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Consensual Police-Citizen Encounters: Human Factors of a Reasonable Person and Individual Bias.

Evan M. McGuire

ARTICLES

CONSENSUAL POLICE-CITIZEN ENCOUNTERS: HUMAN FACTORS OF A REASONABLE PERSON AND INDIVIDUAL BIAS

EVAN M. MCGUIRE*

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 Evan M. McGuire lives and practices in Fort Worth, Texas with his wife and family. A graduate of Texas A&M University and St. Mary's University School of Law, Mr. McGuire focuses his practice in the area of civil litigation and real estate law. The author would like to thank the immense efforts of the editors and staff members of the Scholar: St. Mary's Law Review on Race & Social Justice, as well as his wife and colleagues, all of whom worked so diligently to complete this piece. "We all agree your theory is crazy . . . but is it crazy enough to be true?" –Niels Bohr.

I. INTRODUCTION

The Fourth Amendment protects citizens from unreasonable government intrusion[1] and "generally requires valid individual grounds, determined in accordance with procedural fairness, before personal liberty may be restricted."[2] In light of continued reports of suspected racial profiling[3] as well as court-issued opinions[4] denouncing "crime prevention" programs, this Article serves as a resource for individuals who must be acquainted with minute Fourth Amendment distinctions at each level of police-citizen interaction.[5] The last decade was marked by an expansion of exceptions to the Fourth Amendment. However, courts and concerned citizens only recently started to turn against institutionalized focus on certain segments of the population.

The Supreme Court's defined exceptions—from least intrusive to most intrusive upon a citizen's freedom—are: consensual police-citizen encounters,[6] Terry stops,[7] and arrests based on probable cause[8] pursuant to

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1. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) (outlining generally the Fourth Amendment's protections). The protection provided by the Fourth Amendment applies beyond an individual's body and extends into physical locations in which a reasonable expectation of privacy exists. Katz v. United States, 389 U.S. 347, 351–52 (1967).

2. Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 508 (2001). Upon finding probable cause to initiate a search of an individual's body or residence, a neutral magistrate is required to confirm the finding of probable cause as valid and issue a warrant to the authorities perpetrating the search. *Id.* at 512 nn.17–18.

3. *See* Kristine Schanbacher, *Behind the Veil of the War on Drugs: an Institutional Attack on the African American Community*, 16 SCHOLAR 103 (2013) (discussing prevalence of racial profiling across the United States).

4. *See, e.g.*, Floyd v. City of New York, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at *75 (S.D.N.Y. Aug. 12, 2013) (criticizing the stop-and-frisk policies of New York City's police department).

5. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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.").

6. *See* Florida v. Bostick, 501 U.S. 429, 434–36 (1991) (defining behavior not constituting seizure); *see also* Florida v. Royer, 460 U.S. 491, 504, 506 (1983) (indicating "consensual encounters" are an additional category of police-citizen interactions); *Terry*, 392 U.S. at 22–23 (indicating the realm of a consensual encounter). Over time, case law has defined the boundaries of a consensual encounter and defines what action will force the encounter into Fourth Amendment scrutiny.

7. *See* United States v. Hensley, 469 U.S. 221, 229 (1985) (dictating a Terry stop is appropriate if "reasonable suspicion, grounded in specific and articulable facts" arises because of a past crime); *see also Terry*, 392 U.S. at 22 (formalizing the practice and ability of government officers to investigate a citizen based on reasonable suspicion, but absent probable cause).

"exigent circumstances."[9] Although the Supreme Court acknowledges these three avenues increased government's presence in citizen's lives, the consensual police-citizen encounter, however, does not arise to the level of constitutional seizure.[10] Thus, officers may approach citizens for any purpose as long as a "reasonable person" in their place would feel free to walk away from the officer's advances.[11]

As limited as this exception may appear, this Article analyzes the potential for abuse when asserted in practice, with particular focus upon disproportionate application to minorities.[12] The consensual police-citizen encounter fails to distinguish between legitimate conversations or desired police assistance and police action based upon a "gut feeling," a "hunch," or profiling with discriminatory motivation.[13]

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8. *See* Henry v. United States, 361 U.S. 98, 100–02 (proclaiming a valid arrest requires probable cause if a warrant is not obtained). Initially, government authority to arrest a citizen was restricted to criminal offenses witnessed by the government officer him or herself; however, case law has expanded an officer's ability to investigate potential criminal activity.

9. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (stating a warrantless arrest is valid if required to prevent the suspect from escaping); *see also* United States v. Santana, 427 U.S. 38, 42–43 (1976) (stating a "hot pursuit" chase of the suspect constitutes a valid exception to the warrant requirement); Cupp v. Murphy, 412 U.S. 291, 295–96 (1973) (affirming fear that the suspect will destroy evidence is a valid exigent circumstance to allow a warrantless arrest); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (holding a danger posed to the lives of police officers and other citizens is a valid exception to a warrantless entry and arrest).

10. *See Terry*, 392 U.S. at 24–27 (indicating the existence of a particular type of police-citizen encounter that does not constitute a Fourth Amendment seizure when conducted under particular circumstances); *see also* Illinois v. Lafayette, 462 U.S. 640, 644–46 (1983) (stating a search after the suspect is in custody is proper although it is subject to Fourth Amendment scrutiny).

11. *See Bostick*, 501 U.S. at 434–35 (describing a citizen's consent to police interaction is essentially consent to the encounter and thus does not activate the Fourth Amendment protection against unreasonable searches and seizures); *see also Terry*, 392 U.S. at 11, 13 (stating "[e]ncounters are initiated by the police for a wide variety of purposes . . .[,]" however, not all interactions between the police and a citizen end in a criminal prosecution).

12. *See Bostick*, 501 U.S. at 434–35 (outlining the approach used to bypass Fourth Amendment protection); *see also Royer*, 460 U.S. at 502–05 (illustrating an abuse of the concept of a consensual encounter and the practice used by the police to redirect the situation into a favorable arena).

13. *See* United States v. Mendenhall, 446 U.S. 544, 552 (1980) (stating correctly that some interaction with police authority will not constitute a seizure within the meaning of the Fourth Amendment). An innocent interaction between the police and the general public does not constitute a criminal investigation and will generally build public trust and confidence in government authority when all parties show respect toward each other. *Id.* at 553–54.

This Article analyzes consensual police-citizen encounters and the problems arising from the discrepancies upon which the doctrine is based. The notion of a reasonable person—on which courts rely in determining whether Fourth Amendment violations have occurred—is arguably predicated upon a fictitious or idealized individual.[14] This Article considers the practical unreasonability of expecting such constitutional understanding amongst ordinary citizens.[15] Subjected to years of abuse, disenfranchised populations have lost faith in government officers tasked with protecting their communities and, as a result of past experience, legitimately react to officer presence in a manner patently distinct from the court-defined "reasonable person."

Part II explores intricacies between an investigative detention and a consensual police-citizen encounter, describing nuances within each specific topic.[16] Part III depicts common problems arising from the discrepancy of the doctrine itself, while Part IV analyzes societal problems linked to a lack of legal knowledge of both citizens and government officers. Part V proposes solutions for this discrepancy for the court practitioner's consideration. Finally, Part VI concludes with a brief synopsis of current issues and evaluates possible solutions.

II. THE FOURTH AMENDMENT: LEVELS OF POLICE-CITIZEN INTERACTIONS

A. *Traditional Arrest*

Under Fourth Amendment jurisprudence,[17] a valid arrest first requires the acquisition of probable cause, which must then be presented to a neu-

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14. *See* Steinbock, *supra* note 2, at 522–27 (describing the Supreme Court's interpretation of a reasonable person and the confines in which society finds itself, regardless of the valid differences that exist among the population).

15. *See Bostick*, 501 U.S. at 437 (acknowledging an average person confronted on the streets by police may not feel free to leave or even know they have the right to leave during a consensual encounter); Berkemer v. McCarty, 468 U.S. 420, 441–42 (1984) (admitting the "reasonable person" standard regarding the application of *Miranda* rights to roadside stops is left intentionally ambiguous, and potentially confusing).

16. *See Terry*, 392 U.S. at 30 ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity my be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

17. *See* Gerstein v. Pugh, 420 U.S. 103, 114–16 (1975) ("[H]istorical support in the common law . . . has guided interpretation of the Fourth Amendment."); Warden, Md.

tral magistrate who then, and only then, may issue a warrant for the search of a particular location[18] or an individual's seizure.[19] These procedural requirements are imposed on the government, ostensibly protecting citizens from unfounded intrusions on their expectation of privacy[20] and from spiteful abuses of government discretion.[21]

The probable cause requirement forces government officers to justify their belief of criminal activity with tangible facts, thereby moving the investigative process beyond a "gut feeling" or a "hunch."[22] In *Terry v. Ohio*,[23] the U.S. Supreme Court illustrated the distinction between prob-

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Penitentiary v. Hayden, 387 U.S. 294, 301 (1967) ("We have examined on many occasions the history and the purpose of the [Fourth] Amendment. It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' . . . . Protection of these interests was assured by prohibiting all 'unreasonable' searches and seizures, and by requiring the use of warrants, which particularly describe 'the place to be searched, and the persons of things to be seized,' thereby interposing 'a magistrate between the citizen and the police,' . . . ."); Carroll v. United States, 267 U.S. 132, 149–50 (1925) (stating the practice of a warrantless arrest based on probable cause is rooted in the common law and dates back to the authors of the United States Constitution).

18. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses, . . . and effects, . . . shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, ..."). The Fourth Amendment illustrates the original framework of a valid arrest intended by the Founding Fathers when drafting the United States Constitution.

19. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, . . . shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing . . . the persons . . . to be seized.").

20. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964) ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests."). Current jurisprudence acknowledges the tension between the two opposing parties and asserts the current test provides a fair test for all to utilize.

21. *See id.* ("Requiring more [than probable cause] would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("[L]ong-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law . . . .").

22. *See Terry*, 392 U.S. at 27 ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."); *Brinegar*, 338 U.S. at 175–76 (1949) ("Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.") (citation omitted).

23. 392 U.S. 1 (1968).

able cause and reasonable suspicion, and also found an arrest is subject to far greater scrutiny under the Fourth Amendment than in any other form of police-citizen contact.[24] Probable cause, as defined by the Supreme Court, consists of "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[25]

Once probable cause is acquired, a neutral magistrate must officially recognize the facts and grant a valid warrant.[26] The judge reviews the totality of the circumstances and concludes whether probable cause exists and if the police have stated rational grounds to intrude upon the sanctity of an individual's privacy.[27] In *Jones v. United States*,[28] the Supreme Court outlined the policy:

Due regard for the safeguards governing arrest and searches counsels the contrary. In a doubtful case, when the officer does not have clearly

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24. *See id.* at 26 ("Thus [the search] must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion."). The Supreme Court acknowledged the need to provide a working officer with the ability to protect him or herself while confronting an individual on the street. *Id.* at 24. Society's interest in protecting its government officers outweighs the individual's personal privacy during a temporary stop to investigate the particular situation. *Id.* at 25–26.

25. Michigan v. DeFillippo, 443 U.S. 31, 37 (1979); *see also Gerstein*, 420 U.S. at 111 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.") (internal quotes omitted); Adams v. Williams, 407 U.S. 143, 148 (1972) ("Probable cause to arrest depends upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.") (internal quotes omitted); *Beck*, 379 U.S. at 91 (1964) ("Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.").

26. *See* Draper v. United States, 358 U.S. 307, 313 (1959) (stating the realm in which probable cause can properly be acquired).

27. *See* Illinois v. Gates, 462 U.S. 213, 238–39 (1983) ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.") (internal quotes omitted).

28. 362 U.S. 257 (1960).

convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.[29]

If a judge affirms probable cause exists, a valid warrant outlining specific boundaries granted to the police is issued and any subsequent search is valid if the confines of the warrant are respected.[30]

B. *Exigent Circumstances*

A counterargument to adhering to a strict reading of the Fourth Amendment is that it fails to provide necessary flexibility to the government investigating suspicious situations.[31] In response, the Supreme Court defined an exception to the warrant requirement for situations in which probable cause exists, but circumstances leave government officers unable to acquire a valid warrant:[32]

> Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence . . . .[33]

Courts recognize a number of exigent circumstances as valid exceptions to obtaining a warrant prior to action.[34] Such exigent circumstances in-

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29. *Id.* at 270–71.

30. *See* Miller v. United States, 357 U.S. 301, 313 (1958) ("Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.").

31. *See* Gerstein v. Pugh, 420 U.S. 103, 113 (1975) ("[W]hile the Court has expressed a preference for the use of arrest warrants when feasible . . . it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.").

32. *See id.* ("Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement.").

33. *Id.* at 113–14.

34. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) ("[A] warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence . . . or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.") (citation omitted); *see also* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.").

clude "hot pursuit" of a suspect,[35] a reasonable belief of police that evidence will be destroyed if an immediate search is not conducted,[36] and reasonable threats to the safety of the individual officer and to the public at large.[37] Although courts discourage use of these exigent circumstances, the practice of a valid arrest prior to obtaining a warrant is justified based on necessity and practicality.[38]

C. *Terry stops and the Creation of the Police-Citizen Encounter*

The investigative stop originated in *Terry v. Ohio*,[39] and has been further developed through subsequent cases that expanded the initial, narrow holding in *Terry*.[40] In *Terry*, the Supreme Court ruled government

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35. *See generally* Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (explaining the boundaries of a "hot pursuit"); *see also* United States v. Soto-Beniques, 356 F.3d 1, 36 (1st Cir. 2003) ("[P]olice are permitted to pursue the fleeing felon into a private residence in order to effect an arrest.").

36. *See* Cupp v. Murphy, 412 U.S. 291, 296 (1973) ("[Police were justified] in subjecting [suspect] to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails."); *see also* Ker v. California, 374 U.S. 23, 40–41 (1963) ("[T]he officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed . . . was not unreasonable under the standards of the Fourth Amendment . . . .").

37. *See Hayden*, 387 U.S. at 298–99 ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."); *see also* United States v. Beaudoin, 362 F.3d 60, 68–69 (1st Cir. 2004) ("The notion is abhorrent that police who are investigating a crime and suddenly find themselves at risk are precluded from acting reasonably in response to that risk merely because they have not yet established probable cause to make an arrest for a crime.").

38. *See* United States v. Cresta, 825 F.2d 538, 553 (1st Cir. 1987) ("Warrantless searches and seizures are constitutionally impermissible unless supported by probable cause and justified by either exigent circumstances or another recognized exception to the Fourth Amendment warrant requirement."). A set number of exceptions allow a government officer to arrest an individual without a warrant; therefore, an otherwise invalid arrest will be properly viewed as not violating the Fourth Amendment if the officer abides by the exception's requirements.

39. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). The Supreme Court listed a set number of requirements the government officer must be able to verbally express to a future magistrate if the court is to later deem the investigation valid. *Id.* at 21.

40. *See* Kaupp v. Texas, 538 U.S. 626, 630 (2003) (illustrating the contours of *Terry v. Ohio* by stating, "Involuntary transport to a police station for questioning is 'sufficiently like [an] arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'") (quoting Hayes v. Florida, 470 U.S. 811, 816 (1985)); *see also* United States v. Drayton, 536 U.S. 194, 203 (2002) (expanding *Terry v. Ohio* by illustrating the difference between a Terry stop and a consensual encounter and dictating when a citizen constructively feels free to leave, a Terry Stop has not occurred and thus the Fourth Amendment does not factor into the equation); Hayes v. Florida, 470 U.S. 811, 815 (1985) ("None of these cases have sustained [a] Fourth Amendment challenge [of] involuntary

officers have authority to investigate an individual even though no probable cause exists.[41] Rather than probable cause, government officers can make an investigative stop as long as they possess a "reasonable suspicion."[42] Herein lies the foundation of abuse. Although a *Terry* stop constitutes a seizure under the Fourth Amendment, the level of scrutiny afforded to the conduct of the governmental authority is downgraded to "reasonable suspicion."[43] Specifically, a "police officer must be able to point to specific and [particular] facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."[44] Justifying this action, the Supreme Court reasoned:

> [T]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercises of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . [t]hus the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interest.[45]

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removal of a suspect from his home to a police station and his detention there for investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization."); Florida v. Rodriguez, 469 U.S. 1, 5–6 (1984) (expanding *Terry v. Ohio* by laying the foundation of consensual conversation with a citizen and dictating the fact that asking an individual "investigatory" type questions does not constitute an investigation if the individual consent to the questioning); United States v. Adeyeye, 359 F.3d 457, 462 (7th Cir. 2004) (expanding *Terry v. Ohio* by directing that a Terry stop has not occurred when the individual did not have to approach the police officer upon request but chose to do so).

41. *See Terry*, 392 U.S. at 21–22 (holding a government officer, upon the acquisition of reasonable suspicion, could properly conduct a valid investigative stop).

42. *Id.*

43. *Id.*

44. *Id.* at 21.

45. Delaware v. Prouse, 440 U.S. 648, 653–54 (1979). *See also* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) ("The reason is found in the basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) ("Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has . . . divided the members of this court."); United States v. Ramsey, 431 U.S. 606, 619 (1977) (illustrating the need to properly balance the interest of the government in preventing and stopping criminal activity and the interest of the public in being free from an unreasonable search and seizure); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual.").

Acknowledging the presence of a balancing test, the Supreme Court stated reasonable intrusions into an individual's privacy are permissible if the government presents a valid interest obtained through the acquisition of reasonable suspicion.[46]

Aside from shaping the realm of investigative detentions, *Terry* created an interaction among governmental authorities and the general public devoid of constitutional oversight.[47] Officers are considered citizens while on the job, and as such, are deemed to have every right to partake in conversation or assist an individual in need.[48] Expanding this belief, the "Community Caretaker Doctrine"[49] maintains government officers are permitted, if not encouraged, to tend to the needs of the public.[50] Affirming this culturally based doctrine, the Supreme Court stated, "[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification."[51]

However, a seizure within the meaning of the Fourth Amendment occurs when a government officer restrains[52] an individual in such a manner

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46. *Terry*, 392 U.S. at 21 (stating reasonable suspicion satisfies Fourth Amendment scrutiny for an investigative stop).

47. *Id.* at 30 (holding an investigative stop is valid upon the acquisition of "reasonable suspicion").

48. *Id.* at 34 ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

49. *See* Colorado v. Bertine, 479 U.S. 367, 372 (1987) (describing the Community Caretaker Doctrine as "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"); South Dakota v. Opperman, 428 U.S. 364, 369–71 (1976) ("These caretaking procedures have almost uniformly been upheld by the state courts . . . . Applying the Fourth Amendment standard or 'reasonableness,' the state courts have overwhelmingly concluded that, even if an inventory is characterized as a 'search,' intrusion is constitutionally permissible."); Cady v. Dombrowski, 413 U.S. 433, 442 (1973) (engaging in investigations "described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"); *Terry*, 392 U.S. at 13 (1968) (stating the existence of a wide variety of circumstances that can bring a police-citizen encounter).

50. *See Opperman*, 428 U.S. at 368 (stating the Community Caretaker Doctrine incorporates the police officer's right to impound nuisance automobiles); State v. Blades, 626 A.2d 273, 278 (Conn. 1993) (acknowledging the Community Caretaker Doctrine also includes the "emergency aid doctrine," occurring in situations involving serious threats to life or property); State v. Griffin, 459 A.2d 1086, 1089 (Me. 1983) (stating the public servant function of a police officer is found within the Community Caretaker Doctrine).

51. United States v. Mendenhall, 446 U.S. 544, 553 (1980).

52. *See* Hibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 185 (2004) (holding that asking a citizen to consensually show identification is not a seizure under the Fourth Amendment); United States v. Drayton, 536 U.S. 194, 200 (2002) (declaring a government officer questioning a member of the public per their consent does not encumber the Fourth Amendment); *Mendenhall*, 446 U.S. at 553 (affirming that police contact will not amount to a show of authority in every instance); *Terry*, 392 U.S. at 34 (1968) (White, J., concurring) ("There

that leads a reasonable person to "believe that he [is] not free to leave."[53] Inherent in the nature of a seizure is a "show[ing] of authority" or actual "physical force" on the part of a government officer restraining an individual's free movement.[54] "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion" as proscribed by the Fourth Amendment.[55]

The distinction between behaviors constituting restraint versus consensual interaction has been litigated without consistency.[56] Rather than defining a bright-line rule, the Supreme Court has decided to evaluate each alleged abuse on a case-by-case basis by analyzing the "totality of the circumstances."[57] This approach appears logical, if for no other reason than practicality, due to the wide variety of human interaction and the countless means by which humans interrelate.[58]

However, a cross section of appropriate case law illustrates a frequent set of variables consistently appearing when analyzing consensual police-citizen encounters.[59] "In the absence of some such evidence, otherwise

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is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

53. Florida v. Bostick, 501 U.S. 429, 436–37 (1991) (expanding the "free to leave" test to incorporate a reasonable person who does not feel free to decline the officer's request); *Mendenhall*, 446 U.S. at 552–54 ("A person has been 'seized' within the meaning of the Fourth Amendment only if . . . a reasonable person would have believed that he was not free to leave.").

54. *Mendenhall*, 446 U.S. at 553 ("We [the Court] adhere to the view that a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained.").

55. *Id.* at 552 (explaining the inherent application of the "free to leave" test and the constitutional application achieved when a reasonable person does not feel as though he or she is restrained from walking away).

56. *Bostick*, 501 U.S. at 432 (1991) (stating a weapon on the police officer's body does not immediately lead to the conclusion that an investigative detention took place); Florida v. Royer, 460 U.S. 491, 497 (1983) (noting a police officer identifying himself as an officer does not initiate an investigative encounter); *Terry*, 392 U.S. at 22–23 (describing a consensual encounter may take place while the officer is in or out of uniform); United States v. White, 81 F.3d, 775, 779 (8th Cir. 1996) (stating presence of a weapon on the officer's body does not negate a consensual police-citizen encounter).

57. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (dispelling the possibility that an officer may have to inform an individual that he is not required to participate in the consensual encounter).

58. *See Terry*, 392 U.S. at 13 ("Street encounters between citizens and police officers are incredibly rich in diversity . . . . Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.").

59. *See Bostick*, 501 U.S. at 432 (dictating the variable of the presence of a weapon); *Royer*, 460 U.S. at 497 (stating identification of an officer does not in and of itself constitute a seizure); *Terry*, 392 U.S. at 22–23 (affirming a police officer may approach a citizen); United States v. White, 81 F.3d 775, 779 (8th Cir. 1996) (relating the effect of a presence of a weapon on the police officer's person); United States v. Boone, 67 F.3d 76, 78–79 (5th

inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."[60] The mere presence of a weapon on an officer's body does not constitute an investigative stop on its own.[61] Additionally, seeking the attention of a private citizen will not move a consensual encounter into the realm of an investigative encounter.[62] Finally, conversing with a citizen one-on-one does not constitute an investigatory situation, so long as compliance is not required through implication or inference.[63]

Herein lies the problem with the Courts' traditional view of a valid consensual police-citizen encounter. As later addressed in this Article, society cannot be viewed in a static environment allocating an equal level of desired knowledge to each individual citizen. Countless variables dictate an individual's behavior when confronted with unexpected police contact.[64] Empirical data indicates current judicial practice fails to consider the realities of consensual police-citizen encounters.[65] Implementing solutions may be difficult, possibly disrupting our current concept of justice. However, the Fourth Amendment prohibits unreasonable

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Cir. 1995) (implying the location of the encounter does not alone decide the presence of a seizure); United States v. Flowers, 912 F.2d 707, 710 (4th Cir. 1990) (illustrating additional locations that may provide a consensual encounter).

60. *See Mendenhall*, 446 U.S. at 555 (stating physical contact between a police officer and a citizen, in and of itself, is not a seizure).

61. *See Bostick*, 501 U.S. at 432 (indicating the presence of a weapon does not end a consensual police-citizen encounter); *White*, 81 F.3d at 779 (declaring the presence of a weapon on the officer's body does not negate a consensual police-citizen encounter).

62. *See Terry*, 392 U.S. at 22 (stating the presence of a police officer in the affairs of a citizen can simply imply a consensual encounter). The Supreme Court recognized a government officer's job entails more responsibilities than merely arresting criminals and preventing criminal behavior. *Id.*

63. *See Bostick*, 501 U.S. at 432 (noting officers specifically advised the defendant of his right to refuse compliance); United States v. Torres-Guevara, 147 F.3d 1261, 1265 (10th Cir. 1998) (stating an officer's tone can end a consensual encounter and initiate an investigative stop based on when a reasonable person would no longer feel free to leave).

64. *See Bostick*, 501 U.S. at 432 (illustrating the behavior the Supreme Court believes to be appropriate when the officer possesses a weapon); *Mendenhall*, 446 U.S. at 554 (describing the expected behavior in the presence of multiple officers); *White*, 81 F.3d at 779 (describing the behavior of a citizen who has been stopped by an armed officer).

65. *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 9 (2010) ("[E]rror can occur in at least two ways: first, catching the guilty by pure luck rather than by the reasoned, individualized decision-making process that the Constitution commands; and, second, by searching or seizing individuals who are innocent of any crime, or at least who are not in possession of any evidence of crime, at the time of a search.").

searches and seizures[66] and demands we view a "reasonable person" in the context in which we live.[67]

III. FOUNDATIONS OF THE CONSENSUAL POLICE-CITIZEN ENCOUNTER

Police-citizen interactions are fluid—evolving from one moment to the next.[68] A consensual encounter between a government officer and an individual citizen may begin as a voluntary encounter,[69] only to evolve into a situation producing reasonable suspicion[70] or perhaps probable cause.[71]

One problem arises when government officers take action based on pre-determined suspicion of unlawful behavior, but mask their initial contact as consensual encounters.[72] To legitimately initiate consensual police-citizen encounters, officers must clear their minds of all suspicious

66. U.S. CONST. amend. IV.

67. *See Bostick*, 501 U.S. at 436 (1991) (implying Fourth Amendment scrutiny should be viewed in today's context).

68. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (describing factors considered by a magistrate when issuing a valid search warrant). *See also* United States v. Mendenhall, 446 U.S. 544, 552 (1980) ("The distinction between an intrusion amounting to a 'seizure' of the person and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts of *Terry v. Ohio.*"); Terry v. Ohio, 392 U.S. 1, n.16 (1968) (illustrating the interaction and fluidity between an investigative detention and a consensual encounter). A consensual encounter between a government officer and a citizen can begin as an innocent interaction for any non-criminal purpose only to later develop into a legitimate "*Terry* stop" or an arrest upon the discovery of reasonable suspicion or probable cause.

69. *See* United States v. Place, 462 U.S. 696, 708–10 (1983) (illustrating a consensual encounter can transition into an investigative stop based on a number of variables such as length of detention and confiscation of property at unknown locations).

70. *See id.* at 709 ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."); Dunaway v. New York, 442 U.S. 200, 214 (1979) ("For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.").

71. *Place*, 462 U.S. at 709 ("We therefore examine whether the agents' conduct in this case was such as to place the seizure within the general rule of requiring probable cause for a seizure or within *Terry's* exception to that rule.").

72. *See* Cady v. Dombrowski, 413 U.S. 433, 453 (1973) ("The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search."); Carroll v. United States, 267 U.S. 132, 156 (1925) ("In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages.").

belief of possible or future criminal activity.[73] Of course, legitimate consensual encounters have the possibility of yielding information that necessitates further intrusion.[74]

The foundation for the above-mentioned abuse lies in the Supreme Court's "reasonable person" standard.[75] "[A] person has been 'seized' within the meaning of the Fourth Amendment only if . . . a reasonable person would have believed that he was not free to leave."[76] While this test appears direct, the notion of a reasonable person poses a variety of problems in delineating a reliable, practical definition.

A. *Conceptual Discrepancies*

Use of the reasonable person standard is inherently suspect due to the wide array of individuals coming into contact with the judicial system. Simply described, the reasonable person is a constructive legal concept utilized in an objective manner, a mere fiction.[77] Objective application of the reasonable person standard requires courts establish set criteria shaping a model citizen who represents the epitome of this "reasonable person."

However, this task is illusory. Instead, courts use vague lists of desirable traits loosely believed to represent "reasonableness."[78]

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73. *See Cady*, 413 U.S. at 441 (stating necessity of separating an officer's investigative roles from his citizen role when he or she desires to initiate a consensual police-citizen encounter).

74. *See Royer*, 460 U.S. at 499–501 (implying the interaction between the three levels of police-citizen interaction by asserting the purpose of an investigative detention is to determine the need for an arrest, and stating further intrusion may be necessary depending on the outcome of each initial encounter); *Place*, 462 U.S. at 702–03 (indicating interaction among the three levels of police-citizen encounters).

75. *See* Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (determining whether a suspect is in custody should be measured by how a "reasonable man" in the place of the suspect would have interpreted the situation and whether he could leave); *see also* California v. Greenwood, 486 U.S. 35, 39–40 (1988) ("An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable."); Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969) ("It is the officer's statements and acts, the surrounding circumstances, gauged by a 'reasonable man' test, which are determinative.").

76. United States v. Mendenhall, 446 U.S. 544, 554–55 (1980) (dictating the test used by the courts in determining whether a police-citizen encounter constituted an investigative stop or was merely a consensual encounter).

77. *See* Florida v. Bostick, 501 U.S. 429, 436–37 (1991) (implying the reasonable person test is based on an objective review of all of the circumstances surrounding the encounter).

78. *See id.* at 432 (finding a reasonable person is not threatened by the mere presence of a gun); *Mendenhall*, 446 U.S. at 554 (noting despite being approached by multiple officers, a reasonable person in the suspect's position was not threatened); Terry v. Ohio, 392 U.S. 1, 21–23 (1968) (stating an officer must make an objectively reasonable decision

> The definition of the word [reasonable] becomes mysterious, as trial judges have learned to their discomfiture . . . [T]he dimensions of the reasonable person have remained vague . . . [The reasonable] person is characterized by common sense and moderation—a prudent, sensible, centrist member of society, who shares its understandings.[79]

Based on these two different ideas, who is the legally defined reasonable person? The test presents itself as an objective determination,[80] but uses subjective criteria such as "sensible," "average," "moderate," and "prudent."[81] The subjective nature of each definition leads courts astray.[82] The definition of the reasonable person intrinsically implicates legitimate anomalies within the legal system.[83]

Do individuals especially vulnerable to police persuasion forfeit Fourth Amendment protection?[84] How does the reasonable person standard incorporate notable qualities[85] such as individuals with a uniquely peculiar outlook on society or minorities raised in an environment of systematic fear?

Case law defines a reasonable person based on common occurrences in the field and identifying the typical responses of individuals.[86] For example, courts assume a reasonable person treats a government officer as

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before a warrantless search is appropriate, and therefore, justifiable under the Fourth Amendment); United States v. White, 890 F.2d 1413, 1417 n.4 (8th Cir. 1989) (concluding a refusal to consent to a police encounter does not alone create a reasonable suspicion) (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

79. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 464–65 (1997).

80. *Berkemer*, 468 U.S. at 442.

81. Bernstein, *supra* note 79, at 464–65.

82. *Id.* at 464.

83. *See Bostick*, 501 U.S. at 448 ("Even if respondent had perceived that the officers would let him leave the bus, moreover, he could not reasonably have been expected to resort to this means of evading their intrusive questioning."); *see also* Steinbock, *supra* note 2, at 522–23 (stating the concept of a reasonable person is to be viewed as a "bell curve" with the definition of "reasonable" as a set number of deviations from the center); Kenneth S. Abraham, *The Costs of Attitudes*, 95 YALE L.J. 1043, 1055 (1986) (dictating the concept of "reasonable" extrapolated across the general population will undoubtedly omit a set number of individuals based on the logic behind the scientific principal used).

84. *See* Abraham, *supra* note 83 (identifying the nuances of unique and idiosyncratic beliefs held by various sects of the population).

85. *See id.* at 1055 ("[I]f tort law protected victims who were members of cult religions, held utterly idiosyncratic beliefs, or had culturally derived advantages, the subterfuge embodied in the objective standard or reasonable behavior—the notion that most people are capable of complying with the standard, and capable of complying through roughly the same investment of energy or money—would start to unravel.").

86. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 22–23 (1968) (expanding the reasonable person standard).

though he or she is another citizen on the street.[87] The reasonable person is aware of the Fourth Amendment's nuances and attendant abilities granted to government officers under each level of scrutiny.[88] This person shows no fear in the mere presence of multiple officers,[89] and realizes an armed figure poses no real threat.[90] Furthermore, in the Supreme Court's estimation, a reasonable person will consistently resist the advances of an aggressive officer seeking consent,[91] cognizant that refusing to consent cannot create its own reasonable suspicion.[92]

Ironically, the above-mentioned criteria measuring a reasonable person were only announced because an ordinary citizen argued these characteristics demonstrated the show of authority and subsequent search was *not* reasonable.[93] The current reasonable person standard ignores individualism's role and ascribes simplicity to a system awash in variables. Case law illustrates many examples of individual citizens who, in fact, did not feel free to leave, in spite of the Supreme Court's prescribed reasonable person standard.[94]

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87. *See id.* at 22–23 (implying if a police officer has the right to approach an individual as an average citizen, then, in turn, the individual has an equal right to deny such an encounter).

88. *See id.* (illustrating differences between each level of police-citizen interaction).

89. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (stating seizure does not occur unless an individual perceives the presence of multiple officers as threatening).

90. *See* Florida v. Bostick, 501 U.S. 429, 432 (1991) (indicating a weapon's presence is not determinative in deciding whether a consensual encounter occurred); United States v. White, 81 F.3d 775, 779 (8th Cir. 1996) (stating a reasonable person would give no weight to a weapon present on the body of a police officer during an encounter).

91. *See Bostick*, 501 U.S. at 434 (1991) (inferring a reasonable person can consistently deny the advances of an officer).

92. United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) ("The constitutional right to withdraw one's consent to a search would be of little value if the very fact of choosing to exercise that right could serve as any part of the basis for finding the reasonable suspicion that makes consent unnecessary."); *White*, 81 F.3d at 779 (stating a police officer cannot use an individual's refusal to consent to a search as grounds to initiate an investigative search).

93. *See Bostick*, 501 U.S. at 432–34 (1991) (indicating the presence of a weapon would not lead a reasonable person to feel as though he or she was not free to leave and implying a reasonable person would feel free to leave even if he could not physically leave his or her current location); Florida v. Royer, 460 U.S. 491, 497 (1983) (explaining mere identification of an officer as such does not initiate an investigative detention).

94. *See Bostick*, 501 U.S. at 436–37 (expanding the "free to leave" test to incorporate a reasonable person who does not feel free to decline the officer's request); *see also Mendenhall*, 446 U.S. at 552–54 ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if . . . a reasonable person would have believed that he was not free to leave.").

IV. Societal and Cultural Biases Arise in Practice

As noted, the boundary of a constitutional seizure lies at the point a reasonable person no longer feels free to terminate an encounter with a government officer and is currently unable to leave the situation on his or her own accord.[95] This standard is applied through the lens of a person who is sensible, prudent, and aware of all constitutional rights.[96] This objective standard[97] directs the public to presume law enforcement as wholly obliging, while operating in utmost good faith.[98] While the reasonable person standard creates a convenient sense of uniformity for law enforcement officials,[99] it ignores relevant variables within subsets of the population.[100]

When approached by a government officer, a citizen is deemed to have implicitly consented to the encounter if the individual was "free to leave"[101] but "chose" to interact with the officer.[102] Such interaction is problematic when a consensual encounter with a government officer is considered valid among the general population but, in reality, is coerced through intimidation or fear within a particular subset of the community.

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95. *Mendenhall*, 446 U.S. at 554 (illustrating the concept utilized by the courts to determine whether an encounter constituted a constitutional stop or a consensual encounter).

96. *See* Bernstein, *supra* note 79, at 464–65 (asserting characteristics of a reasonable person include common sense, moderation, prudence, and sensibility).

97. Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (stating a seizure is reviewed under an objective standard as opposed to the individual's subjective belief of seizure under the specific situation).

98. *See Bostick*, 501 U.S. at 432 (holding the presence of a weapon by an officer will not be the only determinative factor when deciding if an encounter was consensual); *Mendenhall*, 446 U.S. at 554 (noting a seizure within the meaning of the Fourth Amendment will only occur if an individual feels the presence of multiple officers is threatening); Terry v. Ohio, 392 U.S. 1, 22–23 (1968) (implying a police officer's right to approach an individual as a citizen necessitates a finding that the individual has the right to deny the encounter on a similar basis).

99. *See Terry*, 392 U.S. at 13 (demonstrating the need for a reasonable person standard for police officers to use while in the field and illustrating the logic behind the standard test currently applied to all individuals). Current jurisprudence supporting the reasonable person standard illustrates the need for a test that can be applied quickly and in the heat of the moment.

100. *See* Abraham, *supra* note 83, at 1055 (stating unique subsets of the population perceive and interact with law enforcement officials differently based on a umber of variables each effecting the specific encounter).

101. *Bostick*, 501 U.S. at 436–37; United States v. Mendenhall, 446 U.S. 544, 552–54 (1980).

102. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that [the court] demonstrate that the consent was in fact voluntary.").

A. *Experiences Based on Race and Ethnicity*

The current test utilizing the reasonable person standard is purportedly based on a totality of the circumstances,[103] but consciously acknowledges the practice of excluding relevant factors influencing a community's cognitive perception of authority.[104] Focusing on the experiences of African-American and Latino populations in the United States' poor urban areas,[105] studies show a sense of communal fear of oppressive behavior stemming from past actions of law enforcement officials.[106] The experiences of these communities, both past and present, decidedly shape the perception of police authority and dictate its members' behavior.[107]

To an outsider, this community may appear hostile and uncooperative, likely resulting in mutual confusion amongst the citizen and government officer.[108] This feeling of animosity creates a level of tension that naturally distorts the behavior of otherwise law-abiding citizens, making the

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103. *See Terry*, 392 U.S. at 21–22 ([Are] "facts available to the officer at the moment of the seizure or the search [to] warrant a man of reasonable caution in the belief that the action taken was appropriate?").

104. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1987) ("The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."); *see also* 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, 241 (1993) ("The test ignores the day-to-day experiences that members of minority communities . . . have with the police.").

105. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 212, 241 (1984) (illustrating a police practice of randomly interviewing the employees of a factory to determine their legal status within the United States, and the subsequent deportation of any individuals who did not possess the proper documentation). *See also* Ward, *supra* note 104 (noting African-Americans and Latinos are especially vulnerable to an unfavorable perception of police authority based on experiences and familial, as well as communal, teachings).

106. *See Bustamonte*, 412 U.S. at 226 (listing factors to consider when determining if consent was truly voluntary, but failing to describe a process to ascertain an end result when making such a decision).

107. *See* Illinois v. Krull, 480 U.S. 340, 345 (1987) (dispelling the belief that a good-faith investigation will lead to a finding of a valid Fourth Amendment intrusion); *see also* United States v. Leon, 468 U.S. 897, 899 (1984) ("Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."). Originally, the courts operated on the assumption that officers exercised power over the citizenry in an utmost good faith manner on every occasion a police-citizen interaction occurred. *Id.* at 898–99. However, relevant events forced the Supreme Court to reevaluate this position and institute the idea of human error in the realm of police interaction with a citizen. *Id.* at 898.

108. *See* Taslitz, *supra* note 65, at 17 n.63 (noting an individual's perception of a situation or a culture that is vague or distant to their own experience will naturally cause a sense of confusion and fear).

reasonable person standard inapplicable because of the warped perception of the motives of all parties involved in the encounter.[109]

A phenomenon known as "egocentrism" illustrates an individual's natural tendency to perceive the entire population as possessing a similar outlook as the individual.[110] As law professor Andrew Taslitz notes, this cognitive event is rather beneficial in day-to-day life for the majority of the population due to the normal acclamation of one's social group,[111] but in routine situations in which government officers find themselves, it can be detrimental to the fair determination of suspicious behavior.[112] This occurrence is common, often resulting in the perception of criminal behavior:

> Police perceive any quick, sudden, or unexpected move as suspicious. They are particularly concerned about what they perceive to be flight away from them, assuming that such flight indicates consciousness of guilt. That assumption may hold true in a local culture that respects and trusts police to do the right thing. But in a culture, like that in many poor Black neighborhoods, where police are distrusted both for under-protecting the community and racially profiling its members while treating them with undue aggression, flight from police may make much more sense. Rightly or wrongly, police may be perceived as a source of danger, too willing to stop the innocent, humili-

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109. Monica J. Harris & Christopher P. Garris, *You Never Get a Second Chance to Make a First Impression: Behavioral Consequences of First Impressions*, *in* FIRST IMPRESSIONS 147, 157–58 (Nalini Ambady & John J. Skowronski eds., 2008) (illustrating a circular set of events pushing upon each participant a set of ideas and behaviors that, in turn, affect the other participant in a continual fashion). The idea that a first impression can carry such weight on all parties who find themselves in an intimidating situation is likely to go unnoticed by the participants themselves. *See* Taslitz, *supra* note 65, at 23 ("Given an officer's flawed assumption of common knowledge with his target . . . the officer may believe the target is up to no good . . . ."). Taslitz describes the notion of a "self-fulfilling prophecy" and attributes both the officer's and the citizen's behavior to each other as a subconscious reaction to the ill-conceived notion of the other's danger. *Id.* at 23.

110. Taslitz, *supra* note 65, at 15–21 (defining egocentrism as "the tendency to assume that others share one's knowledge, preferences, and attitudes").

111. *Id.* at 21–22, 25–26 (stating the human mind can only process a set amount of information and relying on a standard assumption when an individual perceives certain stimuli eases this mental burden and allows one to accomplish a task with the least amount of effort). Taslitz refers to the concepts of "Egocentrism" and "Cognitive Load" to illustrate an evolutionary concept, asserting when confronted with the unknown and a need to make a quick decision, individuals will often choose the path of least resistance. *Id.*

112. *See* Daniel T. Gilbert et al., *On Cognitive Busyness: When Person Perceivers Meet Persons Perceived*, 54 J. PERSONALITY & SOC. PSYCHOL. 733, 734 (1988) (highlighting the differences between a calm and focused observer and of an observer in a high-stress, cognitively unfamiliar situation). Gilbert discovered an individual's ability to accurately perceive a situation is detrimentally affected by the level of stress one feels in a particular situation. *Id.*

> ate them, or trap them into saying or doing things they do not mean. Even if it is not the officer whom the residents fear, they may recognize that the officer's presence might mean that someone is up to no good, seeing it as not worth staying in the area when a gun fight breaks out. Many poor Black children are indeed raised to be wary of the police, to view avoiding them as preferable to dealing with them. Police from a sharply different cultural background in which the officer is one's friend may thus overemphasize flight, misconstruing its meaning by seeing an effort to flee to safety as an effort to elude capture.[113]

These misperceptions lead to unwarranted encounters that heighten the state of fear between the parties involved.

The ever-present fear within these communities further hinders rationally resolving the issue of voluntary consent by using the reasonable person standard.[114] If and when government officers approach members of a disenfranchised community, even if the officer is acting in good faith with no inclination of criminal suspicion,[115] the citizens' perception of an officer's *potential* behavior may manipulate their reaction.[116] Citizens may become nervous and feel they will be punished if they fail to cooper-

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113. Taslitz, *supra* note 65, at 21–22.

114. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 271–72 (1991) (stating the current standard ignores the reality of the situations and variables that arise in the real world).

115. *See* Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1114 (2008) ("A self-fulfilling prophecy results: differentials in police resource allocation between the two groups mean ever-more arrests and convictions of members of the higher relative to the lower offending group."). Taslitz suggests the original perception of high criminal activity leads the police to increase their level of aggression and produces a sense of animosity within the affected community, both of which lead to an ever-increasing level of hostility. *Id.*; *see also* Charles R. Lawrence III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[T]he theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understanding: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.").

116. *See* Taslitz, *supra* note 115 (illustrating the concept of a self-fulfilling prophecy and the idea that, once the thought is in motion, an otherwise valid and innocent encounter is likely to be construed as hostile and will eventually infect all parties involved).

ate.[117] Individuals may lack the knowledge or education to know they have the right to leave, or they may fear if they utilize this right they will inadvertently give the government officer a reason to continue the intrusive investigation.[118]

Studies show certain subsets of the population are far more cautious of authoritative behavior and, as a result, consent to *any* encounter with an officer may be truly involuntary,[119] regardless of the reasonable person standard within the population.[120] Government officers are aware of the sensitivities of these particular communities, acknowledging the practice of inducing fear among the residents.[121] This fear prevents a truly volun-

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117. *See* United States v. Withers, 972 F.2d 837, 842 (7th Cir. 1992) ("The factors we [the court] consider in determining whether . . . a reasonable person would believe she was free to leave include . . . whether the suspect consented or refused to talk to the police . . . ."); United States v. Sterling, 909 F.2d 1078, 1083 (7th Cir. 1990) (allowing an individual's refusal of a police request to favor a valid Terry stop when examining the totality of the circumstances). *But see* United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (stating an individual stopped by the police has the right to refuse consent or withdraw their consent while the officer does not have the right to initiate an investigatory stop based solely on this refusal to consent or withdrawal of consent); United States v. Wilson, 953 F.2d 116, 126 (4th Cir. 1991) (dictating a police officer must have "something more than a hunch" when an individual withdraws his or her consent and the officer continues the investigation); United States v. White, 81 F.3d 1413, 1417 (8th Cir. 1996) (stating a police officer can not consider an individual's refusal to consent to a search as a factor in the totality of the circumstances to initiate a valid Terry stop).

118. *See* Mark C. Alexander, *Law-Related Education: Hope for Today's Students*, 20 OHIO N.U. L. REV. 57, 67 (1993) ("Preventive law can be seen as a component of . . . a means of educating disempowered people about their legal rights in order to ensure that they both know about and are better able to protect these rights.").

119. *See* Michigan v. Chesternut, 486 U.S. 567, 573–74 (1987) ("While the test is flexible . . . it calls for consistent application . . . regardless of the particular individual's response to the actions of the police."); *see also* Ian F. Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1023 (2007) ("[D]ivergent interest . . . [and] variations in group culture better explain group tensions . . . . "); Ward, *supra* note 104 (illustrating attitudes held by many within the minority community as hostile toward authority figures such as the police).

120. *See* Florida v. Bostick, 501 U.S. 429, 432 (1991) (illustrating the use of a reasonable person standard when determining whether an individual was free to leave a police-citizen encounter); *see also* United Stated v. Mendenhall, 446 U.S. 544, 554 (1979) (stating the reasonable person standard is to be objectively applied to the general population while deciphering the outcome of each situation will be based on the totality of the circumstances); Terry v. Ohio, 392 U.S. 1, 22–23 (1968) (creating the existence of the reasonable person standard in modern jurisprudence).

121. *See* Ward, *supra* note 104, at 247–48 ("[P]olice oppression and harassment include physical and verbal abuse, as well as indifference by police to concerns of the community.") Ward asserts a history of police misconduct and undue aggression towards the minority community has created a sense of heightened tension among all participants in a police-citizen encounter of a variety. *Id.* at 247–48; *see also* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N. Y. U. L. REV. 956,

tary assertion of consent to any encounter, and, as a result, manipulates the purpose of the Fourth Amendment, allowing government intrusion upon an individual's privacy, simultaneously cloaking itself in a protection void of constitutional scrutiny.[122]

V. Proposed Solutions and Potential Arguments

The U.S. Supreme Court describes a government officer as a citizen of the United States, currently treating the officer as simply an everyday member of the community while on duty.[123] This notion appears reasonable at first blush; however, conceding the explicit and implicit natural power flowing from the government officer's position, it is actually quite unrealistic.[124] This often unnecessarily leads to confrontational attitudes and adversarial sentiment among police officers.[125] While officers hold a respected and necessary position in society, they are far from infallible because of human influence in the process.[126]

Although relatively uncommon, notable incidents creating a severe mistrust of government officers cannot be ignored.[127] Years of systematic

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1008–09 (1999) ("The traditional, reactive form of professional policing, which relies on the squad car to police urban centers, contributes to the perception that police departments constitute an occupying force within communities of color."). Thompson asserts the police force needs to develop a further understanding of the culture and the community with which they patrol to better understand the behavior of the residents within the community. *Id.* at 1008–09.

122. *See* United States v. Drayton, 536 U.S. 194, 198 (2002) (depicting an intimidating scenario with two individuals subject to a consensual encounter by two officers on a bus and illustrating the breadth of police investigatory power within an enclosure that will still be considered consensual).

123. *See* Terry v. Ohio, 392 U.S. 1, 19, 22–23 (1968) (stating an officer has every right to approach an individual on the street absent any professional reason and implying that any citizen can approach and call upon any other citizen, police included).

124. *See* Amy DePaul, *Police-Minority Relations: Focus on NAACP Hearings*, 22 Crim. Just. Newsl. 6 (1991) (discussing the level of perceived power held by the police and the attitudes of minorities toward the police).

125. *See* Taslitz, *supra* note 65, at 46 ("[T]he pseudo-militaristic culture of many police departments and units encourages a 'them/us' dichotomous style of thinking. 'They' are the bad, dishonest, dangerous guys, and 'we' are the good guys."); *see also* Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 Tex. Tech. L. Rev. 1383, 1415 (2007) (describing the administrative aspect of police culture as analogous to that of a military operation with a definite enemy).

126. *See* Ward, *supra* note 104, at 247–48 (describing a number of occurrences in which police brutality was inflicted upon a minority).

127. *See* Taslitz, *supra* note 65, at 11 (reviewing the statistical occurrence of minority investigations as compared to white investigations). Taslitz further discusses the ratio between a minority group being stopped and investigated as compared to the occurrence of white citizens being subject to the same treatment, and illustrates the likelihood of a white individual to actually be carrying a dangerous weapon if and when they are stopped. *Id.*

abuse by government officers has scarred residents of victimized communities.[128] Regardless of positive changes implemented in preventing similar occurrences in the future, the reasonable person standard cannot be used in evaluating the reactions of people from these communities.

Alternative options can and should be implemented to mitigate these variables and create a standard that respects the entire population. Although it is impossible to deny human nature and the natural reactions of an individual, courts must acknowledge these phenomena and consciously include every factor informing the officer's initial actions, as well as the actions of the potentially harassed.[129] Treating a government officer as an everyday citizen with the ability to approach citizens for any platonic purpose is irresponsible.[130] While the government officer's function as a community caretaker provides a well-deserved public service,[131] applicable instances lend themselves to masking future abuse.[132] By implementing stricter exclusionary rules and increasing motivational incentives, officers are likely to adjust their behavior, thereby more efficiently utilizing police resources to ensure citizens' rights are respected.[133]

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128. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 97 (2003) ("[E]mpirical data suggest[s] that African-American males fleeing from the police in a high crime neighborhood were more likely to do so from fear of the police rather than as recognition of guilt."). Taslitz also suggests a history of abuse has created an environment of mistrust that leads to the minority community being hesitant to accept any definite change of future police conduct. *Id.* at 97–98.

129. *See* INS v. Delgado, 466 U.S. 210, 220 (1984) (explaining minority populations' perception of systematic abuse towards them specifically).

130. *Contra* Terry v. Ohio, 392 U.S. 1, 19 (1968) (establishing the current state of criminal jurisprudence, dictating that an officer has the same rights as any other citizen to approach an individual for any reason). Although the *Terry* Court established the current state of consensual police-citizen encounters, the perceived power a police officer possess elevates them to a level of power above that of an everyday citizen, so it is unreasonable to assume each individual confronted with an unexpected police encounter will be aware of their rights. *Id.*

131. *See* South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (illustrating the breadth of the Community Caretaker Doctrine and the various situations in which an officer may effectively utilize this tool); *see also* Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (announcing various applications for the Community Caretaker Doctrine); *Terry*, 392 U.S. at 13 (stating the presence of government officers is not always solely for the purpose of criminal investigation).

132. *See Terry*, 392 U.S. at 6 (describing factual situations that appear to be in the communities' best interest, but in application infringe upon the sanctity of an individual's Fourth Amendment rights). The *Terry* Court acknowledged the chance that a "hunch" is immediately suspect and the likelihood that an officer's behavior may be motivated by more than the mere presence of citizen in need. *Id.* at 22.

133. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 373 (1999) (showing the behavioral effects on an individual when the application of specific rewards or punishments are placed upon the outcome of certain actions).

A. *Human Nature, Communal Experience, and the Effect on the Individual*

Since *Terry*, government officers are aware of the vulnerability of many segments of society.[134] Years ago, government officers were thought to possess a superior ability to perceive and acknowledge potential danger.[135] Their "gut feelings" and "hunches" were considered honorable attributes of keen detectives.[136] They knew the face of danger and were poised to intervene before any real harm fell upon the general public. These attributes were not only desirable or necessary, but were also promoted and encouraged among the fellowship of law enforcement.[137]

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134. *See* Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 180 (2007) ("A similarly broad bias stemming from in-group/out-group distinction is a group version of the 'fundamental attribution error'—in psychology, a robust finding that an individual sees negative actions by herself and positive actions by others as highly dependent on the situation . . . ."). Hollander-Blumoff describes the effect of the "Attribution Error" on individuals unfamiliar with their surroundings as a tendency to place excess importance on a situation when others perform favorably, while at the same time attributing any negative behavior as an innate character flaw of that individual. *Id.* at 180; *see also* Charles F. Bond, Jr. & Bella M. Depaulo, *Accuracy of Deception*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 214 (2006) (stating the once-perceived validity of an officer's "hunch" has been shown to be no more accurate than that of an everyday individual with no particular training). Charles Bond and Bella Depaulo illustrate the rate at which a trained government officer can accurately perceive when an individual is deceiving him or her and then compare that result to the rate at which an everyday citizen can accurately perceive when he or she is being deceived. *Id.* The experiment concluded the majority of the population accurately perceived deception at fifty-four percent while trained government officers plateau at fifty-six percent. *Id.*

135. *See* Taslitz, *supra* note 65, at 23 ("The officer . . . takes credit for the target revealing his true colors, never considering that the truest colors might have been those shown before the confrontational officer made his appearance."). In the past, government officers' "gut feeling" was considered valid based on their extensive training and the thought that the "hunch" would occur regardless of the race or ethnicity of the individual suspect. *Id.*

136. *See id.* (describing the perception society once had, and likely still possesses, concerning the detective's ability to investigate a situation based on instinct); *see also* Taslitz, *supra* note 115, at 1126–27 ("Police's greater willingness to believe more unreliable information targeting racial minorities than information targeting whites suggests that the blinders effect is at work."). The blinders effect illustrates the likelihood of a government officer's reliance on unreliable information if it concerns a member of a minority group because of the inherent preconceived notions of this community's criminal activity amongst the total population. *Id.*

137. *See* Taslitz, *supra* note 65, at 23 ("The officer's own influence on other's behavior, prompting action that the officer sees as suspicious, is simply not on most officer's radar screens. . . . Indeed, officer's might see some of their behavior as wisely changing a target's behavior."). The officer perceives any suspicious activity to be the result of his or her accomplished professional work product and will likely never consider the fact that his mere presence may have induced the behavior to occur. *Id.*

Today, social science has revealed government officers are in no way immune to the bias and influence of human nature.[138] Officers do not possess an uncanny ability to perceive danger and are no more likely to appreciate an individual's deceit than the general population.[139] The once-coveted "gut feeling" has been identified as a basic evolutionary response located deep within the subconscious.[140] Indeed, a number of factors influence one's ability to perceive an event in an unbiased manner, including, but not limited to, both external stimuli such as facial features of the opponent and the officer's internal sense of self.[141]

Although people vary in their ability to accurately perceive their surroundings, a number of factors determine the likelihood of a "hunch" or correctly acknowledging the true situation upon first impression.[142] External factors include the opponent's facial characteristics,[143] the officer's familiarity with the culture and behavior of the opposing party,[144] as well as the weight and motivation attributed to an accurate judgment.[145] Alternatively, a number of internal factors play a similar role in distorting an individual's initial perception of a situation,[146] including an egocentric

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138. *See id.* at 14–32 (dictating nine aspects of human nature found to alter the perception of an individual's outlook on the specific situation in which that individual finds him or herself).

139. *See id.* at 27–29 (describing the officer's ability to perceive deception as similar to that of an average individual and stating possible techniques the police force can use to possibly increase their rate of accuracy) (internal citation omitted); *see also* Mark Costanzo, *Training Student to Decode Verbal and Nonverbal Cues: Effects on Confidence and Performance*, 84 J. EDUC. PSYCHOL. 308, 308 (1992) (illustrating the average individual's ability to perceive intentional deception).

140. Hollander-Blumoff, *supra* note 134.

141. *See* Taslitz, *supra* note 65, at 27–28 ("Police often believe that their training and experience make them better lie detectors. They are wrong . . . ."); *see generally* Jennifer L. Eberhardt, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (illustrating negative stereotypes regarding black males are engrained to the point of violent and criminal assumptions).

142. *See* Taslitz, *supra* note 65, at 15–16 ("[F]irst impressions can involve at least five major attributes, namely, the subject's emotions, personality, intelligence, mental states, and use of deception.").

143. *See generally* Eberhardt, *supra* note 141, at 878 (showing a consistent finding that whites generally react more negatively to an individual who possess stereotypical black facial features).

144. *See* Taslitz, *supra* note 65, at 21–22 (2010) (stating an officer's perception of a community's culture will likely be inaccurate if that officer is a member of an alternative community).

145. *Id.* at 23–25 ("One way to increase accuracy motivation is to hold perceivers 'personally responsible for the accuracy of their impressions,' for then they 'devote more effort to forming them, leading to more individuating impressions, especially when the target's behavior does not match the initial expectancy or stereotype.'").

146. *See id.* at 15–17, 21–22, 25–27, 29–31 (stating internal cues subconsciously effect an individual's perception of a situation in both negative and positive ways). Taslitz de-

outlook,[147] the perception of one's own ability to accurately deduce a first impression,[148] and the cognitive load placed upon the individual at the time of the encounter.[149]

Together, these factors force a participant to view the world through a uniquely personal window shaped to that individual at a subconscious level.[150] Conversely, these same factors are triggered when a disenfranchised citizen unexpectedly encounters a government officer.[151] The same reactions will occur within these individuals and will likely play into the preconceived notions of the officer's thought process.[152]

Acknowledging human nature is the logical first step in achieving a fair and accurate representation of the validity of the consent. Numerous levels of government acknowledge and incorporate recent social science discoveries into their revised procedures.[153] Achieving a truly consensual police-citizen encounter requires approaching the citizen without any inclination of investigation.[154] The other side of the formula requires the

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scribes a number of internal factors, including the individual's personality traits, an egocentrist outlook, an individual's cognitive load, and an individual's resistance to admitting his or her incorrect assessment. *Id.*

147. *Id.* at 21 ("Where such knowledge, preference, and attitudes differ, misunderstandings will arise, and police will lack the shared experience and values needed to understand a particular person's intentions.").

148. *See* Nalini Ambady, *The Perils of Pondering: Intuition and Thin Slice Judgments*, 21 PSYCHOL. INQUIRY 271, 275 (2010) (asserting an increased awareness of one's surroundings provides an increase in the accuracy of an individual's first impression). Ambady's findings illustrate a possible solution to the current issues resulting from the government officer's misunderstanding when referring to a foreign environment. *Id.*

149. *See* Gilbert et al., *supra* note 112, at 134 (describing the effect of cognitive load on an individual within an unfamiliar and stressful situation). Gilbert theorizes an individual placed in a stressful situation will likely resort to preconceived notions of others' behavior and will ignore situational factors that dispel this preconceived notion. *Id.*

150. *See* Taslitz, *supra* note 65, at 15–31 (applying the nine factors to any individual, including a government officer, will illustrate the cause and effect of otherwise innocuous behavior on an individual's perception of that behavior).

151. *See id.* (stating the effects of human nature do not merely affect the aggressor, but seemingly affect every individual who comes into contact with another).

152. *See id.* ("[A]n officer's flawed assumption of common knowledge with his target and the influence of the fundamental attribution error, the officer may believe that the target is up to no good. The target picks up on these cues . . . perhaps subconsciously, and behaves nervously or resentfully—just as the officer expects.").

153. *See, e.g.*, 42 U.S.C. § 283c (2006) (acknowledging the benefits of researching the social sciences related to human behavior and incorporating said findings in an attempt to better society).

154. *See* Florida v. Bostick, 501 U.S. 429, 434 (1991) (stating the initial interaction between the police and the citizen is not considered a "stop" merely because an officer is present); *see also* California v. Hodari D., 499 U.S. 621, 625 (1991) (stating the individual, as a reasonable person, must feel free to leave if the encounter is to be considered consensual and the government officers must have no desire to investigate criminal activity if the

citizen to feel truly free to terminate the encounter at will.[155] However, the very notion that an individual can calm the natural bias inherent in all individuals is both unfounded and impractical.[156] Approaching an individual for a purported reason may appear to be innocent; but with increased knowledge of the human self, and resulting consequences from such an encounter, applying a test which assumes these natural biases do not exist becomes irresponsible.[157]

B. *The "Exclusionary Rule" Expanded*

The "exclusionary rule" of evidence is most accurately illustrated by "the fruit of the poisonous tree" doctrine.[158] Simply put, the exclusionary

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court is to consider the initial encounter as a valid consensual encounter); Terry v. Ohio, 392 U.S. 1, 19 (1968) (declaring a Terry stop has occurred when a government officer has expressed a showing of authority and has illustrated that the citizen is no longer free to leave). These cases illustrate the creation of the consensual police-citizen encounter, but imply the notion that any encounter with a government officer must be clear of a desire to investigate if the encounter is to be considered consensual and thus void of Fourth Amendment scrutiny.

155. *See Bostick*, 501 U.S. at 434 (1991) (stating a reasonable person will be considered "stopped" and subject to a Terry stop if the officer asserts a level of authority that a reasonable and prudent individual would interpret as preventing the termination of the encounter); *see also Hodari*, 499 U.S. at 625 (asserting an individual is not seized if a reasonable person would feel free to leave); *Terry*, 392 U.S. at 19 (1968) (creating the application of a consensual police-citizen encounter and establishing the boundary depicting a "*Terry* stop").

156. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1987) ("[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."). *But see* Ward, *supra* note 104 ("The test ignores the day-to-day experiences that members of minority communities . . . have with the police.").

157. *See* Taslitz, *supra* note 65, at 15-31 (illustrating the findings of multiple social experiments indicating the presence of subconscious biases found within each and every individual). Taslitz purports the notion that subconscious bias affects every decision we make, even if one does not realize that the decision is being influenced by these thoughts. *Id. But see Chesternut*, 486 U.S. at 574 ("This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."). The Supreme Court has determined a Terry stop will be found to have occurred if and when an individual does not feel free to leave the presence of a government officer based on a showing of express authority. United States v. Mendenhall, 446 U.S. 544, 552–54 (1980). However, the Supreme Court also states the finding that a "stop" has occurred will be determined by the "totality of the circumstances." *Bostick*, 501 U.S. at 437. It appears difficult to harmonize these statements due to the inherent difference within each individual and the group dynamics found within each subset of the population. These differences lead each citizen to perceive the encounter from a slightly different angle and it appears reckless to arbitrarily exclude a legitimate variable from the "totality of the circumstances."

158. *See* Elkins v. United States, 364 U.S. 206, 211 (1960) ("There it was held that when the participation of the federal agent in the search was 'under color of his federal

rule views any and all evidence obtained through the violation of the Fourth or Fourteenth Amendment as inadmissible.[159] Even though illegally obtained evidence may prove the defendant's guilt, current jurisprudence negates admissibility of such evidence and the charges will likely be dismissed if no further evidence satisfies the necessary standard of proof.[160] As counterintuitive as this rule may seem to laypersons, the current state of jurisprudence dictates it is better to let the guilty go free than abuse the rights of the public at large.[161]

Social policy presents a plausible solution. Although the exclusionary rule acts to negate the officer's incentive, the once-broad application of the exclusionary rule has been slowly narrowed to a limited number of situations subject to an ever-expanding list of exceptions.[162] Stricter implementation of the exclusionary rule will logically force government of-

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office' and the search 'in substance and effect was a joint operation of the local and federal officers,' then the evidence must be excluded . . . ."); *see also* Nardone v. United States, 308 U.S. 338, 341 (1939) ("[T]he knowledge gained by the Government's wrong cannot be used by it simply because it is used derivatively."). The evidence obtained from a Fourth Amendment violation will be excluded and deemed inadmissible for any purpose, as will the derivative evidence obtained as a result of the initial violation. *Id.*

159. *See Elkins*, 364 U.S. at 213 ("The security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."). Although the Court recognizes society's interest in protecting society at large and the government officers themselves, the Constitution dictates the sanctity of the individual's privacy and the Supreme Court respect the inherent notion of liberty found within the Fourth Amendment. *Id.*

160. *See* Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1183 (1995) ("[I]n recent times the courts have been inclined toward intrusion on traditionally protected Fourth Amendment rights. People who possess drugs are unsympathetic defendants. When police find drugs on people they stop, courts are predisposed to rule against these defendants' Fourth Amendment claims.").

161. *See* Robert J. Norris et al.,*"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1303 (2011) ("William Blackstone famously stated that 'it is better that ten guilty persons escape than that one innocent suffer.'"). The authors revisited Blackstone's age-old adage to review the rate at which states protect the innocent from false imprisonment as a result of wrongful conviction. As quoted within the article, "[t]here should be no . . . hesitation in converting the stated principle into policy, embodied by meaningful criminal justice reforms designed to protect the innocent against wrongful conviction." *Id.*

162. *See* Michigan v. Harvey, 494 U.S. 344, 344 (1990) ("[V]oluntary statement taken in violation of the Fifth Amendment prophylactic rules, while inadmissible in the prosecution's case in chief, may nevertheless be used to impeach the defendant's conflicting testimony."); *see also* United States v. Leon, 468 U.S. 897, 920 (1984) ("[E]xcluding the evidence will not further the ends of the exclusionary rule . . . [when] the officer is acting as a reasonable officer would and should act in similar circumstances . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . ."). Although the exclusionary rule is used to prevent the use of evidence obtained in violation of an individual's rights, in order to permit the use of such questionable evidence, the courts have utilized a number of exceptions. *Id.*

ficers to cautiously behave in a manner consistent with the rights of the individual citizen. By marginalizing any and all incentives to unduly investigate an otherwise innocent, or even ambiguous event, government officers will be compelled to operate within the Constitution's boundaries.[163] Fear of releasing a true criminal should temper the officer's actions before rushing to act.

C. *An Institutional Solution*

Currently, the reasonable person test allows an officer to confront a citizen, achieving a "consensual" encounter regardless of how the other participant truly feels, provided the officer does not assert a level of authority deemed controlling by the U.S. Supreme Court.[164] With such a broad scope of permissible action, the government's officer possesses no reason to cautiously approach an ambiguous situation.[165] Multiple reasons can correctly explain why the officer approached the citizen. The Fourth Amendment's current fluidity allows such an encounter to evolve into further investigation, often masking a potentially bad faith exercise of the initial encounter.[166]

Encouraging a sense of responsibility among the officers as well as incorporating motivational techniques within the institutional structure will incentivize members of this community.[167] Tying promotional and financial rewards to an individual's rate of harassment complaints or civil rights violations encourages respecting the individual citizen, if for no other reason than career aspirations or personal gain.[168]

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163. *See* Taslitz, *supra* note 65, at 76 ("Accountability clearly comes most often today from the mere prospect of a suppression hearing . . . .").

164. *See Mendenhall*, 446 U.S. at 552–54 ("A person has been 'seized' within the meaning of the Fourth Amendment only if . . . a reasonable person would have believed that he was not free to leave.").

165. *See* Florida v. Bostick, 501 U.S. 429, 432 (1991) (describing an encounter between the police and a suspected drug trafficker); *see also* Florida v. Royer, 460 U.S. 491, 497 (1983) (asserting that a government officer possesses an ability to present himself in his professional capacity); Terry v. Ohio, 392 U.S. 1 (1968) (illustrating the breadth of a government officer's discretion).

166. *See Bostick*, 501 U.S. at 432 (indicating presence of a weapon does not end a consensual police-citizen encounter); *see also Mendenhall*, 446 U.S. at 554–55 (stating mere physical contact between a police officer and a citizen does not constitute a seizure).

167. *See* Thomas E. Ford & Arie W. Kruglanski, *Effects of Epistemic Motivations on the Use of Accessible Constructs in Social Judgments*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 950, 951–52 (1995) (illustrating the increased likelihood of an accurate judgment when the test subject was informed of the need to explain his reasoning in the future).

168. *See id.* at 950–52 (showing motivational factors and their effect on one's perception of others). Arie and Kruglanski's hypothesis, which was later supported by their findings, dictated that providing an incentive to an individual and thus forcing that individual

Alternatively, positive reinforcement does not require motivational incentives.[169] The threat of personal and financial liability for violations will influence officers at an individual level, guiding their future conduct with a sense of self-preservation.[170] Expanding the exclusionary rule to include state and possibly personal liability for violating an individual's Fourth Amendment rights establishes a financial incentive to cautiously respect the rights of the public. Applying legislation similar to 42 U.S.C. § 1983[171] to states, coupled with reducing or terminating qualified immunity, notices officers of their obligation to respect the Constitution and other public rights.[172] Such legislation provides legal assurance to the public by promoting respect for the current state of the law.

VI. CONCLUSION

The reasonable person standard applies uniformity to the entire population, determining whether a citizen is free to leave based on the "totality of the circumstances."[173] However, this test consciously acknowledges personal biases, as well as communal experiences, have no place in this

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to strive for success will likely increase an individual's efficiency when confronted with a situation in which a reward becomes possible. *Id.*

169. *See* Slobogin, *supra* note 133, at 373–74 (illustrating the use of punishment in the form of excluding evidence and subsequently releasing an otherwise guilty individual).

170. *See id.* at 387 ("[T]he availability of liquidated damages should provide incentive to sue in at least come cases in which only constitutional injury occurs (although even in those cases where the victim is uninterested in a suit, the state-supported agency could initiate one, thus ensuring that a large number of legitimate claims will be brought)."). Subjecting the violating government officer to both personal and financial liability will create a level of incentive that cannot otherwise be achieved through the mere use of the exclusionary rule alone.

171. 42 U.S.C. § 1983 (2012). The statute expressly states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any such action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

172. *See id.* § 1983 (stating a path to redress a federal violation of Constitutional rights). Expanding the concept relied on within 42 U.S.C. § 1983 to incorporate the actions of the state as well as the actions of the individual violators will convey a greater sense of protection to each citizen.

173. *See Bostick*, 501 U.S. at 437 (incorporating the "totality of the circumstances" when deciding whether an individual was seized based on the reasonable person standard).

determination and identically treats each individual's confrontation with authority.[174] The current test for determining whether consent was given voluntarily is warped to the extent that any consent should be viewed in a light most favorable to the individual citizen; however, this is not currently the case.

Social science, in unearthing a previously unknown area of the subconscious, necessitates a new outlook on the conception of human nature, as no person is immune from a natural bias towards differences inherent within all people.[175] These differences cannot be overcome, but they can be reduced.[176] Educating government officers and fostering awareness allows each officer, as an individual, to reflect on the situation in a new light, affording them an opportunity to view an unfamiliar situation through the eyes of another.[177]

Officer incentivization and excluding vital evidence, unlawfully obtained, have already proved viable to an extent, if implemented correctly.[178] Expanding these practices will increase their effectiveness, affording each institution and individual officer a personal stake in the outcome of future encounters with citizens.

The sciences may never discover the full extent of human nature. Nonetheless, social science's ever-expanding body of knowledge must be utilized for the community's good, redefining future encounters through informed judicial application. Law has never been static, and it falls upon courts to apply those aspects of human interaction uncovered since *Terry*.[179]

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174. *See* Ward, *supra* note 104, at 247 (acknowledging use of intimidation in asserting presence of power and authority with the intent to achieve a level of peace based on a fear of criminal prosecution).

175. *See* Gilbert et al., *supra* note 112 (illustrating the effect of subconscious bias on an individual's initial perception).

176. *See* Ford & Kruglanski, *supra* note 167, at 950–52 (depicting the ability of an individual to overcome a natural bias if given the incentive to reconsider and properly evaluate the situation).

177. *See* Taslitz, *supra* note 65, at 22 (asserting empathy for an offender can help a governmental officer better evaluate a situation and possibly reconsider his or her first impression).

178. *See* Ford & Kruglanski, *supra* note 167, at 950 (illustrating the use of motivation and stating a motivational incentive must be stronger than the mere exclusion of illegally obtained evidence). The exclusionary rule alone will not provide the necessary incentive to alter the behavior of the violating officer. Expanding the system of rewards and punishment to include financial incentives, as well as civil liability, has been shown to increase an individual's ability to efficiently assess a foreign situation.

179. Terry v. Ohio, 392 U.S. 1, 22 (1968).