALLOCATION OF JUDICIAL RESOURCES

With respect to judicial efficiency, the Court noted in *United States v. Leon* that “‘sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.’” The *Leon* Court therefore “confined” the concept of good faith to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” Likewise, in creating a public safety

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245 See *supra* notes 123-32, 143-46, 152-55, 167-83 and accompanying text.

246 See *supra* notes 79-81, 87-97, 203-14, 218-40 and accompanying text.

247 HOLMES, supra note 6, at 108.


249 468 U.S. 897, 919 n.23 (1984) (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)); see also id. at 924 (noting that “the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice” and “the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time”).

250 Id. at 919 n.23.
exception to Miranda in New York v. Quarles, the Court expressed reservations about a subjective standard based on "the motivation of the individual officers involved." The Court observed that police officers often "act out of a host of different, instinctive, and largely verifiable motives" and concluded that the public safety exception should not turn on "post hoc findings . . . concerning the subjective motivation of the arresting officer."

Nevertheless, the judicial system engages in this type of subjective fact-finding every day—evaluating, for example, a defendant's mens rea in criminal cases or the intent to discriminate required to prove an equal protection violation. The Court acknowledged as much in City of Indianapolis v. Edmond, noting that despite "the challenges inherent" in a subjective "purpose inquiry," constitutional standards often require such assessments in order to "sift[] abusive governmental conduct from that which is lawful." It is, of course, impossible to get into any actor's head and determine with complete confidence her subjective state of mind at the time of the conduct in question, and fact-finders therefore are forced to make imperfect assessments, often relying on objective measures to evaluate subjective intent. These challenges are no more intractable in criminal procedure cases than in any other setting.

Moreover, in rejecting the pretext search argument in Whren v. United States, the Court discounted the weight of judicial economy concerns, observing that the Court's avoidance of subjective standards in Fourth Amendment cases was "not based only upon . . ., or . . . even principally upon," "the evidentiary difficulty of establishing subjective intent." The

252 Id.; see also Berkemer v. McCarty, 468 U.S. 420, 442 n.35 (1984) (noting, in choosing an objective definition of custody for purposes of Miranda, that "an objective, reasonable-man test is appropriate because, unlike a subjective test, it 'is not solely dependent either on the self-serving declarations of the police officers or the defendant'" (quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967))).
253 See, e.g., Yeager, supra note 42, at 623 (citing by way of example the criminal laws defining theft, rape, and self-defense).
256 See, e.g., Devenpeck v. Alford, 543 U.S. 146, 154 (2004) (noting that "of course subjective intent is always determined by objective means"); Bacigal, supra note 86, at 730 (pointing out that "the reasonable person perspective" can be used "as circumstantial evidence of a defendant's subjective state of mind"); Glanville Williams, Lords' Decision on the Law of Rape, LONDON TIMES, May 8, 1975, at 15 (observing that a mens rea requirement demanding proof that a rape defendant acted knowingly does not foreclose the jury from reasoning that "if anyone would have realised from what the woman said and did that she was not consenting, then they are entitled to conclude that the defendant realised it").
Court then went on to comment—unanimously—that “even if our concern had been only an evidentiary one, . . . it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act.” The Court’s suggestion that formidable fact-finding hurdles surround even the application of objective standards echoes similar observations made about the inconstancy of the reasonable person standard in other contexts. Thus, judicial efficiency concerns cannot explain the variations in perspective that pervade the Court’s criminal procedure decisions.

B. GUIDANCE FOR THE POLICE

The second concern the Court has voiced about subjective standards is the lack of guidance they provide the police. The Court has expressed reservations in a number of cases about saddling police officers with the task of ascertaining a suspect’s subjective state of mind—in the words of Berkemer v. McCarty, “the burden of anticipating the frailties or idiosyncracies of every person whom they question.” For example, in Davis v. United States, the Court opted for an objective standard to assess whether a suspect had invoked her Miranda right to counsel in order “to avoid difficulties of proof and to provide guidance to officers conducting interrogations.” Observing that “it is police officers who must actually decide whether or not they can question a suspect,” the Court explained that the police should not be asked to “make difficult judgment calls about

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258 Id. at 814-15.

259 See, e.g., John G. Fleming, The American Tort Process 116 (1988) (observing that the law of negligence “employs . . . open-textured concepts or standards rather than precise and rigid rules”); Donovan & Wildman, supra note 1, at 458 (noting that “the inquiry into an accused’s own mental state is more concretely grounded in reality than are conjectures about a mythical reasonable man”); Rutledge, supra note 37, at 1015 (arguing that “[a] subjective standard simply requires the court to decide the state of mind of the relevant actor,” whereas “an objective standard—particularly one where objective reasonableness is measured by the totality of the circumstances—may require a decision maker to focus on a wider variety of factors, making it comparatively more difficult” to apply). Cf. infra notes 330-58 and accompanying text (discussing the complexities that arise in determining whether objective standards should account for an individual’s subjective characteristics).


whether the suspect in fact wants a lawyer even though he has not said so.\(^{262}\)

Nevertheless, these concerns have not dissuaded the Court from adopting subjective standards focused on the particular suspect in other criminal procedure cases, most notably those that follow the consent model in determining whether a defendant’s choices were freely made. For example, the totality of the circumstances tests used to determine whether a suspect’s confession was voluntary,\(^{263}\) whether consent to search was willingly given,\(^{264}\) and whether a defendant made a valid waiver of *Miranda* or the Sixth Amendment\(^{265}\) have traditionally depended in large part on the characteristics of the particular defendant.\(^{266}\) In each of these contexts, police officers must assess an individual suspect’s state of mind before deciding whether they can safely proceed with the search or interrogation.

More generally, it has become something of a sport among criminal procedure aficionados to point out how wildly inconsistent the Court’s criminal procedure decisions have been on the subject of bright-line rules.\(^{267}\) On the one hand, the Court has touted this interest in a number of cases. In the Fourth Amendment context, for example, the Court has noted the importance of “straightforward rule[s],”\(^{268}\) “bright” lines,\(^{269}\) and “simple
and, by contrast, the undesirability of “standards requiring sensitive, case-by-case determinations” and “unworkable and fact-specific inquiries” that create a “bog of litigation.”

On other occasions, however, the Court has steadfastly refused to adopt bright-line rules. In describing the totality of the circumstances definition of reasonable suspicion, for example, the Court has admitted that the test is a “somewhat abstract” and “elusive concept,” rather than a “finely-tuned standard.” Nevertheless, the Court has “deliberately


270 Georgia v. Randolph, 547 U.S. 103, 121 (2006) (despite recognizing that it is “drawing a fine line” that is “formalistic,” holding that the consent search exception does not apply when one co-tenant “is in fact at the door and objects,” but reaching the opposite result where “the potential objector [is] nearby, but not invited to take part in the threshold colloquy”); see also California v. Acevedo, 500 U.S. 565, 579 (1991) (overturning prior decisions involving searches of containers found in automobiles on the ground that “it is better to adopt one clear-cut rule to govern automobile searches”).

271 Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citing the need for “administrable rules” in support of the decision to allow custodial arrests for even minor offenses). But see Dripps, supra note 268, at 392-93, 397, 404 (calling Atwater, Belton, and Whren “the Supreme Court’s Iron Triangle, . . . [e]ach leg of [which] is supported primarily by the need for bright-line rules,” but which together “authorize police practices that no American jurisdiction regards as reasonable” and that “the Framers detested”); Saltzburg, supra note 86, at 1007-09 (finding Atwater’s argument concerning the need for clear rules “unpersuasive,” and proposing instead that arrests be prohibited in cases involving “minor offenses and offenders where there is no apparent danger or likelihood of flight” so as to avoid “sanction[ing] arrests made with questionable motives”).

272 Thornton v. United States, 541 U.S. 615, 623 & n.3 (2004) (relying also on the need for “clear rule[s] readily understood by police officers” in extending Belton, see supra note 268, to arrests of a vehicle’s “recent occupant[s]”).

273 Wyoming v. Houghton, 526 U.S. 295, 305-06 (1999) (citing such “practical realities” in allowing police conducting warrantless automobile-exception searches to inspect items belonging to passengers who are not suspects). See generally Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141 (observing that “Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities,” and that “[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be literally impossible of application by the officer in the field”) (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), rev’d, 414 U.S. 218 (1973)).

274 United States v. Arvizu, 534 U.S. 266, 274 (2002). For further discussion of the definitions of probable cause and reasonable suspicion, see supra note 37 and accompanying text.
avoided reducing it to ‘a neat set of legal rules.’” Likewise, the Court observed in United States v. Banks that the constitutional standards governing the execution of warrants have been “fleshed out . . . case by case, largely avoiding categories and protocols,” and instead “treat[ing] reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case.”

The Banks Court continued, “[I]t is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.” The Court similarly acknowledged in United States v. Sharpe that its decisions distinguishing between Terry stops (based on reasonable suspicion) and full arrests (requiring probable cause) “may in some instances create difficult line-drawing problems.” Even so, the Court declined to impose a “rigid time limitation” on Terry stops, explaining that “[m]uch as a ‘bright line’ rule would be desirable, . . . common sense and ordinary human experience must govern over rigid criteria.”

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277 Id. at 36; see also Hudson v. Michigan, 126 S. Ct. 2159, 2163 (2006) (describing Banks’ “reasonable wait time’ standard” as “necessarily vague”).


279 Id.; see also Scott v. Harris, 127 S. Ct. 1769, 1777-78 (2007) (refusing to apply the standard set out in Tennessee v. Garner, 471 U.S. 1 (1985), for evaluating the permisibility of using deadly force to apprehend a fleeing felon, noting that “Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force,’” and that “[a]lthough respondent’s attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of ‘reasonableness’”). The Court’s tendency to resort to a balancing test and general notions of “reasonableness” in order to resolve Fourth Amendment questions is largely to blame for the absence of bright-line rules. See, e.g., Amsterdam, supra note 24, at 393-94 (concluding that a “sliding scale approach . . . converts the fourth amendment into one immense Rorschach blot,” which can “only produce more slide than scale [and] means in practice . . . that appellate courts defer to trial courts and trial courts defer to the police”); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 855 (1994) (characterizing the reasonableness approach as “freewheeling”); Thomas, supra note 89, at 544 (observing that “there is no original understanding of a ‘reasonable’ search, and that the Court has simply followed modern, relativistic usage in creating categories of searches that are, and are not, reasonable”). But see Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 804 (1994) (advocating that we “keep[] our eyes fixed on reasonableness as the polestar of the Fourth Amendment”).
The same inconsistencies can be found in the confession cases. The Court has commented on the virtues of "concrete constitutional guidelines,"\(^{280}\) "bright line[s] that can be applied by officers in the real world of investigation and interrogation,"\(^{281}\) and standards defined by "the clarity of [their] command and the certainty of [their] application."\(^{282}\) The Court has likewise rejected standards that would "spawn numerous problems of interpretation"\(^{283}\) or would have "the inevitable consequence of muddying Miranda's otherwise relatively clear waters."\(^{284}\)

By contrast, in *North Carolina v. Butler*, the Court rejected the state supreme court's bright-line requirement that *Miranda* rights be waived expressly, reasoning that questions pertaining to waiver must be evaluated on "the particular facts and circumstances surrounding [the] case."\(^{285}\) The Court observed that waiver is "an issue with which courts must repeatedly deal," and it found "no reason to discard [the totality of the circumstances] standard and replace it with an inflexible per se rule."\(^{286}\) Similarly, the Court created the public safety exception to *Miranda* in *New York v. Quarles* despite "acknowledg[ing] that to some degree we lessen the desirable clarity of [the *Miranda*] rule."\(^{287}\) In *McNeil v. Wisconsin*, the Court refused to adopt "a 'clear and unequivocal' guideline" that would have barred the police from questioning any suspect who had asked for a lawyer "to assist him in defense or in interrogation," openly admitting that it "lik[e]s" "guidelines for judicial review . . . to be 'clear and unequivocal,' but only when they guide sensibly and in a direction we are authorized to go."\(^{288}\)

Although we might appreciate the *McNeil* Court's candor, it fails to provide any neutral, principled explanation for the shifting perspectives characterizing the Court's criminal procedure rulings. More generally,


\(^{281}\) *Davis v. United States*, 512 U.S. 452, 461 (1994); see also *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (emphasizing the need for "a bright-line rule"). For descriptions of *Roberson* and *Davis*, see *supra* notes 165-74 and accompanying text.


\(^{283}\) *Colorado v. Spring*, 479 U.S. 564, 577 n.9 (1987) (rejecting a requirement that police must inform suspects of the topics to be discussed during interrogation).


\(^{286}\) *Id.* at 374-75.

\(^{287}\) 467 U.S. 649, 658 (1984). For further discussion of the public safety exception, see *supra* notes 178-83 and accompanying text.

\(^{288}\) 501 U.S. 171, 181-82 (1991) (concluding that defendant's invocation of his Sixth Amendment right to counsel did not invoke his *Miranda* rights with respect to other, uncharged offenses).
these many instances in which the Court has refused to draw bright lines and instead has opted for more amorphous approaches create no less
difficulty for law enforcement officials than subjective standards centered
on a particular suspect. These subjective inquiries do not ask the police to
perform the impossible feat of reading a suspect’s mind. Rather, the police
can presumably rely on the same objective measures to evaluate a suspect’s
state of mind that are always used in making subjective assessments.\(^289\)

C. EVEN-HANDED LAW ENFORCEMENT

The final objection the Court has raised to subjective tests is that
“‘evenhanded law enforcement is best achieved by the application of
objective standards of conduct, rather than standards that depend upon the
subjective state of mind of the officer.’”\(^290\) To the extent this concern is not
simply *ipse dixit* or redundant of the prior criticisms, it points in two
different directions. On the one hand, the Court has at times indicated that
a police officer’s subjective good faith is insufficient to immunize law
enforcement techniques that do not satisfy objective standards of conduct.
For example, the Court observed in *United States v. Leon* that “‘good faith
on the part of the arresting officers is not enough.’”\(^291\) “If subjective good
faith alone were the test,” the Court continued, “the protections of the
Fourth Amendment would evaporate, and the people would be ‘secure in
their persons, houses, papers, and effects,’ only in the discretion of the
police.”\(^292\) That observation, however, suggests the importance of retaining
both objective and subjective considerations. It provides no basis for
preferring objective tests or for replacing all subjective inquiries with
objective ones.\(^293\)

On the other hand, the Court has more recently voiced concerns about
“evenhanded law enforcement” in decisions rejecting any inquiry into a
police officer’s subjective intent. The phrase originated in *Horton v.
California*, where the Court eliminated the “inadvertence” element of the
plain view exception to the warrant requirement.\(^294\) In so doing, the Court
relied on the disconnect between inadvertence and bad faith on the part of

\(^{289}\) See *supra* note 256 and accompanying text.

U.S. 128, 138 (1990)).


\(^{292}\) *Id.*

\(^{293}\) See also *infra* note 306 and accompanying text (discussing criminal and tort law to
illustrate this point).

\(^{294}\) *Horton*, 496 U.S. at 138-39 (abolishing the requirement set out in *Coolidge v. New
Hampshire*, 403 U.S. 443, 469-70 (1971), that police must discover evidence inadvertently
in order to come within the plain view exception).
the police, noting that the police have "'no possible motive'" for filing a warrant application that "'deliberately'" fails to mention evidence they ultimately find in plain view.\textsuperscript{295} The Court reasoned that "[o]nly oversight or careless mistake" could explain such an omission because including the evidence in the warrant application "could only permit the officer to \textit{expand} the scope of the search."\textsuperscript{296} This is a very different argument from the one made later in \textit{Devenpeck v. Alford} (quoting Horton's "evenhanded law enforcement" language) and the \textit{Whren} line of cases that a police officer's subjective intent is irrelevant even in situations—unlike the plain view discovery of evidence—where the "possible motives" do \textit{not} rule out an inference of bad faith.\textsuperscript{297} Those more recent cases, which allow the police to make an arrest on trivial charges regardless of their underlying motivation, open the door to racial profiling, harassment, and other types of pretextual actions.\textsuperscript{298}

More generally, notions of "evenhanded law enforcement" and "objective standards of conduct" are reminiscent of tort and criminal law, where the concept of objective reasonableness is utilized both to reflect community values\textsuperscript{299} and to enforce uniform standards of behavior.\textsuperscript{300} It is

\begin{itemize}
\item \textsuperscript{295} Id. at 138 n.9 (quoting Coolidge, 403 U.S. at 517 (White, J., dissenting)).
\item \textsuperscript{296} Id. at 138-39, 138 n.9 (quoting Coolidge, 403 U.S. at 517 (White, J., dissenting)) (emphasis added).
\item \textsuperscript{297} See Devenpeck v. Alford, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." (citing Whren v. United States, 517 U.S. 806, 812-13 (1996))). For further discussion of the \textit{Whren} line of cases, see supra notes 39-44 and accompanying text.
\item \textsuperscript{298} See, e.g., Hudson v. Michigan, 126 S. Ct. 2159, 2166 (2006) (noting that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act"); Saltzburg, supra note 86, at 1003-04 (listing impermissible justifications that motivate some arrests, including the officer's desire to "punish[]" or "humiliate" the suspect, or to "get the benefit of" conducting either an interrogation or "the ‘free’ . . . search incident to arrest"); Anthony C. Thompson, \textit{Stopping the Usual Suspects: Race and the Fourth Amendment}, 74 N.Y.U. L. Rev. 956, 982-87 (1999) (criticizing \textit{Whren}'s dichotomy based on the presence or absence of probable cause and noting that a police officer's assessment of probable cause is inevitably, even if subconsciously, influenced by racial stereotyping).
\item \textsuperscript{299} See, e.g., Donovan & Wildman, supra note 1, at 447 (observing that "[t]he notion that the law of provocation should reflect community values as to what constitutes understandable human frailty was implicit" in the development of criminal law's definition of voluntary manslaughter); FLEMING, supra note 259, at 116 (noting that the tort law of negligence "seeks to permit the infusion of community values and their adjustment over time and place").
\item \textsuperscript{300} See, e.g., Regina v. Morhall, [1996] 1 A.C. 90, 97-98 (H.L. 1995) (pointing out that the purpose of the reasonable person test in voluntary manslaughter cases is "to introduce, as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law"); PROSSER & KEETON ON THE LAW OF TORTS, supra note 5, § 32, at
\end{itemize}
not obvious, however, that these principles carry the same weight in criminal procedure jurisprudence. Community values should certainly be less influential in this context, where suppression motions are decided not by juries, but by judges, who are charged with the countermajoritarian task of interpreting constitutional provisions irrespective of the will of the majority.

Moreover, some of the reasons for establishing uniform standards of conduct in tort and criminal law—to assess culpability and allocate the costs of injury—are not relevant to constitutional criminal procedure. Unconstitutionally obtained evidence is not suppressed in an effort to punish miscreant police officers or out of a belief that government should bear the costs of constitutional injuries. The goal of deterrence that animates both tort and criminal law, and is also encompassed in the idea of enforcing uniform standards of behavior, does have relevance to constitutional criminal procedure, especially in the view of the current

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173 (noting that “[t]he whole theory of negligence presupposes some uniform standard of behavior”).

301 See, e.g., Thompson v. Keohane, 516 U.S. 99, 113 & n.13 (1995) (distinguishing “reasonable person” inquiries made in tort and criminal procedure cases on the grounds that “[t]raditionally, our legal system has entrusted negligence questions to jurors, inviting them to apply community standards,” whereas “[j]udges alone make ‘in custody’ assessments”). Compare Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1179 (1991) (maintaining that “juries could be trusted far more than judges to protect against government overreaching” and thus could “assess [the] reasonableness” of searches), with Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,” 74 N.C. L. Rev. 1559, 1622 (1996) (noting that assigning juries the task of evaluating the constitutionality of searches would require that “‘[r]easonableness’ . . . be reworked from the ground up,” and would “undo the considerable achievement already gained in establishing rules for police to follow), and Tracey Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S. CAL. L. Rev. 1, 40 (1994) (predicting that juries would simply “defer to police determinations of what was reasonable”).


304 See, e.g., PROSSER & KEETON ON THE LAW OF TORTS, supra note 5, at 169 (noting that one who acts unreasonably may make an “honest blunder . . . that . . . may absolve the actor from moral blame, but the harm to others is still as great”).
Supreme Court.\textsuperscript{305} Even here, however, the analogy to tort and criminal law breaks down because in those contexts objective standards supplement rather than supplant subjective inquiries.\textsuperscript{306}

Thus, the concept of even-handed law enforcement does not justify a preference for objective standards and cannot explain the variations in perspective found in the Court's criminal procedure rulings any more so than the other objections the Court has leveled at subjective tests. None of these concerns can therefore displace reliance on the fundamental interests underlying a particular constitutional provision in selecting a controlling perspective.

V. YARBOROUGH V. ALVARADO AND "SUBJECTIVE" OBJECTIVE TESTS

By the time Yarborough v. Alvarado\textsuperscript{307} reached the Supreme Court in 2004, the Court had a long tradition of issuing criminal procedure opinions that shifted opportunistically among different perspectives, based on neither the principles underlying the constitutional provisions at issue nor the attributes of the tests themselves. Alvarado involved a suspect five months shy of his eighteenth birthday who was questioned in connection with the

\textsuperscript{305} For a discussion of the Court’s emphasis on the deterrent function of constitutional criminal procedure, see, e.g., supra notes 28, 132, 189-91, 224 and accompanying text.

\textsuperscript{306} See, e.g., PROSSER & KEETON ON THE LAW OF TORTS, supra note 5, at 212-13 (observing that willful, wanton, or reckless conduct constitutes “an aggravated form of negligence, . . . which is so far from a proper state of mind that it . . . may justify a broader duty, and more extended liability for consequences”); see also supra notes 30-34 and accompanying text (citing to criminal law in discussing deterrence and subjective inquiries).

One exception to this general rule arises in constitutional tort litigation, where the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982), abandoned the subjective element of the qualified immunity defense in favor of an objective standard that the Court anticipated would make for easier fact-finding, especially on summary judgment. There are similarities between § 1983 cases and constitutional criminal procedure, and the Court has at times equated the two. See, e.g., Malley v. Briggs, 475 U.S. 335, 344 (1986) (holding that “the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon defines the qualified immunity accorded an officer”); United States v. Leon, 468 U.S. 897, 922 & n.23 (1984) (citing Harlow though recognizing that “[t]he situations are not perfectly analogous”). Nevertheless, the considerations that drove the Court’s decision in Harlow—the desire to protect public officials by ensuring that “insubstantial claims” brought against them are resolved on summary judgment, and the concern that subjective inquiries in § 1983 cases “entail broad-ranging discovery [that] . . . can be peculiarly disruptive of effective government,” Harlow, 457 U.S. at 817—do not apply to criminal cases. See Illinois v. Krull, 480 U.S. 340, 368 (1987) (O’Connor, J., dissenting) (observing that “suppression of illegally obtained evidence does not implicate [Harlow’s] concern” that “fairness to the defendant, as well as public policy, dictates that individual government officers ought not be subjected to damages suits for arguable constitutional violations”).

\textsuperscript{307} 541 U.S. 652 (2004).
theft of a truck and the death of its driver. Alvarado maintained that he was in custody and therefore entitled to Miranda warnings, a question that turned on the objective inquiry of "how a reasonable person in the suspect’s situation would perceive his circumstances." On habeas, the Ninth Circuit concluded that the state court had erred in finding that Alvarado was not in custody during his interview at the police station, explaining that it was "simply unreasonable" to say that "a reasonable 17-year-old, with no prior history of arrest or police interviews," would have felt free "to terminate the interrogation and leave." The Supreme Court reversed the Ninth Circuit’s decision by a vote of five to four, and, in an opinion written by Justice Kennedy, determined that "fair-minded jurists could disagree over whether Alvarado was in custody." Therefore, under the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the state court had not unreasonably applied clearly established federal law in ruling against Alvarado.

The Supreme Court commented on the relevance of Alvarado’s age, noting the “important conceptual difference between the Miranda custody test and the line of cases from other contexts considering age and experience.” Pointing out that the definition of custody is an objective one, the Court acknowledged that “the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases,” and “[i]t is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation.” For example, the Ninth Circuit had “styled its inquiry as an objective test” by asking how a reasonable defendant sharing Alvarado’s age and criminal experience would have felt. Nevertheless, the Supreme Court thought that the objective definition of custody “could reasonably be viewed as different” from subjective standards, such as the voluntariness due process test, which do take into account a suspect’s age and inexperience. Custody is

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308 Id. at 656.
309 Id. at 662 (citing Berkemer v. McCarty, 486 U.S. 420, 442 (1984)). For further discussion of the definition of custody, see supra notes 115-18 and accompanying text.
311 Alvarado, 541 U.S. at 664. The Court found facts supporting both Alvarado’s assertion that he was in custody and the government’s claim to the contrary. See id. at 664-65.
313 See Alvarado, 541 U.S. at 665.
314 Id. at 667.
315 Id.
316 Id.
317 Id. (emphasis added).
determined based on "an objective rule designed to give clear guidance to the police," the Court observed, whereas "consideration of a suspect’s individual characteristics—including his age—could be viewed as creating a subjective inquiry." The Supreme Court therefore concluded that the state court had not unreasonably applied clearly established federal law by refusing to take into account Alvarado's age.

The precedential impact of this discussion is limited, however, both because of the deferential AEDPA standard of review applied in the case—reflected in the Court’s carefully qualified "could be viewed as" language quoted above—and because of a brief, one-paragraph concurrence written by Justice O’Connor. Justice O’Connor thought that “[t]here may be cases” where a minor defendant’s age is relevant in applying Miranda’s definition of custody. Nevertheless, she joined the majority opinion in full, influenced by the fact that Alvarado was almost eighteen at the time he was questioned. “It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority,” she explained, and “[e]ven when police do know a suspect’s age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave.” Given that Justice O’Connor represented the critical fifth vote in Alvarado, the outcome of the case might well have been different had the suspect been younger.

While the Court’s views on the relevance of age are therefore somewhat ambiguous, the majority rejected outright the notion that a suspect’s “prior history with law enforcement” should be considered in applying the objective custody inquiry. Reasoning that police officers typically will be unfamiliar with that history, and that the relationship between a suspect’s prior experiences with the police and the custody standard is “speculative,” the Court concluded that such “contingent psychological factors ... turn[] too much on the suspect’s subjective state of mind and not enough on the ‘objective circumstances of the interrogation.’”

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318 Id. at 668 (emphasis added).
319 Id.
320 Id. at 669 (O’Connor, J., concurring).
321 Id.
322 Id. (also noting that “17½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults”).
324 Alvarado, 541 U.S. at 668.
325 Id. at 668-69 (quoting Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam)).
The four Alvarado dissenters were critical of the Court’s suggestion that age might not be relevant to the objective definition of custody, pointing out that it conflicted not only with the overwhelming weight of lower court authority on this issue, but also more generally with the reasonable person standard used in tort cases. As the dissenting opinion noted, the law of torts gives courts “latitude” to “make allowance not only for external facts, but sometimes for certain characteristics of the actor himself, including physical disability, youth, or advanced age.” The dissenters thought that the torts approach “makes sense” given tort law’s “recognized purpose” of deterrence, “[u]nless one is prepared to pretend that Alvarado is someone he is not, a middle-aged gentleman, well versed in police practices,” for example, or “the statistically determined ‘average person’—a working, married, 35-year-old white female with a high school degree.” Observing that the Court had adopted an objective definition of custody in order to “keep Miranda a workable rule,” the dissenters concluded that Alvarado’s age was a relevant factor because it was not a “special quality,” but instead “an objective circumstance that was known to the police” and “a widely shared characteristic that generates commonsense conclusions about behavior and perception.”

Although the Alvarado majority rightly noted that the line between objective and subjective tests is murky and the incorporation of subjective characteristics into the reasonable person standard is certainly controversial, the Court’s decision in Alvarado does not contribute meaningfully to the debate. The Court greatly oversimplifies the issue by suggesting that consideration of any of a defendant’s characteristics may automatically turn an objective inquiry into a subjective one. This simplistic statement ignores the fact that the objective reasonable person inquiry looks—and always has looked—at the reasonable person “under the circumstances.”

326 See id. at 675 (Breyer, J., dissenting) (citing Alvarado v. Hickman, 316 F.3d 841, 850 n.5 (9th Cir. 2002) (noting that “every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the ‘in custody’ determination, either as a factor under the totality of circumstances test, or by way of modification to the reasonable person standard,” and citing opinions from eleven different states in support)).
327 Id. at 674 (quoting PROSSER AND KEETON ON THE LAW OF TORTS, supra note 5, § 32, at 174-79).
328 Id. at 673, 674, 676.
329 Id. at 674. The dissenting opinion did not take a clear position on the relevance of Alvarado’s inexperience with law enforcement, noting only that the majority’s discussion of this issue was “a bright red herring in the present context where Alvarado’s youth (an objective fact) simply helps to show (with the help of a legal presumption) that his appearance at the police station was not voluntary.” Id. at 675.
330 See Alvarado, 541 U.S. at 668 (quoted supra text accompanying note 318).
331 See id. at 662 (“a reasonable person in the suspect’s situation”); see also Brendlin v. California, 127 S. Ct. 2400, 2408 (2007) (“reasonable passenger”); Florida v. Bostick, 510
The real difficulty therefore arises in determining which "circumstances" ought to be taken into account.

This is not an easily answered question, and it has generated a great deal of discussion. On the one hand, a generic "reasonable person" standard paints an unfair and inaccurate picture if it excludes relevant characteristics of the individual being judged. Moreover, even an abstract "reasonable person" test is not truly an objective standard. Rather, it relies—perhaps unconsciously—on assumptions, privileging the perspectives, experiences, and values of the dominant group (or perhaps of the decisionmaker) and ignoring the distinct experiences and perspectives of others. Insisting on a generic reasonable person standard thus
“confers... a formal equality... [that] is illusory and in fact leads to unjust consequences, for the ‘systematic application of an equal scale to systematically unequal individuals necessarily tends to reinforce inequalities.”

On the other hand, incorporating subjective characteristics into an objective standard arguably undermines the basic function of objective tests—to enforce uniform standards of conduct. Moreover, a “subjective” objective test may be difficult for decisionmakers to apply, especially for those who do not share the particular characteristic in question. Finally, starting down the road of including subjective characteristics in the reasonable person standard leads to inevitable slippery slope concerns: the more characteristics an objective standard incorporates, the more it looks like a purely subjective inquiry. As George Fletcher aptly observed, “If the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances.”

Despite the difficulties raised by these issues, the law treats juveniles and adults so differently that Alvarado’s suggestion that a minor defendant’s age might not be an appropriate consideration in assessing reasonableness seems completely out of touch not only with the overwhelming weight of authority on the specific custody question at issue in the case, but also with the law governing a wide range of areas. Whatever the merits of considering other subjective characteristics in applying the reasonable person standard, age is different.

As the Alvarado dissenters noted, tort law has traditionally deemed the defendant’s age a relevant factor in evaluating how a reasonable person in

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334 Donovan & Wildman, supra note 1, at 465 (quoting Isaac D. Balbus, Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law, 11 LAW & SOC’Y REV. 571, 577 (1977)).

335 See, e.g., Keenan v. Commonwealth, 44 Pa. 55, 58 (1862) (observing that “no judicial tribunal can have time or competence for such a thorough investigation of the special character or state of each individual mind as the rule requires”).


337 See supra note 326 and accompanying text.

her position would have acted. Despite the dissent's reference to deterrence, the law of negligence may not be completely analogous here because the deterrent focus in tort law is on the (young) defendant, whereas deterrence in the criminal procedure context is aimed at the police officers investigating the (young) defendant. Tort law's reasonable person standard might account for age to avoid unfairly awarding damages against a youthful defendant simply because she failed to conform to the standard of a reasonable adult, but it does not automatically follow that criminal procedure's "reasonable defendant"—a standard often justified by the desire for rules easily administered by the police—should also incorporate a minor defendant's age.

Nevertheless, while the torts analogy is not perfect, a minor defendant's age ought to be a relevant circumstance in applying criminal procedure's objective standards. All nine Justices in Alvarado cited two factors germane to this discussion: whether the characteristic in question is "known" to the police and whether it is "likely relevant to the way a person would understand his situation." As the Alvarado dissenters recognized, youthfulness is a quality "known to the police," and it "generates commonsense conclusions about behavior and perception." Thus, the doctrine of negligence certainly illustrates the point—reflected in numerous other areas of the law as well—that we do not expect the same maturity and behavior from minors as we do

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339 See Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (pointing out that "all American jurisdictions count a person's childhood as a 'relevant circumstance' in negligence determinations").

340 See id.

341 Cf. Rutledge, supra note 37, at 1013 (distinguishing "reasonableness determinations" in tort and criminal law, which "typically serve as liability-defining rules," from those used in criminal procedure cases, which "instead simply operate within a larger framework of evidentiary rules"). See also supra notes 299-306 and accompanying text (comparing objective standards used in tort and criminal law to those applied in criminal procedure cases).

342 See supra notes 260-62 and accompanying text.

343 Alvarado, 541 U.S. at 674 (Breyer, J., dissenting); see also supra text accompanying notes 322 & 325 (quoting language to the same effect in the majority and concurring opinions).

344 Alvarado, 541 U.S. at 674 (Breyer, J., dissenting); see, e.g., Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 924, 944, 1005 (2004) (finding, "[c]onsistent with previous research," that juveniles were "over-represented" in their study of 125 "interrogation-induced false confession cases," and noting that "juvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and [they] appear to be at a greater risk of falsely confessing when subjected to psychological interrogation techniques").
from adults. Even the Supreme Court’s per curiam decision in *Kaupp v. Texas*, issued just a year before *Alvarado*, twice mentioned Kaupp’s age (he was seventeen years old) as one of the “probative circumstances” informing the Court’s conclusion that he was under arrest when the police took him to the police station in the middle of the night.345

Moreover, the police are already well-advised to make judgments about the impact of a young suspect’s age in deciding whether to accept her consent to search or willingness to answer questions, given that a miscalculation will lead to the suppression of evidence under the consent model’s subjective definitions of voluntariness.346 Therefore, incorporating a minor suspect’s age into criminal procedure’s objective standards should not unduly burden the police. Finally, it bears repeating that the whole point of the “reasonable defendant” inquiries used in criminal procedure cases is to focus on the suspect, not on the police. The standards may be phrased in objective rather than subjective terms because of some efficiency-related policy concern, but their ultimate purpose is to look at the defendant’s perspective and assess how she likely “feels.” Failing to take her age into account, when it has such obvious relevance to that inquiry, is to “require old heads upon young shoulders,” something the law has traditionally been reluctant to do.347

A similar conclusion can be made about race. Although obviously our laws do not expressly distinguish on the basis of race like they do with age, the evidence is overwhelming that minority-race defendants experience the criminal justice system and interactions with the police very differently than white defendants.348 The racial disparities in our criminal justice statistics,

345 538 U.S. 626, 631 (2003) (per curiam). *Kaupp*’s implications for our purposes are somewhat unclear because, although the Court seemed to be applying an objective standard similar to the custody inquiry at issue in *Alvarado*—i.e., the “reasonable defendant” standard used to define a *Terry* stop, see *supra* text accompanying notes 79-81—the real question in *Kaupp* was not whether the defendant had been stopped, but whether he had been arrested, a concept which the Supreme Court has never defined. See *Kaupp*, 538 U.S. at 627, 630-31.


348 See, e.g., Devon W. Carbado, (E)racing the Fourth Amendment, 100 MICH. L. REV. 946, 952, 966 (2002) (noting that “[t]he very sight of the police in my rear view mirror is unnerving [and] . . . engenders feelings of vulnerability,” and that experience with the police “affects the everyday lives of people of color,” leading to, among other things, “internalized
confirmed by countless studies, and the cultural competence training that is considered an important element of police training, provide just two quick illustrations. Thus, at least in the context of criminal procedure, a “reasonable defendant” standard that fails to incorporate the race of a person of color cannot hope to accurately reflect her experience or measure how she feels. Race, like age, is a characteristic “known to the police” that “generates commonsense conclusions about behavior and perception.”

To be sure, race differs from age, and a criminal procedure jurisprudence that factors a suspect’s race into the “reasonable person” standard is subject to criticism on the grounds that it tends to reinforce racial stereotypes and hierarchies, it undermines the goals of racial neutrality and equality, and it fails to account for the diversity of experience among people of color. Similar objections have been raised in response to suggestions—most notably in self-defense cases—that criminal law’s racial obedience toward, and fear of, the police”); David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659, 660, 681 (1994) (arguing that the disproportionate number of Terry stops directed at poor and minority-race persons “perpetuates a cycle of mistrust and suspicion,” thereby “widening the racial divide in the United States”).

See, e.g., Illinois v. Wardlow, 528 U.S. 119, 132-35, 132 n.7, 133 n.10 (2000) (Stevens, J., dissenting) (citing studies from Florida, Massachusetts, New Jersey, and Pennsylvania); Cole, supra note 90, at 2555-57 (describing racial disparities in the prison population, and especially in the incidence of drug arrests, convictions, and sentences); Thompson, supra note 298, at 957-58 (noting that “the police target people of color, particularly African Americans,” for Terry stops and traffic stops, and citing statistics from Maryland, New Jersey, and New York).


Yarborough v. Alvarado, 541 U.S. 652, 676 (2004) (Breyer, J., dissenting); see Illinois v. Wardlow, 528 U.S. 119, 132-33 & nn.7-10 (2000) (Stevens, J., dissenting) (observing that the “concerns and fears” about law enforcement practices “a[ mong some citizens, particularly minorities and those residing in high crime areas, . . . are known to the police officers themselves, and are validated by law enforcement investigations into their own practices”).

See, e.g., Maclin, supra note 10, at 270-74 (summarizing and responding to such objections); Mia Carpiniello, Note, Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops, 6 MICH. J. RACE & L. 355, 380-87 (2001) (same).
reasonable person standard incorporate the experience and perceptions of battered women.\footnote{See, e.g., Kinports, supra note 1, at 172-73, 177-80.}

Borrowing from arguments I have made in that context,

[It seems preferable to take into account the effects of [race] in assessing a [suspect’s situation], not only because doing so will permit a more accurate and more complete—and therefore fairer—assessment of her situation, but also because otherwise we disadvantage her compared to [white] defendants for whom the criminal justice system has historically, though perhaps unconsciously, been willing to make such accommodations.\footnote{Id. at 179-80; see also Carbado, supra note 348, at 1002-03 (pointing out that “there is no race neutral position from which to conduct the ‘reasonable person under the circumstances’ inquiry,” and therefore “[f]ocusing on everything but race” in applying the objective “free-to-leave test . . . is tantamount to discrimination based on race”); Maclin, supra note 10, at 272 (noting that “[i]f the Court were to acknowledge and take account of the coercive dynamics that surround police confrontations involving black males, . . . [b]lack men would get no special treatment . . . [b]ut] would only receive what the Fourth Amendment guarantees them”).}

Although this is a complex issue, perhaps recognizing that a suspect’s race is relevant to criminal procedure’s objective inquiries will help ensure that our criminal procedure jurisprudence no longer seems “insensitive to, and unconcerned with, the contemporary realities of race.”\footnote{Carbado, supra note 348, at 964-65.}

Unfortunately, the Supreme Court does not seem ready to take on these issues, given that Yarborough v. Alvarado, its only real foray into this arena,\footnote{As noted above, the Court has identified the reasonable person in the defendant’s position as the reasonable “innocent” person and the reasonable “passenger,” see supra notes 80-81 and accompanying text, and at times has suggested that the particular police officer’s training and experience should be considered in applying the objective standards used to determine probable cause and reasonable suspicion, see supra note 37. These opinions mention the issue only briefly, however, and they do not address the distinction between subjective and objective standards. Moreover, the Court’s opinions since Alvarado do not differ in any material respect from the ones that preceded it; rather, they reflect the same divergent perspectives that characterized the pre-Alvarado cases. See, e.g., discussion of Brendlin v. California, 127 S. Ct. 2400 (2007), supra note 81 and accompanying text; Scott v. Harris, 127 S. Ct. 1769 (2007), supra notes 38 & 279 and accompanying text; Samson v. California, 126 S. Ct. 2193 (2006), supra notes 57-58 and accompanying text; Brigham City v. Stuart, 126 S. Ct. 1943 (2006), supra notes 46-47, 53 and accompanying text; Georgia v. Randolph, 547 U.S. 103 (2006), supra notes 55-56, 97, 270 and accompanying text; Devenpeck v. Alford, 543 U.S. 146 (2004), supra notes 27, 47, 256, 297 and accompanying text; Missouri v. Seibert, 542 U.S. 600 (2004), supra notes 137-46 and accompanying text.} does not advance the ball. For the moment, then, commentators\footnote{See, e.g., Carbado, supra note 348, at 1000-04 (advocating consideration of suspect’s race in applying reasonable person standard); Floralynn Einesman, Confessions and Culture: The Interaction of Miranda and Diversity, 90 J. CRIM. L. & CRIMINOLOGY 1, 17 (1999) (suggesting that the suspect’s “culture, alienage, and language difficulties” be taken into}
and the lower courts must take responsibility for continuing the discourse concerning how criminal procedure should best resolve the controversies surrounding the “reasonable person” standard and how “subjective” criminal procedure’s objective tests should be.

VI. CONCLUSION

The Supreme Court’s constitutional criminal procedure jurisprudence has played virtually no role in the contemporary debates surrounding objective and subjective tests, in particular, the question whether the objective reasonable person standard should incorporate a particular individual’s subjective characteristics. In Yarborough v. Alvarado, the Court offers only a simplistic analysis of the complexities raised by these questions, perhaps due to the fact that its criminal procedure rulings—the opinions governing both the constitutionality of searches and seizures and the admissibility of confessions—suffer from a more basic flaw. The Court has been completely unpredictable in its choice of perspective in these cases, as it routinely and inexplicably shifts between objective and subjective standards and between the defendant’s point of view and that of the police.

Although subjective tests have come under critical scrutiny in a number of contexts, the concerns raised about those tests cannot explain the inconsistencies in the Supreme Court’s criminal procedure opinions. A

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358 See United States v. Washington, 490 F.3d 765, 768, 773 (9th Cir. 2007) (describing “[r]ecent relations between police and the African-American community in Portland” as “pertinent to our analysis,” and including two “publicized shootings by white Portland police officers of African-Americans” during traffic stops in the list of circumstances informing the court’s decision that a reasonable person in the defendant’s position would not have felt free to leave); United States v. Alexander, 755 F. Supp. 448, 452 (D.D.C. 1991) (“If I were authorized to do so, I would find... that... a reasonable person in defendant’s circumstances (a black male familiar with street life in New York and Washington and with the Washington bus station and its environs) could reasonably fear that if he walked away from the officers confronting him or declined to permit a search of his underwear that he would be forcibly restrained, if not beaten, or, as defendant testified, shot.”); In re J.M., 619 A.2d 497, 504-07 (D.C. App. 1992) (Rogers, C.J., dissenting) (advocating consideration of minor suspect’s age in applying objective standard used to define Terry stops); id. at 513 (Mack, J., dissenting) (“I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team.”); 2 LAFAVE ET AL., supra note 155, § 6.6(c), at 526-27 n.33 (collecting lower court cases incorporating suspects’ characteristics in applying Miranda’s objective definition of custody); 4 LAFAVE, supra note 63, § 9.4(a), at 414-18 (citing lower court cases incorporating suspects’ characteristics in defining Terry stops).
principled approach to the question of perspective in criminal procedure cases thus requires that the Court return to the fundamental interests the relevant constitutional provisions were designed to serve. Those underlying principles vary depending on the particular constitutional right at issue, and thus will undoubtedly lead to the conclusion that criminal procedure cases should not all be controlled by one uniform perspective. Nevertheless, the choice of perspective should be made thoughtfully, in light of the goals a constitutional guarantee was meant to further.

Accepting the Court’s views as to what those goals are, criminal procedure doctrines that are designed to deter unconstitutional police practices—the Fourth Amendment’s ban on unreasonable searches and seizures and the Sixth Amendment’s efforts to preserve the adversary system—should focus on the perspective of the police, the party to be deterred. Maximizing deterrence requires, however, that evidence be suppressed whenever the police act improperly using either subjective or objective measures. If the Court is really serious about deterrence, it makes no sense to ignore either subjective bad faith on the part of the police, like many Fourth Amendment decisions do, or the failure to meet objective standards of reasonable police behavior, like some of the Court’s Sixth Amendment rulings suggest.

On the other hand, when interpreting criminal procedure doctrines that are aimed at promoting voluntary decisionmaking and/or dispelling coercion, the controlling perspective depends on whether the Court subscribes to the consent model or the coercion model. The consent model focuses on the defendant, analyzing whether her choice was freely made, whereas the coercion model focuses on the police, asking whether they acted in a coercive manner. The Court’s choice of model will therefore dictate whose perspective is controlling in several areas: in interpreting the reach of Miranda and the voluntariness due process test, in defining Fourth Amendment “seizures,” in deciding issues surrounding the consent search exception to the warrant requirement, and in resolving questions about the validity of a defendant’s waiver or invocation of her Sixth Amendment rights.

Because the consent model focuses on the suspect and whether she felt free to make an unconstrained decision, this model requires an assessment of the subjective state of mind of the particular defendant, especially when the inherently subjective concepts of voluntary waiver, consent, and invocation are at issue. For other arguably more “objective” concepts—like defining Fourth Amendment “seizures” and the Miranda terms “custody” and “interrogation”—the concern that constitutional protections should be constant, and should not vary from person to person, may motivate the Court to select an objective standard evaluating how the reasonable suspect
would feel under the circumstances. Under the consent model, however, the focus should remain on the defendant.

The coercion model, by contrast, centers on the police, on whether they acted coercively so as to compel the defendant’s choice. Because the coercion model is aimed at regulating police behavior, it is fundamentally indistinguishable from the deterrence-based doctrines like the Fourth and Sixth Amendment rules described above. As a result, the coercion model calls for emphasizing the police officer’s point of view, taking into account both subjective and objective considerations and finding a defendant’s action involuntary if the police either knew or should have known they were engaging in coercive behavior.

Supreme Court Justices certainly have the prerogative to take a different view of criminal procedure jurisprudence than their predecessors, and it is therefore not at all surprising to find the Burger Court, the Rehnquist Court, and now the Roberts Court acting in various ways to cut back on criminal procedure rulings issued by the Warren Court. Nonetheless, the Court should do so openly and honestly, rather than by using the choice of perspective to mask substantive changes in the law. In my view, it is time for the Court to take a step back and formulate a consistent, intentional approach to the question of perspective that is tied to the purposes a particular constitutional doctrine was designed to further. Until the Court has done so, oversimplified decisions like *Yarborough v. Alvarado* are to be expected, and the Court will not be in a position to move forward and take on the task of making a meaningful contribution to the continuing controversies that beset the “reasonable person.”