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Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment

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REASONABLENESS AND OBJECTIVITY: A FEMINIST DISCOURSE OF THE FOURTH AMENDMENT

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I. Introduction

More than ever, the commands of the Fourth Amendment now play a pivotal role in our everyday lives and affect people from all walks of life. Apart from law enforcement and the criminal justice system, we are routinely subjected to the likes of metal detectors and baggage x-rays at airports, border searches, roadside driver's license inspections, and e-mail monitoring in the workplace. Our most personal information–such as our social and financial status, shopping habits, or interests and hobbies–is constantly gathered and exchanged between governmental and private entities, and is likely to become even more vulnerable to exploitation as sophisticated hi-tech equipment becomes widely available and access to data increases. Some of us may experience many other forms of intrusions upon our lives driven by race, ethnicity, gender, and class considerations. It is not surprising, therefore, that the Fourth Amendment continues to be a subject of constant litigation, resulting in a huge and complex body of case law.

Despite the plethora of precedent and legal scholarship, the meaning of the Fourth Amendment remains in a constant state of uncertainty and confusion. One court, for example, has described the law of search and seizure as "a labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions,"[1] and Fourth Amendment scholar Akhil Amar goes so far as to conclude that "[t]he Fourth Amendment today is an embarrassment."[2] The question is whether there is a new way to look at the Fourth Amendment that will eliminate its entangled state.

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1. State v. Hygh, 711 P.2d 264, 272 (Utah 1985).

2. *See* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (later incorporated into AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, FIRST PRINCIPLES (1997)). Professor Amar explains:

> Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. As a matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law are hard to support; in fact, today's Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so. . . . The result is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse. Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them.

Id. at 757-58.

This article suggests that a critical reexamination of the Fourth Amendment and its jurisprudence through feminist lenses can shed new light and add to our understanding of it. These insights, in turn, can and should generate a positive feminist Fourth Amendment jurisprudence–a distinctive feminist voice to be integrated systematically into the law of search and seizure,[3] leading to a transformation of the Fourth Amendment itself. Applying feminist theories to particular issues and normative layers of current Fourth Amendment jurisprudence may help guide us through the more difficult task of imagining a feminist jurisprudence of search and seizure law.[4]

A gender-conscious analysis of search and seizure law can uniquely contribute to the understanding and reconceptualization of the Fourth Amendment, both as a matter of substance and as a matter of legal

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3. *Cf.* Harold H. Koh, *Two Cheers for Feminist Procedure*, 61 U. CIN. L. REV. 1201 (1993) (discussing the potential contribution of feminist jurisprudence to civil procedure).

4. *Cf.* Roy L. Brooks, *Feminist Jurisdiction: Toward an Understanding of Feminist Procedure*, 43 U. KAN. L. REV. 317, 318 (1995) (proposing to begin the search for feminist civil procedure by applying feminist legal theory to the area of personal jurisdiction).

To date, there has not been a fundamental and comprehensive feminist challenge to the Fourth Amendment. The few examples of a feminist critique of the Fourth Amendment include Mary E. Becker, *The Politics Of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 453-54 (1992) (arguing that the Fourth Amendment neither gives women security in their homes from husbands nor ensures that the government treats marital rape like other rapes and assaults, as part of a more general argument that the Bill of Rights does less to solve the problems of women and non-propertied men than to solve the problems of men of property, especially white men of property); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987) (advocating a relational approach to the Fourth Amendment doctrines of "standing" and "third-party consent searches"); Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047 (2001) (arguing that e-mail monitoring in the workplace or disclosure of medical information should be regarded as issues of power and control rather than privacy); Teresa A. Miller, *Keeping the Government's Hands off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861 (2001); Teresa A. Miller, *Sex and Surveillance: Gender, Privacy, and the Sexualization of Power in Prison*, 10 GEO. MASON U. CIV. RTS. L.J. 291 (2000).

There is, however, some critical race and class oriented scholarship that can significantly inform a feminist exploration of the Fourth Amendment. *See, e.g.*, Judith G. Greenberg & Robert V. Ward, *Teaching Race and Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995) (using narratives to question and contextualize color-blind reasonableness in police-minority encounters); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998) (advocating the elimination of consent searches during a traffic stop in light of the inherent power disparities in police-initiated encounters, especially concerning minority drivers); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, SUP. CT. REV. 271 (1997); David D. Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 HOW. L.J. 239 (1993).

discourse. Feminist jurisprudence is centrally concerned with the gendered underpinnings of legal doctrines and reasoning, with the male standard implicit in the norms that are central to legal reasoning, and with the epistemological standpoint from which the law operates, i.e., its purported "point of viewlessness."[5] The Fourth Amendment provides a rich soil for such feminist exploration—from its text, to the values it is understood to embody, to the particular doctrines and epistemology that define its scope and guide its application in particular cases.

Following feminist inquiries in other areas of the law, this article seeks to flesh out the invisible biases that underlie the facially objective and neutral legal standards of search and seizure law. It specifically seeks to deconstruct the reasonable-unreasonable and objective-subjective dichotomies that control Fourth Amendment jurisprudence. I aim to expose the inherent arbitrary and artificial construction of the dichotomous structure, so that its maintenance can no longer be justified on grounds of rational, coherent, and bright guidelines. The vast array of Fourth Amendment case law will provide numerous examples in this process of deconstruction.

Once the logical and analytical foundations of the dichotomies break down, feminist theories suggest that the courts maintain the appearance of rational, natural, and essential dichotomies as a mechanism of perpetuating patriarchy and the subordination of women and other historically disadvantaged groups. The Fourth Amendment's overarching standard of reasonableness and its epistemological stance of objectivity particularly embody male values and reflect a male perspective. Furthermore, the Supreme Court's insistence on objectivity and neutrality not only hides the partiality and perspectivity of its own Fourth Amendment jurisprudence, but affirmatively invalidates all other perspectives in a way that systematically oppresses women and other subordinated members of society.[6]

Notably, highlighting the interrelations of the reasonable-unreasonable dichotomy and the objective-subjective dichotomy adds another dimension to the deconstructive process and aids in exposing the power webs that

5. This phrase was coined by Catherine MacKinnon. *See, e.g.*, CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

6. My feminist critique of the Fourth Amendment is not limited to exposing the implications of search and seizure law for women as women. I see it as an essential goal of any feminist project to address racism, class-bias, heterosexism, and other forms of oppression as well as male domination. It is an integral part of my ideological and epistemological feminist commitment. I see the multi-dimensional webs of power and powerlessness that connect all forms of social and legal subordination; and I believe that only a feminist theory that aims to acknowledge and dismantle these multiple web-like structures of domination can improve women's lives and the lives of other oppressed members of society.

underlie the Court's jurisprudence. Though analytically distinct, these two dichotomies are often used interchangeably in Fourth Amendment case law and are ideologically intertwined with one another. Objective standards are invoked to construe reasonableness, which in turn aids in our understanding of objectivity. Thus, reasonableness is spoken of in terms of objective truth and vice versa. On the other hand, subjectivity—that which embodies personal, partial perspectives—is implicitly tied with unreasonableness and often dismissed as untrue. Yet particular subjective viewpoints of those in power are validated by the legal system. In deconstructing the objective-subjective dichotomy, this article focuses particularly on the manner in which the Court consistently empowers the police, both when it ignores police officers' subjective motivations and when it validates their personal experiences. At the same time, the Court maintains a male discourse of objectivity and reasonableness, which serves to subordinate individuals encountering the police and exclude them from legal discourse and the criminal justice system.

Having exposed the oppressive fallacy of reasonableness and objectivity, this article advocates the abandonment of these two concepts. Instead of reasonableness and objectivity, I look to several possibilities of modeling a feminist Fourth Amendment by adopting a constantly shifting, multi-perspectival jurisprudence in substance and in form. Hence, I displace reasonableness with an anti-subordination principle suited for a re-envisioned power-centered Fourth Amendment. I discard the abstract discourse of reasonableness and objectivity in favor of employing a multifocal approach to Fourth Amendment adjudication, especially by transcending our conception of how to determine a constitutional violation and of whose voices should be heard and given preference. I also suggest we infuse search and seizure law with multiple perspectives of Fourth Amendment scenarios in the form of personal narratives in order to expand our basis of knowledge and understanding of multiple and other perspectives.

Once we train ourselves to see the world through multifocal lenses, we will be able to overcome many of the traditional objections to the adoption of contextual and personal standards without sacrificing the integrity of our legal system. To the contrary, the feminist emphasis on diversity of (excluded) voices and perspectives, on personal narratives, and on the importance of eradicating hierarchical power structures provides the initial tools sufficient to start imagining a different Fourth Amendment and a better society as a result.

II. Reasonableness

The concept of reasonableness permeates most Fourth Amendment doctrines, such as the reasonable expectations of privacy, reasonable suspicion, and reasonable person standards. More importantly, reasonableness operates as the overarching norm of the Fourth Amendment.[7] The Fourth Amendment does not denounce all searches or seizures, but only those deemed unreasonable,[8] and reasonableness is set forth as the ultimate constitutional standard.[9] Reasonableness is both the substantive command of the Fourth Amendment and its preferred methodology, and is the meta-narrative of search and seizure law.

Determining the precise meaning of reasonableness, however, has been an elusive goal. Carol Steiker has observed that no other provision of the Constitution seems to call so plainly for an open-ended interpretation and "positively invites constructions that change with changing circumstances."[10] The Court has similarly held that "[w]hat is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus paper test."[11]

Nonetheless, "[t]o say that the search must be reasonable is to require

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7. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. CONST. amend. IV.

8. Carroll v. United States, 267 U.S. 132, 147 (1925); *see also, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Elkins v. United States, 364 U.S. 206, 222 (1960); Schmerber v. California, 384 U.S. 757, 768 (1966); Terry v. Ohio, 392 U.S. 1, 9 (1968); United States v. Sharpe, 470 U.S. 675, 682 (1985); Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 619 (1989).

9. Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); United States v. Knights, 534 U.S. 112, 120 (2001); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 825 (2002); Samson v. California, 547 U.S. 843, 855, n.4 (2006); Brigham City, Utah v. Stuart, 547 U.S. 398, 402 (2006).

10. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994). *Cf.* Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (The Fourth Amendment "recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures.'").

11. *Rabinowitz*, 339 U.S. at 63; *see also Skinner*, 489 U.S. at 619 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)) ("What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'"); Scott v. Harris, 127 S.Ct. 1769, 1778 (2007) ("[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'").

some criterion of reason,"[12] for it is no guide for judges or for the police to say that only an unreasonable search is forbidden.[13] Consequently, various criteria, such as the warrant requirement, the probable cause requirement, or the reasonable suspicion requirement, are put forth by the Court as objective criteria of reason. However, all are vehemently debated in the Court's jurisprudence and offer no more meaningful guidance than the concept of reasonableness itself does.

A. Reasonable Expectations of Privacy: Threshold Issues of Defining a Search and Determining Standing

A constitutional scrutiny of the reasonableness of the governmental conduct begins with an inquiry as to whether this conduct amounts to a search or a seizure within the scope of the Fourth Amendment.[14] Since the Fourth Amendment protects only against unreasonable searches and seizures, it follows that if a given activity is not a search or a seizure, it is not covered by the Amendment and does not require a warrant, probable cause, or reasonable suspicion, individualized or other. In fact, it will not be scrutinized for its reasonableness altogether.[15] We must also determine whether the police action is a search or a seizure with respect to the particular person who is raising the Fourth Amendment claim. Only those individuals whose own rights were implicated by the search or the seizure have standing to invoke the exclusionary rule or seek civil remedies.[16] The concept of reasonableness guides both inquiries: A seizure of a person is determined according to a reasonable person standard,[17] and the search and the standing cases employ a reasonable expectation of privacy analysis.[18]

In *Katz v. United States*, the Supreme Court presumably expanded the protection offered by the Fourth Amendment by declaring that it protects people, not places.[19] The Court abandoned its former standard of trespass and physical intrusion and replaced it with a privacy inquiry. The majority briefly stated that the government's activities in electronically listening to and recording the defendant's words spoken into a telephone receiver in a

12. *Rabinowitz*, 339 U.S. at 83 (Frankfurter, J., dissenting); *see also* Chimel v. California, 395 U.S. 752, 765 (1968).

13. *Rabinowitz*, 339 U.S. at 83.

14. *Skinner*, 489 U.S. at 614.

15. United States v. Jacobson, 466 U.S. 109, 113 (1984).

16. Rakas v. Illinois, 439 U.S. 128, 134 (1978).

17. *See* Dana Raigrodski, *No Reason for the Reasonable Person—Lessons from the Fourth Amendment*, DISORIENT: CRITICAL LEGAL JOURNAL OF THE PACIFIC NORTHWEST (forthcoming 2008) (manuscript on file with the Texas Journal of Women and the Law).

18. *Rakas*, 439 U.S. at 137, 148-49; Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980); Minnesota v. Carter, 525 U.S. 83, 88 (1998).

19. Katz v. United States, 389 U.S. 347, 351 (1967).

public telephone booth violated the privacy upon which the defendant justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the Fourth Amendment.[20] However, subsequent decisions of the Court cited as the *Katz* test the two-pronged analysis that was articulated by Justice Harlan in his concurring opinion: "[F]irst, that the person has exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as reasonable."[21] In other words, although an individual might have a subjective expectation of privacy, that expectation alone is not enough to establish a constitutionally protected privacy interest. The individual's expectation must be objectively reasonable if society is to recognize it as legitimate.[22]

In determining the reasonableness of one's expectations of privacy, the Court relies on allegedly objective distinctions between the private and public, between the home and public marketplace, and between intimate details and commercial activity.[23] It thus held that none of the following

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20. *Id.* at 353.

21. *Id.* at 361 (Harlan, J., concurring). The Court first used the test in *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It has since used several interchangeable variations of the phrase "reasonable expectation of privacy." *See, e.g.,* United States v. Jacobson, 466 U.S. 109, 122-23, n.22 (1984) (using interchangeably the terms "reasonable" and "legitimate" in regards to the socially recognized expectations of privacy).

22. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984); Hudson v. Palmer, 468 U.S. 517, 525, n.7 (1984); California v. Ciraolo, 476 U.S. 207, 211 (1986).

23. *See, e.g.,* Oliver v. United States, 466 U.S. 170, 179 (1984) ("[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference. . . . Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be . . . the asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"); Kyllo v. United States, 533 U.S. 27, 34 (2001) ("[I]n the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."); *Id.* at 37 ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."); United State v. Karo, 468 U.S. 705, 714 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."); Gooding v. United States, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting) ("[T]here is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night."); Lewis v. United States, 385 U.S. 206, 211 (1966) (holding that while a private home is normally "accorded the full range of Fourth Amendment protections . . . when . . . a home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."); Donovan v. Dewey, 452 U.S. 594, 598-99 (1981) ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly

types of police conduct interfered with expectations of privacy that society considered reasonable: using undercover agents;[24] removing a paint sample from a car;[25] obtaining bank records;[26] obtaining a list of all outgoing telephone calls from the phone company;[27] using an electronic beeper in a drum of chemicals to monitor travel on public roads;[28] using a dog sniff to detect drug odor emanating from luggage[29] or from a vehicle during a traffic stop;[30] re-opening packages previously opened by a customs agent[31] or by a private citizen;[32] searching an inmate's jail cell[33] and even a parolee's home;[34] trespassing on private property beyond the curtilage of the home,[35] including peering through a window of a closed barn with a flashlight after ignoring several fences;[36] moving papers inside a car to view its VIN;[37] flying airplanes and helicopters over backyards,[38] including

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from the sanctity accorded an individual's home."); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) ("[T]he privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts."); Minnesota v. Carter, 525 U.S. 83, 90 (1998) (quoting New York v. Burger, 482 U.S. 691, 700 (1987)) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home!"); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (holding that one has a lesser expectation of privacy in a motor vehicle because "it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."), *aff'd* Rakas v. Illinois, 439 U.S. 128, 153-54 (1978); United States v. Knotts, 460 U.S. 276, 281 (1983); New York v. Class, 475 U.S. 106, 112-13 (1986); Wyoming v. Houghton, 526 U.S. 295, 303 (1999).

Elsewhere, I have questioned not only the designation of some things as private or as public, as intimate or as commercial, and so forth, but the utility of these distinctions as guidance in the construction of reasonableness and of reasonable expectations of privacy in light of the inherent malleability of such dichotomies and the particular ideology they stand to serve. *See* Dana Raigrodski, *From Privacy to Power: Toward a New Theory of the Fourth Amendment*, 16 MICH. J. OF GENDER AND L. (forthcoming 2010) (manuscript on file with the Texas Journal of Women and the Law).

24. United States v. White, 401 U.S. 745, 749 (1971).
25. Cardwell v. Lewis, 417 U.S. 583, 588, 592-93 (1974) (plurality opinion).
26. United States v. Miller, 425 U.S. 435, 441-43 (1976).
27. Smith v. Maryland, 442 U.S. 735, 742-43 (1979).
28. United States v. Knotts, 460 U.S. 276, 277 (1983).
29. United States v. Place, 462 U.S. 696, 707 (1983).
30. Illinois v. Caballes, 125 S.Ct. 834, 837-38 (2005).
31. Illinois v. Andreas, 463 U.S. 765, 770 (1983).
32. United States v. Jacobsen, 466 U.S. 109, 117-18 (1984).
33. Hudson v. Palmer, 468 U.S. 517, 525-26 (1984).
34. Samson v. California, 547 U.S. 843, 846, 851 (2006) (relying on a blanket search parole condition to hold that a parolee does not have a legitimate expectation of privacy).
35. Oliver v. United States, 466 U.S. 170, 180 (1984).
36. United States v. Dunn, 480 U.S. 294, 298 (1987).
37. New York v. Class, 475 U.S. 106, 114 (1986).
38. California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (airplane); Florida v. Riley, 488 U.S. 445, 450 (1989) (plurality opinion) (helicopter).

the taking of aerial photographs with a sophisticated camera;[39] and rummaging through someone's garbage.[40] Absent a reasonable expectation of privacy, none of these activities constitute a search for Fourth Amendment purposes and does not have to pass constitutional muster.

On the other hand, using an electronic beeper in a drum of ether to locate the drum in a private residence;[41] lifting a piece of stereo equipment to see its serial number;[42] squeezing a passenger's bag in the overhead bin of a bus to detect drugs;[43] and using thermal imaging to detect heat emanating from one's home[44] infringe on objectively reasonable expectations of privacy.

The Court also imported the reasonable expectations of privacy standard into its standing inquiry, using the terms "reasonable" and "legitimate" interchangeably. In *Rakas v. Illinois*, the Court held that only a person whose own legitimate expectations of privacy have been violated has standing and may invoke the exclusionary rule.[45] Since then, in determining whether a plaintiff's own substantive Fourth Amendment rights have been implicated, the Court has generally followed and complimented its narrow and confusing portrayal of privacy expectations in the search context. The Court has thus held that mere one-time passengers in a car lack any legitimate expectation of privacy in the glove compartment or area under the seat of the car because these are "areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy."[46] Similarly, it found that the owner of drugs found in the purse of his female companion had neither subjective nor objective expectation of privacy in the purse.[47] Likewise, a person who is merely present in a house with the consent of the householder, as opposed to a social guest, has no legitimate expectation of privacy in the home, especially if he is there for commercial purposes.[48]

The crucial issue in both the standing and definition of a search contexts is the basis on which some privacy expectations are deemed reasonable and others unreasonable. The second prong of the *Katz* test is meant to reflect societal understandings of reasonableness rather than

39. Dow Chemical Co. v. United States, 476 U.S. 227, 229 (1986).
40. California v. Greenwood, 486 U.S. 35, 40-41 (1988).
41. United States v. Karo, 468 U.S. 705, 714 (1984).
42. Arizona v. Hicks, 480 U.S. 321, 323 (1987).
43. Bond v. United States, 529 U.S. 334, 336 (2000).
44. Kyllo v. United States, 533 U.S. 27, 29 (2001).
45. 439 U.S. 128, 137 (1978).
46. *Id.* at 148-49.
47. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980).
48. Minnesota v. Carter, 525 U.S. 83, 90 (1998); *contra* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (a social overnight guest has a reasonable expectation of privacy in the host's home).

personal viewpoints. A footnote in *Rakas* reaffirmed that the expectations of privacy must have their source outside Fourth Amendment law.[49] It also added that any subjective expectations entertained by criminals to keep their criminal activity undiscovered are not expectations that society recognizes as reasonable.[50]

In order to flesh out societal understandings of the reasonableness of particular privacy expectations, the Court can rely on both positivist empirical sources and normative sources.[51] The cases applying the reasonable/legitimate expectations of privacy standard have taken, rhetorically at least, both a descriptive approach (what is the extent of privacy most people normally expect?) and an aspirational normative approach (what is the extent of privacy people should have?). Both in defining a search and in the standing context, the Court has portrayed a very restricted view of reasonable and legitimate privacy expectations. The emerging picture of those privacy expectations that are deemed reasonable is not descriptively accurate or normatively cohesive. Consequently, it leaves the concept of reasonableness open to debate about its contents. More importantly though, from a feminist perspective, it leads us to question the utility and desirability of reasonableness as a legal standard.

An empirical study by Christopher Slobogin and Joseph Schumacher demonstrates that the Court's holdings do not necessarily reflect actual societal expectations of privacy.[52] Contrary to the Court's holdings, people ranked government access to bank records and police trespass on private property as relatively very intrusive, and even rummaging through one's garbage was ranked as more intrusive than other police conduct that the Court thought infringed on reasonable expectations of privacy.[53]

The Court has not done a better job from a purely normative aspect. Its holdings lack consistent guidelines and do not convincingly articulate agreed-upon values justifying its choices.[54] For example, if the Court's

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49. *Rakas*, 439 U.S. at 143-44 n.12.

50. *Id.*

51. *See generally*, Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19 (1988).

52. 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).

53. *Id.* at 740-41.

54. The "Accidental Tourist's Guide to Maintaining Privacy Against Government Surveillance" illustrates:

> To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with any other person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the backyard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available (be sure to check the

reasonableness discourse was to remain consistent with its decision that a frisk is a search,[55] the use of dogs to detect odors on people should also be regarded as infringing on reasonable expectations of privacy.[56] If inspections of burned-down houses and residential safety inspections are considered searches,[57] so should flying over backyards and rummaging through garbage left at curbside.[58]

Not surprisingly, traditional criticisms abound among Justices[59] and legal scholars[60] as to the reasonableness of finding a reasonable expectation of privacy in one case and not in another. Tracey Maclin, for example, has argued that the *Katz* test lacks content and substance—at best prone to circular reasoning and at worst a subjective malleable formula.[61] Ironically, Justice Scalia similarly attacked the reasonable expectation of privacy test as "self-indulgent," because the expectations of privacy that society is prepared to recognize as reasonable "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[62]

From a feminist standpoint, having the Justices determine the reasonableness of one's privacy expectations in light of their own

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> latest Sharper Image catalogue). Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents (again see your Sharper Image catalogue); ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached.

Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?* 94 COLUM. L. REV. 1751, 1790-91 (1994).

55. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968).

56. Slobogin & Schumacher, *supra* note 52, at 755.

57. *See* Michigan v. Clifford, 464 U.S. 287 (1984) (burned-down house); *see also* Camara v. Municipal Court of City and Country of San Francisco, 387 U.S. 523 (1967) (residential safety inspection).

58. Slobogin & Schumacher, *supra* note 52, at 755.

59. In almost every case at least two to four Justices dissent, finding that there is or is not a reasonable expectation of privacy while the majorities holds to the contrary.

60. *See, e.g.,* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?* 3 U. PA. J. CONST. L. 398 (2001); Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Commonsense,* 73 IOWA L. REV. 541 (1988); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine),* 48 U. PITT. L. REV. 1 (1986).

61. Maclin adds:

> The Court's precedents are not built upon objective legal principles; rather, the Court's rulings simply reflect the current sentiments of a majority of the Justices deciding whether a particular police investigative practice is reasonable under the circumstances. Maclin, *supra* note 60, at 431.

62. Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

conceptualizations of privacy and reasonableness is particularly worrisome due to the traditional composition of the judiciary. Mary Coombs argues that both the objective and subjective prongs of the expectation of privacy standard are sufficiently indeterminate, allowing judges' individual assumptions about how people do and ought to behave to easily intrude.[63] Judges tend to assess these factors through the eyes of someone like themselves. Most of the Supreme Court Justices are, and always have been, white, male, and middle to upper class. As a group, they have particularly experienced and conceptualized *individualized* privacy.[64] Yet, such assessments may bear only a tangential relationship to the lives of those more commonly subject to police investigations.[65]

More importantly, the elitist composition of the judiciary magnifies the core concern from a feminist perspective with the use of reasonableness and the objectivity it connotes as a useful and appropriate legal standard. This concern cannot be resolved by merely diversifying the judiciary. The profound controversies over the application of the reasonable expectations of privacy standard in particular cases reflect fundamental disagreements over the proper construction of the term "reasonable." Such disagreements, in turn, serve to undermine altogether the notion of reasonableness as reflecting some attainable external and objective truth. If anything, they exemplify the partiality of law and the particular viewpoint it adopts.

Expanding the existing legal discourse to be more inclusive and sympathetic to perspectives shaped by different life experiences, especially along the lines of race, gender, and class, is an important goal for feminists to pursue. Indeed, my own feminist vision of the Fourth Amendment calls for a discourse of multiple perspectives.[66] From a pragmatic standpoint, such diversity could result in immediate positive accommodations in search and seizure law. But accommodations within the existing doctrine leave the basic jurisprudence of reasonableness and objectivity untouched. They may even run the risk of perpetuating the normative utility and superiority of these concepts. By maintaining a discourse of objectivity and reason, we perpetuate the privileged status assigned to everything which is stereotypically male and the denigration of that which is stereotypically female. Consequently, we perpetuate the broader gender hierarchy in

63. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1594 (1987) (criticizing the Court for its narrow, individualistic conception of privacy, rooted in the right to exclude others and "to be let alone," and offering a relational conception of shared privacy within the context of standing and of third party consent to a search).

64. *Cf.* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 404 (1974) ("People who live in single houses or well-insulated apartments tend to take a rather parochial view of privacy.").

65. Coombs, *supra* note 63, at 1595 n.9, 1615.

66. *See infra* Part II.B.3.

which men dominate women, and deepen the destructive internalization of subordination and exclusion as acceptable, if not desirable, normative concepts.

B. "Objective" Criteria of Reasonableness

To hold that the challenged governmental conduct is a search or a seizure to which the Fourth Amendment is applicable is only to begin the inquiry into the standards governing such intrusions.[67] The lack of guidance offered by the concept of reasonableness is not limited to the threshold analysis of reasonable expectations of privacy that defines a search and determines standing. This lack of guidance is evident throughout the Court's Fourth Amendment jurisprudence when reasonableness is used as an overarching norm and in the formulation of particular legal standards.

In assessing the reasonableness of a search or a seizure, the Court has advanced several purportedly objective criteria, ranging from a warrant requirement to a general balancing test.[68] In reviewing these criteria my purpose is two-fold. First, I question the ability of these criteria to advance our understanding of the concept of reasonableness and to distinguish unreasonable searches and seizures from reasonable ones. Moreover, to the extent that any of these criteria resort to notions of reasonableness in their definition, it is tautological. Second, it will become clear that none of these criteria can resolve the reasonableness inquiry alone or in combination. Both the Justices and traditional Fourth Amendment scholars will concede that reasonableness is largely a matter of common sense. Therefore, any of the particular criteria, the overarching concept of reasonableness and the concept of common sense, are suspect from a feminist perspective because of their claims to objectivity and universal point of viewlessness. Rather, they embody the particular and partial privileged perspective of affluent white men.

1. The Framers' Intent

The Court has often held that the Fourth Amendment should be construed in light of what was deemed an unreasonable search and seizure

67. Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 618-19 (1989); O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (plurality opinion); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

68. *See generally* Thomas K. Clancy, *The Fourth Amedment's Concept of Reasonableness*, 2004 UTAH L. REV 977 (2004) (arguing that there is a fundamental need for objective criteria to measure reasonableness).

when it was adopted.[69] The Court recently reaffirmed that "an examination of the common law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable."[70]

Deferring to the Framers or to common law understandings of reasonableness, however, only shifts the temporal reference point for constructing reasonableness. It does not explain the basis on which past generations distinguished reasonable from unreasonable. David Sklansky argues that the term "unreasonable" almost always meant in the late-eighteenth-century what it means today: contrary to sound judgment, inappropriate, or excessive.[71] These terms—sound judgment, inappropriate, or excessive—are no less open-ended than the concept of reasonableness itself and cannot provide us with much needed guidance to distinguish reasonable from unreasonable government conduct. However, the association of these terms with the meaning of reasonableness does serve to partially expose the inevitable resort to value-based, positional judgments, which are masked by the objective and a-perspectival appearance of reason and reasonableness.

Justice Scalia's concern with the part of the Court's holding in *Terry v. Ohio* approving pat-down searches based on reasonable suspicion illustrates how constitutional originalism does not escape the core objection to reasonableness from a feminist perspective. To the contrary, examining the types of government conduct that were regarded by the Framers as reasonable or as unreasonable demonstrates the inherent positionality of reasonableness and exposes the particular elitist viewpoint that has traditionally shaped reasonableness. According to Scalia, the purpose of the guarantee against unreasonable searches and seizures is "to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusions 'reasonable.'"[72] Consequently, Justice Scalia doubts whether "the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity."[73]

When it came to others, though, the Framers were less virtuous, and

69. Carroll v. United States, 267 U.S. 132, 149 (1925); *See also* California v. Acevado, 500 U.S. 565, 583-84 (1991) (Scalia, J., concurring); Minnesota v. Dickerson, 508 U.S. 366, 379-80 (1993) (Scalia, J., concurring).

70. Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001).

71. David A. Sklansky, *The Fourth Amendment and Common Law,* 100 COLUM. L. REV. 1739, 1780-81 (2000).

72. *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring).

73. *Id.* at 381.

regarded as "reasonable" all kinds of intrusions upon other people that they would never have tolerated for themselves. As David Skalnsky points out, eighteenth century search-and-seizure law was unmistakably elitist, driven by class and race privilege.[74] While American merchants and landowners objected to virtually any intrusions on their persons or property by officers of the Crown, they approved of routine arrests of night-walkers; inspections of the homes of the poor to look for vagrants, poached game, and moral violations; and in the South, the rounding up by military squads, known as the slave patrol, of drifters and the routine invasions of "Negro Houses" and other dwellings that might harbor or provide arms to escaped slaves.[75]

Such examples enable us to pierce the veil of objectivity surrounding the concept of reasonableness. Reasonableness is inherently subjective in the sense that it is shaped by particular perspectives and experiences. Furthermore, feminists insist, the law legitimates selective viewpoints, especially of those privileged by race, class, and gender, while not treating them as viewpoints at all.[76] The historical distance helps us see this partiality of reasonableness and objectivity and the specific perspectives they embody. If the Fourth Amendment is to mean anything, we cannot afford to wait another two centuries before we realize the positionality inherent in our conceptualizations of reasonableness and objective truth.

2. The Warrant Requirement

Fourth Amendment originalism aside, where the past yields no answer, the Court will employ traditional standards of reasonableness.[77] In light of the second clause of the Fourth Amendment and its history, the warrant and probable cause requirements are frequently invoked as traditional standards of reasonableness. Thus, although the Fourth Amendment speaks broadly of unreasonable searches and seizures, the definition of reasonableness turns in part on the more specific commands of the warrant clause.[78]

The question of whether the existence of a search or an arrest warrant is *sine qua non* to the reasonableness of a search or a seizure arises in light of the dual clauses of the Fourth Amendment: the reasonableness clause and the warrant clause. Much of the Court's jurisprudence and Fourth Amendment academic scholarship has focused on debating this perceived tension within the Fourth Amendment.[79] In any event, even if the Fourth

74. *See* Sklansky, *supra* note 71, at 1805-06.
75. *Id.*
76. *See infra* Part III.A.
77. Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999).
78. United States v. U.S. District Court, 407 U.S. 297, 315 (1972).
79. Professors Akhil R. Amar and Tracey Maclin, for example, disagree about whether

Amendment does not explicitly impose the requirement of a warrant, it is certainly possible to consider that mandate implicit within the requirement of reasonableness.[80] Although the Court oscillates between imposing a categorical warrant requirement and looking to reasonableness alone, for the most part it has held that warrantless searches and seizures are *per se* unreasonable.[81] There has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[82] Hence, "the police must, when practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[83]

Nonetheless, it is not disputed that there can be reasonable searches without a search warrant.[84] Even the presumption of unreasonableness that attaches to all warrantless home entries[85] has been called into question, and

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the Fourth Amendment embodies a warrant preference, as Maclin argues, or is rather anchored in a general reasonableness standard, as Amar claims. *Cf.* Akhil R. Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998); Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996); Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-80 (1991); *with* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?* 3 U. PA. J. CONST. L. 398 (2001); Tracey Maclin, *Informants and the Fourth Amendment*, 74 WASH. U. L.Q. 573 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); *See also* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825 (1994) ("The modern Court's (at least occasional) focus on warrants and probable cause as the touchstones of constitutional 'reasonableness' . . . can and should be defended against the more freewheeling 'reasonableness' inquiry . . . proposed by Professor Amar.").

Amar even argues that warrants were viewed unfavorably, and that the warrant clause was intended to place limits on the issuance of warrants rather than mandate their use. *Id. See also* California v. Acevedo, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'uneasonable.' What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use, for the warrant was a means of insulating officials from personal liability assessed by colonial juries.").

80. *See, e.g., Acevedo*, 500 U.S. at 582 (Scalia, J., concurring).

81. Katz v. United States, 389 U.S. 347, 357 (1967).

82. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Michigan v. Tyler, 436 U.S. 499, 506 (1978).

83. Terry v. Ohio, 392 U.S. 1, 20 (1968).

84. United States v. Rabinowitz, 339 U.S. 56, 65 (1950); *see also* Brigham City, Utah v. Stuart, 547 U.S. 398, 402 (2006) ("Because the ultimate touchstone of the Fourth Amendment is 'reasonableness', the warrant requirement is subject to certain exceptions.").

85. Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971); Welsh v. Wisconsin, 466 U.S. 740, 748-50 (1984); Groh v. Ramirez, 540 U.S. 551, 559 (2004); *Brigham City, Utah*, 547 U.S. at 402 (2006).

the "firm line [drawn] at the entrance to the house"[86] has been blurred.[87] The Court insists, though, that the cardinal principle that searches conducted without a judicial warrant are per se unreasonable is subject only to a "few specifically established and well-delineated exceptions."[88] In reality, the warrant requirement has become so riddled with exceptions that it is unrecognizable. There are some twenty exceptions including searches incident to arrest, automobile searches, stop and frisk searches, plain view searches, consent searches, border searches, administrative searches of regulated businesses, exigent circumstances, welfare searches, inventory searches, airport searches, school searches, searches of mobile homes, and searches of offices of public employees.[89] Seizures such as arrest outside of the home, on-the-street investigative stops, or brief detentions at fixed sobriety or border checkpoints are likewise exempt from the warrant requirement.[90]

Reasonableness continues to play a role even in those instances where a warrant makes the search or the seizure presumptively reasonable. First, the warrant clause of the Fourth Amendment requires that the warrant particularly describe the place to be searched and the people or things to be seized as well as supported by oath or affirmation.[91] Both requirements, in turn, are based on the facts as the officer reasonably believes them to be. Second, the execution of the warrant itself must not be unreasonable. In what has become standard circular reasoning in the Court's Fourth Amendment cases, the Court held in *Hicks v. Arizona* that any operational necessities to conduct a search must be reasonably related to the scope of

86. *Payton*, 445 U.S. at 589-90.

87. *See, e.g.*, California v. Carney, 471 U.S. 386 (1985) (approving warrantless search of mobile home); Maryland v. Buie, 494 U.S. 325 (1990) (approving warrantless protective sweep of home during in-home arrest); Illinois v. Rodriguez, 497 U.S. 177 (1990) (validating warrantless home search based on apparent authority of a third party to consent to the search). *But cf.* Georgia v. Randolph, 547 U.S. 103 (2006) (holding warrantless search unreasonable as to defendant physically present and expressly refusing consent).

88. Katz v. United States, 389 U.S. 347, 357 (1967); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (citing *Katz*); California v. Acevedo, 500 U.S. 565, 580 (1991). *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk searches); Harris v. United States, 390 U.S. 234 (1968) (plain view searches); Carroll v. United States, 267 U.S. 132 (1925) (motor vehicle searches); United States v. Robinson, 414 U.S. 218 (1973) (searches incident to arrest); *Coolidge*, 403 U.S. at 443 (searches under exigent circumstances); and Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (searches based on consent).

89. *See generally* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment, Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993); Craig M. Bradley & Joseph L. Hoffmann, *"Be Careful What You Ask For": The 2000 Presidential Election, The U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889 (2001); *See also, e.g., Acevedo*, 500 U.S. at 581-82 (1991) (Scalia, J., concurring).

90. *Id.*

91. U. S. CONST. amend. IV.

the search warrant for it to be considered a reasonable search.[92] It thereafter relied on this holding to determine that a media ride-along in executing a warrant in a home violated the Fourth Amendment because the presence of the media was not in aid of the warrant's execution.[93] The Court reasoned that police actions in the execution of a warrant must be ("reasonably" is implied) related to the authorized objectives of the warrant and entrance into the home.[94]

The Court also considered whether this reasonableness requirement imposes a "knock and announce" duty on the police when executing a search warrant of a home. First, the Court held, without specifying, that depending on the circumstances, an officer's unannounced entry into a home might be either unreasonable or reasonable.[95] Later, it sanctioned a warrant that preemptively exempted the police from announcing their presence prior to entry (a "no-knock" warrant), reasoning that the police did not have to announce their presence if they had a reasonable suspicion that doing so would be dangerous, futile, or would inhibit the effective investigation of the crime.[96] When the reasonableness of the police conduct is determined by employing a standard defined itself by a notion of reasonableness, the standard rings hollow.[97] This is even more true where the reasonable suspicion standard is employed as the sole criterion for reasonableness rather than the warrant and probable cause requirements.[98]

3. Probable Cause

When a warrant is issued, the warrant clause imposes a probable cause requirement.[99] However, when a warrant is not required, textually, probable cause is not invariably required either.[100] Nonetheless, the Court initially maintained that, regardless of a warrant, searches and seizures

92. Arizona v. Hicks, 480 U.S. 321, 325 (1987).

93. Wilson v. Lane, 526 U.S. 603, 614 (1999).

94. *Id.* at 604 (citing *Hicks*, 480 U.S. at 325).

95. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

96. United States v. Ramirez, 523 U.S. 65, 67-68 (1998); Hudson v. Michigan, 547 U.S. 586, 589-90 (2006).

97. In fact, the Court seems to have discarded whatever little guidance was meaningful in using a reasonable suspicion standard to evaluate the reasonableness of the officers' unannounced entry to execute a search warrant. In *Hudson*, the Court held that a violation of the knock and announce rule, regardless of the existence of any such reasonable suspicion to justify the officers action, does not warrant suppression of evidence found as the appropriate remedy. *Hudson*, 547 U.S. at 599. The decision hence suggests that the Court views the knock-and-announce rule with less importance, and in facts shields unannounced entries to execute a search warrant as per se reasonable.

98. *See infra* Section 4.

99. U. S. CONST. amend. IV.

100. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

should be based on probable cause in order to be deemed reasonable.[101] Thus, probable cause serves as a criterion of reasonableness for warrantless arrests outside of the home, or for the exigent circumstances and automobile exceptions to the warrant requirement. However, the Court has not only chipped away at the probable cause requirement, but has defined the standard in a way that does not substantially advance our understanding of reasonableness.

Probable cause is usually thought of in terms of statistical probabilities. Essentially, though, it is a flexible, common sense standard.[102] The Court emphasizes that "[l]ong before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior."[103] Hence, the probable cause standard merely requires that the facts available to the officer would cause a "man of reasonable caution" to believe that the items sought are contraband or evidence of a crime.[104] Defined in that manner, one might wonder what differentiates probable cause from the supposedly less stringent standard of reasonable suspicion often used by the Court as a substitute for the probable cause standard. Grounding both standards in notions of common sense and in the conclusions reached by reasonable people will require us to investigate what qualifies as common sense and how certain conclusions about human behavior are reached.[105]

4. Reasonable Suspicion and General Interest Balancing

As with the warrant requirement, the Court made it clear that probable cause is not synonymous with reasonableness. Sometimes a reasonable suspicion of wrongdoing will suffice, and sometimes no suspicion at all is required for the search or seizure to be reasonable. These options became acceptable due to a fundamental change in traditional Fourth Amendment analysis that took place in the late 1960s. In two close cases, the Court significantly shifted the focus of Fourth Amendment inquiry.[106] First, it openly acknowledged the central place of reasonableness rather than warrants and probable cause. Second, the Court developed a general balancing test as the ultimate criterion for Fourth Amendment reasonableness.

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101. Carroll v. United States, 267 U.S. 132, 155-56 (1925) (probable cause is "reasonableness" standard for warrantless searches and seizures).

102. *Id.* at 161; Texas v. Brown, 460 U.S. 730, 742 (1983); *See also* Illinois v. Gates, 462 U.S. 213, 230, 238 (1983) (characterizing the determination of probable cause as a practical matter of common sense).

103. *Gates*, 462 U.S. at 231 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

104. *Brown*, 460 U.S. at 742 (citing *Carroll*, 267 U.S. at 162).

105. *See infra* Part I.C.

106. Camara v. Municipal Court, 387 U.S. 523 (1967); Terry v. Ohio, 392 U.S. 1 (1968).

The facts of both cases presumably had limited applicability but expanded the protections of the Fourth Amendment to cover thus far unregulated government activity.[107] However, these cases' implications for Fourth Amendment jurisprudence were far-reaching. The Court has since made it clear that the Fourth Amendment test is whether the governmental intrusion is reasonable based upon a balancing of the government's need to engage in the intrusion against the individual's privacy interests.[108]

This shift in the Court's jurisprudence has only aggravated the problematic use of reasonableness from a feminist perspective. Both the reasonable suspicion standard and the general interest-balancing framework clearly demonstrate the main themes of my critique. First, despite their purported objective normative guidance, the reasonable suspicion standard and the interest-balancing framework do not provide us with a meaningful guide to differentiate reasonable suspicions from unreasonable ones. Second, both rely on common sense "knowledge," which in itself lacks any guidance, and rather than being objective and universal embodies a privileged white male perspective. Finally, like the previous criteria of reasonableness and common sense, both the reasonable suspicion standard and the interest-balancing scheme mask their inherent perspectivity behind a façade of objectivity and point of viewlessness.

In *Camara v. Municipal Court of San Francisco*,[109] the Court took the first step towards shifting traditional Fourth Amendment analysis away from the warrant and probable cause requirements to a general balancing inquiry. At first, it concluded that administrative searches by municipal health and safety inspectors for housing code violations constituted significant intrusions upon the interests protected by the Fourth Amendment, and that such searches, when authorized and conducted without a warrant procedure, lacked traditional Fourth Amendment safeguards.[110] The Court went on to say, however, that these conclusions must not be the end of its inquiry.[111] Reasonableness, the Court held, was still the ultimate standard.[112] Eventually, "there can be no ready test for

107. *Camara* dealt with routine inspections for housing code violations, and *Terry* addressed the police practice of stop and frisk during street encounters with individuals. *Camara*, 387 U.S. at 523; *Terry*, 392 U.S. at 1.

108. *See, e.g.,* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619-20 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989); New Jersey v. T.L.O., 469 U.S. 325, 337, 342 n.8 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-54 (1995); United States v. Knights, 534 U.S. 112, 119 (2001); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 825 (2002); Samson v. California, 547 U.S. 843, 848 (2006); Scott v. Harris, 127 S.Ct. 1769, 1778 (2007).

109. 387 U.S. 523 (1967).

110. *Id.* at 534.

111. *Id.*

112. *Id.* at 539.

determining reasonableness other than by balancing the need to search against the invasion which the search entails."[113] As opposed to a search pursuant to a criminal investigation, the reasonable goal of enforcing the housing code justified conducting periodic routine area inspections even absent individual probable cause to search a particular dwelling.[114]

Quoting *Camara*,[115] the Court expressly imported the balancing analysis into the context of criminal investigations in *Terry v. Ohio*, decided the following year.[116] In *Camara*, the balancing analysis resulted in approval of a search based on *non-particular* probable cause. In *Terry*, the balancing analysis led to the *substitution* of a reasonable suspicion standard for the usual probable cause requirement. The *Terry* Court had to assess for the first time the reasonableness of on-the-street police-citizen encounters and the police practice of stop and frisk. While finding that an investigative stop constituted a Fourth Amendment seizure, and that a pat-down frisk was a Fourth Amendment search, the Court held that neither a warrant or probable cause were required for either. Instead, it accepted reasonable suspicion as the new threshold of constitutionality.[117]

Hence, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion."[118] The officer's suspicion, though, is judged against an objective standard: would the facts "warrant a man of reasonable caution in the belief that the action taken was appropriate."[119] Simple good faith on behalf of the officer is not enough; she must be able to articulate more than an inchoate and unparticularized hunch of criminal activity.[120] Consequently, the Court held that a police officer could conduct a warrantless investigative stop of a citizen based on a reasonable, articulable suspicion that criminal activity was afoot.[121] That same officer, based on a reasonable suspicion that the citizen may be armed and dangerous, could conduct a pat-down frisk of the citizen's outer clothing. In the context of the latter, a reasonable suspicion requires that "a reasonable prudent man in the circumstances would be warranted in the belief that his safety or that of others would be in danger."[122]

While the Court has acknowledged that the concept of reasonable

113. *Id.* at 536-37.
114. *Id.* at 536-38.
115. Terry v. Ohio, 392 U.S. 1, 20-21 (1968).
116. *Id.*
117. *Id.* at 27.
118. *Id.* at 21.
119. *Id.* at 21-22.
120. *Id.* at 22, 27; *See also* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979).
121. *Terry*, 392 U.S. at 30.
122. *Id.* at 26.

suspicion is somewhat "abstract"[123] and "elusive,"[124] it has deliberately avoided reducing it to "a neat set of legal rules."[125] To the contrary, the Court has maintained that the concept of reasonable suspicion is one of the relatively *simple* concepts embodied in the Fourth Amendment.[126] I disagree. As defined, the reasonable suspicion standard is circular and does not provide a meaningful guide to differentiate reasonable suspicions from unreasonable ones. Although reasonable suspicion is regarded as a less demanding standard than probable cause, it at least requires a minimal level of objective justification.[127] Such objective justification, we have seen, may arise upon specific facts and rational inferences from them. These facts and inferences must reasonably warrant the intrusion, as opposed to hunches that are insufficient. What exactly would make an inference rational as against a mere hunch? What facts reasonably warrant the intrusion as against facts on which it is unreasonable to warrant the intrusion?

In subsequent cases, the Court has stated that a police officer is entitled to rely on common sense inferences about human behavior, so long as those inferences establish a particularized and objective basis for the establishment of reasonable suspicion.[128] The Court was also clear that law enforcement agents may, and should, rely on their experience in making such inferences. Those inferences, including ones based on perceptions of seemingly innocent facts, should be given due deference because of the unique law enforcement experience of police officers and government agents.[129] These doctrinal "clarifications," however, do not provide us with better guidance to understand which inferences would give rise to an objectively reasonable suspicion.

Sheri Lynn Johnson has pointed out the amazing variety of innocuous human behavior that experienced officers regard as suspicious.[130] She demonstrates how the police have inferred an attempt to conceal criminal activity both from a traffic violator's reach toward the dashboard or floor of a car, and from her alighting from the car and walking toward the police.[131] Drug Enforcement Agency officers have inferred a desire to avoid

123. United States v. Arvizu, 534 U.S. 266, 274 (2002).

124. United States v. Cortez, 449 U.S. 411, 417 (1981).

125. *Arvizu*, 534 U.S. at 274 (quoting Ornelas v. United States, 517 U.S. 690, 695-696 (1996)).

126. *Id.* (quoting United States v. Sokolow, 490 U.S. 1, 7-8).

127. United States v. Sokolow, 490 U.S. at 7.

128. *Cortez*, 449 U.S. at 418; *See also* Illinois v. Wardlow, 528 U.S. 119, 123, 124-25 (2000).

129. *See infra* Part III.B.2.c.

130. Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

131. *Id.* at 219.

detection both from a traveler's being the last passenger to get off a plane and from him being the first.[132] INS agents have concluded that it was suspicious that the occupants of a vehicle reacted nervously when a patrol car passed, and also that it was suspicious that the occupants failed to look at the patrol car or were just "excessively" calm.[133] It seems that a seasoned officer can interpret almost any conduct as suspicious, and given the Court's deference to the officers' inferences almost anything can be a reasonable suspicion. What qualifies each suspicion as objectively reasonable remains a mystery.

The impact of the reasonable suspicion standard and the overall analytical framework of interest-balancing would not have been that far-reaching had the Court's subsequent cases stayed true to the rhetoric and reasoning of *Terry*. In applying a balancing test and evaluating the proper extent of governmental intrusion, the *Terry* Court emphasized the limited nature of the stop and frisk intrusions in place, time, scope, and purpose. Hence, the less demanding reasonable suspicion standard probably was considered constitutionally adequate in light of the particular circumstances involved in *Terry*.[134] However, *Terry*'s broad implications became clear as subsequent cases disregarded these limiting circumstances and applied the balancing analysis and reasonable suspicion standard in various settings entailing more significant intrusions.

The Court extended the reasonable suspicion standard to motor vehicle stops,[135] including a frisk of the vehicle's interior,[136] to protective sweeps of homes following an in-home arrest,[137] and even to warrantless searches of probationers' homes on suspicion of criminal activity.[138] Detention no longer had to be brief once the Court approved of a prolonged detention (over 16 hours) of a traveler at the border to dispel a reasonable suspicion that she smuggled drugs in her body cavities.[139] Police officers performing a *Terry* pat-down search can seize discovered items they reasonably suspect are contraband, even though the items pose no threat of

132. *Id.* at 219.

133. *Id.* at 219-20.

134. *Terry* involved a detention on the street for a brief investigative questioning to dispel suspicion of present or future criminal activity, and a pat-down search of the outer clothing of the individual suspected of being armed and dangerous in order to detect the weapons for the officer's protection. *Terry*, 392 U.S. at 30.

135. Michigan v. Long, 463 U.S. 1032, 1049 (1983).

136. *Id.* at 1051.

137. Maryland v. Buie, 494 U.S. 325, 337 (1990) (held that officers may conduct a limited protective sweep if they have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.").

138. United States v. Knight, 534 U.S. 112, 121-22 (2001).

139. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

danger.[140] And in *New Jersey v. T.L.O,* the Court approved a full-blown search of a student's personal belongings based on reasonable suspicion she violated or was violating the law or the school's rules.[141]

Even the requirement that the suspicion be particular and individualized for it to be deemed "reasonable" has been severely undermined. Although in *Terry* the Court adopted a balancing analysis as the ultimate measure of Fourth Amendment reasonableness, it maintained the premise that "a search ordinarily must be based on individualized suspicion of wrongdoing."[142] Yet subsequent cases have made it clear that some searches and seizures may be reasonable under the Fourth Amendment without any individualized suspicion.[143] For example, the Court has upheld certain regimes of suspicionless searches where the program was designed to serve "special needs beyond the normal need for law enforcement."[144] It has also approved of suspicionless searches of pervasively regulated industries for certain administrative purposes,[145] and condoned suspicionless brief seizures at fixed sobriety[146] and border patrol[147] checkpoints designed to combat drunk driving and intercept illegal immigrants respectively.

In these cases, several factors in the balancing analysis combined to justify the search or seizure absent an individualized suspicion. On the one hand, the Court characterizes the governmental interest as administrative in nature or grounded in special needs beyond regular (criminal) law

140. Minnesota v. Dickerson, 508 U.S. 366, 373 (1993).

141. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

142. Chandler v. Miller, 520 U.S. 305, 308 (1997). Indeed, even in *T.L.O.*, where the Court approved a search of a student's purse as a result of balancing the special needs of school authorities with the diminished privacy expectations of children at school, it did so in light of the individualized suspicion that the particular student was violating school rules concerning cigarettes. *See T.L.O.*, 469 U.S. at 337.

143. *See, e.g.,* Samson v. California, 547 U.S. 843, 855 n.4 ("The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion . . . although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which search absent individualized suspicion could be reasonable under the Fourth Amendment.").

144. *See, e.g.,* Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (suspicionless drug testing of all students who participate in competitive extracurricular school activities is constitutional); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (random drug testing of certain student athletes is reasonable without any particularized showing of suspicion); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (upholding suspicionless drug tests for U.S. Customs Service employees seeking transfer or promotion to certain positions); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding drug and alcohol tests for railway employees involved in train accidents or in violation of safety regulations).

145. New York v. Burger, 482 U.S. 691, 702-03 (1987).

146. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

147. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

enforcement. On the other hand, turning again to the reasonable expectations of privacy standard, it portrays the individual's privacy interest as limited or diminished.[148] Set up against each other, the administrative interest/special need of the government outweighs the privacy interest of the individual, leading the Court to characterize the intrusion upon the individual as minimal. Consequently, the individual is granted a lesser procedural protection from the intrusion by the government.

To date, the Court has not directly condoned suspicionless searches or seizures for overtly criminal law enforcement purposes, but it has come, at least for all practical purposes, very close. Initially, the Court approved such searches only in the administrative context. Hence, in *City of Indianapolis v. Edmond*,[149] the Court struck down suspicionless drug interdiction checkpoints as unconstitutional, distinguishing them from sobriety or border checkpoints because their primary purpose was to uncover evidence of ordinary criminal wrongdoing.[150] The Court was particularly reluctant to recognize exceptions to the general requirement of individualized suspicion where governmental authorities primarily pursue their general crime control ends:[151] "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."[152]

The distinction between "special needs beyond the normal need for law enforcement" and general crime control purpose was also significant to the holding of the Court in *Ferguson v. Charleston*.[153] In this case, the Court held that both the nonconsensual drug testing of urine samples of pregnant patients in the hospital and the reporting of positive test results to the police were unreasonable searches. In reaching this conclusion, the

148. The Court completes a full circle in its jurisprudence of reasonableness when it re-uses the 'reasonable expectation of privacy' standard to conclude that the individual has only a diminished expectation of privacy, which accordingly deserves lesser procedural protections. For example, the Court sanctioned the warrantless, suspicionless drug and alcohol testing of railway employees, in part on the ground that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989). Likewise, in *Bell v. Wolfish*, the Court balanced the strong legitimate security interest of the prison against the inmates diminished expectation of privacy (upon incarceration) and concluded that neither searches of the inmates' rooms nor body-cavity searches required any individualized suspicion or were otherwise unreasonable. Bell v. Wolfish, 441 U.S. 520, 557, 560 (1979).

149. 531 U.S. 32 (2000).

150. *Id.* at 40-42.

151. *Id.* at 43.

152. *Id.* at 42.

153. 532 U.S. 67 (2001).

Court emphasized the law enforcement's purpose of collecting evidence of drug use, which was meant to coerce the women into drug treatment.[154] While the outcomes of these two cases favor the individual, the Court's opinions demonstrate the malleability of the criminal-civil distinction, and consequently undermine it.

There are several reasons to criticize the criminal-civil line in the context of the Fourth Amendment.[155] First, the Fourth Amendment applies equally to civil and criminal law enforcement. Its text speaks to all governmental searches and seizures, and its history is not uniquely bound up with criminal law.[156] Second, in many cases, the purpose behind the governmental search or seizure can be easily characterized as either civil, criminal, or both.[157] Third, if two searches are equally unintrusive to the target, especially if the search suspect is not suspected of a crime, it is unclear why the criminal search should be more severely restricted than the civil search.[158] The expanding powers of the modern administrative state make civil searches and seizures no less intrusive and subject to potential abuse of state power. Finally, the Court is expressing a white, privileged, male perspective when it views some administrative searches as involving minor intrusions on one's privacy. For example, I doubt whether poor minority women who are welfare recipients share the Court's view of the "limited" intrusion into their lives caused by frequent and suspicionless welfare searches. Hence, if administrative searches may be "reasonable" absent particular individualized suspicion of wrongdoing, there is nothing inherently unreasonable in suspicionless searches for traditional criminal law enforcement purposes.

Like *Edmond* and *Ferguson*, the malleability of the criminal-civil distinction was evident in the Court's most recent cases regarding warrantless home searches of a probationer[159] and a parolee[160] respectively. In contrast to *Edmond* and *Ferguson*, the civil "special needs" backdrop of the probation and the parole no doubt served to undermine the otherwise traditional law enforcement nature of the police action under the circumstances. The Court, however, structures its holding so that they do not have to confront this question directly. First, in *United States v.*

154. *Id.* at 80-86.

155. *See generally* Amar, *supra* note 2.

156. *Id.* at 758-59 (placing the Fourth Amendment in criminal procedure distorts search and seizure law and causes us to give short shrift to the following questions: How should searches and seizures outside the criminal context be constitutionally regulated? Or what makes a search or seizure substantively unreasonable?).

157. *Id.* at 770 ("[A]ren't metal detectors there to detect and deter crimes like attempted hijacking?").

158. *Id.*

159. United States v. Knights, 534 U.S. 112 (2001).

160. Samson v. California, 547 U.S. 843 (2006).

Knights, the Court found that a probationer's severely diminished expectation of privacy due to a blanket search condition in the probation order,[161] combined with the police officer's actual individualized reasonable suspicion that criminal activity was taking place,[162] justified deviating from the probable cause and warrant requirements and held the search reasonable within the meaning of the Fourth Amendment.[163] Not only was the probation search condition a "salient circumstance" in finding that a probationer has a significantly diminished expectation of privacy,[164] but the Court seemed to have accepted that the Fourth Amendment does not limit searches based on a probation condition to those with "probationary" purposes.[165]

The *Knights* Court was not required to address the constitutionality of a suspicionless search based on a probation condition because the search in that case was supported by reasonable suspicion. Hence, the Court left open the question of whether a probation condition so diminishes or even eliminates a reasonable expectation of privacy, that a search without individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.[166] When it did have to address that question, in the case of *Samson v. California,* the Court avoided directly answering the question of whether individualized suspicion will no longer be needed for traditional law enforcement searches, at least for *Terry* stops outside of the home, by holding that a parolee has *no* legitimate expectation of privacy.[167]

It is not clear whether the Court is fully aware of the implications of its holding. By finding no legitimate expectation of privacy, the Court in fact characterizes the encounter as a non-search within the meaning of the Fourth Amendment. As such, it is not at all subject to reasonableness scrutiny under the Fourth Amendment,[168] regardless of whether it is characterized as administrative or special needs in nature, regardless of the government's professed interest, and even regardless of the extent of intrusion by the police. Nonetheless, the Court's analysis conflates the

161. *Knights*, 534 U.S. at 119-20.

162. *Id.* at 115-16.

163. *Id.* at 122.

164. *Id.* at 118-20.

165. *Id.* at 116.

166. *Id.* at 120 n.6.

167. 547 U.S. 843, 855 (2006). In this case, the officer observed Samson walking down a street with a woman and a child. Based on prior contact, the officer knew Samson was on parole and believed there was an outstanding parole warrant against him. The officer stopped Samson, which denied such warrant, and also confirmed by radio that there was no outstanding warrant. Nevertheless, based on Samson's status as parolee, the officer searched Samson and found methamphetamine. *Id.* at 846.

168. *See supra* Part II.A.

threshold question of defining a search with the constitutional examination if reasonableness, to suggest that the Court may not have intended to go that far.[169]

Whereas *Knights* and *Samson* may arguably be limited in scope due to the unique status of probationers and parolees, the Court's decision in *Illinois v. Caballes*[170] came very close to undoing what limited protection is afforded by the reasonable suspicion standard in criminal investigations. As you recall, in 2000 the *Edmond* Court struck down suspicionless drug interdiction checkpoints.[171] However, the holding of *Caballes* offers the police a way around *Edmond*. In the same way that the police have been widely using legal traffic stops to then obtain the consent of the individual to search the vehicle for drugs or firearms, a search which in itself would not be further subjected to reasonableness scrutiny,[172] it now seems that the police can formally rely on legal traffic stops to then conduct widespread dog sniffs of vehicles (and possibly even persons) or other "non-search" activities to jump start a criminal investigation.

In *Caballes*, a state police trooper stopped Roy Caballes for driving 71 miles per hour in a 65 miles per hour speed zone. The trooper radioed the police dispatcher to report the stop but requested no assistance. A second trooper, a member of the drug interdiction team, heard about the traffic stop over the radio, and decided to come to the scene to conduct a dog sniff. While the first trooper was still writing the ticket, the second one walked the dog around the car and was alerted to drugs in the trunk of the car, which were consequently introduced as evidence in trial. Ironically, Caballes refused earlier the first trooper's request for his consent to search the car.[173] The Court held that the initial seizure was legally based on probable cause and was not unduly prolonged by the dog sniff.[174] The dog sniff itself did not infringe on any legitimate expectation of privacy and therefore was not a search subject to the Fourth Amendment.[175] Hence, the reasonableness scrutiny did not extend to police conduct that followed the initial justified traffic stop, although the nature of the investigation no

169. In the footnote to its holding that Samson had no legitimate expectation of privacy, the Court states that "[b]ecause we find that the search at issue here is reasonable under our general Fourth Amendment approach," there is no need to reach the issue of consent. *Samson*, 547 U.S. 843, 852 n.3. The dissenting Justices, Stevens, Souter and Breyer, criticize the majority for its faulty syllogism and circular reasoning ("[T]he Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether."). *Id.* at 860.

170. 543 U.S. 405 (2005).

171. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

172. *See* Section E. *infra* and accompanying notes.

173. *Caballes*, 543 U.S. at 418 (Ginsburg J., dissenting).

174. *Id.* at 408.

175. *Id.* at 408-09.

doubt shifted and with it the potential for misuse of police power.

As the dissent notes, however, introducing an intimidating drug-detecting dog into a traffic stop can in fact be quite intrusive.[176] It therefore justifies critically re-examining the previous characterization of dog-sniffs as neither a search nor a seizure; and once seen as the Fourth Amendment search that it is in practice, the unwarranted and nonconsensual expansion of the routine traffic stop to a drug investigation is not reasonable within the meaning of the Fourth Amendment.[177] In contrast, the Court's decision clears the way for suspicionless dog-led drug sweeps of parked cars, motorists waiting at a red light, and simply pedestrians on the street–something before reserved primarily for security measures at airports and border crossings.[178]

Only time will tell whether the Court will decide to eliminate the reasonable (individualized) suspicion criterion altogether. There is nothing in the Court's concept of reasonableness to prevent it from doing so. Nor is there anything in the interest-balancing scheme that requires police to have a particular suspicion in order to justify searches and seizures for traditional criminal law enforcement purposes. In our day, it is not hard to imagine instances where the governmental interest in crime prevention and detection will be seen as more important when balanced against the individual interest in being secure from governmental intrusions, so that no suspicion at all will be constitutionally required.

The indeterminacy of the balancing framework, including the uncertain role of the requirement for a particular suspicion, is related in part to the use of common sense cognition in the Court's balancing analysis. Unlike its pronouncements in relation to probable cause and reasonable suspicion, the Court's balancing rhetoric does not refer directly to common sense. Still, common sense seems to influence the Court's characterization of the interests that are relevant to its inquiry and the actual balancing of these interests against each other. We should be critical of this indirect use of common sense within the balancing analysis because, as I will argue in Part III, it unconsciously and indiscriminately legitimizes the preferences and interests of those who have been socially empowered.

More importantly, though, is that any balancing of interests is inherently a matter of values and policies. Such a value-laden legal framework more truthfully captures the role of law and the Court in society compared to the artificial stance of objectivity currently cloaking adjudication.[179] Nonetheless, it is time for the Court to acknowledge

176. *Id.* at 421-22 (Ginsburg J., dissenting), 411 n.2 (Souter J., dissenting).

177. *Id.* at 421-22 (Ginsburg J., dissenting), 411 (Souter J., dissenting).

178. *Cf. Id.* at 421-22 (Ginsburg J., dissenting).

179. Part of the reluctance of the Supreme Court Justices to see themselves as playing out competing values has to do with separation of powers, and the belief that, from a

openly the value-laden basis of its jurisprudence, and to be conscious and critical of the sources of its values and the process for choosing among them.

5. Consent

The last criterion of reasonableness is the Court's use of consent as a measure of the reasonableness of the search or the seizure. Traditionally, a search based on consent has been viewed as one of the specifically established and well-delineated exceptions to the warrant requirement.[180] However, the consequences of consent to a search are much broader than merely excusing the police from having to obtain a warrant. Absent coercion, searches based on consent are *per se reasonable* regardless of the practicability of obtaining a warrant or the existence of any suspicion of misconduct.[181] Moreover, in a consent case the Court will not even examine the balance struck between the individual's privacy interest, the intrusion upon that interest, and the governmental interest. Practically speaking, a search based on consent is immunized from constitutional review.

Rather than being confined to limited exceptional circumstances, obtaining the individual's consent to a search has become a widely practiced investigative tool used by the police. Since the Court deems the individual's consent to be voluntary, except in extreme cases, and since it does not question the reasonableness of the search any further once voluntary consent is established, many of the searches conducted by the police go unregulated and remain beyond the purview of serious judicial scrutiny. In light of the power hierarchy between the police and the citizenry, the use of consent to justify searches and seizures is highly questionable. Combined with the fact that consent is used as a determinative factor of the reasonableness of the search or the seizure, the result is a significant erosion of the protections afforded by the Fourth Amendment.[182]

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democratic point of view, policies should be decided by the legislature and not by the courts. Even if we accept this narrower vision of the judicial role, reality is such that many policy issues are not resolved by the legislature and yet require immediate attention and solutions. Thus, the Court in many, if not most, instances is faced with having to set the policy rather than implementing pre-existing legislative policy. This is especially so with regards to constitutional questions.

180. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

181. *Id.*

182. For a critique of the use of consent in search and seizure law see Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L. J. 37-62 (2004).

6. Conclusion

Even if we assume, for the sake of argument, that all of the proposed criteria can guide the construction of reasonableness, it is clear that none of them fully encapsulate the meaning of reasonableness within the Fourth Amendment. The Court has acknowledged as much in the following passage from *Vernonia School District 47J v. Acton*, in which it summarized the analytical framework of the reasonableness inquiry:

> [T]he ultimate measure of the constitutionality of a governmental search is "reasonableness" . . . where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. . . . [R]easonableness generally requires the obtaining of a judicial warrant...[with] the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required probable cause is not invariably required either. A search unsupported by probable cause can be constitutional...when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable. . . . [W]e approved [a school search that] while not based on probable cause *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, the Fourth Amendment imposes no irreducible requirement of such suspicion.[183]

If "neither a warrant nor probable cause nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness,"[184] what gives reasonableness (or the balancing test) its content? What, essentially, guides us?

C. Reasonableness and Common Sense

Traditionally, reasonableness is largely a matter of *common sense*.[185] As the Court in *United States v. Sharpe* states, "[I]n evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."[186] Moreover, both probable

183. 515 U.S. 646, 652-54 (1995) (citations omitted).

184. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619-20 (1989)).

185. Amar, *supra* note 2, at 780.

186. 470 U.S. 675, 685 (1985).

cause and reasonable suspicion inherently embody common sense,[187] as reiterated in *Ornelas v. United States*:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are common sense, non-technical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men act." [188]

The traditional legal thought behind these pronouncements implies that common sense and reasonableness embody some transcendent, universal knowledge, independent from and uninfluenced by the observer. The assumption is that there is an ordinary experience shared by all humans in everyday life. In contrast, feminist legal scholars and advocates for women have long argued that women experience life differently than men and differently from each other depending on race, class, and other factors.[189] In this sense, there is no ordinary human experience. Our understandings of the world, common sense, and reason are inherently intertwined with the identity of the observer. From this insight, feminists went on to demonstrate how traditional constructions of reasonableness represent particular life experiences of those socially enlisted with the power to define reality on their own terms. Whatever makes sense to white privileged men is imposed as common to all; whatever is reasonable from a white privileged male perspective is deemed objectively reasonable, excluding all other perspectives as subjective and unreasonable.

No less than reasonableness, common sense is an open-ended concept which is receptive to multiple constructions despite its universal neutral appeal. Like reasonableness, the objective, a-perspective stance of common sense actually reflects the particular perspective of white privileged men. This particular perspective sees itself as exclusive, and dismisses as contrary to common sense any conclusions that are reached by members of different races, genders, or classes in light of their lived-experiences. Take for example the relevance of unprovoked flight from the police to the formation of reasonable suspicion—a question that occupied the Court in *Illinois v. Wardlow*.[190] This case exemplifies both the inherent subjectivity and positionality of common sense and the race and class biases that taint the concept of reasonableness. It is a particularly potent example because it demonstrates how our own experiences and identities influence even our perceptions of supposedly objective external facts. The influence of one's perspective is not only limited to subjective hunches or

187. United States v. Cortez, 449 U.S. 411, 418 (1981).

188. 517 U.S. 690, 695 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949))).

189. *See* notes 178-87 and accompanying text.

190. 528 U.S. 119 (2000).

interpretations like those made by experienced officers, but is inherent in the construction of reality and knowledge.

In *Wardlow*, the Court held that an individual's unprovoked flight in a high-crime neighborhood upon seeing the police may make police suspicion "reasonable" and justify a stop and frisk.[191] While headlong flight is not necessarily indicative of wrongdoing, the Court found it certainly suggestive of such as a matter of common sense judgments and inferences about human behavior.[192] For a white privileged judge, it may be a matter of pure common sense that people do not run from the police unless they have something to hide. Consequently, it would be reasonable for the judge or the police to suspect a fleeing individual of wrongdoing and to justify an investigative stop.

In contrast, for many individuals of color and the urban poor, the dictate of common sense may justify entirely opposite results. In light of their own experience or community experience with police harassment and brutality, evading the police would not suffice to form a reasonable suspicion, but would actually seem like a reasonable action regardless of innocence or guilt. Such differing perceptions and common sense inferences rising from the same external conduct exemplify how reasonableness depends on one's race or class, for example, and how common sense eventually means white and privileged sense.

The insight that race influences one's own understanding of what is reasonable has gained a limited acceptance within traditional Fourth Amendment jurisprudence. However, this limited acknowledgement of the effect that being of a non-white race may have on reasonableness is not accompanied by the further acknowledgement that reasonableness has never been colorblind and has always been white. Implicitly, whiteness is perpetuated as the norm, as the embodiment of neutrality and objectivity, and as the essence of reasonableness.

Justice Stevens in *Wardlow* examined what common sense conclusions could be drawn respecting the motives behind an unprovoked flight from the police.[193] The State's argument was that unprovoked flight is so aberrant and abnormal that it could not be explained by innocent motives and was *per se* suspicious. In response, Justice Stevens noted:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither

191. *Id.* at 124.
192. *Id.* at 125.
193. *Id.* at 128 (Stevens, J., concurring in part and dissenting in part).

"aberrant" nor "abnormal."[194]

Such alternative common sense inferences implicitly led Justice Stevens to conclude that the unprovoked flight in this case was insufficient to form a reasonable suspicion.[195]

Akhil Amar ties race, gender, and class considerations directly to the question of common sense and Fourth Amendment reasonableness.[196] For Amar, the understanding of reasonableness as a matter of common sense raises the question of *who* should decide what is unreasonable.[197] In his view, Fourth Amendment issues should be decided by the jury, who represent the common sense of common people.[198] However, only a jury that is truly inclusive along race, gender, and class lines can be said to be representative of this common sense.[199]

As a feminist, I welcome any attempts to expand our pool of knowledge by taking race, gender, and class into consideration as a necessary part of making sense of the world and the construction of knowledge itself. The problem is that a façade of external objectivity and universal applicability is traditionally associated with these concepts of common sense and reasonableness. What is missing from Stevens' and Amar's race-conscious, gender-conscious, or class-conscious accounts is the acknowledgement that reasonableness and common sense have always been assigned a race (white), a gender (male), and a class (wealthy). In the same way that male is the implicit reference for human,[200] so is white the universal race. We rarely think of white, wealthy men when we call for taking race, gender, and class into consideration. The unstated norm remains white, male, and privileged.

While reasonableness has always been thought of as gender-neutral or genderless, feminists have begun to expose the maleness of reasonableness in several contexts. For example, one critical insight of women's self-defense work has been the idea that there is deep gender bias in the concept of reasonableness.[201] In general, men are viewed as inherently reasonable

194. *Id.* at 132-33.

195. *Id.* at 137.

196. Amar, *supra* note 2, at 780.

197. *Id.* at 818.

198. *Id.* at 780, 818-19 ("Threats to the 'security' of Americans come from both government and thugs; the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers. This judgment, of course, will vary from place to place and over time.").

199. *Id.*

200. *See* MACKINNON, *supra* note 5, at 168.

201. *See generally* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992) [hereinafter Schneider, *Particularity and Generality*]; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213 (1992) [hereinafter Schneider, *Describing and*

and women are viewed as inherently unreasonable. Moreover, based on a male paradigm of the brawl in the bar, self-defense traditionally requires an imminent and life-threatening danger and usually imposes a duty to retreat.[202] Therefore, women who stay in abusive relationships, plan the killing, and surprise their abusers in their sleep would hardly seem to be reasonably acting in self-defense (from the unstated male perspective). Consequently, women become less likely to be able to plead self-defense successfully and have been relegated to pleas of temporary insanity or manslaughter.[203]

The critical defense problem was and is used to explain the woman's action as reasonable. It would seem that describing women's experiences (to the extent that they differ from the experiences of men) and including them within the legal discourse would result in women's conduct being treated as reasonable. Thus, feminists called for viewing a woman's action in the context of her experience as a battered woman and her inability to leave the relationship.[204] Most judges and juries did not possess this knowledge, which may have actually run counter to their common sense. Hence, they had to be educated about the problems of male battering of women and about the battered woman syndrome by expert witnesses.[205]

Expert testimony on battering is important precisely because jurors' common sense experience with domestic relationships gives them the illusion of knowledge; jurors are not aware of how their views have been shaped by common myths and stereotypes and tainted by bias.[206] It is wrong to assume that the jurors can understand the possible reasonableness of a battered woman's belief that she was in particular jeopardy at the time that she responded in self-defense instead of leaving. The jury needs expert testimony on reasonableness precisely because the jury may not understand that the battered woman's prediction of the likely extent and imminence of violence may be particularly acute, accurate, and reasonable.[207]

Yet, maleness proved inherent in the concept of reasonableness itself. Even with expert testimony, reasonableness and its male character resist transformation. Although battered women's advocates intended descriptions of battered women's experiences to illuminate and expand the traditional concept of what reasonable means, the opposite effect often resulted. The more specific and distinct the expert descriptions of these experiences, the more it suggested a separate standard of a reasonable

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Changing].

202. Schneider, *Describing and Changing*, *supra* note 201, at 218-20.

203. *Id.*

204. *Id.*

205. Schneider, *Particularity and Generality*, *supra* note 201, at 561-62.

206. Schneider, *Describing and Changing*, *supra* note 201, at 229-30.

207. *Id.*

woman or a reasonable battered woman.[208]

Parallel outcomes have resulted in sexual harassment law, where some courts have now adopted a 'reasonable woman' standard on the theory that women's experiences with sexual harassment are so distinct that they cannot apply a generic legal standard of reasonableness.[209] Opponents of the 'reasonable woman' standard maintain that it substitutes the idea that reasonableness is in the eye of the beholder for the notion of reasonableness as an objective criterion; that it abandons all pretense of judicial neutrality and plays favorites based on gender; and that it implies that women are inherently unreasonable, for if women were objectively reasonable there would be no need for a special subjective standard based on a perspective understood only by women.[210]

But reasonableness already plays favorites based on gender; its presumed objectivity and neutrality mask the vision of a particular male beholder. The problem remains that such separate standards reinforce the maleness of reasonableness and perpetuate the male experience and viewpoint as the objective norm, while implying it is not a viewpoint at all. All other perspectives are accommodated as a matter of policy. But they can never become the objective norm; they can never define reasonableness itself. They, in contrast to objective reasonableness, are always seen for what they are: positional perspectives shaped by one's race, gender, class, and overall life experiences.

III. Objectivity

Why is it that the gender, race, and class biases of reasonableness and common sense standards evade detection and transformation? Why is the concept of reasonableness inherently male? The answer lies in the aura of objectivity that surrounds such legal standards. Thus, while traditional critiques of the concept of reasonableness focus on its indeterminacy, feminist critiques go a step further to expose reasonableness as a mirage. Reasonableness "is an illusion that promises objectivity but actually incorporates subjective beliefs."[211] This illusion is so powerful that it is difficult for lawyers and judges to challenge the paradigm of reasonableness and the ideological underpinnings of objectivity overall.

208. Schneider, *Particularity and Generality, supra* note 201, at 562-63.

209. *Id.* at 565. *See also* Raigrodski, *supra* note 17.

210. *See, e.g.*, Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 634-39 (1993).

211. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1435 (1992).

A. Feminist Critique of Objectivity

Reasonableness is traditionally regarded as an objective standard reflecting a neutral and communal agreement beyond the particular subjective viewpoints of individuals.[212] Because of its appeal of objectivity, reasonableness has gained a prominent position in almost every area of American law, including search and seizure law.[213] Conceptually, reasonableness embodies societal consensus and community ideals that are superimposed on individual behavior and constrain judicial decision-making.[214] The effectiveness of the reasonableness principle in achieving objectivity therefore depends upon its fundamental neutrality[215] and its detachment from the subjective ideals of any individual. Feminists have thus re-examined reasonableness as part of a critique of objectivity.[216]

Objectivity is a fundamental precept of Anglo-American jurisprudence.[217] Patricia Williams observes how the opposition of objectivity to subjectivity constructs our theoretical legal understanding. Our legal thought and rhetoric are characterized by the existence of "transcendent, a-contextual, universal legal truths" that are conveyed by objective, unmediated voices such as judges.[218] "The more serious problem of this essentialized world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), contextual (socially constructed), or non-universal (specific) as 'emotional,' 'literary,' 'personal,' or just Not True."[219] The result is, as Letti Volpp points out, that our jurisprudence fails to recognize the inherent subjectivity of legal standards and masks the oppressive force of the law against subordinated communities.[220]

Williams and Volpp are not alone in pointing out the subjectivity of objectivity. As part of a persistent feminist investigation of the relationship between power and knowledge, many feminist scholars have demonstrated how particular views of the world dominate our discourse, "how our

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212. L.A. County v. Rettele, 127 S.Ct. 1989, 1992 (per curiam) ("The test of reasonablesness under the Fourth Amendment is an objective one.").

213. *See generally* Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326 (1992); *see also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1181 (1990).

214. *See generally* Unikel, *supra* note 213; Ehrenreich, *supra* note 213.

215. Unikel, *supra* note 213, at 329.

216. Cahn, *supra* note 211, at 1406.

217. Unikel, *supra* note 213, at 326; *see also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 8-9 (1991).

218. WILLIAMS, *supra* note 217, at 8.

219. *Id.*

220. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 80 (1994).

'knowledge' is far less diverse than our people."[221] Central to these critiques is skepticism about claims of objectivity and neutrality, and about statements that purport to have universal applicability. The point is that frequently what passes for the whole truth is instead a representation of events from the perspective of those who possess the power to have their version of reality accepted.[222]

Martha Minow, for example, has exposed the problematic nature of knowledge when seen as an expression of the social and political positions of those claiming to know.[223] She joins other feminists in arguing that the unspoken assumption of objectivity masks the fact that knowledge depends on the interaction between the one who sees and what is seen. Reality is constructed from the unstated and biased standpoint of the observer,[224] for we cannot see the world unclouded by preconceptions. As Minow writes:

> Seeing inevitably entails a form of subjectivity, an act of imagination, a way of looking that is necessarily in part determined by some private perspective. Its results are never simple 'facts,' amenable to 'objective' judgments, but facts or pictures that are dependent on the internal visions that generate them.[225]

This argument is not uniquely feminist. Feminists, however, have also exposed how our discourse of neutrality hinders any challenge to the actual absence of objectivity, even if the impact of the observer's perspective is oppressive.[226] The observer's perspective is also oppressive because knowledge is inextricably intertwined with social power. Thus, social understandings based on prevailing views or consensus approaches express the perspectives of those socially positioned to enforce their points of view in society.[227]

The focus on the relation between knowledge and power allows Minow to question the categorizing of people based on purportedly objective and inevitable differences. She argues that the claim to knowledge manifested by the labeling of any group as different "disguises the act of power by which the namers simultaneously assign names and

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221. Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. OF WOMEN & L. 95, 95 (1992).

222. *Id.*

223. Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 174 (1987) [hereinafter Minow, *Differences*].

224. *Id.* at 175-76.

225. Martha Minow, *The Supreme Court, 1986-Forward: Justice Engendered*, 101 HARV. L. REV. 10, 45-46 (1987) [hereinafter Minow, *Justice Engendered*].

226. *Id.*

227. Minow, *Differences*, *supra* note 223, at 128.

deny their relationships with, and power over, the named."[228] No perspective asserted to produce "the truth" is objective, but rather will obscure the power of the person attributing a difference while excluding important competing perspectives.[229] This is because "[r]elationships of power are often so unequal as to allow the namers to altogether ignore the perspective of the less powerful."[230] Hence, the assignment of difference marks the relationship between those who have the power to claim that theirs is the true perspective and those who have no such power.[231]

In sum, what initially seems an objective stance may appear partial from another point of view. Moreover, what initially seems a fixed and objective difference may seem from another viewpoint like the subordination or exclusion of some by others. In any event, regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and "shows how claims to knowledge bear the imprint of those making the claims."[232]

Catherine MacKinnon also uses seemingly natural and real differences—the differences between men and women based on sex—to question objectivity. According to MacKinnon, objectivity assumes that equally competent observers who are similarly situated see the same thing. The line between subjective and objective perception that is supposed to divide the idiosyncratic, partial, and unverifiable from the real, presumes that only one reality exists, and that this reality is not contingent upon angle of perception. But if sex-discriminatory conditions exist for women, there are (at least) two realms of social meaning. Consequently, if women inhabit a sex-discriminatory reality, their point of view is no more subjective than men's.[233]

The point of this observation is that "social circumstances, to which gender is central, produce distinctive interests, hence perceptions, hence meanings, hence definitions of rationality."[234] It follows that neutral legal standards, as an expression of objectivity, are inadequate to describe the non-neutral objectified social reality that women experience.[235] Although MacKinnon focuses on the role of gender in forming perceptions and women's reality, her observations are applicable to race and class as well. Moreover, the implication of her insight is not limited to the inadequacy of gender-blind standards in addressing sex inequality. By analogy, neutral objective reasonableness standards, like those dominating search and

228. *Id.*
229. Minow, *Justice Engendered, supra* note 225, at 33.
230. Minow, *Differences, supra* note 223, at 128.
231. *Id.* at 175.
232. Minow, *Justice Engendered, supra* note 225, at 14.
233. MACKINNON, *supra* note 5, at 231-32.
234. *Id.*
235. *Id.*

seizure law, are inadequate to address police misconduct when multiple realities shaped by gender, race, and class produce different understandings of what is abusive or intrusive.

The core issue, however, is not the plain inadequacy of the stance of objectivity to address socially constructed realities, but the oppressive domination of male power that is objective epistemology. MacKinnon writes: "[T]he male standpoint dominates society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all."[236]

Objectivity as epistemology defines both the process of observation or acquiring knowledge and the content of that knowledge and the world observed. As the traditionally superior methodology for acquiring knowledge, we have seen that the epistemology of objectivity erects distance and a-perspectivity as its methodological criteria. To perceive reality accurately, "one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times at once."[237] While the criteria of distance and a-perspectivity appear to be general ways of getting at reality rather than constructing it, they have specific social roots and implications. These include "devaluing as biased and unreliable the view from the inside and within the moment, and the perspective from the bottom of the social order."[238]

The objectivist epistemology controls not only the form of knowing but also its content by defining how to proceed and the process of knowing, and by confining what is worth knowing. Objectivity defines the relevant world as that which can be objectively known. Hence, the epistemic question concerns the relation between knowledge (a replication or reflection of reality) and objective reality (that world which exists independent of any knower or vantage point). This objective reality is "independent of knowledge or the process of coming to know, and, in principle, knowable in full."[239]

In light of our current gendered social hierarchies, the world which can be objectively known corresponds with men's reality. Since men control the world, they create the world from their own point of view, which then becomes the reality to be described. The male epistemological stance—objectivity—does not comprehend its own perspective and does not see that the way it apprehends its world is a form of its subjugation and presupposes it. What is objectively known corresponds to the world as men live it, and can thus be verified by being pointed to because the world

236. *Id.* at 237.
237. *Id.* at 97.
238. *Id.* at 99.
239. *Id.* at 97.

itself is controlled from the same male point of view.[240]

Because men control the world, the male epistemology of objectivity dominates all our social structures, from science, to the state, to the law. MacKinnon's critique of objectivity is bound up with her critique of the state and of the law. According to MacKinnon, both the state and the law are male in that objectivity is their norm.[241] Objectivist epistemology is expressly the law of law. The rule form, uniting scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence.[242] Consequently, since the imposition of the stance of objectivity is the paradigm of power in the male form, then the state and the law appear most relentless in imposing the male point of view when it comes closest to achieving its criteria of distanced a-perspectivity. When it is most ruthlessly neutral, it is most male.[243] Accordingly, reasonableness, as embodying neutral and objective point of viewlessness, is thus particularly male and especially subordinating.

After exposing objectivity for its maleness, feminists exposed the divide between objectivity and subjectivity, as well as other dichotomies, as themselves being a product of male power. Because women have been objectified as sexual beings and stigmatized as ruled by subjective passions, they reject the division between subjective and objective postures. "Disaffected from objectivity, having been its prey, but excluded from its world through relegation to subjective inwardness, women's interest lies in overthrowing *the distinction itself*,"[244] argues MacKinnon. The goal is not to affirm feminine particularity and reject masculine universality, nor to reclaim female passion in place of male rationality. We should reject the division of objectivity from subjectivity, of reason from emotion and of abstract from concrete, as well as the discourse of opposites itself, because they are invented from a position of power to maintain gender hierarchy.

We came to view the world generally as a series of complex dualisms, such as reason-passion, rational-irrational, power-sensitivity, thought-feeling, and objective-subjective. Men, who created our dominant consciousness and discourse, have organized these dualisms into a system in which each dualism has a strong positive side and a weak negative side. Men associate themselves with the strong sides of the dualisms and project the weak sides upon women.[245] Socially, men are considered objective, women subjective. Privileging reason over emotion or objectivity over

240. *Id.* at 121-22.
241. *Id.* at 162.
242. *Id.* at 162-63.
243. *Id.* at 248.
244. *Id.* at 120-21.
245. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1575-76 (1983).

subjectivity is traditionally male. The binary pairs, in turn, reflect the hierarchy of gender in our society—the privileged status and control of men over women.[246]

These binary pairs came to be viewed as "natural" and "neutral;" mere tools describing a pre-existing reality rather than having been constructed by men to serve men's interests. Feminists exposed these dichotomies as ideological social constructs driven by male power that are far from being natural or inevitable. The distinction between the universal and the particular was revealed to be false, because that which is called universal is the particular from the point of view of male power. The subjective-objective division was likewise revealed to be false because the objective standpoint embodies the specific subjective view from the social position of dominance that is occupied by men.[247] Therefore, as long as men continue to control women and male preferences continue to shape our world and discourse, such dichotomies will continue to look "general, empty of content, universally available to all, valid, mere tools, against which all else fell short."[248]

B. Fourth Amendment Reasonableness and the Objective-Subjective Split

Accordingly, law will continue to value objectivity, reason, and neutrality and marginalize particular perspectives as subjective, unreasonable, and biased. This has clearly been the case in search and seizure law. Within Fourth Amendment jurisprudence, the concept of reasonableness has been particularly tied up with the objective-subjective dichotomy. First, it is expressly embodied in the two prongs of the *Katz* test.[249] In addition, both the probable cause standard and the reasonable suspicion standard embody objectivity in their resort to interpretation of the facts from the standpoint of an objectively reasonable officer.[250] After all, "the reasonable individual personifies a community ideal of reasonable

246. *Id.*

247. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 690 (2000).

248. *Id.*

249. Katz v. United States, 389 U.S. 347 (1967).

250. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 696 (1996) ("We have described reasonable suspicion simply as 'a particularized and *objective* basis' for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a *man of reasonable prudence* in the belief that contraband or evidence of a crime will be found. . . . The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an *objectively reasonable police officer*, amount to reasonable suspicion or to probable cause.") (citations omitted) (emphasis added).

behavior."[251] The objective standpoint of a reasonable person/officer also informs the definition of a seizure of a person, the evaluation of a third-party apparent authority to consent to a search, and the application of the good faith exception to the exclusionary rule. While not as explicit as in the *Katz* test, the opposing notion of subjectivity plays a role in these instances as well, both visible and invisible, both valued and devalued.

1. The Interplay of the Objective-Subjective Dichotomy in the *Katz* Test

The gendered hierarchy of the objective-subjective dichotomy and the resulting invalidation of subjectivity is manifest in the way each of the prongs of the *Katz* test is articulated and applied as well as in the way the two prongs relate to each other. The rhetoric and terminology of the second prong of the *Katz* test perpetuate several of the dichotomies questioned by feminists and reveal the connections between the privileged male sides of these dichotomies, as well as between the weaker female sides. In *Katz* itself, Justice Harlan's requirement that an expectation of privacy be one that society is prepared to recognize as reasonable correlates with the majority's holding that the government violated the privacy that the defendant justifiably relied on. Subsequent cases applying the test explained that the expectation must be objectively reasonable to be legitimate.[252] Both in the search context and in the standing context the standard was restated so that reasonable is supplanted by legitimate,[253] and both terms are employed interchangeably.[254] Hence: objective = reasonable = legitimate = justified.

Like objectivity, notions of reasonableness, legitimacy, and justification occupy the strong male sides of common dichotomies in our legal and social discourse. Consequently, in a hidden and implicit manner, subjective expectations of privacy are dismissed and devalued, as are the weaker female sides of these dichotomies with which they are associated.

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251. Unikel, *supra* note 213, at 329.

252. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984); Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984); California v. Ciraolo, 476 U.S. 207, 211 (1986).

253. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (noting that the Fourth Amendment protects only those expectations of privacy that "society recognizes as 'legitimate'"); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (noting that only a person whose own legitimate expectations of privacy have been violated may invoke the exclusionary rule).

254. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 248 n.9 (1986) (Blackmun, J., concurring in part and dissenting in part) ("Our decisions often use the words 'reasonable' and 'legitimate' interchangeably to describe a privacy interest entitled to Fourth Amendment protection."); California v. Ciraolo, 476 U.S. at 219-20, n.4 (1986) (Powell, J., dissenting).

Hence: subjective = unreasonable = illegitimate = unjustified. Additional hierarchical dichotomies are manifest in the construction of the subjective prong as reflecting the actual and personal privacy expectations of the individual as against the neutral, universal point of viewlessness of the objective prong.

The manner in which the two prongs of the *Katz* test relate to each other, normatively and as applied, further perpetuates the axiomatic supposition about *the objectivity of reasonableness and the unreasonableness of subjectivity*. Normatively, the first prong of the *Katz* test supposedly reaffirms the value of individual subjectivity, by assigning it a positive role in the determination of the scope of the constitutional protection. However, it is doctrinally inferior to the second objective prong. The test expresses a normative hierarchy between its two prongs, in which the individual's subjective expectations of privacy are subjugated to the objective expectations of privacy that are recognized by society. The test is essentially an objective one: whether the expectation is one that society is prepared to recognize as reasonable.[255] If the subjective expectation deviates from that which the Court constructs as an objectively reasonable perspective, then it is invalidated and undeserving of constitutional protection.

The application of the two-pronged test further reinforces the denigration and marginalization of personal (subjective) viewpoints. As it turns out, personal subjective perceptions are essentially irrelevant to the determination of a search. Sometimes the Court skips this part of the analysis altogether, or assumes that there could not have been any subjective expectation of privacy, regardless of whether the defendant testified to the contrary or did not testify at all. For example, in *Smith v. Maryland*,[256] the Court doubted whether people in general entertain any actual expectation of privacy in the numbers they dial, even though the defendant testified that he manifested such expectation in his conduct.[257] In other cases, although the Court could have ended its inquiry based on the absence of a subjective expectation of privacy, it chose to focus on the objective prong, either in addition to or in place of the first prong.[258]

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255. Michigan v. Clifford, 464 U.S. 287, 292 (1984) (citing Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring)); *see also* Smith v. Maryland, 442 U.S. 735, 739-741 (1979).

256. 442 U.S. 735 (1979).

257. *Id.* at 742 ("All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.").

258. *See, e.g.*, United States v. Curry, 46 M.J. 733, 736 (1997) (noting briefly that the defendant may have lacked a subjective expectation of privacy, being the one that placed the telephone call to the police that accordingly went to the barracks to investigate a possible murder, but grounding its holding on the absence of reasonable expectation of privacy in

Finally, the stark contrast between the Court's treatment of an individual's subjective expectation of privacy in an opaque soft bag placed directly above his seat on the bus[259] and the Court's treatment of privacy expectations in previous cases illustrates the skewed and unrealistic construction of the subjectivity prong.[260] Bond, the plaintiff in the bus case, could have better protected his privacy by traveling with a hard unsqueezable suitcase; he could have better wrapped the drugs to conceal the hard brick shape; and he could have placed his bag underneath his seat, where it was less likely that other people would touch it. Thus, in his own conduct, Bond did not manifest much of a subjective expectation of privacy in his bag, at least not to the extent that is recognized by the Court.[261] By contrast, people who could not have done more to protect their privacy when using the phone,[262] maintaining a bank account,[263] disposing of garbage,[264] or traveling on public roads,[265] and even those who explicitly tried to shield their privacy with high fences, "no trespassing" signs, and heavy curtains,[266] were denied even the minimal recognition of their subjective privacy expectations when the Court held in a series of cases that they had affirmatively chosen exposure to public view.[267] The message is that, objective reasonableness aside, even the subjective prong, which pretends to draw from and validate *actual* individual's expectations, is construed in the abstract to conform to the Court's vision of worthy subjective expectations of privacy.

2. The Schizophrenic Treatment of Subjectivity: Empowering the Police

The Court's treatment of subjectivity is inconsistent. Sometimes its reasoning or holdings affirm and value subjectivity, and in other instances they degrade and invalidate subjectivity. Rather than being a coincidental inconsistency, this schism in the treatment of subjectivity is itself an expression of male power and serves to perpetuate male domination. Feminists like Frances Olsen have observed how in the same way that men

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military barracks).

259. Bond v. United States, 529 U.S. 334, 336 (2000).

260. *See generally*, George M. Dery III, *Lost Luggage: Searching for a Rule Regarding Privacy Expectations in Bond v. United States*, 69 U. CIN. L. REV. 535 (2001).

261. *Id.* at 551-53.

262. Smith v. Maryland, 442 U.S. 735 742 (1979).

263. United States v. Miller, 425 U.S. 435, 441 (1976).

264. California v. Greenwood, 486 U.S. 35, 40 (1988).

265. United States v. Knotts, 460 U.S. 276, 278 (1983).

266. *See, e.g.*, Oliver v. United States, 466 U.S. 170 (1984); California v. Ciraolo, 476 U.S. 207 (1986); Dery, *supra* note 260, at 551-55.

267. *Id.*

simultaneously exalt and degrade women and the family, the Court simultaneously exalts and degrades the concepts on the weak sides of known dualisms. Irrational subjectivity and sensitivity, for example, are both treasured and denigrated.[268] Upon closer scrutiny, it becomes apparent that men treasure subjectivity only to the extent that it is in their interest and to the extent that their own subjectivity is affirmed. On the other hand, men negate the role of subjectivity when it can disempower them or empower others and undermine the domination of male power.

Instances in the Court's jurisprudence where subjectivity is subordinated to so-called objectivity, as in the formulation and application of the *Katz* test, are to be expected in light of the gendered hierarchy of the objective-subjective dichotomy.[269] But this explanation is only part of the story. We must closely scrutinize the instances where subjectivity is valued in order to appreciate the oppressive impact of the objective-subjective dichotomy. Accordingly, it is through the Court's schizophrenic treatment of the subjectivity of police officers that we can fully understand how male ideology informs the construction of both objectivity and subjectivity, and how the particular subjectivities of those in power have always factored into legal discourse.

When it comes to police officers, the split treatment of subjectivity is clearly visible. On the one hand, "bad" subjective state of mind of the police is deemed irrelevant to the constitutional inquiry, based on the traditional rationale that personal subjective viewpoints have no place in an otherwise objective jurisprudence. On the other hand, the Court explicitly treasures the unique subjective experiences of police officers in fighting crime and law enforcement, and otherwise gives weight to the officer's "good" subjective state of mind in several contexts. The *Terry* Court even explicitly positioned the two against each other when it stated that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and un-particularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[270]

Still, the affirmation of the officer's positive subjectivity is accomplished either under the guise of objectivity itself or as a limited exception to the rule of objectivity, warranted by special circumstances. At the end, disregarding some aspects of police subjectivity and valuing other aspects of it serves to reinforce the power of the police over the citizenry. At the same time, maintaining objectivity as the norm the inherent

268. *See* Olsen, *supra* note 245, at 1575-76.

269. The individual's subjectivity is denigrated and invalidated, for example, through the use of the reasonable person standard to determine whether a seizure has taken place. *See* Raigrodski, *supra* note 17.

270. Terry v. Ohio, 392 U.S. 1, 27 (1968).

subjectivity of the legal discourse, hides the particular subjectivities that currently shape the law, and hides the falsehood of the objective-subjective divide. Overall, it perpetuates male power in its various forms, such as state and police power.

a. Ignoring police officers' invidious subjective state of mind

Based on the traditional rationale that the law reflects objective knowledge acquired through objective modes of inquiry, the Court consistently holds that the reasonableness of the search or the seizure does not depend on the subjective state of mind of the police officer. The Court has long expressed a strong preference, in theory at least, for tying the legality of law enforcement measures to objective circumstances rather than to officers' intentions.[271] For example, the officer's invidious motive is irrelevant in evaluating claims of use of excessive force to seize an individual,[272] and the reasonableness of the force used must be judged from the perspective of a reasonable officer on the scene.[273] The Court even stated that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[274] In addition, the Court also notes the evidentiary difficulty of establishing subjective intent, and reasons that the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer, best achieves evenhanded law enforcement.[275]

In *Whren v. United States*,[276] the Court ruled that a police officer's subjective intentions were irrelevant to the constitutional validity of a traffic stop that is justified objectively by probable cause to believe that a traffic violation has occurred.[277] As a general matter, "subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."[278] The Court has since maintained its position that an action is reasonable under the Fourth Amendment regardless of the individual officer's state of mind as long as the circumstances, viewed objectively,

271. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990); New York v. Quarles, 467 U.S. 649, 656 n.6 (1984).

272. Graham v. Connor, 490 U.S. 386, 397 (1989).

273. *Id.* at 396. *See also* Tennesse v. Garner, 471 U.S. 1, 11-12 (1985).

274. Scott v. United States, 436 U.S. 128, 138 (1978).

275. Horton v. California, 496 U.S. 128, 138 (1990).

276. Whren v. United States, 517 U.S. 806 (1996); *aff'd* Ohio v. Robinette, 519 U.S. 33, 38 (1996); Bond v. United States, 529 U.S. 334, 338 (2000); Arkansas v. Sullivan, 532 U.S. 769 (2001); Brendlin v. California, 127 S.Ct. 2400, 2408 (2007).

277. *Whren*, 517 U.S. at 810-13.

278. *Id.* at 813.

justify the action,[279] despite widespread public recognition that many legal traffic stops are initiated by the police as a pretext for drug and firearms investigations.[280]

The Court is so adamant about not allowing bad subjectivity of police officers to become a factor that it also declined to employ the reasonable officer standard suggested by the petitioners.[281] Such standards are often used to cloak particular subjectivities with the appearance of objectivity; a reasonable person standard is a widely accepted legal fiction in search and seizure law, tort law, criminal law, and most other legal areas. But in *Whren*, the Court surprisingly blows the whistle on this fiction in a remarkably ironic paragraph:

> [T]his approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.
> Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact the our cases have foreclosed the more sensible option. . . . [E]ven if our concern had only been an evidentiary one, petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an

279. *See Robinette*, 519 U.S. at 38; *Sullivan*, 532 U.S. at 772 (per curiam); Devenpeck v. Alford, 543 U.S. 146, 146-54 (2004) (rejecting a "closely related offense" rule and holding that the officer's subjective reason for making the arrest need not be the criminal offense as to which the known fact provides probable cause); Brigham City v. Stuart, 547 U.S. 398, 404 (2006).

280. For a critique of *Whren* and its progeny, *see, e.g.*, Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?"*, 48 CASE W. RES. L. REV. 173 (1997); D. A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, SUP. CT. REV. 271 (1997).

281. *Whren*, 517 U.S. at 813-14 ("Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of 'reasonableness.' They insist that the standard they have put forth—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given--is an 'objective' one.").

> 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. . . . [O]rdinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.[282]

Exercises in virtual subjectivity are nothing new in the Court's jurisprudence. Even more so, framing a test in such a fashion that the Court cannot consider *actual* pretext is not a curiosity but part of the male ideology that controls our jurisprudence. So-called objective standards embody and perpetuate the existing social order, and the Court's virtual subjectivity conforms to the subjectivity of those in power while excluding the subjectivity of others, all in the name of objectivity, judicial neutrality, and the rule of law.

The Court's refusal to examine an officer's subjective state of mind is not limited to probable cause analysis or to traffic stops. In *Bond v. United States*, the Court treated the officer's subjective intent as irrelevant to the question of whether the officer's conduct amounted to a search, *i.e.* whether he violated a reasonable expectation of privacy in conducting a tactile examination of Bond's carry-on luggage in the overhead compartment of the bus.[283] The Court applied *Whren*, reasoning that the issue was not the officer's state of mind but the objective effect of his actions.[284] The Court later re-emphasized in *City of Indianapolis v. Edmond*[285] that subjective intent was irrelevant in *Bond* because the inquiry focuses on the objective effects of the actions of an individual officer.[286]

Both *Bond* and *Edmond* demonstrate the Court's determination in maintaining the fiction that individual subjectivity, here in its negative form (bad intention or pretext), has no place in Fourth Amendment jurisprudence. In both cases, the Court's reasoning rings particularly hollow. In *Bond*, the Court not only distinguished the objective effects of the officer's conduct from his subjective intention, but also distinguished the conduct of the officer—squeezing the bag—from the same conduct by fellow passengers on the grounds that the officer felt the bag in an *exploratory manner*.[287] As George Dery rightfully asserts, no matter how the Court splits this hair, it is thinking about the officer's subjective intent in touching the bag. The objective effect of the officer's hard squeeze was the same as that risked by all travelers with carry-on luggage exposed daily

282. *Id.* at 814-15.
283. Bond v. United States, 529 U.S. 334, 338 (2000).
284. *Id.* at 338 n.2.
285. 531 U.S. 32 (2000).
286. *Id.* at 46.
287. 529 U.S. at 339.

to cramming, shoving, and pounding. The only difference between the officer's squeeze and that of another stranger was the motive behind it.[288]

The Court in *Bond* created two competing standards, concludes Dery. An explicit standard, under *Whren*, rejects the need to divine an official's subjective motivations; while an implicit standard, under *Bond*, enables courts to consider subjective intent so long as it may be couched in terms of objective manner.[289] For Dery, this double standard leads to confusion among law enforcement in the field.[290] From a feminist perspective, these are not merely conflicting signals, and their most important effect is not the confusion it would create among law enforcers. This is how male ideology and its epistemology of objectivity operate to devalue subjectivity, which really means both dismissing and affirming subjectivity depending on who is being empowered or subordinated by each option.

The Court continued to split hairs in order to dismiss police subjectivity as irrelevant in *City of Indianapolis v. Edmond*[291] when it struck down the city's drug interdiction checkpoints. The Court distinguished its holdings in *Whren* and in *Bond* from the case at issue, and rejected the argument that if the government articulates a legitimate purpose for the suspicionless checkpoints, then the courts should not look into the actual (criminal investigation) purpose.[292] The Court reasoned that while subjective intentions are irrelevant, *programmatic* purposes are relevant to the validity of Fourth Amendment intrusions pursuant to a suspicionless general scheme.[293] It concluded by emphasizing that the purpose inquiry is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.[294]

This distinction between the programmatic level and the individual level is as disingenuous as the distinctions drawn in *Bond*. It is hardly believable that individual officers all across the nation are acting upon their own aberrant initiatives to use traffic stops as a pretext for searching for drugs or evidence of other crimes and are not implementing a programmatic law enforcement purpose at some level, even absent official drug interdiction checkpoints.

The Court also reasoned that an additional legitimate purpose, such as verifying licenses and registrations, does not preclude an inquiry into the real purpose of the program, because otherwise law enforcement authorities

288. Dery III, *supra* note 260, at 560.
289. *Id.* at 561.
290. *Id.*
291. 531 U.S. 32 (2000).
292. *Id.* at 45.
293. *Id.* at 45-46.
294. *Id.* at 48.

would be using license or sobriety checkpoints as a pretext for virtually any purpose.[295] But this is exactly the practice that the Court has sanctioned in *Whren* and *Robinette*. I suspect that the Court implicitly employed its programmatic versus individual distinction to accept in this case a pretext argument it had previously rejected.

Finally, while the Court has often justified precluding an inquiry into the subjective purpose or state of mind of the individual as impracticable if not nearly impossible, in *Edmond* it stated that, "while we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful."[296] As a result, "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar."[297]

This is very true. Not only is an inquiry into motives possible, but it is also essential if the purpose of the Fourth Amendment is to prevent abusive governmental conduct. However, this is no less true when we are dealing with the purpose of the individual police officer who is using a traffic stop or a *Terry* stop as a pretext, racially motivated or not, than when we are dealing with programmatic purposes. There is no justification for the Court's caution that the purpose inquiry should be limited to the programmatic level and not individual officers' motives. Of course, distinguishing programmatic purposes from individual motives enables the Court to maintain the pretense of objectivity and to empower the police in the long-run. By invalidating the non-discretionary drug interdiction checkpoints while at the same time leaving the *Whren* holding in place, the Court made certain that police officers would continue, with even greater zeal, to use discretionary traffic stops and *Terry* stops as a pretext to criminal drug-related investigations, and the risk of governmental abuse of power will only intensify.

Indeed, it did not take long for the *Whren* and *Robinette* potential for governmental abuse to become a reality. In two later cases, the Court disregarded the officers' motives in order to find arrests for minor traffic violations reasonable under the Fourth Amendment. In *Atwater v. City of Lago Vista*, the Court did not find the arrest (including handcuffs and booking procedures at the police station) for a seatbelt violation of Atwater, a mother of small children, to be extraordinary or unusually harmful so as to violate the Fourth Amendment.[298] The Court reasoned that the officer

295. *Id.* at 46.
296. *Id.* at 46-47.
297. *Id.* at 47.
298. 532 U.S. 318 (2001).

had objective probable cause[299] and disregarded the evidence that the officer "had it in" for Atwater, seeming to have arrested her simply because he had the power to do so.[300]

Similarly, in *Arkansas v. Sullivan*, the Court approved of an arrest for fine-only traffic violations (speeding, improper window tinting, and driving without registration and insurance documentation), even though the stop and the arrest were a pretext to conduct a full inventory search of the car in light of "intelligence" the officer had on Sullivan regarding narcotics.[301] Citing *Whren* and *Atwater*, the Court held that any improper subjective motivation of the police officer for the stop and the arrest did not render the arrest (and subsequent search) unconstitutional under the Fourth Amendment.[302]

It remains to be seen what other practices may be approved of by the Court with further holdings hiding behind its rhetoric that an officer's individual subjectivity plays no role in the reasonableness inquiry. The consequences are already clear: the power that the police can exert over an individual, and the real potential for abuse that comes with any such power, is tremendous. Rather than protecting the individual from governmental abuse, the Court enables such abuse to proceed with impunity and magnifies the subordination of the citizenry to state power.

b. Empowering police officers by ignoring invidious subjectivity: the remedial context

The empowering effect of ignoring the officer's bad subjectivity is augmented if we consider the two common remedies for a violation of the Fourth Amendment's guarantee against unreasonable searches and seizures: excluding the evidence in the criminal context and imposing

299. *Id.* at 353-54.

300. The opinion recites the following facts: As he approached the truck, officer Turek yelled "we've met before" and "you're going to jail," and called for backup. Atwater failed to provide the officer with her papers, saying her purse was stolen the day before, to which the officer replied that he had "heard that story two hundred times." Atwater asked to take her frightened, upset, and crying children to a friend's house nearby, but the officer told her "you're not going anywhere" and apparently threatened to take the children into custody as well. After Atwater's friend, who learned from the neighborhood children what was going on, arrived and took the children away, the officer handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Her mug shot was taken, and she was placed, alone, in a jail cell for about an hour, after which she was taken before a magistrate and released on $310 bond. Atwater ultimately pled no contest to misdemeanor seatbelt offenses, paid a $50 fine, and sued for violation of her Fourth Amendment right against unreasonable seizure. *Id.* at 323-24.

301. *Sullivan,* 532 U.S. at 770.

302. *Id.* at 771.

personal civil damages liability on the officer. The exclusionary rule has been recognized since its inception as a principal mode of discouraging lawless police conduct.[303] It is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[304] The Court has often said that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words."[305] Another, less important goal of the exclusionary rule is to protect judicial integrity.[306] Hence, the courts "will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[307]

The rule does more than deter future misconduct by individual officers who have the evidence suppressed in their own cases. Its chief deterrent function operates by promoting general institutional compliance with the requirements of the Fourth Amendment by law enforcement agencies.[308] It demonstrates the serious consequences our society attaches to a violation of constitutional rights, and is thus thought to encourage, over the long term, those who formulate law enforcement policies and the officers implementing them to incorporate Fourth Amendment ideals into their value system.[309] On the other hand, as the Court itself acknowledges, "admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced the evidence."[310]

Rather than broadening the opportunities to deter police misconduct and encouraging the police to value Fourth Amendment ideals, the irrelevancy of the officer's bad faith to Fourth Amendment analysis affirmatively prevents the fulfillment of these goals, even in those instances where there is no mistake about the police intention to subvert the commands of the Fourth Amendment. One would think lawless conduct, such as in *United States v. Payner*,[311] where the IRS agent deliberately broke into an apartment and stole confidential documents, is exactly the kind of governmental misconduct that the Fourth Amendment was designed to combat and that the exclusionary rule would help deter. Likewise, in order to attempt to eradicate racial animus by the police, it is

303. Weeks v. United States, 232 U.S. 383, 391-93 (1914).
304. United States v. Calandra, 414 U.S. 338, 348 (1974).
305. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961); *see also* Terry v. Ohio, 392 U.S. 1 (1968).
306. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 222 (1960).
307. *Terry*, 392 U.S. at 13.
308. United States v. Leon, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting).
309. Stone v. Powell, 428 U.S. 465, 492 (1976).
310. *Terry*, 392 U.S. at 13.
311. 447 U.S. 727 (1980).

necessary to apply the exclusionary rule at least in those cases where such animus is not in dispute. Hence, subjective (bad) intentions are very relevant to deterring abusive conduct and to maintaining the integrity of the courts. By ignoring any such bad faith motives and admitting the evidence obtained by the misconduct, the Court legitimizes governmental abuse and intentional subversion of constitutional guarantees. It therefore empowers the police to continue to exert subordinating power over the individual.

Even when the exclusionary rule is applicable, its appropriateness and effectiveness are a matter of controversy. In some contexts, the exclusionary rule cannot provide redress to the individual whose rights are infringed. The Court itself has stated that the exclusionary rule is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.[312] Hence, for example, the wholesale harassment that minority groups frequently complain of by certain elements of the police community will not be stopped by the exclusion of evidence from any criminal trial.[313]

Indeed, when government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees."[314] The individual can thus pursue the imposition of personal civil liability against the officer for violating his Fourth Amendment rights by filing either a 42 U.S.C. § 1983 suit if state officers are involved,[315] or making a *Bivens* claim against federal officers.[316] In both instances, however, the doctrine of qualified immunity may shield the officer from personal civil liability for damages if the police conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[317]

Whether an officer protected by qualified immunity may be held personally liable for an allegedly unlawful action turns on the objective legal reasonableness of the action.[318] The officer's subjective beliefs or invidious motives are irrelevant to that inquiry, and consequently irrelevant to the determination of the qualified immunity defense.[319] In cases such as *Atwater*, or when the police use traffic violations as pretext to harass minorities, the failure to examine the officer's bad subjectivity will allow qualified immunity to apply since objective probable cause exists. As a

312. *Terry*, 392 U.S. at 13-15.

313. *Id.*

314. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

315. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

316. *See* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1972).

317. *Harlow*, 457 U.S. at 818; Anderson v. Creighton, 483 U.S. 635, 641 (1987); Malley v. Briggs, 475 U.S. 335, 341 (1986).

318. *Harlow*, 457 U.S. at 819.

319. *Id.* at 815-20; *Creighton*, 483 U.S. at 641.

result, the officer will be shielded from liability even though these are the most appropriate cases to impose liability for the clear abuse of official power. Having no remedy against the abuse, the individual is violated and subordinated again. In contrast, having his or her conduct legitimated, the officer is empowered to continue the abuse of power with impunity.

c. *Validating police officers' personal experiences under the guise of objectivity*

While the Court is persistent in ignoring negative subjectivity on the part of the officer at the substantive and remedial stages of Fourth Amendment adjudication, positive subjectivity of the officer often plays an important role in the Court's jurisprudence. Such subjectivity is not treated as valuable on its own terms but is rather validated under the guise of universal objectivity and reasonableness.

The glimpses into the officer's positive subjective state of mind are typically of two kinds. First, the Court permits reliance on the officer's unique experience and knowledge in the overall reasonableness analysis and in the formation of probable cause and reasonable suspicion. Second, the Court assigns legal relevancy to the officer's good faith beliefs during the execution of searches and seizures. The officer's good faith subjectivity is relevant to substantive Fourth Amendment doctrine, such as to the formulation of a third party's apparent authority to consent to a search. The officer's good faith subjectivity is also relevant to remedial aspects like the application of the good faith exception to the exclusionary rule.

In the first kind of endorsed subjectivity, the Court not only defers to the officer's experiences, knowledge, and skills in dealing with criminal suspects,[320] but affirmatively approves of the use of such personal expertise as a matter of law.[321] Personal observations of the police officer and the inferences he or she thereafter draws based on personal experience, special

320. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996) (since "a police officer views the facts through the lens of his police experience and expertise," the inferences he draws deserve deference).

321. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 ("[T]he officer is entitled to assess the facts in light of his experience."); United States v. Mendenhall, 446 U.S. 544, 566 (1980) ("[I]n applying the test of 'reasonableness,' courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience."); United States v. Cortez, 449 U.S. 411, 418 (1981) (holding that law enforcement officer can rely on his own experience in detection and prevention of crime); United States v. Arvizu, 534 U.S. 266, 275 (2002) (recognizing that officers are allowed to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them).

training, and expertise may establish probable cause[322] and are typically the primary bases for reasonable suspicion.[323] Moreover, the Court affords considerable deference to the observations and inferences of the police even regarding facially innocent details, reasoning that an experienced officer can infer criminal activity from conduct that seems innocuous to a lay observer.[324] For example, the central role of the officer's personal policing experience in the formulation of reasonable suspicion was evident in *United States v. Sharpe*, where the Court stated:

> Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation.[325]

I certainly think that police officers do and *should* be allowed to perceive the facts in light of their unique experiences. My deep disagreement with the Court lies elsewhere. First, the Court limits its affirmation of personal experiences to police experience in law enforcement. This has two effects. First, while valuing the officers' experiences validates and empowers the police as actors in search and seizure activities and as human beings, the exclusion of all other subjective experiences serves to invalidate and undermine the humanity of others, as well as to severely limit the protections afforded by the Fourth Amendment. This is evident in the Court's expectations of privacy cases, and its characterization of the reasonable person standard.[326] Furthermore, the Court still maintains the fiction that, in general, facts can be objectively described from a neutral stance, rather than acknowledging that our experiences and identities always shape the way we perceive the world. This stance of objectivity serves to legitimize the status quo and to

322. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 897 (1975) (finding that a police officer may draw inferences based on his own experience in deciding whether probable cause exists).

323. *See, e.g., Arvizu*, 534 U.S. at 266 (the officer's assessment of the situation in light of his specialized training as a border patrol agent and his familiarity with the customs of area inhabitants was sufficient to support a reasonable suspicion of drug smuggling and justify stopping the suspect vehicle).

324. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 742-43 (1983) (probable cause to arrest when experienced police officer, who knew narcotics frequently transported in party balloons, inferred that a party balloon observed in plain view contained narcotics); *Ornelas*, 517 U.S. at 700 (holding that a veteran officer, who had searched roughly 2000 cars, could see loose car panel as evidence of hidden drugs); United States v. Cortez, 449 U.S. 411, 418 (1981) (officers with special border patrol training and experience had reasonable suspicion of criminal activity upon observing distinctive shoeprints on an isolated area of the road, a high occupancy vehicle, and late night travel close to border).

325. 470 U.S. 675, 682 n.3 (1985).

326. *See* Raigrodski, *supra* note 17.

perpetuate the dominance of particular views from a position of power as the true representation of reality, while other constructions of reality are dismissed as untrue and undeserving of legal and social recognition.

Second, while the uniqueness of the individual officer's personal policing experiences and knowledge is the basis that justifies the officer relying on them to assess the facts and to construe reality, the Court's rhetoric never refers to these experiences for what they really are: inherently personal and subjective. In this manner, the Court is able to maintain the epistemology of objectivity and to exclude as subjective and personal the experiences it is not interested in validating. This objectivist rhetoric represents the general ideology and epistemology of objectivity that, feminists argue, is particularly entrenched with gender hierarchy. This broader ideological and epistemological subordination of subjectivity perpetuates the subordination of that which is considered female and strengthens the social control of men over women.

The stronghold of the ideology and epistemology of objectivity is clear in those instances where the Court assigns legal relevancy to the officer's good faith beliefs during the execution of searches and seizures. The Court's treatment of a police officer's subjectively honest yet mistaken beliefs in executing searches and seizures suitably demonstrates that the law actually incorporates particular subjective experiences without deviating from its rhetoric of objectivity. The doctrine of a third party's apparent authority to consent to a search and the good faith exception to the exclusionary rule further exemplify how the officer's subjective good faith belief is indeed legally relevant but only, at least in theory, if it measures up against an objective reasonableness standard.

In the context of the officer's good faith conduct, mistaken or not, the officer's state of mind is most relevant to the evaluation of the reasonableness of his conduct, in a way that can and often does result in the validation of what otherwise might be characterized as an unreasonable search or seizure. Thus, in upholding a warrantless search incident to an arrest of the wrong person, the Court said:

> [T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong . . . and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness . . . the officers' mistake was understandable and the arrest a reasonable response to the situation facing them. . . .[327]

Similarly, the Court held that room must be allowed for some mistakes on the part of officers, but only those mistakes that reasonable

327. Hill v. California, 401 U.S. 797, 803-04 (1971).

men might have made.[328] Hence, the officers' good faith subjective mistakes must first be incarnated as objectively reasonable. Not surprisingly, however, they often are.[329]

Evaluating the officer's mistaken conduct against an objective reasonable person standard is explicitly the crux of the Court's analysis of searches based on a third party's apparent authority to consent to a search. In *Illinois v. Rodriguez*, the Court expanded the doctrine of searches based on third party's consent to include the latter's apparent authority to give consent if the officers reasonably (though erroneously) believe that the third party had authority to consent.[330] The Court explained that its holding does not suggest that the officers may always accept the third party's assertion of authority. The surrounding circumstances could be such that a reasonable person would doubt its truth and not act upon it without further inquiry.[331] Hence, the consent must "'be judged against an objective standard: would the facts available to the officer at the moment . . . "warrant a man of reasonable caution in the belief"' that the consenting party had authority over the premises."[332] If not, a warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.[333]

Combined with the Court's blindness to the bad faith of police officers, this last mentioned subjective-objective analytical structure may lead to interesting results. Assume that an officer subjectively acts in bad faith and enters the premises even though she does not believe authority to consent exists (thus, acting in blatant disregard of any privacy interests protected under the Fourth Amendment). If the third party does have actual authority to consent, the entry will be validated and the officer's conduct will be deemed reasonable, even though she abused her power. Consequently, any evidence obtained would be admissible despite the specific need to deter such police conduct. In contrast, if the officer subjectively believes in good faith that authority to consent exists but the Court finds that an objective but hypothetical reasonable person would not so believe, the officer's conduct would be deemed unreasonable and unjustifiable, although no governmental abuse of power took place. Any evidence obtained would be excluded, even if doing so does not seem to advance any goal of deterrence or judicial integrity.

What happens if the officer subjectively acts in bad faith, when no

328. Brinegar v. United States, 338 U.S. 160, 176 (1949).

329. *See also* Raigrodski, *supra* note 17 (comparing the construction of the reasonable officer standard in favor of officers in general with the typical construction of the reasonable person standard to the disadvantage of the individual).

330. 497 U.S. 177, 186 (1990).

331. *Id.* at 188.

332. *Id.* at 188-89 (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

333. *Id.* at 189.

actual authority to consent exists, but the Court finds that an objectively reasonable person would have believed such authority existed? Supposedly, good faith on behalf of the officer is a necessary first step in the apparent authority analysis. But if the Court's treatment of the subjective and objective prongs of the *Katz* expectations of privacy test is any indication, the subjective element will likely be left behind. Therefore, it is likely in such a case that the officer will again be rewarded (his or her conduct deemed reasonable and constitutional, and the evidence admissible) despite the abuse of power and intentional disregard for the individual's constitutional civil rights.

Finally, the remedial aspects of the Fourth Amendment also demonstrate how the Court's schizophrenic approach to the police officer's subjectivity actively operates to enlarge the power and control of the police over the individual, and with it the potential for abuse, within the traditional boundaries of a fictional and oppressive discourse of objectivity. As we have seen, the officer's subjective bad faith state of mind will not factor into the question of whether evidentiary exclusion is warranted, regardless of any deterrence goals. On the other hand, his subjective good faith state of mind is, as the name indicates, relevant to the application of the good faith exception to the exclusionary rule, particularly in light of the deterrence purposes of this remedy. Subjectivity comes in through the back door of an ostensibly objective reasonableness standard.

An officer's subjective state of mind is often deemed relevant by the Court. In *United States v. Leon*,[334] the Court held that the exclusionary rule will not apply to evidence obtained by an officer whose (subjective good faith) reliance on a search warrant was objectively reasonable, even though the warrant was found to be defective.[335] This good faith exception would not apply where the warrant was so facially deficient that the officer "cannot reasonably presume it to be valid."[336] In *Illinois v. Krull*, the Court applied the good faith exception to circumstances where the officers acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, which was ultimately found to violate the Fourth Amendment.[337] As in *Leon*, the officer cannot be said to have acted in good faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.[338]

In both cases, the Court insisted that the standard of reasonableness it had adopted was an objective one and did not turn on the subjective good

334. 468 U.S. 897 (1984).
335. *Id.* at 926; *see also* Massachusetts v. Sheppard, 468 U.S. 981 (1984).
336. *Leon*, 468 U.S. at 923.
337. 480 U.S. 340, 349 (1987).
338. *Id.* at 355.

faith of individual officers.[339] But it did not explain what would make the officer's good faith reliance on a warrant or on a statute objectively reasonable. In light of the overall deference and credibility that the Court affords police officers, I suspect that in most cases the Court will validate the officer's subjective beliefs as reasonable in the same way that it usually finds that the officer's suspicion is an objectively reasonable one. Validating actual experiences and perceptions of individual officers seems justified in itself for a feminist advocating a concrete experience-based knowledge. Nothing, however, makes these perceptions more reasonable or more objective than any other perspectives deemed unreasonable.

IV. Discarding the Pretense of Reasonableness and Objectivity

As a feminist, my concern is not with the affirmation itself of the actual personal experiences and perceptions of individual officers. Law would be more just if the actual experiences and viewpoints of us all, especially of those of us who have traditionally been silenced and excluded from the legal discourse, were to shape our jurisprudence, inside and outside of the Fourth Amendment. For that to happen, however, the law must accept the actual perspectives of all as equally valuable rather than upholding or degrading particular perspectives in a manner that consistently empowers the government and subordinates the individual, especially those who are already socially oppressed.

Is it possible for feminist or other outsider constructions of reality to attain the status of objectivity within a legal framework that recognizes multiple realities? Martha Chamallas thinks the answer depends on whether objectivity will come to mean a construction of reality deserving legal recognition and protection rather than a neutral assessment devoid of perspective.[340] I propose that we take a step further towards transforming our discourse and jurisprudence. Rather than trying to attain the status of objectivity within a discourse based on the division of objectivity from subjectivity, we can strive to discard the male epistemology of objectivity and the dichotomies it entails. We need to "discard the habit of equating our most noble aspirations with objectivity and neutrality"[341] and adopt a concrete experience-based multi-perspectival epistemology and methodology. This alternative epistemology is not to be mistaken for replacing male objectivity with female subjectivity. The point is not that subjectivity is superior to objectivity or that passion is superior to reason. Rather, it is only through the wholesale rejection of the polarization of the

339. *Leon*, 468 U.S. at 919 n.20; *Krull*, 480 U.S. at 355.

340. Chamallas, *supra* note 221, at 123.

341. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1402 (1986).

dualistic pairs that we can create "the possibility of wholeness."[342]

Within that newly envisioned feminist jurisprudence, should we also discard the concept of reasonableness or should we retain and redefine it? Like objectivity, the concept of reasonableness carries with it an immense symbolic power that can legitimate outsider claims. On the other hand, like objectivity, the risk is that even when used by the disempowered, reasonableness will continue to hide power hierarchies and thereby legitimate fundamentally oppressive structures. Especially if the new formulations of reasonableness are presented as neutral themselves, the redefined construct will merely reinforce and legitimate an unequal status quo.[343] The failure, so far, of battered women's self-defense work in transforming the concept of reasonableness, and the emergence of gender- and race-specific reasonableness sub-standards, demonstrate how grave that risk is. It also seems futile and even harmful to attempt a transformation of the concept of reasonableness when it is so closely tied to the idea of objectivity and cannot allow for such a transformation.[344]

Within Fourth Amendment jurisprudence in particular, reasonableness and objectivity have proven unable to address the core problems of citizen-government relations in a meaningful and just manner. Neither the overarching umbrella of reasonableness nor any specific reasonableness-based standards account for the power hierarchy that exists between the government, particularly the police, and the citizenry. Nor can any reasonableness standard meaningfully constrain oppressive power or address the harms of subordination. To the contrary, the notions of reasonableness and objectivity perpetuate such oppressive hierarchies. Therefore, it is especially important to displace the notion of reasonableness and the ideology of objectivity within search and seizure law.

Fourth Amendment jurisprudence should instead be restructured to account for government power and its abuse as means of controlling and subordinating the citizenry. Such a constitutional regime that is concerned with power and with hierarchical relations of domination will examine the behavior of the police officer and of the individual in light of the power hierarchies between them. This paradigmatic shift requires abandoning reasonableness-based standards altogether.[345] Instead, I suggest we

342. Olsen, *supra* note 245, at 1575-76.

343. *See* Ehrenreich, *supra* note 217, at 1231.

344. *Id.* at 1232.

345. *Cf.* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 885 (1997) ("Power is the root of sexual harassment. . . . The 'reasonableness' standards do not account for the unique power relationship that often exists between a landlord and a tenant. . . . [T]he law should focus on relations between the oppressor and the oppressed and question the defendant's actions in light of the power

embrace the values of anti-subordination and empowerment to guide us in resolving power struggles within the context of the Fourth Amendment.

Refocusing the Fourth Amendment on oppressive power and subordination will require a new legal discourse, one explicitly committed to seeking out multiple perspectives other than our own instead of perpetuating an ideology of false objectivity and elitist reasonableness. This transformation is called for by the substantive core of the Fourth Amendment, by the general feminist critique of objectivity, by the commitment of feminists to voice the experiences of the oppressed other, and by the need to build on these experiences as a source of unique knowledge in the struggle against our subordination.

A commitment to anti-subordination and empowerment requires us to abandon the pretense of abstract objectivity and universal knowledge and adopt a multi-perspectival way of knowing informed by the detailed particularities of our lives. These particularities then "become facets of the collective understanding within which differences constitute rather than undermine collectivity."[346] As Ann Scales observes, if the purpose of law is indeed to decide the moral crux of the matter in real human situations, "[I]t would seem obvious that law's duty is to enhance, rather than to ignore, the rich diversity of life. Yet this purpose is not obvious; it is obscured by the myth of objectivity which opens up law's destructive potential."[347]

The myth of objectivity exemplifies the way in which knowledge—itself an embodiment of power—has been used as a mechanism of exclusion and marginalization of those who do not possess the power to have their version of reality accepted. The abstract universality of the objective point of viewlessness in Fourth Amendment jurisprudence treats the particular perspectives of the powerful as reality and defines other perspectives out of existence. In contrast, aware of the inextricable connection between knowledge and power, feminists practice a positive, inclusive, and empowering vision of knowledge that does not require objectifying some other.

Feminist epistemology values the multiplicity of perspectives and realities. It takes multiplicity to be constitutive of reality; it sees different perspectives as systematically related to each other and to other relations, such as exploited and exploiter; and it regards different perspectives as emergent and always changing.[348] Feminist legal scholars have developed several versions of such multi-perspectival jurisprudence, but one message,

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differentials between the parties. This shift in focus requires abandoning the reasonableness standards altogether.").

346. MACKINNON, *supra* note 5, at 86.

347. Scales, *supra* note 348, at 1387-88.

348. *Id.* at 1388.

captured by Martha Minow, unites them: "Only through the variety of relationships constructed by many people seeing from different perspectives can truth be known and community be created."[349]

Judges, lawyers, and police officers must rethink how we come to know what we know. Particularly within the context of the Fourth Amendment, we must contemplate how and what we know about harm and injurious behavior. We must be more attentive to the lives of other people and the forces they operate within. Moreover, we must learn to view the world from more than a single, reflexive position. Patricia Williams has described this practice as the "ambi-valent, multivalent way of seeing that is. . . at the heart of what is called critical theory, feminist theory, and the so-called minority critique."[350] It is the "fluid positioning that sees back and forth across boundary,"[351] and which has been the "daily experience of people of color and of women."[352]

Others advocate multiple consciousness as a jurisprudential method that ties together consciousness-shifting with a search for the pathway to a just world. In consciousness-shifting, Mari Matsuda refers to the ability to see that the law reflects a particular viewpoint, to operate within that view, and at the same time to shift out of it for purposes of critique, analysis, and strategy.[353] Such multiple consciousness is not a mere random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. We can all choose to know the concrete lived details of others by reading, studying, and listening. The jurisprudence of outsiders teaches us that these details and the emotions they evoke are important as we set out on the road to justice.[354]

For some, like Martha Minow, acknowledging our own inability to escape our perspective and seeking out multiple viewpoints is specifically the path to justice. As Martha Minow declares:

> Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences. . . . As we make audible, in official arenas, the struggles over which version of reality will secure power, we disrupt the silence of one perspective, imposed

349. Martha Minow, *Stories in Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 24, 34 (Peter Brooks & Paul Gewirtz, eds., 1996).

350. Patricia Williams, *The Obliging Shell: An Informal Essay of Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2151 (1989).

351. *Id.*

352. Patricia Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11 (1989).

353. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

354. *Id.*

as if universal.[355]

Minow thus calls on judges to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.[356] She urges the judiciary to make a perpetual commitment to seek out unstated assumptions and typically unheard points of view.[357] Rather than rules and fixed standards, we need struggles over descriptions of reality. Law should be "an opportunity to endow rival vantage points with the reality that power enables, to redescribe and remake the meanings of the world that has treated only some vantage points as legitimate."[358]

It is especially important that judges engage in an analysis that is self-consciously aware both of their own perspectives and of the concrete circumstances and varying viewpoints involved in any Fourth Amendment issue. While no judge will be able to completely escape his or her own cultural blinders, an ongoing effort to occupy the place of the other can push us to challenge our ignorance and fears and to investigate our usual categories for making sense of the world.[359] Minow explains:

> Once you try to break out of unstated assumptions and take the perspective of the "other" you may glimpse that your patterns for organizing the world are both arbitrary and foreclose their own reconsideration. You may see an injury that you had not noticed, or take more seriously a harm that you had otherwise discounted. You will get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change. . . . You may find you had so much ignored the point of view of others that you did not realize you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be.[360]

It is not easy to understand those whose experiences and values are very different from our own. It takes practice, emotional maturity, and humility to make a habit of looking through the perspectives of others, advocates Minow. It takes an even greater effort to be moved by them. We need to open our minds to the possibility that a reality other than our own may matter.[361] Indeed, the very effort to imagine another perspective could sensitize us to the possibility of a variety of perspectives, and could allow

355. Minow, *supra* note 229, at 95.
356. *Id.* at 14-15.
357. *Id.* at 16.
358. *Id.*
359. *Id.* at 79-80.
360. *Id.* at 72.
361. *Id.* at 74.

us to open our minds to accept more than one, two, or even three truths in any given situation.[362]

Proceeding with humility and educating ourselves to take the perspective of the other will broaden anyone's perspective. For judges, lawyers, and police officers, such practice is crucial. Not only will it better protect individuals from governmental abuse, but it will also make us better judges, lawyers, and police officers. An officer sensitive to the perspective of a person of color who lives in a neighborhood in which expectations of police brutality are routine may choose not to regard seemingly evasive conduct as suspicious. Consequently, the officer may decide not to force an encounter upon an individual or at least not to resort to forceful means of detention. Similarly, officers and judges may not be so quick to construe an individual's submissive behavior as consent to a search. They may better appreciate the forces that lead an individual to perceive no other choice than to comply, and consequently may decide not to exploit this weakness.

When we take other perspectives into account it does not necessarily mean that the perspective of the other will or should prevail. But at least it will be seriously considered. In the long-term, the working premises of police officers and judges may even be transformed so as to better weigh the interests of the individual. Furthermore, if fewer subordinating altercations between individuals and the police occur, or if more instances of oppressive governmental conduct are redressed by the courts, we will have fulfilled the promise of the Fourth Amendment and restored faith in the criminal justice system.

To aid judges, lawyers, police officers, and the public in familiarizing ourselves with the perspectives of others, I suggest that we explicitly adopt a methodology of narratives. We should incorporate first person narratives into judicial opinions, police training, and media coverage of Fourth Amendment issues. Up until now, attempts to "imagine" other perspectives within traditional doctrinal structures like a reasonable person or officer standard have resulted in a narrow, one-dimensional, elitist, and oppressive perspective. In contrast, we should make room for concrete personal accounts of the parties involved. To some extent, personal accounts of police officers are already included in the law, as exemplified by the Court's deference to officers' accounts in forming reasonable suspicion and probable cause. But even an officer's voice is often filtered through the hypothetical lenses of the reasonable officer, and her first person testimony is relegated to a footnote rather than being a focal point of the Court's opinion.

The story form is itself well suited to portray the multiplicity of

362. Minow, *supra* note 227.

human viewpoints about any given event.[363] Its inevitable particularity may provide a way for us to understand the diversity of perceptions that are attributable to race, class, gender, or other individual factors.[364] The narrative methodology is attentive to the partiality of any story; in fact, it revels in particularity, difference, and resistance to generalization. Thus, it has immense potential for enacting and expressing insights about the partiality of any individual's viewpoint, as well as for providing us with the hope that we can come to imagine the viewpoint and experiences of others.[365] First person stories, particularly those about police-citizen encounters, may allow judges, police officers, and the public to connect and allow ourselves to be persuaded by stories that previously seemed unbelievable because of their unfamiliar otherness.[366]

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363. Minow, *supra* note 357.

364. *See generally* Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 798-99 (1990).

365. Minow, *supra* note 357, at 34-35.

366. Several law professors have already started using these sorts of narratives in their law school courses. Their experiences may give us a better understanding of the possibility of acquiring knowledge of the point of view of others and of the real potential of incorporating first person narratives into legal discourse. Joseph Singer, for example, used narrative to help students recognize aspects of themselves of which they previously were unaware. Joseph W. Singer, *Legal Storytelling: Persuasion*, 87 MICH. L. REV. 2442 (1989).

Singer's property students were having a hard time understanding workers' arguments in plant closing cases. He thus created a story that required them to hypothesize that the law school had decided that it could raise its bar passage rates by flunking out one-third of the students. *Id.* at 2449. According to Singer, "the story encouraged students to see the world from someone else's perspective." *Id.* at 2454. It brought the students in touch with the complexity of their moral intuitions. It enabled them to understand the plant closing case as one of moral conflict, rather than a problem that could be easily solved. This realization changed them by bringing them in touch with the viewpoints of others. The students had identified, consciously or unconsciously, with the corporate managers, and placed themselves in an imagined hierarchical relationship with the workers, unaware of their own power relationship with the workers. Only when they started seeing the world from the perspective of the workers, did their relationship with those others come into being so that persuasion became possible. *Id.* at 2457-2458.

Judith Greenberg and Robert Ward used narrative to encourage the students in their law and race class to confront both the Rodney King controversy and the more general evidence of deeply embedded prejudice in modern society and the modern legal regime. Judith G. Greenberg & Robert V. Ward, *Teaching Race and Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995).

While Singer used a fictional narrative, the students in Greenberg and Ward's class encountered narratives in all forms, including trial transcripts, newspaper articles, legal commentaries, and personal anecdotes from teachers and fellow classmates. Significantly, the first person accounts of racism the students read were the most effective in allowing the students to feel the pain and helplessness of those subjected to racist attacks. *Id.* at 340. They could thus understand, on an intuitive level, the role that race plays in the formation of our individual identities. These first person narratives were effective in allowing the students to connect their own identities with those of people who are a different race, and allowed them to reach deep inside themselves for knowledge about the role of racism that

Voicing multiple stories and experiences of subordination conveyed particularly through first person narratives is also important to the individual who is telling his or her story. Personal narratives carry with them a liberating, empowering potential which is uniquely suited to redress the traditional invalidation of outsiders by the exclusion of their stories and perspectives from the law. As Lucie White argues, in order to "shape the law to respond to the needs of subordinated groups, the power to tailor must shift to those that the tailoring seeks to help. Those who have been diagnosed as different, as disabled, must assume the power to describe their own circumstances."[367]

Therefore, courts should allow all the facts to be presented by the parties; they should encourage the speech of the 'legally inarticulate' and include it within the universe of social realities that the law comprehends.[368] Rather than having judges and lawyers re-tell the citizen or officer's story in the voice and from the perspective of an outside third-person, the law should presume that each experience can be best described by the individual who experienced it. In this way, the legal system will empower individuals—citizens and officers alike—not only by responding to their experiences but also by giving them a space to speak their own words. This may allow all the parties to feel counted within the legal system and provide the recognition and validation that are important goals of many of those seeking legal relief[369] and of many police officers.

Current legal narratives de-subjectivize the parties and de-contextualize what happened outside of court. To the extent that the individual faces a world defined by a language he or she cannot speak in which he or she cannot locate him or herself, and which does not deal in intelligible ways with claims he or she regards as important, the legal discourse can be said to be "one of authority rather than community, its force divisive rather than cohesive."[370] In contrast, a discourse that embraces the language of officers and suspects gives recognition to what each party regards as important concerns. It can thus function as an important force of social definition and cohesion, and simultaneously legitimize itself in the eyes of the individuals whose lives it affects the most.

In sum, the legal discourse of the Fourth Amendment can become empowering to the individual by letting the person's unmediated voice be spoken, and by listening to his or her story. However, for the directive to *listen* to be a meaningful normative guide rather than empty rhetoric, we

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previously had been inaccessible. *Id.* at 341-42.

367. Lucie E. White, *Lawyering for the Poor*, 56 BROOK. L. REV. 861, 886-87 (1990).

368. *See* Coombs, *supra* note 65, at 1657.

369. Cahn, *supra* note 215, at 1436.

370. Coombs, *supra* note 335, at 1657.

should view our commitment to voice multiplicity and diversity as part of an expanded commitment to the true sharing of social power. Like Nancy Ehrenreich, I see multi-perspectivity as a substantive commitment. First, it requires a dedication to making decisions based on genuine attempts at understanding the perspectives and social circumstances of others, to making choices with care and humility. Second, it requires a willingness to reach results that actually produce the sharing of power with the powerless. We must be willing to accept the hard choices—and losses—that a true redistribution of power would entail.[371]

Search and seizure law has always been comprised of narratives and personal stories. The trial level in particular is an arena of competing and complementing concrete stories. Accordingly, legal actors already exercise many of the skills necessary to comprehend the legal narratives of the other. Lawyers and judges are frequently required to immerse themselves in the concrete, to be sensitive to the particularities of various voices, and to find meaning in the nonlinear or the ambiguous.[372] Especially within the realm of the Fourth Amendment, where encounters between individuals and the police are rich in details and immensely diverse, and turn on hair-splitting distinctions, detailed and specific narratives have always shaped the law.[373]

The problem, however, is that the law has been shaped by narrow, one-dimensional, and oppressive narratives. The problem has not been an overall rejection of narratives in law, but rather that only the stories of the powerful have been listened to. David Dante Troutt argues that in the context of police brutality prosecutions for example, these dominant narratives construct a reality in which police discretion is overvalued and police accounts of incredible conduct by suspects are regularly accepted.[374] Because other constructions of reality, especially those presented by non-innocent individuals, are easily dismissed as unbelievable, these dominant authority narratives remain largely unchallenged. Moreover, these narratives of authority and dominance are not called stories. As Catharine MacKinnon observed, "[t]hey are called reality."[375] The dominant story of an individual's conduct during an encounter with the police is presented as the objective reality of consent; the dominant narrative of facts preceding

371. Ehrenreich, *supra* note 217, at 1232-33.

372. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1043-44 (1991).

373. *Cf.* David D. Trout, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 26 (1999) ("[T]he difficulty of infusing narratives into the law is not that their appropriateness is questioned. Police brutality prosecutions have long been a battleground of competing stories.").

374. *Id.* at 95.

375. Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 357, at 235.

an encounter with an individual is presented as objective reasonable suspicion.

The fact that the law has systematically excluded some stories and legitimized others as reality does not mean that we should now elevate the silenced stories to the status of the only reality. Our commitment to multiperspectivity mandates that, while we seek to voice the perspectives of the oppressed, we do not silence the voices of police officers and other governmental agents. We must recognize that multiple stories reflect multiple experiences and realities. The complexity of life constitutes our reciprocal realities, and it is the conflict between our realities that constitutes us, whether we engage in it overtly or submerge it under a dominant view.[376] We must realize that the presence of different versions of a story does not automatically mean that someone is lying and that a deviant version needs to be discredited.[377] Stories may diverge because they are both self-believed descriptions coming from different points of view informed by different background assumptions and ways of making sense of events.[378] Thus, different participants may experience "what happened" differently.[379] Instead of labeling one story as the objective reality, each story, and hence each reality, is both objective and subjective for the participants. In the past, the story of one reality has been dominant; all stories must now be weighted more equitably within the legal system.[380]

To acknowledge the complexity of our shared and colliding realities also means acknowledging the impossibility of all prevailing at once. After developing a sense of alternate perspectives, we must choose. The task is to find a principled way to make these choices without replicating the exclusionary impact of our current approach. The question then is how we can choose among competing stories from the perspectives of the police officer and the individual without invalidating the experience of the one or the other in a way that is as oppressive as the legacy of our current jurisprudence.

I believe we can still make fair decisions even when we are moved by competing views. Guided generally by a posture of humility and acknowledgement of the partiality of truths,[381] it is possible to develop better abilities to grasp competing perspectives and to make more knowing choices thereafter.[382] The first step is in the telling of new stories itself.[383]

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376. Minow, *Justice Engendered*, *supra* note 229, at 76.

377. Kim Lane Scheppele, *Legal Storytelling, Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2097 (1989).

378. *Id.* at 2082.

379. *Id.* at 2097.

380. Cahn, *supra* note 215, at 1437.

381. Minow, *Stories in Law*, *supra* note 357, at 35.

382. Minow, *Justice Engendered*, *supra* note 229, at 69-70.

383. Cahn, *supra* note 215, at 1438.

True, stories on their own offer little guidance for evaluating competing accounts. But, as Catharine MacKinnon observed, "[i]f the whole story has not been told before, the principles that have been predicated on the assumption that the story was whole cannot be unbiased principles."[384]

If a story has been told only from the perspectives of police officers, then the resulting principle of a search based on reasonable suspicion, for example, should be suspect as oppressive because of its partiality. Hearing new stories may cause us to pause and question our reflexive responses. While the process of looking through other perspectives will not yield answers to the question of which partial view to advance, it may lead to an answer that is different from the one that would otherwise have been reached.

We should be guided by our substantive commitment to focus on power and subordination and by our commitment to redistribute and share social power. Our substantive commitments do not tell us what to do but they may and should help us select from plausible, competing choices in a given circumstance.[385] Our focus on power hierarchies may guide our Fourth Amendment inquiry in multiple ways. It better captures the harm of oppression that is at the core of the Fourth Amendment; it explains the plausibility and even likelihood of competing realities of harm, especially injurious realities; and it enables us to choose among these competing realities. In this latter function, a jurisprudence of power is best captured in the principles of anti-subordination and empowerment.

Critics may ask how one would know who is subordinated and who is not. The larger question is how one knows anything in life or law.[386] For Mari Matsuda:

> To conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists. In law, we conceptualize. We can determine when subordination exists by looking at social indicators: wealth, mobility, comfort, health, and survival tend to mark the rise to the top and the fall to the depths.[387]

Ann Scales similarly writes:

> When our priority is to understand differences in perspectives and to value multiplicity, we need only to discern between occasions of respect and occasions of oppression. Those are judgments we know how to make, even without a four-part test to tell us, for every future circumstance, what constitutes

384. MacKinnon, *supra* note 383, at 234.

385. Minow, *Justice Engendered*, *supra* note 229, at 91.

386. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2362 (1989).

387. *Id.*

> domination. . . . Domination comes in many forms. Its mechanisms are so insidious and so powerful that we could never codify its "essence." The description that uses no formula, but which points to the moral crux of the matter, is exactly what we need.[388]

Valuing the principle of anti-subordination means a serious commitment to evaluating and eradicating all forms of oppression.[389] We should explicitly examine whether an individual was less powerful than the police in the specific case, and whether the police exploited or benefited, directly or indirectly, from their power over the individual. We can assume that typically the police are more powerful than the individual, even though this is due to the operation of social forces outside the specific encounter and to the individual's social position. We can also assume that the police benefit from this privileged position of power and the relative powerlessness of the individual, even if the officer does not intentionally exploit the vulnerability of the individual. Finally, we can assume that the individual is subordinated at least to the extent that the police benefit from his relative powerlessness. Consequently, the burden of persuasion should be on the state to show that no power disparity operated to the disadvantage of the individual, or that the individual acted out of true agency and empowerment.

Moreover, when our conscious examination of the power structures leaves us equally moved by the stories of the officer and the individual, we should choose to empower the individual, if only because of the fact that until now the jurisprudence has erred on the side of the police. In so redistributing power, the benefit of validating and empowering those who have thus far been denied power outweighs the losses of excess power and privilege that the police have. Nevertheless, these are explicit moral choices of who should carry the burden of persuasion, about whose side to take when in doubt or when equally persuaded, and about who should gain power and who should lose power when sharing is impossible.

This moral choice to commit to anti-subordination would hold police officers and other governmental agents to a heightened standard in light of the significant power they typically have over the individual due to their authority and social legitimization. As the powerful party in a situation of power, the police would have a moral obligation to see the world from the point of view of those they govern or control, and to exercise their power in the interests of the governed individual.[390]

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388. Scales, *supra* note 348, at 1388.

389. *See* Volpp, *supra* note 397, at 97-98 (arguing that antisubordination is a value that the legal system must factor into the decision whether to present testimony as to a defendant's cultural background).

390. *See* Zalesne, *supra* note 353, at 893.

Judges will also be bound by this heightened moral obligation. They should consider the human consequences of their decisions rather than hiding behind abstractions.[391] They should expressly immerse themselves in a normative debate over questions of power instead of obscuring it with discussions of objective reasonableness. Martha Minow also urges judges to open their minds to the possibility that someone not like them may move them. Such an experience will not tell them what result to reach, but it may give them a way to forge new approaches to the problems at hand.[392] Consequently, the Court should no longer focus on restrictive definitions of a search or a seizure, and we should not let the formalities of a warrant, probable cause, reasonable suspicion or consent determine the limits of our inquiry into the police and individual conduct. Instead, the Court must identify the power matrix between the parties, considering such factors as the gender, race, and class of both the officer and the individual, and any other factors which contribute to an imbalance of power in the specific case at hand, such as general police practices or general attitudes about crime and security. The Court must then determine whether such power disparities were exploited in an impermissible way.[393]

Our inquiry should not be limited to intentional exploitation of power. Power imbalances are often invisible and appear natural. However, as long as people are disadvantaged because of their non-white race, for example, white people enjoy the privilege and power that accompanies whiteness. As long as male ideology and perspective dominate the world, men enjoy the social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them or not. This is exactly why we impose a moral obligation on the powerful to act from the perspective of those less powerful.

This kind of inquiry may not necessarily steer our ultimate choice along lines of what we have traditionally regarded as reason and rationality. The stories told by the individuals involved evoke emotions that eventually may be all that we can rely on in making our choices. This is not something to fear. Emotions play a decisive role in helping us to distinguish among value-laden alternatives, where each may be logical, yet nonetheless irreconcilable. As Robin West observed:

> The insistence on rational knowledge and, hence, on objects of rational knowledge, may have blinded us to the possibilities within the human spirit for arational and arationally (or subjectively) acquired forms of undisciplined knowledge. . . . We can, do, and should use our knowledge of the subjectivity of

391. Minow, *Justice Engendered*, *supra* note 229, at 89.

392. *Id.* at 89-90.

393. *Cf.* Zalense, *supra* note 353, at 865-66 (advocating a similar approach to analyze landlord-tenant relation in the context of hostile housing environment).

others, sympathetically and arationally acquired.[394]

We should stop fearing that we will be unable to make judgments if we embrace complexity and subjectivity. We can and do make judgments all the time. We can and do make decisions by immersing in particulars and by renewing our commitments to a fair world.[395] Critics will say that such feminist law will not work. But this is premature. Its possibilities, wrote Catherine MacKinnon, "cannot be assessed in the abstract but must engage the world."[396] A few decades ago, MacKinnon pointed out that feminist theory "has barely been imagined; systematically, it has never been tried."[397] The time has come.

394. Robin West, *Disciplines, Subjectivity, and Law, in* THE FATE OF LAW 119, 152 (Austin Sarat & Thomas R. Kearns, eds., 1991).

395. Minow, *Justice Engendered, supra* note 229, at 90-91.

396. MACKINNON, *supra* note 5, at 249.

397. *Id.*