

Fall 2001

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Recommended Citation

Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211 (2001-2002)

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RECONSTRUCTING CONSENT

MARCY STRAUSS*

*"Will you walk into my parlor? Said the Spider to the fly."*¹

Every year, I witness the same mass incredulity. Why, one hundred criminal procedure students jointly wonder, would someone "voluntarily" consent to allow a police officer to search the trunk of his car, knowing that massive amounts of cocaine are easily visible there?² The answer, I have come to believe, is

* Professor of Law, Loyola Law School. J.D. 1981, Georgetown University Law Center; B.S. 1978, Northwestern University. As always, I am grateful to my dear friend Erwin Chemerinsky for reading and critiquing this manuscript. Thanks are owed to my research assistants Karin Necessary, Kris An, James Warren, Lisa Jones, and especially Aaron Agness. This Article is dedicated with love and admiration to my oldest son, Jeffrey Chemerinsky, as he reaches the age of legal consent.

¹ See <http://www.bartleby.com/66/52/29152.html> (citing MARY HOWITT, OXFORD BOOK OF CHILDREN'S VERSE (1973)).

² In case after case, students read about suspects who supposedly told the police without hesitation to "go right ahead and search," when incriminating evidence was obviously going to be discovered. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991) (Bostick consented to search of his luggage where contraband was easily discovered). One author, tongue in cheek, suggested that Bostick went along because he was feeling guilty and wanted to be caught. Stephen Chapman, 'Voluntary' Consent and Other Judicial Fantasies, CHI. TRIB., Nov. 24, 1996, at 23; see also *People v. Reddersen*, 992 P.2d 1176 (Colo. 2000) (defendant agreed to search of person and drugs were found in pockets). Granted, there are times when a person consents to a search because he or she believes that the contraband is well hidden. See, e.g., *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir. 1999) (police had to pry the interior door panel apart to find the drugs). Some courts consider how well hidden the evidence is as a factor in determining voluntariness. *United States v. Dortch*, 199 F.3d 193, 201-02 (5th Cir. 1999).

This incredulity is not only expressed by law students. See Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 187 (1991) ("What is baffling about consent to search is why it is ever given. Why should anyone surrender to the police, perhaps without a whimper, an interest recognized both practically and legally to be the first order and often resulting in the discovery of evidence that incriminates the consenter?"); see also Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 416 (1986) (discussing views of judges who find it hard to believe that an individual really consented voluntarily); *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954) (no sane man would be willing to let police search where contraband would be discovered); cf. *United States v. Forbes*, 181 F.3d 1, 7 (1st Cir. 1999) (in evaluating credibility, the

that most people don't willingly consent to police searches. Yet, absent extraordinary circumstances, chances are that a court nonetheless will conclude that the consent was valid and the evidence admissible under the Fourth Amendment.³ Although courts pay lip service to the requirement that a person's consent to a search must be "the product of a person's free will and unconstrained choice" in order to be valid,⁴ in reality that requirement means very little. Typically, courts simply recite the accepted notion that "the government has the burden of demonstrating a voluntary consent"⁵ without much further analysis. Even if the court delves further, it almost always fails to consider whether the coercion inherent in the "request" to search, made by a police officer should vitiate the consent. And courts almost never determine whether particular races or cultures may be particularly susceptible to such authoritative pressures. Only if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent.⁶

Why is this so? The real problem is that the idea of voluntary consent, if seriously considered at all, has come to be a de-

court found that it was unlikely that the defendant, an individual familiar with the criminal justice system, would consent to the search of a car he knew contained drugs).

³ The Fourth Amendment guarantees people the right to be free from unreasonable searches and seizures. Evidence discovered in violation of the Fourth Amendment may be suppressed under the exclusionary rule. See *Weeks v. United States*, 232 U.S. 383 (1914) (Fourth Amendment bars evidence obtained in illegal search or seizure in federal prosecution); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment through the Due Process Clause of the Fourteenth Amendment to apply to states, therefore holding evidence obtained in violation of the Fourth Amendment is inadmissible in state court). As the Court in *Weeks* noted, "[If evidence seized illegally can be used] against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393; see Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) (discussing the origins of the exclusionary rule).

⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-56 (1973); see also *Bumper v. North Carolina*, 391 U.S. 543 (1968). In *Bumper*, the Supreme Court held that the government's burden of proving "that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49. Consent was found invalid when the police officer told the homeowner, a 66-year-old African-American widow, that he had a search warrant to search the house. At trial the police relied on the doctrine of consent, not the warrant, to justify the search. *Id.* at 546.

⁵ *Id.* at 548-49.

⁶ See *infra* notes 50-57 and accompanying text.

scriptive question. The court at best recites factual information—what the defendant said and did, what the police officer said and did—and then makes some conclusory statement about whether the consent was voluntary. What is missing from the dialogue about consent is any normative judgment. Exactly what is meant by “voluntariness?” Do we simply mean the absence of coercion? Are we concerned with the behavior of the police—have they acted reasonably? Should the background, experience, race, or beliefs of the suspect matter?

This Article attempts to rethink the notion of voluntary consent. In Section I, the current law governing voluntary consent searches under the Fourth Amendment is set forth. In Section II, the problems with applying the voluntary consent standard as currently understood are considered. There are three main flaws in the law of voluntariness. First, I argue that the law of consent is unclear and misguided. Specifically, I maintain that the subjective views of the suspect are almost invariably ignored by the courts. Moreover, recent Supreme Court decisions cast doubt on whether a subjective or objective perspective is appropriate, leaving the current test in flux.

Second, and most important, current caselaw fails to consider the reality that most people will feel compelled to allow the police to search, no matter how politely the request is phrased. Such feelings of compulsion are particularly experienced by members of certain racial and cultural groups who fear confrontation with the police.

Third, and finally, the current doctrine of consent inherently fosters distrust of police officers as well as the judicial system. Establishing viable consent relies on a process that at its worst encourages police perjury, and at its best, distortion. Judges are forced in many ways to either acknowledge the perjury or look the other way.

In Section III, I consider possible solutions to the current quagmire of consent, and pose the question: why not eliminate consent searches? Although I argue that there is strong theoretical and analytical support for such a position, I recognize that the courts are not likely to do so. Accordingly, less “drastic” alternatives that might make the law of consent conform to the normative goal of ensuring that a search is the product of a person’s free and unrestrained choice are discussed.

Although the notion of consent searches has been accepted for over fifty years, it is essential that the doctrine be re-

evaluated. Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available,⁷ there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.⁸ And recent decisions by the Supreme Court endorsing suspicionless drug interdictions and pretextual automobile stops will only magnify the problem.⁹ After all, in

⁷ There is no national clearinghouse for statistics on the number of times police ask for consent to search. And obviously, the published cases that raise the issue of consent are only the tip of the iceberg. For every consent search that ends up in the books, there are likely hundreds that are never disputed, either because nothing was found or because the defendant plea bargained and thus no evidentiary issues were litigated, or even, in rare circumstances, because the person refused consent to search! Rarely do individuals pursue administrative or legal remedies for an arguably illegal search when nothing was found. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 244 (1993); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296, 305 (2001).

⁸ See, e.g., *Harris v. State*, 994 S.W.2d 927, 932 n.1 (Tex. Crim. App. 1999) (police officer testified that he asked for consent to search every car he stopped, regardless of suspicion). Another police officer testified that he routinely requested permission to search any car he stopped for a traffic violation; in one year he requested consent to search 786 times. *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (Ginsberg, J., concurring). Another officer stated that, personally, he had searched in excess of 3,000 bags in nine months. *Florida v. Kerwick*, 512 So. 2d 347, 349 (Fla. Dist. Ct. App. 1987). In one city, it was estimated that ninety-eight percent of the searches were by consent. Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 17.01, at 241 (2d ed. 1997) (discussing estimates that ninety-eight percent of warrantless searches are conducted via consent). As Professor Dressler wrote, "Put simply, there are few areas of Fourth Amendment jurisprudence of greater practical significance than consent searches." *Id.* at 241.

⁹ There are two recent cases that increase the likelihood that the police will try to utilize the doctrine of consent to search a person or their property. First, in *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court unanimously upheld "pretextual searches," where police officers may stop a car for the purpose of asking consent, even on a hunch, so long as the driver commits some type of traffic violation. "By all indications, pretextual traffic stops have increased markedly all over the country since the *Whren* decision." *Whitehead v. State*, 698 A.2d 1115, 1117 (Md. Ct. Spec. App. 1997). And inevitably, these stops involve a police officer requesting consent to search. Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1411 (2000) (typically, "an officer making a profiled stop requests consent from the motorist to search his car . . . even though the officer has no articulable suspicion that the search will reveal anything").

Second, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Supreme Court approved suspicionless drug interdiction practices, which also significantly increase the likelihood of police searches based on consent. In *Bostick*, two police officers boarded a bus en route to Atlanta from Miami when it stopped in Fort Lauderdale. *Id.* at 431. Without any articulable suspicion, police officer picked out Bostick and asked him for his identification and ticket. *Id.* Although nothing about these items was remarkable,

situations where the police lack probable cause, the only source for a valid search will be consent. Thus, the time is ripe to re-think consent.

I. THE LAW OF CONSENT

The Fourth Amendment to the U.S. Constitution guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizure" and that "no Warrants shall issue but upon probable cause."¹⁰ By its terms, the Fourth Amendment does not explicitly require a warrant before undertaking a search, and the courts have consistently recognized numerous situations where a warrant is not necessary. This Article is concerned with perhaps the most significant exception to the Fourth Amendment's

the police officer asked for his consent to search his luggage. *Id.* at 432. Bostick said yes; the police found illegal narcotics in his luggage. *Id.* Bostick argued that he had been illegally seized, and therefore, that his consent was invalid. *Id.* at 435. The Court disagreed, finding that while a reasonable person would have not felt free to leave (the traditional test for a seizure under the Fourth Amendment), that is not an appropriate question here. *Id.* Bostick would not have felt free to leave even if the police were not present by virtue of being on a bus. *Id.* Thus, the real issue, according to the Court, is whether a reasonable (innocent) person would feel free to ignore the police officer and go about his or her business. *Id.* at 436. In Bostick's situation, a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter. *Bostick v. State*, 593 So. 2d 494 (Fla. 1992) (on remand, Florida Supreme Court found encounter consensual).

Many scholars have criticized these decisions on a number of grounds, including the concern that the police will use the power granted them under these decisions to target minority members. A brief filed in the *Bostick* case by the ACLU claimed that among reported bus sweep prosecutions, all of the defendants were African-American or Hispanic. JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE; PRINCIPLES, POLICIES AND PERSPECTIVES* 380 (1999); see also DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 21 (1999) (bus stops and traffic stops affect minority community disproportionately). Statistics reveal that traffic stops also disproportionately affect minorities. See Kenneth Gavsie, *Making the Best of Whren: The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 391-92 (1998) (in one study, seventy percent of all traffic stops involved African-Americans, even though African-Americans made up less than ten percent of the drivers on the highway; African-Americans were two times more likely to have cars searched subsequent to the stop). In *Whren*, the occupants of the car pulled over were black; in the "facts" section of the opinion, the Court's only description of the occupants was that they were "youthful." See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 979 (1999).

¹⁰ U.S. CONST. amend. IV.

requirements: searches undertaken solely based on a person's consent.¹¹

The Supreme Court first recognized the validity of a search based not on a warrant but upon a person's consent in 1946.¹² But it was not until 1973, in *Schneckloth v. Bustamonte*,¹³ that the Supreme Court clearly articulated the requirements for a voluntary consent search consistent with the Fourth Amendment. In *Schneckloth*, a police officer stopped a car at around 2:40 a.m. "when he observed that one headlight and its license plate light were burned out."¹⁴ Six men were in the car; one, Joe Alcala, was the brother of the car's owner, who was not present.¹⁵ When asked by the officer if he could search the car, Alcala replied, "[S]ure, go ahead."¹⁶ No one was threatened with arrest, and the police officer's uncontradicted testimony was that "it was all very congenial."¹⁷ Alcala assisted in the search, even opening the trunk and glove compartment. In the course of the search, the police officer found three stolen checks wadded up under the left rear seat. These checks were later admitted as evidence against Robert Bustamonte, one of the passengers in the car.¹⁸

¹¹ The Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967) held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few, specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357.

The precise basis for the consent doctrine has never been made explicit, and thus there is some dispute whether the consent doctrine is actually an exception to the warrant requirement. Most treat consent as an exception to the warrant and probable cause requirements. See *People v. Sanchez*, 686 N.E.2d 367, 371 (Ill. App. Ct. 1997). Some suggest that consent searches really lie outside the Fourth Amendment because when a person consents, that person relinquished any expectation of privacy, and thus no "search" occurred for constitutional purposes. See *Katz*, 389 U.S. at 351 (defining search). Others have argued that a consent search is justified under the Fourth Amendment because it is "reasonable"—there is no harm to a person's privacy or dignity if that person freely authorized a government search. See Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 36 (1991).

¹² *Zap v. United States*, 328 U.S. 624 (1946); see also *Davis v. United States*, 328 U.S. 582 (1946); *Bumpers v. North Carolina*, 391 U.S. 543, 548 (1968) (no voluntary consent when police represented that they had a warrant to search).

¹³ 412 U.S. 218 (1973).

¹⁴ *Id.* at 220. Actually, there were three armed police officers at the scene. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Bustamonte moved to suppress the evidence on the grounds that the search was invalid. The question posed to the Court was "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given?"¹⁹ In considering this issue, the Court first considered the meaning of voluntariness developed in the area of police interrogations and confessions.²⁰ The confession cases, the Court concluded, yielded "no talismanic definition of 'voluntariness.'"²¹ Rather:

"The notion of 'voluntariness'" . . . "is itself an amphibian." It cannot be taken literally to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness."²²

Finding no clear definition, the Court instead decided to base its definitions of voluntariness on a consideration of the competing policy considerations. That is, the Court held that the meaning of voluntary consent must reflect a balance between the conflicting interests involved in police searches. On the one hand, according to the Court, is the need for consent searches, as evidenced by the facts of *Schneckloth* itself. After all, here was a search that yielded important information that resulted in the arrest of a person; without consent, the officer would have been unable to search the car since he admittedly lacked any probable cause for believing incriminating evidence would be discovered there. On the other hand, and equally important, is "the set of values reflecting society's deeply felt belief

¹⁹ *Id.* at 223.

²⁰ *Id.* at 223-24. Even the area of "voluntary" plea agreement borrows from the coerced confession doctrines. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (plea needs to be voluntary, knowing and intelligent decision).

²¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

²² *Id.* (quoting Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and The Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72-73 (1966)).

that the criminal law cannot be used as an instrument of unfairness."²³

Accommodating these conflicting values led the Court to conclude that:

the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.²⁴

...

In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches.²⁵

Although the Court did not provide a detailed list of all the factors to be considered, it did mention that the suspect's age and intelligence, amount of schooling, the officers' claim of authority, whether the suspect was in custody, and the conditions under which consent was given were relevant considerations.²⁶

Moreover, and of primary importance in *Schneckloth*, the Court addressed whether a voluntary consent requires that the person know of his or her right to refuse the police officer's "request" to search the car. Since the Court felt that it would be virtually impossible to prove in most cases whether a person knew of his rights, the question really was whether the police had to advise a person of such a right before obtaining consent. Thus, in *Schneckloth*, the issue became: was the fact that Alcala was never told he did not have to consent relevant to or even determinative of the voluntariness assessment?

As mentioned above, the Court's analysis in *Schneckloth* borrowed heavily from previous decisions in the confessions arena. Under the Fifth Amendment, a suspect must be told of his rights before a confession is deemed voluntary. In the landmark case of *Miranda v. Arizona*, the Supreme Court held that

²³ *Schneckloth*, 412 U.S. at 225.

²⁴ *Id.* at 227.

²⁵ *Id.* at 229.

²⁶ *Id.* at 226; see also *United States v. Watson*, 423 U.S. 411 (1976) (discussing consent when the suspect is in police custody).

in-custody interrogation necessarily involves "inherently compelling pressures which work to undermine the individual's will."²⁷ Thus, prior to engaging in custodial questioning, the police must inform a suspect of his right to remain silent and his right to an attorney, and must obtain a waiver of these rights.²⁸

In *Schneckloth*, the Supreme Court held that importing this aspect of Fifth Amendment doctrine was not required under the Fourth Amendment. First, the Court noted, coercion should not be presumed in most consent settings because they typically occur in non-custodial situations. Indeed, such searches "normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions" far removed from the custodial interrogation context.²⁹ Contending that there is a "vast difference" between Fifth Amendment rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment,³⁰ the Court insisted that the "knowing and intelligent" waiver requirement should not be applied to the search context.³¹ Significantly, the Court was concerned that

²⁷ 384 U.S. 436, 467 (1966).

²⁸ *Id.* at 479.

²⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973). The Court in *Schneckloth* maintained that "consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. *Id.* at 247. This distinction appears overstated. Except where consent is requested in a person's home, it is often sought in areas unfamiliar and intimidating. How many of us feel like we are on "familiar territory" when pulled over to the side of the road by a police car or two? Not many of us would find being singled out in an airport or on a bus to be part of our comfort zone.

³⁰ *Id.* at 241.

³¹ *Id.* Two states impose a warning requirement under their state constitutions. New Jersey was the first state to require that the government prove the person knew he had a choice not to allow the search. *State v. Johnson*, 346 A.2d 66, 69 (N.J. 1975). That state stood alone for almost 25 years; in 1998 Washington State joined the fold. *See Washington v. Bustamonte-Davila*, 983 P.2d 590 (Wash. 1999) (en banc) (interpreting state's privacy provision in constitution to require that officers inform home owners of the right to refuse consent when police try to search their homes without a warrant); *Washington v. Ferrier*, 960 P.2d 927 (Wash. 1998) (en banc). *But see State v. Johnson*, 16 P.3d 680 (Wash. Ct. App. 2001) (holding *Ferrier* only applies to "knock and talk" situations at homes). *See generally* Brendan W. Williams, *Horizontal Federalism Inches Along: New Jersey's Experiment in State Constitutionalism and Consent Searches Finally Finds Company*, 5 TEX. F. ON C.L. & C.R. 1, 3 (2000) (discussing New Jersey and Washington rules); *Smith v. State*, 753 So. 2d 713, 716 (Fla. Dist. Ct. App. 2000) (suggesting Supreme Court adopt rule that law enforcement must inform persons of right to refuse or withdraw consent before undertaking a body search). A Mississippi court issued a strange opinion, suggesting that Mississippi requires that the suspect be advised of his rights only in circumstances when the defendant specifically claims that

were such a requirement extended to searches, the ability of the police to undertake consent searches might be thwarted. Requiring warnings might interrupt the flow of questioning and otherwise frustrate police efforts.³²

Thus, *Schneckloth* established a vague, totality of circumstances test to measure voluntariness.³³ Courts are to assess a va-

his consent was not knowledgeable. *Gilbreath v. State*, 783 So. 2d 720 (Miss. Ct. App. 2000).

Other states have considered and rejected such a requirement. *See, e.g.*, *State v. Forrester*, 541 S.E.2d 837 (S.C. 2001) (highest court finding no warning requirement under state constitution and citing to other states in accord with South Carolina); *State v. Woolfolk*, 3 S.W.3d 823 (Mo. Ct. App. 1999) (Missouri does not require a warning).

Some police officers provide such warnings (or at least claim they do) even though not constitutionally required. *See, e.g.*, *Reasor v. Texas*, 12 S.W.3d 813 (Tex. Crim. App. 2000) (police officer informed suspect he had right to refuse); *United States v. Hernandez*, 76 F. Supp. 578 (E.D. Pa 1999) (same); *see also infra* notes 151-162 and accompanying text.

³² *Schneckloth*, 412 U.S. at 231-32. The dissent criticized what they felt was the majority's real concern: if a warning was given and people would be aware of their rights, they might just exercise them. *See id.* at 287-88 (Marshall, J., dissenting).

The Court reinforced the notion that individuals need not be informed of their rights in *Ohio v. Robinette*, 519 U.S. 33 (1996). There, the police officer stopped a car for speeding. The driver was ordered out of the car. After checking the driver's license and finding no outstanding violations, the officer issued the driver a verbal warning and returned his license. The officer then said: "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" The driver said no. *Id.* at 36. The officer then asked if he could search the car and the driver consented. The search revealed a small amount of marijuana and a pill later found to be a controlled substance. Possession of the pill formed the basis for the arrest. *Id.*

The defendant argued that the consent should be deemed involuntary because he was not told that he was free to go before he consented to a search of his car. The Ohio Supreme Court agreed, holding that the allegedly consensual search of the car was invalid, since it was the product of an unlawful seizure. Fearing that the shift from a lawful traffic stop to a consensual encounter is so nebulous that a motorist being questioned would not realize it, the state Supreme Court established a bright line rule, requiring that once a valid traffic stop is concluded, the police officer must tell the motorist that he or she is free to go before engaging in consensual questioning or requesting consent to search. *Id.*

The Supreme Court, 8-1, disagreed. Rejecting the constitutional necessity for such a warning, the Court found that, like in *Schneckloth*, it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Id.* at 40.

By the way, Robert Robinette is white. David A. Sklansky, *Traffic Stops, Minority Motorists and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 320-23, n.241.

³³ Under the United States Constitution, the state must prove voluntariness by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177-78 (1974). Some states have a different standard. *See, e.g.*, *LeFlar v. Texas*, 2 S.W.3d 571, 574 (Tex. App. 1999) (applying Texas' clear and convincing evidence standard).

riety of factors, including but not limited to, the behavior of the police, and the suspect's own traits that might make the consent a function of duress. The police need not tell the suspect about his rights, and whether the suspect knew he had a right to refuse to consent is simply one factor to be taken into account.

Schneckloth remains the standard for assessing whether consent is voluntary. Not surprisingly, this amorphous standard has proven difficult for lower courts to implement, as discussed below.

II. AN EVALUATION OF THE CONSENT DOCTRINE: A STUDY IN FUTILITY

My criticisms of the Court's test for determining voluntariness are threefold. First, the test itself is so vague that it provides little guidance to courts, litigants or police officers. Moreover, recent decisions by the Supreme Court in related areas of the law have further confused the meaning of voluntariness. Second, even if the test could be understood, it fails to acknowledge the simple truism that many people, if not most, will always feel coerced by police "requests" to search. To most people, the request to search will be considered an uncontrollable demand to search. Psychological research on individuals' responses to authority amply supports this proposition. Most importantly, many members of certain races and cultures never feel free to reject a police officer's "request" to search. For them, a "voluntary" request by the police to search becomes an oxymoron. Third, and finally, the consent doctrine is misguided because it leads to a distrust of the police and the judicial system. Each of these arguments is discussed separately below.

A. A VOLUNTARINESS TEST IN APPLICATION: CONFUSION AND MISAPPLICATION

The test established for evaluating "voluntariness" is oft-invoked, yet rarely do the courts invalidate a search based on this ground.³⁴ Although the Supreme Court in *Schneckloth* sug-

³⁴ See Douglas M. Smith, Comment, *Ohio v. Robinette: Per Se Unreasonable*, 29 MCGEORGE L. REV. 897, 937 (1998) ("Absent an unlawful claim of authority to search, or some physically coercive conduct by the police, a defendant who answers 'yes' to a request to search by the police is almost surely to be found to have voluntarily consented").

gested 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. Even more rare is the case where the court finds them determinative and excludes the evidence.³⁵

I must admit to being surprised at the paucity of information on this aspect of the voluntariness test. In researching this paper, I started by reading every published consent case in the last three years at both the federal and state level. I was looking to see how the lower courts analyzed the various subjective factors in determining whether there was a viable consent. In case after case, I found that the court simply recited a paragraph on what constituted voluntariness and on the state's burden to demonstrate that the consent was voluntary. I discovered only a handful of cases—out of hundreds of decisions—in which the court analyzed the suspect's particular subjective factors.³⁶ Only a few courts found them compelling. For example, in *Lobania v. Arkansas*, the court conceded that there was no voluntary consent when the defendant, who spoke no English, received a translation from the interpreter that mistakenly translated the police request to search into a statement that the police had a permit to search.³⁷ The court's finding that this did not constitute consent is hardly revolutionary.

Quite frankly, the results of my research confused me. Surely some defendant must have "lacked schooling," or had a low IQ. Surely some defendant felt that his or her prior experi-

³⁵ COLE, *supra* note 9, at 32 (in most of the cases where the court found a valid consent, the court did not even discuss the subjective factors deemed relevant in *Schneckloth*; when they mentioned these subjective factors at all they minimized them); Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215 (1997) (same).

³⁶ See, e.g., *United States v. Chavez*, 75 F. Supp. 1015, 1022 (W.D. Mo. 1999) (court went through defendant's education, employment, age, alcoholism and emotional capacity and found consent voluntary); *State v. Phillips*, 577 N.W.2d 794, 804 (Wis. 1998) (same). *United States v. Luna-Rojas*, 28 F. Supp. 2d 54 (D. P.R. 1998); see also *Lobania v. State*, 959 S.W.2d 72 (Ark. Ct. App. 1998) (same); COLE, *supra* note 9, at 32.

³⁷ *Lobania*, 959 S.W.2d 72. The mere fact that a suspect may have trouble understanding English, however, often is not enough by itself. See, e.g., *Semelis v. State*, 493 S.E.2d 17 (Ga. Ct. App. 1997) (appellate court disturbed by fact that defendant required interpreter at trial and that he had serious problems understanding English and was illiterate, but would not overturn district court finding of voluntariness).

ences with police officers made him or her feel compelled to agree to a search. Was it that the defendants were not bothering to raise these issues, or that courts were not even deigning to consider them on appeal?³⁸

Expanding my search beyond the last few years, I did encounter a limited number of cases in which the court more completely analyzed the voluntariness issue. But, again, in virtually all the cases, the court found the consent voluntary.³⁹ As Professor Cole concluded: "In theory, the voluntariness inquiry . . . does allow for consideration of the different situations of each individual approached. In practice, however, the courts find consent to be voluntary in all but the most extreme circumstances."⁴⁰

Typical of the cases in which the courts found consent to be voluntary despite arguments based on subjective factors is *United States v. Hall*.⁴¹ There, the Court of Appeals found that the suspect's low IQ (76) and psychological problems did not vitiate consent when the police behavior was non-threatening, and when the suspect's own actions in refusing to answer all questions addressed to her by the police belied any coercive environment.⁴²

³⁸ See, e.g., *United States v. Rodney*, 956 F.2d 295, 297 (D.C. Cir. 1992) (defendant argued, among other things, that he had been asked four times before by police officers in other situations for consent, and even though he had refused each time, the police had nonetheless searched. While the court repeated this fact, no discussion of it occurred); *People v. Brazzel*, 18 P.3d 1285 (Colo. 2001) (court repeated defendant's testimony that he was manic depressive and therefore goes from cooperative to depressive, but never referred to it again when analyzing whether consent was voluntary).

³⁹ See *infra* notes 41-49 and accompanying text. Professor David Cole also provides support for this position. He discussed a study by a Georgetown University Law Center student who reviewed all cases involving consent searches in the D.C. Circuit from January 1989 to April 15, 1995. In every case the court found the consent voluntary. COLE, *supra* note 9, at 32.

⁴⁰ COLE, *supra* note 9, at 32; accord Smith, *supra* note 34, at 937:

Although the government is supposed to have the burden of proving that consent was given voluntarily, in practice it need only point to the fact that the subject responded affirmatively to the officer's request for consent. Absent an unlawful claim of authority to search, or some physically coercive conduct by the police, a defendant who answers "yes" to a request to search by the police is almost surely to be found to have voluntarily consented.

⁴¹ 969 F.2d 1102 (D.C. Cir. 1992).

⁴² *Id.* at 1107-08. The police approached the woman in the middle of the night in a relatively deserted parking lot. Nonetheless, the court, calling these unavoidable circumstances, believed that the pressure applied to the plaintiff was "minimal" because the officer was dressed in plain clothes, he did not brandish his weapon, and he

Similarly, in *United States v. Rodney*, the defendant argued that his consent was involuntary based on the following factors: he was relatively young (24) and uneducated (10th grade), he had been surrounded by three or four "large" officers, and that four times before he had denied requests by police to search, and that each time the police had searched anyway.⁴³ The District Court simply concluded that there was voluntary consent without making any subsidiary findings of fact.⁴⁴ The Court of Appeals provided a bit more analysis—but not much. It concluded that because the officers did not draw their guns or otherwise intimidate the suspect, the consent was voluntary.⁴⁵

Significantly, in no case was a suspect's testimony that he did not know of his rights and that the police failed to inform him of them found significant on its own.⁴⁶ In only a few rare cases did a suspect's prior experience with the police, or fear of the police, lead to a finding of involuntariness.⁴⁷ Interestingly, and perhaps perversely, prior experience with the police usually worked against the suspect. Typical was one court's finding that because the suspect was familiar with the legal system, she was

spoke in a conversational tone. *Id.* at 1107. This case was the rare exception where the voluntariness issue was at least extensively discussed by the Court of Appeals and the District Court. In many cases, the lower court simply recites all the facts alleged by the parties and makes a conclusory ruling that the search was (or was not) valid. *See, e.g., United States v. Rodney*, 956 F.2d 295, 297 n.1 (D.C. Cir. 1992) (pointing out that district court made no subsidiary findings of fact).

⁴³ *Rodney*, 956 F.2d at 297. The courts do appear to be more sympathetic to children in similar situations. *See United States v. Barkovitz*, 29 F. Supp. 2d 411, 415-16 (E.D. Mich. 1998) (no voluntary consent given by crying child who was scared, confused and confronted by four armed and large officers, some in uniform: "[child] was merely acquiescing to the show of force presented").

⁴⁴ *See Rodney*, 956 F.2d at 296 n.1.

⁴⁵ *Rodney*, 956 F.2d at 297.

⁴⁶ *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 36 (1996) (at his suppression hearing, Robinette testified that he did not believe he was free to consent; trial court found consent was voluntary); *State v. Hughes*, 607 N.W.2d 621, 633 (Wis. 2000) (under facts of case, failure to warn not significant).

⁴⁷ One of the most egregious distortion, in my mind, of a person's prior police experience occurred in *State v. Hughes*, 607 N.W.2d 621, 633 (Wis. 2000). The suspect, a woman, had testified that she felt coerced by the police. The Court held that the consent was voluntary, noting that she had lived for over a year in a building that was often the subject of drug sweeps by the Milwaukee police department, and thus, the woman could not have been completely unfamiliar with the police! *See id.* Since drug sweeps are not likely the epitome of calm, controlled police interactions, such a holding seems disingenuous.

less likely to feel coerced by the police.⁴⁸ One Court of Appeals specifically refused to consider a defendant's experience with or attitude towards the police, stating that "an intangible characteristic such as attitude towards authority is inherently unverifiable and unquantifiable."⁴⁹

Rather than focus on subjective factors, those rare cases in which consent was found to be involuntary typically involved fairly obvious and egregious police misconduct. There were four recurring types of police misconduct that typically led to a finding that the search was not voluntary: threats to the suspect or his family, deprivation of necessities until the suspect consents, asserting an absolute right to search, and an unusual and extreme show of force.

For example, one district court found no voluntary consent when the police threatened a mother that they would contact social services to take away her child if she did not agree to let the police search.⁵⁰ Similarly, consent was deemed involuntary when the suspect was deprived of basic necessities; the police told the suspect that he would not be able to go to the bathroom—which he apparently desperately needed to do—unless he let them frisk him first.⁵¹ Consent was found not to be voluntary in cases where the police essentially asserted that they had a right to search,⁵² or when the police started to search before they even requested permission.⁵³

⁴⁸ *Id.*; see also *United States v. Barnett*, 989 F.2d 546, 556 (1st Cir. 1993); *People v. Gonzalez*, 347 N.E.2d 575, 581 (N.Y. 1976) (consent by person "calloused in dealing with police, is more likely to be the product of calculation rather than awe").

⁴⁹ *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993). In *Zapata*, the defendant argued that his background and attitudes toward the police were derived from his experiences in his native Mexico. *Id.* at 755. During the trial, he was asked, "why did you allow Mr. Small to search your luggage?" The defendant answered: "Because I saw that he was a police officer . . . I thought that if I didn't do [what he asked], he would get angry or he would do something else." *Id.* at 755 n.2. The Court of Appeals held that the consent was voluntary. *But see United States v. Recalde*, 761 F.2d 1448, 1454 (10th Cir. 1985) (court found significant defendant's undisputed evidence that his upbringing and experience in Argentina "instilled in him an acquiescence to police authority. This factor is certainly relevant to the issue of coercion.").

⁵⁰ *United States v. Tibbs*, 49 F. Supp. 2d 47, 48-49, 53 (D. Mass. 1999); accord *United States v. Ivy*, 165 F.3d 397 (6th Cir. 1998) (threatening to take a child from mom is coercive); cf. *United States v. Eggers*, 21 F. Supp. 2d 261, 270-71 (S.D.N.Y. 1998) (police threat to keep suspect locked out of house until consent obtained is coercive).

⁵¹ See *State v. Wilson*, 600 N.W.2d 14, 17 (Wis. Ct. App. 1999).

⁵² *United States v. Nuyens*, 17 F. Supp. 2d 1303, 1310 (M.D. Fla. 1998) (no voluntary consent when police had search warrant and had already conducted a protective

Evaluation of the final area of police misconduct—show of force—has proven somewhat problematic. While at some point, a certain amount of physical restraint against, or a show of force towards, the suspect will invalidate a consent, there is no bright line determining when the police cross the line between acceptable and egregious display of power. For example, in one case, a court invalidated consent that was obtained after the defendant was arrested, handcuffed, confronted by eleven police officers with arms drawn, and after the police had already begun to round up his fiancée and children.⁵⁴ Ironically, the court emphasized the police's behavior in "rounding up" the defendant's family as particularly egregious.

Other courts have found consent to be voluntary even when the suspect is "requested" to consent at gunpoint.⁵⁵ In one case, a suspect consented to a search after he was arrested at gunpoint, forced to lie on the ground, and while a gun was drawn on him. Nonetheless, the court found that the situation was "not too coercive" and that the consent was voluntary.⁵⁶ In another case, the court found consent to be voluntary even though it was 1:45 in the morning, there were eleven police officers present, at least one police officer had his gun out of the holster and pointed to the ground, and the police said that if the suspect refused, he would get a warrant.⁵⁷

sweep, and defendant felt it wouldn't matter what he said); *State v. Hall*, 493 S.E.2d 718, 722 (Ga. Ct. App. 1997) (no valid consent when police officer said he would get a warrant, and police officer did not have probable cause). *But see State v. Johnson*, 16 P.3d 680 (Wash. Ct. App. 2001) (voluntary consent even where police threatened to get a warrant).

⁵³ *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000); *see also State v. Sakezeles*, 778 So.2d 432 (Fla. Dist. Ct. App. 2001) (consent was merely acquiescence to authority when police entered apartment, chased the defendant into the bathroom, pulled him into the living room and received his consent to search there).

⁵⁴ *United States v. Hurston*, 12 F. Supp. 2d 630 (E.D. Mich. 1998).

⁵⁵ *See, e.g., United States v. Barnett*, 989 F.2d 546, 555-56 (1st Cir. 1993) (voluntary consent even though there were numerous police officers with guns drawn because the defendant was no newcomer to law enforcement encounters). *But see United States v. Chan-Jimenez*, 125 F.3d 1324 (9th Cir. 1997) (rare case in which court held that involuntary consent when police had hand on gun).

⁵⁶ *United States v. Espinosa-Orlando*, 704 F.2d 507, 513 (11th Cir. 1983); *see also State v. Stankis*, 582 N.W.2d 468 (Wis. Ct. App. 1998) (voluntary consent even though driver in car approached by only one officer during initial stop, but then approached on both sides of his car by officers in order to ask consent; court's decision not affected by fact officers testified that they always used this tactic to get consent, and that they had never been denied consent to search).

⁵⁷ *Commonwealth v. Paredes-Rosaria*, 700 A.2d 1296 (Pa. Super. Ct. 1997) (court overturned lower court finding of involuntariness).

In sum, a suspect's consent, except in extreme cases of obvious police misconduct, is typically found by the courts to be voluntary. Given that the burden to prove that consent was voluntary rests with the government,⁵⁸ one might expect that establishing valid consent to search would be more onerous. The evidence, however, indicates otherwise. The reality is that consent searches are upheld except in extreme cases that almost always focus not on subjective factors of the suspect, but on the behavior of the police.

Why is this so? What explains the overwhelming attention to police behavior and the virtual inattention paid to the defendant's subjective factors in determining whether consent is the product of a person's "free will and unconstrained choice?" There are a number of possible explanations for the courts' seeming lack of interest in subjective factors and concomitant concern with objective ones. One explanation, of course, is that the defense does not raise the subjective factors, or if raised, the subjective factors are fairly and appropriately considered by the court and simply (always) found lacking. Frankly, I believe that there are several more likely explanations for the court's reluctance to credit the defendant's subjective arguments.

First, the courts are probably ill-suited to make these determinations. Deciding whether a person's education, IQ, psychological difficulties, cultural experiences and past interactions with the police render a consent involuntary is difficult under the best of circumstances. And when undertaken by individuals who typically share none of the fear, background or beliefs of the suspects, it is not surprising that little weight is often assigned to these subjective factors.⁵⁹ While it may be difficult for

⁵⁸ See *Bumper v. North Carolina*, 391 U.S. 543 (1968).

⁵⁹ The inevitability that a judge's background influences the decision was recognized by Chief Judge Benjamin Cardozo, when he wrote, "we may try to see things as objectively as we please. . . . None the less, we can never see them with any eyes except our own." BENJAMIN N. CARDOZA, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1949); see also Theresa M. Beiner, *What will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 148 (1999):

The data compiled by political scientists is not entirely conclusive on the effects of diversity on the bench. This is not especially surprising, given the difficulty of assessing all the factors that may play a role in judicial decision making. However, with more and more non-traditional judges being appointed to the bench, more recent studies suggest that the diversity they bring to the bench has an actual effect on the outcome of cases.

See also Joel B. Grossman, *Social Backgrounds and Judicial Decision-making*, 79 HARV. L. REV. 1551, 1552 (1966) ("[t]he inescapable conclusion [is] that judicial decisions . . .

a judge to identify with a suspect's background and experience, assessing the reasonableness of the behavior of the police, however, is a more comfortable and familiar path for the court.

Moreover, the vagueness of the test itself, and the amorphous description of the meaning of voluntariness likely causes the court to shy away from considering subjective factors. Talismanic phrases like "ensuring a person's uncoerced choice" provide little assistance. Ferreting out coercion, moreover, is not enough according to the courts; the determination of voluntariness must be undertaken with a respect for the appropriate balance between the need to search and the individual's rights. What does all this mean? It should not be surprising that courts have difficulty applying such an amorphous test.⁶⁰

Given that this "balancing act" inevitably takes place in the context of suppressing evidence that was discovered during the consent search, moreover, it is not surprising judges place a finger on that part of the scale that emphasizes society's interest in promoting unfettered police investigation. Although theoretically irrelevant to the determination of voluntariness, the fact remains that if a judge finds a search involuntary, she likely will be suppressing highly probative and reliable evidence.⁶¹ The defendant may have been forced to consent, but the cocaine discovered in the luggage is no less real! In this way, the voluntariness question with respect to a search differs from the con-

are at least partially attributable to the personal values and experiences of the judges . . ."); Peter Lauricella, *Perspective: Chi Lascia La Via Vecchia Per La Nuova Sa Quel Che Perde E Non Sa Quel Che Trova: The Italian-American Experience and its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa, and Judge Vito Titone*, 60 ALB. L. REV. 1701, 1701 (1997) ("A judge's background and upbringing often influence his philosophy on deciding a particular case").

And through what lens do the judges view the consent issue? Although there certainly have been improvements in diversity, studies show that most judges are still white, male and come from middle or upper class backgrounds. See also Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 793 n.17 (describing diversity, or lack thereof, on the California bench). See generally Beiner, *supra* (discussing the amount of diversity on the bench).

⁶⁰ See *State v. Stankus*, 582 N.W.2d 468, 471 (Wis. Ct. App. 1998) ("voluntariness" is an elusive standard impervious to concise articulation, and the criteria for voluntariness reflect a balancing of competing values"); see also Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239, 244-45 (1993) (*Schneekloth* did not provide sufficient guidance on determining whether a person's consent to a search is voluntary).

⁶¹ "[E]normous pressure exists to ignore constitutional violations so as to avoid suppression of the evidence." Rudovsky, *supra* note 7, at n.89; accord Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1322 (1994).

fession context. An involuntary confession is also highly unreliable.⁶² An involuntary search yields as reliable evidence as a voluntary one.

Finally, lower courts may ignore or short-change subjective factors of the suspect because judges may believe that *Schneckloth* has been overturned sub silentio, or, at a minimum, may be confused about the appropriate standard to apply. Recent Supreme Court decisions under both the Fourth and Fifth Amendments seem to be moving the law away from subjective considerations and towards an objective standard. In other words, numerous Supreme Court decisions since *Schneckloth* have all underplayed subjective factors in favor of objective evaluations.⁶³ Instead of focusing on the suspect's beliefs or perspective, the courts emphasized what a reasonable person would believe, or whether the police acted reasonably under the circumstances.

Thus, there is at least some lingering questions as to which perspective—objective or subjective—should be utilized in assessing voluntariness. And the distinction obviously has profound effects. Consider the situation in which the police arrest a woman who appeared normal and coherent when she agreed to permit a search of her car. Assume that at trial, the judge believes two things: First, the woman actually suffered from schizophrenia, which rendered her incapable of consenting, but, second, the police had no way of knowing this, and truly believed that her consent was in accordance with the law. How should the court resolve whether the consent was voluntary? Under *Schneckloth*, the fact that the police acted “reasonably” seems irrelevant, or at least insignificant. It is not a question of whether a reasonable person (or police officer) believed that she was schizophrenic and thus incapable of consent. It is presumably a subjective question: did the mental illness preclude the woman from making a voluntary consent?

Yet in several recent decisions under both the Fourth and Fifth Amendments, the Supreme Court rejected a subjective approach in favor of an objective one that focuses on whether the police acted reasonably. In the Fourth Amendment arena,

⁶² *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

⁶³ See *infra* notes 64-82 and accompanying text. For an excellent discussion of shifting perspectives, see Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677 (1998).

the Court considered several consent cases regarding third party consent⁶⁴ and the scope of a consent search.⁶⁵ It also determined the meaning of "seizure" under the Constitution.⁶⁶ In all these cases, the Court opted for an objective perspective.

For example, in assessing whether a third party can consent to the search, the Supreme Court held that a person who lacked actual authority to consent may still do so if the police reasonably believed the person had such authority.⁶⁷ Similarly, in deciding the scope of a consent search, the Supreme Court stated that it should be determined by asking what an objectively reasonable person would believe was the scope of the search and not by the subjective intent of the person who granted consent.⁶⁸ In both situations, the Court emphasized that what is

⁶⁴ See *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁶⁵ See *Florida v. Jimeno*, 500 U.S. 248 (1991).

⁶⁶ See *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

⁶⁷ *Illinois v. Rodriguez*, 497 U.S. 177 (1990). In *Rodriguez* several police officers, without an arrest or search warrant, gained entry into Rodriguez's home with the assistance of Gail Fischer. *Id.* at 180. Fischer, who went to the police complaining that Rodriguez had beaten her, made comments about it being her apartment too, and opened the door with her key. *Id.* Inside, the police found drugs and related paraphernalia. *Id.* Rodriguez moved to suppress the evidence, claiming that at the time of entry, Fischer in fact no longer lived there and therefore, was unable to consent to a search of the apartment. *Id.*

The Supreme Court disagreed with this standard, holding that a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believed possessed common authority over the premises:

The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Id. at 186. The Court remanded to the lower court to determine whether the police reasonably believed Fischer had the authority to consent. (No such determination was made; Rodriguez pled to a lesser charge and dropped the motion to suppress).

Rodriguez has been subjected to significant criticism. See, e.g., Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN L. REV. 1 (1991); Note, *The Theory and Practice of Illinois v. Rodriguez: Why an Officer's Reasonable Belief about a Third Party's Authority to Consent Does not Protect a Criminal Suspect's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604 (1993).

⁶⁸ *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). A police officer stopped Jimeno's car for a traffic violation and asked permission to search the car, because he had a "feeling" that there were narcotics there. Jimeno consented, and the officer ultimately found cocaine inside a folded paper bag on the car's floorboard. Jimeno moved to suppress the evidence on the ground that his consent did not extend to the closed container. The Supreme Court rejected his motion, holding that the scope of

demanding of the police in deciding whether and where to search is "not that they always be correct, but that they always be reasonable."⁶⁹

Finally, the Court used an objective standard in assessing whether the police have "seized" an individual and thus must meet the requirements of the Fourth Amendment, or whether there merely has been a consensual encounter, which does not need to comply with the Fourth Amendment. In *United States v. Mendenhall*,⁷⁰ the Court made it clear that the standard for sei-

the search is determined by whether the police officer was objectively reasonable in believing that the consent extended to the item or place searched. *Id.* at 252. The Court concluded that:

the question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is. . . . In this case, the terms of the search's authorization were simple. . . . [The police officer] had informed Jimeno that he believed Jimeno was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondents' car included consent to search containers within that car which might bear drugs.

Id. at 251.

⁶⁹ *Rodriguez*, 497 U.S. at 185-86.

⁷⁰ 446 U.S. 544 (1980). Sylvia Mendenhall was approached by two Drug Enforcement Administration agents when she arrived at the Detroit Metropolitan Airport. After they identified themselves, on request she produced her driver's license and her ticket (which were issued in different names). She agreed to accompany the agents to the DEA office for further questioning. At the office, she consented to a search of her purse and her person after being told twice that she had the right to withhold consent. After disrobing, the police found two packages in her undergarments; the packages were later confirmed to contain heroin. *Id.* at 547-49. Ms. Mendenhall was arrested for narcotics possession. She moved to suppress the evidence as the fruit of an illegal search and seizure.

The plurality denied her argument, finding first that she was never seized. A person is seized within the meaning of the Fourth Amendment only if, in view of the all the circumstances, a "reasonable person would have believed that he was not free to leave." *Id.* at 554-55. Here, no seizure occurred, the Court concluded, because nothing in the record indicated that she was not free to end the conversation and continue on her way; rather the defendant accompanied the agents to the DEA office voluntarily, in the spirit of cooperation. *Id.* at 555.

Nor was the search invalid. Since there was no seizure, the search was not the fruit of an illegal seizure. *Id.* at 559. And the search was voluntary. After noting that there were no threats nor any show of force, the Court turned to the subjective factors, finding that the respondent was twenty-two years old and had an eleventh grade education and therefore, was plainly capable of a knowing consent. *Id.* at 558-59. The Court emphasized that she had been twice told she was free to decline to consent, which "substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive." *Id.* Earlier in the opinion, the Court had addressed and rejected the fact that the "respondent, a female and a Negro, may have

zure is whether a reasonable (innocent) person would feel free to leave. The fact that the particular person involved did not feel free to leave is irrelevant. Nor are those person's susceptibilities or attributes considered in addressing whether the person was "seized" by the police.⁷¹

The notion that it is the reasonableness of the police behavior, judged by an objective standard that is determinative, rather than the subjective interests or desires of the suspect was also reinforced in the Fifth Amendment "voluntariness" context. In *Colorado v. Connelly*,⁷² the Supreme Court held that there must be a finding of coercive police behavior before a confession is found involuntary. In that case, a man went up to a uniformed police officer and confessed to a murder. After receiving numerous Miranda warnings, he repeated his confession several times during that day. At his preliminary hearing, a psychiatrist testified that the defendant suffered from chronic schizophrenia and at the time of his confession was suffering from command hallucinations which made him unable to make a free and rational choice.⁷³ The Colorado Supreme Court found the confession to be involuntary.

The United States Supreme Court reversed, finding that the mental condition of the defendant, while a significant factor, does not justify a conclusion of involuntariness apart from its relation to official coercion.⁷⁴ In other words, the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'"⁷⁵ Here, that condition was not met, since the police officers who received the suspect's confession had no knowledge of his mental infirmity and in no way exploited it.⁷⁶

These cases have created some uncertainty with respect to the appropriate law for voluntary consent. On their face, they

felt unusually threatened by the officers, who were white males." *Id.* at 558; *see also* *Florida v. Bostick*, 501 U.S. 429 (1991).

⁷¹ *Mendenhall*, 446 U.S. at 555.

⁷² 479 U.S. 157 (1986).

⁷³ *Id.* at 161, 167. The suspect felt that God had given him the "choice" to either confess or kill himself. *Id.* at 161.

⁷⁴ *Id.* at 164.

⁷⁵ *Id.* at 167.

⁷⁶ One police officer did ask the suspect if he had been drinking or taking drugs. The defendant told him no, but said that he had been a patient at a mental hospital. Nonetheless, the police testified that the defendant appeared to understand the nature of his acts. *Id.* at 160.

did not overrule the subjective standard for determining voluntariness established in *Schneckloth*. Obviously, an objective standard to determine seizure, third party consent, scope of consent and voluntariness of confessions can be employed at the same time that a subjective one is utilized to ascertain the voluntariness of consent. But these cases at least raise a question about whether the courts should focus exclusively, or at least more predominantly, on objective factors. They raise a question whether police misconduct is a necessary condition to a finding of involuntariness.

Given the uncertainty in the law caused by this overwhelming trend to focus on the reasonableness of the police officer's behavior, or the perspective of a reasonable (innocent) person, the court's minimal attention to subjective factors in assessing voluntariness can perhaps be explained, if not understood.⁷⁷ And some lower courts have explicitly decided to follow the approach in *Rodriguez*, *Jimeno*, *Mendenhall*, and *Connelly*. For example, the Second Circuit has declared that the test for determining consent is an objective one: "the ultimate question presented is whether the 'officer had a reasonable basis for believing that there had been consent to the search.'"⁷⁸ The

⁷⁷ The Court has not tried to explain or reconcile its competing approaches. The closest it has come is a statement in *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988), where the court noted that the "'reasonable person' standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." No decision has tried to distinguish *Schneckloth*. See Bacigal, *supra* note 63, at 687.

⁷⁸ U.S. v. Garcia, 56 F.3d 418, 423 (2d Cir. 1995) (quoting U.S. v. Sanchez, 32 F.3d 1330, 1334-35) and citing *Jimeno*, 500 U.S. at 249; see also *United States v. Murphy*, 16 F. Supp. 2d 397 (S.D.N.Y. 1998) (defendant was in custody, handcuffed, confronted by eight officers; still, consent was voluntary because officers under the "circumstances had more than ample basis for believing that the consent was valid"). Other courts outside the Second Circuit have also utilized a reasonable person test. See, e.g., *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000) (under the circumstances a reasonable person would not feel that he had a right to withhold consent); *Reasor v. Texas*, 12 S.W.3d 813 (Tex. Crim. App. 2000) (voluntary consent because police officer acted reasonably by letting companion go after questioning and by warning suspect that he had the right to remain silent); cf. *Commonwealth v. Strickler*, 757 A.2d 884, 901 (Pa. 2000) (test for voluntariness is an objective one which takes into account the maturity and mental or emotional state of the defendant; test for voluntariness of consent and seizure examines the same objective circumstances).

The Fifth Circuit had also held that the reasonableness of the police officer's perceptions or behavior is irrelevant, but the decision was before *Mendenhall*, *Rodriguez* and *Jimeno*. See *United States v. Elrod*, 441 F.2d 353, 356 (5th Cir. 1971):

[N]o matter how genuine the belief of the officers is that the consentor is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judi-

Tenth Circuit, while not going so far, did note that "while '[a] person's subjective characteristics may be relevant to the voluntariness of the person's consent . . . recent Supreme Court decisions cast doubt on this issue.'"⁷⁹

Other courts explicitly have considered whether the requirement of official police coercion acting on the suspect set forth in *Colorado v. Connelly* should be imported into the consent context. For example, both the Eleventh Circuit and the D.C. Circuit have rejected an invitation to apply *Connelly* to voluntariness in consent.⁸⁰ The Fourth Circuit, however, cited *Connelly* when it held that:

[A] court's evaluation of the totality of the circumstances is based, not on the perceptions of the individual searched, but on the coerciveness of the officer's conduct in obtaining the consent. . . . In other words, the

cially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed.

More recently, at least one lower court in that district has held otherwise. See *DeLeon v. State*, 700 So. 2d 718, 720 (Fla. Dist. Ct. App. 1997) (where defendant alleges that his consent results from coercion or intimidation, the court must determine whether the police conduct would have communicated to a reasonable person that he was not free to decline the officer's request (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991))).

See also Michael J. Friedman, Comment, *Another Stab at Schneckloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313 (1998). Friedman states that after *Rodriguez*:

[I]t is the officer's belief that the suspect consented which must be objectively reasonable. The court asks not whether the suspect's consent actually was voluntary under the totality of the circumstances, but rather whether the officer reasonably perceived the suspect's consent to be voluntary. . . . The suspect's actual feeling whether predetermined by indoctrinated obedience or a product of free will, are irrelevant so long as their outward manifestation looks like voluntary consent.

Id. at 323-24.

⁷⁹ *United States v. Zapata*, 997 F.2d 751, 759 (10th Cir. 1993) (quoting *United States v. Bloom*, 975 F.2d 1447, 1455 n.9 (10th Cir. 1992)). But see *State v. Pierce*, 709 N.E.2d 203, 207 (Ohio Ct. App. 1998) (recognizing that the standard for determining voluntariness is subjective, unlike the objectively reasonable person test for seizure).

⁸⁰ See *United States v. Hall*, 969 F.2d 1102, 1108 n.6 (D.C. Cir. 1992); *Tukes v. Dugger*, 911 F.2d 508, 516-17 n.13 (11th Cir. 1990); see also *State v. Sondergaard*, 938 P.2d 351, 354 (Wash. Ct. App. 1997) (*Connelly* has not overruled or modified *Schneckloth*); cf. *United States v. Park-Swallow*, 2000 WL 821383 (D. Kan. 2000) (relevant factors for voluntary consent include police officer's use of threats, and physical and mental condition and capacity of defendant); *United States v. Pena*, 143 F.3d 1363, 1367 (10th Cir. 1998) (same).

relevant question is not whether the person whose consent is sought *perceived* coercion but, rather, whether there actually *was* coercion.⁸¹

And one Sixth Circuit case—decided prior to *Connelly*—also held that improper coercion on the part of the police was a necessary condition to a finding of involuntariness: “[T]he defendant must show more than a subjective belief of coercion, but also some objectively improper action on the part of the police.”⁸² A defendant’s subjective belief is not enough to negate voluntariness.

In sum, the voluntariness standard set forth in *Schneckloth* has led to confusion at best and inadequate protection for suspects’ Fourth Amendment rights at worst. It is poorly understood, and in practice, the subjective factors emphasized in *Schneckloth* are often ignored or minimized. Only in extreme cases of police misconduct have courts seemed willing to invalidate consent. This failure to give any substantial weight to subjective factors will likely continue as courts attempt to reconcile the “voluntariness” test set forth in *Schneckloth* with more recent decisions on third party consent, the scope of consent, and the voluntariness of confessions.

And yet, perhaps the greatest criticism of the voluntariness test is not simply that it is misunderstood or confusing. Even if the type of subjective factors described in *Schneckloth* were fully appreciated by the courts, the voluntariness standard could still be criticized for ignoring the most significant factor of all: the inevitability that individuals will feel coerced simply by virtue of dealing with an authority figure like the police.⁸³ Moreover, the law fails to acknowledge the subjective reaction of people of color, who may feel that they have no choice but to obey even a “request” from a police officer.⁸⁴

⁸¹ United States v. Quezada, 1991 U.S. App. LEXIS 22712, at *2 (4th Cir. 1991) (emphasis in original).

⁸² United States v. Crowder, 62 F.3d 782, 787 (6th Cir. 1995). But see United States v. Worley, 193 F.3d 380 (6th Cir. 1999) (finding that defendant did not confess voluntarily when he said, “[y]ou’ve got the badge, I guess you can,” after court noted that there was no evidence of overt duress or coercion, and there was no lengthy detention or visible weapons).

⁸³ See *infra* notes 85-108 and accompanying text.

⁸⁴ See *infra* notes 117-125 and accompanying text.

B. THE FICTION OF CONSENT: AUTHORITARIAN DILEMMA AND RACIAL CONSIDERATIONS

Numerous scholars and even judges have made the very basic observation that most people would not feel free to deny a request by a police officer. Even in the "best" of circumstances—a polite officer, without gun drawn, familiar circumstances for the consenter—people consent in situations where they only have something to lose. As one scholar put it, "common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost.'"⁸⁵

This common sense proposition has received a fair amount of scholarly attention. One author recently attempted to employ psychological experiments on obedience to authority to support the notion that "people mechanically obey legitimate authority" and thus that "man's innate tendency to obey authority can impair his decision making and, ultimately, dull the understanding with which he exercises his constitutional rights."⁸⁶ The psychology experiments, conducted by Stanley Milgram⁸⁷ and Leonard Bickman,⁸⁸ together support the general idea that obedience to authority is deeply ingrained, that people will obey authority even when it is not in their own best interest to do so, and that obedience increases with when the authority figure has visible trappings of authority, such as a uniform.⁸⁹

Milgram's experiments at Yale University revealed that adult subjects display surprisingly high obedience to an authority figure, even when the actions of the subjects appeared to inflict severe pain upon a mock victim. Specifically, experimenters directed subjects to give progressively stronger electrical shocks to experimental learners if the learners failed to give correct replies to simple word-pair learning tasks.⁹⁰ An actor—a confederate of the experimenter—was strapped in a chair with his

⁸⁵ Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250 (1991). Professor Maclin was speaking specifically about seizures, but the same analysis would apply to consent doctrine. See COLE, *supra* note 9, at 28 (like the test for identifying seizures, the court has created a standard that effectively ensures coercion of involuntary consent).

⁸⁶ Barrio, *supra* note 35, at 231.

⁸⁷ STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 13-26 (1974).

⁸⁸ Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974).

⁸⁹ *Id.*

⁹⁰ MILGRAM, *supra* note 87, at 19-21.

arms restrained, and a subject was "selected" to be a teacher.⁹¹ Each actor pretended to fail the learning task so that the teacher was under the directive to administer a shock as negative feedback for failure to perform.⁹²

The degree of obedience in continuing to administer shocks was measured in four situations of differing proximity, from a separate room to direct hand-to-hand contact between the subject and the "learner."⁹³ In each setup, the "learner" gave stronger and stronger verbal protests as increasing voltage was applied, including a scream of great distress and a statement of withdrawal from the experiment at 300 volts, and a final scream of pain at 315 volts.⁹⁴

Milgram asked a variety of sources, including psychiatrists, to predict how far subjects would go as they applied increasingly strong shocks. Most predicted that subjects would refuse to obey the experimenter when the shocks obviously hurt another person.⁹⁵ However, such predictions proved inaccurate; subjects obeyed experimenters even when they heard that the "learner" had a heart condition. With no visual cues about the distress of the learner, 65% of the subjects continued to deliver shocks to the maximum level, 450 volts.⁹⁶ With vocal cues alone, 62.5% of the subjects delivered shocks to the maximum value.⁹⁷ When confronted with victims in the same room, the percentage that shocked to the maximum dropped to 40%, and when required to have tactile contact, just 30% of the subjects reached the maximal shock.⁹⁸

Milgram concluded that the unexpectedly high levels of obedience to authority derived from three basic factors. First, subjects have learned to obey authority figures most of their lives, from parents in the family to teachers in the classroom.⁹⁹ Second, subjects tended to see themselves as agents of the ex-

⁹¹ *Id.* at 18-19.

⁹² *Id.* at 22.

⁹³ *Id.* at 32-37.

⁹⁴ *Id.* at 22-23.

⁹⁵ *Id.* at 27-31. This is similar to the assumption made by some judges that that suspects who do not want the police to search will simply deny police officers that opportunity.

⁹⁶ *Id.* at 35 tbl.2.

⁹⁷ *Id.*

⁹⁸ *Id.* at 35 tbl.2.

⁹⁹ *Id.* at 135-43.

perimenters, not as the principle directors of the administration of shocks.¹⁰⁰ Third, each subject brought traits that encouraged obedience, including politeness, a desire to adhere to the agreement with the researcher, anxiety, awkwardness at the prospect of stopping, and a tendency to continue in an experiment set up in a series of small steps.¹⁰¹

In another classic study, Leonard Bickman investigated how the type of dress of individuals directing pedestrians to carry out simple tasks affected the degree of compliance to simple commands from a uniformed or non-uniformed individual.¹⁰² In a series of experiments, Bickman first tested 153 adults in Brooklyn for their degree of obedience to simple commands: pick up a piece of trash, provide a dime for a parking meter, and move away from a specified area within a public bus stop zone.¹⁰³

Bickman discovered that adult pedestrians obeyed young men wearing either a higher authority uniform or a lower authority uniform at a statistically significant increased rate than actors who wore a sports jacket and tie when commanding the experimental subjects.¹⁰⁴ Those wearing a guard's uniform (even without a weapon) achieved significantly increased compliance than actors who wore either a milkman's uniform or a jacket and tie.¹⁰⁵ For example, 82% of the subjects picked up trash when the "guard" directed them, versus 64% when a "milkman" told them to, and 36% when a civilian so directed.¹⁰⁶ Similarly, 89% attempted to comply with a guard's request to find pocket change for someone else's parking meter, versus 57% and 33% compliance with a milkman and civilian request, respectively.¹⁰⁷ Even with an unreasonable demand to leave an

¹⁰⁰ *Id.* at 143-52.

¹⁰¹ *Id.*

¹⁰² Bickman, *supra* note 88. The uniforms ranged from a civilian sports jacket and tie, to a milkman, to a guard's uniform which resembled a police officer's but without a gun and with a different badge and insignia. *Id.* at 49. Bickman also conducted an experiment on 141 Smith College students to determine how well they could predict compliance with commands given by figures in the three types of garb. The students predicted no statistically significant effect from the presence of uniforms. These predictions proved woefully inaccurate. *Id.* at 57. See *infra* notes 104-08 and accompanying text; see also Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance* 14 J. APPLIED SOC. PSYCHOL. 501-508 (1984).

¹⁰³ Bickman, *supra* note 88 at 50.

¹⁰⁴ *Id.* at 50-51 tbl.1.

¹⁰⁵ *Id.* at 51 tbl.1.

¹⁰⁶ *Id.* at 51.

¹⁰⁷ *Id.*

appropriate bus stop waiting area, 56% of the subjects complied with "guard" given instructions, versus 20-21% compliance with lower authority uniforms or no uniforms.¹⁰⁸

These experiments, while fascinating, do not definitively prove the inherent coerciveness of police-citizen encounters. There are two main problems with importing the conclusions of the experiments to the voluntariness debate. First, the experiments may have limited utility to the consent situation, which involves a suspect who has so much to lose personally by conceding to the officer. Perhaps it could be argued that the desire to please authority breaks down when an individual *personally* suffers in a very *concrete* way—by providing the evidence for his own conviction. In other words, in the Milgram experiment following the orders of the authority figure led to discomfort and emotional trauma for the subjects, who acted contrary to their own inner values. Acceding to authority in the Bickman study meant the loss of an insignificant amount of change, or a minor inconvenience. While these are costs to a person, they are undoubtedly less serious a loss than the realization that allowing a search will almost undoubtedly lead to the discovery of incriminating evidence lying there in plain sight, and thus result in an arrest and likely incarceration.

There is obviously a distinction between the willingness to endure some degree of emotional trauma or minor inconvenience and facing the tangible, severe consequences of arrest and likely conviction. My point is simply that the distinction in the degree of consequences may make analogizing between the reactions of persons to authority in the Milgram and Bickman experiments and police-citizen encounters problematic.

While the magnitude of harm to individuals in situations where police request to search may provide some hesitation in applying the lessons of the experiments, I believe the studies can still provide useful insight. The point is that people follow or obey a "request" made by police officers in authority positions in situations where there is not only no ostensible benefit to do so, there is likely harm. While the consequences to the individual consentor may be greater than those suffered in Mil-

¹⁰⁸ *Id.* This relocating from a location where they have a right to be may be most analogous to the people who accede to a search request even when they have reservations about its legality or appropriateness.

gram and Bickman, the behavior appears the same. Thus, while imperfect, the study provides a viable explanation.¹⁰⁹

A second possible limit to analogizing the Milgram and Bickman experiments to the consent scenario is a more basic methodological attack. The psychology experiments involved clear demands to do something by authority figures, not simply requests by those figures. For example, in Milgram, the authority figure would say things like "the experiment requires that you continue," and "it is essential that you continue," and even "you have no choice but to continue"¹¹⁰ if the subject was wavering. Bickman's experiment also involved situations where the authority figure demanded persons to do something rather than simply requested a favor. Thus, it can be argued that these studies are not analogous to the consent situation because persons may comply with a "demand" but still refuse to go along with a "request." There may be obedience to a direct order by an authority figure, but greater ability to resist a "request" issued by that same person.

In other words, these experiments do not make the essential leap: will persons perceive a request as a demand because it is made by a person in a position of authority—and therefore automatically comply? It is this latter point—that people automatically comply with authority figures' demands—that the experiments document, not the critical question of whether there is a "demand" in the first place.

So, the question becomes: do individuals read a police officer's request as a demand that they will (according to the experiments) most assuredly obey? While the Milgram and Bickman experiments do not speak to this particular point, there is abundant evidence supporting such a proposition.

¹⁰⁹ As Professor Lassiter noted, "[t]he dearth of independent private reasons to consent to a search is the best intuitive evidence of the actual and perceived power imbalance between the law enforcement officer and the private citizen in the routine traffic stop." Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 130 (1998); see also Robert V. Ward, Jr., *Consensual Searches, the Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 *TOURO L. REV.* 451, 472 (1999):

Both the obedience and social power of the uniform theories point out that absent some kind of preliminary warning, the average citizen will find it nearly impossible to tell an approaching officer that, "I don't want to talk with you now." It defies logic to characterize such meetings as being consensual encounters which may subsequently lead to the voluntary relinquishing . . . of important constitutional rights.

¹¹⁰ See Milgram, *supra* note 87.

First, there is testimony by defendants that they perceived a request to search not as an option but as an imperative.¹¹¹ Such a reaction, moreover, should not seem surprising. In everyday life, demands are often phrased as polite requests. For example, if a police officer came up to a person about to park his car and said, "Would you mind moving your car?", most persons would do so, believing that they *had* to move their car. In an employment setting, a boss may "ask" a secretary politely to get coffee: "Would you mind bringing me some coffee?" But I doubt many secretaries would feel that this question was really a request, or that they could answer "no" and still keep their jobs.

Moreover, numerous judges have acknowledged that citizens would view the request to search as a demand when it comes from an authority figure. For example, one court recognized that "many persons, perhaps most, would view the request of a police officer to make a search as having the force of law."

¹¹² The Ninth Circuit recently came close to recognizing this principle as well.¹¹³ The court found that consent was involuntary because one officer asked permission for consent while his hand rested on his gun.¹¹⁴ Such a situation, the court concluded, is "implicitly coercive"—the request for permission to search would be viewed as a command, not a request.¹¹⁵ Al-

¹¹¹ In those few cases where defendants raise this issue and claim that they felt they had no choice, it is typically ignored or given no weight by the courts. *See, e.g.,* *Melton v. State*, 705 N.E. 2d 564, 567 (Ind. Ct. App. 1999). In *Melton*, the defendant, a female, testified that she was intimidated and felt that she could not refuse. The court summarily concluded that her testimony did not outweigh evidence of voluntariness, which was that she had said "all right" and that she helped the police by opening drawers and moving items at the officer's request. *Id.* at 567; *see also* *United States v. Tucker*, 57 F. Supp. 503, 513 (W.D. Tenn. 1999) (court simply found testimony that she felt she had no choice not to be credible). *But see* *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999) (suspect's statement: "[y]ou've got the badge, I guess you can" not unequivocal statement of free and voluntary consent).

I have spoken informally to numerous individuals outside of the legal field, including women from upper class, white backgrounds, and white, middle class teenagers, and virtually all were surprised that people had the right to turn down a police "request" to search.

¹¹² *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975); *accord* *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting); *Commonwealth v. Cleckley*, 738 A.2d 427, 434 (Pa. 1999) (Nigro, J., dissenting); *cf. Worley*, 193 F.3d at 386 (accepting defendant's statement in response to a search request—"[y]ou've got the badge, I guess you can," as simply acquiescing to officer's authority).

¹¹³ *United States v. Chan-Jiminez*, 125 F.3d 1324, 1325 (9th Cir. 1997).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1327-28.

though the court emphasized the hand being on the gun, this seems to be one small step removed from recognizing that at least police officers in uniform convey such authority and power that requests for consent are construed as demands.

Finally, from a linguistic perspective, there is strong support for the conclusion that people will view requests from the police as commands. As Professor Peter Tiersma wrote:

When someone in a position of power and authority makes what is literally a request to a subordinate, and the person in power has the right to command the other, the request will be interpreted as a command. It is phrased in the language of requesting permission in order to express politeness, by giving a superficial choice to the addressee. In fact the power relationships dictate that when the police make a request and they could apparently compel the suspect to carry out the request, the suspect will view the request as a command.¹¹⁶

Even if there is no proof that most persons view the authority of the police as inherently coercive, there is strong evidence that at least certain segments of society will see even the politest "request" by an officer that way.¹¹⁷ Specifically, many African-Americans, and undoubtedly other people of color,¹¹⁸ know that

¹¹⁶ Peter Tiersma, *The Judge as Linguist*, 27 LOY. L.A. L. REV. 269, 282 (1993); accord Rotenberg, *supra* note 2, at n.63 (drawing analogy between demands in Milgram experiment, which were often made "weakly," not backed by meaningful sanctions, and a "request" by police officer to search, where a person may face consequences and sanctions.)

¹¹⁷ Statistics compiled by the state police of New Jersey, for example, show that minority motorists are far more likely to consent to a search than white motorists. Charles Stile, *Profiling Attributed to Lack of Diversity*, THE REC., March 22, 2001, at A1; see also Lassiter, *supra* note 109, at 118, 123 (a study in Florida showed police searched blacks 6 times more frequently than white motorists stopped for minor traffic offenses; in Utah, fifty percent of traffic stops are Hispanic, and a majority consent to vehicle searches); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296, 312 n.94 (2001) (citing to the following statistics: on one highway in which African-Americans constituted less than twenty percent of all drivers, of the 1590 searches conducted, sixty-three percent were of African-Americans, and thirty percent were of whites).

¹¹⁸ The fear of police officers is shared by many people of color, not just African-Americans. A Hispanic resident of a Los Angeles Housing project described his reaction to the police as follows: "Sometimes I think of the L.A. police officers in the neighborhood as soldiers of a hostile foreign army who harass good citizens and commit untold acts of brutality." Hector Tobar, *Police Fear, Need Shapes Pico-Aliso*, L.A. TIMES, April 28, 1991, at B1, in Ward, *supra* note 109; see also Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 205-09; Charles J. Ogletree et al., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995).

refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences. As Professor Terry Maclin argues:

Black men know that a different law exists on the street. Black men know they are likely to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata, regardless of their levels of education, and whatever their job status or place in the community.¹¹⁹

It is not the intent of this Article to provide an extensive documentation of police abuse, particularly against people of color. Suffice it to say that such abuse is well documented and non-controverted.¹²⁰ Rather, the point I am making is this. Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.¹²¹ And this presumption applies even to those who have not personally suffered at the hands of the police—although it would likely apply most obviously to those who have.

Even judges in some candid moments have recognized this presumption.¹²² For example, Judge Oberdorfer noted that if he were authorized to so find, he would hold that a thirty-two

¹¹⁹ Maclin, *supra* note 85, at 253.

¹²⁰ See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001); Scott Glover & Matt Lait, *10 More Rampart Cases Voided*, L.A. TIMES, January 26, 2000, at B1 (discussing Rampart scandal); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465 (1992).

¹²¹ See *supra* notes 117-125 and accompanying text.

¹²² This recognition is often expressed in a dissent, or made in passing without influencing the decision. When a judge uses this justification to suppress evidence, however, there may be severe consequences, at least in high profile cases. For example, one district court judge, Harold Baer, suppressed evidence in a case, in part on the ground that flight from police by residents of a minority community in New York may be reasonable, given the belief by many there that the police are "corrupt, abusive and violent." See *U.S. v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996). An uproar over his comments erupted, escalating into demands by some for the judge's impeachment. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310, 311 (1997). Even President Clinton became involved in the fray. Alison Mitchell, *Clinton Presses Judge to Relent*, N.Y. TIMES, March 22, 1996, at A1. Subsequently, Judge Baer vacated his decision. *U.S. v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd*, 201 F.3d 116 (2d Cir. 2000).

year old black male familiar with the District of Columbia police department and who had at least one violent altercation in the past with the police, "could reasonably fear that if he . . . declined to permit a search of his underwear that he would be forcibly restrained, if not beaten, or . . . shot."¹²³ Justice Page, in an eloquent dissent in another case, made a similar point:

I speak from the perspective of an African American male who was taught by his parents that, for personal safety, . . . it is best to comply carefully and without question to the officer's request. It is a lesson that I have taught my children and, in fact, it is one that I follow to this day.¹²⁴

Given the reality faced by the African-American community, a court's nimble assertion that a person can "just say no" to a police request to search is a sorry, empty slogan. It is no more based in reality than the tooth fairy or Santa Claus. Rather, the reality facing African-Americans and other members of minority groups is this: they are more likely to be stopped, and more likely to be asked to consent to a search of their persons and property because of their color. And, because of the experiences in their community, they will frequently—if not usually—feel coerced to forego their constitutional right of privacy. The idea of a voluntary consent in such circumstances is a fantasy.¹²⁵

C. THE LOSS OF JUDICIAL INTEGRITY

There is a final problem with the consent doctrine as currently construed by the courts. That is, the cost of litigating consent may be too high. By the nature of the dispute, the integrity of the police department as well as that of the judiciary suffers immeasurably.¹²⁶

¹²³ *U.S. v. Alexander*, 755 F. Supp. 448, 452-53 (D.D.C. 1991). This is one of those rare cases in which the search was found involuntary on the grounds that the suspect would have felt cornered by the police after being asked several times to consent, and given that the suspect would have detected the police officer's "aggravation" when he resisted. See also *United States v. Layman*, 730 F. Supp. 332, 342 (D. Colo. 1990) ("[A]ny reasonable traveler, and especially two out of state young black men in the company of two uniformed and armed white law officers . . . in rural Colorado would not have felt that he could do anything other than sign the consent to search.").

¹²⁴ *State v. Harris*, 590 N.W.2d 90, 106 n.4 (Minn. 1999). Not surprisingly, there was no mention of race in the majority opinion.

¹²⁵ See Sklansky, *supra* note 32, at 320-21 ("consent" and "voluntariness" are, in the context of constitutional criminal procedure, legal fictions).

¹²⁶ The ramifications of this loss of trust in the system are severe. As Professor Cole wrote, "[t]hose who view the performance of police and courts negatively . . . are less

How is this so? The problem is that the validity of consent often comes down to conflicting tales. The suspect may deny that the officer even requested consent, or, if he concedes the request was made, may deny granting it.¹²⁷ Even if he admits consenting, the suspect may argue that it was begrudgingly given, or that the officer drew his gun and asked in an intimidating tone. The police officer, on the other hand, may maintain precisely the opposite: he asked for consent, in a polite tone of voice, and the suspect without hesitation said yes. The question of voluntariness, therefore, comes down to a question of credibility, with often no witnesses besides the suspect and the police officer. I can think of few other issues in the criminal justice system that inherently rely so heavily on a swearing contest between officer and suspect; rarely does so much depend on persons recounting precise words and actions without witnesses or any formal way to memorialize the conversation at the time.¹²⁸

likely to play by the rules. Most significantly, people's 'views about authority are strongly connected to judgements of the fairness of the procedures through which authorities make decisions.'" COLE, *supra* note 9, at 172 (quoting TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 38 (1990)).

¹²⁷ See, e.g., *Carmouche v. State*, 10 S.W. 3d 323 (Tex. Crim App. 2000); *United States v. Poulack*, 82 F. Supp. 2d 1024, 1029 (D. Neb. 1999); *Rokitski v. State*, 715 So. 2d 859, 861 (Ala. Crim. App. 1997); *People v. Herrera*, 935 P.2d 956 (Colo. 1997); *United States v. Brisbane*, 931 F. Supp. 245, 247-48 (S.D.N.Y. 1996); *United States v. Ruffino*, 592 F. Supp. 409, 415 (N.D. Ill. 1984); *United States v. Park-Swallow*, 105 F. Supp. 2d 1211, 1213 (D. Kan. 2000) (defendant denied being asked for consent, officer said she said "go ahead").

¹²⁸ The closest analogy is probably to the question of whether a suspect has received, and asserted or waived his Miranda rights. Although this raises very similar issues, there are some reasons to believe that the testimony concerning Miranda is more reliable. First, Miranda warnings are often given in situations with witnesses and in the more formal setting of the stationhouse. Second, and relatedly, the giving of Miranda warnings is often videotaped. See William A. Geller, *Videotaping Interrogations and Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE & POLICING* 303 (Richard A. Leo & George C. Thomas eds., 1998) (in 1990, about a third of all police departments serving more than 50,000 people were videotaping). Two states require videotaping of at least some interrogations. See *Stephan v. State*, 711 P.2d 1156, 1157 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). Finally, the rights guaranteed by Miranda are widely known and accepted. See Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 110 (1998) ("*Miranda v. Arizona* may be the United States Supreme Court's best known decision. Anyone who has watched a television police drama during the last 30 years undoubtedly has heard the famous warnings."); see also Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101 (2001).

See also the problem of pretextual searches, where it is easy for the police officer to claim that he pulled someone over for not wearing a seatbelt, or for failing to signal when changing lanes. See *supra* note 9.

One problem, of course, is perjury. The officer may lie, not only to preserve the evidence for trial, but also to prevent being accused of a bad search. The extent of police perjury in consent cases is, of course, unquantifiable. "By their very nature, successful lies will remain undetected."¹²⁹ But anecdotal evidence and some empirical studies document that police perjury is a serious problem. One former Police Chief candidly admitted his belief that much "testilying" occurs at suppression hearings with respect to consent searches:

Hundred of thousands of police officers swear under oath . . . that the defendant gave consent to a search. This may happen occasionally, but it defies belief that so many drug users are . . . so dumb as to give cops consent to search . . . when they possess drugs.¹³⁰

Professor Dripps, after surveying the available studies, concurred: "The available evidence strongly indicates that police perjury is a widespread phenomenon."¹³¹

Hopefully, the system can ferret out times of perjury, and there are circumstances where the court has found the officer's testimony to be "incredible."¹³² But more often judges are inclined to accept the testimony of a police officer in a swearing

¹²⁹ Morgan Cloud, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Judges, Testilying and the Constitution*, 69 S. CAL. L. REV. 1341, 1356-57 (1996).

¹³⁰ Joseph McNamara, *Has the Drug War Created an Officer's Liar's Club?*, L.A. TIMES, Feb. 11, 1996, at M1. Every year, I have several students in my criminal procedure class report to me that they refused officer's consent, only to have the officer say "thank you for agreeing," and then proceeded to search.

¹³¹ Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. LAW & CRIMINOLOGY 693, 693-94 (1996). Professor Dripps recommends the introduction of polygraph testimony in certain "swearing contests." *Id.*; see also Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 36-38 (1993); Myron Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) ("virtually all of the officers admit that the police commit perjury, if infrequently, at suppression hearings"); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1039-40 (1996). But see Kevin Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1062 (1996) (suggesting problems with studies on extent of perjury).

¹³² See, e.g., *Carmouche v. State*, 10 S.W.3d. 323 (Tex. Crim App. 2000) (videotape showed truth); *People v. Herrera*, 935 P.2d 956 (Colo. 1997); *United States v. Brisbane*, 930 F. Supp. 245 (S.D.N.Y. 1996); *People v. Massiah*, 367 N.Y.S. 73, 75 (N.Y. App. Div. 1975) ("We cannot credit the testimony of the police officer that the [defendant] an ex-felon, would consent to a search with knowledge that the contraband sought was in the room in open view. We refuse to credit testimony which has the appearance of having been patently tailored to nullify constitutional objections.").

contest with a criminal defendant. "Hence, absent some significant discrepancies . . . factual disputes over whether consent was in fact given are overwhelmingly resolved in favor of the state."¹³³ As one judge put it:

I am dubious [of the defendant's claim] that Trooper Stanczyk, a thirteen year veteran of the Nebraska State Patrol, would have ordered him to open the back of the truck without asking for his consent. Also, [the defendant] a convicted felon, and presently charged with possessing a substantial amount of marijuana, has everything to gain by testifying that he did not consent to the search. . . . I therefore choose to credit Trooper Stanczyk's version that he asked for, and received . . . consent to search.¹³⁴

Moreover, even when judges suspect something is "fishy," they are reluctant to side with the defendant. There are a number of judges who admit that they have found consent in situations where they are fairly sure it is a fiction, but they feel they have no choice.¹³⁵ Many judges understandably are uncomfortable accusing the police of blatant lying on the stand unless the evidence is starkly against the officer.¹³⁶ As one judge put it,

¹³³ David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 75 DENV. U. L. REV. 941, 947 (1997); Dripps, *supra* note 131, at 696:

In a swearing context, the trial judge can discredit the police testimony only by branding the police as liars and accepting the word of an apparent felon. Typically the police, rather than the felon, will be telling the truth, but in a significant number of cases, the police account is false. Nonetheless, judges decide cases one at a time, so the police almost always win the swearing contest.

¹³⁴ *United States v. Poulack*, 82 F. Supp. 2d 1024, 1029 (D. Neb. 1999); *see also* *State v. Boyd*, 695 N.E.2d 843 (Ohio Ct. App. 1998) (accepting police officer's version); *State v. Peterson*, 964 S.W.2d 854, 857-58 (Mo. Ct. App. 1998) (same).

And there are racial aspects to this issue as well. "[B]lack defendant's may face greater challenges in asserting credible denials of consent than their white counterparts." Lassiter, *supra* note 109, at 81.

¹³⁵ *See United States v. Heath*, 58 F.3d 1271, 1276 (8th Cir. 1995) (McMillian, J., concurring) ("The police officers' saccharine account of the events . . . leaves a bitter aftertaste. . . . The [fact] that the [defendant] would so willingly consent to the search . . . of the shoe box, which he knew contained drugs . . . is surprising, to say the least."); *see also* ALAN DERSHOWITZ, *THE BEST DEFENSE*, xxii (1987) (Rule VIII: Most trial judges pretend to believe police officers who they know are lying); Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 416 (Sep/Oct 1986) (quoting numerous judges); *cf.* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) ("Trial judges . . . and magistrates . . . are functionally and psychologically allied with the police The result [in resolving testimony conflicts between police and suspect] is about what one would suspect").

¹³⁶ Cloud, *supra* note 129, at 1377-78.

"[M]any times, I feel the police are lying, but I can't make a finding on a hunch."¹³⁷

When police officers discover that they are successful on the stand in convincing the court of the validity of their actions, moreover, it may encourage them to be more reckless in the field. A suspect's "no" becomes a yes more easily in court if the officer is convinced that he can get away with such testimony.¹³⁸

There is a more subtle problem with determining voluntariness based on the testimony of police officers, however, and that problem is likely even more pervasive than perjury. That is, police officers will "hear" what the suspects say, and remember the words in a way that conforms to the officers' desire to be able to search and to have the evidence admissible in court.¹³⁹ In other words, police officers, like other people, "hear what they want to hear."¹⁴⁰ Social psychology studies demonstrate that individuals perceive information selectively. Information is held and processed according to what that person wants to

¹³⁷ Dripps, *supra* note 131, at 700. Professor Dripps believes that "the judge might well believe that the police lie in a fifth of the cases, and yet never make a finding of police perjury in a single case." *Id.*; see also Carol Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767 (2001) ("Although judges are aware that officers lie to preserve cases, they are reluctant to catch officers in their lies, especially when the consequence of doing so will lead to the suppression of evidence which is essential to proving the prosecution's case.").

¹³⁸ See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 465 (1999) ("One of the strongest reasons that police lie in court is the simple fact that judges allow them to get away with it."). See also Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596 ("the policeman is as likely to be indicted for perjury . . . as he is to be struck down by thunderbolts from an avenging heaven").

¹³⁹ See RICHARD R. BOOTZIN ET AL., *PSYCHOLOGY TODAY* 218-19 (1986) (emphasizing the "importance of selective attention": "The gatekeeper to our memory is a process known as selective attention . . . Only those few stimuli that we select for focused attention will be registered firmly in our memory . . . Stimuli that affect our *goals* and *self-esteem*, or those of our loved ones, interest us."); see also NICKY HAYES, *FOUNDATION OF PSYCHOLOGY* 39 (1994) (summarizing a study that found individuals perceive sentences on controversial topics in different ways, "which suggests that individual differences in values and attitudes are a major factor in [human perception.]"); *id.* at 59-60 ("we are continually surrounded with rich sources of information, from all our senses, and we interpret that information in ways that are most useful to us."); cf. Maclin, *supra* note 85, at 385 ("an officer may falsely . . . add a fact . . . to validate a consent search—particularly where she perceives that the judiciary has imposed unrealistic barriers to the efforts to snare drug traffickers.").

¹⁴⁰ In the words of a Simon and Garfunkel song, "and a man hears what he wants to hear and disregards the rest . . ." SIMON & GARFUNKEL, *The Boxer*, in *GREATEST HITS* (1972). For academic support for this proposition, see HENRY GLEITMAN, *PSYCHOLOGY* 191-94 (1986).

hear.¹⁴¹ Thus, a police officer that wants to search may hear a qualified consent as an unequivocal yes.

As time passes, the words used by the suspect become even more convincingly clear in the police officer's mind. After all, the officer wants to conform his behavior to the law. Any dissonance between his actions (searching) and the law (needing to have voluntary consent) can be resolved by remembering the interaction as friendly, the suspect as cooperative.¹⁴² He selectively recalls those facts that help him feel better about himself and his behavior, and forgets incongruent factors.¹⁴³ By the time of trial, the officer can honestly—in his mind—take the stand and testify that the suspect clearly and without reservation consented.¹⁴⁴

¹⁴¹ See Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y. REV. 389, 399 (1994); cf. DONALD VINSON, *JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY* 26-27 (1986) (applying selective perception theories to jurors: "Like everyone else, . . . jurors see what they want to see, hear what they want to hear, and perceive what they want to perceive [T]his is an unconscious process and can be done without malice by well meaning and very conscientious jurors.").

¹⁴² See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 260 (1957) (discussing how people try to reduce internal inconsistencies between their beliefs and observations). As Professor Festinger writes, "The basic background of the theory consists of the notion that the human organism tries to establish internal harmony, consistency or congruity among his opinions, attitudes, knowledge and values. That is, there is a drive down consonance among cognitions." *Id.* When cognitive elements are in conflict, individuals tend to view their experiences in a modified manner, by employing, among other things, selective recall. *Id.* at 11.

¹⁴³ See BOOTZIN ET AL., *supra* note 139, at 237 (summarizing selective recall studies by Loftus and Greenwald: "Motivations also can create distortions, causing us to remember ourselves in a more favorable manner than we deserve, so that our memories become self serving...Our self-serving memories are rarely attempts to deceive others; rather they are unconscious reconstructions that bolster our self esteem, so that we can continue to think of ourselves in a positive light.").

¹⁴⁴ See JUDITH GREENE, *MEMORY, THINKING AND LANGUAGE* 79-81 (1987) (People remember their interpretation of utterances rather than the exact words). Even with the Speedy Trial Act, there may be significant gaps of time between the search and the trial. See, e.g., *United States v. Nuyens*, 17 F. Supp. 2d 1303, 1309-10 (M.D. Fla. 1998) (testimony of police was credible, "despite notable inconsistencies resulting from the passage of two years since the search"); J. Andrew Read, Comment, *Open-Ended Continuances: An End Run Around the Speedy Trial Act*, 5 GEO. MASON L. REV. 733 (1997).

It is not only the police officer that will suffer from selective perception and memory problems over time. The suspect will likely share the same fate. I must confess to personal knowledge here. About six months before I wrote this article, I had the pleasure of approximately ten police officers converging on my house to complain about my teenage son's frankly out of control party. Agreeing with the officers, the party was broken up, and the police watched five hundred teens leave my backyard. When virtually all the kids were gone, the officers went into the backyard "to look around." Even though I was obviously aware of my rights, and all the criminal procedure issues and cases related to search and seizure were flashing through my

The problem of police officers "honestly misremembering" the circumstances surrounding consent is exacerbated by two related problems. First, a suspect is more likely to be equivocal than to come right out and clearly say "no" to a search request. Even if the situation surrounding the consent search is not deemed coercive, it will at least be somewhat tense. In such situations, a person is likely to be uncertain and tentative in their communication with the officer.¹⁴⁵ This gives the officer room to claim that, while he did not remember the exact words, the person had no objection to the search.¹⁴⁶ While it may be difficult for an unequivocal "no-absolutely not" to be recalled as a "yes" over time, a suspect's wavering ("Well, I don't know, I guess so") is more readily converted into a clear agreement to search in the memory of the officer. As Professor Hayes noted, "[b]ecause people tend to remember what they think they heard, or what they expected to hear, rather than what was literally said, they often remember the message as having been far more definite than it really was."¹⁴⁷

Moreover, the law of consent—unlike confessions¹⁴⁸—does not preclude the police from trying to "persuade" the suspect to

mind (did the police have probable cause? Exigent circumstances?), I frankly would be unable—even after just a few months—to accurately recollect all that they said to gain access to the backyard and what I said in return. I'm not even positive that they asked my permission to go into the backyard or whether they simply went back there. Even without any obvious show of force, and even in my own home I was nervous, intimidated, and frankly embarrassed dealing with so many officers.

The event remains a "blur" in my mind. Luckily, since nothing was found, the event safely can remain a distressing blur.

¹⁴⁵ And this may be particularly true for certain cultures, women, and people of color. Professor Ainsworth, in a comprehensive study of a suspect's use of language and asserting the right to counsel, made this point. Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L.J. 259 (1993).

Even if the suspect's words are unequivocal, the dynamics of the situation may lead to confusion about whether the suspect consented. Typically these will be resolved against the suspect. For example, in one case, the police asked: Do you mind if we search—is it ok? *Lyons v State*, 735 N.E.2d 1179 (Ind. Ct. App. 2000). The suspect replied, "yeah." The police officer testified that this response proved that there was consent to search. The suspect testified that there was no consent. Rather, according to the suspect, the officer asked if he minded if the police searched, and the suspect said "yeah"—that is, yeah, he did mind! The court held that the consent was voluntary. *Id.* at 1185-86.

¹⁴⁶ See *State v. Ready*, 565 N.W.2d 728, 817 (Neb. 1997) (police officer testified at trial that although he could not recall the exact words, he was sure that she did not object).

¹⁴⁷ HAYES, *supra* note 139, at 38.

¹⁴⁸ Under the Fifth Amendment, once a suspect says that they want to remain silent, or asserts the right to an attorney (unequivocally), the police must cease ques-

consent. An officer does not have to take “no” as absolute, or accept the suspect’s reluctance.¹⁴⁹ The law does not preclude the police from “wearing down” the suspect to obtain consent. Thus, the following hypothetical scenario is not only lawful, it is likely to occur:

Police Officer: “Mind if we look around?”

Suspect: “Well....”

Police Officer (bit more menacing, touches gun, or shifts holster): “You got a problem with it? Gonna give me some trouble here?”

Suspect: “I really don’t...”

Police Officer (sounding a bit impatient and even more menacing, leans toward the suspect): “You got a problem here? Can we look around?”

Suspect (shrugs in resignation): “Go ahead then.”

And how does this scenario replay at trial? The police officer testifies that in a normal tone of voice (being macho and tough-sounding is normal police talk), without guns drawn, he

tioning. See *Davis v. United States* 512 U.S. 452 (1994); *Edwards v. Arizona*, 451 U.S. 477 (1981) (accused who requests counsel cannot be subject to further interrogation outside presence of attorney unless accused initiates conversation and waives rights); *Michigan v. Mosley*, 423 U.S. 96 (1975) (police must scrupulously honor defendant’s assertion of right to remain silent—means questions must cease). See generally, Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359 (1995) (discussing the invocation of the right to counsel, and the ability of the police to re-question a suspect who has invoked his right to counsel).

¹⁴⁹ See, e.g., *Krise v. State*, 718 N.E.2d 1136 (Ind. Ct. App. 2000) (defendant’s roommate initially refused to consent, but eventually consented after being asked several times; court found it voluntary), *rev’d on other grounds*, 746 N.E.2d 957 (Ind. 2001) (Supreme Court held that roommate did not have actual or apparent authority to consent to search of defendant’s purse); see also *United States v. D’Armond*, 80 F. Supp. 2d 1157, 1162 (D. Kan. 1999) (court noted that defendant initially took “umbrage” at the request to search and then consented; held consent voluntary); *Davis v. United States*, 328 U.S. 582, 586 (1946) (over the course of an hour, defendant several times refused to open a locked inner room, and finally did open it; defendant claimed that officer said if he didn’t open it, the agents would break down the door, court did not credit this testimony); but see *State v. Monroe*, 630 N.W.2d 223, 227 (Wis. Ct. App. 2001) (citing *State v. Kiekhefer*, 569 N.W.2d 316, 324 (Wis. Ct. App. 1997)) (initial refusal “militates against finding of voluntariness”).

asked the suspect if he minded if they looked around, and the suspect willingly said, "go ahead." Gone are the nuances, the hesitation, the body language. Even if the police officer relays that the suspect initially refused, but then changed his mind, voluntariness is likely to be found.¹⁵⁰ Indeed, showing that he "knew" he had the right to refuse may work against the suspect.

Concededly, other issues in a criminal trial rely on the integrity of police officers. But the area of consent uniquely fosters an environment that encourages or promotes officer perjury. Even with the best of intentions and honesty, it is likely asking too much from officers to expect them to accurately recreate the exact words, ambiance, subtle body language, and every other aspect of the situation that is so crucial to understanding the voluntariness of a consent search.

When police officers lie, the criminal system obviously suffers. That injury is magnified manifold when the court tacitly accepts that deception. Even when officers "honestly" misremember or selectively recall details, faith in the integrity of the system and its ability to render fair and objective justice is perverted. Because the voluntariness doctrine inherently rests on such imprecise memory at best and purposefully distorted recollections at worst, its utility can be questioned.

III. A PROPOSED SOLUTION: REJECTING CONSENT

In the previous section I argue that the determination of voluntariness is currently confused, misapplied, and based on a fiction. Moreover, determining voluntariness raises significant concerns about the integrity of the judicial system. So what should be done about it? In this section, I propose a concededly radical solution: eliminating consent. But first, commonly proposed, less drastic solutions are considered and rejected as ineffective and undesirable.

A. PROVIDING WARNINGS

One alternative that has oft-times been proposed for ensuring a voluntary consent is to reject the holding in *Schneckloth* and require that police officers tell individuals that they have the right to refuse consent, that such a refusal would not be

¹⁵⁰ See *supra* notes 148-50.

held against them,¹⁵¹ and that any evidence found during the search can be used against them. Indeed, many scholars have advocated such a position, arguing that a true and knowing choice requires knowledge of options and consequences.¹⁵²

Moreover, many scholars and even police officers persuasively contend that, contrary to the assertion of the Court in *Schneckloth*, providing a warning would not hinder law enforcement.¹⁵³ First, warnings would not lead to the end of consent; the experience with Miranda warnings show that many people—indeed most people—still waived their rights after being pro-

¹⁵¹ Whether a refusal to allow consent can be used against the suspect has yet to be decided. See COLE, *supra* note 7, at 33 (“The courts have never clearly answered a basic question: can the police use an individual’s exercise of his right to say no as a basis for developing suspicion justifying a non-consensual search?”). Some courts have suggested that a person’s refusal to consent should be considered a factor in determining whether the officer has reasonable suspicion to detain a person or to undertake other investigatory techniques. *Id.*; see *United States v. Withars*, 972 F.2d 837, 843 (7th Cir. 1992); *cf. United States v. Holloman*, 113 F.3d 192, 193 (11th Cir. 1997) (driver refused consent, police used narcotics dog to sniff); *United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990) (warrant to search based on suspect’s nervousness and withdrawal of consent); *cf. Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (flight from police can be factor in determining reasonable suspicion to stop).

Other courts have suggested that the refusal to consent cannot be used against the suspect. *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993); *United States v. White*, 890 F.2d 1413, 1417 n.4 (8th Cir. 1989) (refusal to consent cannot be support for reasonable suspicion); *cf. United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) (refusal to search cannot establish probable cause to search. “A contrary rule would vitiate the protections of the Fourth Amendment. . . . Indeed, the Fourth Amendment would mean little if officers could manufacture probable cause by asking questions until a suspect either consents or exercises constitutional rights.”).

The answer to this question has obvious import. As Professor Cole noted, “If the police can use a citizen’s negative answer against her, then she is not truly free to say no. . . . The very fact that the law is unclear on this point means that a citizen . . . cannot know whether her choice to say no will be held against her.” COLE, *supra* note 9, at 33.

¹⁵² See, e.g., Barrio, *supra* note 35; Rebecca Stack, Note, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183 (1991). See generally 3 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, 8(1)(a)(1-5) (1996) (listing articles in support of this proposition).

¹⁵³ See James A. Adams, *Crime and Punishment Symposium: Search and Seizure as seen by Supreme Court Justices: Are they Serious or is this just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 446-49 (1993); see also *Ohio v. Robinette*, 519 U.S. 33, 52 n.12 (1996) (Stevens, J., dissenting) (discussing the fact that many law enforcement agencies do incorporate warnings into their Fourth Amendment consent forms); Michael R. Bromwich & William J. Bratton, *Police Have Good Reasons to Support Miranda Warning*, B. GLOBE, Feb. 7, 2000, at A15.

vided such warnings.¹⁵⁴ Second, many departments currently require or encourage their officers to tell suspects of their right not to consent before obtaining consent to search. "[I]nstructors in many police training programs . . . recommend such warnings as a sound police practice, likely to bolster the voluntariness of a consent to search."¹⁵⁵ Despite the fact that many officers do inform suspects of their rights, no one has suggested that law enforcement has floundered in those areas.¹⁵⁶

I agree that a voluntary consent, at a minimum, requires that police officers tell a suspect from whom they are seeking consent of the right to refuse. I disagree, however, that these warnings are much of a panacea, and do not solve all of the problems with the consent doctrine.

First, it is unclear whether being told of the right to refuse really dissipates coercion. It is police officers providing the information in the same coercive environment that existed before; individuals who distrust and fear the police are likely not reassured by such a warning.¹⁵⁷ Since many believe that police officers routinely ignore and violate other rules and limitations on their authority, why should this be any different simply because the police officers are forced to tell the suspect of his rights? Ironically, the evidence used to deny that warnings harm law enforcement interests thus can be seen as a double edged-sword. The argument that providing such warnings will not significantly decrease the number of consent searches does dispute that law enforcement interests are harmed, but at the same time it provides some evidence that coercion may still persist.

Moreover, because the police are allowed to try to persuade a suspect to consent, even after an initial rejection of permission, it is questionable whether suspects will believe that the officer is truly prepared to honor their wishes.¹⁵⁸ More important than knowledge of one's rights is the belief that police are pre-

¹⁵⁴ Lassiter, *supra* note 109, at 82-83; see also Jan Hoffman, *Miranda ruling losing effectiveness through court, police action*, S. BEND TRI., Mar. 29, 1998, at A5 (stating that some officers have found eighty percent or ninety percent of suspects waive their rights).

¹⁵⁵ State v. Robinette, 685 N.E.2d 762, 771 n.6 (Ohio 1997) (quoting Amicus Curaie Brief for Americans for Effective Law Enforcement) (Robinette III).

¹⁵⁶ See Barrio, *supra* note 35.

¹⁵⁷ Lassiter, *supra* note 109, at 132.

¹⁵⁸ See *supra* notes 148-50; see also *Edwards v. Arizona*, 451 U.S. 477, 479 (1981); *Miranda v. Arizona*, 384 U.S. 436, 454-55 (1966).

pared to honor those rights. If a person rejects a search request (or believes that he or she did) and the police officer ignores that rejection by continuing to request permission or wear down the person's will, the suspect may become convinced that his or her wishes will not be respected, regardless of the warning.¹⁵⁹ The suspects may learn from the warnings that they have a right to say no, but the officer's behavior tells them that that if they do so, they will be bothered and harassed until they "decide" to say yes.

Second, warnings may be a necessary, but not a sufficient solution to the problems of consent because police officers can still lie about or misremember whether such warnings were even given.¹⁶⁰ As Professor Dripps noted in an analogous context, "[t]old that the test of a confession's admissibility is not voluntariness but a waiver made after warnings, unscrupulous police officers will simply lie about giving the warnings and getting the waiver."¹⁶¹ While a written consent form informing the suspect of their rights may mitigate some of this problem, it does not erase it. This form may be signed after a party has already consented (without such warnings); signing a form with the written warning once a suspect verbally has committed to allowing a search does not resolve whether the decision to consent was made with full knowledge of these rights.¹⁶²

Thus, requiring police officers to tell a person that he has a right to refuse consent is a step in the right direction toward alleviating coercion, but does not go far enough. Taking this baby step, moreover, may have the unfortunate, unintended consequence of preventing further reform. In other words, some may believe that implementing this proposal solves the problems with coercion, and thus may divert attention and efforts from true, more meaningful reform. It may diffuse inter-

¹⁵⁹ See Samira Sadghi, Comment, *Hung up on Semantics: A Critique of Davis v. U.S.*, 23 HASTINGS CONST. L.Q. 313, 332 (1995) (making analogous argument in *Miranda* context).

¹⁶⁰ See, e.g., *People v. Brazzel*, 18 P.3d 1285, 1287 (Colo. 2001) (defendant said police officer lied about giving him his *Miranda* warnings).

If police officers were to videotape every encounter, that certainly would help. That may not be viable in many settings, however, in which consent is sought. See *United States v. Kreisel*, 210 F.3d 868, 869 (8th Cir. 2000) (viewing of videotape convinced court consent was voluntary).

¹⁶¹ Dripps, *supra* note 131, at 697.

¹⁶² See *State v. Meyers*, 695 N.E.2d 327, 329 (Ohio Ct. App. 1997) (signed consent form one hour after search began).

est in the needed solution, either eliminating consent altogether if possible, or, in the alternative, developing some means to assess and give weight to cultural and racial responses to police authority.

B. WARNINGS PLUS AN AWARENESS OF SUBJECTIVE, CULTURAL COERCIVE FACTORS

Another possible solution is to not only require police officers to inform suspects of their rights, but also to reinforce the requirement that coercion be assessed from the subjective viewpoint of the defendant, including consideration of the defendant's race. Thus, courts would give careful and considerable attention to the background of the consenter and whether his prior personal experience or group cultural experience with the police may have affected the decision to consent.¹⁶³

Again, while this may have some advantages over the court's current approach, I do not believe it is a viable solution to ensure "voluntariness." First, as mentioned before, even if judges conscientiously considered these factors, they may still have difficulty truly understanding their significance and identifying the depth of the fear and intimidation experienced by other cultures or classes.¹⁶⁴ Second, this mandate to consider subjective factors does not eliminate the issues of perjury and distortion; it is still reliant on police testimony concerning the nature of the request to search and the suspect's responses. It is only the explanation for that response that lies exclusively within the province of the defendant.

Moreover, it may be undesirable to promote a system so governed by an almost infinite number of subjective factors. Criminal procedure rules are:

primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile

¹⁶³ See Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 How. L.J. 239 (1993).

¹⁶⁴ See *supra* note 59 and accompanying text.

minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.¹⁶⁵

A rule that recognizes not only the past experience of the suspect, but also past experiences of members of his ethnic or racial group obviously provides no guidance to the police in the field. How can an officer obtaining consent factor in these variables?¹⁶⁶

Finally, such a rule may lead to a perception that the system is unfair. Many may perceive that people of color, or immigrants from police states are gaining some advantage in the criminal justice system that they do not have. Letting an African-American prevail on a suppression motion because he can honestly claim that he felt coerced by the show of police authority, while a white, middle class person may not have the same option, may strike some as a strange form of "affirmative action."¹⁶⁷

If subjective factors are so problematic, why not simply make it an objective test: would a reasonable person feel coerced in the circumstances? Or, as in *Connelly*, why not simply look at the actions of the police to see if they behaved in a coercive manner? There are several problems with abandoning the subjective approach. First, and most fundamentally, an objective approach would not be consistent with the Constitution and the mandate of the Fourth Amendment here. Consent searches are valid not because a reasonable person would have consented in a particular circumstance, but because this person did. Consent is a personal waiver of Fourth Amendment rights, a personal relinquishment of rights of privacy.¹⁶⁸ It is reasonable for

¹⁶⁵ *New York v. Belton*, 453 U.S. 454, 458 (1981) (quotations omitted) (discussing the need for clear and concise rules concerning search incident to arrest); see also *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (praising a rule for providing "clear and unequivocal" guidelines to law enforcement).

¹⁶⁶ One author, after conducting a study of police training concludes that police officers are "much better able to work with specific, clearly-delineated policies than with vague exhortations to consider all the circumstances," although even when forced to work with vague rules, they do try to follow the law. Corey Fleming Hirokawa, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 328 (2000).

¹⁶⁷ See Sklansky, *supra* note 32, at 327-28.

¹⁶⁸ See *Edwards v. Arizona*, 451 U.S. 477, 483 (1981) ("The issue in *Schneekloth* was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights."); *Stoner v. California*, 376 U.S. 483, 489 (1964) ("It is important to bear in mind that it was the petitioner's constitu-

police to search not because the police behaved in a non-coercive manner, but because the person chose to let the police invade his private space. That is why the Court in *Schneckloth* emphasized repeatedly that voluntariness must be shown in fact in this particular case, and that this person must have voluntarily consented.¹⁶⁹

Second, objective factors by definition marginalize the real life experience of millions of people—people of color. So long as the reasonable person is likely a reasonable white person, the voices of those traditionally excluded from the justice system continue to be unfairly silenced.¹⁷⁰

So the bottom line is this. A rule requiring the court to consider subjective factors such as racial and psychological responses to police authority is essential to ensure voluntary consent. Yet, such a rule would be difficult for the courts to apply, and impossible for the police to implement. In other words, the voluntary consent doctrine is inherently flawed, and piecemeal attempts to solve its problems are doomed to failure. There is an inescapable contradiction in the doctrine of consent. Thus, the only viable solution undoubtedly is the most radical: eliminating consent.

C. ELIMINATING CONSENT

Given that “voluntary consent” under the Fourth Amendment is often an oxymoron, and that the system isn’t capable of sifting the “truly voluntary” from the coerced, why not simply eliminate the consent exception? What would be lost were the police no longer able to obtain a person’s consent to search? In *Schneckloth* and subsequent cases, the Court identified two main reasons for allowing consent searches.¹⁷¹ First, consent searches

tional right . . . at stake It was a right, therefore, which only the petitioner could waive.”); Davies, *supra* note 11, at 26; see also John B. Wefing & John G. Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 215 (1974) (“the issue [in consent] is whether the protections of the Fourth Amendment have, in fact, been waived by a party with authority to do so”).

¹⁶⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). This position may be inconsistent with the current law on third party consent. See *supra* notes 67-68 and accompanying text. To extent it is, I believe that the third party consent rules are misguided. See generally Davies, *supra* note 11.

¹⁷⁰ See Dana Raigrodski, *Breaking Out of “Custody”: A Feminist Voice in Constitutional Criminal Procedure*, 36 AM. CRIM. L. REV. 1301, 1326-27 (1999).

¹⁷¹ Actually, the law enforcement interests were part of the balance in determining “voluntariness” in *Schneckloth*. Considering this factor in that context is problematic. As Alan Wertheimer, a professor of philosophy noted, “it is not clear that society’s le-

promote the interests of law enforcement. Second, individuals may benefit from voluntary consent, and in any event should have the right to decide whether they want to allow the police to engage in a search.¹⁷² Although both reasons have surface appeal, neither withstands close scrutiny.

Consider first the argument that consent searches enhance law enforcement and crime fighting. By definition, such searches permit the police to look for incriminating evidence even when they lack probable cause to search.¹⁷³ Moreover, even if there is probable cause to search, obtaining a warrant may be time consuming or inconvenient. "A consent search allows an officer to bypass paperwork and the need to locate a magistrate who can issue a warrant."¹⁷⁴

Finally, even if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid. In other words, "because of the various constitutional and statutory requirements which attend the issuance and execution of a search warrant,' the police may perceive the consent search alternative as the surest method of reducing the chances of the evidence being suppressed at trial."¹⁷⁵

gitimate need for searches can or should be accommodated 'in determining the meaning of "voluntary" consent.' Not only does society provide for nonconsensual searches, but however important society's need for searches, it arguably has nothing to do with the voluntariness of consent." ALAN WERTHEIMER, *COERCION* 117 (1987).

¹⁷² *Schneekloth*, 412 U.S. at 225.

¹⁷³ See *id.* at 227 ("In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."). It is not clear what the evidence of illicit activity was in *Schneekloth*. As least one court is troubled by idea of searching without any suspicion at all. *Harris v. State*, 994 S.W.2d 927, 932. n.1 (Tex. Crim. App. 1999) (police officer testified that he "asks for consent to search every vehicle that he stops, regardless of any suspicion of illegal activity. In our opinion, this is a questionable practice"). The New Jersey consent decree to end racial profiling bans consent searches unless the officer has reasonable suspicion. See *infra* note 194.

¹⁷⁴ David S. Kaplan & Lisa Dixon, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation and the Law: Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 948 (1997); see *State v. Walker*, 965 P.2d 1079, 1087 (Wash. 1998) (police officer testified that he relied on consent and did not get a search warrant because it was time consuming).

¹⁷⁵ Barrio, *supra* note 35, at 220 (quoting 3 WAYNE LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.1, at 147 (2d ed. 1987)). My discussions with a number of police officers confirm this; they all said that even if they believed that they had legal justification to search, they would still try to ask for consent; cf.

Although police officers undoubtedly gain at least a minimal efficiency advantage from consent searches, the magnitude of these interests are unclear. Nowhere have any of these arguments been empirically validated.¹⁷⁶ And police officers' lament that their hands will be tied, and that the amount of crime will explode if they could not undertake consent searches, must be viewed skeptically. Police officers have a reputation of at least slight exaggeration of the dire consequences of any limits on their authority. After all, police departments virtually in unison insisted that they would be totally ineffective in fighting crime if the exclusionary rule were applied to the states in the 1960s.¹⁷⁷ Similar doomsday predictions followed the *Miranda* decision, and its requirement that suspects be warned before the police could engage in custodial interrogation.¹⁷⁸

Nonetheless, even in the absence of empirical evidence, the argument holds at least surface appeal. Just like it seems intuitively obvious that people feel coerced by authority figures, the argument that law enforcement benefits from consent searches makes sense. The real question is how much weight to give such an argument in the absence of any empirical support. The answer, I ultimately conclude, is not much.

First, of course, enhancing the efficiency and effectiveness of law enforcement cannot be the only rationale for consent searches. Police would undoubtedly uncover evidence of criminal activity that might otherwise go undetected were they given free reign to search a person's property. Yet, no one suggests such a prospect. As the Supreme Court noted:

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. . . . The investigation of crime would always be simplified if warrant were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be

United States v. Chavez, 75 F. Supp. 2d 1015, 1022 (W.D. Mo. 1999) (could search bags incident to arrest so didn't need consent).

¹⁷⁶ Rotenberg, *supra* note 2, at 190 ("Notwithstanding the Supreme Court's observation that 'a legitimate need for [consent] searches' exist, the case for need has not been made." (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973))).

¹⁷⁷ James Stribopoulos, *Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 104 (1999); see *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961).

¹⁷⁸ Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1057 (1998); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 455-56 (1987).

totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.¹⁷⁹

Moreover, there is strong reason to believe that crime control would not unduly suffer were the police no longer able to obtain consent to search. First, in many—if not most—contexts the loss of consent does not mean the loss of evidence, arrest or conviction. Consent searches often are used in circumstances where the police also have probable cause to search, but don't want to go to the "trouble" of getting a warrant. Thus, the harm from eliminating consent searches is that police officers must do additional paper work and suffer annoyance by obtaining a warrant, and not the failure to apprehend and convict a dangerous criminal.

If there is no time to obtain a warrant, the police can engage in a search based simply on probable cause under the exigency exception.¹⁸⁰ Moreover, the "hassle" of getting a warrant—if a constitutional requirement can be so described—surely can be minimized in this technological era. Use of fax machines, e-mail, cell phones, telephonic warrants and other such advances make the obtaining of a warrant less troublesome.¹⁸¹ Undoubtedly, future innovations can only speed up or lessen the onerous nature of the process. The point is that in many cases where a consent search is undertaken, the criminal

¹⁷⁹ *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

¹⁸⁰ Exigency is another exception to the warrant requirement of the Fourth Amendment. See *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Warden v. Hayden*, 387 U.S. 294 (1967); see also *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990) (while police exceeded permissible scope of consent, probable cause and exigency existed to justify search); *United States v. Romero-Garcia*, 991 F. Supp. 1223 (D. Or. 1997) (even if consent invalid, had exigent circumstances); *State v. Edwards*, 735 A.2d 723, 729 (Pa. Super. Ct. 1999) (Del Sole, J., concurring) (did not need to reach consent issue because police had probable cause and exigency); cf. *People v. Berr*, 731 N.E.2d 853 (Ill. App. Ct. 2000) (even if no consent, was plain view).

¹⁸¹ See Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 295 (1996) ("with current computer and electronic telecommunication technology, police officers can now swiftly obtain a warrant without leaving the area of investigation"); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471-72 (1985) (discussing warrant model based on telephonic warrants); Michael John James Kuzmich, *www.warrant.com: Arrest and Search Warrants by E-mail*, 83 MICH. L. REV. 590 (1999) (discussing California's use of e-mail for warrants); Geoffrey P. Alpert, *Telephonic Search Warrants*, 38 U. MIAMI L. REV. 625 (1984); see also *People v. Peck*, 38 Cal. App. 3d 993, 1000 (Cal. Ct. App. 1974) (upholding constitutionality of telephonic warrants).

would still be apprehended without using consent with, at worst, minimal additional duties placed on the police.¹⁸²

What about those cases without probable cause? Again, it may be worthwhile to probe deeper. There are two possible scenarios. The first is the situation where the officer has reasonable suspicion but not probable cause. Reasonable suspicion would not typically enable a police officer to engage in a search, but it does allow him to stop and question the person for a brief period of time.¹⁸³ If a consent search cannot be undertaken in this situation, does serious harm to law enforcement entail? Again, the answer is not necessarily—and certainly not in every case.¹⁸⁴

Consider an example to illustrate my point. A police officer pulls Mr. A's car over because he has reasonable suspicion to believe that Mr. A has just engaged in a drug interaction. If the officer cannot obtain Mr. A's consent to search the car, is all lost? Of course not. The officer, based on reasonable suspicion, has the right to seize and detain A and question him for a limited period of time.¹⁸⁵ He can obtain Mr. A's name and address. He

¹⁸² See, e.g., *United States v. Hernandez*, 76 F. Supp. 2d 578, 582 n.1 (E.D. Pa. 1999) (criticizing police for not obtaining a warrant before search based on consent because they had probable cause and time to get a warrant).

¹⁸³ See *United States v. Mendenhall*, 446 U.S. 544 (1980) (discussing meaning of seizure); *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding stop and frisk based upon reasonable suspicion of criminal activity and reasonable suspicion suspect is armed). The police officer stopped the suspects in *Terry* because they "didn't look right" to him. It should be noted that the two men stopped in *Terry* who didn't look right were African-American. See *Thompson*, *supra* note 9. The defendant in *Mendenhall* was also African-American.

¹⁸⁴ For example, it appears that significant time and energy is wasted in situations where police officers ask consent to search every car pulled over, and find nothing. Studies show various levels of success from searches; almost all indicate a fairly small payoff. For example, in 1997, the California Highway Patrol stopped 34,000 cars, and seized contraband in two percent of the stops. *Rudovsky*, *supra* note 7, at n.40. Data by the Maryland police department show that police officers recovered evidence in thirty percent of the cars searched. *Maclin*, *supra* note 85, at 350-51 (1991). But this figure seems to include suspicion-based as well as consent searches; the amount of time evidence is discovered with no suspicion at all is not delineated. Another study found contraband in only five percent of the searches. *Id.* at 354. See also *Smith*, *supra* note 34, at 928 (had the police found no evidence of contraband in the vehicle, the consent search in *Schneckloth* may have seemed a waste of police resources).

¹⁸⁵ *Terry*, 392 U.S. 1 (discussing right to stop an individual based on reasonable suspicion). Even if the officer simply believes that Mr. A committed a traffic offense, the same scenario can play out. *Whren v. United States*, 517 U.S. 806 (1996). The police, however, cannot randomly pull over a car, *Delaware v. Prouse*, 440 U.S. 648, 649 (1979), unless the car is being stopped as part of a valid checkpoint, see *Michigan Dept of State Police v. Sitz*, 496 U.S. 444 (1990).

can order Mr. A out of his car,¹⁸⁶ and whatever he sees—or smells¹⁸⁷—in the car or on Mr. A may be the basis for a further search.¹⁸⁸

If all these efforts fail—if the questioning does not make the reasonable suspicion ripen to probable cause and no other incriminating information is gleamed—the officer must let Mr. A go. But that does not end the investigation. Rather, the police officer, if he still suspects that A is somehow engaged in criminal activity, can then engage in traditional law enforcement investigatory techniques. It is possible that patient, detailed police work will yield even greater results than a consent search.¹⁸⁹ For example, if the officer watches Mr. A's home, perhaps he'll discover others involved in the drug trafficking in which he suspects Mr. A engages.¹⁹⁰

¹⁸⁶ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (allowing police to order driver out of car on stop); *Maryland v. Wilson*, 519 U.S. 408 (1997) (allowing police to order passengers out of car).

¹⁸⁷ *See, e.g., State v. Huges*, 607 N.W.2d 621, 627 (Wis. 2000) (smell can be basis for probable cause).

¹⁸⁸ Police can search an automobile based solely on probable cause, without a warrant. *See, e.g., United States v. Ross*, 456 U.S. 798 (1982). They can search the passenger compartment of a car without probable cause if they arrest a recent occupant of a car and take that person into custody. *See New York v. Belton*, 453 U.S. 454 (1981); *see also Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory search of entire car after arrest upheld). Moreover, police can engage in a limited search of a car for weapons if they have reasonable suspicion that there may be such weapons in the car. *See Michigan v. Long*, 463 U.S. 1032 (1983). What they see during this search in plain view may be seized. *Id.*

¹⁸⁹ To some extent, I may have picked the easiest example to demonstrate alternative methods of investigation by choosing the car. Concededly, a police officer who fails to gain consent to search a house is much more limited in options. Without probable cause, there is virtually no way to search a home. But this should be considered a strength, not a weakness. The Supreme Court has just recently re-affirmed the sanctity of the home—any difficulty in gaining access should be lauded, not lamented. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

Even without consent, the police can use other investigatory techniques to either obtain probable cause, or, failing that, leave the homeowner alone.

¹⁹⁰ Some have made this argument with respect to the Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983). In *Gates*, the Supreme Court watered down the test for establishing probable cause based on an anonymous tip. Professor Kamisar has argued that had the court not made it easier on the police to get a warrant in such a situation, and if the police had been forced to continue to investigate to obtain probable cause under the old, two pronged standard, they might have apprehended “big time drug dealers.” Yale Kamisar, *Gates, Probable Cause, “Good Faith” and Beyond*, 69 IOWA L. REV. 551, 576 (1984). As it was, the police arrested Sue and Lance Gates, who

So now the question becomes: how often, when the officer has reasonable suspicion to search, would he or she be unable to obtain probable cause based on investigatory techniques besides a consent search? And that answer does not even reveal the true cost of eliminating consent. It must be further queried how often, in those cases in which reasonable suspicion does not ripen into probable cause, is there evidence of illegality that does not get discovered? After all, some cases of reasonable suspicion do not turn into probable cause because there is no real basis for the suspicion. The only harm to law enforcement comes from being unable to find contraband or other pertinent evidence of criminal activity.

Obviously, no empirical evidence exists to answer any of these questions. If I had to wager a guess, however, I'd suggest that the bottom line is pretty small. The gap between probable cause and reasonable suspicion is not so vast that it cannot typically be bridged by officer-citizen interaction short of a consent search.¹⁹¹

Now consider the second scenario: the situation where the officer has no suspicion at all. In such a case, the officer can only engage in a consensual encounter, which is an extremely brief interaction short of a seizure. Certainly the police officer is more limited here, both time-wise and in the scope of the questioning. At some point, the detention may become illegal because by its length or nature, a reasonable person would not feel free to leave, and thus, the consensual encounter turns into a seizure, requiring reasonable suspicion. So the window to obtain consent to search in these kinds of encounters are fairly limited to begin with.¹⁹²

pled guilty to drug charges and were sentenced to probation. DRESSLER & THOMAS, *supra* note 9, at 156.

¹⁹¹ Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). "Reasonable suspicion is a less demanding standard than probable cause." *Alabama v. White*, 496 U.S. 325, 330 (1990). Reasonable suspicion exists when police officers are able to articulate some minimum level of objective justification for stopping a person. It must be more than an "inchoate and unparticularized suspicion or hunch," but less than probable cause. *Id.* at 329 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). See C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence or Constitutional Guarantee?*, 35 VAND. L. REV. 1293, 1325 (1982) (discussing difference between probable cause and reasonable suspicion).

¹⁹² At some point a consensual encounter becomes either too long, see *United States v. Sharpe*, 470 U.S. 675 (1985), or so intrusive, see *Florida v. Royer*, 460 U.S. 491 (1983) that it turns into a seizure that must be justified by reasonable suspicion.

Even if consent searches do take place with some frequency here, the loss of such searches again can only be judged by the same questions posed above. How often would the "interaction" yield at least some information that might provide reasonable suspicion or probable cause even without a consent search? And, perhaps more important, how often do searches conducted with absolutely no suspicion at all yield evidence of criminal activity? Although the evidence is somewhat raw, what does exist strongly suggests that searches conducted without any suspicion rarely yield evidence of a crime.¹⁹³ Of course, even if contraband happens to be found in such situations, it should be remembered that consent to search in this situation is also the most problematic, because it is the arena that race can figure in most prominently. In other words, an officer may be more likely to stop and request consent on a "lark" to search from an African-American male than a white person.¹⁹⁴

The point I am making is a simple one: a laundry list of law enforcement benefits from consent searches have been oft-repeated in the caselaw, with little real discussion. With no empirical evidence to support it, and significant arguments suggesting that the benefit is minimal at best, the argument for permitting consent searches based on the needs of law enforcement appears weak at best.

Besides promoting law enforcement interests, consent searches are often lauded as enhancing individual interests as

¹⁹³ See *supra* note 184 and accompanying text. It is also worth asking what type of evidence is typically discovered during a search without any reasonable suspicion. In other words, if I had to hazard an educated guess, I would guess that much of what is discovered involves minor possessory offenses—a joint or a small amount of a controlled substance. My point is not to minimize these offenses, but to point out that it is unlikely that major felonies get "cracked" this way. It would be interesting to discover not only how often police turn up evidence of a crime or contraband during consent searches without any suspicion, but also how often they end up prosecuting based on such evidence. The true cost of consent must take into account all these variables, most particularly the nature of the evidence discovered.

¹⁹⁴ See *supra* note 9 and accompanying text. In fact, some have suggested that police not be able to seek consent in the absence of some reasonable suspicion. See *State v. Munroe*, 630 N.W.2d 233 (Wis. Ct. App. 2001) (court troubled by fact police tried to get consent to search hotel room without any suspicion at all). In the consent decree issued in New Jersey to end racial profiling, state troopers are prohibited from requesting consent to search a motor vehicle unless they can articulate reasonable suspicion that the search would reveal evidence of a crime (and they must tell the suspect that they have the right to refuse). See Consent Decree, *U.S. v. State of N.J.* C.A. No. 99-5970 (D.N.J. 1999); see also *State v. Hampton*, 754 A.2d 567 (N.J. Super. Ct. App. Div. 2000).

well. The argument is that persons should have the ability to decide whether or not they wish to exercise their constitutional right to be "let alone." And, it is argued, an individual may have a good reason to permit a search without a warrant. For example, an innocent person may deflect suspicion and avoid the embarrassment of further police investigation by agreeing to a search.¹⁹⁵

Again, at face value, this argument seems compelling. Surely an individual who "truly wants" the police to search—who would benefit from it—should be allowed to do so. Normatively, the idea that individual choice should be thwarted in order to preserve free will seems perverse. But consider the argument more closely.

The argument that individuals should have the right to decide whether to consent really has two separate parts that must be proven. First, do individuals truly benefit from allowing the police to search based on consent? If the answer to that is yes, would it then be fair to remove that choice from them? Even if the answer to that question is no, it must still be asked whether it nonetheless would be fair to remove choice from an individual who might believe that consent is in her best interest.

Do individuals benefit from police searches because they can stop further investigation and deflect suspicion? I must admit that originally I accepted this argument at face value. I heard or read the argument so often, that I really didn't initially consider it more deeply. But on further reflection, I have come to seriously question this assumption. I tried to imagine scenarios where a person would want the police to search. Take the example of a person with nothing to hide in the car, which is pulled over for speeding. This person is a white, nineteen-year-old teenager with Grateful Dead bumper stickers on an old car.

¹⁹⁵ See also *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) (suggesting other reasons why a person might consent to a search, including the powerful "convention of openness and honesty"). As the mother of two teenage boys, I read with interest—and a few chuckles—about an attempt in a middle class suburb to gain consent of the parents in advance to search their homes for evidence of teen underage drinking. In a predominantly white, middle class New Jersey suburb, the police chief sent out 2700 consent forms to parents of teenagers, asking them to waive their fourth amendment rights and allow the police to enter their homes at will to catch teenagers drinking. The police chief was surprised and disappointed that only twenty forms were returned after four months. See Robert Hanly, *An Anti-Drinking Campaign and How it Flopped*, N.Y. TIMES, Sep. 28, 1994, at B1, cited in Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 393 n.173 (1998).

The police officer writes him a ticket, and then asks if he minds if the officer looks around inside the car. Now, the young man has no contraband, but he may have private things in there. He may be carrying condoms, or a love note, or even his report card. Yet the argument is that he may benefit from consenting to the search, because he diverts attention and allows the police to "leave him alone." But how is that? Based on the facts described, the police must leave him alone in any case. The officer has no suspicion of any further wrongdoing, and thus he must let the young man go.

Take another scenario where an individual might benefit from consent. Rumors are circulating that a person is growing marijuana in his basement, and the police are investigating. Concededly, the individual might be able to get the police "off his back" by showing him his basement. But in reality, either the police have probable cause or they don't. If they have probable cause, they can (and should) get a warrant to search. If they don't have probable cause, and their routine investigation (questioning neighbors, watching the house and so on) does not provide it, presumably they will also "get off his back."

Moreover, there is no guarantee that a consent search will stop the investigation, particularly in cases where the police have strong evidence to the contrary. For example, after an unfruitful search, the police might believe that the person "moved the stuff," but still suspect that there is criminal activity. So, in cases with strong evidence of criminal involvement, the police are unlikely to give up simply because a person consented to a search, and thus, the individual gains marginally, if at all. And with weak evidence, the police are likely to give up even if no consent search occurs unless other evidence is obtained. The point is, either way, permitting consent searches provides minimal, if any, benefit to the individual. It's a classic heads I win, tails you lose situation.

Finally, consider another scenario where it is oft asserted that a person benefits from consent. Suppose the police pull over a car, and claim that they are arresting the driver for drug dealing, because they have probable cause to believe that she is carrying cocaine in the red backpack seated next to her in the car. Isn't this a situation where the innocent driver wins by allowing consent? She shows the police her backpack—even lets them search the entire car, and no cocaine will be discovered.

She won't be arrested, and will be free to go. Certainly, a significant benefit!

Again, the reality is quite different from the scenario. In this kind of situation, the police are perfectly free to—and undoubtedly will—search the backpack and car, even without consent. Under the automobile exception to the warrant requirement, the police can search the car and the backpack based simply on probable cause.¹⁹⁶ Under a search incident to arrest doctrine, the car and the person can be searched.¹⁹⁷ It is unlikely that a person will be arrested and carted away without such a search taking place. The consent doctrine adds nothing.

Thus, the actual benefit that an individual obtains from allowing the police to search upon request is minimal at best. But what about the normative argument—that even in the absence of actual benefit, it is unfair to take that choice from a person. Part of being an autonomous human is being able to make the decision that we wish to make.¹⁹⁸ Even if there is no real benefit, the mere fact that some person may think there might be, and may simply *want* to consent militates against eliminating the consent doctrine.

Concededly, this argument has appeal. But ultimately, I conclude that it is not determinative, and certainly does not outweigh the problems with the consent doctrine. Indeed, the arguments against the doctrine—the existence of inherent coercion—suggest that it is almost impossible to separate out those situations in which a person “truly” wants to consent from those situations in which a person feels compelled to acquiesce. Given the inability to ascertain whether there has been a free choice in some cases, it is better to remove the choice in all cases.

There is ample support in extraordinary circumstances for removing choice from an individual when the coercive nature

¹⁹⁶ See *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹⁹⁷ *New York v. Belton*, 453 U.S. 454 (1981) (court established bright line rule: after a lawful custodial arrest of an occupant of a car, police can automatically search the passenger compartment and any containers therein); see also *United States v. Chavez*, 75 F. Supp. 2d 1015, 1022 (W.D. Mo. 1999) (regardless of whether there was voluntary consent, search could have taken place under search incident to lawful arrest doctrine).

¹⁹⁸ See Marcy Strauss, *Toward A Revised Model of Attorney-Client Relationships: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336-39 (1987).

of the situation cannot be rectified. In such cases, the inherent coercion exercised by a person in a position of authority over a subordinate justifies a blanket rule precluding behavior that concededly some individuals might desire even absent the coercive elements.

Consider, for example, the prohibition on relationships between subordinates and inferiors in the military. Military rules against fraternization have existed for centuries, and have been traced to policies that include maintaining class distinctions in European feudal society and avoiding undermining leadership and unit effectiveness by regulating the behavior of officers.¹⁹⁹

More recently, the concern about possible abuse of power by the superior officer has been cited as a basis for restricting fraternization between officers and enlisted personnel. This rationale for regulating behavior appeared in the Army's first written policy on this issue: "Relationships between service members of different rank which involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline and high unit morale."²⁰⁰ The Army's most recent position on this issue absolutely bans any new romantic relationships between officers and enlisted soldiers.²⁰¹

Such prohibitions on romantic relationships might sweep within its scope some clearly consensual behavior. People do fall in love, even within the chain of command. But limiting a person's choice to become involved in this situation is justified at least in part out of fear that the consensual relationship cannot be differentiated from the coerced one. As Professor Chamallas notes:

¹⁹⁹ See C. Quince Hopkins, *Rank Matters But Should Marriage? Adultery, Fraternization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 239-240 (1999); see also Major Kevin W. Carter, *Fraternization*, 113 MIL. L. REV. 61, 90-91 (1986).

²⁰⁰ *Id.* (citing Army's "first written policy concerning superior-subordinate relationships").

²⁰¹ Sgt. 1st Class Connie E. Dickey, *Army Announces New Fraternization Policy*, ARMY NEWS SERVICE, March 2, 1999, available at <http://www.dtic.mil/armylink/news/Mar1999/a19990305fratpoli.html> (last visited 06/13/01). If the relationship existed prior to March 1, 1999, the soldiers have until March 1, 2000 to get married, break up, or face the consequences. *Id.*; see also Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 332-333 (1998).

With respect to relationships within the chain of command, a per se ban on consensual relationships reduces the likelihood that officers will abuse their power to pressure enlisted women to have sex, knowing that they will not be able to defend against a charge of sexual misconduct by alleging that the victim consented to or welcomed the conduct. It could also be argued that the officer/enlisted soldier relationship is so fundamentally asymmetric that it is simply too difficult to ensure that these sexual liaisons are not coerced or exploitive.²⁰²

Similarly, sexual relationships between doctors and patients have been banned, not because all such relationships are coercive, but because it would be impossible to differentiate the consensual relationship from the involuntary one. The concern is that a patient's attraction to the physician is not a response to real life feelings, but a reflection of the patient's feelings regarding a care-giving authority figure.²⁰³ Thus, as the College of Physicians and Surgeons of British Columbia acknowledge, "even though we could envision relationships which are consensual . . . and do not involve exploitation, we concluded that these cases will be rare and it is better to absolutely prohibit all sexual contact between physicians and patients."²⁰⁴

Finally, some universities have adopted absolute prohibitions on student/faculty relationships. Although such a blanket rule may sweep "consensual" relationships within its ambit, that cost is worth the price of ensuring that subtly coercive as well as overtly coercive relationships are prevented.²⁰⁵

In sum, it is not unprecedented to prohibit even potentially consensual situations because of the difficulty distinguishing between coercive and welcome interactions. Particularly when there is a grossly asymmetric power relationship, the concern

²⁰² Chamallas, *supra* note 201, at 355.

²⁰³ See H. Russell Searight & David C. Campbell, *Physician-Patient Sexual Contact: Ethical and Legal Issues and Clinical Guidelines*, 36 J. FAM. PRAC. 647, 648 (1993); accord Francoise Baylis, *Therapist-Patient Sexual Contact: A Non-Consensual, Inherently Harmful Activity*, 38 CAN. J. PSYCHIATRY 502, 504 (1993) (stating that because of the power imbalance inherent in the physician-patient relationship, among other things, a patient is unable to give valid consent to a sexual relationship).

²⁰⁴ See Catherine S. Leffler, Note, *Sexual Conduct within the Physician-Patient Relationship: A Statutory Framework for Disciplining this Breach of Fiduciary Duty*, 1 WIDENER L. SYMP. J. 501, 517 (1996).

²⁰⁵ See Patrick Dilger, *Putting an End to Risky Romance*, YALE ALUMNI MAG., April 1998, at 30 (Yale adopted a policy banning all sexual relationships between teachers and students over whom they have direct supervisory responsibility). See generally Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Carol Sanger, *The Erotics of Torts*, 96 MICH. L. REV. 1852 (1998).

for preventing coercion outweighs any concern for individual choice in regulating relationships in the military, and between doctor and patient and teacher and student. So it should be with consent searches. The power imbalance, the likelihood of coercion, and the difficulty in assessing the voluntariness of the situation all weigh in favor of a *per se* ban on consent.

IV. CONCLUSION

Eliminating consent is obviously a drastic solution. Nonetheless, I am convinced that stop gap measures of informing the suspect of their rights, or considering individual subjective factors more fully, do not go far enough. The radical solution in this case would not only be more faithful to the Fourth Amendment, it would greatly enhance faith and trust in the judicial system. Those benefits, moreover, would come at slight cost. As I have argued, the harm to law enforcement and to an individual's autonomy interest is likely to be insignificant.²⁰⁶ At a minimum, the arguments raised in this paper about the benefits to law enforcement and to an individual hopefully demonstrate that the presumed necessity for consent searches should be seriously questioned and not taken at face value in evaluating the costs of consent searches.

Eliminating consent would require a huge leap of faith, but a worthy one. It would reaffirm a belief that the police can solve crime by focusing not on hunches, but on suspicion and probable cause. It would mean police cannot target minorities by stopping them on the public streets, and then intimidating them into agreeing to a search of their car—a search that only rarely yields incriminating evidence, but almost always leaves the consenter feeling diminished and angry. It would mean that the dignity of the individual is not overpowered by the authority

²⁰⁶ There is a final cost to abandoning consent that deserves mentioning: it is possible to police officers, forced to rely on other justification for a search, will abuse or stretch other theories to enable them to engage in the exact behavior a consent search would have allowed. And, the concern is that the courts, which I have argued accept the officer's version of events, would give a wink and a nod to the officer's attempt to search under other theories.

While I am concerned about this prospect, I ultimately conclude that it is not a justification for keeping the consent doctrine. First, there is nothing to keep the police from abusing other doctrines now, even with consent available. Second, the argument that other exceptions to the warrant requirement might get perverted to make up for any loss (or perceived loss) from not being able to do consent searches simply argues for enhanced vigilance in these other areas, not keeping consent.

and power of the police officer. It would mean that the Fourth Amendment's concern for the privacy of each citizen would be restored to its rightful place—to be interfered with only when the government has the proper justification for doing so. It would be the right thing to do.