

Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine

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INTRODUCTION

Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.¹ And yet, in evaluating consensual searches, the Supreme Court remains mired in a paradigm that fails to acknowledge the complexities of police-civilian interaction and runs against the traditional standards of the Fourth Amendment. The result is a triple inconsistency: the Court claims to be applying one test, but in reality is applying a different test—and neither test fully comports with the real-life confrontations occurring on the street.

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1. Some estimates are even higher. One police detective estimated that 98% of warrantless searches were based on the consent exception to the warrant requirement. See RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 19 (1984); Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986).

Nowhere was this dissonance more apparent than the recent decision of *United States v. Drayton*.² In *Drayton*, the defendants were riding a cross-country bus to Michigan, in order to transport narcotics that they had taped to the insides of their thighs. After the bus made a scheduled stop to refuel, the driver collected the tickets from the passengers and disembarked. Three police officers then boarded the bus. One of them positioned himself by the door; the other two walked up the narrow aisle, one standing behind each passenger as he or she was questioned and the other leaning forward to within eighteen inches of the passenger's face and asking each individual to "cooperate" by allowing the officer to search his or her luggage and person.³ Both defendants—knowing full well that they had felony-weight narcotics hidden on their person—consented to the search, and the officer recovered the contraband.⁴

The Supreme Court upheld the search, finding that under these circumstances the defendants had acted "voluntarily" in consenting to the search.⁵ Like past decisions upholding consensual searches, the ruling that the defendants truly consented to the search had (as the dissent put it) an "air of unreality" about it.⁶ The idea that these defendants acted voluntarily is at once absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence. It is absurd because no outsider viewing the interaction would conclude that the defendants voluntarily consented to a search when surrounded by police at close quarters, especially if the defendants knew (as they must have) that giving the consent would ultimately result in serious criminal charges being filed against them. It is meaningless because no action taken by anybody in any situation is wholly "voluntary" or "involuntary," but rather is a result of myriad pressures, some internal and some external. Thus, the Court should be looking to the *degree* of compulsion being applied, not asking an overly simplistic "yes or no" question. And finally, the determination that the defendants acted "voluntarily" is irrelevant under traditional Fourth Amendment jurisprudence because the lynchpin of the Fourth Amendment is "reasonableness," an objective inquiry that focuses on the actions of the law enforcement officer, not on the subjective state of mind of the defendant.

So, were the actions of the government agents "reasonable" in *Drayton*? This is a question the Court never directly answered, although the Court at times wrote as though this were the question it meant to answer.⁷ Instead, the opinion keeps returning to the question of voluntariness.⁸ As a result, the Court ended up defending the search not because the search was "reasonable" (which was arguably true) but rather because the Court claimed the defendants acted "voluntarily" (which was almost certainly not

2. 536 U.S. 194 (2002).

3. *Id.* at 197–99.

4. *Id.*

5. *Id.* at 207 ("[T]he totality of the circumstances indicates that [Drayton and Brown's] consent was voluntary . . .").

6. *Id.* at 208 (Souter, J., dissenting).

7. *See, e.g., id.* at 204 ("There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."); *id.* at 205 ("[Officer Hoover] did nothing to intimidate the passengers . . ."); *id.* at 206 ("Nothing Officer Lang said indicated a command to consent to the search.").

8. *See id.* at 205–06.

true). The consequence of this misdirection was a firestorm of academic criticism and a scathing reception by the public at large.⁹ It is no exaggeration to say that the nearly unanimous condemnation of the Court's rulings on consensual searches is creating a problem of legitimacy which threatens to undermine the integrity of judicial review of police behavior. What has gone wrong?

The best way to understand the current state of consent search jurisprudence is to examine the evolution of the doctrine since it was first set out thirty years ago. At that time, the Court adopted a certain paradigm and test—focusing on whether the subject's consent was "voluntary"¹⁰—but it very quickly became obvious that this paradigm was irredeemably flawed. So, in subsequent decisions the Court began to change the test in practice, while formally still keeping the same language and standards of the voluntariness paradigm.¹¹ What *Drayton* represents is the Court at the midpoint of this evolution, moving from a subjective binary test that focuses on whether or not the subject acted voluntarily, to a more nuanced objective test that focuses on the amount of compulsion used by the law enforcement officer. The purpose of this Article is to chart the course of this evolution and then to propose a new paradigm for the Court to adopt once it has officially jettisoned the voluntariness standard.

This new paradigm has three characteristics: (1) it is wholly objective and focuses solely on the behavior of the law enforcement official; (2) it differentiates between different levels of compulsion that a law enforcement official might bring to bear on a subject, treating compulsion as a matter of degree rather than as a binary condition; and

9. See, e.g., Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 575 (criticizing consent searches and *Drayton*'s affirmation of the current doctrine); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (2002) (claiming that "the 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, 139–41 (discussing the *Drayton* case and concluding that the Court asked none of the important questions in the case to determine if there was consent, and that therefore "the *Drayton* world is fiction"); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 252 (2001–2002) (arguing for the abolition of consent searches since "the determination of voluntariness is currently confused, misapplied, and based on a fiction" which "raises significant concerns about the integrity of the criminal justice system").

Criticism of the consent search doctrine is nothing new. The amount of pre-*Drayton* scholarship attacking the consent search doctrine is prodigious as well. See, e.g., David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U.L. REV. 941, 954–56 (1997) (claiming that the consensual searches jurisprudence is driven by public policy concerns rather than precedents, and that as a result the courts have "lost sight of the sense of fairness and humanity embodied in the individual rights . . ."). The popular media have also decried the "fiction" of consent searches. See, e.g., Stephen Chapman, *'Voluntary' Consent and Other Judicial Fantasies*, CHI. TRIB., Nov. 24, 1996, at C23 (reviewing the decision of *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997), and concluding that the defendant who the Supreme Court claimed voluntarily consented was actually "coerced into giving up rights he wasn't even aware he had").

10. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–26 (1973); *infra* notes 22–37 and accompanying text.

11. See *infra* notes 38–77 and accompanying text.

(3) it differentiates between different kinds of compulsion—or, more accurately, influence—that a law enforcement official might use in acquiring consent. The defendants in *Drayton* may not have “voluntarily” agreed to the search, but the search was not necessarily invalid. As long as the police acted properly and the level and type of compulsion they exercised was appropriate, the search would still be reasonable and thus constitutional.

Part I of this Article will discuss the first aspect of this paradigm shift: the need to conduct a wholly objective inquiry in evaluating consent searches. This need is so great that it is in fact what the Supreme Court has already done; although subjective elements of the test remain on paper, in practice they have almost never been applied. This Article will demonstrate this by tracing the development of the law of consent searches, from the seminal case of *Schneekloth v. Bustamonte*¹² thirty years ago through the slow but inevitable evolution towards the objective test we see in *Drayton*.¹³

Part II will focus on the second aspect of the paradigm shift: instead of reviewing consent searches as a binary question in which a consent is either “voluntary” or “involuntary,” courts must consider the *amount* of compulsion or influence exercised by the law enforcement officer. Compulsion or social pressure is not all or nothing; it exists on a continuum which ranges from absolutely no coercion or pressure (meaning that law enforcement officers must wait for an individual to volunteer to be searched) all the way to achieving “consent” by direct force. Since the extreme ends of the spectrum rarely occur in the real world, we must begin to examine the vast middle ground and try to determine at what point along the continuum the police conduct becomes “unreasonable” under the Fourth Amendment.¹⁴ In making this determination, we can look for guidance in the jurisprudence of voluntary confessions,¹⁵ but ultimately the differences between the two doctrines demand unique standards for each.¹⁶ Part III also examines—and ultimately rejects—the applicability of some of the psychological research in the area of obedience to authority.¹⁷

Part III of the Article turns to the third aspect of the new paradigm: the need to differentiate between different types of coercion and influence that a law enforcement officer may use in acquiring consent. Part IV describes six different categories of social influence, and shows how each may be present, to different degrees, in a request for consent.¹⁸ The Part further explains how the presence and degree of each of these types of coercion and influence can alter the “reasonableness” of the subsequent search.¹⁹

Finally, Part IV of the Article will carry out an evaluation of the current state of the law, and demonstrate that using our new paradigm of evaluating consent searches, the current state of the law *as applied* strikes—for the most part—an appropriate balance.²⁰ Part V will also argue that the law as applied is inconsistent with the rhetoric

12. 412 U.S. 218.

13. See *infra* notes 22–77 and accompanying text.

14. See *infra* notes 78–95 and accompanying text.

15. See *infra* notes 96–122 and accompanying text.

16. See *infra* notes 123–44 and accompanying text.

17. See *infra* notes 145–92 and accompanying text.

18. See *infra* notes 193–204 and accompanying text.

19. See *infra* notes 205–14 and accompanying text.

20. See *infra* notes 215–40 and accompanying text.

used by the courts and the actual language of current test, and explain why this dissonance is harmful to the courts and to society as a whole.²¹

I. AN OBJECTIVE TEST IN LAW TO MATCH THE ONE IN FACT: THE EVOLUTION OF THE LAW FROM *SCHNECKLOTH* TO *DRAYTON*

Of the three reasons for changing the paradigm which we use to evaluate consent searches, the need to shift to an explicitly objective criteria is perhaps the easiest to justify. Although the legal test that courts have been applying in evaluating consent searches has a subjective and an objective prong, in fact the subjective prong has been virtually ignored for the past thirty years. A brief survey of the history of the consent search doctrine will show that this shift to a wholly objective test—in practice, if not in law—was inevitable, given the objective “reasonableness” standard that permeates Fourth Amendment jurisprudence.

A. Schneckloth

The Supreme Court has long held that consent is a legitimate exception to the warrant requirement of the Fourth Amendment,²² and that such consent must be “freely and voluntarily given.”²³ It was not until 1973, however, that the Court, in deciding the landmark case of *Schneckloth v. Bustamonte*, finally took on the challenge of defining the term “voluntary.”²⁴ In *Schneckloth*, the Court looked for guidance to the concept of “voluntariness” in the context of confessions, as controlled by the Due Process Clause of the Fourteenth Amendment, since that area represented “[t]he most extensive judicial exposition” of the question.²⁵ The first observation the Court made was that the layman’s definition of “voluntary” was too broad to be of much use.²⁶ On the one hand, “voluntary” could conceivably describe any statement (or consent) made after brutal treatment or threats of violence by the authorities, since the defendant was still making a choice between alternatives, however limited they may be. On the other end of the spectrum, the term could be taken to mean “but for” causation—that is, only statements (or consents) given absent any official request or action are truly “voluntary.”²⁷ Thus the Court concluded that the term “voluntary” was a carefully constructed term of art whose definition was carefully crafted based on policy judgments.²⁸ This definition

21. *Id.*

22. *See, e.g., Zap v. United States*, 328 U.S. 624, 628 (1946) (“[R]ights [under the Fourth Amendment] may be waived. And when petitioner, in order to obtain the Government’s business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had . . .”).

23. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

24. 412 U.S. 218 (1973).

25. *Id.* at 223.

26. *Id.* at 224.

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

28. *Id.* at 224–25 (“[V]oluntariness’ has reflected an accommodation of the complex of values implicated in police questioning of a suspect.”).

required balancing the legitimate interests of law enforcement with “the possibility of unfair and even brutal police tactics.”²⁹ Relying on the pre-*Miranda* case of *Columbe v. Connecticut*,³⁰ the Court determined that if the defendant’s “will has been overborne and his capacity for self-determination critically impaired,” a confession was involuntary and its use violated due process.³¹ The Court noted that in applying the “overborne will” test to confessions, earlier cases had looked to the “totality of all the surrounding circumstances”—both subjective (regarding the characteristics of the accused) and objective (regarding the conduct of the police and the circumstances surrounding the interrogation).³²

The *Schneckloth* Court then imported these standards for confession into the consent jurisprudence,³³ explaining that “voluntariness” in the context of consent should also be constructed by balancing between the interests of law enforcement and the need to avoid police misconduct, and that a court should consider the totality of the circumstances in determining whether consent was “voluntary.”³⁴

Unfortunately, in *Schneckloth* we begin to see the damage caused by the use of the “voluntariness” paradigm in evaluating consent searches: the decision shows the first signs of a dissonance (soon to become vast) between the language of the test and the purpose of the test. 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.³⁵ Since the Court was supposedly determining whether the subject’s consent was “voluntary,” this subjective inquiry seemed to be essential: how can you determine if a person is acting voluntarily without examining the specific characteristics of that person?

29. *Id.* at 225.

30. 367 U.S. 568 (1961).

31. *Schneckloth*, 412 U.S. at 225–26 (quoting *Columbe*, 367 U.S. at 602). Unfortunately, the *Schneckloth* Court’s summary of the voluntariness standard in confession cases was not quite this clear. The Court quoted from *Columbe* that a confession was either “the product of an essentially free and unconstrained choice by its maker” or the result of the defendant’s will being “overborne and his capacity for self-determination critically impaired.” *Id.* (quoting *Columbe*, 367 U.S. at 602). These two rather stark alternatives provide little guidance to the rather broad (and common) range of circumstances in between, in which the defendant’s will is not overborne and yet the choice is not completely unconstrained. The *Schneckloth* Court goes on to apply the “overborne will” test in describing the confession cases. *Id.* at 226. The Court then seems to backtrack when turning to consent searches, saying that any coercion, no matter how subtle, would render them involuntary. *Id.* at 228. Thus the term “involuntary” was linked to the equally vague term “coercion,” ultimately providing too little guidance to future courts.

32. *Id.* at 226.

33. “[T]here is no reason for us to depart in the area of consent searches, from the traditional definition of ‘voluntariness.’” *Id.* at 229.

34. *Id.* at 227–29.

35. *Id.* at 247–48. The Court also listed a number of cases that considered subjective factors in the context of confessions. *Id.* at 226 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958) (lack of education of the accused); *Fikes v. Alabama*, 352 U.S. 191 (1957) (low intelligence of the accused); *Haley v. Ohio*, 332 U.S. 596 (1948) (youth of the accused)).

The use of subjective factors rings hollow, however, when considered in the context of the overriding rationale of the opinion. Throughout the decision, the Court makes clear that in both the confessions and consent contexts, the voluntariness requirement is meant to prevent police misconduct, not to ensure that the defendant is making a subjectively free choice.³⁶ Given this policy goal, the focus of the test should be on the conduct of the police, not the knowledge or intelligence of the particular defendant. As we will see, subsequent cases support this view: in practice the courts only look to the conduct of the police in determining whether the consent was "voluntary."³⁷ The subjective language of the test occasionally survives, but it serves no function other than to mislead the reader into believing the subject's state of mind is relevant to the court's decision, which in turn only tends to undermine the legitimacy of the decision.

B. The Law Since Schneckloth: An Evolution Towards a Purely Objective Analysis

It is an open secret that the subjectivity requirement of *Schneckloth* is dead.³⁸ In other words, although *Schneckloth* specifically instructed courts to consider whether a particular defendant meant to consent by examining the defendant's educational background, intelligence, and knowledge of his rights,³⁹ recent cases at every level have considered only objective criteria, such as the location of the search, the language used in making the request, and the behavior of the police officer.⁴⁰

This transformation of the test occurred silently, and it marked a subtle but significant shift in the rationale behind the consent doctrine. At first, the Court reaffirmed *Schneckloth*'s subjective prong. In *United States v. Watson*,⁴¹ decided three years after *Schneckloth*, the Supreme Court explicitly considered subjective factors in determining whether the defendant's "will had been overborne" when he consented to

36. See, e.g., *id.* at 225 ("At the other end of the spectrum [of the balancing test] is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."); *id.* at 233 (summarizing the involuntary consent cases as circumstances where the consent was "coerced by threats or force, or granted only in submission to a claim of lawful authority").

37. The law has in fact evolved since *Schneckloth* to require a completely objective inquiry. See *infra* notes 38–65 and accompanying text.

38. See, e.g., Strauss, *supra* note 9, at 222.

39. *Schneckloth*, 412 U.S. at 248.

40. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002). In this case, the district court examined only objective factors in determining that there was valid consent: the officers were dressed in plain clothes, did not "brandish" their badges, did not make a general announcement to the entire bus, did not address anyone in a menacing tone of voice, and did not block the aisle or exit. *Id.* at 200. The Eleventh Circuit, in reversing the trial court, looked only to objective criteria and explicitly rejected the government's proffer of subjective criteria (such as the age and employment history of the defendants). *United States v. Drayton*, 231 F.3d 787, 791 n.6 (11th Cir. 2000) (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991)), *rev'd*, 536 U.S. 194 (2002). Finally, the Supreme Court, in reversing the Eleventh Circuit, looked to the same objective factors in making its determination. *Drayton*, 536 U.S. at 200.

41. 423 U.S. 411 (1976).

the search.⁴² Four years later, in *United States v. Mendenhall*,⁴³ the Court again applied the voluntariness test from *Schneckloth* and examined the defendant's subjective characteristics.⁴⁴ But in *United States v. Drayton*,⁴⁵ the Court's most recent consent case, the majority applied a purely objective test: a "voluntary" search was defined as one in which the request "indicat[ed] to a reasonable person that he or she was free to refuse."⁴⁶

This shift is explained by the fact that during the intervening years, the Court decided a series of consent cases in which the law enforcement officers who asked for consent to search were simultaneously seizing the defendant.⁴⁷ As a result the Court naturally analyzed these cases in the context of Fourth Amendment seizure jurisprudence.⁴⁸ In other words, *Schneckloth* borrowed its test from the confessions

42. *Id.* at 424 (quoting *Schneckloth*, 412 U.S. at 225) (alteration in original). In addition to considering numerous objective factors, the Court looked to whether this specific defendant "was a newcomer to the law, [or] mentally deficient." *Id.* at 424-25.

43. 446 U.S. 544 (1980).

44. *Id.* at 558-59 (finding that consent was voluntary in part because defendant was twenty-two years old, had an eleventh grade education, and knew that she had the right to refuse).

45. 536 U.S. 194 (2002).

46. *Id.* at 206 (emphasis added). The three dissenting Justices also applied an objective test, but claimed that the only question before the court was whether or not a seizure occurred, not whether or not the consent was voluntary. *Id.* at 208 n.1 (Souter, J., dissenting). The dissent argued that if there were any reason to reach the issue of "consent untainted by seizure," the proper test would be the "voluntariness test" of *Schneckloth*, which combined both objective and subjective factors. *Id.* As *Drayton*'s predecessors make clear, however, the Fourth Amendment reasonableness standards have filtered into the consent test to such an extent that the Court is unlikely to ever find a case where the consent issue is distinct from the seizure issue. Even if it did, the majority in *Drayton* appears to have now replaced the old "voluntariness" test for consent (which was borrowed from coerced confession jurisprudence) with the reasonableness test (borrowed from seizure jurisprudence). *Id.* at 206.

47. *See, e.g.*, *United States v. Bostick*, 501 U.S. 429, 436-38 (1991) (discussing that when defendants were questioned on a bus which had made a scheduled stop, three police officers boarded the bus while the driver was away and questioned defendants, asking for consent to search their bags and persons); *Florida v. Rodriguez*, 469 U.S. 1, 3-4 (1984) (defendants stopped in airport, asked to move to the side of the terminal, questioned, and then asked for consent to search their suitcases); *Florida v. Royer*, 460 U.S. 491, 494-95 (1983) (defendant stopped in airport, questioned, then asked to come into a nearby room where he was asked for consent to search his bags). Other cases did not involve consents to search, but developed the "seizure" case law in contexts where the defendant was being questioned and/or ordered to comply with the authorities; thus these cases were cited by later "consent" cases. *See, e.g.*, *INS v. Delgado*, 466 U.S. 210, 212-23 (1984) (INS agents positioned themselves at the exits of a factory during business hours while other agents approached the workers, questioned them about their citizenship, and occasionally asked them to produce documents), *cited in Bostick*, 501 U.S. at 439.

48. In each of these cases the primary question for the Court was whether or not the seizure had been legal, leading the Court to apply an objective Fourth Amendment test of reasonableness. The legality of the consent was apparently dependent on the legality of the seizure itself; unlike in *Schneckloth*, these cases did not apply an independent test to see whether the consent was freely given once the seizure question had been resolved. *See, e.g.*, *Rodriguez*, 469

context, which was based at the time on the Due Process Clause.⁴⁹ Although there had been a "seizure" in *Schneckloth*, the Court never discussed whether the seizure was permissible under the Fourth Amendment—presumably because there was no question that the car stop had been constitutional.⁵⁰ In *Watson*, which affirmed the subjective element of the *Schneckloth* test, the Court first reviewed the constitutionality of the arrest and then discussed separately the independent question of whether the consent was voluntary.⁵¹ In *Mendenhall*, the last Supreme Court case to apply subjective criteria to the question of consent, the Court engaged in an extensive analysis (and set out a new test) in determining whether there was a seizure.⁵² The Court then turned to the independent question of whether consent was freely given and devoted a separate page of discussion to the issue.⁵³

In the consent cases following *Mendenhall*, the fact patterns involved both a seizure and a consent search. However, instead of conducting separate analyses for the seizure and the consent, the Court simply used one test—the Fourth Amendment test for seizure—without even considering the separate question of voluntary consent.⁵⁴

By 1991, the test for consent was beginning to merge with the objective test for seizure. The Court declared in *Florida v. Bostick* that "the appropriate inquiry [for seizure] is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."⁵⁵ Since the Court had a long history of using objective tests in the seizure context, it noted that the objective test was well-settled law, stating that "this proposition is by no means novel" and noting that it was supported by a "long, unbroken line of decisions dating back more than twenty years . .

U.S. at 5–7 (finding that the stop in the airport was allowable under *Terry v. Ohio*, 392 U.S. 1, 30 (1968) because there was an "articulable suspicion" that a crime had been committed, and then stating that it was unable to review the trial court's opinion on whether the consent was voluntary since the trial court had incorrectly applied the Fourth Amendment as to the seizure question); *Royer*, 460 U.S. at 501 (holding that under the Fourth Amendment's reasonableness test, the defendant was illegally detained under the Fourth Amendment, therefore any consent that was given was "tainted" by this illegality, so there was no need to conduct an independent voluntariness inquiry).

49. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

50. See *Schneckloth*, 412 U.S. at 220 (defendant was driving a car with a burned-out headlight and license plate light).

51. *United States v. Watson*, 423 U.S. 411, 424–25 (1976).

52. *Mendenhall*, 446 U.S. at 554. The *Mendenhall* Court sensibly found that the Fourth Amendment required an objective test, and held that a seizure occurs if a reasonable person would have believed that he was not free to leave. *Id.* This test was amended somewhat by *California v. Hodari D.*, 499 U.S. 621 (1991), which held that even if a reasonable person would not feel free to leave, a seizure does not occur unless and until the defendant yields to the show of authority. *Id.* at 628–29.

Of course, if the court does determine that a seizure occurred, then it needs to determine whether or not the seizure is appropriate under the circumstances—but consistent with Fourth Amendment jurisprudence, this also involves applying an objective test. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

53. *Mendenhall*, 446 U.S. at 558–59.

54. See *supra* note 47.

55. *United States v. Bostick*, 501 U.S. 429, 436 (1991).

...⁵⁶ The Court went on to uphold the consensual search, but did not set out any separate test for consent, aside from the rather unhelpful suggestion that citizens cannot be “coerced to comply with a request that they would prefer to refuse,”⁵⁷ and remanded the case to the state court to determine whether the defendant “chose to permit the search of his luggage.”⁵⁸

Significantly, later cases cited the *Bostick* seizure language when determining whether a defendant consented to a search, sometimes using the language to explicitly reject the consideration of subjective factors.⁵⁹ By the time the Supreme Court heard its next case on consent searches, the merging of the doctrines was complete: in *United States v. Drayton*,⁶⁰ the Court affirmed the objective nature of the consent inquiry, noting (without authority) that “where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.”⁶¹ In analyzing the voluntariness of the search, the Court concluded that the police conduct “indicat[ed] to a reasonable person that he or she was free to refuse” and upheld the search.⁶²

Officially, the subjective prong is still viable, as *Schneekloth*'s test has never been overruled.⁶³ But in practice, the voluntariness test for consent has become so inextricably linked to the objective Fourth Amendment test for seizure that it is unlikely that the subjective elements will ever be reaffirmed by the courts. Most lower courts never even mention any subjective elements in determining whether consent was

56. *Id.* at 439 (citing *Florida v. Rodriguez*, 469 U.S. 1 (1984); *INS. v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983); *Terry*, 392 U.S. 1 (1968)).

57. *Id.* at 438.

58. *Id.* Like the other post-*Mendenhall* cases, *Bostick* was both a seizure case and a consent case. The defendant was on a bus when police officers conducted a “sweep”—one officer stationed himself by the exit of the bus and the other two confronted the passengers one at a time, asking for permission to search the passengers’ bags. *Id.* at 431–32. The Court claimed at the beginning that “[t]he sole issue presented for our review is whether a [bus sweep] necessarily constitutes a ‘seizure’ within the meaning of the Fourth Amendment.” *Id.* at 433. However, the Court then went on to consider the constitutionality of the search, though without setting out a distinct test for evaluating the “voluntariness” of the consent. *Id.* at 433–40.

59. See, e.g., *United States v. Drayton*, 231 F.3d 787, 791 n.6 (11th Cir. 2000); *United States v. Washington*, 151 F.3d 1354, 1356 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393, 1394 (11th Cir. 1998).

60. 536 U.S. 194 (2002).

61. *Id.* at 206.

62. *Id.*

63. In *Drayton*, the three dissenting Justices argued that there had been a seizure, and so never reached the question of consent. *Id.* at 208 n.1 (2002) (Souter, J., dissenting). However, they noted in a footnote that if they reached the seizure question, they would apply a partially subjective test under *Schneekloth*. *Id.* (Souter, J., dissenting). The language used by the Court at some points also implies a subjective test—“the totality of the circumstances indicates that [the defendants’] consent was voluntary, so the searches were reasonable.” *Id.* at 207. Thus, even though in practice the test turns on objective factors and focuses on the circumstances of the search and the conduct of the law enforcement official, the formal language of the test remains focused on the defendant and asks whether he or she actually gave voluntary consent.

valid.⁶⁴ And even in the rare cases when a court pauses to consider subjective elements, the search is almost always upheld.⁶⁵

Although this withering away of the subjective prong of the test occurred almost accidentally, it seems to have been an inevitable occurrence for two reasons. First, even in the context of confessions, the "voluntariness" test of the Due Process Clause has become more objective since 1973, when *Schneekloth* used it for guidance in crafting a test for consent searches. For example, in *Colorado v. Connelly*,⁶⁶ the Supreme Court upheld a confession made by a chronic schizophrenic who confessed because the "voice of God" in his head commanded him to do so.⁶⁷ Although the confession was by no means "voluntary" in the traditional sense of the term, the Court reasoned that the justification behind the voluntariness requirement was to prevent police overreaching, and held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."⁶⁸ In *Arizona v. Fulminante*,⁶⁹ the Court found that a confession was involuntary primarily because of the compulsion by the government informant, relegating the subjective factors (which the lower court had not even considered) to a footnote.⁷⁰ Thus, although subjective factors are still formally part of the voluntariness inquiry in the confessions context, here too the Court is moving away from an inquiry into whether the defendant actually felt coerced and focusing primarily, if not solely,

64. See Strauss, *supra* note 9, at 222 (stating that after reading every published consent case on the federal or state level over a period of three years, the author found only a handful out of hundreds of cases in which the court analyzed subjective factors); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32 (1999) (stating that most courts that find a valid consent do not discuss subjective factors, and the few that do tend to minimize them).

65. See Strauss, *supra* note 9, at 223. Professor Strauss's exhaustive survey of case law revealed that in almost every case in which consent was found to be involuntary, the court reached its conclusion based on misconduct on the part of the law enforcement official. She breaks these cases down into four categories: (1) threats to the suspect or his or her family; (2) deprivation of necessities; (3) a false assertion (or effective assertion) that the police had a right to search; or (4) an "unusual or extreme show of force." Unsurprisingly, all four of these categories would result in a finding that the search was involuntary under the objective "seizure" test—no reasonable defendant would believe he or she had the right to decline the request to search under those circumstances.

66. 479 U.S. 157 (1986).

67. *Id.* at 170–71 ("Respondent's perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak.").

68. *Id.* at 164.

69. 499 U.S. 279 (1991).

70. *Id.* at 286–88 & n.2. The Court held that the confession was coerced because of a credible fear of physical violence to the defendant absent protection from the government agent, which would only be provided if the defendant confessed. In a footnote, the Court listed "additional facts" which had not been relied upon by the Arizona Supreme Court—the defendant's below-average intelligence, his low level of schooling, his small stature, and his difficulties in adjusting to prison life. The Court noted that these type of subjective factors had been "previously recognized" as relevant to a voluntariness inquiry, but cites no confession case in support of this later than 1961—thirty years prior to the *Fulminante* ruling (the Court cited *Schneekloth*, though of course that was not a confession case). *Id.* at 173 n.3.

on the objective circumstances of the interrogation and the conduct of the law enforcement official.⁷¹

But regardless of how the voluntariness standard is evolving in the confessions context, a move towards objectivity seemed inevitable for evaluating consent to search. Fourth Amendment jurisprudence has always used reasonableness as its basis.⁷² It was only a matter of time before the question of whether consent was “voluntary” was determined by referring to how a “reasonable” defendant would react under the circumstances. Since the *Schneckloth* decision, the Supreme Court has applied objective tests to other related areas in Fourth Amendment doctrine, such as determining the scope of consent.⁷³ Thus it seems appropriate that this aspect of Fourth Amendment jurisprudence should also be controlled by an objective, reasonable test. As we have seen,⁷⁴ the reasoning of *Schneckloth* itself (though certainly not the language) leads to a purely objective test, since the *Schneckloth* Court focused on the propriety of police conduct and not the characteristics of each individual defendant in determining whether or not “compulsion” had occurred.

The shift to an objective test reaffirms the initial observation made by the *Schneckloth* Court: that the term “voluntary” is misleading.⁷⁵ If the test truly becomes completely objective, courts will not really be determining whether a specific defendant made a “voluntary” choice or not—they will be looking to whether the police conduct was appropriate given the totality of the circumstances.⁷⁶ Of course, in

71. Of course, the central inquiry in most confession cases is no longer the voluntariness test of the Due Process Clause, but instead the test announced in *Miranda v. Arizona*, 384 U.S. 436 (1966)—a purely objective test that has revolutionized the way courts evaluate the admissibility of confessions. Although *Miranda* had been decided before *Schneckloth*, it was not apparent at the time the extent to which the objective *Miranda* test would come to dominate the confessions jurisprudence.

72. See *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (“The ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search ‘reasonable.’”).

73. *Id.* In other examples, the Supreme Court has used a “reasonableness” standard to determine whether a “stop and frisk” is constitutional (*Terry v. Ohio*, 392 U.S. 1, 19 (1967) (“We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner’s personal security as he did.”)) and whether electronic surveillance impermissibly intrudes upon an individual’s privacy (*Katz v. United States*, 389 U.S. 347, 361 (1968) (Harlan, J., concurring) (“[T]he expectation [must] be one that society is prepared to recognize as ‘reasonable.’”).

74. See *supra* note 36 and accompanying text.

75. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–25 (1973).

76. See *Nadler*, *supra* note 9, at 161 (“Over the years, lower courts applying *Schneckloth* tended to focus their inquiry about the voluntariness of consent to search on police misconduct, rather than on characteristics of the suspect that might increase the likelihood that consent was involuntary.”). Taking the perspective of the law enforcement officer rather than the subject of the search involves more than shifting from a subjective to an objective test; as Professor *Nadler* argues using empirical data from psychological studies, actions and circumstances that may appear non-coercive to an authority figure can be perceived as quite coercive to the subject. See *id.* at 170–71 (citing studies in which individuals viewing interrogations from the perspective of the interrogator found confessions to have only a small degree of coercion; when the same interrogation is viewed from the perspective of the suspect, individuals infer a large degree of coercion). Thus in practical situations, it makes a real

determining the appropriate objective level of pressure a law enforcement official is permitted to apply, we must look to see how much compulsion a reasonable individual would feel under the circumstances—thus, the “voluntariness” of the consent given by the (fictional) reasonable person is a relevant consideration. But to say that a defendant “voluntarily” agrees to be searched in every case in which consent is upheld is incorrect. Holding on to that terminology only serves to confuse the issue for lower courts and law enforcement, and leads to misunderstanding—and occasionally hostility—among the lay population that reads the courts’ decisions.

In short, a consent to search is “voluntary” if the police have not used “coercive” tactics in obtaining the consent,⁷⁷ but what is “coercive?” This is a term that has turned out to be nearly as problematic as the term “voluntary.” It is superior in that it properly places the focus on the objective actions of the police officer, not the subjective state of mind of the individual being searched. But it is inappropriate for our new paradigm because it does not fit well with the other two factors. It implies an either/or result; although one can imagine different degrees of coercion (certainly more easily than one can imagine different degrees of “voluntariness”), one still expects behavior to be either coercive or not coercive. Likewise, the term is too crude to describe the various different *types* of influence that a police officer might have over a suspect, and as we shall see in Part II, the *type* of pressure that is brought to bear can be as important—or even more important—than the amount.

Therefore, the shift from subjective “voluntariness” to objective “coercion” is helpful in a number of respects, but it does not in itself give us a bright-line test; it merely changes the question being asked from “at what point does the individual feel he has no choice but to agree to consent?” to “where should we set the line between proper and improper police conduct in determining whether the consent was properly acquired?” *Schneckloth* provided a number of guidelines in setting that line: a court must look to the totality of the circumstances, and should attempt to strike a proper balance between the need for effective law enforcement and the prevention of actions or statements by the police that cause a defendant’s will to be “overborne.” Before we try to refine this test, however, we will turn to the other two factors of the new paradigm and further refine our terminology.

II. NOT ALL OR NOTHING: ACKNOWLEDGING VARYING LEVELS OF COMPULSION IN THE POLICE-CITIZEN ENCOUNTER

We have seen that, under the rationale of *Schneckloth*⁷⁸ and the language of *Drayton*,⁷⁹ the Court’s actual inquiry in evaluating consent searches is into the

difference as to whether the goal of the consent search doctrine is to prevent police misconduct and abuse, or to ensure that the subject herself is giving truly “voluntary” consent.

77. *Schneckloth*, 412 U.S. at 229. The Court held that “to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.” *Id.* As we have seen, the subjective prong of the test withered quite quickly and died. The Court went on to summarize the purpose of the consent search test: “Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches.” *Id.*

78. See *supra* note 36 and accompanying text.

79. See *supra* note 62 and accompanying text.

reasonableness of the police officer's actions. This observation alone is sufficient to call into question the old paradigm of "voluntariness." But two other aspects of the police-citizen encounter also deserve to be taken into account in designing a new paradigm. In this Part we challenge the implied binary premise of the "voluntariness" paradigm: that the police officer is either coercing obedience or requesting consent. In fact, the level of compulsion or influence the police officer exercises can vary widely, and is better measured on a continuum or spectrum than by asking whether or not "coercion" is present. This was acknowledged by the Court in *Schneckloth* itself,⁸⁰ and has in fact been the underpinnings of the voluntary confessions doctrine ever since the *Miranda* case.⁸¹

In fleshing out this factor of our new paradigm, we must ultimately determine what level of compulsion would be reasonable in the search context. The voluntary confessions jurisprudence will provide a useful framework, but as we shall see, the legal and factual similarities between confessions and consent searches do not run as deep as they first appear. In the end, we are forced to add in the third factor—the type of compulsion being exercised—in order to construct a workable test.

However, the recognition that compulsion can vary in its degree is important in its own right, since it helps defend the current trend of the consent search doctrine in the courts. Some of the harshest criticisms of the consent search doctrine have relied on empirical psychological studies in the field of obedience to authority to demonstrate the harmful fiction of "voluntariness" in cases such as *Drayton*. The concluding section of this Part will examine these psychological studies and conclude that they have little relevance to the distinctive nature of the police-citizen encounter that takes place when consent is requested.

A. What *Schneckloth* Left Unanswered

As noted above,⁸² the seminal case of *Schneckloth* admitted that the everyday definition of the word "voluntary" is too broad to be of much use in the consent search context. The *Schneckloth* Court crafted its voluntariness test as a careful balance between the competing policy interests of attempting to ensure effective law enforcement and preventing unfair police tactics.⁸³ The Court acknowledged that the level of compulsion exercised by the police officer might vary, but hedged considerably when the time came for setting the point at which the level of compulsion results in legal involuntariness. Quoting from a then recent confession case, the court asked:

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.⁸⁴

80. See *infra* note 85 and accompanying text.

81. See *infra* notes 96–121 and accompanying text.

82. See *supra* notes 23–31 and accompanying text.

83. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

84. *Id.* at 225–26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

This passage is surprisingly unhelpful in providing guidance to lower courts, not to mention law enforcement officials. There is obviously an enormous middle ground between a "free and unconstrained choice" and a person's will being "overborne." If we recognize (as *Schneckloth* does elsewhere)⁸⁵ that "virtually no statement" will be made if the police apply no pressure whatsoever to the subject, and further acknowledge that the amount of compulsion used can be of varying intensity, we can imagine a sliding scale of compulsion, and the level of compulsion applied by a police officer in any given situation will fall somewhere on that spectrum. The two situations described by the questions in the above-quoted passage fall on rather disparate points along that spectrum; indeed, they serve as its boundaries at either end. Between the two points—times when a defendant's choice is not entirely free and unconstrained and yet his will is not completely overborne—falls almost every interaction between law enforcement officials and suspects.

Schneckloth ducks this difficult analytical issue, since it does not make any further inquiry about where the line should be set between these two disparate points. Instead, it produces a test by simply adopting one of those points without further analysis and proceeding to apply it to the case at hand, asking whether the defendant's "will has been overborne and his capacity for self-determination critically impaired."⁸⁶

Thus, future courts were left to determine the exact point on the spectrum of compulsion where consent became "involuntary," or rather where police conduct became inappropriate. But they did so with a test that, by its language, would allow any sort of behavior by the police short of explicit threats of violence. As we have seen, this test evolved into an objective test imported from the seizure context.⁸⁷ This test, however, has led the courts to uphold almost every request for consent by law enforcement officials.⁸⁸ In other words, the courts believe that a "reasonable person" would feel free to decline an officer's request under almost any circumstances,⁸⁹ notwithstanding the fact that in the real world, only a small fraction *do* decline such a request.⁹⁰ It is this dissonance between the mild language of the test and the harsh (for

85. *Id.* at 224 (rejecting the "but-for" causation definition of voluntariness since "[u]nder such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind").

86. *Id.* at 225 (quoting *Culombe*, 367 U.S. at 602). Later in the case, the Court seems to adopt a much more lenient standard, claiming that any form of coercion, however "subtly the coercion was applied," whether "by explicit or implicit means, by implied threat or covert force," rendered the consent involuntary. *Id.* at 228. But as noted in the text, it was the "overborne will" test that survived.

87. See *United States v. Drayton*, 536 U.S. 194, 206 (2002) (finding that a "voluntary" search is one in which the request "indicat[ed] to a reasonable person that he or she was free to refuse") (emphasis added).

88. Strauss, *supra* note 9, at 221–27. Professor Strauss read every published consent case over the past few years and concluded that "a suspect's consent, except in extreme cases of obvious police misconduct, is typically found by the courts to be voluntary." *Id.* at 227.

89. Professor Strauss found that only "obvious and egregious" police misconduct led to a finding of involuntariness: "threats to the suspect or his family, deprivation of necessities until the suspect consents, [falsely] asserting an absolute right to search, [or] an unusual and extreme show of force." *Id.* at 225.

90. A study done of consent requests made by the Ohio State Highway Patrol and the Maryland State Police found that 88.5% to 96.5% of individuals consented to a search of their

defendants) reality of the cases that has caused the consent rule to fall into such disrepute among academics and the lay population.

But this dissonance does not mean that the holdings of the cases are wrong, or that the language of the test is wrong—only that the test itself, even after it has evolved from *Schneckloth's* unhelpful subjective and overbroad rule, is still not an accurate description of what courts are doing when they analyze whether a consent was voluntary. What is needed is a more nuanced rule that is derived directly from the conflicting policy goals of the consent doctrine—to deter police misconduct in requesting consent but still allow law enforcement to effectively investigate crime.

As described in Part I, the first step in creating such a rule is to change the terminology being used. The term “voluntary” is misleading, both because of the breadth of its definition and because it implies an either/or analysis. As *Schneckloth* stated, *all* consents (like confessions) are “voluntary” in that the defendant makes a choice between at least two alternatives.⁹¹

Given this messy fact about interactions with law enforcement, some might argue that gaining consent to search should not depend on compulsion of any kind; thus, any amount of pressure will render a consent unconstitutional. Since there will always be some level of compulsion when a law enforcement officer makes a request to search, this rule would effectively mean that no consensual searches would be admissible, or, to put it another way, the right to be free of unreasonable searches could not be waived by an individual.⁹² This proposal is a natural conclusion to draw if one adopts the subjective binary “voluntariness” paradigm; if we believe that a consent is either “voluntary” or “involuntary,” then it is reasonable to argue that *any* amount of pressure or compulsion renders a consent involuntary and thus unconstitutional.⁹³

There is nothing wrong with such a requirement in principle, but in practice, it would result in a radical realignment in the balance between effective law enforcement

car after a request by a law enforcement officer. See Ilya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 *How L.J.* 349, 367–73 (2001). These numbers are supported by anecdotal evidence from police officers. For example, the officer in the most recent consent case to reach the Supreme Court testified that over the course of a year of conducting searches of luggage on bus sweeps (during which he may have carried out hundreds of searches), only “five or six” passengers had refused to give consent. *Drayton*, 536 U.S. at 198.

91. *Schneckloth*, 412 U.S. at 224 (1973) (citing Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 *COLUM. L. REV.* 62, 72–73 (1966)). The Court puts aside the “law school hypotheticals” of a defendant who is drugged or under hypnosis or otherwise completely robbed of the ability to exercise free will. *Id.*

92. Professor Marcy Strauss proposes this in a recent article. She concludes that (1) the current system is flawed, since no consent to search is truly voluntary, and (2) less drastic remedies to cure the system (such as requiring warnings and/or reintegrating a subjective element into the test) would be insufficient or too difficult to apply in practice. Thus, she argues that “eliminating consent” is the only viable solution. Strauss, *supra* note 9, at 238–71. Although I agree that no consensual search is truly voluntary, and that there is no remedy that will make consents completely voluntary, I disagree with her normative conclusion—that non-voluntary searches are *per se* unacceptable.

93. Some might argue that the Supreme Court has implicitly adopted the other natural conclusion of the binary paradigm—that almost no amount of pressure or compulsion will render a consent involuntary, since the individual still has a choice as to whether to consent.

and an individual's right to privacy, as it would take away an effective and extremely common tool used by law enforcement.⁹⁴ As a result, an unknown number of crimes would go undetected, and their perpetrators would go unapprehended. Of course, such a change would also likely prevent many inconvenient and at times humiliating warrantless searches of innocent individuals. Whether such a realignment would be beneficial to society is ultimately both an empirical and a political question: How many crimes (and what types of crimes) would go undetected? How many searches of innocents would be prevented? Would the trade-off be socially beneficial? Would it be politically feasible? For our purposes it is enough to note that such a change would require a dramatic restructuring of Fourth Amendment jurisprudence, as the Supreme Court has repeatedly and forcefully held that a person is able to waive his Fourth Amendment rights, and thus consensual searches are constitutional.⁹⁵

Furthermore, while abolishing consent searches is a natural conclusion to draw if one accepts the subjective binary paradigm, the policy makes much less sense if we reject the binary paradigm and adopt a more realistic and nuanced objective analysis that recognizes various levels and degrees of compulsion. It would be hard to argue that the application of even the smallest amount of pressure in requesting consent is unreasonable conduct by the police officer.

So if consent searches are permitted, then we are implicitly accepting some amount of compulsion on the part of the police officer in gaining that consent. On its face this is an uncomfortable concept to accept, but only because we have been conditioned by the "all or nothing" implication of the language used in the consent cases. To say we are accepting *some* amount of compulsion does not mean that the consent will be completely involuntary; it is merely an acknowledgement that almost any interaction with a police officer—especially one in which an individual might be convinced to give up a fundamental right—will unavoidably involve at least some small but significant amount of compulsion. By explicitly acknowledging this fact, we are not breaking new ground, since there is at least one other context—voluntary confessions—in which police are allowed to use a certain level of compulsion in order to persuade a suspect to waive his constitutional rights. As a first step in determining the constitutionally acceptable level of compulsion for consent searches, we will examine the rules and reasoning set down by the Supreme Court in the context of voluntary confessions.

94. See Brief of Amici Curiae Washington Legal Foundation and the Allied Educational Foundation in Support of Petitioner at 7–8, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01–631) (arguing that the practice of conducting bus sweeps reduces violent crime and deters would-be terrorists from targeting the public transportation system). *But see* Strauss, *supra* note 9, at 264–65 (conceding that there is no empirical evidence on the issue, but arguing that the number of productive searches that would be barred by eliminating consent would be small, since a law enforcement officer can still attempt to develop probable cause or engage in more "traditional" and "patient, detailed" police work in order to ascertain the guilt of the subject).

95. See, e.g., *Drayton*, 536 U.S. at 201 (2002); *Schneckloth*, 412 U.S. at 223 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Katz v. United States*, 389 U.S. 347, 358–59 (1967).

B. Miranda's True Revolution—Compulsion Without Involuntariness

The constitutionality and admissibility of confessions is controlled by *Miranda v. Arizona*,⁹⁶ perhaps the most famous criminal procedure case decided by the Supreme Court. *Miranda* is best known for imposing a blanket requirement upon all law enforcement officers to issue a set of warnings to defendants before engaging in custodial interrogation.⁹⁷ The Court deemed these warnings to be so simple and powerful that the Court warned that if the warnings were not given in future cases it would not even "pause to inquire in individual cases whether the defendant was aware of his rights"⁹⁸

But the truly radical part of the opinion came before this requirement. In order to establish the need for these warnings, the Court had to take two significant steps. The first was to hold that "compulsion" for the purposes of the Fifth Amendment encompassed more than just legal or physical compulsion.⁹⁹ By its plain meaning, the Fifth Amendment prohibits legal compulsion—that is, it prohibits the state from legally requiring that the defendant testify or give any statement either before or during a trial.¹⁰⁰ And many years before *Miranda*, the Court had taken the obvious step of holding that physical compulsion was also unconstitutional: interrogations were regulated by the voluntariness doctrine of the Due Process Clause, which had been established by a long line of case law that prohibited "compulsion"—torture or other extreme methods of interrogation—in acquiring a confession.¹⁰¹ Although the test

96. 384 U.S. 436 (1966).

97. *Id.* at 467–69.

98. *Id.* at 468.

99. The Fifth Amendment states in applicable part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. For a useful parsing of the *Miranda* case, see Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987). Professor Schulhofer divides the *Miranda* decision into three parts: (1) "informal pressure to speak" can constitute "compulsion" under the Fifth Amendment; (2) some element of informal compulsion is present in every instance of custodial interrogation; and (3) in order to lower the amount of informal compulsion to an acceptable level, law enforcement officials must deliver particularized warnings to the defendant before beginning the interrogation. *Id.* at 436. Schulhofer uses this tripartite categorization to defend *Miranda*, noting that the first two steps the Court took were merely interpreting the language of the Fifth Amendment and thus clearly an appropriate exercise of judicial authority. It is only the third step that could be classified as "legislative"—and yet conservative critics of *Miranda* fail to recognize that without that controversial step (which provides a simple "safe harbor" for law enforcement officials) applying the first two parts of *Miranda* would result in every custodial interrogation being constitutionally suspect. *Id.* at 453–54.

100. The self-incrimination clause of the Fifth Amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

101. It was this extensive body of law that *Schneckloth* first turned to when crafting its original test for voluntary confessions. *Schneckloth*, 412 U.S. at 223–27 (1973). Although *Schneckloth* was decided after *Miranda*, it turned to the pre-*Miranda* case law, which was grounded in the Due Process Clause of the Fifth and Fourteenth Amendments, rather than the stricter *Miranda* test, which was derived from the self-incrimination clause of the Fifth Amendment. Furthermore, the Court noted that *Miranda* specifically applied only to custodial interrogation, not "general on-the-scene questioning," and therefore the *Miranda* Court's

prohibited physical compulsion, it was otherwise quite permissive—as we saw from *Schneckloth*, a statement was “voluntary” as long as the subject’s will was not “overborne.”¹⁰² As applied in the pre-*Miranda* era, this permissive rule allowed for a wide variety of psychological pressures and tactics that clearly made the *Miranda* Court uncomfortable. The opinion contains a rather extraordinary ten pages detailing different interrogation techniques used by the police to pressure defendants into confessing.¹⁰³ The Court quotes directly from numerous police interrogation manuals, and sharply disapproves of the psychological attacks that investigators are trained to employ in order to extract confessions.¹⁰⁴ It concludes that these tricks, though they fall short of the physical torture prohibited by the pre-*Miranda* cases, “can operate very quickly to overbear the will” of a defendant in custody.¹⁰⁵

Thus, the Court held that “compulsion” for the purposes of the Fifth Amendment did not mean merely legal or physical compulsion; instead the Court acknowledged that law enforcement officials, in zealously pursuing their duty, were able to bring strong pressures to bear against a defendant—which by any meaningful definition of the word produced some amount of compulsion.¹⁰⁶ The Court then took the second important step: instead of simply ruling that any compulsion results in exclusion of the confession, it set out to devise a system to “cure” the compulsion.¹⁰⁷

The Court’s remedy was to craft its famous set of warnings and assert that unless the warnings were given to the defendant, any confession was *per se* unconstitutional.¹⁰⁸ The primary reason for these warnings was not to ensure that the defendant was aware

rationale (and stricter standards) was not applicable to requests for consent to search during the initial police/suspect interaction. *Id.* at 232.

102. *Id.* at 225–26.

103. *Miranda*, 384 U.S. at 447–56.

104. *Id.* For example, the Court describes police tactics such as using the “Mutt and Jeff” routine, which involves a “good cop” and a “bad cop”; making the defendant believe that his guilt is foregone conclusion by arranging an artificial line-up in which the witness is coached; implying that the defendant is making himself seem guilty by refusing to make a statement; and making a confession easier by sympathetically offering a number of justifications for the crime. *Id.*

105. *Id.* at 469. The Court also noted that “[T]he process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Id.* at 467.

106. *Miranda*, 384 U.S. at 457.

In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms In each of these cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

Id.

107. *Id.* at 479.

108. *Id.*

of his rights, though this was obviously an important consideration.¹⁰⁹ Even more important, according to the Court, was that the warnings would serve to “overcom[e] the inherent pressures of the interrogation atmosphere.”¹¹⁰ Even if the defendant is perfectly aware of his rights, the warning will demonstrate that the interrogator respects those rights and will recognize them if asserted.¹¹¹ Thus, the warnings—together with the pre-existing bars on physical abuse—serve to lower the level of compulsion to an acceptable level.

But what level of compulsion, if any, remains in the police/suspect interaction after *Miranda* warnings are given? There is language in the decision which implies that the Court believed the use of these warnings would remove all compulsion from the interrogation process, but this is hard to take at face value.¹¹² The *Miranda* Court was obviously aware of the extraordinary psychological pressures that law enforcement officials were able to bring to bear against suspects, and to suggest that reading off a series of warnings and notifications before interrogations would remove all compulsion from the encounter would be absurdly naive. Indeed, in the years since *Miranda*, law enforcement officials have continued to employ many of the same techniques disapproved of in the *Miranda* opinion, including isolating the suspect from his home and family,¹¹³ playing “good cop/bad cop” roles,¹¹⁴ and even claiming to have evidence of the defendant’s guilt that did not in fact exist.¹¹⁵ According to *Miranda*, these techniques are so powerful that if applied without the required warning, they could potentially “overbear the will” of the defendant, and yet the Court has accepted such

109. *Id.* at 468.

110. *Id.*

111. *Id.*

112. *See, e.g., id.* at 457 (“[Officers failed] to insure that the statements were *truly the product of free choice.*”) (emphasis added); *id.* at 469 (“Our aim is to assure that the individual’s right to choose between silence and speech *remains unfettered* throughout the interrogation process.”) (emphasis added); *id.* at 478 (“Any statement given freely and voluntarily *without any compelling influences* is, of course, admissible in evidence.”) (emphasis added).

Indeed, it is interesting to compare these seemingly naive absolutist statements from *Miranda* with similar statements in *Schneckloth*:

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, *no matter how subtly the coercion was applied*, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Schneckloth, 412 U.S. at 228 (emphasis added).

113. *See, e.g., Duckworth v. Eagan*, 492 U.S. 195 (1989) (defendant was arrested and read *Miranda* rights; he was then kept inside a cell for twenty-nine hours and read the *Miranda* warnings again, at which point he confessed).

114. *See, e.g., Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986) (detective played “good cop” by acting sympathetically to the defendant and opining that whoever committed the crime needed psychological help and not punishment).

115. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (in order to induce a confession, interrogator falsely told the defendant that his fingerprints were found at the scene).

tactics as long as they are accompanied by the required warnings.¹¹⁶ The Court must have been aware that there is virtually no such thing as a "completely voluntary" statement, acquired without any compelling pressures at all on the part of law enforcement. Even if such statements do exist, the *Miranda* case obviously allows the police to do more than sit back and wait for criminals to walk into the precinct and freely admit their crimes. In fact, the test does not determine whether the confession was completely voluntary or completely compelled, since almost all confessions fall in between those two extremes. Instead, the Court has implicitly held that giving the warnings lowers the level of compulsion in the interrogation context to an acceptable level.

Thus, *Miranda* in practice has established an intermediate, acceptable level of compulsion—a point on the scale of compulsion somewhere greater than wholly voluntary but somewhere less than wholly compelled. Of course, once the Court has established and accepted one such point, the conceptual leap has been made—compulsion is no longer an either/or proposition, but rather an element that is always present in every police/civilian interaction to some degree. In the case of voluntary confessions, the Court has used the mandatory *Miranda* warnings to set a very specific level of compulsion that is acceptable—but in other contexts, such as consensual searches, the acceptable level might be at a different point along the scale.¹¹⁷

Finally, it is important to note that the *Miranda* standard for the acceptable level of compulsion is derived from the Fifth Amendment's prohibition against self-incrimination. There is another, much lower, standard that existed before *Miranda* and which was derived from the Due Process Clause of the Fourteenth Amendment: if a confession was physically coerced or taken under circumstances which would make it unreliable, use of that confession in court would violate the Due Process Clause.¹¹⁸ This lower standard still exists today, so that even if police comply with *Miranda*, or even if *Miranda*'s higher standards do not apply (for example, if the state is using the confession to impeach the defendant), the state must still prove that its actions in obtaining the confession did not violate the Due Process Clause. In other words, a dual standard applies for the admissibility of confessions: if a confession does not meet the *Miranda* requirements it can still be admitted under certain circumstances (for

116. See *supra* notes 113–15 and accompanying text. Other acceptable tactics include planting an informant in the same cell as the defendant and having the informant extract a confession (*Illinois v. Perkins*, 496 U.S. 292 (1990)); staging a conversation between two officers in the presence of the defendant in order to elicit an incriminating comment from the defendant (*Rhode Island v. Innis*, 446 U.S. 291 (1980)); and conducting an interrogation of the defendant even after a third party had retained an attorney for the defendant, and after that attorney contacted the police and requested that they not question the defendant until the attorney was present (*Moran v. Burbine*, 475 U.S. 412 (1986)). For a scathing criticism of questionable police tactics in this area which have been upheld, see Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581–90, 599–600, 628–29 (1979).

117. As noted below, the Court has in fact decided that a higher level of compulsion is acceptable for consensual searches. See *infra* notes 128–37 and accompanying text.

118. This standard was first applied in *Brown v. Mississippi*, 297 U.S. 278, 282 (1936), in which the African-American defendants were whipped until they confessed to the crime. The Court held that allowing such a confession to be used in court was inconsistent with "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and therefore violated the Due Process Clause. *Id.* at 286.

example, if the defendant was not in custody at the time of the confession or if the statement is being used only to impeach the defendant); but if the confession is physically coerced or is otherwise totally involuntary, it fails to meet the Due Process standard and cannot be admitted under any circumstances.¹¹⁹

In the context of consensual searches, a similar dual standard has developed, although its application is by no means as transparent: the subjective “overborne will” test based on the Due Process Clause is still formally valid, while in practice the courts have turned to the “whether the reasonable person feels free to refuse” test based on the seizure doctrine in the Fourth Amendment.¹²⁰ Thus, in both the confession and the consent search contexts, the Court has historically derived the acceptable level of compulsion in the police/civilian interaction from the Due Process Clause, but has recently moved away from relying solely on the Due Process Clause to regulate police conduct in this area. Quite properly, it has developed its Fifth Amendment jurisprudence to set carefully the appropriate level of compulsion in confession cases, and it has (less explicitly) begun to apply the seizure rules of the Fourth Amendment to set the appropriate level of compulsion in consent search cases.¹²¹

Of course, even if the doctrines spring from different constitutional sources, they could still theoretically set the acceptable level of compulsion at the same point. In *Miranda*, the Court was faced with setting this point in the confession context, and it responded by requiring a set of warnings in order to lower the compulsion level of all interrogations to an acceptable level.¹²² But is this the right level for consent searches? The Court has concluded that the answer is no; consent searches should be easier to obtain than confessions, and thus society tolerates a higher level of compulsion in the consent search context than in the compelled confession context. To see why, we must

119. See *Mincey v. Arizona*, 437 U.S. 385, 397–98 (1978) (“[A]ny criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law”) (emphasis in original). See *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (noting that even in a case where *Miranda* rights are read to a suspect, the court must make an independent inquiry as to whether the interrogation technique renders the confession “involuntary”).

120. Compare *Florida v. Bostick*, 501 U.S. 429 (1991), with *United States v. Drayton*, 536 U.S. 194 (2002) (Souter, J., dissenting). But now perhaps *Drayton*’s majority opinion has swept away the unused subjective prong of *Schneekloth*.

121. This implicit allowance for some amount of compulsion in the consent search doctrine—in contrast to the explicit language of the test, which prohibits *any* compulsion—is acknowledged by Justice Breyer during the oral argument of the most recent consent case. In crafting a question to the defendants’ counsel, he noted:

[S]uppose I think for argument’s sake in many circumstances when policemen come up and question people, even if they say politely, are you willing to answer my questions or be searched, the person feels coerced. But the law still draws a line even if that’s fictional in reality. Very well. What’s the right line?

United States v. Drayton, 536 U.S. 194 (2002) (oral argument at 40), at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (last visited Nov. 1, 2004).

122. See *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

examine the differences between confessions and consent searches, and then leave the long-running analogy with the confession cases behind.

C. Imperfections in the Analogy Between Confessions and Consent

Schneckloth's original reference to the voluntariness analysis in confessions cases was understandable on a number of levels. On a practical level, the facts and circumstances surrounding defendants who are being interrogated or being asked to consent to search are similar. In both contexts, the police are asking the defendant to voluntarily do something that is contrary to the defendant's best interest,¹²³ and in both cases the evidence that is acquired by law enforcement is particularly powerful and persuasive.¹²⁴ Furthermore, both interrogations and requests for consent frequently occur in situations where law enforcement officers have the ability to use a significant amount of compulsion against the defendant. All of these practical elements combine to create a strong potential for abuse by law enforcement officials.

Beyond the common practical considerations, confessions and consensual searches appear at first to share a number of common doctrinal and policy questions. Doctrinally, both confessions and consensual searches involve a defendant agreeing to forgo a right guaranteed in the Bill of Rights,¹²⁵ and thus are controlled by the Due Process Clause. From a policy standpoint, *Schneckloth* correctly points out that the same competing concerns must be balanced in determining the validity of the government action: the legitimate need for confessions and searches, and the "equally important requirement" of ensuring that no police compulsion occurs.¹²⁶

Given these similarities, it was understandable that the *Schneckloth* Court turned to the confessions cases for guidance. It was even more understandable given the fact that the case law on voluntariness was far more developed in the confessions cases, with thirty different Supreme Court cases addressing the question between 1936 and 1964.¹²⁷ Unfortunately the policy questions underlying the need to ensure "voluntariness" in the two contexts are only superficially similar—and when the many differences are fully considered, they inevitably lead to a different analysis for consensual searches than is used for confessions.

Schneckloth itself acknowledged two of these differences. First, it noted that an innocent person who agrees to be searched might actually benefit by agreeing to the

123. It is, for example, inconceivable that a guilty defendant would either confess or consent to a search if the defendant had competent defense counsel present at the time he was asked to confess or consent.

124. *See, e.g., Miranda*, 384 U.S. at 466 (noting that a confession is "the most compelling possible evidence of guilt"). Likewise, if a defendant is found with contraband on his person, it is extremely difficult for him to prevail at trial—the only effective way to fight the case is to challenge the search itself.

125. The Supreme Court has cautioned against using the term "waiver," saying that it is "a vague term used for a great variety of purposes, good and bad." *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973) (quoting *Green v. United States*, 355 U.S. 184, 191 (1957)).

126. *Id.* at 227.

127. *Id.* at 223. The Court also turned to the coerced confession case law when it examined the meaning of the term "voluntary" in the context of guilty pleas. *See Brady v. United States*, 397 U.S. 742, 749 (1970).

search, since an unproductive search might convince the police of the subject's innocence, or at least preclude an arrest or a "far more extensive search" once a warrant is acquired.¹²⁸ Thus, "a search pursuant to consent may result in considerably less inconvenience for the subject of the search. . . ."¹²⁹ In contrast, an innocent person who is interrogated and gives a statement is unlikely to clear himself quite so effectively in the eyes of law enforcement, and thus derives little (if any) benefit from agreeing to give a statement.

The second difference mentioned by the Court is somewhat more controversial, and was described in relatively tortured terms. Essentially, the Court held that the right to remain silent was a "trial" right, rather than a "pretrial" right.¹³⁰ Saying that there was a "vast difference" between these two kinds of rights,¹³¹ the Court held that the principle of knowing and intelligent waivers which applied to trial rights did not apply in the case of pretrial rights. Therefore, law enforcement officials are not required to inform individuals of their right to refuse to consent to a search, though obviously such a requirement is required before custodial interrogation.¹³²

The Court cited two differences between custodial interrogations and consent searches to support this distinction between trial rights and pre-trial rights.¹³³ First, the protections of the Fourth Amendment have "nothing . . . to do with promoting the fair ascertainment of truth at a criminal trial."¹³⁴ In other words, regardless of whether the defendant's Fourth Amendment rights had been violated during the investigation, the fundamental truth-seeking function of the trial would be unaffected. The values underlying the Fourth Amendment—essentially, the right to security and privacy against police investigations—are no less important, but they do lead to different conclusions about the waiver rules. A defendant who waives his right to his own

128. *Schneekloth*, 412 U.S. at 228.

129. *Id.*

130. *See id.* at 236–45. "Trial" rights include the right to counsel during trial or during a guilty plea, the right to confrontation, the right to a jury trial, the right to a speedy trial, and the right to be free from double jeopardy. Since confessions essentially become "testimony" at trial, the Court held that Fifth Amendment rights were also "trial" rights. *See id.* at 236–38.

131. *See id.* at 241.

132. *See Miranda*, 384 U.S. at 478–79.

133. The Court mentioned two other distinctions between trial rights and Fourth Amendment rights, but the other distinctions do not apply to confessions. First, the Court explained that unlike trial rights, which carry a presumption against waiver, society has a strong interest in *encouraging* consent searches, since they "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." *Schneekloth*, 412 U.S. at 243. Because the same could be said for confessions (though not other trial rights), though, this observation does not point out any distinction between confessions and consent searches. The Court also noted that the waiver of most trial rights (such as the right to counsel or the right to a jury trial) requires a lengthy and detailed inquiry on the part of a neutral magistrate to ensure that the right is being waived knowingly and voluntarily. *Id.* at 243–45. Again, this highlights a difference between Fourth Amendment rights and other trial rights, but not the right against self-incrimination, which can be waived after a relatively brief set of warnings delivered by a law enforcement officer.

134. *Id.* at 242.

privacy affects only his own privacy; while a defendant who waives a "trial right" impacts the very legitimacy of the trial system.

The second reason the Court distinguished between trial rights and pre-trial rights was that, historically, Fourth Amendment rights were less well-protected in other contexts. For example, third parties with an interest in the property being searched can give consent for a search even if the individual who is the target of the search is not present.¹³⁵ Likewise, if a police officer reasonably believed he had probable cause to conduct a search (even if he did not), the search will be upheld.¹³⁶ These holdings would be unthinkable in the "trial rights" context—a third party could not possibly waive someone else's right to an attorney, and a police officer's good faith does not allow for an end run around the self-incrimination clause.¹³⁷ These differences further weaken the argument that a defendant must "knowingly and voluntarily" waive his Fourth Amendment right. In the Fourth Amendment context, the focus is on the reasonableness of the actions of the law enforcement official, not the subjective consent of the individual being searched.¹³⁸ In other words, while the Fourth Amendment allows "reasonable" searches, the Fifth Amendment does not allow for "reasonable" self-incrimination. An interrogation can only take place if the individual knowingly and voluntarily waives his right.¹³⁹

In addition to the two differences acknowledged in *Schneckloth*, there are at least two other important distinctions between confessions and consent searches. The first surrounds the need to ascertain true voluntariness in order to ensure reliability. In the context of evaluating confessions, the truthfulness of the statement itself is a primary concern, so examining the issue from the defendant's perspective is critical. If a defendant has been compelled to give a statement, her statement is far less likely to be accurate; thus, courts have good reason to want to ensure that the defendant did in fact make a voluntary statement. This consideration, however, does not apply to consent searches—even if an officer compels a defendant into consenting to be searched, the evidence that results from the search is just as reliable as if the consent were freely given. Of course, this does not mean that law enforcement officials should have unfettered rights to forcibly search anyone they choose, only that in crafting restrictions on their actions, we need be less concerned from a policy standpoint as to how much compulsion the defendant actually felt.

135. *Id.* at 245 (citing *Frazier v. Cupp*, 394 U.S. 731, 740 (1969)).

136. *Id.* at 245–46 (citing *Hill v. California*, 401 U.S. 797, 802–05 (1971)).

137. At least this was true at the time *Schneckloth* was decided. Since then, as we have seen, the Fifth Amendment voluntariness test has become more objective as well. See *Colorado v. Connelly*, 479 U.S. 157 (1986) (upholding the confession of a psychotic man whose inner voices "forced" him to confess because there was no improper conduct on the part of the police officer).

138. See *supra* text accompanying notes 36–76.

139. Compare U.S. CONST. amend. IV, with U.S. CONST. amend. V. This distinction is perfectly appropriate given the difference in language between the two Amendments: the Fourth Amendment prohibits only "unreasonable" searches and seizures, while the Fifth Amendment states in more unequivocal terms that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." As noted in *supra* text accompanying notes 72–73, Fourth Amendment jurisprudence has always had "reasonableness" as its basis.

The final, and equally important, difference involves the differing motivations of defendants that choose to cooperate with authorities in each context. Courts and commentators have set out five possible reasons why a defendant might decide to confess to a crime (assuming that the individual was not compelled): (1) she believes she will receive more lenient treatment from the police; (2) she wants to come clean and do the right thing; (3) she wishes to protect another person (guilty or innocent) who might otherwise be implicated; (4) she wants to justify or explain her actions (especially if the defendant does not believe that her actions were improper); and (5) she has been tricked or misled by the interrogator.¹⁴⁰

In contrast, a defendant (especially a guilty defendant) has a different set of potential motivations for giving consent to being searched—again, assuming there is no compulsion on the part of the law enforcement officer.¹⁴¹ A defendant might be motivated to consent to a search because: (1) the defendant may believe she will receive more lenient treatment through cooperation; (2) the defendant may believe that the contraband is so well-hidden that the police will not find it; (3) the defendant might not know or believe that she is doing anything illegal; (4) the defendant might assume she will be searched anyway (that she does not really have the right to refuse to be searched), and so consenting now will save time and inconvenience; and (5) the defendant may believe she can “bluff” the police—that is, if the defendant consents to search, the police will believe the defendant to be innocent and leave her alone.

In comparing the possible motivations a person might have to confess with the possible motivations a person might have to consent to a search, a number of general possible motivations ought to be considered. First, in both contexts, the motivations are not mutually exclusive of one another. In other words, a defendant may confess for a combination of reasons: because she wants to more fully explain her actions; because she wants to get the information off her chest; and because she believes that cooperating early-on will result in more favorable treatment. Likewise, a defendant may consent to be searched for a combination of reasons: because she believes that the police will find a way to search her anyway if she refuses; because she thinks that the police may conclude she is innocent if she agrees to a search; and because she believes that the contraband is so well-hidden that it will not be found.

More importantly, none of these motivations (or combination of motivations) is inconsistent with the additional motivation of police compulsion. A defendant might want to confess in order to come clean and perhaps receive more lenient treatment, but would be less likely to do so until pressured to do so by the police. Obviously, the presence of some amount of pressure from the police may not be in itself enough to make the statement involuntary; yet when combined with the other motivations that a

140. See *supra* text accompanying notes 113–116.

141. As we shall see at *infra* notes 169–82, the term “compulsion” can be applied broadly or narrowly, depending on the context. For the purposes of this discussion, I include under the “compulsion” category any “involuntary” reason—be it pressure applied by the law enforcement officer, or an uncontrolled and unconscious motivation that stems from within the individual. In Part III, *infra*, the Article also explains that there are many different forms of compulsion, and not all forms of “compulsion” or involuntary causation are negative. This Article intentionally refrains from adopting the term “coercion,” since that term carries a stronger negative connotation and implies that someone was forced to do something against his or her free will.

defendant might be feeling, it might be enough to push a defendant over the edge and confess.

Consent searches are somewhat different—not only would pressure by the police be a *possible* additional motivation (in addition to the five enumerated above), it is more or less a *necessary* additional motivation. In other words, none of the possible motivations to consent to a search would even exist if the police had not already asked the defendant for consent. Thus, it is conceivable (though admittedly unlikely) that an individual would come forward and truly “volunteer” to confess, for the first three reasons listed (leniency, desire to come clean, or to protect another); while it is more or less inconceivable that an individual would volunteer to be searched absent a direct police request.

The differences in motivations run somewhat deeper than this initial observation. For a moment, let us put ourselves in the position of a law enforcement officer attempting to extract a confession from a suspect. Applying direct pressure is unlikely to be effective, since the defendant is by definition in custody and well aware that he is likely to be charged with a crime if he confesses—and tactics that compel the defendant to the point where his will is completely overborne are barred by the courts.¹⁴² Rather, a police officer would likely play off any possible motivation the defendant might already have for wanting to confess—she would make promises (explicit or implicit) to go easy on the defendant if the defendant confessed; she would appeal to the defendant’s conscience and tell the defendant to come clean; she would implicitly threaten to arrest or interrogate others whom the defendant might care about; she would make the defendant feel that the defendant’s actions could somehow be explained and justified; or she might try to trick the defendant into believing that it was in the defendant’s best interest to confess.

By contrast, consider a law enforcement officer that is attempting to convince a subject to consent to a search. As with obtaining confessions, outright compulsion through violence or threats of violence is impermissible.¹⁴³ But lesser forms of pressure are more likely to be effective—the defendant is not in custody and the investigation is at a much earlier stage, so the subject is unlikely to be fully aware of the consequences of consenting to a search, even if he or she is carrying contraband. And not only is external pressure more likely to be effective, it might be the only thing that is effective, since it would be difficult for a law enforcement official to exploit any “natural” tendency a subject might have for giving consent. A promise of leniency once charges are filed is only likely to make the defendant more aware of the dire consequences of consenting. There is no way to encourage a defendant in his belief that the contraband is too well hidden to be found; that the items he is carrying are not really contraband; or that a consent will convince the law enforcement official of innocence. A law enforcement official could conceivably encourage a subject’s belief that he will be searched anyway, and so the subject might as well consent now, but this would consist

142. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (holding in a pre-*Miranda* confession case, that the Due Process Clause will nullify a confession if the defendant’s “will has been overborne and his capacity for self-determination critically impaired”).

143. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (adopting the due process confession test from *Culombe* and applying it to the consent search context).

mainly of convincing a subject that a search is inevitable; in other words, that the subject had no real right to refuse to be searched.

Thus, a brief survey of possible motivations on the part of the defendants and the possibility of exploiting these motivations on the part of law enforcement officials leads to another difference between obtaining confessions and obtaining consent: subtle pressure is more likely to work in obtaining consent to search than in obtaining a confession, while other more "voluntary" avenues of persuasion that can be used in the confession context are unavailable in the consent search context. Furthermore, these subtle pressures are necessary in order to obtain consent to search, since a guilty defendant is unlikely to have any internal motivation to consent, while a guilty defendant may have a number of internal motivations to explain or admit his actions in a confession context.

In summary, there are a number of significant differences between custodial confessions and consensual searches: innocent individuals can benefit from consenting to search; a waiver of Fourth Amendment rights does not impact the integrity of the trial itself; Fourth Amendment rights can be waived by a third party with an interest in the property being searched; the reliability of the results of a consensual search are unaffected by the validity of the waiver; and finally, the motivations to consent to a search absent police pressure are weaker than the motivations to confess. Together these differences point towards a different calculus in determining what police tactics are acceptable in the consent search context. The Supreme Court already acknowledged this in *Schneckloth*, of course, when it refused to require warnings before a valid consent could be given.¹⁴⁴ The reasoning behind this refusal involved important policy considerations which argue for law enforcement officers to receive more leeway in asking for consent than they are granted in the custodial confession context; in other words, we should be willing to accept a somewhat higher level of compulsion in the consensual search context than in the confessions context.

D. Psychological Research into Forms of Compulsion

Although policy considerations may lead us to permit a higher level of compulsion for police officers attempting to gain consent to search, one aspect of the equation still remains unaccounted for: the reaction of the subject of the search herself. Although we are not interested in the subjective state of mind of the specific individual in any given case, it would be useful to know how individuals react in general to requests by authority figures. If we are concerned with the "appropriate" level of compulsion, it would assist us if we knew how much compulsion is inherent in the average police/citizen encounter. Indeed, it is the failure to consider this question that lies at the heart of most of the criticism of the current consent search doctrine.¹⁴⁵ The most frequent criticism of the consent search cases is that the Supreme Court is unaware of the realities on the street, where any time a police officer requests something of a

144. *See id.* at 236-45.

145. *See, e.g.,* United States v. Drayton, 536 U.S. 194, 208-12 (Souter, J., dissenting) (arguing that the majority opinion had an "air of unreality" about it, and that "no reasonable passenger could have believed" that he would lose nothing by not consenting to the search).

civilian, however innocently and politely, the civilian will feel a large amount of compulsion to comply.¹⁴⁶

Although the criticisms may or may not be accurate, they fairly point out a glaring leap in reasoning made by the Court in evaluating police/citizen encounters. The Supreme Court's discussions and holdings in *Schneckloth* and *Miranda* made certain assumptions about human nature and drew specific conclusions about the effect of certain law enforcement behavior on individuals. For example, the *Schneckloth* Court listed seven potential subjective and objective factors to consider in determining whether a defendant's will was "overborne," including the defendant's lack of education, the length of the detention, and whether he was advised of his rights.¹⁴⁷ Although intuitively these factors do seem to be relevant to the voluntariness of the suspect's consent, there is no actual evidence to show that, say, someone with less education is easier to pressure into consenting than someone who is well-educated. And even if all of these factors do bear on the actual voluntariness of the consent, surely they do not all have equally compelling effects; yet the Court sets them all out without inquiring as to which may be more or less significant in "overbearing the will" of the suspect. For its part, the *Miranda* Court assumed that "in-custody interrogation" contained "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."¹⁴⁸ The *Miranda* Court then went on to presume that adding the warnings would reduce the pressure to speak to an acceptable level, "permit[ing] a full opportunity to exercise the privilege against self-incrimination"¹⁴⁹ But in neither case did the Court consider any actual psychological data on the question of compulsion or obedience to authority.

One way to test that intuitive belief about the "reasonable person" and also to define the concept of "voluntariness" more accurately and honestly is to turn to the field of psychology. Although courts have yet to do this, a few legal scholars have applied various psychological experiments to the question of consent searches, and without exception they have concluded that the studies provide evidence that most of the "consents" approved of by the Supreme Court are in fact involuntary.¹⁵⁰ As we shall see, however, the evidence provided by these studies is not really applicable to the consent search context, since the relationship between the experiments and the fact

146. Whereas this Article advocates abandoning the subjective prong of the test completely, there is a small but growing body of commentary that argues for a complete rethinking of the consent search doctrine—not to make it more objective, but to revive the subjectivity prong and focus on whether the subjects of these searches are voluntarily consenting. These critics quite properly turn to psychological studies on coercion and obedience to authority for guidance as to what actions on the part of the police may make consent "involuntary." See *infra* note 167.

147. *Schneckloth*, 412 U.S. at 226. Other factors were the low intelligence of the suspect, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id.* These seven non-exclusive factors included both subjective and objective considerations, though as we have seen, the subjective factors have fallen into disuse.

148. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

149. *Id.*

150. See *infra* text accompanying note 166.

patterns of most consent searches is quite tenuous. However, the field of psychology does ultimately help us to understand the question of compulsion, and we will return to it in Part III to assist us in providing a more nuanced and accurate description of the different kinds of compulsion.

1. Milgram: The Obedience Experiments

Any discussion of obedience to authority literature in psychology must start with the groundbreaking Milgram experiments of the early 1960s. These are the experiments that have been most often cited by numerous legal scholars as evidence that the consents allowed by the Supreme Court are illusory.¹⁵¹ However, although the experiments are useful in defining some of the parameters of voluntariness and compulsion, this Article will argue that their application to the question of consent searches is too indirect to be of any use in setting the appropriate level of compulsion for consent searches.

In the early 1960s Professor Stanley Milgram conducted a series of landmark experiments at Yale University that investigated the nature of individual obedience to authority.¹⁵² The subject of the experiment was told that he or she was assisting in an experiment on how learning patterns are affected by negative reinforcement. To this end, the subject met with the experimenter and a "learner" who was actually a confederate in the experiment. The subject was put into the role of the teacher, and the experimenter instructed the subject to "teach" the learner random word pairs and administer electric shocks to the learner if the word pairs were not learned properly.¹⁵³

Professor Milgram ran through many permutations of the experiment, but the basic setup involved sitting the subject in front of an impressive-looking machine with a series of thirty switches, labeled from "15 volts" to "450 volts" in fifteen volt increments. The switches were also labeled with verbal descriptors, such as "Slight Shock," "Moderate Shock," and—for the second-to-the-last group of switches—"Danger: Severe Shock." The last group of switches was merely labeled with "XXX."¹⁵⁴ The learner—whom the subject believed was another volunteer off the street like herself—was strapped to a chair and hooked up to the "shock generator."¹⁵⁵ The experimenter would instruct the subject to read off the word pairs to the learner and provide a shock if the learner gave an incorrect response. The experimenter also instructed the learner to increase the level of intensity for every incorrect answer. After the shocks reached a certain level of intensity, the learner (who was of course not really being shocked) would begin to protest mildly, then protest vigorously, and ultimately scream that he wanted to be released from the experiment.¹⁵⁶

The Milgram experiments were remarkable in that they produced a clear, unambiguous set of data about how individuals react that was completely contrary to

151. *See infra* note 167.

152. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW at xv (1974).

153. *Id.* at 16–22.

154. *Id.* at 20.

155. *Id.* at 19.

156. *Id.* at 19–23. In most variations, as the shocks approach the maximum intensity the learner simply falls silent, as though he has lapsed into unconsciousness. *Id.* at 23.

how individuals *believed* they would react.¹⁵⁷ Indeed, the willingness of subjects to follow the "authority" of the experimenter in administering greater and greater shocks surprised even the psychologists who designed the experiment.¹⁵⁸ When the experiment was described to individuals who had not been subjects, most predicted that they would disobey the experimenter and cease giving shocks to the learner before the tenth shock—that is, a third of the way through the experiment. Every individual who was polled predicted that they would call off the experiment at or before the twentieth shock.

In reality, only small numbers of subjects refused to obey the experimenter before the twentieth level of shock.¹⁵⁹ In fact, twenty-five out of forty subjects continued to obey the experimenter right up to the end of the experiment—long after the screaming learner had lapsed into an ominous silence—administering three "shocks" at 450 volts before the experimenter told them they could stop.¹⁶⁰ The level of obedience dropped slightly when the learner was present in the room with the subject, but 40% of the subjects still followed through to the end of the experiment, even with the learner writhing in pain a few feet away.¹⁶¹

Professor Milgram ran eighteen different variations of the experiment—changing the proximity of the learner to the subject,¹⁶² for example, or portraying the learner as a man with a heart condition.¹⁶³ In one especially telling alteration, the roles were reversed so that the scientist/authority figure became the learner being shocked and the other "volunteer" off the street gave the orders to continue. When the learner/authority figure asked for the experiment to be called off after the tenth shock, every single subject obeyed, regardless of how vehemently the other volunteer ordered the subject to continue.¹⁶⁴ Professor Milgram's reasonable conclusion from this and other permutations is that: "The decisive factor is the response to authority, rather than the response to the particular order to administer shocks. Orders originating outside of authority lose all force."¹⁶⁵

157. *See id.* at 27.

158. *Id.* at 22. Professor Milgram and his colleagues originally designed the experiment with no verbal feedback from the victim, but under these circumstances "virtually every subject" readily advanced to the strongest level of shock. The experiment had to be redesigned a number of times—with greater and greater intensity of protests—before a statistically useful number of subjects were willing to disobey the experimenter. As Professor Milgram writes, this difficulty indicated that "subjects would obey authority to a greater extent than we had supposed." *Id.* (emphasis omitted).

159. Only ten out of forty subjects broke off the experiment before the twenty-first shock in the "Voice-Feedback" permutation experiment. In cases where there was no verbal feedback from the learner—that is, the subject could not hear the learner protesting—no subject broke off before the twenty-first shock. *Id.* at 35.

160. *Id.*

161. *Id.* at 34–35.

162. *Id.* at 34–36.

163. *Id.* at 55–57.

164. *Id.* at 99–104.

165. *Id.* at 104.

Over the past thirteen years, a number of articles have critiqued *Schneckloth* in light of the Milgram experiments¹⁶⁶—and without exception these articles have concluded that these experiments tend to prove that many “consents” which are approved by the courts are not truly voluntary.¹⁶⁷ For example, one author writes that “Professor Milgram and his adherents likely would agree that [bus searches] present a situation . . . which lead[s] to consents to search based more on obedience to authority than true voluntariness.”¹⁶⁸

Although the Milgram experiments provided especially dramatic (and chilling) evidence of people’s willingness to obey authority, one cannot ignore the critical differences between Milgram’s laboratory experiments and consent searches. On the one hand, the “authority figure” in the experiments was quite a bit weaker than a police officer: orders were given by an unidentified “experimenter” who was wearing a gray suit. A police officer wearing a uniform (and a gun) would no doubt engender even more tendency to obey.¹⁶⁹ And in the experiments it is made quite clear that the result

166. Although the Milgram experiments predated the *Schneckloth* decision by ten years, and Milgram’s book came out almost contemporaneously with the decision, legal scholars did not begin applying obedience theory to consent searches until the early 1990s.

167. See, e.g., Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 364–65 (2001) (arguing that some of Milgram’s experiments support the contention that subjects who consent to searches are responding to coercive “social power” of the authority, not “legitimate power” which is supported by legal authority); Nadler, *supra* note 9, at 175–77 (conceding there are “obvious differences” between Milgram’s studies and consensual searches during bus sweeps, but concluding that the experiments support the theory that authority leads to coercion since in each case “people are coerced to comply when they would prefer to refuse” due to the “symbols of authority” that are present); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 187–89 (1991) (acknowledging that it is “risky” to apply Milgram’s experiment to consent searches, but nevertheless concluding that Milgram demonstrates that “police authority” is the main reason that individuals consent to searches); Strauss, *supra* note 9, at 236–41 (using Milgram’s experiments as evidence that individuals are likely to obey a “request” made by authorities even if they are likely to be harmed by complying); 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 (1997) (arguing that Milgram’s experiments demonstrate that individuals obey legitimate authority “to an extraordinary degree;” thus challenging *Schneckloth*’s premise that psychological coercion is only significant in a custodial context); Dennis J. Callahan, Note, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefield in the War on Drugs*, 43 WM. & MARY L. REV. 365, 407–15 (2001) (using the Milgram experiments as evidence that individuals have difficulty defying authority in the context of a bus search, and proposing a *Miranda*-like warning to reduce the coercive effects); Jeremy R. Jehangiri, Student Article, *United States v. Drayton: “Attention Passengers, All Carry-On Baggage and Constitutional Protections are Checked in the Terminal*, 48 S.D. L. REV. 104, 126–27 (2003) (using Milgram’s experiments as evidence of the “coercive effects” of suspicionless bus searches).

168. Note, Callahan, *supra* note 167, at 415. See also Rotenberg, *supra* note 167, at 193 (“Both law and psychology point to the same conclusion—consent in reality is consentless.”); Note, Jehangiri, *supra* note 167, at 127 (“Milgram’s experiment correlates with the difficulty of bus passengers to defy police officers and authority altogether, especially when in the tight confines of a bus.”).

169. See, e.g., Rotenberg, *supra* note 167, at 188 n.63.

of the subject's action is to cause immediate and direct harm to another individual. An individual who consents to a search may not immediately process the long-term ramifications of giving consent. These two considerations would lead one to conclude that individuals who are asked for consent to search are in fact even *more* likely to submit to authority than the subjects in Milgram's experiments.

On the other hand, there are differences that would tend to make an individual approached to be searched *less* obedient than subjects in the experiment. For example, Milgram's subjects were harming a third party, while guilty individuals who consent to searches are harming themselves. It is possible (though no doubt disturbing) that individuals are more willing to comply when an authority figure instructs them to harm another individual than when an authority figure instructs them to harm themselves.¹⁷⁰ In other words, if in Milgram's experiment the subjects were assigned to be learners and told to apply the shocks to their own bodies when an incorrect answer was given, the obedience rates might (or might not) have been much lower.

Furthermore, there is the obvious difference that Milgram's experiments involved an *order* by the authority figure, while consent searches by definition involve a *request*. This distinction is acknowledged by most of the legal scholarship, though the authors argue that the distinction is trivial, since a "request" by a police officer will tend to sound like an order (especially if police are trained to make it sound that way), and also that many individuals will assume that the police will conduct the search whether or not consent is given.¹⁷¹ But this argument overlooks the actual details of the Milgram experiment—specifically, the statements made by the experimenter, the high level of tension felt by the subjects, and the verbal protests made by the subjects.

In the Milgram experiments, when a subject balked or objected to the experiment, the authority figure was to give a series of "prods," escalating in severity: (1) "Please continue;" (2) "The experiment requires that you continue;" (3) "It is absolutely essential that you continue;" and (4) "You have no other choice, you *must* go on."¹⁷² This phrasing conveys a very different message from "Would you mind if I looked through your car," regardless of the tone and demeanor of a police officer. And although the consent search jurisprudence allows officers quite a bit of leeway in asking for consent, it is consistent in holding that a police officer may not tell a suspect

170. Psychologists have attempted to devise experiments to see if obedience rates would be different if the subject believed he was harming himself. Obedience rates remained high; however, the conditions of the experiments were different in significant ways from Milgram's conditions. See, e.g., J. Martin et al., *Obedience Under Conditions Demanding Self-Immolation*, 29 HUM. REL. 345-56 (1976) (differing from Milgram's conditions in that the subjects were all schoolchildren aged thirteen and fourteen, and the students' regular teacher (a legitimate authority) introduced the experimenter to the students).

171. See, e.g., Rotenberg, *supra* note 167, at 188 n.63; Strauss, *supra* note 9, at 240-44 (citing Peter Tiersma, a professor of linguistics, for the proposition that "[w]hen a person in a position of power makes what is literally a request to a subordinate . . . the request will be interpreted as a command.").

172. MILGRAM, *supra* note 152, at 21 (emphasis in original). If the subject asked or complained about the injury to the learner, the experimenter replied: "Although the shocks may be painful, there is no permanent tissue damage, so please go on." If the subject pointed out that the learner did not wish to continue, the experimenter replied: "Whether the learner likes it or not, you must go on until he has learned all the word pairs correctly. So please go on." *Id.* at 21-22.

that he is required to submit to the search and can never order or command the suspect.¹⁷³ There is no question that if a police officer told a suspect, "The law requires that you allow me to search," or, "You have no other choice, you *must* allow me to search your bag," the consent would be deemed involuntary. Because Milgram relied upon this kind of language to get his extraordinarily high obedience rates, the application of his results to consent searches is tenuous.

The difference is highlighted by the responses by the subjects in the experiments: Milgram reports that the subjects were "frequently in an agitated state"¹⁷⁴ and that the experimenters observed "striking reactions of emotional strain."¹⁷⁵ In fact, Professor Milgram asked some of the subjects to rate their level of tension afterwards, and the vast majority of respondents responded somewhere between "moderately tense" and "extremely tense."¹⁷⁶ The internal conflict felt by the subjects is reflected in the verbal protests made by many of the subjects who obeyed. Although Professor Milgram does not quantify the number of subjects who voice a protest, he prints a number of them as case studies, as they tend to dramatically show how the subjects obey authority even though they feel they are doing the wrong thing. One subject objected or tried to convince the experimenter to stop twenty times during the course of the experiment,¹⁷⁷ exhibiting far more resistance than would be allowed by courts evaluating a consent search.¹⁷⁸ Other subjects repeatedly asked if they should continue, and were told that they must.¹⁷⁹

Since the number of individuals who verbally protested and were subsequently ordered to obey was not recorded, it is difficult to know how significant the phrasing of the order actually was in attaining obedience. To put it another way, if the experimenter in Milgram's experiments had not given orders but rather asked: "Would you mind continuing the experiment please?" or, "Would you apply the shock, please?" the results might easily have been different. If the experimenter were prevented (as law enforcement officers are) from giving a direct command, obedience rates may have been much lower—especially given the high level of tension and protests on the part of the subjects. It is worth noting that changing other aspects of the

173. See, e.g., *United States v. Drayton*, 536 U.S. 194, 206 (2002)

Nothing Officer Lang said indicated a command to consent to the search. . . . Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.

Id.

174. MILGRAM, *supra* note 152, at 33.

175. *Id.* at 41.

176. *Id.* at 41–42.

177. See *id.* at 73–76.

178. Once a subject has refused to allow a law enforcement officer to conduct the search, the mere fact of refusal cannot be used to support a probable cause determination to justify a search. See *United States v. Wilson*, 953 F.2d 116, 125–26 (4th Cir. 1991).

179. For example, one subject turns to the experimenter and asks, "Must I go on? Oh, I'm worried about him. Are we going all the way up there . . . ? Can't we stop? I'm shaking. I'm shaking. Do I have to go up there?" MILGRAM, *supra* note 152, at 80. Many others showed concern and repeatedly asked the experimenter if it was safe to continue. See, e.g., *id.* at 77, 86.

experiment—the proximity of the learner, for example, or whether the experimenter was present in the room or giving orders by telephone—had dramatic impacts on the rates of obedience.¹⁸⁰

Critics of the consent search doctrine could argue first that it might *not* have made any difference, and second that, even if it did, applying severely painful shocks is a more difficult thing to do than merely consenting to a request to search. But both of these arguments are only conjecture; they merely serve to underscore the fact that the obedience experiments, while superficially similar to the dilemma of consent searches, are not in fact a very good fit.

In the end, it seems likely that scholars have seized upon the obedience experiments to explain what otherwise seems to be an unfathomable phenomenon: Why would a rational individual carrying contraband agree to be searched?¹⁸¹ But in doing so they fall victim to the binary thinking that is encouraged by the Court's current terminology—they tend to see the encounter as either "voluntary" or "involuntary." Since no rational person would voluntarily give consent, they must be doing so "involuntarily." The Milgram experiments—however poor the fit between the experimental conditions and the circumstances of a consent search—provide a convenient authority to explain how these actions are actually involuntary.

As noted above, the truth is probably a lot more complicated. An individual may have many reasons for consenting to a search—just as they may have many reasons for giving a confession. One of those reasons would be the pressure they feel to comply with an authority figure. But the mere existence of this pressure (which will always exist to some degree in any police-civilian encounter) does not in itself make the consent involuntary. It makes it *less* voluntary than it otherwise would be—how much less depends on how much pressure was applied, as well as how predisposed the individual may have been to consent without the pressure.

In summary, Milgram's experiments are not very useful in helping us assign the appropriate level of police pressure in the context of consent searches. Many of those that obeyed protested vigorously; all did so knowing full well the results of their actions. Compliance was never based on a misunderstanding of the subject's legal rights or the authority figure's intentions. Most of all, Milgram—who was attempting to determine why individuals obey orders to commit atrocities like the Holocaust or the My Lai massacre¹⁸²—was studying obedience to orders, not to requests. Thus, the application of his work to the area of consent searches is problematic at best.

180. For example, subjects who only heard the learner's voice complaining obeyed 62.5% of the time, while subjects who had to touch the learner during the experiment obeyed only 30% of the time. *Id.* at 35. More significantly, if the experimenter/authority figure was out of the room and communicating by telephone, the obedience rates dropped from 62.5% to 20.5%. *Id.* at 60.

181. *See, e.g.*, Strauss, *supra* note 9, at 211–12. Professor Strauss begins her article with this question and answers it by concluding that most people do not willingly consent. *See also* Rotenberg, *supra* note 167, at 187–88.

182. *See* MILGRAM, *supra* note 152, at 1–2, 188–89.

2. Bickman: Obedience to a Uniform

Further psychological study in obedience theory has moved beyond Milgram's work into circumstances which might be more analogous to the consent search area. A decade after Milgram's experiments, Professor Leonard Bickman crafted an experiment which examined how obedience rates varied based on the uniform being worn by the individual giving the order.¹⁸³ The experimenter stood on a street in Brooklyn dressed either as a civilian (sports jacket and tie), a milkman (white uniform with a milkman's basket), or a guard (police-type uniform with badge, but no gun).¹⁸⁴ The experimenter approached a pedestrian on the sidewalk and told the subject to do one of three things: pick up a bag from the ground; give a dime to an individual standing next to a parking meter,¹⁸⁵ or move and stand in a different location.¹⁸⁶ Unfortunately for our purposes, the authority figure gave direct orders, in some ways even more explicitly than the experimenter in Milgram's experiments; for example, "Pick up this bag for me!" and "Give him a dime!"¹⁸⁷ However, the presence of the guard uniform when compared to the civilian uniform, provides a better indication of how compliance rates might be affected by the authority of a police officer.

As in Milgram's experiments, compliance rates were quite high, and significantly, they were much higher for the guard than for the other two. For example, 33% of the individuals gave the dime to a stranger when ordered to do so by a civilian, while 89% complied when ordered by a person in security guard uniform; 20% of the civilians moved away from the bus stop when told to do so by a civilian, while 56% complied when the command came from the security guard.¹⁸⁸ In short, the presence of the uniform increased compliance rates between 36% and 56%, depending on the task involved.

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

184. *Id.* at 49.

185. The year was 1974, so a dime was apparently sufficient for a parking meter, even in New York.

186. *Id.* at 50. The first two requests were made of pedestrians who were walking by the experimenter; the third was made of pedestrians who were standing at a bus stop.

187. *Id.* In all three cases, if the subject did not immediately comply, the experimenter would provide some explanation for why the subject should comply. In the case of the paper bag, the experimenter explained that he had a bad back and could not pick up the bag himself. In the case of the parking meter, he explained that he had no change. In the case of the bus stop, the experimenter would point to a sign at the bus stop which said "No Standing"—which applied, of course, to cars—and the experimenter would tell the subject "Don't you know you have to stand on the other side of the pole? The sign says 'No Standing'." If the subject did not comply immediately, the experimenter would further explain "Then the bus won't stop here, it's a new law." *Id.* Unsurprisingly, given the oddity of this request and explanation—and the fact that most New Yorkers know that such a sign does not apply to pedestrians—the bus stop scenario had the lowest level of compliance out of the three requests. *Id.* at 51–52.

188. *Id.* at 51. Oddly enough, the milkman uniform gained significantly higher compliance rates than the civilian for picking up the bag or giving the dime (64% versus 36% and 57% versus 33%, respectively), but was statistically about the same as the civilian for moving away from the bus stop. *Id.*

At first this finding seems to merely confirm one intuitive belief that many of us have: people are much more likely to obey a police officer (or at least a figure who looks like a police officer) than a civilian. Indeed, a few legal commentators have used the Bickman experiments to posit that the mere existence of a uniform has a "compelling" effect on people, causing at least some of them to obey (or give consent to search) when otherwise they would not have.¹⁸⁹ Thus, these scholars argue that the Bickman experiments provide further evidence that the Supreme Court's view of voluntariness is naïve—a uniform alone has some compelling impact, they argue, and when combined with actual legal authority, and the standard pressuring tactics that a police officer will use (tone of voice, body language), the impact on voluntariness is severe, and yet remains unacknowledged by the courts. When combined with the Milgram experiments, the Bickman study completes a persuasive combination of psychological evidence that the current rules of consent are misguided.¹⁹⁰

But once again it is necessary to look a little closer at the results of the experiments. It is true that the subjects in Bickman's experiments showed a greater rate of obedience to an individual in a uniform—a jump of about 45% on average. But the significant aspect of this result is that this extra obedience did *not* flow from the subject's belief that she legally *must* obey the requester. The subjects in Bickman's experiments were under no illusions that the law required them to comply, or that they would suffer negative consequences (other than the disapproval of the requester) for not obeying.¹⁹¹

In other words, the extra 45% of individuals who obeyed is the extra amount of persuasive or compelling power that a uniform has *in the absence of actual authority*. A police officer that requests consent for a search has both the persuasive power of the uniform and actual or perceived authority. He has the actual authority to legally require the subject to do certain things, such as the authority to order the subject to desist from disorderly conduct, or keep her hands in plain view during the interaction. He has the perceived authority to do even more, since most individuals are unaware of the scope of a police officer's authority during an initial interaction. Some individuals, for example, may believe that they are legally required to submit to a search, and that the officer is only asking out of courtesy. Finally, the police officer has the ability to arrest or detain the subject if she does not submit to that authority. For now, we will label all compelling pressures that are based on actual or perceived authority "formal influences." The Bickman experiments only measured compelling pressures that were *not* based on actual or perceived authority; that is, non-formal influences. The

189. See, e.g., Strauss, *supra* note 9, at 240; Barrio, *supra* note 167, at 240 (concluding that the guard's uniform in the Bickman study created an "almost hypnotic power" over the experimental subjects).

190. See Strauss, *supra* note 9, at 240 (arguing that Milgram and Bickman prove that individuals "automatically comply with authority figures' demands").

191. This conclusion is further supported by a later study which replicated Bickman's experiment using a fireman as the authority figure—an individual with arguably even less actual authority than a security guard. Compliance rates for the fireman in the more recent study were almost identical to the compliance rates for the security guard (89% for the guard and 82% for the fireman), and in both cases there was a significant difference between the compliance rates in response to the non-uniformed civilian and the uniformed individual. See Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 502–06 (1984).

experiments are useful because they were able to isolate (albeit imperfectly) and then measure the instances that individuals obeyed feel simply because they felt it was important to obey a person in uniform, not because they believed they would be punished or were legally required to obey.¹⁹² We will return to these differences in types of compulsion in Part III.

We have seen in Part I that the consent search doctrine should be (and in practice already is) an objective inquiry into the reasonableness of the police officer's actions, not a subjective inquiry into the state of mind of the subject. In Part II we have seen that compulsion should not be thought of in binary terms, but rather on a continuum or spectrum, because every interaction between police and civilians will involve some amount of compulsion. The Supreme Court has already acknowledged this fact in the confessions context, and has set the appropriate level of compulsion with the *Miranda* test. However, there are significant policy differences between confessions and consent searches, and they all lead to the conclusion that we should be willing to accept a higher level of compulsion for consent searches. Finally, we have examined the psychological research on obedience to authority and concluded that it is of little use in providing us with guidance as to how much compulsion is appropriate for consent searches.

The question still remains: what amount of compulsion is permissible for consent searches? As it turns out, this question is still too simplistic to address the complex social interaction that occurs when a law enforcement official requests permission to conduct a search. In order to fully understand this interaction and to answer the question about the appropriate level of compulsion, we need to consider the third factor in the new paradigm: the different types of compulsion that might be at work when a police officer asks for consent to conduct a search.

III. DIFFERENT TYPES OF COMPULSION

The Bickman experiments are the first step in breaking down the concept of "compulsion" and differentiating between the different types. The next step is to complete the dissection and differentiation of the concept and evaluate whether some forms of compulsion are more favored than others. Once we understand the mechanics of compulsion more clearly, we can return to the question of where to set the line on our spectrum of compulsion for consent searches.

192. Of course, like the Milgram experiments, the Bickman experiments have many significant differences from the consent search context—the subject is ordered rather than commanded, and in no case is the action ordered as inconvenient or potentially inculpatory as consenting to a search. This makes the Bickman experiments—like the Milgram experiments—tenuous as direct evidence of how much "compulsion" exists when a police officer requests a civilian to consent to a search, and thus provides only weak support to scholars who use it to attack the current consent search doctrine. However, for our purposes—that is, to isolate and at least crudely quantify the non-authority influences of a uniform—the differences between the experimental details and the consent search scenarios are less important. What is important is seeing that there are significant differences in compliance rates even when there is no real authority at work.

A. French and Raven: A More Complex View of Obedience

As psychologists have revisited and reconsidered the obedience experiments, they have tried to understand *why* Milgram and Bickman see such high obedience rates in their subjects. One review of the obedience experiments¹⁹³ applied a classification system developed by French and Raven,¹⁹⁴ which breaks social power down into six different categories. The following categories are theoretically applicable to any situation in which one individual (the "authority") exerts influence over another.¹⁹⁵

Reward power is based on a belief that the authority will reward obedience by the subject;

Coercive power is the opposite: compliance based on a belief that non-obedience will result in the authority punishing the subject;

Obligatory power is based on a belief that the authority has the legal or societally derived right to prescribe behavior;¹⁹⁶

Referent power is based on identification with the authority figure and a desire to be like him or her;

Expert power is based on a belief that the authority has specialized knowledge related to the command given;¹⁹⁷

Informational power is influence of behavior based on new information that the authority figure gives to the subject. Unlike the previous five categories, it is not rooted in the authority figure as a person, but rather on the content of the information given to the subject during the interaction.¹⁹⁸

193. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J. APPLIED SOC. PSYCHOL. 955, 962 (1999). Professor Bickman based his "uniform" experiments on the French and Raven system as well.

194. J.R.P. French, Jr. & B. Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150–67 (Dorwin Cartwright ed., 1959).

195. *Id.*

196. French and Raven term this category "legitimate" power; however, the term "legitimate" has a connotation (if not a denotation) that the power is sanctioned by the rule of law. *Id.* Obligatory power does not necessarily imply that the authority actually does have the legal power to exert influence over the subject, only that the subject *believes* that the authority has that legal power. In the context of consent searches, this is a major distinction, since frequently a subject will believe that legal authority exists for the search when it in fact does not.

197. One example commonly given of "expert" social power is the influential force of a doctor's commands during a physical—or more extremely, during a medical emergency—to do things a person would not ordinarily do, such as take off one's clothes or submit to a painful procedure.

198. This is frequently confused with expert social power. However, in the case of expert social power, the individual submits to the authority without knowing why; merely the knowledge of who the expert is and what he or she knows is enough to influence the subject to obey, at least if the order is within the realm of the perceived expertise. With "informational"

Although social power is broken down into these six categories for analysis, it should be obvious that in any given interaction there will likely be more than one type of social power at work. An individual may be influenced by an authority figure for any or all of these reasons. It should also be obvious that, unlike the relatively clumsy terminology used by the courts (“coercion” and “voluntary”), the amount of social power wielded by the authority over any given individual will be variable, not all or nothing. If the authority possesses only a small amount of social power, we would perceive her as having a small amount of influence over the subject, as in the case of advice given by parents to a grown child. If the authority possesses a moderate amount of social power, we would perceive her as exerting strong pressure over the subject, such as a boss asking an employee for a favor outside of work. And if an authority possesses a large amount of social power, we would perceive that the authority is able to truly compel the subject, for example a drill sergeant giving orders to a recruit or a mugger giving orders to a victim at gunpoint. A police officer requesting consent from a suspect could fall into any of these categories, depending on the type and amount of social power he or she wields over the subject.

Using the French and Raven terminology, we can return to the “informal influence” that we saw at work in the Bickman study of obedience to a uniform. Bickman’s results showed that simply putting a uniform on the authority figure resulted in an increase of the compliance rate from 33% to 89% in one scenario.¹⁹⁹ Such an individual had no *actual* legal authority to exercise control over the subject—what we called “formal influence” in Part II. With the new terminology, we can now see that “formal influence” is actually three different kinds of social power: reward (the belief that obedience will result in the authority conveying a benefit onto the subject); obligatory (the belief that the authority has the legal or socially accepted right to give orders); and coercive (the belief that non-obedience will result in punishment). Because these influences did not exist in Bickman’s experiment,²⁰⁰ the higher obedience rates for those in uniform were based on “informal” power—either referent, informational, or

social power, the influence only occurs if the authority figure explains the reasons behind the order so that the subject understands independently the necessity for obedience.

199. See *supra* note 188 and accompanying text.

200. Bickman followed up his experiment with a survey of 141 college students, asking them to rate the “legitimacy” of such requests by a guard when compared with a request by a civilian or milkman, and he found that these requests were seen as “no less nor no more legitimate than requests from a civilian or a milkman.” Bickman, *supra* note 183. Bickman also conducted another follow-up experiment in which he measured the difference in compliance rates when the subject knew the guard was watching him after the order compared with when the subject believed the guard was not watching him—that is, a “surveillance” and a “non-surveillance” condition. Statistically speaking, compliance rates were identical, which led Bickman to conclude that neither reward nor coercive power was at work (because they should only be responsive to the surveillance condition). *Id.* at 53–55. Another psychologist, Brad Bushman, repeated Bickman’s experiment with a fireman as the authority figure. This authority could not exercise reward, coercive, or obligatory power over a subject (who would know that a fireman has no legal authority to order other people to do things). Bushman’s study found almost the same obedience rates for firemen as Bickman did for security guards (89% to 82%). Bushman, *supra* note 191, at 502–06. All of these experiments confirm one’s intuitive belief that none of these forms of social power were at work.

expert.²⁰¹ Police officers requesting permission to search theoretically have (and are using) at least four forms of social power—obligatory, coercive, referent, and informational—as we shall see below.²⁰²

Categorizing the different types of social power also allows us to use more sophistication in comparing consent searches with the Milgram experiments. When a police officer makes a request to an individual on the street, the individual is likely to comply, but the individual who complies may be responding to a very different kind of social power than the kind wielded by Milgram's experimenter. The two most common reasons cited by psychologists for obedience in Milgram's experiment were obligatory and expertise—that is, the subjects believed the authority figure had the right to tell them what to do, and that the authority figure had special expertise in the area that gave him extra influence.²⁰³ An individual consenting to a search, however, may be responding to any or all of four different types of influence. Some might be the same—for example, an individual may consent to search in part based on obligatory power, believing the police officer has the right to tell her what to do (as the subjects of the Milgram experiment apparently believed).

As it turns out, most forms of social power wielded by a policeman were not present, or at least not to the same extent, in the Milgram experiments. It is doubtful, for example, that the subjects in Milgram's experiments obeyed because they were worried about being punished if they did not obey (coercive power), but civilians may obey a police officer at least in part for that reason.²⁰⁴ Likewise, Milgram's subjects were probably not obeying the authority figure because of referential social power—that is, an affinity for the researcher or the position he held—but respect and affinity for the police officer or for the position he holds could likely be a factor in persuading an individual to cooperate.

B. Applying the Different Categories of Compulsion to Consent Searches

Ultimately, breaking down the concept of compulsion into specific categories of persuasive pressures allows us to be more sophisticated when we discuss the question of consent searches. We have already seen that it is a fallacy to think about the amount of compulsion in binary terms—that is, a consent is not "voluntary" nor

201. Bickman rejects referent power based on "logic," saying that "[i]t is doubtful that the pedestrians in these studies identified with the guard and wanted to be like him." Bickman, *supra* note 183, at 54.

202. In other contexts (for example, when conducting crowd control or when an officer gives instructions to individuals in an emergency), a policeman might have expert social power, but is unlikely to ever legitimately exercise reward power.

203. As Professor Blass notes, these are the two reasons that have been cited by scholars who have studied the Milgram experiments. Blass, *supra* note 193, at 963. They are also the two top reasons chosen by individuals who watched the obedience experiments on film and were asked to explain why the subjects obeyed the experimenter. *Id.* at 960–63.

204. This assumption may not be true. A set of students watching a film of one of the Milgram experiments cited "coercive" power as the third most likely explanation for why the subject obeyed the experimenter. Blass, *supra* note 193, at 961–63. This result concerned the author of the survey, who worried that "subjects [of Milgram's original experiments] may have been reading things into the experimenter's words." *Id.* at 963.

“involuntary”—but rather falls somewhere along a sliding scale depending on the amount of compulsion that is applied by the law enforcement officer.²⁰⁵ Similarly, the *type* of compulsion that an individual feels can also vary, and some kinds may be more acceptable than others. It is for this reason that this Article has avoided the term “coercion,” which carries a negative connotation of a person being forced to do something against her will, perhaps in response to a threat or physical violence. Yet when courts speak of involuntary consents, they generally use the term “coercive”—implying not only an either/or dichotomy with their terminology, but also that *any* form of pressure or influence that an individual may feel from an authority figure is “coercion” and therefore normatively bad.²⁰⁶

By following the paradigm set out by French and Raven, we can break down the different types of influences created by authority figures and make different normative valuations for each one. To take an obvious example, if an individual agrees to a search for Referential reasons—that is, because she identifies with or admires the law enforcement officer—this would not necessarily be a form of compulsion that courts would want to discourage. Similarly, an individual may consent to a search because of informational power: the individual may recognize the importance of the law enforcement function and have a desire to cooperate to achieve the shared goal of crime prevention and detection.²⁰⁷ Once again, there is no policy reason for discouraging this kind of reaction to authority.

How realistic are these examples? Consider a follow-up to the Bickman experiments in which a man dressed as a fireman ordered individuals to give a dime to a stranger to put in a parking meter. Consistent with Bickman’s findings, a large proportion—82%—of the subjects ordered by the fireman complied, compared with only 50% of the subjects ordered by a man in a suit.²⁰⁸ The confederate who portrayed the fireman reported that all but one of them—98%—would have obeyed if they had a dime to give.²⁰⁹ More telling is the description by the experimenter of the subjects’ reactions when accosted by the fireman. “[T]he confederate [fireman] noted that the subjects responded quite differently. The confederate would say ‘Give him a dime!’ and the

205. See *supra* notes 74–121 and accompanying text.

206. See, e.g., *United States v. Drayton*, 536 U.S. 194, 207 (2002) (stating that asking citizens for consent and respecting their wishes helps to “dispel inferences of coercion”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (discussing problems that arise if consent searches must be “free from any aspect of official coercion”).

207. Justice Scalia claims to be one of these individuals. During the oral argument for the *Drayton* case, another Justice asked hypothetically why any individual, guilty or innocent, would consent to a search if they knew that there would be no negative repercussions for refusing—in our terminology, if we could remove all Coercive and Obligatory influences from the individual’s decision. The defendant’s attorney said that as someone who knew there could not be any negative repercussions, he himself would never consent and he did not think that anyone else who knew better would consent. Justice Scalia protested: “I don’t agree. I know it’s risk free, and I would certainly give my consent. I think it’s a good thing for the police to do.” *United States v. Drayton*, 536 U.S. 194 (2002) (oral argument at 41), at http://www.supremecourt.us/oral_arguments/argument_transcripts.html (last visited Nov. 1, 2004). In other words, Justice Scalia would be influenced for Informational reasons—he understands the reason and goal of the search and agrees with it.

208. See *Bushman*, *supra* note 191, at 506.

209. *Id.* at 507.

majority of subjects would look at his badge and say 'sure.'²¹⁰ These subjects were not being "coerced" in any meaningful sense of the word; they felt no legal or physical compulsion to obey the fireman. A compliance rate of 82% to 98% is certainly comparable to the rate of compliance by individuals who consent to searches,²¹¹ yet the experiment attained this frequency using only referent and informational power. Although the contexts are obviously different (as noted during this Article's critique of the comparison of the Milgram experiments with consent searches), it does not seem unreasonable to conclude that many individuals may consent to searches based on an affinity for the position of the police officer or an inherent desire to assist law enforcement once the situation is explained.

However, those two motivations are unlikely to be the reason why a *guilty* person consents to a search, knowing full well that he or she is carrying contraband. Yet in determining where the line should be drawn on our spectrum of compulsion, we are essentially conducting a balancing test: the need for effective law enforcement balanced against the invasion of privacy and inconvenience of allowing police greater latitude to conduct searches. Assuming that a large number of individuals who are compelled to consent to a search are innocent, there may be a significant percentage of compelled searches in which the individual feels compelled mainly because she believes it is important to cooperate with the police in order to prevent crime. If so, society has less reason to want to prevent the search from taking place; thus, the balancing test would tilt more towards the crime-prevention side.

The courts have implicitly supported this argument by holding that the "reasonable person" for consent searches is a reasonable *innocent* person.²¹² Because no reasonable guilty person would consent to a search, using the perspective of a reasonable guilty person would essentially prohibit all searches.²¹³ The average reasonable *guilty* person may only react to certain forms of social—obligatory or coercive—and is unlikely to feel persuaded by an affinity for the police officer or a belief in the need for effective law enforcement. But in determining where to set the line we must take the perspective of an innocent person, who may be responding to any form of social power.

Here it is important to refer back to the first factor of our paradigm—the purpose of the consent search doctrine is not to determine whether an individual is *actually* consenting on a subjective level. If it were, we would not care *why* an individual felt pressure to consent—if the compelling pressures brought to bear on the individual went past a certain level the courts should declare the consent involuntary and void the search. It could, for example, be argued that an individual felt such overwhelming respect and admiration for police officers that he would blindly obey any police request made of him. Under a subjective regime this person would be incapable of ever giving true consent, and any search of his person would have to be rejected by the courts.

But as we have seen, the purpose of the consent search doctrine is not to see if an individual is "truly" consenting and thus knowingly and willingly waiving his Fourth

210. *Id.* at 506–07.

211. For example, the Ohio Highway Patrol kept records of all traffic stops that occurred between January 1995 and May 1997 in which consent was requested, and found that 8% of the subjects refused to give consent.

212. *Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("[T]he 'reasonable person' test presupposes an *innocent* person.") (emphasis in the original) (citations omitted).

213. *Id.*

Amendment rights. Rather, the consent search doctrine is an objective test that is meant to curb police misconduct and overreaching in requesting consent. When consent searches are viewed in this light, breaking compulsion down into different types creates an interesting question: if a police officer relies upon an individual's good-faith desire to cooperate with law enforcement in order to pressure an individual to consent to a search, is the officer overreaching or acting in a way that should be discouraged by the court? What about our hypothetical law-abiding citizen who would comply with any police request out of respect for the uniform; is there any policy reason why a police officer should be discouraged from requesting consent of such a person? Police officers that have earned the trust and respect of the citizens would justifiably be more persuasive in asking for consent from a suspect; while police officers that have bullied and terrorized a neighborhood might also get consent more often, though by exercising very different forms of social power. Any test for the appropriate level of compulsion ought to distinguish between the two and, therefore, must take into consideration not just the *amount* of compulsion that is applied, but also the *type* that is being used. Persuasion or compulsion that is based on referent or informational social power is not to be discouraged; it is, in fact, a sign that the police are respected and the members of the community support the job that is being done. Persuasion or compulsion that is based on coercive or obligatory social power is inappropriate, though some amount of it is no doubt unavoidable, and should be discouraged by the legal system. Of course, "obligatory" is being used as a term of art in this case, meaning the subject is influenced because she perceives that the law enforcement officer has a legitimate right to force her to consent. Because by definition the law enforcement officer does *not* have such a right in the context of consent searches, the use of obligatory social power is an abuse of the policeman's authority; it essentially tricks the subject into believing that the police officer has legal power that he does not in fact possess.

The test we devise, then, should define involuntary searches as those that are consented to after an excessive amount of coercive or obligatory social power is applied during the interaction. We still must define the term "excessive amount," but the survey of psychological literature has allowed us to be quite a bit more precise in understanding and setting out the type of compulsion we are trying to prevent.

The psychological studies tell us one other interesting fact: the extraordinary high number of consents that are reported by police officers²¹⁴ does not mean that the system is broken and that most consensual searches are, in truth, involuntary. Individuals may be acceding to requests by police officers for perfectly appropriate

214. In the *Drayton* case, the police officer testified that he could recall "five or six instances in the previous year in which passengers had declined to have their luggage searched." *Drayton*, 536 U.S. at 198 (2002). Given the "efficiency" of bus sweeps, the officer could easily have searched over a thousand bags in a year, resulting in a compliance rate of 99.5%. See, e.g., *Florida v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. App. 1987) (noting that one officer was able to search over 3,000 bags in a nine-month period using bus sweeps).

Of course not everyone consents to a search when asked to do so; and usually when a person—innocent or guilty—refuses to consent, no record is kept and no case is filed. Nevertheless there are plenty of cases that make it to the appellate courts in which an individual refuses consent. See, e.g., *United States v. Williams*, 271 F.3d 1262, 1265 (10th Cir. 2001) (suspect refused to consent to search of car); *United States v. Wood*, 106 F.3d 942, 944 (10th Cir. 1997) (suspect refused to consent to search of car).

reasons. Although they may feel "compelled" the way the subjects in the Bickman experiments felt "compelled" to cooperate with the security guard and fireman, it is not the sort of compulsion that the Fourth Amendment is designed to protect against.

IV. SETTING THE PROPER BALANCE

If consent searches are viewed through the proper objective paradigm, rather than the discredited voluntariness paradigm, courts will be able to evaluate police-citizen interactions in a more accurate and nuanced fashion. Likewise, commentators and the general public will be able to better understand what is being judged, and the decisions that are handed down will no longer seem disconnected from reality.

In the previous sections we have derived a number of principles that should guide us in determining the appropriate line to draw for consent searches. The standard should be an objective one, a standard that focuses on police conduct and not the subjective consent given by the suspect. This was the underlying meaning of *Schneckloth* and is consistent with the reasonableness standards of the Fourth Amendment. Also, in order to be transparent, the test must acknowledge the fact that some amount of compulsion is inevitable and thus constitutionally permissible in the obtaining of consent searches, just like in the confessions context. However, there are a number of reasons why police officers should be given more leeway in obtaining consent to search than they have under the Fifth Amendment in obtaining a confession. And finally, the test should, if possible, differentiate between certain kinds of compulsion—such as those based in referent and informational social power—and others, such as coercive and obligatory.

How does the Supreme Court's test for consent searches fare under these criteria? If one looks at the language alone, it is difficult to tell. The current formulation of the test is whether "a reasonable person" would feel "free to refuse" the officer's request.²¹⁵ This is evidently an objective test, though its focus is on the individual being searched rather than the police officer's actions.²¹⁶ And although from this language alone it is difficult to know whether the test for consent searches is stricter or more lenient than the test for obtaining confessions, the courts have made it clear there is no need to notify the suspect of his right to refuse, in contrast to the sophisticated *Miranda* warnings that are required for confessions.²¹⁷

215. *Drayton*, 536 U.S. at 206.

216. *Id.* This is probably a distinction without a difference. If courts focused on the actions of the law enforcement official, they would evaluate the actions based on how a "reasonable person" would react to them. Likewise, when courts focus on the defendant, they are merely evaluating the reasonableness of the law enforcement officer's actions through the lens of the individual being searched. The key is that courts are using an objective standard and evaluating the actions of the officer and the other objective circumstances of the situation (e.g., closed quarters, night or day, location of the interaction) and are not truly concerned with what is going on inside the defendant's mind.

217. Compare *Drayton*, 536 U.S. at 206 ("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."), with *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966) (setting out a series of notifications and warnings that must be given before custodial interrogation).

Unfortunately, the explicit language of the test fails to meet the other criteria. It is impossible to tell what the Supreme Court means by the term "free to refuse." This phrase could imply that a certain amount of compulsion is acceptable, because one might feel a significant amount of pressure and yet feel free to refuse a request. But by using the term "voluntary" in describing the standard, the Court implies just the opposite.²¹⁸ The Court, in fact, has gone out of its way at times to explain that no amount of compulsion is acceptable, stating that citizens may not be "coerced to comply with a request that they would prefer to refuse,"²¹⁹ that courts are required to "assur[e] the absence of coercion,"²²⁰ and that any amount of coercion makes consent involuntary "no matter how subtly the coercion was applied."²²¹

Most importantly, the language of the test makes no distinction between the different possible reasons that a reasonable person might not feel free to decline. If a police force in a small town had built up such a positive rapport with the citizenry that a culture developed that encouraged cooperation with law enforcement, there might be a cultural assumption ingrained into the citizens that it was inappropriate to refuse a polite and reasonable request to search. Given the societal pressures to conform and an inherent belief in the importance of the police work, an individual may not feel at all free to decline a request to search—but where is the police misconduct or overreaching that we are trying to deter in such an instance? Granted, this idyllic town with such a harmonious relationship between the police and the civilians may exist only in the world of hypotheticals, but as with anything else, it is a question of degree. On its face, the language of the current test discourages police officers from doing *anything* to pressure an individual to consent, including asking politely, treating the subject with respect and dignity, and explaining the importance of the investigation. An individual might easily feel more free to decline if an officer simply walked up to them and said roughly, "Mind if I look through your bag, buddy?" than if he was courteous, respectful, and took the time to explain the situation. On an institution-wide level, a police force that believes its consensual searches will get thrown out of court if they do anything to encourage the citizens to cooperate will have far less incentive to take the sometimes difficult steps to encourage that cooperation and build relationships with the community. In short, a test that makes no distinction between positive, appropriate social power and negative, inappropriate social power is problematic.

Luckily, as we have seen, the courts do not actually follow this test. The "real" test they apply is indeed objective, geared towards police conduct (or misconduct), and allows for a certain amount of compulsion. Contrary to the rhetoric in the case law, courts have found consent to be voluntary even if the circumstances show a significant (if not overwhelming) amount of compulsion, even Coercive or Obligatory compulsion.

Indeed, if one looks beyond the rhetoric and the literal language of the test, the courts do appear to be differentiating between kinds of compulsion. In the *Drayton* case, the factors considered by the Supreme Court included the fact that the police officer did not brandish his gun, did not block the aisle to physically prevent the

218. See, e.g., *Drayton*, 536 U.S. at 206 ("[A]s the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary.").

219. *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

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

221. *Id.* at 228.

defendants from leaving, and used a polite, quiet tone of voice.²²² Under the French and Raven terminology, these are factors that reduce the level of coercive social power brought to bear. Meanwhile, the Supreme Court has also said that notifying the suspect of his or her right to refuse, while not required, is a factor that can be considered in determining voluntariness.²²³ This factor, if present, will reduce (if not eliminate) the level of obligatory social power brought to bear (just as the Court has found the *Miranda* warnings reduce the level of obligatory social power to an acceptable level in the context of custodial interrogations).²²⁴

Even so, the Supreme Court's refusal to require law enforcement to notify individuals of their right to refuse to be searched is somewhat troublesome.²²⁵ True, this Article concluded that law enforcement should be able to use more compulsion in the consent search context than in the interrogation context; thus, the alleviation of compulsion caused by the warnings is arguably not necessary for consent searches. However, notification of the subject's rights could go a long way towards reducing the abuse of obligatory social power by the law enforcement officer—that is, it could at least partially remove the compulsion people feel based on an inaccurate belief that the police have the legal right to compel them to search. Furthermore, it is not clear how giving a brief, polite notification of an individual's right to refuse would cause any harm. In fact, it might tend to increase the amount of referential or informational social power brought to bear on the subject of the search.

Many commentators who are critical of the Supreme Court's consensual search case law have rejected mandatory notifications because they believe that such warnings will be completely ineffective.²²⁶ As evidence, Professor Lichtenberg carried out a study of the effect of such notifications using data from the Ohio Highway Patrol.²²⁷ During a two-year period where all law enforcement officers were required to notify the subject prior to asking for consent to search, the proportion of individuals who gave consent

222. *Drayton*, 536 U.S. at 205–06.

223. *Schneekloth*, 412 U.S. at 248–49 (“Voluntariness is a question of fact to be determined from all the circumstances, and while the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.”).

224. See *supra* notes 108–117 and accompanying text.

225. See *Drayton*, 536 U.S. at 206 (“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.”); *Schneekloth*, 412 U.S. at 248–49.

226. See Lichtenberg, *supra* note 90, at 374; Nadler, *supra* note 9, at 204–06; Strauss, *supra* note 9, at 254.

227. In 1995, the Ohio Supreme Court held that police officers must notify all suspects of their right to refuse prior to asking for consent. *State v. Robinette*, 653 N.E.2d 695 (Ohio 1995). This case was reversed and remanded by the United States Supreme Court in 1996. *Ohio v. Robinette*, 519 U.S. 3 (1996). The ruling was overturned on remand by the Ohio Supreme Court. *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997). Thus, there was a short period of time during which Ohio police officers were required to give notifications to suspects prior to requesting consent. The Ohio State Patrol kept track of the number of requests and consents for this period, as well as the number of requests and consents during other periods when the notifications were not required. Professor Lichtenberg also obtained the number of requests and consents during the same periods in the state of Maryland to use as a control group, because Maryland courts never required such a notification.

remained virtually unchanged (in fact there was a slight increase—though the change was negligible—from 88.5% to 92.2%).²²⁸ Though perhaps surprising to some, this result is predictable given the small effect *Miranda* warnings have had on law enforcement's ability to obtain confessions, an effect variously estimated as somewhere between no effect at all and at maximum a 16% decline.²²⁹ The results of the Ohio study on notifications prior to consent led Professor Lichtenberg to abandon such verbal notifications as a useful reform, because they were "an ineffective means of encouraging citizens to exercise freely their constitutional rights."²³⁰ Another commentator argues that given the extraordinary psychological pressure individuals face in the consent search context and their tendency to automatically obey an authority figure when under such pressure, a verbal notification simply cannot reduce the level of compulsion to any significant degree.²³¹ Others have worried that requiring notification will not only have a negligible effect, but will divert attention from more fundamental reforms that are seen as necessary.²³²

However, the would-be reformers are again failing to consider the myriad different reasons why an individual may consent to a search. The fact that most individuals still give consent even after being given a notification of their right to refuse shows one of two things: (1) the notifications fail to significantly diminish the obligatory social power being exercised by the law enforcement official, or (2) the individual is consenting in response to other forms of persuasion. If the former, the notifications do no harm. However, even if a change in the rate of consent cannot be seen, the warnings may in fact be invisibly shifting the types of social power the law enforcement official is using. As was the case with custodial interrogations, law enforcement officials forced to give a notification will no doubt learn to rely on other techniques to gain consent, and if the notification is properly given, it will be difficult for these other techniques to rely upon obligatory social power. If the warning has no effect in diminishing the use of obligatory social power, it is hard to see how it would have any effect at all; in other words, requiring a notification could not possibly do harm. The truth is probably somewhere in the middle. For some subjects, the notifications will have absolutely no effect; for others, it will completely eliminate the improper use of obligatory social; while for most, it will diminish, at least to some extent, the improper use of that power and thus force police to rely upon other, more acceptable forms of persuasion.

The notification need not be extensive; because we have seen that police should be able to gain consent more freely than they can gain confessions, the notification need not be nearly as extensive as the warnings mandated by *Miranda* for custodial interrogations. One sentence explaining that the subject is free to leave or refuse consent would at least have some of the desired effect.²³³ The Supreme Court has

228. Lichtenberg, *supra* note 90, at 367.

229. See *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* at xviii (Richard A. Leo & George Thomas eds., 1998).

230. Lichtenberg, *supra* note 90, at 374.

231. See Nadler, *supra* note 9, at 205.

232. See Strauss, *supra* note 9, at 255–56.

233. When the Ohio Supreme Court held that a notification was required before a request for consent was made, the court simply mandated that the law enforcement official say “

shown concern that a notification would be an "unrealistic" burden to put on law enforcement²³⁴ and would be "thoroughly impractical,"²³⁵ but if the notification was brief enough, these concerns seem unjustified. The Court has also resisted such a requirement because "the touchstone of the Fourth Amendment is reasonableness," which must be measured by the totality of the circumstances, without any "bright line rule" that mandates accepting or rejecting the search. But this adherence to the "totality of the circumstances" rings hollow; in practice there are bright-line rules already in place. If a police officer asks for consent at gunpoint, for example, or explicitly threatens retaliation or violence if the consent is not granted, the search will almost certainly be held unconstitutional.²³⁶

Thus, there would be no harm and perhaps a bit of good in requiring a brief notification of a suspect's rights before a law enforcement officer can request consent. But other than that change, the current test—that is, the actual test being applied, not the stated test—seems to strike the proper balance between the need for effective law enforcement and the need to prevent police overreaching in violation of Fourth Amendment rights.

The real problem in the consent search doctrine—and it is an important problem—is the paradigm that courts and the general public use in understanding what is happening. Under the old "voluntariness" paradigm courts were effectively deciding that the Fourth Amendment did not apply: the subject of the search waived his Fourth Amendment rights, and so as long as the waiver met the requirements of the Due Process Clause (as set out by the confession cases), the consent was voluntary, the waiver was valid, and the search was constitutional.

This old paradigm was doomed from the beginning for three reasons. First, it relied upon the subjective state of mind of the subject being searched, something unknowable by both the courts reviewing the search and by the police officers attempting to abide by the courts' rules. Second, the overbroad denunciation in the Court's rhetoric of all forms of compulsion or pressure that law enforcement officers use to gain consent failed to account for the myriad different reasons—some good, some not—that an individual may have for giving consent. The terms "voluntary" and "coercive" are

'At this time you legally are free to go' or . . . words of similar import" before requesting consent. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995).

234. *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996).

235. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

236. Granted, no such case has come before the Supreme Court (or any other court, so far as I know). But the point is to say (as the Court does) that "voluntariness" as determined by "reasonableness" under a totality of the circumstances test does not preclude the possibility that there are some actions by the police that are so unreasonable that they make the search involuntary no matter what the other circumstances. In other words, there are certain factors that should be added into the totality of the circumstances test (the number of officers, the length of the detention prior to the request, the physical proximity of the officer making the request, and—currently—whether the suspect is notified of his right to refuse prior to the request). There are other factors that are so unreasonable that their presence automatically makes the consent involuntary: threatening violence or other retribution if consent is not given, for example, or falsely claiming that the officer has the legal right to search anyway. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (finding law enforcement officials falsely claiming they had a warrant to search the house in order to gain consent from the occupant). Adding a notification requirement would merely take the "absence of notification" factor out of the "totality of the circumstances" category and place it in the "per se unreasonable" category.

meaningless in this context. They were first developed as terms of art, but the binary world they described was misleading. Finally, the old paradigm was based on the Due Process Clause language and jurisprudence, and as the years went by the Fourth Amendment jurisprudence (with its objective “reasonableness” standard) kept filtering back into the equation, usually through the seizure issues that almost inevitably accompanied the consent search question. Thus, the test evolved almost in secret, leaving angry commentators and a confused public wondering how an individual accosted by three police officers with badges and guns on a bus could have possibly acted “voluntarily” when he allowed them to search him and recover the drugs under his clothes.

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. In determining whether or not the behavior is appropriate, we will look at how this behavior will affect a reasonable person in these situations, so the amount of compulsion and the types of compulsion used are critical in determining whether the search is reasonable.

In other words, the problem with the consent search doctrine is not that the courts allow consensual searches too often, but rather that the way they claim to look at the situation and the way they present their evaluation to the public does not fit the holdings of the courts.²³⁷ While the actual results of the case are arguably more important than the words and concepts that are used to get there, adopting a more accurate paradigm matters for a number of reasons: it will provide more transparent guidance to future courts,²³⁸ better incentives and a clearer test²³⁹ for law enforcement, and a more accurate set of expectations in the general population.²⁴⁰ Those who

237. See, e.g., Nadler, *supra* note 9, at 213–14 (concluding that there is a formal standard and a “real” standard derived from the actual decisions of the courts); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2170 n.102 (2002) (arguing that in seizure cases, “feel free to terminate the encounter” is only the “nominal” standard, and “[t]he actual (though unarticulated) definition is more like this: One is seized when a police officer behaves with a higher level of coercion than is ordinary and reasonable in a brief street encounter”).

238. The unhelpful binary test from *Bostick* generated a number of inconsistent court decisions in the circuit and state courts. For a general discussion of the confusion in the lower courts in the wake of *Bostick*, see Nadler, *supra* note 9, at 214–16. Unfortunately *Drayton* will do little to clarify the situation, because it merely affirmed *Bostick*’s standard. *Drayton*, 536 U.S. at 206 (2002).

239. One benefit to explicitly stating that the consent test is focused on preventing abuse and misconduct by police officers is that phrasing the standard in that way will make it easier for police to know where the line is between proper and improper conduct. Seeing how much courts (not to mention legal academics) have struggled over the past twenty years in determining when a “reasonable person” feels compulsion, it is impossible to believe that a police officer on the scene will be able to know whether his or her actions are violating the Constitution. Setting out an objective test that focuses on police conduct (as the Court did in *Miranda*) will make it more likely that police will be able to successfully stay on the proper side of the line.

240. Teachings from the fields of procedural justice and expressive law show that perceived unfairness in the legal system has significant negative consequences in terms of

disapprove of the current consent search jurisprudence should also welcome a more "honest" paradigm, because transparency is the first step towards reform; in other words, the standard cannot be changed so long as it is not acknowledged. Although this Article argues that the "actual" test for consent searches strikes a sensible balance between the competing interests at stake, the general population and/or legislators may be unwilling to accept a test that explicitly allows for compulsion and ignores whether or not the subject is in fact acting "voluntarily." If so, they will be free to enact stricter guidelines for law enforcement officials seeking consent. But none of this is likely until the courts are candid about what they are doing when they evaluate consent searches.

In summary, this Article calls for two substantive changes. First, it is high time to get rid of the voluntariness paradigm altogether. It carries too many inaccurate connotations and denotations of what the consent exception should be, and only provides the vaguest hint of what is actually going on in the police-citizen encounter. It creates an expectation of a subjective inquiry into the mind of the person being searched, when no such inquiry is taking place. It implies a binary conclusion—either the subject agreed to be searched freely and without any undue influence, or she was forced to submit and had absolutely no choice in the matter. The cautionary language in *Schneckloth* aside, courts have labored under this false dichotomy for decades, and struggled—unsuccessfully—to shoehorn their applications of law to diverse factual situations into one of the two alternatives. And finally, the voluntariness terminology is blind to the myriad reasons why a person might agree to consent; it makes no distinction between socially beneficial influence and socially unacceptable influence. The continued reliance on this terminology and this concept has led to a scholarly and popular perception that there is an extraordinary dissonance between the Court's holdings and the reality of police-citizen encounters.

Instead, we need to return to the touchstone of the Fourth Amendment: reasonableness. The term implies an objective inquiry into the nature of the conduct by the law enforcement official. Using this test, courts must acknowledge and accept, as they do in the confessions context, that some amount of compulsion will always exist in this encounter, and determine the acceptable level of compulsion, which ought to be more than is allowed in the confession context. Finally, courts should seek to differentiate between different kinds of compulsion, and set out rulings that discourage negative types of compulsion, such as Coercive and Obligatory, but that encourage socially beneficial types of compulsion, such as Referential and Informative.

The second change called for by this Article is a specific rule of law that logically makes sense once the new paradigm is adopted. Since we are concerned not only with lowering the level of compulsion that law enforcement officials use in acquiring consent but also with lowering the level of certain *types* of compulsion (and perhaps raising the level of others), courts should require a brief notification to be given to individuals before asking for consent to search. This notification can help to lower the obligatory social power that is brought to bear against the subjects and force law

dissatisfaction with authority and willingness to break the law oneself. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (explaining how people's perceptions about the fairness or unfairness of the procedures used by law enforcement have a significant effect on their satisfaction with authority generally); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW U. L. REV. 453 (1997) (stating that satisfaction with legal rules leads to greater compliance with the laws).

enforcement officials to rely on other more socially appropriate forms of persuasion when seeking consent.

CONCLUSION

In 1897 Justice Holmes wrote:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.²⁴¹

Most critics of the consent search jurisprudence tend to see the subjects of consent searches as the proverbial "bad men," agreeing to the search only because they believe the law requires them to do so, or worse, because they fear repercussions from the officer if they refuse. But many, if not most, individuals who agree to searches are not bad men or women; they agree for a variety of reasons, some based on the actual or perceived authority of the officer, and some based on their own "vaguer sanctions of conscience" that persuade them to obey police officers and other authority figures. If we are to continue to allow searches based on consent, we must acknowledge openly that every request for consent carries with it some amount of compulsion, and that certain dimensions of that compulsion are neutral or perhaps even beneficial (since they reflect positively on the relationship between civilians and law enforcement) while certain dimensions are disfavored. Any analysis of consent searches needs to take this distinction into account, rather than simply assuming that (1) any amount of compulsion is unacceptable, and/or (2) all forms of compulsion are equally bad. The language of the current test assumes both, but fortunately the test as applied goes a long way towards rejecting both assumptions. But the dissonance between the rhetoric and reality is harmful. It is now long past time for courts to reassess the way they approach consensual searches and align the language of their tests and explanations with the reality of their holdings.

241. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).