

## THE FALLACY OF A COLORBLIND CONSENT SEARCH DOCTRINE

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**ABSTRACT**—Most searches conducted by police officers are “consensual” and thus beyond the reach of the Fourth Amendment. However, such searches violate the Fourth Amendment when, under the totality of circumstances, consent appears to be a product of coercion—that is, when the consent was involuntary. In 1980, in *Mendenhall v. United States*, the Supreme Court identified race as a relevant factor courts should consider but failed to explain precisely why race was relevant. After decades of mistreatment and state-sanctioned violence, distrust of law enforcement was rampant in communities of color, and the *Mendenhall* Court correctly intuited (but failed to describe) the coercive effect of this entrenched distrust and corresponding fear when law enforcement sought consent to search from a person of color. These sentiments have persisted—even as police forces have become more diverse and misconduct has, by many accounts, decreased—and recent developments in video recording technology and social media have created immediate and pervasive social awareness of new incidents of police violence against persons of color and further reinforced this inherited distrust. Yet, since *Mendenhall*, the Supreme Court has ignored race in its consent search cases, and lower courts have followed suit. This is an inexcusable and worrisome omission—race should be one of the central factors relevant to determining whether, under the totality of the circumstances, consent to search was impermissibly coerced.

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INTRODUCTION..... 528

I. CONSENT SEARCHES AND THE COERCIVENESS INQUIRY ..... 533

    A. *Totality Factors Under Current Law*..... 535

    B. *The Proper Perspective for Framing the Inquiry* ..... 543

    C. *Awareness of Distrust and Its Root Causes*..... 545

II. THE COERCIVE EFFECTS OF DISTRUST AND FEAR..... 548

III. RACE MUST BE CONSIDERED WHEN EVALUATING CONSENT TO SEARCH ..... 554

    A. *Race Is Indistinguishable from Factors Routinely Considered Under Schneckloth*..... 555

    B. *The Totality Inquiry Is Incomplete Without Race*..... 556

    C. *Race Is Important Regardless of How Courts Frame the Consent Inquiry*..... 557

IV. ADDITIONAL CONSIDERATIONS ..... 559

    A. *Media Trends* ..... 559

    B. *Reliance on Other Communal Sentiments* ..... 561

    C. *Behavioral Incentives*..... 562

    D. *Questions of Line Drawing and Weight*..... 564

    E. *Inherent Flaws of Totality Test*..... 564

CONCLUSION..... 566

*In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own.*

—Justice Anthony M. Kennedy<sup>†</sup>

*And when you think about why, in the African American community at least, there's a lot of pain around what happened here, I think it's important to recognize that the African American community is looking at this issue through a set of experiences and a history that doesn't go away. . . . [T]hose sets of experiences inform how the African American community interprets what happened one night in Florida. And it's inescapable for people to bring those experiences to bear. The African American community is also knowledgeable that there is a history of racial disparities in the application of our criminal laws—everything from the death penalty to enforcement of our drug laws.*

—President Barack Obama<sup>‡</sup>

INTRODUCTION

A man is walking home alone late one evening. A police officer approaches him and, relying on nothing more than a hunch, asks the man if

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<sup>†</sup> United States v. Drayton, 536 U.S. 194, 207 (2002) (majority opinion).

<sup>‡</sup> Remarks by the President on Trayvon Martin (July 19, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin> [<https://perma.cc/3MDR-2C32>].

he can search his backpack, which unbeknownst to the officer, contains a small amount of marijuana. Knowing that his bag contains contraband, why would the man consent to the search of his bag? The most obvious explanation is that he likely does not know that he has a constitutional right to refuse consent in such an encounter and that the police officer, lacking articulable reasonable suspicion, cannot lawfully compel his compliance. Regardless of whether he knows his rights, it is nonetheless natural to assume that such a request “originating from an authority” is “backed by force.”<sup>1</sup> Even if an officer has not expressly threatened physical force, the perceived risk of consequences for noncompliance can coerce consent from someone legally entitled to and preferring to refuse. Thus, while “[i]t may be *rational* to comply” with such a request to search, “that doesn’t make it *voluntary*.”<sup>2</sup>

In *Schneckloth v. Bustamonte*, the Supreme Court held that a warrantless search pursuant to consent—such as the hypothetical one above—is valid if the consent was voluntarily granted and invalid if it was the product of coercion.<sup>3</sup> The “totality of the circumstances” are to be considered in making this determination, with attention paid to both “subtly coercive” police conduct and the “vulnerable subjective state of the person who consents.”<sup>4</sup> The Court explicitly identified “the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment” as examples of such relevant factors.<sup>5</sup> Yet, turning back to the hypothetical above, does the race of the “consenting” man have a place in this totality test?

In 1980, *United States v. Mendenhall* suggested that it does—the Supreme Court acknowledged that the defendant may have felt “unusually threatened” because she was “a female and a Negro” and the police were white men.<sup>6</sup> But the Court offered no explanation of why race was relevant to this inquiry and subsequently afforded it little weight in upholding the

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<sup>1</sup> Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 332 (Peter M. Tiersma & Lawrence M. Solan eds., 2012); see also *id.* at 337 (“Given the nature of police authority and the context of the citizen–police encounter, it is highly likely that police requests to search are often interpreted as commands to permit the search to take place.”).

<sup>2</sup> *Id.* at 332 (emphasis added).

<sup>3</sup> 412 U.S. 218, 227 (1973).

<sup>4</sup> *Id.* at 227, 229.

<sup>5</sup> *Id.* at 226 (citations omitted).

<sup>6</sup> 446 U.S. 544, 558 (1980).

validity of the search.<sup>7</sup> And in the years since, the Court has at least twice reviewed the validity of a consent search involving a person of color and in each case entirely omitted any mention of race.<sup>8</sup> Rather, *Mendenhall*'s recognition of the salience of race has been relegated to offhand footnotes,<sup>9</sup> and lower courts have likewise all but ignored race when they walk through the *Schneckloth* analysis.<sup>10</sup> These omissions are consistent with what scholars label the law's "systematic denial of the reality of the social meaning underlying" citizen-police encounters,<sup>11</sup> particularly between persons of color and police.

This Note argues that *Mendenhall*'s nod to race—while lacking in rhetorical and analytical vigor—was undeniably correct and that the subsequent colorblind gloss on the consent search doctrine was and remains misguided, unnecessary, and inconsistent with *Schneckloth*'s command that all relevant circumstances be considered. Accordingly, the doctrine requires (as do concerns for equity and fairness) that courts explicitly consider race when conducting the totality of circumstances inquiry. For generations, communities of color have been subject to systemic and at times violent oppression at the hands of law enforcement, manifested through complicity with Jim Crow institutions and their modern progeny, as well as individual acts of targeted depravity.<sup>12</sup> As a result, there

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<sup>7</sup> *Id.*

<sup>8</sup> See *United States v. Drayton*, 536 U.S. 194 (2001); *Florida v. Bostick*, 501 U.S. 429 (1991). In their *Bostick* dissent, Justices Thurgood Marshall, John Paul Stevens, and Harry Blackmun observe that, despite the constitutional bar from doing so, law enforcement officers continue to use race as a factor in determining which passengers to (supposedly) randomly approach during bus sweeps. See 501 U.S. at 441 n.1, 450 n.4 (Marshall, Stevens, and Blackmun, J.J., dissenting). The dissent offers a scathing critique of the majority opinion yet does not identify its failure to consider race in evaluating coerciveness as one of its flaws.

<sup>9</sup> See *Florida v. Royer*, 460 U.S. 491, 517 n.2 (1983) (Blackmun, J., dissenting) ("The plurality instead points to several other differences between this case and *Mendenhall*: the officers retained Royer's ticket and identification, momentarily took possession of Royer's luggage, and did not advise him that he could decline to be searched [460 U.S.] at 504, n. 9. Like Justice Powell, I considered the question whether a threshold seizure had taken place in *Mendenhall* to be 'extremely close.' 446 U.S., at 560 (Powell, J., concurring in part). Thus, notwithstanding the facts that, unlike the suspect in *Mendenhall*, Royer was a well-educated, adult, Caucasian male, cf. [460 U.S.] at 558 ('that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males,' is 'not irrelevant' to the degree of coercion), the differences noted by the plurality lead me to agree that a reasonable person in Royer's circumstances would not have felt free to walk away.").

<sup>10</sup> See 2 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 3.10(b) (4th ed. 2016) (describing factors bearing on validity of consent and not mentioning race); Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192 (2006) (collecting consent search cases and identifying prominent factors, and making no mention of race).

<sup>11</sup> Nadler & Trout, *supra* note 1, at 326; see *id.* at 333–34.

<sup>12</sup> Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN.COM (July 27, 2017), <http://www.smithsonianmag.com/smithsonian-institution/long->

is well-documented heightened distrust of law enforcement in communities of color around the country.<sup>13</sup> For some, this distrust manifests into “fear of how an officer with a gun will react to them.”<sup>14</sup> For others, distrust might not induce fear but rather a measured apprehension, a perception of heightened risk of possible harm. Whether operating through fear or calculated risk, such pervasive distrust has influenced the manner in which persons of color relate to and engage with law enforcement. To be sure, in some instances, this distrust manifests into active resistance of police commands or flight to avoid an encounter entirely.<sup>15</sup> However, it can also have the opposite, disarming effect—inducing compliance with police requests that, absent the coercive effect of the perceived danger, would otherwise be refused. This phenomenon is the focus of this Note.

Recognizing that courts have increasingly framed the coercion inquiry as whether it was objectively reasonable for an officer to believe that consent was voluntary given the totality of the circumstances known to the officer at the time of the request, heightened distrust may only be considered if a reasonable officer in the position of the arresting officer would have known about it. While many individually held and community-wide subjective beliefs would be excluded under this framing, law enforcement has long been aware of widely held beliefs in communities of color regarding unjustified use of force, and that awareness has only grown with the proliferation of mobile video recording technology and social media.

Therefore, meaningful consideration of race would likely lead courts to invalidate as coercive some, but by no means all, consent searches that would otherwise be upheld as voluntary. While the Supreme Court may

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painful-history-police-brutality-in-the-us-180964098 [https://perma.cc/V526-NU8M]. The deaths of Laquan McDonald, Tamir Rice, and Philando Castile serve as prominent modern examples, while the beatings of John Smith in Newark in 1967 and of Rodney King in Los Angeles in 1991, and the regular employment of fire hoses and police dogs against protestors throughout the Civil Rights Era likewise were and remain infamous. See, e.g., *Anatomy of a Race Riot*, TIME (July 21, 1967) (cover displaying photo of John Smith), <http://content.time.com/time/magazine/0,9263,7601670721,00.html> [https://perma.cc/Y2SA-UBCQ]; Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES (Mar. 7, 1991), <http://www.nytimes.com/1991/03/07/us/tape-of-beating-by-police-revives-charges-of-racism.html> [https://perma.cc/7D24-3F56]; Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, N.Y. TIMES (May 4, 1963), <https://partners.nytimes.com/library/national/race/050463race-ra.html> [https://perma.cc/YYPD4-8TQL].

<sup>13</sup> See *infra* Part II.

<sup>14</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

<sup>15</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 132 (Stevens, J., concurring in part and dissenting in part) (observing that an innocent person in a minority community very well may believe that “contact with the police can itself be dangerous”).

overstate the social and legal value of consent searches,<sup>16</sup> they are arguably efficient, they (at least in theory) provide opportunities for collaborative citizen–police engagement, and they *do* uncover evidence linked to criminal conduct; thus, it may be undesirable to aggressively discourage or functionally prohibit utilization of this tactic. Because there is little question that consent searches are here to stay,<sup>17</sup> this Note merely suggests that consistent judicial recognition of the psychological effects of long-established, persistent, and widely publicized dynamics between police and communities of color—a recognition implicit in *Mendenhall* but since ignored—could remedy at least *some* instances of gross injustice without requiring drastic, controversial, or expensive reform.<sup>18</sup>

This Note proceeds in four parts. Part I outlines the contours of current consent search doctrine and the test for determining whether consent was coerced. Next, Part II discusses how voluminous, nationwide coverage of alleged police misconduct in communities of color materializes as coercive distrust and fear. Part III argues that, because of the heightened distrust, race is clearly a proper factor to be considered in determining whether a person of color was coerced into consenting to search. Part IV then discusses theoretical and practical concerns that arise from this analytic framework.

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<sup>16</sup> For examples of the Court’s praise of consent searches, see *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014) (“[The warrant] requirement may also impose an unmerited burden on the person who consents to an immediate search, since the warrant application procedure entails delay.”); *id.* (suggesting that denying certain third-party occupants the right to consent to search “would also show disrespect for [their] independence”); *Georgia v. Randolph*, 547 U.S. 103, 116 (2006) (noting the importance of third-party consent to respect the third party’s “legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal”); *United States v. Drayton*, 536 U.S. 194, 207 (2002) (suggesting that consent searches “reinforce[] the rule of law”); *Schneekloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (“[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.”). For a sample of the scholarly criticism of this approach, see Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 543–49 (2015) (suggesting that the Court has overvalued the utility of consent searches for law enforcement); Nadler & Trout, *supra* note 1, at 338–39 (arguing that the Court has underestimated the costs of such searches, by identifying the dignitary harms suffered by innocent persons searched involuntarily and the systemic legitimacy costs to law enforcement and the legal system resulting from such searches).

<sup>17</sup> See Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187 (2006) (“While it remains unclear exactly how useful or essential consent searches are to law enforcement, at least one thing is certain: the Supreme Court has been unabashedly enthusiastic about their use.” (footnotes omitted)).

<sup>18</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (“The Court next states that its unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.” (internal citations omitted)).

## I. CONSENT SEARCHES AND THE COERCIVENESS INQUIRY

On its face, the Fourth Amendment provides considerable protections against intrusions by the state: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>19</sup> The “essential purpose[s]” of these guarantees are “to shield the citizen from unwarranted intrusions into his privacy”<sup>20</sup> and to protect the citizen’s “conscience and human dignity.”<sup>21</sup> Under the Fourth Amendment, a search has not occurred “unless ‘the [private] individual manifested a subjective expectation of privacy in the object of the challenged search,’ and ‘society is willing to recognize that expectation as reasonable.’”<sup>22</sup> Often, deciding whether law enforcement conduct constituted a search is a dispositive question, as Fourth Amendment protections do not apply if the conduct in question was not a “search” as contemplated by the Fourth Amendment.<sup>23</sup>

Contrary to the Fourth Amendment’s seemingly broad protections, “certain categories of permissible warrantless searches have long been recognized” as exceptions to those protections and “[c]onsent searches occupy one of these categories.”<sup>24</sup> A consent search occurs when an individual grants a law enforcement officer permission to search her person or property—the government has the burden of “demonstrat[ing] that [any such] consent was in fact voluntarily given”<sup>25</sup> In determining the validity of consent, courts consider two interrelated but conceptually distinct questions.<sup>26</sup> First, the court asks whether the defendant indicated agreement,<sup>27</sup> either implied or express,<sup>28</sup> to the search. Second, the court

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<sup>19</sup> U.S. CONST. amend. IV.

<sup>20</sup> *Jones v. United States*, 357 U.S. 493, 498 (1958); *see also* *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974) (noting that privacy interests, not property interests, motivate the Fourth Amendment).

<sup>21</sup> *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

<sup>22</sup> *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211 (1986)).

<sup>23</sup> Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002).

<sup>24</sup> *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014); *see also* *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search . . . conducted pursuant to consent.”).

<sup>25</sup> *Schneekloth*, 412 U.S. at 248.

<sup>26</sup> While this Note focuses on the second inquiry, the role of race and heightened distrust of law enforcement in properly addressing the first question is a worthwhile topic for future scholarship.

<sup>27</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (noting that mere “acquiescence to a claim of lawful authority” is not sufficient indicium of agreement to constitute consent).

<sup>28</sup> *See* *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (“[C]onsent . . . may be fairly inferred from context.”).

asks whether that agreement was voluntary or coerced.<sup>29</sup> In the defining consent search case *Schneckloth v. Bustamonte*, the Supreme Court acknowledged the argument that “‘consent’ is a ‘waiver’ of a person’s rights” under the Fourth Amendment,<sup>30</sup> but it held that the standard requirements for valid waiver applied elsewhere in the law—i.e., that a waiver be “knowing” and “intelligent”—do not apply in the consent search context.<sup>31</sup> Accordingly, a person need not know that she has a right to refuse consent to relinquish the right—in most other contexts, such ignorance would preclude any waiver of the right in question. Instead, consent was involuntary if “a defendant’s will was overborne” and her consent was coerced; in ferreting out such coercion, a court is to consider “the totality of all the surrounding circumstances,” including “the characteristics of the accused and the details of the interrogation.”<sup>32</sup> Implicit in this doctrine is the recognition that while citizens have a right to refuse policing, they sacrifice that and other rights if they fail to actively resist.<sup>33</sup>

The rationale justifying the consent exception and the frame through which courts should conduct the *Schneckloth* analysis are hardly settled. Some suggest that “[t]he act of consenting (or, at least, the reasonable expression of consent) is itself an act that justifies” any subsequent search as “legitimate,” and thus reasonable and permissible.<sup>34</sup> Under this paradigm, the fact that a police officer was given permission to conduct a search would generally end the inquiry because reasonableness is measured from the officer’s perspective—and from that perspective, it is always reasonable to conduct a search when someone granted you permission to do so.<sup>35</sup> Only when a police officer unreasonably interprets a citizen’s conduct

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<sup>29</sup> *Schneckloth*, 412 U.S. at 227.

<sup>30</sup> *Id.* at 235.

<sup>31</sup> *Id.* at 241; see also *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938) (articulating the waiver standard for the Sixth Amendment right to counsel). For a discussion of how Fourth Amendment consent to search differs from knowing and voluntary waiver under the Fifth and Sixth Amendments, see David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 942–54 (1997).

<sup>32</sup> *Schneckloth*, 412 U.S. at 226.

<sup>33</sup> See Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U CHI. LEGAL F. 295, 296.

<sup>34</sup> Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 76 (2007); see also John B. MacDonald, Case Comment, *Constitutional Law: Voluntary Consent to Search Pursuant to an Unlawful Arrest*, 28 U. FLA. L. REV. 273, 274 (1975) (“One contention is that a search conducted with the consent of the individual being searched is inherently reasonable.” (footnote omitted)).

<sup>35</sup> See *Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991) (“[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.”). This framing tracks closely with the objective prong of the reasonable expectations of privacy analysis established in *Katz v. United States*, 389 U.S. 347 (1967). Exploring

as a grant of consent would the subsequent search be impermissible under this conception of objective reasonableness.

However, the mainstream gloss on the doctrine focuses on reasonableness and voluntariness: the consent inquiry seeks to identify whether a person has volitionally given up her right to be free from an otherwise unlawful search.<sup>36</sup> This perspective can accommodate both the perspective of a reasonable officer (whether the officer had reason to believe that the consent was involuntary) and, at times, that of the citizen herself. Under this schema, the act of permission is relevant but only one consideration in determining whether the citizen voluntarily welcomed the search. In practice, courts largely, but not uniformly, adopt the officer's perspective and ignore circumstances not readily obvious to an officer during the encounter, such as the citizen's prior experience with law enforcement or education level.

Nonetheless, race is both relevant and meaningful regardless of which perspective frames the analysis. Recognized widely across legal and interdisciplinary scholarship is the belief that courts systematically underestimate the coercive nature of police encounters when evaluating the validity of consent.<sup>37</sup> A recent empirical study of suppression motions in federal court suggests that, absent a Fourth Amendment violation that precedes an officers request to search, courts almost never find consent to have been coerced.<sup>38</sup>

The following Sections discuss, in turn, the array of factors outlined in *Schneekloth* and articulated by courts in the years since that are to be considered in a consent to search analysis; the framing of the totality inquiry; and the degree to which actual or presumptive societal knowledge of a potentially coercive condition is relevant to the totality inquiry.

#### *A. Totality Factors Under Current Law*

The factors considered in the totality of the circumstances test can be fairly categorized as either describing the history and characteristics of the

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the convergence (and divergence) between consent jurisprudence and *Katz*'s progeny may be another worthwhile topic for future scholarship.

<sup>36</sup> See, e.g., William Kluwin & Joseph Walkowski, *Valid Consent to Search Determined by Standard of "Voluntariness"*—*Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), 12 AM. CRIM. L. REV. 231 (1974).

<sup>37</sup> See, e.g., Nadler & Trout, *supra* note 1; John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114–15 (2007); Kaplan & Dixon, *supra* note 31, at 954–56; Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155; Sutherland, *supra* note 10, at 2195.

<sup>38</sup> Sutherland, *supra* note 10, at 2225 (“[I]n practice courts will find consent voluntary in the absence of police misconduct.”).

citizen, or describing the details of the encounter between the police officer and citizen.<sup>39</sup> The following sections provide an illustrative, but nonexhaustive, summary of factors recognized as relevant by the Supreme Court and lower courts. Subsequently, the Note turns to *United States v. Mendenhall* and its explicit (but brief) recognition that race is a relevant factor in the totality test.

### *I. History and Characteristics of the Citizen*

*Schneckloth* held that the “vulnerable subjective state of the person who consents” was relevant to the totality inquiry,<sup>40</sup> and the following physical, cognitive, and experiential factors have been identified as relevant indicia of such vulnerability.

*Gender.* The gender of the individual is relevant, and conventional wisdom is that a court should more readily find coercion if the supposedly consenting individual in question was a woman.<sup>41</sup> However, there is reason to doubt courts actually or consistently employ this rule.<sup>42</sup>

*Age.* The youth of an individual counsels in favor of finding coercion,<sup>43</sup> based on the assumption that younger persons will be more easily manipulated by authority figures and more likely to believe they do not have the right to refuse. There is no bright line in the case law when “youth” ends and when an individual’s age no longer weighs in favor of finding coercion.<sup>44</sup> As a general matter, age seems to be a sliding scale,

<sup>39</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

<sup>40</sup> *Id.* at 229.

<sup>41</sup> See *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that gender can contribute to a defendant feeling “unusually threatened” by police). *But cf.* *United States v. Little*, 18 F.3d 1499, 1505 n.7 (10th Cir. 1994) (refusing to apply an “across-the-board categorization[]” that “all women . . . are always more vulnerable to coercion” (emphasis in original)).

<sup>42</sup> Orit Gan, *Third-Party Consent to Search: Analyzing Triangular Relations*, 19 DUKE J. GENDER L. & POL’Y 303, 346 (2012) (suggesting that consent search doctrine systematically employs an analysis that is “a-contextual, gender-blind, and insensitive to power dynamics”). The historical and sociological gender dynamics at play in consent searches raise important questions, but such a nuanced discussion is far beyond the scope of this Note.

<sup>43</sup> *Schneckloth*, 412 U.S. at 226 (citing *Haley v. Ohio*, 332 U.S. 596, 601 (1948) (finding confession by fifteen-year-old defendant unconstitutionally coerced under the Fourteenth Amendment)).

<sup>44</sup> *Mendenhall*, 446 U.S. at 558 (finding that the age of a twenty-two-year-old defendant counseled in favor of coercion, but that the totality of factors indicated voluntariness); *United States v. Ward*, 400 F. App’x 991, 994 (6th Cir. 2010) (finding that the age of a twenty-nine-year-old defendant counseled in favor of finding valid consent); *Crowe v. Cty. of San Diego*, 608 F.3d 406, 437–38 & n.22 (9th Cir. 2010) (giving little to no weight to the age of a fourteen-year-old suspect in finding his consent to a strip search valid); *United States v. Esquivel*, 507 F.3d 1154, 1159–60 (8th Cir. 2007) (finding that the age of the defendants, who were at least thirty years old, counseled in favor of finding valid consent); *United States v. Renken*, 474 F.3d 984, 988 (7th Cir. 2007) (finding that the age of a forty-seven-year-old defendant counseled in favor of finding valid consent); *United States v. Boyd*, 910 F.

where the age of a young child weighs strongly in favor of involuntariness, while the age of a young adult is less significant.

*Intoxication.* When an individual is drunk or otherwise impaired, there is reason to doubt the voluntariness of her consent to search.<sup>45</sup> This is hardly controversial, especially when an individual is sufficiently intoxicated to be obvious to an inquiring officer.

*Lack of Education or Intelligence.* A lack of education counsels in favor of finding coercion,<sup>46</sup> as does a lack of intelligence.<sup>47</sup> The rationale is that an individual lacking intelligence or education is “weaker and more susceptible” to police manipulation and that police strategies that are “utterly ineffective” against others could easily convince such a person to consent.<sup>48</sup>

*Belief That No Incriminating Evidence Will Be Found.* Several lower courts have concluded that an individual who believes that no incriminating evidence will be found is less likely to have been coerced into granting consent.<sup>49</sup> An individual who subjectively believes she has nothing to hide has little reason to be concerned about the police search, suggesting that her initial consent is indeed voluntary and her protestations are merely post hoc attempts to suppress evidence she did not think existed at the time of the search.<sup>50</sup> On the other hand, a subjective fear that incriminating evidence

Supp. 2d 995, 1002 (W.D. Mich. 2011) (finding that the age of an eighteen-year-old woman counseled in favor of finding consent invalid).

<sup>45</sup> See *United States v. Va Lerie*, 424 F.3d 694, 709–10 (8th Cir. 2005).

<sup>46</sup> *Schneckloth*, 412 U.S. at 226 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)). In *Payne*, the Court found that a confession by a “mentally dull” and “slow to learn” defendant with a fifth-grade education was unconstitutionally coerced under the Fourteenth Amendment. 356 U.S. at 562 n.4; see also *Arizona v. Fulminante*, 499 U.S. 279, 286 n.2 (1991) (applying the *Schneckloth* test to determine whether confession was coerced and concluding that defendant’s fourth-grade education “support[ed] a finding of coercion”).

<sup>47</sup> *Schneckloth*, 412 U.S. at 226 (citing *Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (finding that the confession of a defendant “weak of will or mind” was unconstitutionally coerced)); *United States v. Stokely*, 733 F. Supp. 2d 868, 903–04 (E.D. Tenn. 2010) (noting that the defendant was “intelligent” and “well-spoken,” and that these traits “weigh[ed] in favor of a voluntary consent”); see also *Fulminante*, 499 U.S. at 286 n.2 (applying the *Schneckloth* test to determine whether confession was coerced and concluding that defendant’s “low average to average intelligence” “also support[ed] a finding of coercion”).

<sup>48</sup> *Fikes*, 352 U.S. at 197–98.

<sup>49</sup> See, e.g., *United States v. Solis*, 299 F.3d 420, 436 n.21 (5th Cir. 2002) (citing *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993)); *United States v. Jackson*, 34 F. Supp. 3d 645, 648–49 (M.D. La. 2014) (citing *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002)).

<sup>50</sup> This factor rests upon a flawed assumption: if an individual thought she had nothing to hide, then “there would have been no reason for her to deny consent for a search.” *Hernandez*, 279 F.3d at 308. To the contrary, an individual assuming she has nothing to hide may nonetheless prefer to deny consent for many reasons, such as a desire for privacy, need to avoid delay, or awareness of her legal right to refuse consent without probable cause.

will be found suggests that she would have been less eager to voluntarily consent to search, and therefore coercion may have been necessary to extract her consent.<sup>51</sup> While seemingly straightforward, the Court has elsewhere rejected this argument and has been unwilling to weigh a citizen's awareness of her own criminal conduct in favor of invalidating consent.<sup>52</sup>

*Prior Experience with Violence.* Courts have found that coercion is less likely if an individual had prior experience with violence, under the assumption that such an individual is “less likely than most to be intimidated by [police officers’] show of force.”<sup>53</sup> Yet, the opposite inference could just as easily be true: surviving a violent episode could traumatize someone and leave them especially sensitive to future situations that threaten violence.<sup>54</sup>

*Prior Experience with and Knowledge of the Law.* Courts will presume that prior experience in and familiarity with the criminal justice system counsels in favor of finding consent valid.<sup>55</sup> For example, a novice may interpret relatively innocuous police conduct as a precursor to escalation or physical abuse, not recognizing that, for example, holstering a gun infrequently leads to actual use of the gun. On the other hand, someone who “had confronted the police before” is less likely to be intimidated by them.<sup>56</sup> This factor necessarily presumes that an individual with prior experience with or knowledge of the law was not harassed, injured, or mistreated during their prior encounter(s) with the criminal justice system and police. If the prior encounter(s) indeed had been in any way traumatic, this factor very well could counsel in favor of finding the consent coerced,

<sup>51</sup> See Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1004–05 (2002).

<sup>52</sup> See *id.* at 1006 (“According to Justice O’Connor, the reasonable person standard presupposes an innocent person. Her argument seems to be that, to the extent that a person is in possession of drugs, he is not innocent. Stated more directly, he is factually guilty. Accordingly, such a person may not use the fact of his guilt (possessing drugs) to vitiate his consent or to deny that he consented.”); *Florida v. Bostick*, 501 U.S. 429, 437–438 (1991).

<sup>53</sup> See, e.g., *United States v. Cepulonis*, 530 F.2d 238, 244 (1st Cir. 1976).

<sup>54</sup> See generally POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE (Apr. 2016), [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf) [<https://perma.cc/MT3Q-CNP2>].

<sup>55</sup> *Id.*; *Hubbard v. Tinsley*, 350 F.2d 397, 398 (10th Cir. 1965) (finding that a defendant’s “knowledge[] in investigative and legal proceedings” weighed in favor of voluntariness); see also *United States v. Perry*, 703 F.3d 906, 909 (6th Cir. 2013) (giving significant weight to defendant’s fifty-seven prior arrests in finding her consent voluntary); *People v. Gonzalez*, 347 N.E.2d 575, 581 (N.Y. 1976) (“A consent to search by a case-hardened sophisticate in crime, calloused in dealing with police, is more likely to be the product of calculation than awe.”).

<sup>56</sup> *Cepulonis*, 530 F.2d at 244.

as those prior experiences would probably increase the likelihood that the person would fear reprisal if she failed to consent.

## 2. *Encounter Between Citizen and Officer*

*Schneckloth* also held that the “subtly coercive” conduct of police officers was, quite obviously, relevant to the totality inquiry,<sup>57</sup> and, accordingly, courts have considered relevant the following circumstantial and behavioral factors.

*Knowledge of Right to Refuse Consent.* When an individual has been told that she has the right to refuse consent, this fact weighs in favor of finding consent voluntary and valid.<sup>58</sup> However, “such knowledge” is not a “prerequisite to establish[] a voluntary consent.”<sup>59</sup> In other words, there is no Fourth Amendment analog to the required *Miranda* warnings. As noted, an individual’s ignorance of her constitutional right to refuse consent weighs in favor of finding coercion, but this factor alone does not dispose of the question.

*Advice Given to Individual About Constitutional Rights.* The Supreme Court presumes that if police took the time to instruct an individual of her constitutional rights, the police were less prone to abuse their constitutional prerogative and the individual was less prone to involuntarily consent to a search she knew she could constitutionally refuse.<sup>60</sup> Yet, while failure to inform counsels in favor of finding coercion,<sup>61</sup> such a misstep is by no means dispositive.<sup>62</sup>

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<sup>57</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

<sup>58</sup> *Id.* at 249; *United States v. Worley*, 193 F.3d 380, 386–87 (6th Cir. 1999).

<sup>59</sup> *Schneckloth*, 412 U.S. at 249.

<sup>60</sup> This was the implicit logic of *Florida v. Bostick*, 501 U.S. 429 (1991). In refusing to find the consent to search involuntarily coerced, the Court said it was “particularly worth noting” that “the police specifically advised Bostick that he had the right to refuse consent.” *Id.* at 432; *see generally* Nadler, *supra* note 37.

<sup>61</sup> *Schneckloth*, 412 U.S. at 226 (citing *Davis v. North Carolina*, 384 U.S. 737, 740–41 (1966) (finding that “not [being] advised of his rights” to remain silent and have counsel present weighed strongly in favor of finding the confessions involuntary and coerced)).

<sup>62</sup> *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) (finding that there was voluntary consent despite the officers’ failure to notify the defendant that he could refuse to cooperate). In any event, social science research suggests the initial presumption is likely misguided. *See* Nadler, *supra* note 37, at 155. Professor Nadler astutely notes a crucial point of dissonance for the Court: just because police conduct is polite and does not expressly threaten physical escalation, that does not mean such conduct is not coercive. *See id.* The Court often conflates apparent politeness with a lack of coerciveness. *See, e.g., Bostick*, 501 U.S. at 432 (finding no coercion for several reasons, but a primary one being that “at no time did the officers threaten Bostick with [the] gun” that one of the officers carried).

*Length of Detention.* The longer an individual is detained by police, the more likely that any subsequent consent was the product of coercion.<sup>63</sup>

*Number of Police Officers Present.* The more officers surrounding the individual or in the close vicinity at the time of the request for consent, the more likely that subsequent consent was the product of coercion.<sup>64</sup> This is intuitive. Cumulative coercive potential increases with the number of officers present—an officer who may not take action on her own may feel empowered to do so with the immediate support of her colleagues. The opposite presumption is equally reasonable—an encounter with a single officer could be more presumptively coercive, because a lone officer may be more prone to commit misconduct without colleague-eyewitnesses—but there is no indication that courts have adopted this view.

*Nature of Questioning.* Prolonged and repeated questioning—in which an individual initially refuses consent but eventually grants it—calls into question the voluntariness of the consent.<sup>65</sup> Conversely, if consent is granted immediately without repeated requests, the court may be less prone to believe that the consent was the product of coercion.

*Use of Physical Punishment.* If there is evidence of physical abuse of the individual by police prior to the granting of consent, this fact weighs in favor of finding any consent the product of coercion.<sup>66</sup>

*Voluntariness of Custodial Status.* If an individual is being detained against her will, such as in the back of a police car in handcuffs, her consent is more likely to be the product of coercion.<sup>67</sup> On the other hand, consent granted while voluntarily in police custody, after, for example, showing up to the police station on one's own volition, weighs in favor of finding the consent voluntary and valid.

*Extent of Cooperation with Law Enforcement.* The extent and level of cooperation with police prior and subsequent to the grant of consent are relevant considerations.<sup>68</sup> The greater the degree of cooperation with police, the more likely that the consent was voluntary and not coerced.

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<sup>63</sup> *Schneckloth*, 412 U.S. at 226 (citing *Chambers v. Florida*, 309 U.S. 227, 239–40 (1940) (finding that a lengthy confinement prior to the confession weighed in favor of finding the confession involuntary and coerced)).

<sup>64</sup> *People v. Gonzalez*, 347 N.E.2d 575, 579–82 (N.Y. 1976).

<sup>65</sup> *Schneckloth*, 412 U.S. at 226 (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 152–54 (1944) (finding that a thirty-six-hour questioning period, with repeated questioning, weighed in favor of finding the confession involuntary and coerced)).

<sup>66</sup> *Id.* (citing *Reck v. Pate*, 367 U.S. 433, 441–42 (1961) (finding that physical abuse during questioning weighed in favor of finding confession involuntary and coerced)).

<sup>67</sup> *United States v. Jackson*, 34 F. Supp. 3d 645, 649 (M.D. La. 2014).

<sup>68</sup> *Id.* at 648; *United States v. Walker*, 254 F. App'x 300, 303 (5th Cir. 2007).

*Immediacy of Consent.* Similar to the length of questioning and nature of detention considerations above, consent granted with little to no delay is less likely to be the product of coercion, while lengthy delay raises voluntariness concerns.<sup>69</sup>

*Officer Hostility or Display of Weapon.* If an officer exhibited “overt hostility” toward the individual,<sup>70</sup> brandished a weapon,<sup>71</sup> or made a threat against the individual or a relative prior to the request for consent, any of these actions counsel in favor of finding consent coerced. When police act calmly, do not brandish their weapons, and do not expressly make threats, courts view these facts as indicia of voluntariness.

*Language Barrier.* If there is a language barrier between the officer and the individual, there is a greater likelihood that the individual did not understand the officer’s request to search or the officer did not understand the individual’s answer.<sup>72</sup> This inquiry typically focuses on whether the individual had sufficient English proficiency, but it need not do so if the officer speaks another language.

*Surrounding Atmosphere.* The “examination of coercion” may extend beyond “the acts of the officials requesting to perform the search” to include the “coercive atmosphere” created by others in the vicinity.<sup>73</sup> For example, a surrounding crowd of civilians hostile to the individual in question creates coercive conditions affecting the individual’s ability to voluntarily consent.<sup>74</sup>

*Preceding Fourth Amendment Violation.* If the police committed a Fourth Amendment violation prior to seeking consent, such as illegally seizing the individual or entering a home without a warrant, courts are highly suspicious of any subsequent consent.<sup>75</sup>

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<sup>69</sup> See, e.g., *United States v. Alexander*, 573 F.3d 465, 477 (7th Cir. 2009).

<sup>70</sup> *United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000); see also *United States v. Glover*, 104 F.3d 1570, 1584 (10th Cir. 1997).

<sup>71</sup> *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988); *United States v. Telcy*, 362 F. App’x 83, 86–87 (11th Cir. 2010); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997); *United States v. Edmond*, 413 F. Supp. 1388, 1391 (E.D. Mich. 1976).

<sup>72</sup> See, e.g., *United States v. Guerrero*, 374 F.3d 584, 588–89 (8th Cir. 2004); *United States v. Amano*, 229 F.3d 801, 804–05 (9th Cir. 2000).

<sup>73</sup> *Lopera v. Town of Coventry*, 640 F.3d 388, 398 (1st Cir. 2011). In the context of the Fifth Amendment and coerced confessions, the Supreme Court has focused more narrowly on the conduct of the police and largely discounted such environmental considerations. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 163–64 (1986) (emphasizing the importance of police conduct in determining the voluntariness of a confession under the Fifth Amendment).

<sup>74</sup> *Lopera*, 640 F.3d at 398.

<sup>75</sup> See *Sutherland*, *supra* note 10, at 2216–18.

3. *Mendenhall and a Passing Nod to Race*

In 1980, *United States v. Mendenhall* was the first explicit<sup>76</sup> recognition by the Supreme Court that race was an appropriate and relevant factor in the *Schneekloth* totality of the circumstances test.<sup>77</sup> Sylvia Mendenhall, a twenty-two-year-old black woman, was approached by several white male Drug Enforcement Agency (DEA) agents after disembarking at Detroit Metropolitan Airport, and was subsequently asked to accompany them to the DEA airport office for further questioning.<sup>78</sup> In the office, Mendenhall first consented to the officers' request to search her person and again consented to search when asked by a female officer who had escorted her to a private adjacent room.<sup>79</sup> As she undressed, Mendenhall removed a package of heroin from her undergarments and handed it to the officer.<sup>80</sup> She was arrested for possession.<sup>81</sup>

Mendenhall sought to suppress the admission of the heroin, arguing that her consent was coerced and thus involuntary.<sup>82</sup> In conducting the *Schneekloth* totality test, the Court noted that, because she was a woman and "a Negro," Mendenhall "may have felt unusually threatened by the officers, who were white males."<sup>83</sup> At first blush, this recognition seems like a monumental shift in the law: an explicit recognition by the Court that an encounter between white law enforcement officers and a person of color has a degree of inherent coerciveness. While *Schneekloth* "obscure[d] the fact that, because of race, people are differentially situated with respect to their vulnerability to police encounters,"<sup>84</sup> *Mendenhall* provided an opportunity for jurisprudential redemption. Yet, the Court immediately downplayed the significance of race in this encounter, finding that the totality of *all* factors—namely, the lack of threats, the lack of any demonstration of force, the brief nature of questioning, Mendenhall's

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<sup>76</sup> The Court had ample opportunities prior to 1980 to recognize the significance of race in encounters between police officers and persons of color. *See, e.g.,* *Payne v. Arkansas*, 356 U.S. 560, 561, 562 n.4 (1958) (suppressing the confession of a "mentally dull" "19-year-old Negro" as impermissibly coerced under Fourteenth Amendment but making no mention of the role of race in the analysis).

<sup>77</sup> *United States v. Mendenhall*, 446 U.S. 544, 558 (1980). The defendants in *Schneekloth* were Hispanic, but the decision did not mention their race. Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 *CARDOZO L. REV.* 2161, 2197 & n.204 (2016).

<sup>78</sup> *Mendenhall*, 446 U.S. at 547–48.

<sup>79</sup> *Id.* at 548.

<sup>80</sup> *Id.* at 549.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* She also argued that she had been illegally seized by the agents. *Id.* at 547. The Court disagreed. *Id.* at 565–66.

<sup>83</sup> *Id.* at 558.

<sup>84</sup> Carbado, *supra* note 51, at 1013.

physical possession of her ticket and identification, and the agents' disclosure to Mendenhall that she was free to withhold consent—indicated that she had indeed voluntarily consented to search.<sup>85</sup> Importantly, the Court did not provide any explanation of why race was relevant to this inquiry.

In failing to provide any such commentary, the Court simultaneously recognized as self-evident this coercive dynamic and hinted to lower courts that this factor is not to be taken seriously. While the Supreme Court insisted that it had “engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system” several years later,<sup>86</sup> this error suggests otherwise. The Court’s subsequent failure to mention that the defendants in *Florida v. Bostick*<sup>87</sup> and *United States v. Drayton*<sup>88</sup> were black while validating their supposed consent to search only further highlights the falsity of this claim. Notwithstanding the negligible doctrinal effect of *Mendenhall*’s mention of race to date, pervasive awareness of police misconduct presents a compelling rationale for why race, which remains relevant for other reasons as well,<sup>89</sup> must be considered in consent search cases and thus provides an analytic framework for evaluating race that *Mendenhall* failed to articulate.

#### B. *The Proper Perspective for Framing the Inquiry*

“Although the Supreme Court in *Schneckloth* suggested that a defendant could try to invalidate the consent to search based on numerous subjective factors relating to the suspect’s mental state or character, it is a rare case in which the court actually analyzes any of these factors.”<sup>90</sup> Over time, the Court’s consent search jurisprudence has increasingly limited the inquiry to an objective officer’s perspective of the encounter.<sup>91</sup> That is, the

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<sup>85</sup> *Mendenhall*, 446 U.S. at 558–60; see Cuevas & Jacobi, *supra* note 77, at 2202 (noting that *Mendenhall* “paid lip service to her subjective characteristics (young, uneducated, black, and female) but did not delve into them”).

<sup>86</sup> *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).

<sup>87</sup> 501 U.S. 429 (1991).

<sup>88</sup> 536 U.S. 194 (2002).

<sup>89</sup> See generally Carbado, *supra* note 51 (discussing the various interplays between race and the Fourth Amendment).

<sup>90</sup> See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221–22 (2001).

<sup>91</sup> See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (The “determination of consent . . . must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?” (internal quotation marks omitted)); *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) (“[T]he particular personal traits or subjective state of mind of the defendant are irrelevant . . .

question has largely become whether a reasonable officer would conclude that the citizen voluntarily consented to the search.

This is the trend, to be sure, but it is not without exceptions in the Court's own cases<sup>92</sup> as well as those adjudicated by lower courts.<sup>93</sup> In the Ninth Circuit, a district court must consider "whether the advice of rights was in the defendant's native language" and "whether the defendant had experience with the American criminal justice system" when reviewing the alleged consent of a foreign national.<sup>94</sup> The Ninth Circuit likewise requires the court to consider "whether the defendant appeared to understand those rights"<sup>95</sup>—the use of "appeared" in this factor compels adoption of the perspective of the officer, while its omission in the preceding factors suggests the actual characteristics (not just those apparent to the officer) are relevant to this analysis.<sup>96</sup>

When a court considers the characteristics of the actual defendant and the group-based assumptions associated with her, instead of replacing her with a "reasonable person" in the analysis, it avoids the perspective bias that distorts other objective tests under the Fourth Amendment. In those cases, the "reasonable person" contemplated by the court is commonly intelligent, white, and male, regardless of the actual characteristics of the individual in question or the general characteristics of the population from which that person comes.<sup>97</sup> Explicit consideration of race here might force

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other than to the extent that they may have been known to the officer and influenced his conduct." (internal quotation marks omitted)).

<sup>92</sup> In their *J.D.B. v. North Carolina* dissent, Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas, and Antonin Scalia criticized the majority's consideration of factors beyond those objectively apparent to law enforcement in determining whether a defendant was in custody under *Miranda*. 564 U.S. 261, 286 (2011) (Alito, J., dissenting). In so doing, the dissent emphasized that, unlike *Miranda*'s exclusive focus on "objective circumstances of the interrogation," the *Schneekloth* voluntariness inquiry required consideration of "the details of the interrogation and the characteristics of the accused." *Id.* (citations and internal quotation marks omitted). This juxtaposition was an implicit admission by several justices largely unsympathetic to subjective considerations that the consent search inquiry requires consideration of certain factors that may not be readily and objectively observable to an officer.

<sup>93</sup> See Sutherland, *supra* note 10, at 2199–200 (discussing the muddled and inconsistent application of objective and subjective considerations).

<sup>94</sup> See *United States v. Amano*, 229 F.3d 801, 804–05 (9th Cir. 2000).

<sup>95</sup> *Id.*

<sup>96</sup> Similarly, it would be quite rare for an officer to know about a citizen's prior experience with the U.S. criminal justice system. Thus, when the Ninth Circuit considers such experience, it reaches beyond those facts objectively observable to the officer at the time of the encounter.

<sup>97</sup> Cuevas & Jacobi, *supra* note 77, at 2188–91; see Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 56 (2003) ("How the 'reasonable person' would behave or feel during interactions with the police is in effect judged from the perspective of the middle-class white person expecting police protection rather than the poor person familiar with police abuse.").

courts employing such “objective” standards to reflect upon this systemic bias.

### C. *Awareness of Distrust and Its Root Causes*

While the framing inquiry discussed above is important with regard to certain totality factors, the framing distinction makes little difference here because societal awareness of the fact that communities of color have a heightened distrust (and in some instances, fear) of law enforcement is pervasive. That is, if a court is willing to consider the perspective of the citizen, it would find a reasonable person of color more distrustful of law enforcement and thus her consent more likely coerced. On the other hand, if a court is only looking at factors objectively discernable to an officer, any reasonable officer would be aware of this distrust, just as she would be aware that a person surrounded by several officers is more prone to feel coerced. Leaders within the law enforcement community have publicly recognized this dynamic. Terry Cunningham, President of the International Association of Chiefs of Police, recently apologized for “historical mistreatment of communities of color” hoping to break a “historic cycle of mistrust.”<sup>98</sup> He further acknowledged that the “dark side of our shared history has created a multigenerational—almost inherited—mistrust between many communities of color and their law enforcement agencies.”<sup>99</sup> Further, there is ample anecdotal evidence that ordinary officers are well aware themselves.<sup>100</sup> As astutely observed by Professor Matthew Tokson, in the context of the Fourth Amendment, courts regularly (and seemingly without controversy) impute knowledge to an individual when the information is generally accessible in her community.<sup>101</sup> Professor Tokson

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<sup>98</sup> Merrit Kennedy, *Head of Police Chiefs Group Apologies for ‘Historical Mistreatment’ of Minorities*, NPR (Oct. 18, 2016, 11:16 AM), <http://www.npr.org/sections/thetwo-way/2016/10/18/498380373/head-of-police-chiefs-group-apologizes-for-historical-mistreatment-of-minorities> [<https://perma.cc/QJ4G-PK7Y>].

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., Lindsey Bever & Andrew deGrandpre, *‘We Only Kill Black People,’ a Cop Told a Woman — On Camera. Now He’ll Lose His Job.*, WASH. POST (Aug. 31, 2017), [http://wapo.st/2x8CsBi?tid=ss\\_mail&utm\\_term=.9722b99ce052](http://wapo.st/2x8CsBi?tid=ss_mail&utm_term=.9722b99ce052) [<https://perma.cc/UN29-PX4N>].

<sup>101</sup> Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 139, 149–52 (2017). Professor Tokson’s critique focuses mostly on the evolution of the *Katz* test and waiver doctrine, but his observations about so-called “societal knowledge” are no less relevant here:

Courts’ failure to recognize the complex, multilevel nature of knowledge often leads them to find that people have knowingly waived their Fourth Amendment rights on very thin evidence. In many cases, a vague or general awareness of the possibility of personal data collection is sufficient to vitiate Fourth Amendment rights. For example, the Supreme Court held that dialed telephone numbers were not private in part because customers have “some awareness” that telephone companies can record their numbers, and because many phone books contain a page with text implying that companies can track harassing calls.

suggests that societal knowledge plays an important role in Fourth Amendment law because the Court equates “vague or general awareness” of certain facts with actual knowledge.<sup>102</sup>

To be sure, decades of mass media coverage of high-profile incidents, from Birmingham in 1963 to Los Angeles in 1991 and extensive coverage of contemporary incidents across traditional and social media, have created much more than the vague or general awareness required for anyone in the United States to *know*—as knowledge is conceived under the Fourth Amendment—about these unfortunate realities and their psychological effects in communities of color. Whether the court is analyzing a consent search through the eyes of a citizen of color or a police officer, it would presume at least general knowledge of the racial history, recent high-profile events, and the obvious psychological effect that such facts have on communities of color.<sup>103</sup> At the same time, “general awareness” within a community of a particular police officer’s or a department’s efforts to improve police–community relations and a track record of respectful and collaborative policing could partially mitigate the weight given to the coercive psychological effects of police misconduct writ large.

It is important to clarify one point: it is irrelevant whether a specific officer or even the entire law enforcement community believes that a specific incident was justified and a lawful use of force. There is ample evidence that police and the general public do not see eye-to-eye on these issues,<sup>104</sup> and there is a common sentiment among the police community that media treatment of their profession is fundamentally unfair and inaccurate.<sup>105</sup> However, none of these findings undermine the self-evident assumption that police are aware of widespread public distrust, especially by individuals of color.

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Furthermore, some courts do not require direct evidence of actual societal awareness, only the potential for awareness evinced by available articles or blog posts.

*Id.* at 171 (footnotes omitted).

<sup>102</sup> *Id.* at 171.

<sup>103</sup> Geographic and temporal proximity likely counsel greater weight for race in the totality inquiry. While some incidents may have significant local salience but fail to resonate more broadly, many recent incidents, such as Michael Brown’s death, clearly gained national prominence.

<sup>104</sup> See, e.g., Renee Stepler, *Key Findings on How Police View Their Jobs Amid Protests and Calls for Reform*, PEW RES. CTR. (Jan. 11, 2017), <http://www.pewresearch.org/fact-tank/2017/01/11/police-key-findings> [<https://perma.cc/4C64-PRFL>] (finding that 67% of police officers believe recent deaths of black suspects during encounters with police are “isolated incidents,” while 60% of the public believes they are “[s]igns of a broader problem”).

<sup>105</sup> See John Gramlich & Kim Parker, *Most Officers Say the Media Treat Police Unfairly*, PEW RES. CTR. (Jan. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/01/25/most-officers-say-the-media-treat-police-unfairly> [<https://perma.cc/WQ2M-8KFQ>] (finding that 81% of police officers either “agree” or “strongly agree” that “the media treat police unfairly”).

Under either framing paradigm, any inquiry into the officer's perspective is relevant only insofar as it seeks to discern whether the officer knew or should have reasonably known that the citizen would have felt coerced. Whether an officer personally disagrees with the public characterization of a specific incident is doctrinally irrelevant; it is the existence and orientation of the public characterization and its self-evident impact on individuals of color that matters under the *Schneckloth* totality test.

Moreover, ascertaining law enforcement's understanding of beliefs held in communities of color is not a new endeavor for the courts. In rejecting a per se rule that flight from police in high-crime areas justifies a *Terry* stop,<sup>106</sup> Justice John Paul Stevens, in his partial concurrence and partial dissent in *Illinois v. Wardlow*, made an observation that has only proven more true in the intervening years:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." *Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.* Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient. In any event, just as we do not require "scientific certainty" for our commonsense conclusion that unprovoked flight can sometimes indicate suspicious motives, neither do we require scientific certainty to conclude that unprovoked flight can occur for other, innocent reasons.<sup>107</sup>

The "belie[f] that contact with the police can itself be dangerous" in communities of color was no secret in 2000, and it has only become more widely recognized through the growth of social media,<sup>108</sup> cell phone,

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<sup>106</sup> When an "officer has a reasonable suspicion that an individual is armed, engaged, or about to be engaged, in criminal conduct, the officer may briefly stop and detain an individual for a pat-down search of outer clothing." *Terry Stop / Stop and Frisk*, LEGAL INFO. INST.: WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/terry\\_stop\\_stop\\_and\\_frisk](https://www.law.cornell.edu/wex/terry_stop_stop_and_frisk) [https://perma.cc/A9N3-BBVP]. This is called a *Terry* stop, named after the Supreme Court case that promulgated the rule. *See Terry v. Ohio*, 392 U.S. 1 (1968). It is also known colloquially as "stop and frisk."

<sup>107</sup> *Illinois v. Wardlow*, 528 U.S. 119, 132–35 (2000) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (internal citations and footnotes omitted); *see also id.* at 132–35 & nn.7, 9 (citing studies supporting these observations).

<sup>108</sup> *Social Media Plays Major Role in National Debate on Police Violence*, PBS NEWSHOUR (July 15, 2016, 2:12 PM), <http://www.pbs.org/newshour/bb/social-media-plays-major-role-national-debate-police-brutality> [https://perma.cc/7RJJ-UA58].

dashboard, and body cameras that capture such episodes in vivid detail,<sup>109</sup> and large social movements, such as Black Lives Matter, that have pushed these issues to the fore of public discourse.<sup>110</sup> Even if an officer claimed ignorance of a recent incident or, more incredulously, the history of racialized policing, or if the officer sought to prove that the citizen likewise lacked such knowledge, it would be anomalous in the Fourth Amendment context to ignore “general awareness” of such widely accessible information and pervasive sociocultural beliefs.

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In sum, the Fourth Amendment generally prohibits warrantless searches, but a warrantless search is constitutional if a citizen consents—without being coerced—to the search. To determine whether consent was coerced, courts balance all relevant circumstances, including the characteristics of the citizen herself and the nature of her encounter with the officer. The inquiry into whether consent was coerced is a muddled combination of whether the citizen voluntarily consented to the search and whether the officer’s search was reasonable. There is significantly heightened distrust of law enforcement in communities of color, and these sentiments are (and likely have long been) well-known facts in the law enforcement community. Nearly forty years ago, the Court acknowledged that race may be a relevant circumstance to consider when evaluating the coerciveness of a consent search, but courts have since ignored race entirely in such cases.

## II. THE COERCIVE EFFECTS OF DISTRUST AND FEAR

There is a mountain of evidence documenting higher degrees of distrust of police in communities of color and suggesting that this distrust is, among other causes, the product of direct experiences with and indirect observations of excessive and unjustified use of force.<sup>111</sup> While the most

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<sup>109</sup> Laura Ly, *Can Cell Phones Stop Police Brutality?*, CNN (Nov. 19, 2014, 5:31 PM), <http://www.cnn.com/2014/11/18/us/police-cell-phone-videos> [<https://perma.cc/Z7MM-7BZJ>]; Daniella Silva, *Video Cases Show Tension Between Police, Transparency Advocates*, NBC NEWS (July 12, 2017, 7:22 PM), <http://www.nbcnews.com/news/us-news/video-cases-show-tension-between-police-transparency-advocates-n782401> [<https://perma.cc/4J2A-ENLP>].

<sup>110</sup> David Crary, *AP Poll: US Election Voted Top News Story of 2016*, AP (Dec. 21, 2016), <http://elections.ap.org/content/ap-poll-us-election-voted-top-news-story-2016> [<https://perma.cc/CW66-9Z44>] (noting that “Black Men Killed by Police” was the third most important story of 2016, trailing only the U.S. presidential election and Brexit).

<sup>111</sup> See, e.g., Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 858 (2016) (“[H]igh-profile cases of police misconduct[] contribute

egregious hallmarks of Jim Crow have abated and “smart on crime” has increasingly displaced an older, pure “tough on crime” approach,<sup>112</sup> this distrust persists and, some may argue, has even increased in recent years as developments in recording technology and media have created “more scrutiny of the police and their role in our democratic society today than there has been at any time since the 1960s.”<sup>113</sup> Professor Tom R. Tyler has aptly described this phenomenon:

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to the spread of legal cynicism within black communities.”); Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1011–12 (2005) (citing numerous studies and noting that “exposure to media reports on incidents of police misconduct (e.g., Rodney King) may adversely affect citizens’ confidence in the police, and this effect may be especially true for members of minority groups”); Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 314–15 (2012) (discussing the “institutionalization of distrust” caused by viral videos of police misconduct); Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RES. CTR. (Nov. 26, 2014), <http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america> [<https://perma.cc/56Y2-EQUY>] (noting that 76% of black Americans expressed not too much or no confidence in any investigation of the police shooting of Michael Brown in Ferguson, Missouri, while 52% of white Americans expressed confidence in the investigation); Rachel Gandy, *One Institution, Two Different Views: How Black and White Americans Regard the Police*, PRISON POL’Y INITIATIVE (July 2, 2015), [www.prisonpolicy.org/blog/2015/07/02/police\\_confidence](http://www.prisonpolicy.org/blog/2015/07/02/police_confidence) [<https://perma.cc/W6ZZ-NWW8>] (noting that in 2015, 57% of white Americans reported “a great deal” or “quite a lot” of confidence in police, but only 30% of black Americans expressed such confidence); Jeffrey M. Jones, *Urban Blacks in U.S. Have Little Confidence in Police*, GALLUP (Dec. 8, 2014), <http://www.gallup.com/poll/179909/urban-blacks-little-confidence-police.aspx> [<https://perma.cc/GFE8-CDA6>] (observing that 62% of urban, white Americans have confidence in police, while only 26% of urban, black Americans do); *Perceptions of Treatment by Police*, U.S. DEP’T OF JUSTICE: NAT’L INST. OF JUSTICE (Mar. 18, 2014), <http://www.nij.gov/topics/law-enforcement/legitimacy/pages/perceptions.aspx> [<https://perma.cc/74FU-FLJ8>] (“Frequent exposure to media reports of police abuse or corruption is a strong predictor of perceptions of misconduct and supports the belief that it is common. African-Americans who live in high-crime areas and who regularly hear others talk about police misconduct are especially likely to believe misconduct is common.”). The Chicago Police Accountability Task Force report issued in April 2016, “Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve,” also provides a methodical exposition of these dynamics. POLICE ACCOUNTABILITY TASK FORCE, *supra* note 54.

<sup>112</sup> *The Attorney General’s Smart on Crime Initiative*, U.S. DEP’T OF JUSTICE (Mar. 9, 2017), <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative> [<https://perma.cc/CG29-PXSC>]. While Attorney General Jeff Sessions has unwound some of this progress in the early months of the Trump Administration, see Jeff Sessions, *Being Soft on Sentencing Means More Violent Crime. It’s Time to Get Tough Again.*, WASH. POST (June 16, 2017), [https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b\\_story.html](https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b_story.html) [<https://perma.cc/EZ9M-9E5V>], the fact remains that a broad bipartisan consensus—at the federal and state levels—continues to support this shift. *New Poll Suggests Surprising Support for Criminal Justice Reforms Among Trump Voters*, CHARLES KOCH INST. (Apr. 26, 2017), <https://www.charleskochinstitute.org/news/new-poll-suggests-surprising-support-criminal-justice-reforms-among-trump-voters/> [<https://perma.cc/KLQ9-UTRH>].

<sup>113</sup> Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1540 (2017).

One can hardly turn on the news these days without seeing videos depicting instances of police conduct that some perceive as questionable, if not outright wrong and illegal. It seems likely that these incidents are not a new phenomenon but rather in step with a long history of police violence, particularly toward members of the African-American community. However, such violence—whether justified or not—has seldom been so widely accessible to the general public. Furthermore, video carries an emotional impact not present in written news reports.<sup>114</sup>

Such footage, combined with the “everyday contacts with officers that over time carry great weight in shaping public trust,”<sup>115</sup> only reinforces the sentiment that a request for consent to search may indeed be “backed by force.”<sup>116</sup>

While this racial disparity and the causal links are likely self-evident to most readers, these topics nonetheless deserve some explication here. “[O]ver the past ten years, the carceral state’s increasingly visible racial disparities—in particular its most punitive and aggressive actions—seem to have crossed a threshold of public recognition.”<sup>117</sup> But awareness of these disparities and their high costs is not of recent origin in communities of color, where incidents of excessive and unjustified use of force have left deep physical and emotional scars on direct victims, their families, and others throughout their proximate and national communities. Such traumatic events “overwhelm[] the nervous system” and “organize . . . [bodily] function[s] to respond and cope with the threat to” life.<sup>118</sup> The psychological effects of trauma are not only long-lasting but can also undermine one’s ability to refuse consent even in the absence of physical duress.<sup>119</sup> Importantly, it is the *perception* of danger (not objective indicia

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<sup>114</sup> *Id.* at 1543–44.

<sup>115</sup> *Id.* at 1557.

<sup>116</sup> Nadler & Trout, *supra* note 1, at 332.

<sup>117</sup> Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625, 1646 (2017).

<sup>118</sup> Walter Howard Smith, Jr., *The Impact of Racial Trauma on African Americans* 1 (Heinz Endowments, Policy Paper 2010), <http://www.heinz.org/userfiles/impactofracialtraumaonafrikanamericans.pdf> [<https://perma.cc/XN5A-TYZF>].

<sup>119</sup> In the context of sexual assault, Professor Deborah Tuerkheimer has identified the power of fear to coerce compliance and render physical force unnecessary. See Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 30 (2015) (“[A] narrow temporal frame does not correspond to the phenomenology of fear. From the perspective of the person experiencing it, fear of the defendant—whether based on his behavior just moments beforehand or years earlier—is fear of the defendant; either way, its presence can render unnecessary the use of force to achieve nonconsensual intercourse.”). While there are obvious and important differences between sexual assault and the situations discussed in this Note, Professor Tuerkheimer’s scholarship provides an insightful look into the sociopsychological power of fear.

of risk) that conjures the initial trauma and triggers “intense emotional response[s]” to future stimuli.<sup>120</sup> By repeatedly observing, hearing, reading, and, increasingly, watching video footage of these abuses in their communities, people in these communities experience powerful “secondary trauma”: “Living in black and poor neighborhoods increases one’s risk of experiencing traumatic events like . . . *police incidents* . . . and it increases the risk of experiencing secondary traumas in witnessing these dangers.”<sup>121</sup> Put simply, “vicarious experiences of the police can be as powerful in influencing one’s attitudes as direct, personal experiences.”<sup>122</sup>

The effect of such secondary trauma is significant and extends far beyond people who knew the victim or witnessed the incident firsthand.<sup>123</sup> Individual risk assessment and trust shift as trauma physically experienced by others is “internalized and vicariously experienced,”<sup>124</sup> and when built upon generations of discrimination, the effects are amplified.<sup>125</sup> Research suggests that in the context of police violence, news coverage can “trigger[] very strong emotion[s]” in African-American viewers because “[r]epeatedly witnessing African Americans suffering on television news is painful.”<sup>126</sup> Research also suggests that preexisting “negative perceptions” about police resulting from first-hand experience and/or socialization “are reinforced when they see media coverage of police abuses in other

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<sup>120</sup> Smith, Jr., *supra* note 118, at 1–2; *see also id.* (“Because perception shapes what is dangerous, past experiences become important in understanding how people interpret what situations and experiences are dangerous.”).

<sup>121</sup> *Id.* at 4 (emphasis added).

<sup>122</sup> Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425, 429 (2011) (citing studies).

<sup>123</sup> Erlanger A. Turner & Jasmine Richardson, *Racial Trauma Is Real: The Impact of Police Shootings on African Americans*, PSYCHOL. BENEFITS SOC’Y (July 14, 2016), <https://psychologybenefits.org/2016/07/14/racial-trauma-police-shootings-on-african-americans> [<https://perma.cc/WV6J-39T9>] (“In addition to the mental health symptoms of individuals who have encounters with law enforcement, those who witness these events directly or indirectly may also be impacted negatively.”).

<sup>124</sup> Weitzer & Tuch, *supra* note 111, at 1011–12 (internal quotations omitted).

<sup>125</sup> *See* Smith, Jr., *supra* note 118, at 3–4 (“Racism and other social biases describe social conditions that contain traumatic events for large numbers of persons.”); *id.* at 4 (“African Americans experience specific events of danger related to race that overwhelm the nervous system . . . . The aggressors may be black or white. These events stand out in our memory and have long-term impact on our perception of ourselves and our social environments.”). As noted by Dr. Smith, these dynamics exist even when the police officers are also persons of color, and therefore, the race of a consenting citizen should be a relevant consideration even when the arresting officer is also a person of color.

<sup>126</sup> *Id.* at 4.

cities.”<sup>127</sup> “With the proliferation of portable video recording technology, police misconduct that was once witnessed only by immediate bystanders can now be viewed around the world,” and “the rise of Internet-based news sources and 24-hour news networks provide[s] a powerful medium for broadcasting police misconduct.”<sup>128</sup> Thus, even when an incident of alleged police misconduct occurs halfway across the country, the pervasive belief for many persons of color that “police/citizen encounters are potentially life threatening” is further reinforced.<sup>129</sup>

This powerful sentiment in turn affects how people of color interact with law enforcement. The pervasive concern in communities of color that police are prone to use excessive force is heightened by the common perception that officers are not held accountable for their illegal actions, and thus, there is little deterrence of violent misconduct.<sup>130</sup> Deeply sown distrust increases one’s perceived likelihood that law enforcement would react disproportionately or violently if one refused to comply with police requests or instructions, even if that refusal were respectful and lawful. Even if a citizen knows her legal rights (which few people do), her internal risk calculus may support sacrificing intangible legal rights (with medium- and long-term consequences) for the decreased likelihood of short-term tangible (i.e., physical) harm.<sup>131</sup> The psychological effects of distrust and their manifestations during citizen–police encounters are surely only intensified with each reminder on the nightly news or Facebook of a recent violent incident. Indeed, research suggests:

[P]arents seemingly gave officers the benefit of the doubt during involuntary contacts and believed that if there was an altercation, youths were likely blameworthy. Alternatively, interviewees’ warnings to today’s youth about the importance of showing their hands, avoiding any sudden movements, and not running suggest a widespread concern about the appropriateness of . . . officers’ actions.<sup>132</sup>

According to Professor Devon Carbado, even in the absence of a recent high-profile incident, the presence of deep-seated “racial stereotypes

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<sup>127</sup> Brunson & Weitzer, *supra* note 122, at 439–40 (discussing the “multiplier effect” of “media reinforcement of preexisting negative opinions and adverse personal experiences” in communities of color).

<sup>128</sup> Desmond et al., *supra* note 111, at 857.

<sup>129</sup> Carbado, *supra* note 51, at 1014 n.274.

<sup>130</sup> Bruce Drake, *Divide Between Blacks and Whites on Police Runs Deep*, PEW RES. CTR. (Apr. 28, 2015), <http://www.pewresearch.org/fact-tank/2015/04/28/blacks-whites-police/> [<https://perma.cc/32D5-Q8KJ>] (“Seven-in-ten blacks said police forces across the country did a poor job of holding officers accountable when misconduct occurred, compared with 27% of whites.”).

<sup>131</sup> See Carbado, *supra* note 51, at 1014.

<sup>132</sup> Brunson & Weitzer, *supra* note 122, at 443–44.

[creates] . . . greater pressure for blacks to say yes to consent searches than . . . for whites.”<sup>133</sup> This is because persons of color are aware of the racial stereotype that people of color are more prone to be criminals and thus they are less likely to assert their rights because such conduct “can racially aggravate or intensify the encounter, increasing the person of color’s vulnerability to physical violence, arrest, or both.”<sup>134</sup> Accordingly, it would be strange to suggest these psychological effects—which are regularly triggered with visceral reminders of ongoing racialized violence—are irrelevant to the totality of circumstances affecting the voluntariness of one’s consent.

While some, including several current Justices, believe that acknowledging and addressing the salience of race in the relationship between people and the state may itself contribute to racial discrimination,<sup>135</sup> Justice Sonia Sotomayor’s impassioned dissent in *Utah v. Strieff*<sup>136</sup> makes quite clear that such deliberate ignorance of the relevance of race in warrantless searches requires nothing short of willful blindness. Invoking the collective voice of Michelle Alexander, James Baldwin, W.E.B. Du Bois, and Ta-Nehisi Coates, Justice Sotomayor describes the myriad ways “black and brown parents” have, for decades, tried to keep their children safe, “all out of fear of how an officer with a gun will react to them.”<sup>137</sup> She recognizes that “the countless people who are routinely targeted by police are [not] ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”<sup>138</sup> If a person of color feels that her “body is subject to invasion while courts excuse the violation of [her] rights,”<sup>139</sup> her consent to search should quite clearly raise suspicions about coercion. While Justice Sotomayor spoke alone on the Court in making this bold pronouncement, she joined a growing chorus of voices demanding that our justice system take seriously the complex and important role of race in the law—the Fourth Amendment in particular.

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<sup>133</sup> Carbado, *supra* note 51, at 1017.

<sup>134</sup> *Id.* at 1014.

<sup>135</sup> *See, e.g.,* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>136</sup> 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

<sup>137</sup> *Id.* at 2070.

<sup>138</sup> *Id.* at 2071.

<sup>139</sup> *Id.* at 2070.

III. RACE MUST BE CONSIDERED WHEN EVALUATING  
CONSENT TO SEARCH

This Note has urged that past and ongoing mistreatment of communities of color has heightened their distrust of law enforcement; facilitated by new technology and media, there is broad social awareness of new citizen–police encounters that end violently; this coverage further heightens and reinforces the distrust well beyond the immediate victims; this distrust manifests by coercing consent to search; courts are supposed to consider all relevant circumstances when determining whether a consent to search was permissibly granted or involuntarily coerced; and, to date, courts have failed to recognize the coercive effect of this distrust or its amplification in the aftermath of a highly publicized incident. Thus, it is long past time that courts realize the unfulfilled promise from *Mendenhall* and recognize the importance race deserves under the *Schneckloth* totality test. To be sure, heightened distrust caused by the legacy and recent reminders of police violence is only one of many reasons why race may be relevant to the coerciveness of a consent search. That said, it captures an important reason. Merely urging courts to take race seriously as a factor without analytical guidance would, based on past practice, be a fruitless exercise, as they have proven incapable of giving that consideration real weight absent clear and specific articulation of why it matters so much.

While there has been an “ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent,”<sup>140</sup> this conception of race easily comports with factors routinely considered in consent search cases, it would serve the fundamental purpose of the totality inquiry, and it is applicable even if the totality inquiry is limited to the beliefs of a reasonable officer. Serious consideration of race would pay homage to Justice Sotomayor’s demand that our legal institutions open their eyes to painfully clear instances of institutionalized racism and the resulting injustices.<sup>141</sup> The Fourth Amendment is an ideal focal point for addressing these issues because it allows courts to consider systemic injustices vis-à-vis their effects on individuals through person-to-person interactions. While this conception of race as a factor in the totality inquiry raises line-drawing questions and concerns about behavioral incentives, the inherent advantage of a totality test is that it allows for theoretical and general problems to be ironed out in the practical application to specific facts.<sup>142</sup>

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<sup>140</sup> Nadler, *supra* note 37, at 155; *see generally* Cuevas & Jacobi, *supra* note 77.

<sup>141</sup> *See supra* notes 136–139 and accompanying text.

<sup>142</sup> This Note does not separately discuss the application of this factor to third-party consent, an especially puzzling aspect of Fourth Amendment law. *See* Stephanie M. Godfrey & Kay Levine, *Much*

A. *Race Is Indistinguishable from Factors Routinely Considered Under Schneckloth*

Many factors routinely considered under the totality of circumstances test rely in large part on unsupported behavioral assumptions about certain groups.<sup>143</sup> For example, there is a presumption that a woman's granting of consent is more likely the product of coercion, based on the (unproven) assumption that a woman is more likely than a man to apprehend consequences for noncompliance with police requests. As discussed above in Section I.A, courts employ equally blunt assumptions about age, intelligence, and other factors. To the extent courts consider as relevant facts not readily observable to an officer, they contemplate a citizen's prior encounters with police and her familiarity with the criminal justice system and assume that hardened criminals are less likely to be coerced, while citizens suffering prior abuse at the hands of police are more likely to be. Courts also consider aspects of the citizen–police encounter that are beyond the control of the officer, such as a menacing nearby crowd.

Recognizing race as an important and relevant factor naturally follows. The assumption that a person of color is more likely to feel coerced into consenting (and that this coercive effect is amplified by either local or high-profile incidents of reported police brutality) is no different (logically or doctrinally) than the assumptions that motivate other factors. Unlike the experience of a single person's encounters with law enforcement, which is not readily apparent to an officer, it is readily obvious that communities of color have less trust after decades of oppression or persistent local mistreatment at the hands of a particular officer.<sup>144</sup> Importantly, while a given officer does not have control over the misconduct of other officers in other precincts, wards, cities, and states, and the corresponding distrust it may engender, that does not mean the officer

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*Ado About Randolph: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 735–38 (2007) (describing third-party consent jurisprudence). Yet, there is no reason to suspect this factor would apply differently when determining whether a third person consented to the search of (typically) another's private property. Fear of retribution or mistreatment is just as pronounced when the police seek a person's consent, even if the person or her property are not the targeted subject of the search. A third party—even if she had nothing to hide and knew she had done nothing illegal—is no less susceptible to the coercive effects of distrust and fear.

<sup>143</sup> This Note takes no position on the accuracy of these group-based assumptions, other than to note that these assumptions, without empirical support, routinely guide courts in their *Schneckloth* analysis. Even if empirical proof were required, there is abundant research identifying racially correlated coerciveness caused by distrust and fear.

<sup>144</sup> Noah Berlatsky, *When Chicago Tortured*, ATLANTIC (Dec. 17, 2014), <https://www.theatlantic.com/national/archive/2014/12/chicago-police-torture-jon-burge/383839/> [<https://perma.cc/4G69-YRZJ>] (recounting the horrors committed by Chicago Police Commander Jon Burge).

is unaware of such dynamics, nor is there any doctrinal requirement that an officer have control over a coercive condition for it to be relevant.<sup>145</sup> When a citizen is stopped by an officer, she has no way to know whether that officer is in the majority of peaceful, careful, and respectful officers or in the minority of short-tempered, violent ones.

Undoubtedly, conceiving race under *Schneekloth* raises some line-drawing and weight questions that may not be implicated by other factors. As noted below, many of these questions are unanswerable *ex ante* because the totality test requires contextual and fact-bound analysis.<sup>146</sup> Thus, instead of outlining a robust set of bright-line decisional rules for applying this factor, this Note suggests that commonsense and sensitivity to our nation's racial history should guide judicial application.

### B. *The Totality Inquiry Is Incomplete Without Race*

The failure to acknowledge the relevance of race ignores a potentially significant coercive condition in certain requests for consent. Yet, *Schneekloth* commanded that, to respect "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness,"<sup>147</sup> courts must apply "careful scrutiny [to] all the surrounding circumstances."<sup>148</sup> Heightened and widespread distrust in communities of color is undoubtedly one such circumstance, as are high-profile incidents of police misconduct that intensify that distrust. *Schneekloth* made plain that even "subtly coercive" factors require scrutiny,<sup>149</sup> so, that nuance may be required to understand a topic as complex as race hardly excuses its consideration. Thus, the only basis for continuing to ignore race would be if historical mistreatment and contemporary high-profile incidents had *zero* psychological impact: even if the quantum of effect is small, which it likely is not, there is no reason to excuse courts from considering this relevant factor. The proper process would be to consider race and accord it the weight it deserves in conjunction with the other facts at hand. The notion that the effect is indeed zero is demonstrably false, so the totality inquiry cannot be complete until race is routinely considered in consent search

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<sup>145</sup> Judges primarily concerned with behavioral incentives may balk at this rule because it suggests that there is a baseline degree of coerciveness that a police officer cannot eliminate, regardless of her behavior. And they would be correct: that is reality. While the foundational coerciveness is beyond the control of a given officer, consistent consideration of race would encourage her to reduce coerciveness in all other aspects of the encounter she can control. Thus, the doctrine would still incentivize good and deter bad behavior. *See infra* Section IV.C.

<sup>146</sup> *See infra* Sections IV.D–E.

<sup>147</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

<sup>148</sup> *Id.* at 226 (emphasis added).

<sup>149</sup> *Id.* at 229.

cases. It is a fair criticism to suggest that totality tests are, by design, vulnerable to abuse by “unfettered discretion [in] the trial court” because a “judge can emphasize or downplay any factor she wishes” when no “particular factor [is given] controlling weight.”<sup>150</sup> However, utter disregard of race during the totality inquiry would be legal error, and the complete omission of such a relevant and potentially significant consideration would not be harmless in many cases. However, there is reason to worry that, absent legislative action or clear Supreme Court guidance, appeals courts might find the error harmless in some, if not many, cases.

American scholars and jurists have, rightfully, spent considerable ink trying to parse the line between consent and coercion in the Fourth Amendment context and elsewhere. The stakes are exceptionally high because this distinction raises profound questions about free will, self-determination, and individual liberty, concepts foundational to the American social and legal compact.<sup>151</sup> Misidentifying coerced compliance or cooperation as voluntary consent offends our commitment to free will as a guiding jurisprudential principle<sup>152</sup> and calls into question the legitimacy of related state action. That is precisely what happens when judges continue to walk through the *Schneckloth* totality inquiry while ignoring race. Just as police officers can no longer reasonably deny knowledge of widespread citizen distrust and apprehension in light of ubiquitous coverage and discussion of alleged misconduct, judges no longer can plead ignorance of the psychological impact on persons of color.

### *C. Race Is Important Regardless of How Courts Frame the Consent Inquiry*

Regardless of whether a court conceives the consent to search inquiry as a question of reasonableness or voluntariness, through the exclusive eyes of an officer or borrowing aspects of the citizen’s perspective, race is both relevant and important. First, consider the pure reasonableness conception. Under this paradigm, the Fourth Amendment permits all consent searches

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<sup>150</sup> David T. Huang, Note, “*Less Unequal Footing*”: *State Courts’ Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 447–49 (2001).

<sup>151</sup> See Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403 (discussing, and critiquing, the centrality of free will in American criminal law).

<sup>152</sup> See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 215 (1989) (“[Consent] provides perhaps the single most prevalent paradigm structuring our thinking about law, society, morality, and politics.”); see also Sean Daly, Note, *Free Will Is No Bargain: How Misunderstanding Human Behavior Negatively Influences Our Criminal Justice System*, 15 NEV. L.J. 992 (2015) (noting the importance of free will in American jurisprudence).

where the officer reasonably believes that a citizen grants consent.<sup>153</sup> We reasonably assume that most, if not all officers, actually know about widespread apprehension in communities of color around police violence, and at the very least, courts will impute such knowledge to them because such information is broadly and easily available. Given that knowledge, it would be unreasonable for any such officer to ignore that knowledge and believe that this apprehension did not affect her interactions with persons of color, and in particular, did not make such persons feel (at least somewhat) coerced into granting consent to search. Second, the consideration of this factor under the more prevalent blended reasonableness and voluntariness conception is even more straightforward. Under this paradigm, the consent exception to the Fourth Amendment does not apply when a person involuntarily granted consent to search. The pervasive awareness of police misconduct creates a fundamentally coercive dynamic when a person of color is asked to consent to search, calling into question the voluntariness of any such consent. Assuming (as we can) that all police officers have some awareness of this apprehension, they are put on notice that any request of consent is affected, to a greater or lesser extent, by this coercive dynamic.

To be clear, while courts have wrongfully ignored race in their *Schneekloth* analysis, consideration of race would not require courts to explicitly overturn prior case law. *Mendenhall* indicates that race has long been a proper consideration, notwithstanding its short shrift in the years since. Even if *Drayton* and *Bostick* were read as implicitly abrogating the nod to race in *Mendenhall*, the ubiquitous social awareness of current incidents of police misconduct against people of color and the unparalleled amplifying effect of video footage offer an easy means of distinguishing those cases. In other words, including race as a factor would not require courts to admit error in decades of post-*Schneekloth* case law finding consent of persons of color voluntary despite broad distrust of law enforcement. While dubious, it is not as inconceivable that courts indeed lacked knowledge of such sentiments or could have doubted that that police officers knew or had reason to know that persons of color harbored heightened apprehension. However, the current technology and media landscape has rendered denials as to knowledge of such distrust and its source implausible.

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<sup>153</sup> See Burke, *supra* note 16.

## IV. ADDITIONAL CONSIDERATIONS

Considering race in this manner raises both theoretical and practical concerns, as do all the factors listed in *Schneekloth* and identified since. Some of these are less worrisome than they first appear, but there are certainly others that merit additional review. While this Note does not explore in full detail all such important questions, the following discussion provides a starting point for further analysis. To be sure, recent developments in news and social media have created increasingly divergent and contradictory constructed realities for segments of the American public that call into question the wisdom of permitting communal sentiments to drive legal doctrine. Similarly, framing the consent inquiry too much on such sentiments could lead to absurd results if expanded beyond this context, as unreasonable fears stemming from conspiracy theories could shape Fourth Amendment law. This Part also discusses how consistent consideration of race in consent search cases might change behavioral incentives for police officers. Finally, it addresses arguments that merely including race as one of many factors in a totality inquiry will be inadequate to address systemic inequities.

*A. Media Trends*

Recent events have highlighted the worrisome degree to which Americans obtain news from sources that reinforce prior beliefs.<sup>154</sup> In a world of self-selected social networks, targeted and partisan news outlets, and others exclusive feedback loops, it is not inconceivable that a story pervading one segment of the population barely registers on the radar of another. Many experts worry this problem is likely to worsen in the coming years.<sup>155</sup> For example, a reported incident of police violence could spread like wildfire through communities of color around the country, but, in the short term, law enforcement officers may know nothing about it. This is a legitimate concern, but this problem is not unique to the consent–coercion inquiry. As Professor Tokson notes, courts mostly ignore such nuance in presuming societal knowledge when information is generally accessible,<sup>156</sup> and there is no principled reason to treat this Fourth Amendment inquiry differently. Under this prevailing conception of presumed knowledge for

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<sup>154</sup> See Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROCEEDINGS NAT'L ACAD. SCI. U.S. 554 (2015), <http://www.pnas.org/content/113/3/554.full.pdf> [<https://perma.cc/WB47-9H37>].

<sup>155</sup> See generally Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RES. CTR. (Oct. 19, 2017), <http://www.pewinternet.org/2017/10/19/the-future-of-truth-and-misinformation-online> [<https://perma.cc/G34U-JV65>].

<sup>156</sup> See *supra* notes 101–102 and accompanying text.

generally accessible information, it seems unlikely that an officer could successfully rebut the presumption—her news sources, social media community, and formal and experiential education would have put her on notice of a recent incident of police misconduct and the history of distrust. The only scenario in which this dynamic could prove troublesome would be in the *immediate* aftermath of a high-profile incident. Even still, in such a case, the question would be what additional weight race deserves in the totality inquiry—i.e., whether any additional coercive effect caused by a recent uptick in already heightened distrust is to be considered when it is unclear if information about the incident was not yet generally accessible when the consent search in question occurred.

To be sure, there are legitimate concerns about the increasingly prevalent role of fake news,<sup>157</sup> sensationalized reporting of real events, and the degree to which widespread apprehensions originate from such misleading narratives. Entirely fabricated or materially embellished reporting of a violent incident may lead to a sincere increase in distrust, and it may seem difficult, at first blush, to distinguish such a scenario from instances of actual abuse. Yet, this wrinkle is less problematic than it seems. In *Bostick*, the Court refused to consider the defendant's knowledge of his possession of contraband as an indication that he would not have voluntarily consented to search.<sup>158</sup> In so doing, the Court suggested that certain sentiments, even if sincerely held, can be excluded from the totality inquiry if they would produce absurd results. It would not be difficult for courts to likewise employ their equitable discretion here.

Because there is no reasonable dispute as to the legitimacy and intensity of the heightened distrust of police in communities of color caused by their historical mistreatment, the only questions are what weight should be given to race in the totality inquiry and to what degree that weight should increase as a result of and in the aftermath of a recent high-profile incident. While judges should not be asked to determine the validity or authenticity of possibly fake news, it should not be difficult to respect the core rationale behind the relevance of race while preventing absurd consequences.<sup>159</sup>

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<sup>157</sup> See, e.g., Craig Silverman, *This Analysis Shows How Viral Fake Elections News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 4:15 PM), <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook> [https://perma.cc/E6XX-VSN3].

<sup>158</sup> Florida v. Bostick, 501 U.S. 429, 437–38 (1991).

<sup>159</sup> Another other related concern is that recognizing the effect of news media in this way could incentivize media outlets with supposed “anti-police” leanings to increase coverage of incidents of police violence (and conversely, encourage outlets with “pro-police” leanings to decrease coverage). While the degree of media coverage is indeed relevant, it seems highly unlikely such a minor change in

*B. Reliance on Other Communal Sentiments*

While pervasive distrust of law enforcement in communities of color is an appropriate consideration in a consent to search analysis, there are risks to incorporating other communal sentiments into the totality inquiry. For instance, significant percentages of adults in the United States believe that the following allegations about the government are “definitely” or “probably true”: that the U.S. government helped plan the September 11, 2001 attacks (25%); that Barack Obama was born in Kenya (36%); that the Hillary Clinton presidential campaign orchestrated child trafficking through a pizza shop in Washington D.C. (38%); and that millions of illegal votes were cast in the 2016 presidential election (46%).<sup>160</sup> In addition, 48% of U.S. adults believe in the existence of a “deep state,” which is a cabal of “military, intelligence, and government officials who try to secretly manipulate government policy.”<sup>161</sup> Such beliefs likely correspond with a generally heightened distrust of government, which may translate into distrust of law enforcement.<sup>162</sup> Following the logic of this Note, should these pervasive sentiments not also be considered in the totality inquiry if a person subscribing to them is challenging the validity of a consent search? In other words, does considering race and affording it greater weight in the aftermath of a high-profile incident of police misconduct compel courts to likewise legitimate unfounded but pervasive beliefs? Permitting such unfounded—though sincere—sentiments to shape Fourth Amendment law would be dangerous. Fortunately, continuing to ignore these sentiments is entirely consistent with consideration of racially correlated distrust.

The consent search doctrine already explicitly identifies an individual’s prior experience with law enforcement as a relevant consideration, though, in practice, certain courts have proven unwilling to consider any aspects of the citizen–police encounter that were not readily apparent to the officer. In such courts, the coercive effect of the distrust that follows from fierce conspiratorial beliefs could only be considered if the

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criminal procedure would materially impact coverage decisions, given the myriad considerations that inform such decisions and the remote, uncertain, and minor “benefits” that changes in coverage would yield even for the most partisan of outlets (i.e., a slight change in the probability of suppressing evidence in the prosecution of unknown defendants at indefinite future dates).

<sup>160</sup> *The Economist/YouGov Poll*, YOUGOV 55, 58, 60–61 (Dec. 17–20, 2016), [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ljv2ohxmzj/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxmzj/econTabReport.pdf) [<https://perma.cc/63QA-CPLG>] (surveying 1376 U.S. adults).

<sup>161</sup> *Americas [sic] Say Media and Trump Regularly Spread Falsehoods*, WASH. POST (Apr. 27, 2017), [https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2017/04/27/National-Politics/Polling/release\\_469.xml](https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2017/04/27/National-Politics/Polling/release_469.xml) [<https://perma.cc/D9G9-DLJK>].

<sup>162</sup> Michael J. Wood et al., *Dead and Alive: Beliefs in Contradictory Conspiracy Theories*, 3 SOC. PSYCH. & PERSONALITY SCI. 767, 768 (2012) (“Someone who believes in a significant number of conspiracy theories would naturally begin to see authorities as fundamentally deceptive . . .”).

resulting distrust is sufficiently publicized such that it is considered general knowledge and members of the community are readily identifiable. While it is conceivable that such a community could exist, today's disillusioned and conspiratorial hardly represent a discrete and insular minority. Thus, it would be appropriate to limit the consideration of communal sentiments to the unique status of race, a distinction that has long served as a protected class. This distinction alone justifies the limitation, as does the abundant evidence that communities of color have experienced disproportionately high rates of potentially coercive contacts with law enforcement.<sup>163</sup>

### C. Behavioral Incentives

While the validity of a consent search can arise as an issue in the civil context (i.e., a *Bivens* action or § 1983 claim), the more common context involves the exclusionary rule and a motion to suppress the evidence obtained pursuant to the search.<sup>164</sup> While it once may have had broader justifications, the exclusionary rule has been largely limited to the deterrence of undesirable police behavior.<sup>165</sup> That is, if exclusion of certain evidence would not deter the police from committing bad acts in the future, then such evidence is admissible notwithstanding its unconstitutional origin. While the question of constitutionality under the Fourth Amendment and the application of the exclusionary rule are two distinct inquiries, it is easy to see how the distinction disappears in a circumstance such as this, where it is well-settled that involuntary consent requires exclusion of subsequent evidence. In other words, the deterrence concern that motivates the exclusionary rule very likely colors the Court's application of consent search doctrine to new factual scenarios.

Fortunately, meaningful consideration of race would seemingly have a positive, though likely minor, behavioral impact on law enforcement. Knowing that courts will explicitly consider the heightened distrust held in communities of color when determining the voluntariness of consent, police would have extra incentive to be respectful, calm, and unthreatening

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<sup>163</sup> See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding unconstitutional the New York City Police Department's stop and frisk policies and practices).

<sup>164</sup> The exclusionary rule "prevents the government from using most evidence gathered in violation of the United States Constitution." *Exclusionary Rule*, LEGAL INFO. INST.: WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/exclusionary\\_rule](https://www.law.cornell.edu/wex/exclusionary_rule) [<https://perma.cc/H97P-PW54>].

<sup>165</sup> See Carbado, *supra* note 51, at 1006 ("The most commonly invoked rationale for the exclusionary rule is deterrence."); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012) ("[C]ourts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior . . ."); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 821–22 (2013) (lamenting that the Court has shaped the contours of the exclusionary rule exclusively around concerns of deterrence).

to extinguish the inherently coercive nature of their encounter and ensure that as many of the other *Schneckloth* factors weigh in their favor. While it is conceivable that consideration of race in this manner could “dampen the ardor”<sup>166</sup> with which officers seek consent to search, any changes in behavior would likely be modest and salutary, ensuring their behavior tracks more closely with “positive” factors (such as increased politeness, affirmative disclosure of right to refuse consent, etc.). While some encourage law enforcement to take full advantage of the power imbalance inherent to these encounters,<sup>167</sup> this slight behavioral change would be a welcome correction in light of other excesses permitted by law and occurring in practice. In other words, it seems unlikely that considering race would risk losing many opportunities for voluntary consent. On the other hand, others may find consistent consideration of race in the consent-coercion-inquiry inadequate to address the broad array of issues that beseech citizen-police relations in communities of color.<sup>168</sup> For example, Professor Carbado suggests that social forces, police training and culture, and qualified immunity doctrine explain much of “the persistence of . . . ‘blue-on-black violence.’”<sup>169</sup> To be sure, the changes advocated in this Note are no panacea, but rather immediately attainable adjustments that could materially improve a flawed doctrine.

Setting aside the empirical question of whether consistent inclusion of this factor would reduce the total number of consent searches (because it is speculative) and the normative question of whether that reduction would be a social good (because it is disputable), it seems quite likely that any resulting changes in *how* police engage with people of color and request their consent would be overwhelmingly positive: there would be stronger incentives for respecting civil liberties and applying force more evenly across all communities.

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<sup>166</sup> *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

<sup>167</sup> *See, e.g.*, Williams, *supra* note 34, at 80 (“[The] power to withhold consent to a search is there, but the search target’s disadvantages of ignorance, fear, and resignation are accepted as vulnerabilities we expect law enforcement to exploit to good effect.”).

<sup>168</sup> *Cf.* Robert V. Ward Jr., *Consensual Searches, the Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 *TOURO L. REV.* 451, 454 (1999) (“The doctrine of consent currently applied by the Court encourages officers to take advantage of ordinary citizens. These rules are not sufficiently sensitive to the disparate power relationship that exists between the officer in uniform and members of the public.”).

<sup>169</sup> Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *GEO. L.J.* 1479, 1479 (2016).

*D. Questions of Line Drawing and Weight*

Explicitly including race in the *Schneckloth* test would ensure courts are accurately accounting for the *totality* of circumstances influencing the voluntariness of consent, but important questions of line drawing and weight would indeed remain. The flexibility of a totality test allows judges to apply broad principles to specific fact patterns, but there is a risk that this factor could be misapplied or functionally rendered meaningless without clear guidelines for its application. For how long should a contemporary incident trigger heightened weight for race? Need a contemporary incident involve a person of color to trigger heightened weight? Do these rules apply with equal force as applied to Hispanic communities as to black communities? Does increased factual similarity between a request for consent and a contemporary incident further increase the weight? What degree of harm is necessary for an incident to trigger heightened weight? Serious bodily injury? Death? Should the degree of harm incurred during recent incidents affect the weight? While it is reasonable to presume societal knowledge of historical mistreatment of communities of color by police and ongoing citizen–police incidents today, given that we are merely a generation or two removed from the height of the Jim Crow Era and contemporary events receive blanket coverage, what happens if—let us hope—such incidents grow increasingly rare in coming years and relations between law enforcement and communities of color improve markedly? While it seems quite unlikely we will reach a point in the foreseeable future where race is irrelevant, given centuries of race-based systemic oppression,<sup>170</sup> how much less weight should race be given if relative distrust is on the decline? These are important and difficult questions, and they deserve much more attention than this Note can provide. Nonetheless, these are minor compared to the threshold question of whether race should be considered at all when evaluating the voluntariness of a consent search today.

*E. Inherent Flaws of Totality Test*

This Note can barely scratch the surface of these legitimate, complex questions. And as noted, there are no clear guidelines for weighing *any* factors under *Schneckloth*—a totality of the circumstances inquiry, by design, lacks bright-line principles to predictably guide factor balancing,<sup>171</sup> and instead empowers a judge to reach the most just outcome given the

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<sup>170</sup> I would respectfully disagree with the Court’s suggestion that we are approaching such a time. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing an expectation that “25 years from now,” racial preferences in collegiate admissions would no longer be necessary).

<sup>171</sup> Carbado, *supra* note 51, at 1015.

specific facts at hand.<sup>172</sup> This is the commonly cited tradeoff between standards and rules.<sup>173</sup> Under a totality of the circumstances test, it is not uncommon for judges to downplay the importance of certain factors in adjudicating the cumulative effect of all relevant considerations. Consequently, some might fear that judges would merely pay lip service to race in the totality inquiry while affording it such little weight to render the inclusion meaningless. Such critics may insist that inclusion of race as one of many aspects of a test subject to significant judicial discretion is insufficient to address these systemic sociocultural and legal concerns—rather, they might contend, such uncertainties counsel in favor of creating a *presumption* of coercion until and unless incidents of police violence (and their sociocultural salience) disappear, or at the very least, in the immediate aftermath of an incident that dominates mainstream news outlets. A presumption would eliminate many line-drawing and weight problems and provide bright lines within consent search doctrine. Law enforcement already has the burden of proving consent free of coercion, so this presumption would only represent a change in degree (not in kind) in the burden of proof.

Others would surely argue that such a presumption would materially impair the functioning of law enforcement by discouraging police-initiated encounters and invalidating too many genuinely consensual searches that lead to the discovery of contraband. Thus, this Note's recommendation that courts treat race as one, but exceptionally important, factor may serve as a workable compromise. Consideration of race in the consent search inquiry is hardly a panacea for structural racism and the resulting injustices, as Fourth Amendment doctrine is littered with rules that encourage discriminatory policing and rationalize its effects.<sup>174</sup> Nonetheless, it is a step in the right direction.

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<sup>172</sup> Cf. LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 10 (2014) (noting Justice Stephen Breyer's "[a]llerg[y] to bright-line rules and strict categories" and "prefer[ence] that the Court identify all relevant considerations and then balance them to reach the right, workable result under the circumstances").

<sup>173</sup> See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); The Federalist Society, *Rules Versus Standards in Constitutional and Statutory Interpretation [Showcase Panel II]*, YOUTUBE (Nov. 18, 2016), <https://www.youtube.com/watch?v=K3eNRMs56bw> [<https://perma.cc/4KJQ-L74A>] (panel discussion on this trade-off reflecting upon Justice Scalia's legacy on the Court, featuring, among others, Professor Akhil Reed Amar and Judge Frank Easterbrook).

<sup>174</sup> See generally Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2016).

## CONCLUSION

In January 2017, the U.S. Department of Justice released a scathing report on the Chicago Police Department, which found that “trust between the CPD and the people it serves . . . has been broken, despite the diligent efforts and brave actions of countless CPD officers . . . by systems that allowed CPD officers who violate the law to escape accountability.”<sup>175</sup> By recognizing the psychological impact of historical and recent violence committed by law enforcement against people of color, courts can vindicate long-ignored constitutional violations, honor the deep-seated fears of communities victimized for generations by private and state-sanctioned violence, and encourage law enforcement to shift additional focus to rebuilding trust in these communities. Such a change could very well increase the rate of cooperation between police and the citizenry, allowing law enforcement to better ferret out the crime targeted by their prior coercive—and thus illegitimate—consent searches. Nothing prevents state and federal judges from immediately breathing life into this meaningful aspect of consent search jurisprudence identified by the Supreme Court in 1980 but ever since ignored.

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<sup>175</sup> U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE N.D. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 1 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/Nz8R-KW9U>].