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## Consent Searches and Fourth Amendment Reasonableness

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### Recommended Citation

Alafair Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 Fla. L. Rev. 509 (2015)  
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## CONSENT SEARCHES AND FOURTH AMENDMENT REASONABLENESS

*Alafair S. Burke\**

### Abstract

This Article builds on a growing body of scholarship discussing the role of reasonableness in consent-search doctrine. Although the language of “voluntary consent” implies a subjective inquiry into the state of mind of the person granting consent, the U.S. Supreme Court has repeatedly injected an objective standard of reasonableness into its analysis of a citizen’s consent. Several scholars have characterized the Court’s consent jurisprudence as focusing not on true voluntariness but on the reasonableness of police conduct, which they argue is appropriate because the touchstone of the Fourth Amendment is “reasonableness.”

While the renewed scholarly focus on the role of reasonableness in the Court’s consent jurisprudence is helpful in explaining the puzzling disconnect between language and doctrine, much of this current emphasis has been distorted by the dichotomy between coercion and voluntariness: Did police use (unreasonable) coercive tactics that would override a (reasonable) person’s free will? However, the Fourth Amendment’s default concept of reasonableness is based not on coercion or volition but on its requirement of a warrant based on probable cause. Typically when the Court recognizes an exception to the default rule, it grounds that exception in a concept of reasonableness that requires a weighing of the governmental interests served by the warrantless conduct against the level of the intrusion on affected Fourth Amendment interests: liberty and privacy. Because the Court has relied on the myth of voluntary consent as a proxy for the warrant and probable cause requirements that normally define “reasonableness” in the Fourth Amendment context, the Court has bypassed the usual substitute proxy for Fourth Amendment reasonableness: an express weighing of the governmental and citizen interests at stake.

This Article engages in the reasonableness inquiry that the Supreme Court has avoided. Drawing on the Court’s approach to reasonableness in other Fourth Amendment contexts, this Article first looks to the concept of “macro reasonableness” to argue that the Court has overestimated the value of consensual searches to law enforcement and underestimated their effect on privacy. While the Court has emphasized the value of consensual searches yielding incriminatory evidence that might go

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undetected absent the consent-search doctrine, many consent searches serve no government interests at all. Meanwhile the pervasiveness of the practice imposes tremendous costs to privacy. This Article then seeks to reshape the consent-search exception, using a requirement of “micro reasonableness,” to make the doctrine of consent more reflective of Fourth Amendment reasonableness. Under this requirement, courts would examine not only the voluntariness of the consent underlying the search, but also the government’s reasons for requesting the consent and the scope of the consent requested.

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## INTRODUCTION

Anyone who has ever spent a day in a criminal courtroom, walked the sidewalks of an actively policed neighborhood, or watched an episode of any police show on television is familiar with this scene: A police officer initiates a conversation (“How you doing tonight?”), brings the topic around to criminal activity (“We’re hearing complaints from the neighborhood about drug activity”), and asks for consent to search (“Okay if I check that bag, just to make sure you’re not holding?”).

It is difficult to assess the precise number of consent searches conducted because so many of them go undocumented, especially when they yield nothing incriminatory.<sup>1</sup> Despite numeric uncertainties, it is clear that consensual searches permeate real-world policing.<sup>2</sup> Multiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police,<sup>3</sup> and that they are “unquestionably” the largest source of searches conducted without suspicion.<sup>4</sup> And though the premise of the consent-search doctrine is that people are free to decline, the reality is that nearly everyone “consents,”<sup>5</sup> at least as the Court has defined that term.

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1. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 & n.7 (2001) (“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!”).

2. See JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 317–18 (4th ed. 2010) (stating that the pervasive use of consent searches by the police “suggests that consent issues are of profound importance in the ‘real world’ of searches and seizures”); 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.01 (4th ed. 2006) (providing that consent searches “are a dominant—perhaps the dominant—type of lawful warrantless search” and anecdotally noting consent-search police practices performed by police officers); Brian R. Gallini, *Schneekloth v. Bustamonte: History’s Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233, 233 (2012) (describing consent searches as “one of the more popular” methods that officers “walking the beat” may use for conducting warrantless searches). A search for the term “knock and talk”—law enforcement slang for approaching a house without a warrant, knocking on the door, and asking to search for drugs—in Lexis’s “Federal and State Cases, Combined” library returned 1586 court decisions. LEXISNEXIS, <http://www.advance.lexis.com> (last visited Jan. 24, 2015) (search for “knock and talk,” follow the “filters” dropdown menu, select “Jurisdiction,” then select the “All U.S. Federal” and “All States & Territories” filters).

3. DRESSLER & THOMAS, *supra* note 2, at 317–18 (citing RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984)); Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) (“Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.”).

4. Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 235 (2007) (“Next to the pervasive automobile exception to the warrant requirement, consent is probably the leading justification offered for warrantless searches, and consent is unquestionably the leading rationale for searches undertaken without particularized probable cause or reasonable suspicion.”); see Gallini, *supra* note 2, at 233.

5. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1662 (2012) (gathering statistics and noting that “people consent so often that it

The law governing consensual searches suffers from multiple layers of schizophrenia. On one hand, the Supreme Court treats consent searches as an exception to the Fourth Amendment's warrant requirement; on the other, it views consensual encounters as completely beyond the Fourth Amendment's reach.<sup>6</sup> On one hand, the Court's assumption that at least some people may want to assist law enforcement by granting consent appears sound; on the other, one wonders why anyone would possibly consent to a search that will implicate him.<sup>7</sup> And perhaps most perplexing of all is the discord between the doctrine and its application. On one hand, the general principle underlying the doctrine appears unassailable: Why should courts invalidate police action if the affected citizen was a voluntary participant? On the other hand, the Court has been continually willing to see voluntary consent where seemingly no one else would.<sup>8</sup>

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undermines both the meaningfulness of the consent and the believability that the police are really respecting the doctrine"); ALEXANDER WEISS & DENNIS P. ROSENBAUM, UNIV. OF ILL. CHI., ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNOTATED REPORT: EXECUTIVE SUMMARY 9 (2011), available at <http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2010/2010%20Illinois%20Traffic%20Stop%20Summary.pdf> (reporting that 82% of drivers consented to a vehicle search when asked); Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 367 (2001) (finding that more than 88% of drivers gave consent to search when asked before implementation of a *Robinette* warning and approximately 92.2% gave consent after the warning); *Arrest, Discipline, Use of Force, Field Data Capture and Audit Statistics Reports and the City Status Report Covering the Period of January 1, 2006–June 30, 2006*, L.A. POLICE DEP'T, [http://www.lapdonline.org/special\\_assistant\\_for\\_constitutional\\_policing/content\\_basic\\_view/9016](http://www.lapdonline.org/special_assistant_for_constitutional_policing/content_basic_view/9016) (last visited Jan. 26, 2014) (containing reports of the numbers of drivers and passengers who consented to searches). In one six-month period from January 1 to June 30, 2006, only three of 16,228 drivers did not grant consent when asked, and 99% of pedestrians consented. *Id.*

6. See 1 DRESSLER & MICHAELS, *supra* note 2, § 16.02, at 247–49 (discussing the seemingly incongruent rationales undergirding consent-search doctrine).

7. See John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114 (2007) (“How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to *really* consent—‘freely and voluntarily’—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?”); Kent Greenfield, *Free Will Paradigms*, 7 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 11 (2011) (“If Fourth Amendment ‘consent’ means anything close to what ‘consent’ means in other contexts, then perhaps the mere fact that the passengers knew a search would reveal drugs and result in their arrest is strong evidence that the search was a result of intimidation and pressure rather than choice.”); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 128 (1998) (“It is inherently improbable that criminal suspects voluntarily would consent to the discovery of the very evidence necessary to seal their legal demise.”); Strauss, *supra* note 1, at 211 (describing her students’ “mass incredulity” that people in possession of contraband consent to searches).

8. See, e.g., Bar-Gill & Friedman, *supra* note 5, at 1662 (claiming that “most” people believe the Supreme Court’s conception of voluntary consent is “wrong”); Simmons, *supra* note 3, at 774 (describing one of the Supreme Court’s findings of voluntary consent as “absurd”); Strauss, *supra* note 1, at 211; Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 75 (2007).

The doctrine of Fourth Amendment consent is so schizophrenic that scholars can hardly use the term “voluntary consent” without qualifying it. They refer to the “fictions” of consent<sup>9</sup> and voluntariness,<sup>10</sup> dub consent searches “consent(less),”<sup>11</sup> and insist on placing the words *voluntary* and *consent* in quotation marks.<sup>12</sup> Because of the disconnect many perceive between the standard of “voluntary consent,” and the Court’s application of it, many scholars have called for a more robust definition of “voluntariness.” For example, numerous scholars have called for a requirement that police notify suspects of their right to decline a request to search<sup>13</sup> and for recognition that coercion is inherent in any police interaction.<sup>14</sup>

In addition to the scholars seeking to change the doctrine of consent to require *true* consent, a growing body of scholarship instead attempts to explain the dichotomy between the language of consent and the actual doctrine of consent by exploring the distinction between subjective and objective notions of consent. The language of “voluntary consent” implies a subjective inquiry into the state of mind of the person granting consent.<sup>15</sup> Although some of the Court’s early decisions on consent

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9. See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (“[T]he fiction of consent in Fourth Amendment jurisprudence has led to suspicionless searches of many thousands of innocent citizens who ‘consent’ to searches under coercive circumstances.”); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 141 (“The *Drayton* world is fiction.”); Strauss, *supra* note 1, at 252 (“[T]he determination of voluntariness is currently confused, misapplied, and based on a fiction.”).

10. See, e.g., Simmons, *supra* note 3, at 786 (noting that critics of the consent-search doctrine have relied on empirical psychological studies to demonstrate “the harmful fiction of ‘voluntariness’”).

11. See, e.g., Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 175, 193 (1991) (“Both law and psychology point to the same conclusion—consent in reality is *consentless*.” (emphasis added)).

12. See, e.g., Bar-Gill & Friedman, *supra* note 5, at 1662 (noting that “yes, the continued use of scare quotes [for the word “consent”] is entirely deliberate”); Simmons, *supra* note 3, at 783–85 (repeatedly placing the word *voluntary* in quotation marks); Lichtenberg, *supra* note 5 (placing the word “voluntary” in quotation marks in the article’s title).

13. See, e.g., Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 465–66 (2004) (recommending warnings, similar to the warnings rejected in *Schneckloth*, that would require police to warn people they have a right to refuse consent); Gallini, *supra* note 2, at 235–36; Craig Hemmens & Jeffrey R. Maahs, *Reason to Believe: When Does Detention End and a Consensual Encounter Begin? An Analysis of Ohio v. Robinette*, 23 OHIO N.U. L. REV. 309, 346 (1996) (arguing that officers should be required to advise citizens of their right to not cooperate); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1177 (2007) (encouraging states to use their own constitutions to implement several consent-search reforms, including warnings about the right to refuse consent); cf. Robert H. Whorf, “*Coercive Ambiguity in the Routine Traffic Stop Turned Consent Search*,” 30 SUFFOLK U. L. REV. 379, 410 (1997) (suggesting a rule requiring police officers to return “a motorist’s driving documents before or simultaneous with the statement ‘you are free to go’”).

14. See *infra* Section II.B.

15. See Rotenberg, *supra* note 11, at 177 (“In the context of the consent search, the subjective view seems required because the sole validating source of police authority to intrude on

searches do indicate the use of a subjective standard, the Court has repeatedly injected an objective standard of reasonableness into its analysis of consent.<sup>16</sup> The Court's focus in determining voluntariness is not on whether the defendant actually exercised free will in granting consent, but instead on whether police used unacceptable tactics to gain consent.<sup>17</sup> Scholars have analyzed the Court's consent jurisprudence through a "new paradigm" of reasonableness, characterizing the case law as focusing not on true voluntariness, but on the reasonableness of police conduct.<sup>18</sup> This emphasis on reasonableness is said to be appropriate because, after all, "[t]he touchstone of the Fourth Amendment is reasonableness."<sup>19</sup>

Though the renewed scholarly focus on the role of reasonableness in the Court's consent jurisprudence is helpful in explaining the puzzling disconnect between language and doctrine, much of the current emphasis on reasonableness is still articulated through the coercion/voluntariness dichotomy: Did police use (unreasonably) coercive tactics that would override a (reasonable) person's free will? This focus on the coerciveness of the police conduct, and its subsequent impact upon volition, is not the same standard of reasonableness that is the touchstone of the Fourth Amendment. Instead, it is borrowed from the Court's Fifth Amendment jurisprudence governing the voluntariness of statements to police.<sup>20</sup>

That the Court has built confession law around a compulsion/consent dichotomy is unsurprising given the Fifth Amendment's guarantee that no person be "compelled" to be a witness against himself.<sup>21</sup> But the Fourth Amendment's prohibition is against "unreasonable" searches and seizures, and the default measure of reasonableness is a warrant based on probable cause.<sup>22</sup> Usually when the Court recognizes an exception to the default rule, it grounds that exception in a concept of reasonableness that requires a weighing of the governmental interests served by the

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a premier constitutional right is the individual's grant of permission.").

16. See *infra* Section III.A.

17. Strauss, *supra* note 1, at 212.

18. See Simmons, *supra* note 3, at 773, 822 ("The *new paradigm* is simple: instead of holding that the Fourth Amendment does not apply because the individual has 'voluntarily' waived his rights, we are applying the Fourth Amendment to the search and concluding that as long as the police officer's behavior is appropriate, the search is *reasonable* and thus constitutional." (emphasis added)).

19. Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)).

20. See *infra* notes 176–80 and accompanying text.

21. U.S. CONST. amend. V.

22. See Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) ("The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity."); Bailey v. United States, 133 S. Ct. 1031, 1037 (2013) ("This Court has stated the general rule that Fourth Amendment seizures are reasonable only if based on probable cause to believe that the individual has committed a crime." (internal quotation marks omitted)).

warrantless conduct against the level of the intrusion to the affected Fourth Amendment interests: liberty and privacy.<sup>23</sup> Because the Court has instead relied on the myth of voluntary consent as a proxy for the warrant and probable cause requirements that normally define “reasonable” in the Fourth Amendment context, the Court has also bypassed the usual substitute proxy for Fourth Amendment reasonableness: an express weighing of the governmental and citizen interests at stake. By focusing on reasonableness through the *Fifth Amendment* lens of preventing coercion, rather than reasonableness through the *Fourth Amendment* lens of protecting liberty and privacy, the Court has lost sight of the heart of the Fourth Amendment itself.

This Article builds upon the renewed scholarly focus on the role reasonableness plays in the Court’s consent jurisprudence by looking to the traditional balancing of Fourth Amendment interests to shape consent-search doctrine. Drawing on the Court’s approach to “reasonableness” in other Fourth Amendment contexts, this Article looks to the concept of “macro reasonableness” to argue that, as currently defined, the consent-search doctrine strikes an improper balance between governmental and individual interests at stake. It then seeks to reshape the prevailing doctrine, using a requirement of “micro reasonableness,” to strike a better balance and to make the doctrine of consent more reasonable at a macro level.

Part I sets forth the current doctrine governing consent searches and demonstrates that the Court has been quick to find consent whenever a person has an alternative to complying with a law enforcement request. Part II sets forth the most prevalent critique of the consent-search exception to the warrant requirement—its failure to reflect the real-world dynamics of police–citizen interactions. Turning to the role that reasonableness plays in consent-search doctrine, Part III examines the Court’s focus on objective factors, rather than a subjective standard of voluntariness, in scrutinizing the “voluntariness” of consent searches. This Article then argues that the Court has focused on reasonableness only at the micro level, and only in terms of coercion, examining on a case-by-case basis the coerciveness of police tactics.

Part IV proposes an alternative standard of macro reasonableness for consensual searches that requires balancing the interests of law enforcement against the costs to individual liberty and privacy. This Article then demonstrates that, to the extent the Court has undertaken a “macro” examination of reasonableness at all, it has overstated the extent that consent searches advance governmental interests and understated their toll on individual privacy. Finally, Part V concludes with a

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23. See *infra* notes 218–27 and accompanying text; *United States v. Place*, 462 U.S. 696, 703 (1983) (“The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of the Fourth Amendment’s general proscription against unreasonable searches and seizures.” (internal quotation marks omitted)).



proscriptive recommendation of how consent doctrine might be altered to make it more reflective of the Fourth Amendment's "touchstone" of reasonableness. When scrutinizing whether a search falls within the consent-search exception to the warrant requirement, courts should look not only at the voluntariness of the person's consent, but also at the reasonableness of the government's request for consent. By employing a "micro" requirement of reasonableness that focuses on traditional Fourth Amendment factors rather than Fifth Amendment notions of coercion, the consent-search doctrine would comport with Fourth Amendment notions of reasonableness at a "macro" level. This approach would also drastically change the manner in which law enforcement is trained to conduct consent searches. Rather than treating them as "free" searches outside of the usual Fourth Amendment framework, law enforcement would need to be mindful of the reasonableness of consent searches at all stages, not only in obtaining consent, but also in the initial request and the subsequent execution.

### I. THE DOCTRINE OF CONSENT

The Fourth Amendment familiarly provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>24</sup>

The Amendment's "reasonableness clause" protects against unreasonable searches and seizures, while the Supreme Court has read the Amendment's "warrant clause" to create a default presumption that, to be reasonable, searches and seizures must be conducted pursuant to a warrant based on probable cause.<sup>25</sup>

Despite the Supreme Court's formal reliance on the Fourth Amendment's warrant clause to define reasonableness, searches conducted with warrants are, empirically, the exception in criminal investigations.<sup>26</sup> The divergence between the formal default presumption and the reality on the streets can be attributed primarily to two attributes of Fourth Amendment jurisprudence. First, the Court has defined the terms "search" and "seizure" in ways that remove many investigative tactics from the Fourth Amendment's scope. Second, even if police activity rises to the level of a "search" or a "seizure," as the Court has defined those terms, the Court has recognized numerous exceptions to the

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24. U.S. CONST. amend. IV.

25. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

26. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 139–40 (2008) (discussing the empirical gap between searches conducted with and without warrants).

warrant requirement, allowing law enforcement to rely on alternative measures of a search or seizure's reasonableness.

The distinction between these two doctrinal “moves” is critical. The use of the first move is determinative as a threshold matter. By its very language, the Fourth Amendment prohibits only unreasonable searches and seizures.<sup>27</sup> If police action constitutes neither a search nor a seizure, the Fourth Amendment provides no role for the judiciary to scrutinize its reasonableness, whether defined through the warrant clause or not.<sup>28</sup> The non-search/non-seizure could be as unreasonable as imaginable (e.g., inspecting the curbside garbage<sup>29</sup> of only those homes painted in primary colors), and yet the Fourth Amendment would have nothing to say about it.<sup>30</sup> In contrast, when the Court uses the second “move,” the challenged police action is still subject to Fourth Amendment scrutiny. Accordingly, even if the Court is persuaded to set aside the presumptive warrant requirement, the government conduct still must be reasonable.<sup>31</sup>

As demonstrated in this Part, the Court has permitted consent searches not by removing them from the scope of the Fourth Amendment altogether, but by recognizing an exception to the warrant requirement. Accordingly, the resulting searches must be reasonable. Moreover, in applying the consent exception, the Court has been quick to find voluntary consent as long as the consenting party had the option of refusing.

#### A. Consent Searches Are “Searches”

Under *Katz v. United States*,<sup>32</sup> police activity constitutes a search only if it implicates reasonable expectations of privacy.<sup>33</sup> This is a two-prong test, requiring first that the person manifest a subjective expectation of privacy, and second, that the expectation of privacy “be one that society is prepared to recognize as ‘reasonable.’”<sup>34</sup> In applying the *Katz* standard, the Court has held that when people make otherwise private information available publicly, governmental inspection of that information does not implicate reasonable expectations of privacy and therefore does not

27. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

28. See, e.g., *Texas v. Brown*, 460 U.S. 730, 740 (1983) (Rehnquist, C.J., plurality opinion) (“Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.”).

29. The Fourth Amendment does not prohibit warrantless searches of garbage voluntarily left out for collection. *California v. Greenwood*, 486 U.S. 35, 40–41 (1988). For a general discussion of what constitutes a search for Fourth Amendment purposes, see Section I.A.

30. As one early commentator noted: “[W]here the [F]ourth [A]mendment is inapplicable, the law does not give a constitutional damn about noncompliance.” Charles E. Moylan, Jr., *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of “So What?”*, 1977 S. ILL. U. L.J. 75, 76.

31. See *Wolfish*, 441 U.S. at 558–59.

32. 389 U.S. 347 (1967).

33. *Id.* at 360–61 (Harlan, J., concurring).

34. *Id.* at 361.

constitute a search.<sup>35</sup> For example, neither surveillance from a public vantage point<sup>36</sup> nor inspection of a person's garbage is considered a "search,"<sup>37</sup> and therefore police may engage in these activities without even justifying them as reasonable. This is true even when the public vantage point is from a low-level helicopter hovering over otherwise protected curtilage<sup>38</sup> or when flashlights,<sup>39</sup> binoculars,<sup>40</sup> or electronic beepers<sup>41</sup> facilitate the viewing of publicly exposed information.

One possible conception of a consent search is that it does not constitute a "search" at all because the person has voluntarily chosen to allow the police to search and therefore no longer expects privacy in the area searched.<sup>42</sup> Indeed, this is the doctrinal approach the Court has used to validate the lawfulness of consensual encounters with police, removing them entirely from the definition of a "seizure."<sup>43</sup> The seeds for the idea that not all police–citizen encounters rise to the level of a Fourth Amendment "seizure" were first planted in *United States v. Mendenhall*.<sup>44</sup> In *Mendenhall*, two plainclothes agents approached the defendant as she was walking through an airport concourse, identified themselves as federal agents, and asked to see her airline ticket and

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35. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 48–56 (9th ed. 2010) (noting that cases after *Katz* make clear that "if an aspect of a person's life is subject to scrutiny by other members of society, then that person has no legitimate expectation in denying equivalent access to police," and providing several examples).

36. *Florida v. Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (citing *California v. Ciraolo*, 476 U.S. 207 (1986)).

37. *California v. Greenwood*, 486 U.S. 35, 40–41 (1988).

38. *Riley*, 488 U.S. at 451.

39. *Texas v. Brown*, 460 U.S. 730, 739–40 (1983) ("It is likewise beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenches upon no right secured to the latter by the Fourth Amendment.").

40. *E.g.*, *United States v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970).

41. *United States v. Karo*, 468 U.S. 705, 712 (1984). To be sure, the use of technology that reveals more than has been exposed to public view can constitute a search. *E.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that police conducted a "search" by using heat-detection devices to monitor heat radiation from a home, in part, because it revealed details about activity in the home that would otherwise have been unknown without physical intrusion).

42. 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, 27–28 (1991) (providing that consent searches are easily conceptualized as non-searches under *Katz*—thereby rendering the Fourth Amendment "inapplicable"—because "consent amounts to a citizen's surrender of an expectation of privacy and an exposure of an otherwise private interest").

43. See *United States v. Drayton*, 536 U.S. 194, 200 (2002); *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 555, 558 (1980).

44. See 446 U.S. at 554–55 (providing that absent some indicia of seizure, such as the threatening presence of officers or the display of a weapon, "inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person"). A plurality of the Supreme Court first applied the free-to-leave test in *Royer*, but cited Justice Stewart's analysis in *Mendenhall* as support. *Royer*, 460 U.S. at 497 (citing *Mendenhall*, 446 U.S. at 555).

identification.<sup>45</sup> At the agent's request, she eventually followed them to the airport Drug Enforcement Administration (DEA) office, where she ultimately consented to a search of both her person and purse.<sup>46</sup> Justice Powell, concurring, reasoned that any seizure of the defendant was supported by the requisite level of suspicion.<sup>47</sup> Justice Stewart, however, writing for himself and Justice Rehnquist, reasoned that the defendant was never seized at all; therefore, the government did not need to justify the encounter.<sup>48</sup>

To remove some police–citizen encounters from judicial scrutiny, Justice Stewart compiled language from the Court's seizure jurisprudence that appeared to distinguish between seizures that implicated Fourth Amendment interests and mere encounters that did not.<sup>49</sup> In *Terry v. Ohio*,<sup>50</sup> for example, the Court observed that “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”<sup>51</sup> Concurring in *Terry*, both Justice White and Justice Harlan noted that a police officer, like any other person, has the right to pose questions to people on the street.<sup>52</sup> In *Mendenhall*, Justice Stewart reasoned that a person has not been seized unless her freedom of movement has been restrained, either through physical force or a show of authority.<sup>53</sup> This conception of a voluntary citizen–police encounter conjures images of cordial police officers, walking the beat, talking to cooperative citizens about the neighborhood, the weather, and baseball: “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy . . . .”<sup>54</sup>

In *Florida v. Royer*,<sup>55</sup> a plurality of the Court built upon Justice Stewart's earlier conception of a consensual police encounter and held that an encounter rises to the level of a “seizure” only if, under the totality of the circumstances surrounding the encounter, a reasonable person

45. *Mendenhall*, 446 U.S. at 547–48.

46. *Id.* at 548.

47. *Id.* at 560 (Powell, J., concurring). The government needs “reasonable suspicion” to support a brief, investigatory seizure of a person that falls short of an arrest. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968); *id.* at 33 (Harlan, J., concurring) (“Where such a stop is *reasonable*, however, the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence.” (emphasis added)).

48. *Mendenhall*, 446 U.S. at 555 (Stewart, J., opinion of the Court).

49. *Id.* at 552–55.

50. 392 U.S. 1.

51. *Id.* at 19 n.16.

52. *Id.* at 34 (White, J., concurring) (“There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.”); *id.* at 32–33 (Harlan, J., concurring) (observing that police officers enjoy “the liberty (again, possessed by every citizen) to address questions to other persons”).

53. *Mendenhall*, 446 U.S. at 553 (Stewart, J., opinion of the Court).

54. *Id.* at 554.

55. 460 U.S. 491 (1983) (plurality opinion).

would not have felt free to leave.<sup>56</sup> As long as a reasonable person feels free to leave, the Court treats the police activity as a mere encounter, beneath the Fourth Amendment threshold. Importantly, by removing these encounters from the definition of a “seizure,” the Court has left no role for the judiciary under the Fourth Amendment to scrutinize the reasonableness of the encounter at all, let alone require a warrant.

One could imagine the Court taking a similar approach to consent searches. Government conduct constitutes a search only if it implicates reasonable expectations of privacy, and one could argue that a person loses any reasonable expectation of privacy by agreeing to a search. Instead, the Court has used a different doctrinal basis for conceptualizing consent in the search context, treating consent searches as “searches” under the Fourth Amendment, but recognizing consent as an exception to the warrant and probable cause requirements. The seminal case reflecting this approach is *Schneckloth v. Bustamonte*.<sup>57</sup> In *Schneckloth*, an officer stopped a vehicle because a headlight and license plate light were burned out.<sup>58</sup> The driver and four of his five passengers, including the defendant, could not produce a license.<sup>59</sup> The one passenger that produced identification, said the car was his brother’s, and gave consent to a search of the car—answering, “Sure, go ahead”—which yielded evidence incriminating the defendant.<sup>60</sup>

The Court began with a general pronouncement that all searches conducted without a warrant based on probable cause were presumed to be unreasonable, but then noted “that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”<sup>61</sup> In exploring the proper test for determining the voluntariness of consent, the Court expressly distinguished between the notion of voluntary consent necessary to validate a warrantless search and the notion of a knowing, voluntary, and intentional relinquishment of rights necessary to waive other rights associated with a fair trial, such as the right to a lawyer or to a jury under the Sixth Amendment.<sup>62</sup> The Fourth Amendment, the Court reasoned, did not go directly to the reliability or integrity of the fact-finding mission of a trial.<sup>63</sup> Moreover, the Court believed it would be unfeasible to expect police on the street to adhere to the same standards of waiver that can be met in the formal setting of a courtroom.<sup>64</sup> Instead, the Court held that the voluntariness of consent must be determined in light of the totality of the

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56. *Id.* at 502 (citing *Mendenhall*, 446 U.S. at 554).

57. 412 U.S. 218 (1973).

58. *Id.* at 220.

59. *Id.*

60. *Id.*

61. *Id.* at 219.

62. *See id.* at 242–43.

63. *Id.* at 242 (“The protections of the Fourth Amendment . . . have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.”).

64. *Id.* at 231–32, 243.

circumstances.<sup>65</sup> Importantly, the citizen's knowledge of his right to refuse to grant consent—imperative to any showing of a true “waiver”—was only one fact to be considered.<sup>66</sup> Accordingly, a court could deem consent to be voluntary even when the police did not advise the citizen that he was free to decline.<sup>67</sup>

The general role that the concept of consent plays in Fourth Amendment doctrine—whether by removing consensual encounters from the scope of the amendment altogether or by treating consensual searches as reasonable—appears at first glance to be eminently uncontroversial. If a person chooses to engage in an encounter with police, or to share with law enforcement information that would otherwise be private, why should courts interfere with that decision and prohibit the government's activity after the fact? In both the search and seizure context, the Court has relied on the intuitive appeal of the common-sense notion that people are free to cooperate with law enforcement if they choose to do so.<sup>68</sup> Accordingly, if a person voluntarily opts not to exercise the full scope of her liberty or privacy rights under the Fourth Amendment, then the police are entitled to rely on the volunteered cooperation without judicial interference.<sup>69</sup>

However, the Court's application of this common-sense premise reveals two hidden, less innocuous assumptions about human choice: first, that a person's agreement in the face of alternative options means that the person has voluntarily consented; and second, that people who consent in the absence of police compulsion do so because they want to cooperate with police. The next Section explores those hidden assumptions about human choice.

### B. *Consent in Action: Options and Preference*

Despite the intuitive appeal of the notion that a person's consent to police conduct should be dispositive of the conduct's legality, scholars are nearly universal in their criticism of the Court's treatment of consent in both the liberty and privacy contexts. Multiple scholars have noted a

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65. *Id.* at 227.

66. *Id.* at 249.

67. *See id.* at 231–33; *see also* *United States v. Drayton*, 536 U.S. 194, 203, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996).

68. *See, e.g., Drayton*, 536 U.S. at 197, 205 (“The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, *provided a reasonable person would understand that he or she is free to refuse.*” (emphasis added)); *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (distinguishing unreasonable searches and seizures proscribed by the Fourth Amendment and “voluntary cooperation” permitted by the Fourth Amendment); *Schneekloth*, 412 U.S. at 243 (providing that the Fourth Amendment is not designed to discourage the community from “aiding” in the apprehension of criminals because the community has a “real interest in encouraging consent”).

69. *See Drayton*, 536 U.S. at 207 (“Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.”).

schism between the language of the governing standards, which emphasizes freedom of voluntary choice, and actual case outcomes, where the Court repeatedly finds voluntary consent when reality would suggest otherwise.<sup>70</sup> Though the premise of the free-to-leave and consent-search doctrines is that police, like any other people, are free to approach people on the street,<sup>71</sup> encounters and consent searches that eventually yield incriminatory evidence tend to go beyond a discussion of weather, sports, or any other innocuous conversation that any two ordinary citizens might have on the street. Indeed, the seminal cases themselves involve facts that show the pressures attendant in police–citizen interactions, even in the absence of direct threats or commands.

In *Mendenhall*, for example, after the agents initially approached the defendant in the airport and asked for her ticket and identification, the defendant produced a ticket and identification in two different names.<sup>72</sup> The agents then questioned the defendant about the discrepancy and about the length of her trip.<sup>73</sup> One of the agents specifically identified himself as a federal drug agent.<sup>74</sup> According to the government’s own testimony, the defendant’s demeanor changed notably in response to this information: she “became quite shaken” and “extremely nervous” and “had a hard time speaking.”<sup>75</sup> When the agents returned her ticket and identification to her and asked her to accompany them to the airport DEA office for further questioning, she followed them, but with no verbal response noted in the record.<sup>76</sup> Though she initially gave the agents permission to search her person and purse, it was not until a female police officer arrived that she learned for the first time that a search of her person would require her to remove her clothing.<sup>77</sup> The defendant did not immediately agree. Instead, she said she needed to catch her flight.<sup>78</sup> In response, the officer said there would be no problem if the defendant were not carrying drugs.<sup>79</sup> The defendant yielded, once again without

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70. See, e.g., Simmons, *supra* note 3, at 773–74 (arguing that the Court’s consent-search paradigm “fails to acknowledge the complexities of police-civilian interaction and runs against the traditional standards of the Fourth Amendment” and noting that *Drayton* is an example in which, like past Supreme Court decisions, “the ruling that the defendants truly consent[] to the search had . . . an ‘air of unreality’ about it”); see also *supra* notes 7–12 and accompanying text.

71. See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” (citations omitted)).

72. *United States v. Mendenhall*, 446 U.S. 544, 547–48 (1980).

73. *Id.* at 548.

74. *Id.*

75. *Id.* (internal quotation marks omitted).

76. *Id.*

77. *Id.* at 548–49.

78. *Id.* at 549.

79. *Id.*

verbal comment, and disrobed for the search, revealing narcotics hidden beneath her clothes.<sup>80</sup>

The defendant later argued that her statement to the police officer that she needed to catch her flight demonstrated resistance to the search.<sup>81</sup> Justice Stewart rejected this argument, reasoning that the statement simply evinced a concern about how long the search would take—as if anyone concerned with the timing of a flight would ever volunteer for a detour to and search within a DEA office.<sup>82</sup> Despite the nature of the conversation (we are agents looking for drugs), the setting (come with us even though you are trying to catch a flight), the individuals involved (two agents and a police officer versus one demonstrably nervous, twenty-two-year-old high-school dropout), and the intrusiveness of the ultimate outcome (a strip search), Justices Stewart and Rehnquist would have held that no seizure occurred,<sup>83</sup> and a majority of the Court upheld the search as consensual.<sup>84</sup>

As Professor Kent Greenfield has noted, the Court has been quick to find valid consent based simply upon the existence of an alternative choice, without exploring the desirability or feasibility of that option.<sup>85</sup> For example, in *INS v. Delgado*,<sup>86</sup> the Court reviewed the legality of Immigration and Naturalization Services (INS) factory sweeps, in which INS agents inspected workplaces to determine if employers were using unauthorized workers.<sup>87</sup> The agents were armed, wearing badges, and carrying walkie-talkies.<sup>88</sup> Some of the agents stood at the factory exits while others moved through the workplace to question workers about their citizenship status.<sup>89</sup> The Court recognized that workers might feel restricted in their movement under these conditions, but reasoned that the limitation came from the realities of being at work, not because the agents were keeping them there.<sup>90</sup> Because the workers still had the option of moving about the factory freely, they had not been seized, and therefore the sweeps did not need to be justified as reasonable.<sup>91</sup>

Perhaps most illustrative of the Court's penchant for equating the existence of options to voluntary consent is its approval of so-called bus sweeps in *Florida v. Bostick*<sup>92</sup> and *United States v. Drayton*.<sup>93</sup> In both

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80. *Id.*

81. *Id.* at 559.

82. *Id.*

83. *Id.* at 555 (Stewart, J., opinion of the Court).

84. *Id.* at 558 (majority opinion).

85. Greenfield, *supra* note 7, at 11–12 (exploring what he calls an “ultra-dispositionalist paradigm” to defining choice, in which the existence of other choices is dispositive).

86. 466 U.S. 210 (1984).

87. *Id.* at 212.

88. *Id.*

89. *Id.*

90. *Id.* at 218.

91. *Id.* at 218–19.

92. 501 U.S. 429 (1991).

93. 536 U.S. 194 (2002).



cases, armed agents participating in drug interdiction programs boarded buses during stopovers and asked passengers for consent to search their luggage for contraband.<sup>94</sup> In *Bostick*, the Court held that there was no per se prohibition against the sweeps, even though no passenger would literally feel “free to leave” a bus on which they had booked a ride.<sup>95</sup> Likening the facts to *Delgado*, the Court in *Bostick* reasoned that the passengers’ movements were confined not by government conduct, but by the realities of their own conditions.<sup>96</sup> The relevant inquiry, the Court held, was “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>97</sup> Although the Court declined to answer this critical question in *Bostick*,<sup>98</sup> it went further in *Drayton*, finding that a reasonable bus passenger would have felt free to disengage from a bus sweep, even though officers were posted at the bus entrance and passengers were not told they had a right not to participate in the requested searches.<sup>99</sup> To the majority, *Drayton*’s engagement with the officer was consensual, and therefore not a seizure, because he had options: he could have gotten off the bus or declined the search and remained seated among his fellow consenting passengers (after having been the one bad egg who refused to cooperate with law enforcement).<sup>100</sup>

The Court’s consent jurisprudence exposes a worldview that assumes not only that reasonable people can exercise their options vis-à-vis law enforcement, but also that when they do, the option they exercise is preferred. From this view, a person who chooses to be searched when she could say no, or who chooses to stay when she could in fact go, is not only uncoerced, she is content because she wants to cooperate. For example, the defendant in *Drayton* pointed to the fact that nearly all passengers consented to a search in the bus sweeps as evidence that people believed that they had no choice but to comply.<sup>101</sup> The majority rejected this reasoning and instead viewed the high levels of cooperation as evidence that people know their rights, are able to exercise them, and yet choose—not only without coercion, but happily and for their own benefit—to consent. The “bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.”<sup>102</sup>

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94. *Bostick*, 501 U.S. at 431–32; *Drayton*, 536 U.S. at 194.

95. *Bostick*, 501 U.S. at 435–36, 440.

96. *Id.* at 436.

97. *Id.*

98. *Id.* at 437 (refraining from “deciding whether or not a seizure occurred in this case”).

99. 536 U.S. at 197–98, 203–04.

100. *See id.* at 203–04.

101. *See id.* at 205.

102. *Id.*

Similarly, in *Sibron v. New York*,<sup>103</sup> decided the same day as *Terry v. Ohio*,<sup>104</sup> a police officer approached the defendant in a restaurant and told him to accompany the officer outside.<sup>105</sup> Although the Court did not determine whether Sibron had been seized, it noted that the record was “barren of any indication whether Sibron accompanied [the officer] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer’s investigation.”<sup>106</sup> The Court appears to treat coercion and content cooperation as the only possible explanations. As Professor Ric Simmons has cogently argued, the Court has created a fiction that treats coercion and voluntary consent as either/or conditions in a false binary: consent that is not coerced by improper state conduct is treated as if it is happily and freely given.<sup>107</sup> The Court assumes that the reason people consent to police activity, when they have the option of declining, is out of desire to help the police serve the public.<sup>108</sup>

## II. THE ABSENCE OF TRUE CONSENT

Nearly unanimous in their dissatisfaction with the Court’s application of both the free-to-leave and consent doctrines, scholars have called on the judiciary to apply the tests with a realistic understanding of the reasons people comply with requests from law enforcement.<sup>109</sup> These scholars reject the false binaries of either explicit police coercion, on one

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103. 392 U.S. 40 (1968).

104. 392 U.S. 1 (1968).

105. *Sibron*, 392 U.S. at 45.

106. *Id.* at 63.

107. See Simmons, *supra* note 3, at 785 (noting the falseness of the Court’s treatment of coercion and voluntariness as a binary, in which “a consent to search is ‘voluntary’ if the police have not used ‘coercive’ tactics in obtaining the consent”).

108. See, e.g., United States v. Drayton, 536 U.S. 194, 207 (2002) (stating that citizen consent to searches reinforces a society based on law); Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1422–24 (2007) (setting forth studies and research supporting the proposition that people may obey the police, despite the option not to comply, because of a “moral obligation” to do the right thing and to “empower government to solve problems”).

109. See, e.g., Nadler, *supra* note 9, 155–57 (criticizing the Court’s consent-search analysis as understating the “extent to which citizens in police encounters feel free to refuse” and recommending that the consent-search paradigm should incorporate empirical findings “on compliance and social influence into Fourth Amendment consent jurisprudence”); Rotenberg, *supra* note 11, at 185–86 (“If consent is determined from the police perspective, and the consenters’ subjective limits to the search, as artificial and fictional as they are, do not serve to restrain the police, then the consent search becomes virtually limitless.”); cf. Chanenson, *supra* note 13, at 459–61 (arguing that while the emerging empirical evidence “highlights disturbing concerns about the role of citizens’ fear of police reprisal in the consent search process,” courts are seemingly less apt than the police departments themselves to consider this empirical evidence in resolving legal issues surrounding consent searches); Tracy Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 78–81 (2008) (suggesting that if a person refuses to give consent, then police should be barred from further seeking consent in order to “protect the Fourth Amendment rights of persons who are uncomfortable dealing with police-citizen encounters”).

hand, or “in a spirit of apparent cooperation,”<sup>110</sup> and for “their own safety and the safety of those around them,”<sup>111</sup> on the other. Most commonly, critics have pointed to two other explanations for so-called cooperation with law enforcement: lack of knowledge about options and lack of fortitude to exercise them.

### A. Lack of Knowledge

First, despite the Court’s assumption that a request necessarily conveys the listener’s power to decline, people may be unaware of their options not to cooperate with a police request.<sup>112</sup> They may see the right to decline as one that comes with legal or practical costs. As a legal matter, they may believe that a failure to cooperate will be viewed as suspicious and lead not only to the inevitable search but perhaps even more coercive action by the police.<sup>113</sup> These fears are not unfounded given the broad discretion police have to enforce the most minor transgressions through custodial arrest.<sup>114</sup>

In *Ohio v. Robinette*,<sup>115</sup> the Court appeared to reason that a driver would feel free to disengage from law enforcement, even when the initial limitation on his freedom of movement resulted from a police seizure.<sup>116</sup> The defendant was initially stopped for speeding.<sup>117</sup> The officer asked for and received the defendant’s driver’s license, ran the defendant’s driving history, and then asked the defendant to step out of the car.<sup>118</sup> After giving the defendant a verbal warning for speeding and returning his license to him, the officer 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?”<sup>119</sup> The defendant responded, “no,” and then

110. *Sibron*, 392 U.S. at 63.

111. *Drayton*, 536 U.S. at 205.

112. See Chanenson, *supra* note 13, at 454 (discussing empirical research showing that most people do not know of their right to refuse to consent).

113. See H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR’S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 81 (1988) (“Refusal of requested ‘permission’ is thought by most of us to risk unpleasant, though unknown, consequences.”); Burkoff, *supra* note 7, at 1118 (noting that people fear that a refusal to cooperate will make them look guilty); Chanenson, *supra* note 13, at 454.

114. See *Virginia v. Moore*, 553 U.S. 164, 173–76 (2008) (holding that a custodial arrest for a misdemeanor is constitutionally valid even if the state legislature has determined that punishment for the crime does not include arrest); *Atwater v. City of Lago Vista*, 532 U.S. 318, 323–24, 354–55 (2001) (holding that if a police officer “has probable cause to believe that an individual has committed *even a very minor criminal offense*,” such as a seatbelt offense, then the police officer “may, without violating the Fourth Amendment, arrest the offender” (emphasis added)); *Whren v. United States*, 517 U.S. 806, 813, 819 (1996) (upholding police seizure of a driver who had committed a minor traffic offense and holding that the officer’s subjective intentions for the seizure were immaterial).

115. 519 U.S. 33 (1996).

116. See *id.* at 38–40.

117. *Id.* at 35.

118. *Id.*

119. *Id.* at 35–36 (alteration in original).

consented to a search of his car, which yielded controlled substances.<sup>120</sup> The Court reversed the Ohio Supreme Court's decision in favor of the defendant, because the state court had incorrectly used a bright-line rule requiring police to tell a previously seized suspect that he was free to leave prior to engaging in consensual interrogation.<sup>121</sup> Although the Court's opinion was narrow, it reveals an underlying assumption that there exists any set of circumstances in which a driver already stopped by police on the side of the road would choose to leave before being told expressly that he has a right to do so. The Court did not even entertain the possibility that the defendant may have believed that he would have been detained longer if he refused to consent to the search.

Even if people do not fear legal repercussions for refusing to consent, they may believe as a practical matter that the searches are a prerequisite to maintaining their status quo, and may not want to be treated differently as a result of their non-compliance with police.<sup>122</sup> For example, passengers on a bus may believe that bus-sweep searches<sup>123</sup> are a prerequisite to remaining on the bus and may not want to exit a bus in the middle of the night, in the middle of nowhere.<sup>124</sup> Employees at a factory may view compliance with the INS<sup>125</sup> as a precondition to employment and may not want to be disciplined or fired for failing to comply with a request for information. Members of communities with historically tense relationships with police may fear that a refusal to cooperate will "aggravate or intensify" the encounter.<sup>126</sup>

People lack knowledge about the repercussions not only of refusing to consent, but also of granting their consent. They may believe that cooperation will be viewed as evidence of innocence, and therefore the police officer might not search at all or will conduct a more cursory inspection than if the person did not cooperate.<sup>127</sup> They may not know that they can limit the scope of the search or revoke consent at any time.<sup>128</sup> And they may not know that, even if they grant consent, police

120. *Id.* at 36.

121. *Id.* at 39–40.

122. See Greenfield, *supra* note 7, at 11–12 (noting the Supreme Court's failure to take into account the costs of exercising options other than cooperation).

123. See, e.g., *United States v. Drayton*, 536 U.S. 194, 197 (2002); *Florida v. Bostick*, 501 U.S. 429, 431 (1991).

124. Greenfield, *supra* note 7, at 11–12.

125. See *INS v. Delgado*, 466 U.S. 210, 212 (1984).

126. See Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1013–14 (2002) (noting that when people of color decline a request to search, the refusal "can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both").

127. See L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1523–24 (2011) ("Perhaps the most pervasive example of an activity that law-abiding persons take to avoid a search is, ironically, consenting to a search."); Burkoff, *supra* note 7, at 1118.

128. See, e.g., *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) ("Clearly a person may limit or withdraw his consent to a search, and the police must honor such limitations.").

may still subject them to whatever repercussions they feared as a consequence of refusal.

### B. *Lack of Fortitude*

In construing citizens' apparent cooperation with law enforcement, the Court's jurisprudence also fails to consider the natural tendency of people to comply with authority. Evidence from social psychology suggests that typical people, even if they realize they have the option not to cooperate with law enforcement, may lack the fortitude to do so.<sup>129</sup> It has been decades since psychologist Stanley Milgram's influential obedience studies demonstrated the power of perceived authority.<sup>130</sup> In those experiments, subjects were told they would be assisting researchers who were studying the educational effects of negative reinforcement.<sup>131</sup> Subjects were led to believe that they were in the role of "teacher," matched with a "learner," who was actually a confederate of the researchers.<sup>132</sup> As learners attempted to complete a task involving the pairing of random word pairs, teachers were supposed to reinforce mistakes with escalating levels of shock, using what appeared to be a shock-inducing machine, complete with voltage labels and descriptions ranging from "slight shock" to "moderate shock" to "Danger: severe shock," and most daunting of all, "XXX."<sup>133</sup> As the level of (fake) shock escalated, so too did the learner's protests of discomfort and ultimately severe pain, followed by foreboding silence.<sup>134</sup> Despite this "evidence" of the learner's misery, remarkably few subjects were willing to disobey the experimenters.<sup>135</sup> In fact, most continued to deliver shocks up to the most severe level, even after their learners had fallen into silence.<sup>136</sup>

Numerous scholars have drawn on the Milgram studies to argue that the Supreme Court has overestimated the fortitude of most people to refuse to cooperate with police.<sup>137</sup> Granted, Milgram's experimental

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129. See, e.g., Simmons, *supra* note 3, at 820 (arguing that the social power exhibited by law enforcement may explain why persons give consent despite knowing of their right to refuse); Lichtenberg, *supra* note 5, at 363–65 (noting that people are likely to respond to the authority inherent to a police officer, even when they understand they have a legal right to refuse consent).

130. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974).

131. *Id.* at 18.

132. *Id.*

133. *Id.* at 19–20.

134. *Id.* at 22 ("To our consternation, even the strongest protests from the victim did not prevent many subjects from administering the harshest punishment ordered by the experimenter."); see also *id.* at 32–33 (discussing results of the shock experiment in which twenty-six of forty subjects continued to shock the victim despite protests and ceasing therefrom).

135. *Id.*

136. *Id.* at 35.

137. See, e.g., Lichtenberg, *supra* note 5, at 363–65 (citing Milgram to develop a distinction between the "social power" and "legitimate power" underlying authority); Nadler, *supra* note 9, at 176–77 (noting some "obvious differences" between consent searches and Milgram's paradigm, but concluding "that in both situations, people are coerced to comply when they would prefer to refuse"); Rotenberg, *supra* note 11, at 187–89 (relying on Milgram's research to argue that people

paradigm is not a perfect analog to a police officer's request for consent to search.<sup>138</sup> As Professor Simmons has argued, in Milgram's studies, the researchers used firm commands, and many of the subjects protested vigorously, even as they complied.<sup>139</sup> The difference between a command followed by reluctant compliance, and a request followed by apparent cooperation, is important in the Fourth Amendment context. The Court has been quick to find voluntary consent as long as police phrase the request for consent to search as a question, and not a command.<sup>140</sup>

However, language does not exist in a vacuum; listeners interpret words in their social context.<sup>141</sup> Accordingly, a police officer's request for cooperation, "however gently phrased, is likely to be taken by even the toughest citizen as a command."<sup>142</sup> Moreover, this interpretation will not always be incorrect in a world in which commands are often couched in the language of request. For example, police officers are authorized to order a vehicle's occupants out of the car during a lawful traffic stop.<sup>143</sup> Nevertheless, one could imagine an officer exercising this authority by asking, "Do you mind stepping out of the car for me?" rather than stating, "I have the authority to order you out of the car, whether you like it or not." That the statement ends with a question mark is not inconsistent with the fact that the cars' occupants do not have a choice but to comply.

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consent to search because of the implicit authority of police); Strauss, *supra* note 1, at 236–41 (using Milgram's research to argue that people are likely to comply with a "request" by authorities); Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 243 (1997) (citing Milgram's research and other social psychology to argue that "innocent suspects, much like guilty suspects, are likely to be unable to meaningfully exercise their Fourth Amendment right to exclude the police").

138. Nadler, *supra* note 9, at 176 (noting the "obvious differences" as well as the similarities between the situation "in which Milgram's subjects found themselves" and the typical consent-search scenario).

139. Simmons, *supra* note 3, at 805–07 (maintaining that applying the Milgram experiments to consent searches is "problematic at best").

140. See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1823 & n.66 (1998).

141. See Nadler, *supra* note 9, at 168–72, 179–97 ("The context of discourse is crucial in the understanding of it; this is especially true when the speaker is making a request." (footnote omitted)).

142. UVILLER, *supra* note 113, at 81; see also Williams, *supra* note 8, at 89 ("After all, what maddens us about the voluntariness locution in consent-search cases is precisely the unreality of it—most everyone would feel coerced by the sorts of police encounters that are described everyday in our courthouses."); Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in OXFORD HANDBOOK OF LANGUAGE AND LAW 326, 333–36 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (maintaining that courts fail to consider context when examining the language of police encounters).

143. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 & n.6 (1977) (per curiam) (declaring a bright-line rule that ordering the driver out of the car during a traffic stop is reasonable and describing the intrusion as "*de minimis*"); see also *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (extending *Mimms* to passengers).

Professor Janice Nadler's insightful work on the language of police encounters is especially relevant here.<sup>144</sup> As she has pointed out, empirical evidence demonstrates that the relative hierarchy between speaker and listener affects the meaning of language.<sup>145</sup> For example, in one study, researchers asked subjects to assume the role of an employee being told, either by a boss or a co-worker, not to be late to work again.<sup>146</sup> When subjects listened to a peer, they heard a directive ("don't be late again") as more coercive than a suggestion ("try not to be late again").<sup>147</sup> When a boss was speaking, however, the forcefulness of the language was irrelevant. The researchers concluded that "[t]hose who have authority apparently need not activate coercive potential through their discourse. Their roles are sufficient to do so."<sup>148</sup>

Because police are in a position of authority, regardless of the language they use, listeners are unlikely to distinguish between a command to search and a request.<sup>149</sup> Just as any driver would understand from the question, "Can I please see your license and registration?," that she is required to produce the requested items,<sup>150</sup> most people will understand an officer's request to search as a direction to comply. The failure of courts to consider the social context of the words police use to obtain consent to search is but one example of what Professors Peter Tiersma and Lawrence Solan call "selective literalism"—the tendency of courts to construe words literally when beneficial to law enforcement, but to interpret language within its social context when a literal construction might benefit the defendant:

[T]he problem is not merely that judges sometimes interpret the utterances of ordinary people in an overly literal way by failing to take pragmatic information into account. Rather, judges are selective in when they take pragmatic factors into consideration. Whether consciously or not, their interpretive practices tend either to ignore or to take into account pragmatic information when it benefits police and prosecutors. The utterances that police officers make in seeking consent to a search are almost invariably deemed to be requests, even if the officer poses what is literally an informational question or if the circumstances are such that

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144. See Nadler, *supra* note 9, at 187–89; Nadler & Trout, *supra* note 142, at 329–33.

145. Nadler, *supra* note 9, at 188–90.

146. *Id.* at 189 (citing Jennifer L. Vollbrecht et al., *Coercive Potential and Face-Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 INT'L J. CONFLICT MGMT. 235, 240 (1997)).

147. *Id.*

148. *Id.* (quoting Vollbrecht et al., *supra* note 146, at 244) (internal quotation marks omitted).

149. See *id.* at 188–89 ("[B]ecause a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power.").

150. See *Hibbel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186–88 (2004) (holding that states can pass laws requiring suspects to reveal their identity during a *Terry* stop).

the suspect is likely to interpret the utterance as an order that should not be refused.<sup>151</sup>

### III. CONSENT: REASONABLENESS, NOT WAIVER

The failure of the Court to give more weight to a person's actual awareness of the alternatives to compliance,<sup>152</sup> or a person's actual ability to exercise those options,<sup>153</sup> is incompatible with any requirement that the person subjectively intend to grant consent. Seeking to explain the disconnect between lay notions of voluntary consent and the Court's apparent conception of it, recent Fourth Amendment scholarship has emphasized the role that objective standards of reasonableness play in consent jurisprudence, despite the Court's narrative reliance on subjective notions of consent.<sup>154</sup> However, the Court's inquiries into reasonableness have been imprecise, perhaps in part because the role of reasonableness is hidden. Sometimes the Court examines the reasonableness of police officers and at other times the Court examines the reasonableness of the citizen. Most hidden of all is the Court's implicit and incorrect analysis of what this Article calls "macro reasonableness"—an assessment of whether the consent-search exception strikes a reasonable balance between governmental needs and individual Fourth Amendment interests.

#### A. *Subjective Consent v. Objective Reasonableness*

Though rejecting the requirement of a formal waiver of Fourth Amendment rights, the Court in *Schneckloth* nevertheless stated that the individual characteristics of the person granting consent, such as age, intelligence, and education, were relevant in determining whether the defendant's consent was voluntarily granted.<sup>155</sup> This express consideration of a defendant's individual traits appears to treat the voluntariness of a citizen's consent to police activity as a subjective inquiry. In practice, however, the Court applies the standard objectively. Professor Marcy Strauss

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151. Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 256 (2004).

152. See *supra* Section II.A.

153. See *supra* Section II.B.

154. E.g., Simmons, *supra* note 3, at 778–79.

155. 412 U.S. 218, 226–27; Simmons, *supra* note 3, at 778–79 (“The Court went out of its way in *Schneckloth* to say that subjective as well as objective factors were part of the totality of the circumstances test—noting that the defendant's level of schooling, intelligence, and presence or absence of any warnings were relevant considerations in determining whether a statement was voluntary.”). When the Court uses objective standards, the individual characteristics of the defendant generally do not play a role. See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004) (contrasting *Schneckloth* factors with the objective inquiry used to determine if someone is in custody for *Miranda* purposes); see also Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's Miranda and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1495 (2010) (noting that the factual inquiry into voluntary consent “is nominally a subjective inquiry” (emphasis added) (footnote omitted)).



reviewed every consent search case published in a three-year period and reported “only a handful of cases” in which courts analyzed the suspect’s individual, subjective characteristics.<sup>156</sup>

Whenever confronted with a conflict between subjective intention and objective appearance, the Court has opted for an objective approach, emphasizing that “[t]he touchstone of the Fourth Amendment is reasonableness.”<sup>157</sup> For example, in *Illinois v. Rodriguez*,<sup>158</sup> the Court recognized that police could lawfully rely on “apparent” consent to search.<sup>159</sup> In *Rodriguez*, a woman who claimed to be the defendant’s live-in girlfriend granted the police entry into the defendant’s apartment; she referred to the home as “our” apartment, had a key to the entry, and had clothes and furniture inside.<sup>160</sup> In reality, the woman had moved out of the home a month earlier and, according to *Rodriguez*, retained the key without permission.<sup>161</sup> Because she lacked authority to consent and he did not consent, he sought to suppress the resulting evidence.<sup>162</sup> The Court upheld the search because the Fourth Amendment’s only guarantee is that searches and seizures will be “reasonable,” and the police officers who conducted the search had acted reasonably by relying on the woman’s apparent authority to permit entry.<sup>163</sup>

The Court has also looked to objective standards of reasonableness, rather than subjective consent, when determining the scope of a consent search. In *Florida v. Jimeno*,<sup>164</sup> the defendant consented to a search of his car for drugs without any further discussion of the scope of the search.<sup>165</sup> When the police officer found a folded, brown paper bag on the floorboard of the car, he opened it, without seeking further permission, and found drugs inside.<sup>166</sup> Although the Florida Supreme Court held that the consent search of a car does not extend to sealed containers within the car absent specific consent for the containers, the Supreme Court reversed.<sup>167</sup> The scope of a consent search, the Court reasoned, turns not on what the defendant actually intended to consent to, but instead on what “it is objectively reasonable for the officer to believe” about the scope of the person’s consent.<sup>168</sup> From this perspective, it was “objectively reasonable for the police to conclude that the general consent to search respondent’s

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156. Strauss, *supra* note 1, at 222; see also Mandiberg, *supra* note 155, at 1495.

157. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

158. 497 U.S. 177 (1990).

159. *Id.* at 187–89.

160. *Id.* at 179.

161. *Id.* at 181.

162. *Id.* at 180.

163. *Id.* at 183–84.

164. 500 U.S. 248, 250 (1991).

165. *See id.* at 249.

166. *Id.* at 249–50.

167. *Id.* at 250.

168. *Id.* at 249.

car included consent to search containers within that car which might bear drugs.”<sup>169</sup>

In the seizure context, the emphasis on reasonableness is even clearer. While the Court employs the narrative device of “voluntary consent” to determine the legality of a consent search, the doctrinal distinction between a seizure and a mere encounter that does not implicate the Fourth Amendment is not determined by whether the citizen voluntarily consents to the interaction. Instead, the relevant inquiry is clearly objective in nature, requiring the Court to determine whether a “reasonable person” would have believed she was free to leave under the circumstances.<sup>170</sup>

### B. *Officer Reasonableness and Citizen Reasonableness*

Noting the divergence between the Court’s language of voluntary consent and the empirical realities, a growing number of scholars have characterized consent jurisprudence as a test of reasonableness.<sup>171</sup> Viewed from this perspective, the Court’s emphasis upon “voluntary consent” is mere narrative, while the Court’s “real” concern is about the reasonableness of the challenged encounter or search.

Professor Simmons has offered reasonableness as a “new” paradigm for analyzing consent searches.<sup>172</sup> Professor Daniel Williams has challenged Simmons’s characterization of reasonableness as a new paradigm and asserted that the Court’s emphasis upon the reasonableness of consent searches has always been apparent.<sup>173</sup> Regardless of whether the focus on reasonableness is new, both Professors Simmons and Williams characterize the relevant reasonableness inquiry as an objective

169. *Id.* at 251.

170. *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., opinion of the Court)) (internal quotation marks omitted). Interestingly, the prosecution appeared to assume that the relevant inquiry was subjective, because the Court characterized the government’s argument as follows: “The entire encounter was consensual and hence Royer was not being held against his will at all.” *Id.* at 501. However, the Court rejected the prosecution’s argument using an objective test, holding that the circumstances—retaining Royer’s ticket and license and failing to tell him he had a right to leave—would have led a reasonable person to believe he was not free to leave. *Id.* at 502–03.

171. Maclin, *supra* note 109, at 61 (noting the “modern Court’s abandonment of *Bustamonte*’s ‘voluntariness’ test and its substitution of a ‘reasonableness’ test that considers only objective facts or criteria”); Simmons, *supra* note 3, at 822 (offering a “new paradigm” for the Court’s consent jurisprudence: “As long as the police officer’s behavior is appropriate, the search is reasonable and thus constitutional”); Williams, *supra* note 8, at 75 (asserting that reasonableness “has always been the touchstone of Fourth Amendment analysis,” including in the consent search context); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1, 23 (2008).

172. See Simmons, *supra* note 3, at 775–76 (enumerating the contours of the “new paradigm”).

173. Williams, *supra* note 8, at 93 (“The Court might dress up the analysis with evocative metaphysical notions, but only naiveté or the desire to erect a straw-man critique prevents one from seeing that the Court purports to do nothing more, and nothing less, than assess reasonableness, which is exactly Professor Simmons’s purported ‘new’ paradigm.”).

inquiry into the appropriateness of law enforcement's conduct.<sup>174</sup> In both *Rodriguez* and *Jimeno*, for example, the Court emphasized the reasonableness of the police officers' conduct in light of the facts known to them at the time.<sup>175</sup>

The distinction between an objective inquiry into officer reasonableness and a true voluntariness standard is perhaps best illustrated with a case from the Fifth Amendment context, *Colorado v. Connelly*.<sup>176</sup> In *Connelly*, the defendant approached a police officer and, without prompting from the officer, confessed to a murder committed in another state.<sup>177</sup> At trial, the defendant moved to suppress his statements as involuntary, because he was suffering from schizophrenia and was hearing voices in his head telling him that he either had to confess or commit suicide.<sup>178</sup> Though the statements certainly were not "voluntary" from a subjective perspective,<sup>179</sup> the Court nevertheless held that they were voluntary from a constitutional perspective because the state had done nothing coercive to affect the defendant's decision to speak.<sup>180</sup>

Professors Melanie Wilson and Tracy Maclin have both explored reasonableness as a basis for the Fourth Amendment's consent-search doctrine, but have compellingly demonstrated that the Court considers not only the reasonableness of officers, but also the reasonableness of citizens.<sup>181</sup> In the seizure context, the Court examines citizen reasonableness directly by finding a "seizure" only where a reasonable person would have felt

174. Simmons, *supra* note 3, at 817 ("The standard should be an objective one, a standard that focuses on police conduct and not the subjective consent given by the suspect."); Williams, *supra* note 8, at 86, 89, 92–93 (arguing that Supreme Court precedent demonstrates that "the power to withhold consent is governed by objective considerations, particularly the observable conduct of the law enforcement agents" and further providing that the Court's doctrinal path with respect to consent searches has been charted from the "objective 'reasonableness' standpoint").

175. See *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) ("As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" (alterations omitted) (internal quotation marks omitted)); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). For a discussion of the role of reasonableness in both *Rodriguez* and *Jimeno*, see *supra* notes 157–69 and accompanying text.

176. 479 U.S. 157 (1986).

177. *Id.* at 160.

178. See *id.* at 161.

179. See *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (holding that statements extracted under the threat of violence were not voluntary).

180. *Connelly*, 479 U.S. at 164–65.

181. See Wilson, *supra* note 171 (discussing the role that "citizen reasonableness" plays in Fourth Amendment jurisprudence); Maclin, *supra* note 109, at 65–67 (using the majority opinion in *Drayton* to demonstrate the modern Court's tendency to treat citizens as having a "responsibility to know and assert their rights and tell the police to leave them alone"). See generally Mandiberg, *supra* note 155, at 1483 (exploring officer reasonableness and "lay person" reasonableness in the *Miranda* and several Fourth Amendment contexts, and demonstrating that the Court permits reasonable officers more room for error in their "perceptions, knowledge, emotions, or behavior").

like he was not free to leave.<sup>182</sup> Though the test in the search context sounds more subjective (voluntary consent), the Court has sometimes blurred the seemingly subjective consent-search doctrine with the objective free-to-leave doctrine, stating that both encounters and searches are consensual as long as “a reasonable person would understand that he or she could refuse to cooperate.”<sup>183</sup>

In both contexts, the Court’s examination of reasonableness reveals a distinctive worldview about police–citizen dynamics. When it comes to officer reasonableness, the Court assumes that there is nothing inherently objectionable about a police officer requesting cooperation from citizens,<sup>184</sup> and therefore no explanation need be given for the request. Instead, the Court assumes that an officer’s request (as opposed to a command) necessarily conveys a citizen’s right to refuse to cooperate.<sup>185</sup> When it comes to citizen reasonableness, the Court assumes that reasonable people are able to recognize the right to refuse and to exercise it affirmatively.<sup>186</sup>

In practice, inquiries into officer reasonableness and citizen reasonableness will blur.<sup>187</sup> A court examining the appropriateness of law enforcement conduct might assess its coercive impact upon the reasonable citizen, while a court examining the effect of police conduct on the reasonable citizen is likely to take into account the reasonableness of the police conduct.<sup>188</sup> Consider the combination of *California v. Hodari D.*<sup>189</sup> and *Illinois v. Wardlow*<sup>190</sup> from this perspective. In *Hodari D.*, the defendant ran from police and then “tossed away” a rock of cocaine during the ensuing foot chase.<sup>191</sup> To determine whether the police had the requisite level of suspicion to seize Hodari D., the Court first had to determine when the seizure occurred.<sup>192</sup> Adding a gloss to the traditional free-to-leave test, the Court held that to be seized, the defendant had to either submit to a show of police authority (the free-to-leave test) or be physically seized.<sup>193</sup> Because the suspect did not submit to the police officer’s attempts to stop him, “he was not seized

182. *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (Stewart, J., opinion of the Court).

183. *Florida v. Bostick*, 501 U.S. 429, 431 (1991); see *United States v. Drayton*, 536 U.S. 194, 205–06 (2002).

184. See, e.g., *Drayton*, 536 U.S. at 200–01.

185. See *Bostick*, 501 U.S. at 431.

186. Maclin, *supra* note 109, at 65.

187. Simmons, *supra* note 3, at 817 & n.216 (“This is probably a distinction without a difference.”).

188. See 1 DRESSLER & MICHAELS, *supra* note 2, § 16.03[B], at 266 (“The real issue for courts is whether the police methods of obtaining consent are morally acceptable to us in view of law enforcement goals.”).

189. 499 U.S. 621 (1991).

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

191. 499 U.S. at 623.

192. *Id.* at 623–24.

193. *Id.* at 626–27.

until he was tackled.”<sup>194</sup> Subsequently, in *Wardlow*, the Court held that “unprovoked” flight from police can be treated as suspicious conduct in determining whether a subsequent seizure is supported by reasonable suspicion.<sup>195</sup>

The doctrinal package resulting from *Hodari D.* and *Wardlow* can be viewed as the Court’s assessment of the reasonableness of either police or citizen conduct. As a determination of police reasonableness, the Court’s decisions reflect the belief that there is nothing inappropriate about police chasing people who run from them. As a determination of citizen reasonableness, the Court reveals its belief that reasonable people, though free to decline police cooperation, will do so through words of resistance rather than through flight.

Whether examining the reasonableness of officer conduct or citizen conduct, the Court’s inquiry into reasonableness in these contexts is not completely divorced from the question of coercion. While reasonableness provides an explanatory paradigm for consent jurisprudence, the fundamental inquiry is still grounded in the coercion/consent dichotomy. The Court may not examine voluntary consent from a subjective perspective, but the Court does consider reasonableness from the perspective of coercion: Have the police resorted to overly coercive tactics, and would a reasonable person (as imagined by the Court) feel coerced? It also analyzes reasonableness at a “micro” level, examining the totality of circumstances on a case-by-case basis to determine the permissibility of an encounter or search.

### C. Macro-Level Reasonableness

A different type of reasonableness inquiry is what this Article refers to as “macro reasonableness.” Professor Orin Kerr explains the distinction between the Court’s micro- and macro-level fact finding in Fourth Amendment cases nicely:

A micro-scale inquiry focuses on the exact facts of the case before the court, such as what the officer did or what information he obtained. In contrast, a macro-scale inquiry looks to characteristics of the general type of government conduct, of which the case at hand is merely one example.<sup>196</sup>

Usually when the Court sets aside the warrant clause to focus on reasonableness, it does so by balancing the interests of law enforcement

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194. *Id.* at 629.

195. 528 U.S. at 125.

196. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 523 (2007). To illustrate the micro-level analysis, Professor Kerr uses an example of a police officer who searches a suspect’s mail. At the micro level, the Court might examine whether the officer violated any laws by examining the mail and the quality of the information obtained from the search. *Id.* at 523 n.106. At the macro level, the Court might treat the case as just one example of a larger set of cases involving searches of the mail and seek to develop a rule specifically addressed to the privacy of mail. *Id.*

against the level of intrusion to the individual.<sup>197</sup> Consider *Terry v. Ohio* as an example of the Court examining reasonableness at both the micro and macro levels.<sup>198</sup> *Terry* is best known for its holding that police may conduct a brief, investigatory seizure of a person, without a warrant and without probable cause, as long as the officer has a “reasonable suspicion” that crime is afoot.<sup>199</sup> An individual motion to suppress based on *Terry* requires a court to engage in multiple determinations of micro-level reasonableness. First, to constitute a seizure at all under the Fourth Amendment, the circumstances must have been such that a reasonable person would not have felt free to leave.<sup>200</sup> Second, to constitute a *Terry* stop, as opposed to an arrest that requires probable cause,<sup>201</sup> the duration and scope of the stop must be reasonable in light of the investigatory steps necessary to quell or confirm the suspicions giving rise to the seizure.<sup>202</sup> Finally, if the seizure does constitute a *Terry* stop, it must be supported by “reasonable suspicion,” which requires the Court to determine whether an “objectively reasonable police officer” would have suspected that the suspect was engaged in criminal activity.<sup>203</sup>

Those micro-level reasonableness determinations arise in hundreds of cases per day. However, the underlying reasonable-suspicion doctrine stems from *Terry*’s initial, macro-level analysis of reasonableness. In *Terry*, the Court considered—and rejected—two opposing regimes for judicial involvement in brief, street-level investigatory stops: that they should be treated as entirely outside the reach of the Fourth Amendment,<sup>204</sup> or that they should be subject to the default requirement of a warrant based on probable cause.<sup>205</sup> As to the former, the Court

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197. See *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))); Cynthia Lee, *Reasonableness with Teeth: The Future of the Fourth Amendment Reasonableness Analysis*, 81 *Miss. L.J.* 1133, 1140, 1144 (2012) (describing the “reasonableness” balancing test).

198. See 392 U.S. 1, 22–31 (1968).

199. *Id.* at 24–26, 29–30.

200. See *Florida v. Royer*, 460 U.S. 491, 501–02 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (Stewart, J., opinion of the Court).

201. *United States v. Watson*, 423 U.S. 411, 415–16 (1976).

202. See *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (ruling that in assessing the reasonableness of the length of detention, the Court “consider[s] it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant”); *id.* at 691 (Marshall, J., concurring) (“Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in *duration*, *scope*, or *means* goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause.” (emphasis added)).

203. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

204. *Terry*, 392 U.S. at 16–17.

205. See *id.* at 20.

dismissed as “fantastic” the notion that a “stop and frisk” was of no constitutional consequence.<sup>206</sup> As to the latter, the Court recognized that the nature of a stop and frisk required “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat,” rendering the warrant requirement impracticable.<sup>207</sup> Rejecting a “rigid all-or-nothing model,”<sup>208</sup> the Court instead held that a stop and frisk implicates the Fourth Amendment, but would be evaluated pursuant to the “general proscription against unreasonable searches and seizures.”<sup>209</sup>

A generalized look at reasonableness requires the Court to balance the governmental interests served by the challenged police conduct against the level of intrusion to the privacy and liberty interests protected by the Fourth Amendment.<sup>210</sup> Applying this balancing test to stops, the Court in *Terry* emphasized both the legitimate interests of law enforcement to investigate suspicious circumstances that reasonably indicate criminal activity, and the relatively brief detention of the stopped individual.<sup>211</sup> Turning to the reasonableness of a frisk for weapons, the Court weighed the legitimate interests of police officers in protecting their safety during investigatory stops, and the limited intrusiveness of an inspection for weapons.<sup>212</sup>

Importantly, the Court has expressly looked to the macro-level reasonableness balance to shape the micro-level doctrine governing stops and frisks on a case-by-case basis. Stops cannot take longer than reasonably necessary because the government’s interest in quick, on-the-spot decision-making decreases, while the level of intrusion to the defendant increases.<sup>213</sup> To preserve the reasonableness balance, the Court will treat an overly lengthy or intrusive stop as a de facto arrest (thereby triggering the probable cause requirement), even if the police officer does not intend to elevate the stop to an arrest, or does not announce to the defendant that she is under arrest.<sup>214</sup> The lawful scope of a frisk is

206. *Id.* at 16.

207. *Id.* at 20.

208. *Id.* at 17.

209. *Id.* at 20.

210. *Id.* at 20–21.

211. *Id.* at 22–24, 26.

212. *Id.* at 25–27.

213. *See* *United States v. Sharpe*, 470 U.S. 675, 685–88 (1985); *Terry*, 392 U.S. at 19–20 (“[I]n determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”).

214. *See Sharpe*, 470 U.S. at 685 (providing that although Court precedent obscures the distinction between investigative *Terry* stops and de facto arrests, “if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop”); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (holding that unlike the brief and narrowly circumscribed intrusions involved in *Terry* and its progeny, “the detention of petitioner was in important respects indistinguishable from a traditional arrest” where the petitioner was transported to a police station in a police car, placed in an interrogation room, and questioned without being told that he was free to leave); *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969).

similarly determined by macro-level considerations of reasonableness. The moment a police officer begins to search for anything other than a weapon, the reasonableness balance changes.<sup>215</sup> The government is no longer advancing its interest in officer safety, and the nature of the search becomes more intrusive. Accordingly, the Court has adopted a bright-line rule that the only legitimate aim of a frisk is to locate weapons.<sup>216</sup> A search for evidence, no matter how brief, changes the reasonableness balance, re-triggering the default rule requiring probable cause and a warrant.<sup>217</sup>

It is not only in the stop and frisk context that the Court looks to notions of macro reasonableness to shape Fourth Amendment doctrine. A macro-level balance of governmental interests against intrusions to individual liberty and privacy is at the heart of the doctrinal rules governing special needs searches,<sup>218</sup> roadblocks,<sup>219</sup> administrative searches,<sup>220</sup> community caretaking searches,<sup>221</sup> inventory searches,<sup>222</sup> protective sweeps,<sup>223</sup> searches incident to arrest,<sup>224</sup> and an officer's

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215. See *Terry*, 392 U.S. at 26 (contrasting frisks from typical searches because a “protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person”); 1 DRESSLER & MICHAELS, *supra* note 2, § 17.07[B][2] (“If an officer feels no object during a pat-down, or she feels an object that does not appear to be a weapon, no further search is justifiable under *Terry*, which is based exclusively on the concern for the officer’s safety.”).

216. See *Terry*, 392 U.S. at 24, 26–27; *Minnesota v. Dickerson*, 508 U.S. 366, 373, 377 (1993); *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (noting that *Terry* authorizes a limited frisk for weapons).

217. *Sibron v. New York*, 392 U.S. 40, 65 (1968) (finding an officer’s search to be impermissible under *Terry* where the justification for the search was to find narcotics rather than to search for weapons); *Arizona v. Hicks*, 480 U.S. 321, 325–29 (1987) (holding that probable cause is required to search for evidence, even when the search is alleged to be cursory).

218. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38, 340–41 (1985); *O’Connor v. Ortega*, 480 U.S. 709, 715–25 (1987) (plurality opinion); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 618–25, 627 (1989); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–72 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–59, 661–64 (1995); *Chandler v. Miller*, 520 U.S. 305, 313–14, 318–21 (1997); *Ferguson v. City of Charleston*, 532 U.S. 67, 78–86 (2001); *Bd. of Ed. v. Earls*, 536 U.S. 822, 828–32, 834–36 (2002).

219. See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 449–55 (1980); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–44, 46–48 (2000) (providing that the constitutionality of checkpoint programs conducted by law enforcement “depends on a balancing of the competing interests at stake and the effectiveness of the program”); *Illinois v. Lidster*, 540 U.S. 419, 425–28 (2004) (balancing the gravity of the public interest served by the seizure, the degree to which the checkpoint seizure advances public interest, and the degree of intrusion upon individual liberty).

220. See *Camara v. Mun. Court*, 387 U.S. 523, 534–39 (1967) (providing that in the municipal code enforcement context—as opposed to the criminal investigation context—there is no ready test for “determining reasonableness other than by balancing the need to search against the invasion which the search entails”); See *v. City of Seattle*, 387 U.S. 541, 543–46 (1967).

221. See *Cady v. Dombrowski*, 413 U.S. 433, 439–43, 446–48 (1973).

222. See *South Dakota v. Opperman*, 428 U.S. 364, 367–76 (1976) (upholding the reasonableness of administrative searches in light of the “distinct needs” served by such searches); *Illinois v. Lafayette*, 462 U.S. 640, 643–48 (1983); *Colorado v. Bertine*, 479 U.S. 367, 371–76 (1987).

223. See *Maryland v. Buie*, 494 U.S. 325, 331–37 (1990).



directives that drivers<sup>225</sup> or passengers<sup>226</sup> exit a vehicle during a traffic stop. In each context, the Court determined that the usual warrant and probable cause requirements that serve as a default proxy for reasonableness were inappropriate. In the absence of this requirement, the Court turned to a macro-level determination of reasonableness by weighing the governmental interests served by the category of search against the nature and level of the intrusion to citizen interests. However, when it comes to the consent-search exception to the warrant requirement, the Court has silently bypassed this usual macro-level balancing test to determine reasonableness. To be sure, some language in *Schneckloth* appears to invoke a kind of balancing test. Specifically, the Court noted the need to accommodate the “two competing concerns” of “the legitimate need for [consent] searches and the equally important requirement of assuring the absence of coercion.”<sup>227</sup> But assessing the level of *coercion* upon an individual is not the same as the Court’s usual measure of Fourth Amendment costs to the individual: liberty and privacy. Instead of citing the usual measure of Fourth Amendment reasonableness, the Court in *Schneckloth* expressly borrowed this balancing equation from the *Fifth* Amendment case law that governs police questioning.<sup>228</sup> That confession law has been built around a compulsion/consent dichotomy is unsurprising given the Fifth Amendment’s guarantee that no person be “compelled” to be a witness against himself.<sup>229</sup>

However, the emphasis of the Fourth and Fifth Amendments are different. The Fourth Amendment protects individual privacy and liberty interests against unreasonable interference by the state. Moreover, the default measure of Fourth Amendment reasonableness is a warrant based on probable cause.<sup>230</sup> The standard of probable cause ensures that there is some level of individualized suspicion to justify interference with a

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224. In *Arizona v. Gant*, 556 U.S. 332 (2009), for example, the Court limited the ability of police to search an arrestee’s car—incident to an arrest—to instances in which the defendant was either arrested while still in reach of the car’s passenger compartment, or in which police had reason to believe that the car contained evidence of the crime for which the defendant was arrested. *Id.* at 335. The Court rejected a more expansive reading of the search incident to arrest to preserve the proper balance between the government’s interests and the arrestee’s privacy interests in his car. *Id.* at 344, 351.

225. See *Pennsylvania v. Mimms*, 434 U.S. 106, 109–11 (1977).

226. See *Maryland v. Wilson*, 519 U.S. 408, 411–15 (1997).

227. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

228. *Id.* at 227–28; see also *id.* at 280 (Marshall, J., dissenting) (“The Court assumes that the issue in this case is: what are the standards by which courts are to determine that consent is voluntarily given? It then imports *into the law of search and seizure* standards developed to *decide entirely different questions about coerced confessions.*” (emphasis added)).

229. U.S. CONST. amend. V.

230. 1 DRESSLER & MICHAELS, *supra* note 2, § 8.01; see, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches 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.” (footnotes omitted)).

citizen's privacy and liberty interests,<sup>231</sup> and the requirement of a warrant ensures that a neutral decision maker acts as a check on the discretion of law enforcement, whose judgment might be clouded by the competitive enterprise of crime-fighting.<sup>232</sup> Though the Court has recognized so many exceptions to the warrant requirement that the exceptions swallow the rule, it has done so by looking at "macro reasonableness."

In the consent context, however, the Court has treated the citizen's voluntary, consensual participation in an investigation as an alternative proxy for reasonableness. However valid a citizen's true, voluntary consent might be to establish reasonableness, this Article demonstrates that, as applied by the Court, the concept of "voluntary consent" is a myth. The Court's "fictional"<sup>233</sup> measure of voluntary consent is not the kind of *true* voluntary consent that would be required in the Fifth Amendment confession context from which the Court borrowed the doctrine. For example, in the confession context, *Miranda v. Arizona*<sup>234</sup> supplements the core Fifth Amendment privilege against self-incrimination by creating an irrebuttable presumption that custodial interrogation is compelled unless the defendant first waives his *Miranda* rights.<sup>235</sup>

While the Court has injected notions of Fifth Amendment compulsion into the Fourth Amendment consent context, it has declined to require proof of waiver,<sup>236</sup> proof that the defendant knew he had a right to refuse,<sup>237</sup> or even any showing that the citizen *subjectively* desired to

231. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949); see *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (noting "the general rule that a search must be based on individualized suspicion of wrongdoing"); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (requiring probable cause to believe an item may be seized in order to invoke the "plain view" doctrine, to ensure against "a general exploratory search from one object to another until something incriminating at last emerges" (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)) (internal quotation marks omitted)).

232. See, e.g., *Johnson v. United States*, 333 U.S. 10, 13–14 (1947) (noting that the Fourth Amendment's "protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

233. See *supra* note 9 and accompanying text.

234. 384 U.S. 436 (1966).

235. See *id.* at 444, 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak."); 1 DRESSLER & MICHAELS, *supra* note 2, § 24.04[C][1], at 443–44 (noting that a common reading of *Miranda* was that compulsion inheres to custodial interrogation to such a degree that *any* confession is compelled in that context, and therefore "in the absence of procedural safeguards . . . custodial interrogation necessarily *will*—not simply *can*—result in unconstitutional compulsion").

236. *Schneckloth v. Bustamonte*, 412 U.S. 218, 235, 246 (1973); see *supra* Section III.A.

237. *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Bostick*, 501 U.S. 429, 432, 435 (1991); *Schneckloth*, 412 U.S. at 227.

participate.<sup>238</sup> Instead, the Court resorts to objective notions of “reasonableness,” arguing that reasonableness is the touchstone of the Fourth Amendment.<sup>239</sup> But the kind of “reasonableness” that silently drives Fourth Amendment consent law is not the same kind of “reasonableness” that drives the Fourth Amendment.

In *Illinois v. Rodriguez*, the dissent noted the difference between the micro-level reasonableness emphasized by the majority in upholding the search based on apparent third-party consent, and the macro-level reasonableness that concerned the dissenting Justices.<sup>240</sup> To the majority, the search of the defendant’s apartment was reasonable because the police officers, however mistaken, reasonably believed that they had obtained voluntary consent from a person authorized to give it.<sup>241</sup> Even though several scholars have cited the Court’s third-party consent cases as a clear example where the Court relied on notions of “reasonableness” to approve a consent search,<sup>242</sup> the dissent correctly noted that the Court’s so-called “reasonableness” assessment (a form of micro-level analysis) was not the traditional Fourth Amendment “reasonableness” assessment (a macro-level analysis):

Instead of judging the validity of consent searches, as we have in the past, based on whether a defendant has in fact limited his expectation of privacy, the Court today carves out an additional exception to the warrant requirement for third-party consent searches without pausing to consider whether the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. Where this free-floating creation of “reasonable” exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.<sup>243</sup>

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238. See *supra* notes 155–69 and accompanying text.

239. See *supra* notes 155–69 and accompanying text.

240. See 497 U.S. 177, 190 (1990) (Marshall, J., dissenting).

241. *Id.* at 186 (majority opinion).

242. See, e.g., Simmons, *supra* note 3; Williams, *supra* note 8; Maclin, *supra* note 109, at 61.

243. *Rodriguez*, 497 U.S. at 198 (Marshall, J., dissenting) (citation omitted) (internal quotation marks omitted). The dissent’s point is distinguishable from the argument made in this Article, because the dissent did not question the lawfulness of a search premised on the defendant’s own “voluntary consent,” a term that most commentators agree does not comport with the Court’s application of that term.

Because the Court has lost sight of macro reasonableness, it has failed to look to the balance of governmental and individual Fourth Amendment interests as it has shaped consent-search doctrine.

#### IV. CURRENT CONSENT SEARCHES: ARE THEY (MACRO-LEVEL) REASONABLE?

Despite the recent scholarly attention to the shadow role that reasonableness plays in consent-search doctrine, the Court has largely overlooked the macro-level assessment of a reasonable balance between governmental and Fourth Amendment interests. However, the Court's decisions reveal an implicit assumption that the doctrine it has created under the myth of consent does, in fact, satisfactorily balance governmental interests and individual liberty and privacy interests.

##### A. *The Court's Fondness for Consent*

Professor Nadler has observed that the Court's view "appears to be that consent searches ought to be encouraged (or at least not discouraged) because they reinforce the rule of law."<sup>244</sup> Professor Strauss has aptly noted that "a laundry list of law enforcement benefits from consent searches have been oft-repeated in the case law, with little real discussion."<sup>245</sup> Professor Maclin has described the Court's fondness for the consent doctrine as "zeal to approve consent searches."<sup>246</sup> Consider, for example, the Court's evaluation of the interests at stake in *Schneckloth*:

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. In the present case for example, while the police had reason to stop the car for traffic violations, *the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search,*

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244. Nadler, *supra* note 9, at 210.

245. Strauss, *supra* note 1, at 265.

246. Maclin, *supra* note 109, at 30.

and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.<sup>247</sup>

Notice the assumptions the Court implicitly makes in its cost/benefit analysis. In first analyzing the benefit to the State, the Court uses the example of a case in which the police rely on consent under circumstances in which they would otherwise be *unable* to arrest or search, and then found something *incriminating*. When discussing the costs to the citizen, however, the Court uses an example in which the police *do* have another basis to search or arrest, but a consent search that yields *nothing* persuades them to leave the citizen alone. As a cost/benefit calculation, the Court's analysis is remarkable in its incompleteness. First, by looking only at scenarios in which the police find something incriminating when they otherwise would not, or end up exonerating someone who otherwise was the basis of suspicion, the Court looks only at the potential benefits of consent. Perhaps more importantly, there is no reason to believe that these two scenarios make up the bulk of consent cases. Looking only at the two types of cases mentioned, one would have to believe that police suspicion is so inversely correlated with actual guilt that they are very likely to find something when they suspect nothing, but are likely to find nothing when they have reason to suspect something.

#### B. *Macro Reasonableness: The 2x2 Matrix*

A true reasonableness analysis of consent searches should examine the costs and benefits of four different categories of cases, created by a full consideration of the two distinctions the Court alluded to in *Schneckloth*. First, as the Court has acknowledged in both the free-to-leave and consent-search contexts, sometimes police rely on consent to justify their investigation, even when alternative doctrines would allow them to engage in the same conduct without the defendant's consent. Second, sometimes searches turn up something incriminating, and other times they yield nothing. This two-by-two matrix results in four categories of cases, only two of which the Court explored in *Schneckloth*. The two scenarios explored in *Schneckloth* are: cases where evidence is yielded ("guilty") in a consensual action that otherwise could not occur ("consent only"); and cases where no evidence is yielded ("innocent") when the action could have been justified by another doctrine ("consent is redundant"). The other two categories of cases are: cases where evidence is yielded ("guilty") when the action could have been justified by another doctrine ("consent is redundant"); and cases where no evidence is yielded ("innocent") in a consensual action that otherwise would not occur ("consent only").

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247. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227–28 (1973) (emphasis added) (footnotes omitted). Similarly, in explaining that the "community has a real interest in encouraging consent," the Court reasoned that "the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243.

	<b>Consent is Redundant (CR)</b>	<b>Consent Only (CO)</b>
<b>Guilty (G)</b>	[unaddressed in <i>Schneckloth</i> ]	Addressed in <i>Schneckloth</i> : “Free” evidence
<b>Innocent (I)</b>	Addressed in <i>Schneckloth</i> : <i>No cost to D. Possible benefit if D is spared arrest once exonerated.</i>	[unaddressed in <i>Schneckloth</i> ]

### 1. Consent Only/Guilty

Consider first the two boxes of the matrix discussed in *Schneckloth* (G/CO and I/CR). In the upper-right-hand corner are consent searches that yield incriminating evidence where police lacked any other justification for inspection (G/CO). This is the heart of what the Court sees as the benefit to the current jurisprudence, where the government gets “free” evidence against the guilty. There are two problems with placing too much weight on this upside to consent searches. First, because the current doctrine does not require the government to specify its reasons for requesting consent,<sup>248</sup> it is impossible to know how many consent-search cases are consent-only searches, and how many consent searches would take place regardless of the doctrine.<sup>249</sup> Accordingly, courts that uphold “other justification” searches under the doctrine of consent may overstate the evidentiary benefit of the doctrine because the officers likely could have conducted a search through another exception or by obtaining a warrant. Second, even when consent searches truly yield “free” evidence, a “macro” look at reasonableness requires those gains to be balanced against the considerations of individual liberty and privacy.

### 2. Consent Redundant/Innocent

As to consent searches that yield no evidence when the police had alternative justifications for investigation (CR/I), the Court assumes these searches benefit the defendant because they may persuade the police not to do something more intrusive, like conduct a custodial arrest to trigger the search incident to arrest doctrine.<sup>250</sup> Once again, this reasoning

248. See Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 536 (2001).

249. See Maclin, *supra* note 109, at 32–33 (describing the *Schneckloth* Court’s claim that consent may be the only means to obtain evidence as a “naked assumption without empirical support”); Strauss, *supra* note 1, at 261 (“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.”).

250. Pursuant to a search incident to arrest, police are allowed to search an arrestee and the area within his immediate reach for weapons and evidence, without either a warrant or probable cause to search. *Chimel v. California*, 395 U.S. 752, 772–73 (1969); see also *Arizona v. Gant*, 556 U.S. 332, 355 (2009) (applying *Chimel* to searches of automobiles incident to arrest and stating that “the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s

overstates the benefits to law enforcement and understates the costs to privacy. First, the scope of a consent search may be broader than another justification.<sup>251</sup> For example, consent to search an automobile is presumed to include the trunk,<sup>252</sup> while a search incident to arrest of one of the car's occupants would include, at most, the passenger compartment of the vehicle.<sup>253</sup> Similarly, reasonable suspicion that a lawfully detained person may be armed and dangerous justifies a frisk for weapons, but an officer might instead ask the suspect for permission to search his pockets, without limiting the scope of the search. Second, if police would have conducted the search anyway, but are relying on putative consent, there is nothing for the affected person to challenge. Because there is no basis for challenging the search, there are no repercussions to the officer for having formed an inaccurate suspicion, and these are precisely the cases where we should want police correction.

### 3. Consent Only/Innocent

That leaves the two boxes of the matrix that were unaddressed in *Schneckloth*. The lower-right-hand box is the simplest and holds the clearest disadvantages to Fourth Amendment interests. When police engage in a consent search with no other justification, and the search yields nothing (CO/I), there is no advantage to the government in finding "free" evidence, as the Court in *Schneckloth* emphasized for CO/G searches. And unlike searches where no evidence is found, but consent is a redundant justification to search (CR/I), the individual is not being spared some more intrusive police conduct pursuant to another exception to the warrant requirement. In cases where the individual's consent is *truly* voluntary, there might be no significant cost to privacy, but we have seen that the Court's consent doctrine does not require true consent, only the reasonable appearance of it.<sup>254</sup> Accordingly, compared to the two

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arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search").

251. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1, at 5 (4th ed. 2004) (noting that one "benefit" of consent searches is, "At least when the consenting party does not carefully condition or qualify his consent, that the search pursuant to consent may often be of a somewhat broader scope than would be possible under a search warrant" (footnote omitted)).

252. *United States v. Deases*, 918 F.2d 118, 122 (10th Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991) ("Consent to search a car means to search the entire car and whatever is in it, unless such consent is otherwise restricted."); *see Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (rejecting state court holding that "if the police wish to search closed containers within a car they must separately request permission to search each container" and holding instead that the search may extend to particular containers if the consent given "would reasonably be understood to extend to a particular container").

253. *See Arizona v. Gant*, 556 U.S. 332, 335 (2009) (limiting police authority to search the passenger compartment of a vehicle incident to a recent occupant's arrest to cases in which the arrestee is within reach of the passenger compartment at the time of the search, or when police have reason to believe that the car contains evidence of the crime for which the arrestee is in custody).

254. *See Strauss*, *supra* note 1, at 212–23.

categories of cases discussed in *Schneckloth*, this box of the matrix appears to contain nothing but costs.

The only arguable benefit conferred by CO/I searches is if they prevent police from needlessly investigating the individual further.<sup>255</sup> However, this argument rests on two questionable assumptions. First, it assumes that one unsuccessful search will suffice to halt a police investigation, which may not always hold true, especially where there is a basis for police suspicion. Second, it assumes that if an individual refuses to consent, the police will continue to investigate, which may not always hold true, especially when there is no basis for police suspicion. In sum, a CO/I search confers benefits only when two conditions are met: police suspicion is such that the police would have continued to investigate absent the consent search, but then discontinue the investigation once the consent search yields no evidence.<sup>256</sup>

Consent-only searches also carry the heaviest implications for equality. When there is no other justification for the search, the odds are higher that police are requesting consent, either consciously or unconsciously, based on racial or other stereotypes.<sup>257</sup> Data demonstrating that “hit” rates for searches are lowest when police search people of color support this inference.<sup>258</sup>

Though it is impossible to know what percentage of consent searches might be supported by some other justification, there is every reason to believe that most consent searches fall within this cost-heavy CO/I box. First, the number of consent searches as an absolute number is high,<sup>259</sup> and the overwhelming majority of them yield nothing incriminating.<sup>260</sup> Moreover, the higher the frequency of consent searches, the less likely

255. For example, even in the absence of any other applicable exception to the warrant requirement, police could engage in a number of investigatory strategies that fall outside the scope of a “search” or a “seizure” as the Court has defined those terms. *See supra* Section I.A.

256. This Article’s normative recommendation attempts to retain this benefit by permitting consent searches that are based on reasonable suspicion. *See infra* Part V.

257. *See Steinbock, supra* note 248, at 536–37 (noting that “consensual encounters are more likely to be used against minorities and the poor”); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 *MISS. L.J.* 525, 551–52 (2003) (noting that because police “can approach anyone on the street to ask for consent and can ask any driver who is stopped for a traffic infraction for consent, police are presently free to use race, and only race, to decide when to ask for consent in a huge number of situations”).

258. *See David Cole, Profiles in Policing*, 26 *CHAMPION* 12, 16 (2002).

259. *See supra* notes 2–4 and accompanying text.

260. Bar-Gill & Friedman, *supra* note 5, at 1656 (noting a “staggering shortfall between the enormous burden [consent] searches impose and their fruitfulness”); Nadler, *supra* note 9, at 210 & n.198 (“The vast majority of people subjected to consent searches are innocent.”); *see, e.g.,* Chanenson, *supra* note 13, at 458 (“The vast majority of consent searches in the highway context appear to yield no evidence.”); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 *OHIO N.U. L. REV.* 1, 23–24 (2001) (using data from Ohio to demonstrate that 10,000 consent searches took place per year during routine traffic stops, with only two to four percent of searches yielding evidence of wrongdoing).



they are to result in evidence.<sup>261</sup> It only stands to reason that consent searches conducted with no other justification are the least likely to yield evidence.<sup>262</sup> Nevertheless, the Court has failed to consider the overall costs of these searches to Fourth Amendment reasonableness.

#### 4. Consent Redundant/Guilty

Finally, in the upper-left-hand corner of the matrix, are consent searches that would have been lawful without consent, and which yield incriminating evidence (CR/G). As an initial matter, one might wonder why a police officer would request consent if another justification would support the search. Because current doctrine does not require any level of suspicion or other basis for requesting consent, a common philosophy is that, regardless of whether police have cause to search, it does not hurt to ask.<sup>263</sup> Indeed, police are commonly instructed that requests to search are not only harmless, but smart practice.<sup>264</sup> As previously discussed, if there is no other justification to search, consent may be the only option.<sup>265</sup> Even when police have another justification to search, consent is so frequently given,<sup>266</sup> and so easy to prove,<sup>267</sup> that it will always be in the government's interest to seek consent rather than risk a failure to prove the presence of the alternative justification. As one leading police resource suggests, "It's always a good idea to have at least two ways to skin the search-and-seizure cat."<sup>268</sup> Accordingly, it is common for police

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261. See Steinbock, *supra* note 248, at 536 & n.145.

262. Indeed, though empirical evidence is limited, it appears that consent searches that take place in contexts where suspicion is lacking are, as expected, unlikely to yield incriminating evidence. See, e.g., Florida v. Bostick, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting) (observing that in bus sweeps absent any particular suspicion, "the percentage of successful drug interdictions is low" despite the fact that the police may engage in a "tremendously high volume of searches") (citing United States v. Flowers, 912 F.2d 707, 710 (4th Cir. 1990) (involving a sweep of 100 buses that resulted in seven arrests)); United States v. Hooper, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (noting that searches in the absence of any particular suspicion by the DEA at the airport in Buffalo, New York, produced only ten arrests among 600 detained travelers).

263. See, e.g., Rotenberg, *supra* note 11, at 190 (noting California Attorney General's advice to peace officers).

264. See, e.g., *id.* at 190 (noting that officers are trained to ask for consent, even when they have other authority to search); Devallis Rutledge, *Consent Searches: Extracting the Rules from 17 Supreme Court Decisions*, POLICE MAG. (Feb. 5, 2013), <http://www.policemag.com/channel/patrol/articles/2013/02/consent-searches.aspx> (describing consent as an "excellent" legal justification for searching); ALAMEDA CNTY. DIST. ATTORNEY'S OFFICE, CONSENT SEARCHES 1 (2007), available at <http://le.alcoda.org/publications/files/CONSENTSEARCHES.pdf> (advising police that "seeking consent to search for evidence is not only harmless, it's often smart").

265. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("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."); ALAMEDA CNTY. DIST. ATTORNEY'S OFFICE, *supra* note 264, at 1 (noting that "when officers lack probable cause for a warrant, a consent search may be their only option").

266. See *supra* notes 1–5 and accompanying text.

267. See *supra* notes 85–99 and accompanying text.

268. Rutledge, *supra* note 264.

to seek consent for searches they would likely conduct, regardless of consent, pursuant to one of the many other exceptions to the warrant requirement.<sup>269</sup>

At first blush, any search with consent and an alternative justification that also yields incriminating evidence (CR/G) would appear to be cost-neutral to individual Fourth Amendment interests. Even without consent, the police would conduct the search and discover the same evidence pursuant to the other justification. Indeed, having these searches occur via consent rather than the alternative justifications conceivably confers practical benefits. A growing body of literature on procedural justice teaches us that when people perceive a decision-making process to be fair, they are more likely to accept the outcome of that process, even if the decision itself is adverse.<sup>270</sup> These lessons suggest that suspects who believe they were given a choice in whether they were searched might be more likely to perceive the search as being legitimate<sup>271</sup> and therefore less intrusive on their Fourth Amendment interests. Having these searches upheld under the doctrine of consent may also result in efficiencies in litigation, avoiding the uncertainties of doctrines based on fact-specific standards like exigency, probable cause, and reasonable suspicion.

However, applying the consent doctrine to searches that police would have conducted even absent consent also extracts costs, and these costs vary depending on whether the individual grants or refuses consent. Consider first the situation in which the suspect refuses to give consent that would have been redundant to another justification. The police, because they have other grounds for search, will likely conduct the search anyway. That search will be lawful, but notice what the individual is likely to learn from this experience: that a request for consent to search is

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269. For example, because the government successfully argued in *Drayton* that the defendants were free to leave and voluntarily consented to be searched, the government never had to articulate either reasonable suspicion to support a seizure or probable cause to justify a search. *United States v. Drayton*, 536 U.S. 194, 199, 203–04 (2002). However, by the time *Drayton* provided consent to search, police already knew that he was dressed in heavy, baggy clothes on a hot day and was traveling with someone who had already been tied to drugs. *Id.* at 199. Rather than hold that any seizure of *Drayton* was justified, the Court instead reasoned, “The fact the officers may have had reasonable suspicion does not prevent them from relying on a citizen’s consent to the search.” *Id.* at 207.

270. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); Tom Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCH. 913, 923, 925 (1996); see TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 196 (2002) (“[P]eople’s main consideration when evaluating the police and the courts is the treatment that they feel people receive from those authorities.”). See generally JOHN RAWLS, A THEORY OF JUSTICE 83–90 (1971).

271. Research demonstrates that people are more likely to be satisfied with a process when they have been given an opportunity to participate by expressing their side of the story. Tom Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 94 (2004); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 380–81 (2003).

no “request” at all. This commonplace practice creates a feedback loop that adds to the perception—dismissed by the Court as unreasonable—that people do not have an actual choice in whether to submit to a so-called “consent” search.<sup>272</sup>

Now consider the suspect who grants consent to a search that police would have conducted anyway. For example, the suspect might be lawfully stopped, and the police officer might believe there is reasonable suspicion to justify a check of the suspect’s backpack for weapons,<sup>273</sup> but she might request consent to search as an alternative justification.<sup>274</sup> Similarly, the officer might believe she has probable cause to justify the search of a car under the automobile exception to the warrant requirement,<sup>275</sup> but nevertheless asks for consent to search. As discussed above, if the officer’s beliefs that she has alternative grounds to search are *correct*, then relying on consent imposes no additional costs and arguably benefits perceived fairness and certainty.<sup>276</sup> However, what if the police officer’s beliefs are *wrong*? If the only reason the police officer requested consent to search was because of unfounded suspicions, the consent-search doctrine creates a mask that conceals the underlying problem. Reliance on consent deprives a reviewing court of the ability to serve a teaching function by assessing the legitimacy of the officer’s suspicions.

The role consent plays as an “easy” justification to search is a final cost of the doctrine that the Supreme Court has overlooked: its potential, if unrestrained, to swallow the remainder of the Fourth Amendment landscape. The Fourth Amendment’s “essential purpose” is to “shield the citizen from unwarranted intrusions into his privacy.”<sup>277</sup> The presumptive method for determining whether an intrusion into privacy is justified is to require a warrant based on probable cause.<sup>278</sup> Moreover, to control police discretion and avoid the dangers inherent in a “general warrant,”<sup>279</sup> the warrant must describe with particularity the “place to be searched, and the persons or things to be seized.”<sup>280</sup> Even in the many circumstances in which the Court has recognized exceptions to the warrant requirement,

272. See Barrio, *supra* note 137, at 247 (“[T]he authority behind the officer’s request to search will often indicate to suspects that they have no choice but to consent, leading them to authorize searches otherwise forbidden by the Fourth Amendment.”) (footnote omitted).

273. See *Terry v. Ohio*, 392 U.S. 1, 6–7, 10 (1968); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

274. See *supra* notes 263–69 and accompanying text for a discussion of why police may request consent even when they have an alternative justification to act.

275. See *Chambers v. Maroney*, 399 U.S. 42, 47–48 (1970); *Carroll v. United States*, 267 U.S. 132, 147 (1925); *Cardwell v. Lewis*, 417 U.S. 583, 592, 592–95 (1974) (plurality opinion).

276. See *supra* notes 270–71 and accompanying text.

277. *Jones v. United States*, 357 U.S. 493, 498 (1958); see also *New York v. Belton*, 453 U.S. 454, 464 (1981) (Brennan, J., dissenting).

278. See *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Chambers*, 399 U.S. at 51.

279. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (“The principal evil of the general warrant was addressed by the Fourth Amendment’s particularity requirement . . .”).

280. U.S. CONST. amend. IV.

those exceptions are supposed to be narrowly construed.<sup>281</sup> This principle “carries with it two corollaries:”<sup>282</sup> first, a warrantless search must be “strictly tied to and justified by the circumstances which rendered its initiation permissible,”<sup>283</sup> and second, in recognizing an exception to the warrant requirement, the Court should “carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception.”<sup>284</sup> Following these corollaries, the Court has recognized numerous exceptions to the warrant requirement, each with its own scope, drawn to reflect the justifications underlying the exception.

However, these supposedly important corollaries cease to exist when it comes to consent. Instead, police may *always* request consent, without ever having to justify the request. And once they obtain consent, the Court’s ongoing enterprise of trying to restrain police discretion to search becomes irrelevant.<sup>285</sup> Because nearly everyone consents, the police can almost always bypass not only the default warrant requirement, but also its carefully delineated exceptions.<sup>286</sup> Moreover, because there need be no justification for a consent search beyond the granting of consent, the scope of a consent search is potentially endless.<sup>287</sup> Consent searches, as currently defined, are the exception that swallows every other Fourth Amendment rule.<sup>288</sup> This undermining of the Court’s taxonomy for defining the “reasonableness” of a search is yet another hidden toll the consent-search doctrine exacts on Fourth Amendment interests.

## V. PUTTING REASONABLENESS BACK INTO CONSENT

Scholars have no shortage of advice on how to improve the consent-search doctrine. Some have advocated eliminating the

281. See *Arkansas v. Sanders*, 442 U.S. 753, 759–60 (1979); *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

282. *Belton*, 453 U.S. at 464 (Brennan, J., dissenting).

283. *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (internal quotations and citations omitted).

284. *Belton*, 453 U.S. at 464.

285. See George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1505 (2005) (stating that the strategy of obtaining consent “has proved so successful that it has largely replaced other justifications for searching a suspect such as incident to arrest or in a *Terry* stop and frisk”).

286. See Thomas III, *supra* note 257, at 541 (“Consent is an acid that has eaten away the Fourth Amendment.”); Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 876–77 (2002) (“The Court has held that when the subject of a search voluntarily gives his consent, it is reasonable for a police officer to conduct a search without a warrant.”).

287. See Strauss, *supra* note 286, at 876 (arguing that “[c]onsent searches come dangerously close to general warrants by giving the searching police officer undue discretion to determine the scope of the search”).

288. Cf. *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (rejecting the government’s argument that a defendant who was taken to a police station was not seized because “any ‘exception’ that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause”).

consent-search exception altogether.<sup>289</sup> However, given the Court's fondness for the doctrine,<sup>290</sup> the Court is unlikely to abandon the consent-search exception.<sup>291</sup> Moreover, it is difficult to argue with the underlying rationale for the doctrine in a (perhaps rare) situation where the searched individual truly *wants* to be searched.<sup>292</sup> The challenge, however, is to reshape the doctrine to mirror the "reasonableness" that is the touchstone of the Fourth Amendment.

#### A. *A Role for Fourth Amendment Reasonableness*

Part IV drew on a macro concept of reasonableness and argued that, as currently implemented, the consent-search exception extracts high costs to individual privacy without corresponding benefits to law enforcement. Most scholars who have advocated reforms to the doctrine have focused on reducing the level of the intrusion on individual privacy by attempting to ensure that the search is truly voluntary.<sup>293</sup> For example, scholars have advocated that police use written consent forms,<sup>294</sup> that requests for consent be videotaped,<sup>295</sup> or that magistrates be used to ensure that a person's consent is voluntary.<sup>296</sup> Most commonly, scholars have argued that police should be required to warn people they have a right to refuse

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289. *E.g.*, Strauss, *supra* note 1, at 258–72 (setting forth the “radical solution” of “eliminating consent”); Lassiter, *supra* note 7, at 82 (proposing elimination of the fiction that motorists ever voluntarily consent to searches during traffic stops); Thomas III, *supra* note 257, at 551–52 (discussing the benefits of “abolishing consent searches” vis-à-vis racial profiling); *see* Bar-Gill & Friedman, *supra* note 5, at 1618 (noting that “one solution would be banning consent searches altogether, though it is not necessary to go that far”).

290. *See supra* Section IV.A.

291. Maclin, *supra* note 109, at 78–79 (noting the current Supreme Court “will never ban consent searches”); *see* Strauss, *supra* note 1, at 271 (characterizing elimination of consent searches as a “drastic solution”).

292. For example, one could imagine a person volunteering for DNA testing that would exonerate him when he knows his community suspects him of wrongdoing.

293. Burkoff, *supra* note 7, at 1139–41 (proposing a standard requiring awareness of the right to refuse consent as a predicate to voluntariness); Maclin, *supra* note 109, at 79–80 (proposing a prophylactic rule that would better ensure the voluntariness of consent searches by barring the police from further seeking consent once the subject has already refused); Rotenberg, *supra* note 11, at 179–80; *see also* Nadler, *supra* note 9, at 214, 221–22 (criticizing the Court's consent-search standards as a “sham” that “struggles against a wealth of social science evidence, that subjects many innocent people to suspicionless searches and seizures against their will”).

294. *See, e.g.*, David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 364 (2001) (“All consent requests should be recorded, and all consents should be in writing and signed by the driver, passenger, or pedestrian who was stopped.”). *But see* Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 778–83, 790 (providing that although consent forms provide an essentially dispositive effect on the determination of consent voluntariness, “in reality [consent forms] are no better a guarantee of voluntariness than oral warnings”).

295. Leong & Suyeishi, *supra* note 294, at 792–93.

296. Bar-Gill & Friedman, *supra* note 5, at 1663.

consent.<sup>297</sup> However, warnings are unlikely to be a panacea. As an initial matter, they simultaneously say too little and too much. A warning that the individual has a right to refuse does not make clear, for example, that his refusal to cooperate cannot be used against him, that he has the right to limit the scope of the search, and that he can revoke consent at any time. The warning may also not be true if the police are seeking consent as a redundant justification to another exception to the warrant requirement, such as a search incident to arrest or a *Terry* frisk.<sup>298</sup> Moreover, empirical evidence demonstrates that, just as most people waive their *Miranda* rights, consent-search warnings have very little effect, most likely because of the inherent social authority that comes with police interactions.<sup>299</sup> If anything, consent-search warnings are likely to *increase* the number of searches upheld under the doctrine, because courts are likely to view the warnings as dispositive evidence that the resulting search was voluntary.<sup>300</sup>

Without detracting from efforts to narrow the consent doctrine to include only those searches that are truly consensual, this Article's emphasis on the traditional Fourth Amendment view of reasonableness suggests an alternative method of improving the balance between governmental and individual interests. Other scholars have also looked to the Fourth Amendment's touchstone of reasonableness to shape Fourth Amendment doctrine generally. For example, Professor Christopher Slobogin, has offered a "reconceptualization" of reasonableness using a principle of proportionality: "A search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action."<sup>301</sup> Professor Cynthia Lee has proposed a multi-step process of "reasonableness with teeth," under which courts would review the reasonableness of warrantless searches by

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297. *E.g.*, Gallini, *supra* note 2, at 236–37 (advocating reversal of *Schneckloth* to require police to warn people they have a right to refuse consent); Chanenson, *supra* note 13, at 464 & n.398, 465–66 (arguing that, despite the potential utility of warnings to be "oversold," warnings nevertheless cannot hurt); Hemmens & Maahs, *supra* note 13, at 346 (arguing that officers should be required to advise citizens of their right to not cooperate); Lassiter, *supra* note 13, at 1182–94 (encouraging states to use their own constitutions to implement several consent-search reforms, including warnings about the right to refuse consent); Whorf, *supra* note 13, at 410 (suggesting a rule that people be told they are free to leave before police ask for consent to search).

298. For a discussion of the use of consent as a redundant justification, see *supra* Subsections IV.B.2, IV.B.4.

299. Lichtenberg, *supra* note 5, at 360–61, 363–65, 367 (discussing the relationship between police authority and subjects of consent searches and finding that over 88% of drivers gave consent to search when asked before implementation of a *Robinette* warning and approximately 92.2% gave consent after the warning).

300. See Leong & Suyeishi, *supra* note 294, at 778–83, 790 (criticizing the "essentially dispositive effect" that courts place on written consent forms in determining the voluntariness of consent, because written consent can still be coerced).

301. CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 21 (2007); see also Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1054 (1998); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4 (1991).

assessing the nature of the intrusion into privacy, whether the police had probable cause, the practicability of a warrant, and whether the police acted in bad faith.<sup>302</sup>

However, unlike the scholars discussed above, the Court has lost this focus on reasonableness from a Fourth Amendment perspective in the consent-search context because of its emphasis on the coercion/volition dichotomy.<sup>303</sup> To return real reasonableness to consent searches, courts should consider the reasonableness of a consent search in light of Fourth Amendment values, rather than only by the supposed voluntariness of the consent. Despite the Court's focus on volition, current doctrine leaves room for a requirement that individual consent searches must also be reasonable in light of a balance between the individual and governmental interests at stake.

As an initial matter, all searches must be executed reasonably. The reasonableness requirement, “[i]n each case[,] . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”<sup>304</sup> Accordingly, even searches that are authorized in theory can become unlawful if they are not reasonable at a micro level. For example, searches conducted pursuant to a warrant based on probable cause carry the hallmark of reasonableness; nevertheless, the search would be unlawful if police searched an area too small to contain the object of the search, or if the police failed to knock and announce their presence prior to searching.<sup>305</sup> Similarly, the Court has announced a bright-line rule that it is always reasonable to detain people who are on the premises when a search warrant is executed,<sup>306</sup> but the reasonableness of using handcuffs to achieve the detention must be litigated on a micro, case-by-case basis.<sup>307</sup> The standard used for determining the lawfulness of strip searches is further evidence of a prevailing requirement of micro-level reasonableness. In addition to a general justification to search, strip searches must also be reasonable under the circumstances.<sup>308</sup>

Though the Court has discussed reasonableness in the consent-search context primarily through the consent/volition dichotomy,<sup>309</sup> remnants of Fourth Amendment reasonableness are discernable. For example, even if the officer obtains consent that is deemed voluntary, the search is nevertheless unlawful if the officer goes beyond the scope to which a reasonable person would have believed she consented.<sup>310</sup> Especially

302. Lee, *supra* note 197, at 1137, 1144, 1181.

303. See *supra* Part III.

304. Bell v. Wolfish, 441 U.S. 520, 559 (1979) (emphasis added).

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

306. See Michigan v. Summers, 452 U.S. 692, 704–05 (1981) (holding that the extent of force used to detain persons on premises must be made on a case-by-case basis).

307. Muehler v. Mena, 544 U.S. 93, 111 (2005) (Stevens, J., concurring).

308. Bell, 441 U.S. at 558–59; Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2642 (2009).

309. See *supra* Part III.

310. Florida v. Jimeno, 500 U.S. 248, 249 (1991); see also Tim Sobczak, Note, *The Consent-Once-Removed Doctrine: The Constitutionality of Passing Consent from an Informant*

illustrative of Fourth Amendment reasonableness's vitality in the consent doctrine is the Court's decision in *Georgia v. Randolph*.<sup>311</sup> In *Randolph*, a wife called the police about a domestic disturbance and then told the responding officers that her husband, Randolph, used cocaine.<sup>312</sup> Randolph denied his wife's accusation and claimed she was the one with a substance abuse problem.<sup>313</sup> His wife then volunteered that there was evidence of her husband's drug use in their house.<sup>314</sup> After Randolph, a lawyer, "unequivocally refused" a request for consent to search, his wife "readily" provided it.<sup>315</sup>

Existing doctrine suggested that the resulting search was lawful. After all, the Court had already held that searches were reasonable if based on the voluntary consent of a co-occupant.<sup>316</sup> Indeed, relying on a "reasonableness" model, the Court had extended the consent search rationale even to those cases in which the party granting consent did not actually share common authority over the premises, but merely appeared to.<sup>317</sup> Nevertheless, five Justices held in *Randolph* that the police acted unreasonably by searching Randolph's home with only his wife's consent.<sup>318</sup> The Court distinguished earlier third-party consent cases as involving non-consenting parties who were either not present when the third party consented,<sup>319</sup> or were present but had not expressly declined to give consent.<sup>320</sup> Looking to "widely shared social expectations,"<sup>321</sup> the majority reasoned that people who choose to live with others assume the risk that their co-occupants will invite others in, but not while one occupant is physically present and expressly objecting to the entry:

[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.<sup>322</sup>

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to *Law Enforcement*, 62 FLA. L. REV. 493, 502 & n.72 (2010) ("The Court in *Florida v. Jimeno* held that the scope of consent is determined through a standard of objective reasonableness, that is, what a reasonable person would believe the limits of the consent were.").

311. 547 U.S. 103 (2006).

312. *Id.* at 107.

313. *Id.*

314. *Id.*

315. *Id.*

316. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

317. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

318. *Randolph*, 547 U.S. at 122–23 ("[A] physically present inhabitant's express refusal of consent to police search is dispositive as to him, regardless of the consent of a fellow occupant.").

319. *Id.* at 106, 121 (referencing *Matlock*, which involved the defendant detained in a nearby squad car).

320. *Id.* at 106, 121 (noting that in *Rodriguez*, the defendant was sleeping inside when police relied on apparent authority of another party to search his home).

321. *Id.* at 111.

322. *Id.* at 113.



It is for good reason that Professor Maclin has declared the Court's decision in *Randolph* "good news" for consent-search jurisprudence.<sup>323</sup> The decision examined the defendant's social expectations not only vis-à-vis his co-occupant/wife, but also with respect to the police who were asking to search. It was not only reasonable for Randolph to expect his wife not to invite someone in after he had objected; it was also reasonable for him to expect the police not to rely on her consent, even if she gave it.<sup>324</sup> Reading *Randolph* more broadly, one could view the Court as scrutinizing not only the voluntariness of the consent (which Randolph's wife's consent surely was), but also the reasonableness of the government's request in *asking* for it. Would a reasonable person, having been rejected entry by one member of a household, attempt a second bite at the apple with another, while the objecting party was still present? Apparently she would not.<sup>325</sup>

### B. *A Glimpse at Reasonable Requests for Consent*

Though the Court in *Schneckloth* stated that consent searches served a "legitimate need,"<sup>326</sup> this Article demonstrated in Part IV that the Court's conclusion was based only on a macro assessment of reasonableness, and a wholly incomplete one at that. To inject Fourth Amendment reasonableness into the consent doctrine, courts assessing the reasonableness of an individual consent search at a micro level should consider not only any coercive tactics used to extract consent, but also the reasonableness of the request for consent to search itself. Determining the reasonableness of the request would involve judicial scrutiny of both the government's reason for asking for consent and the scope of the consent requested.

As the Court has recognized in myriad other contexts, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."<sup>327</sup> Generally, to balance the government's needs against individual privacy rights, courts should "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is

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323. See Maclin, *supra* note 109, at 67. Providing a thoughtful and thorough analysis of *Randolph* and its precedents, Professor Maclin found the Court's emphasis on Randolph's express refusal to consent especially important. *Id.* at 78 (connecting the emphasis on Randolph's refusal to give consent specifically to Justice Kennedy's tie-breaking vote). Building on this emphasis, Professor Maclin advocates for a per se rule against requesting consent after an individual declines a first request. *Id.* at 80.

324. *Randolph*, 547 U.S. at 113.

325. In *Fernandez v. California*, 134 S. Ct. 1126 (2014), the Court refused to extend the holding of *Randolph* to a case in which the defendant objected to a search, was then taken into custody, and therefore was no longer present to object when his co-occupant consented. *Id.* at 1129–31. Though the Court found that the police acted reasonably in *Fernandez*, and unreasonably in *Randolph*, both cases evince a willingness to scrutinize the circumstances surrounding a request for consent to search in determining the search's reasonableness.

326. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

327. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

conducted.”<sup>328</sup> Applying these factors to consent searches, a court assessing the reasonableness of a request for consent to search should consider both the reason for the request and the requested scope.

### 1. The Reason for the Request

Many of the more troubling consequences of current consent doctrine can be attributed to the fact that police do not have to articulate any reason at all for requesting consent to search.<sup>329</sup> As long as there is no limit to the ability of police to ask for consent, there is no limit to the overall number of consent searches police can seek. As a matter of privacy, the odds that these searches will affect wholly innocent people are highest when police lack any basis to suspect that evidence will be found in the search. As a matter of equality, without a requirement that police articulate a reason for requesting consent, it is impossible to know whether they are relying on impermissible factors such as race. These costs in the Fourth Amendment balance would be reduced if police were required to articulate a legitimate reason, beyond mere curiosity, for the request.

Importantly, under the proposal presented in this Article, the government’s reason for requesting consent would not have to be sufficient to justify a search in the absence of consent. Clearly, if the police already had a basis for searching (e.g., a search incident to arrest or probable cause to search an automobile), those justifications would be sufficient to search, and would render a (redundant) request for consent to search reasonable, as long as the scope of the search was also reasonable. This Article simply proposes that the request for consent be *reasonable*, and that courts could look to other Fourth Amendment contexts for guidance regarding the reasonableness of the request.

For example, usually the standard of suspicion required for a search for evidence is probable cause; the lesser showing of reasonable suspicion justifies only an investigative stop and accompanying frisk for weapons.<sup>330</sup> Nevertheless, even some critics of the consent-search exception to the warrant requirement agree that it is reasonable for police to request consent when they have a reasonable suspicion that they will find something.<sup>331</sup> Though the level of suspicion alone would be insufficient to obtain a warrant, the government would at least have some

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328. *Id.* (citing *United States v. Ramsey*, 431 U.S. 606 (1977), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Schmerber v. California*, 384 U.S. 757 (1966)).

329. *See Steinbock, supra* note 248, at 536; *United States v. Drayton*, 536 U.S. 194, 201 (2002) (“Even when law enforcement officers *have no basis* for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage . . . .” (emphasis added)).

330. *See Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987); *Minnesota v. Dickerson*, 508 U.S. 366, 372–73, 375 (1993).

331. *See Lassiter, supra* note 13, at 1191–92 (citing cases that recommend a requirement of reasonable suspicion to support consent searches).

level of individual suspicion—an important component of Fourth Amendment reasonableness.<sup>332</sup>

Another example of a reasonable request for consent to search is where the purpose of the search is to protect public safety. Take *Florida v. J.L.*<sup>333</sup> as an example in which concerns about public safety, though themselves insufficient to justify a warrantless search, would render a request for consent reasonable. In *J.L.*, police received an anonymous phone call claiming that a young black man wearing a plaid shirt at a specific bus stop was carrying a gun.<sup>334</sup> When police arrived at the bus stop, they saw J.L., who was wearing a plaid shirt.<sup>335</sup> Based only on that information, police stopped and frisked J.L.<sup>336</sup> The Court held that the tip, standing alone, was insufficient to establish reasonable suspicion, because it was wholly anonymous, with no indication of the source's basis of knowledge or veracity.<sup>337</sup> Alternatively, the government urged the Court to recognize a “firearm exception” to the requirement of reasonable suspicion, permitting police to stop and frisk based on any tip alleging unlawful gun possession.<sup>338</sup> The Court declined to create such an exception.<sup>339</sup> Though it was not reasonable to search J.L. solely on the basis of the anonymous tip, such a tip could be offered as a reasonable basis for requesting consent to search.<sup>340</sup>

Another situation in which requests for consent to search are reasonable is where the discretion of individual officers is otherwise limited. A central goal of the Fourth Amendment is to prevent the government from exercising “standardless and unconstrained discretion” in picking and choosing whom to seize and search.<sup>341</sup> Though individualized suspicion is the usual rule that limits police discretion,<sup>342</sup> the Court has recognized alternative methods as adequate.<sup>343</sup> For

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332. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 41 (2000) (characterizing individual suspicion as an important predicate to most searches permitted by the Fourth Amendment).

333. 529 U.S. 266 (2000).

334. *Id.* at 268.

335. *Id.*

336. *Id.*

337. *Id.* at 271, 274.

338. *Id.* at 272.

339. *Id.*

340. Professor George Thomas, who would prefer to eliminate the consent search exception to the warrant requirement, would permit consent searches that advance the government's interest in public safety. See Thomas III, *supra* note 257, at 557.

341. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

342. See *Whren v. United States*, 517 U.S. 806, 818 (1996) (describing individualized suspicion as a constraint on police discretion); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) (referring to “the general rule that a seizure must be accompanied by some measure of individualized suspicion”).

343. See *Prouse*, 440 U.S. at 654–55 (noting that in “situations in which the balance of interests precludes insistence upon some quantum of individualized suspicion”—such as probable cause or reasonable suspicion—“other safeguards are generally relied upon to assure

example, police might drug test every employee involved in an accident<sup>344</sup> or stop every fifth car that passes through a DUI roadblock.<sup>345</sup> Typically, the Court has limited searches without suspicion to activity advancing a government interest that is qualitatively distinguishable from ordinary law enforcement.<sup>346</sup> Here again, however, the limit on discretion is not being used as a justification to search, but simply as a factor in determining the reasonableness of the government's request to search.

Requiring police to articulate their reasons for requesting consent to search would reduce some of the larger costs of these searches to Fourth Amendment interests. First, it is likely to reduce the number of requests that are motivated by racial or other prohibited factors. Current doctrine does not provide a basis for uncovering the role that discrimination may play in so-called "consent" searches, because the entire focus is on the voluntariness of the consent, with no scrutiny of the request itself. If police know they will be required to articulate a reason for requesting consent—whether it be *some* basis for suspicion, *some* concern for public safety, or pursuant to *some* systemized approach that limits officer discretion—they may avoid engaging in race-based consent searches. In this respect, a court's insistence upon a reason for requesting consent resembles the ability of litigants to force lawyers to articulate a reason for exercising a peremptory challenge against a prospective juror.<sup>347</sup> The reason itself need not rise to the level necessary to strike a juror for cause,<sup>348</sup> but the process of requiring the lawyer to state a race-neutral reason is intended to serve as a method of both deterring discrimination and detecting it where it exists.

Second, consideration of the officer's reason for requesting consent will return at least some role of education to the subsequent motion to suppress. Currently, consent serves as a "mask" for other potential justifications for the search. For example, the police may believe they

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that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field" (emphasis added) (footnote omitted) (internal quotation marks omitted)).

344. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 634 (1989).

345. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451, 455 (1990).

346. For example, the Court has upheld administrative searches in the absence of suspicion, *New York v. Burger*, 482 U.S. 691, 702 (1987); *Michigan v. Tyler*, 436 U.S. 499, 511–12 (1978); "special needs" searches, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666, 675 (1989); *Skinner*, 489 U.S. at 619–20; inventory searches, *South Dakota v. Opperman*, 428 U.S. 364, 367–76 (1976) (upholding the reasonableness of administrative searches in light of the "distinct needs" served by such searches); *Colorado v. Bertine*, 479 U.S. 367, 372, 375–76 (1987); community caretaking searches, *Cady v. Dombrowski*, 413 U.S. 433, 447–48 (1973); and roadblocks that advance a primary purpose that is connected to highway safety, *Sitz*, 496 U.S. at 455; *United States v. Martinez-Fuerte*, 428 U.S. 543, 561–62 (1976).

347. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that peremptory challenges based on racial discrimination violate the Fourteenth Amendment and creating a three-step process for determining whether a peremptory challenge is based on prohibited discrimination).

348. *See Purkett v. Elem*, 514 U.S. 765, 768–69 (1995) (per curiam) (holding that what is required is a clear and reasonably specific explanation of the legitimate reasons for using the peremptory challenges).

have probable cause to search an automobile<sup>349</sup> or reasonable suspicion to support a stop and frisk.<sup>350</sup> If they seek and obtain consent, the motion to suppress can be resolved on these grounds, without the court ever having to address—and without the officer ever learning—whether the other grounds were legitimate. If police were required to articulate their reasons for requesting consent—and *if* these reasons were actually sufficient grounds to search, standing alone—a court would likely rely on these grounds to uphold the search because the voluntariness of the search would then be irrelevant. Even if the reasons, standing alone, were not sufficient to search, the police officer would at least learn whether the reasons were sufficient to justify a request to search, and this may improve the officer’s conduct in the future.

At the same time, courts would learn more about the real-life dynamics of consent searches. Once police have to articulate their reasons for requesting consent, courts may recognize that at least some of these requests are based on race or other discriminatory factors. They will also learn that police often ask for consent even when they intend to conduct the search regardless of whether they obtain consent. If courts realize that sometimes police search even after an individual declines consent, that information might inform subsequent judicial decisions about the real “voluntariness” of consent.

## 2. The Reasonableness of the Scope

The reasonableness of a request for consent to search should take into account not only the officer’s reasons for asking for consent, but also the scope of the consent that she requests. For example, a police officer with reason to believe someone is carrying contraband could reasonably request consent to search for drugs. An officer searching to protect public safety could reasonably request consent to search for weapons. A department concerned about drug transportation on its highways could request consent to search from each, or every fifth, motorist stopped lawfully for a traffic infraction.

Consider, in contrast, a tactic one police officer asked this author, at the time a prosecutor, about many years ago: If neighbors believed a house was being used to sell or manufacture drugs, a standard police response was to visit the house for a “knock and talk.”<sup>351</sup> This officer, however, had added his own gloss to the practice, and wanted to make sure it was permissible. If the suspect had a prior drug record that might indicate he was too savvy to consent to search, the officer, instead of asking for consent to search for drugs, would ask for consent to search for

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349. *See* *Carroll v. United States*, 267 U.S. 132, 147, 149 (1925).

350. *See* *Terry v. Ohio*, 392 U.S. 1, 10–11, 27 (1968); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

351. *See* *Florida v. Jardines*, 133 S. Ct. 1409, 1423 (2013) (Alito, J., dissenting) (using the term “knock and talk” to refer to the practice of “knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence”).

“any jewelry that shouldn’t be in the house.” He described the practice as remarkably effective and even suggested a reason why: The suspect was so relieved to be asked about something he did not do that his immediate instinct was to cooperate; once he consented, he would fear that any backpedaling would be seen as suspicious.<sup>352</sup> And it was not coincidental that the officer used jewelry as the stated object of the search; because jewelry is small, the scope of the resulting search would be sufficiently intrusive to turn up any drugs that might be on the premises.<sup>353</sup>

What the officer wanted to know was whether this practice was lawful. Was it? The Supreme Court has made clear that, in general, the Constitution does not prohibit police officers from using deception.<sup>354</sup> Though the Court has not specifically addressed the use of deception by police officers requesting consent to search, lower courts permit deceit as long as it does not render the consent involuntary under the totality of the circumstances.<sup>355</sup> Indeed, police officers are even instructed that there is no *per se* prohibition against using trickery to obtain consent.<sup>356</sup> If the only consideration is the voluntariness of the consent, the “ask for

352. *See supra* notes 113–14 for a general discussion of the fear that refusal to cooperate will be seen as suspicious.

353. To be clear, as long as the consent search for jewelry was valid, any drugs found could be lawfully seized under the plain view doctrine, even though their discovery was far from accidental. *See Horton v. California*, 496 U.S. 128, 130, 135–36, 140 (1990) (removing inadvertence as a necessary condition of a valid plain view seizure and further providing that a plain view seizure is justified where: (1) “the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed”; (2) the item’s “incriminating character [is] ‘immediately apparent’”; and (3) the officer has “a lawful right of access to the object”).

354. *See generally* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778–88 (1997) (noting the considerable leeway afforded by the Court to the police in the undercover context and further noting the pervasive use of lying and deceit by officers in the search and seizure context); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979) (detailing and analyzing the prevalence of trickery or deceit in police practices in the absence of clear constitutional standards and in the absence of “definitive guidance from the Supreme Court,” especially considering the Court’s voluntariness doctrine).

355. *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429–32 & nn.15–44 (1996) (cataloguing lower court cases upholding deceptive police tactics and the confessions therefrom, despite the fact that the police lied about the strength of their case, fabricated evidence, lied about the extent of the suspect’s culpability, and lied about circumstances of the interrogation).

356. *See id.* at 427–28 & n.10 (“[P]olice interrogation manuals and police seminars recommend police lying, virtually ensuring that each new police officer is familiar with the technique.” (footnotes omitted)); ALAMEDA CNTY. DIST. ATTORNEY’S OFFICE, *supra* note 264, at 24–25 (setting forth, in a prosecution memo, “consensual entry by trick” tactics, such as misrepresenting the officer’s identity and employing false friends, which tactics will likely “not invalidate an entry or search because . . . a suspect’s consent need not be ‘knowing and intelligent’”); Frank Connelly, *Consent to Enter or Search by Deception*, FED. LAW ENFORCEMENT TRAINING CTR., 1–3, available at [https://www.fletc.gov/sites/default/files/imported\\_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/ConsenttoEnterorSearchbyDeception.pdf](https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/ConsenttoEnterorSearchbyDeception.pdf) (last visited Jan. 24, 2014) (training manual regarding the use of deception to obtain consent to search).

jewelry” practice would appear viable in the absence of any coercion used to overcome the person’s ability to refuse. Nevertheless, at the time, this author warned the officer that a court offended by his conduct might look to the overarching Fourth Amendment requirement of reasonableness to declare the search unlawful.

Again, *Randolph* proves a helpful comparison. The wife’s consent was voluntary; the problem was that it was unreasonable to ask her for it or rely on it. Just as social norms suggest that “no sensible person” would walk into a home while one of its co-occupants was present and telling her to stay out,<sup>357</sup> no sensible person would walk into someone’s home when the invitation was based on the visitor’s lie about her reasons for entering.

### CONCLUSION

For all the role that “reasonableness” has played in the consent-search exception to the warrant requirement, the Court has focused on reasonableness through the lens of a coercion/volition dichotomy borrowed from Fifth Amendment doctrine governing the voluntariness of confessions. The traditional notion of Fourth Amendment reasonableness—requiring a balancing of government and individual interests—has been lost in the noise. This Article has attempted to return Fourth Amendment reasonableness to the consent doctrine in two ways.

First, this Article assessed the reasonableness of consent searches at a macro level, examining the governmental interests served by consent searches and the impact on individual privacy. This analysis revealed that the Court, to the extent it has undertaken a macro examination of reasonableness at all, has overstated the extent that consent searches advance governmental interests and understated their toll on individual privacy. Second, to make consensual searches more reasonable at the macro level, this Article has argued that courts should assess not only the voluntariness of the consent to search, but also the reasonableness of the request to consent itself. This micro-level examination of reasonableness will allow courts to determine whether the resulting search does in fact bear a reasonable relationship to the government’s need for engaging in it.

Aligning consent-search doctrine with traditional conceptions of Fourth Amendment reasonableness would drastically change the way that law enforcement views and is trained regarding consent searches. Currently, consent is seen as a “free-for-all,” in which it “never hurts to ask.”<sup>358</sup> Police can request consent to search anything, and the resulting search will be reasonable as long as the consent appears to be voluntary. If, instead, police officers know they will have to articulate their reasons for asking for consent and the logic behind the scope of the search, then

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357. See *Georgia v. Randolph*, 547 U.S. 103, 113 (2006).

358. See *supra* notes 263–69 and accompanying text.

the resulting searches are more likely to be truly reasonable, at both the micro and macro levels.

One disadvantage of “reasonableness” assessments generally is their inherently inexact nature. In many contexts, the Court has opted for bright-line criminal procedural rules because of their clarity and predictability.<sup>359</sup> While bright-line rules bring clarity and predictability, standards like “reasonableness” are indeterminate and require case-by-case decision-making.<sup>360</sup> When it comes to consent searches, the Court has repeatedly “eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”<sup>361</sup> This Article’s proposal, accordingly, does little to shift the position of consent-search doctrine along the rules–standards spectrum. The Court is already using a flexible, fact-intensive standard; this Article simply calls on the Court to apply the correct one: a standard of Fourth—not Fifth—Amendment reasonableness.

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359. See Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 365 (2004) (“[T]he need for bright-line rules was married to the reasonableness model of the Fourth Amendment, and the Burger Court had found its paradigm for searches and seizures.”); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1479 (1985); Wayne R. LaFare, *“Case-By-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141–42; Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31, 34, 39 (2009).

360. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 594, 596 (1992); John O. McGinnis & Steven Wasick, *Law’s Algorithm*, 66 FLA. L. REV. 991, 996 (2014) (“A legal rule has the advantage of clarity and comprehensibility over a standard, other things being equal.”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976) (describing the value of rules that are “formally realizable,” as distinguished from a “standard,” which occupies the “opposite pole” and typically requires an ex post fact-specific inquiry); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (noting that a standard “tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation,” while a rule “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts”).

361. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (reversing lower court for using a bright-line rule to determine the voluntariness of consent when the person granting it had been stopped by police).



