

Misplaced Angst: Another Look at Consent-Search Jurisprudence[†]

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INTRODUCTION

No one seems to have a good word to say about consent-search jurisprudence.¹ Consent searches, the most common type of warrantless searches law enforcement officers conduct,² are understood to be constitutional so long as the permission to search is “freely and voluntarily given.”³ In fact, the Supreme Court applauds these

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1. Attacks on Fourth Amendment jurisprudence generally are, of course, nothing new. See Silas Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 19 (1988) (“Almost no one has a kind word to say about [F]ourth [A]mendment jurisprudence.”). Nonetheless, most members of the Supreme Court, even with Justice O’Connor’s departure, think highly of consent searches:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

United States v. Drayton, 536 U.S. 194, 207 (2002); see also Georgia v. Randolph, 126 S. Ct. 1515 (2006).

2. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 275 (3d ed. 2002) (citing estimates that upwards of ninety-eight percent of searches are “consensual”).

3. Florida v. Royer, 460 U.S. 491, 495 (1983) (quoting unreported trial court opinion from Circuit Court, Dade County, Ellen Morphonios Gable, J.); Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

grants of permission, not only because they facilitate crime fighting,⁴ but also because they supposedly bespeak the law's valorization of autonomy.⁵ Consent is a "master concept" in our culture, a concept that captures the moral grounding of our entire way of thinking about human action.⁶ We associate with "consent" the amorphous notion of "voluntariness."⁷ Hence the notion that voluntariness is the touchstone of consent-search jurisprudence.

Professor Ric Simmons's recent article in this Journal, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*,⁸ is but the latest in a series of scholarly pieces attacking what he calls the "voluntariness paradigm" in consent-search jurisprudence.⁹ He argues that the Supreme Court should "officially jettison[] the voluntariness standard" to make room for his new "reasonableness" paradigm.¹⁰ This new paradigm would eschew the false binary consideration of whether one has acted voluntarily or not and instead demand a presumably more straightforward, if not more honest, constitutional inquiry—one that asks: What may law enforcement reasonably do to fight crime?

I do not intend here to endorse or quarrel with the virtues of adjudicating consent searches through a "reasonableness" lens. How one feels about that approach depends in large measure on what demands for precision we insist upon in constitutional adjudication. After all, "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."¹¹ My purpose here is to

4. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

5. See *Drayton*, 536 U.S. at 207. See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE*, 88–115 (1981) (describing consent as the moral grounding for wealth-maximizing judicial decision making).

6. Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994); see DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 215 (1989); Richard A. Posner, *Colloquy, The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 386 (1985). Herzog says that consent "provides perhaps the single most prevalent paradigm structuring our thinking about law, society, morality, and politics." HERZOG, *supra*, at 215.

7. See HERZOG, *supra* note 6, at 215; Robert A. Burt, *Democracy, Equality, and the Death Penalty*, in *THE RULE OF LAW: NOMOS XXXVI* 80 (Ian Shapiro ed., 1994). For an ancient but still influential investigation into the voluntary-involuntary distinction, see ARISTOTLE, *NICOMACHEAN ETHICS*, 35–40, 46 (N. Kretzmann, G. Nuchelmans & L.M. de Rijk eds., Hippocrates G. Apostle trans., D. Reidel 1975) (1975).

8. 80 IND. L.J. 773 (2005).

9. See *id.* at 775 & n.9 (citing articles critical of Supreme Court jurisprudence involving consent searches).

10. *Id.* at 775.

11. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). The doctrinal mess that is Fourth Amendment jurisprudence largely springs from the varied "models" of reasonableness that the Supreme Court uses to adjudicate search-and-seizure issues. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004). The problem is the Court's inability to articulate a set of principles that coherently govern which particular model of reasonableness to use. Clancy identifies five models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law. *Id.* Clancy contends that the "Court has, from time to time,

expose the unrealistic expectations that plague some critiques of consent-search jurisprudence, and thus to sharpen our focus when assessing this problematic realm of Fourth Amendment law. I endeavor to do this by showing why it is odd for Simmons to advocate a “new paradigm” for understanding so-called consent searches.

I. WHAT IS CONSENT?

A. Encapsulating This Article by Exposing a Logical Fallacy

Our understanding of some descriptive terms is lexical, comprehensible independent of context. For example, the word “blue” is understood to refer to a quality of “blue-ness.” Whether we speak of a blue house or a blue chair or a blue ocean, the quality of “blue-ness” directs our comprehension of what is being described. But many descriptive terms are functional—comprehensible only in terms of what they modify. To see this, consider these two syllogisms:

- I. A beetle is a large insect.
- II. An insect is an animal.
- III. A beetle is a large animal.

and

- I. P is a good carpenter.
- II. P is an American citizen.
- III. P is a good American citizen.

These syllogisms break down because “large” and “good” function differently than an adjective like “blue.” How we understand “large” or “good” depends on what it modifies. There is no quality of “largeness” or “goodness” that adequately directs our comprehension of what is being described. But “blue” is “blue”: we understand “blue-ness” noumenally, independent of what it modifies.

Now, consider this one:

- I. D voluntarily consented to a search.
- II. Consent is an act of granting permission.
- III. D voluntarily granted permission to a search.

We are tempted to treat III as a logical outgrowth of propositions I and II. And so, in a case where commonsense tells us that D did not in any meaningful sense voluntarily grant permission to the police to search her car, we might well work our way backwards through this syllogism to find that proposition I is false: no voluntary consent, and thus no legal search. But this mode of thinking, superficially logical as it is, assumes that this syllogism is more like the blue-house syllogism than the large-insect and good-carpenter syllogisms.

What if we treat “voluntarily” the way we treat “large” and “good” in the insect and carpenter syllogisms? Then the truth of proposition I (D voluntarily consented) is not

attempted to harmonize its analysis by announcing the primacy—or the demise—of a particular model.” *Id.* at 1022. But, he rightly observes, “[n]one of those efforts has been enduring.” *Id.*

necessarily linked to the truth of proposition III (D voluntarily granted permission). How we understand "voluntarily" depends on how we understand "consent" beyond the minimalist understanding of consent as an act of granting permission. The truth of proposition I—that D voluntarily consented—may communicate what we accept in a particular police-civilian encounter; it may signify not just a brute description (like "blue-ness"), but an *evaluation* that implies approval. "Voluntary consent" would thus be a value judgment from a pool of facts that depends on *function*. "Good carpenter" implies something crucial about the function of carpenters, and that function has nothing to do with our judgment about what makes a good American citizen.¹² "Voluntary consent," then, implies something about the function of consent—its function in a particular human encounter. "Good carpenter" is a meaningful statement of approval inasmuch as we have a vision of what a carpenter does. "Voluntary consent" is a meaningful statement of approval inasmuch as we have a vision of what a particular encounter should be like.

We should nail down three observations. One, "good" and "voluntary" are words of commendation, of approval; they cannot be taken as things in themselves, nor as qualities in some noumenal realm. Two, when we agree on the facts but dispute whether a particular carpenter is a "good" one, or whether a particular encounter was "consensual," we experience a clash of visions—visions over what carpenters do or over how we expect certain interactions to transpire.¹³ Three, what is "good" and what is "voluntary" are constructions built from the very things they modify. These terms are not just plucked out of our heads to enhance the meaning of a statement concerning carpentry or consent. The meanings of these descriptive words, which of course do serve to enhance the meaning of the respective statements about carpentry and consent, are themselves gamered by our understanding of what we mean by carpentry and consent. This third observation is actually an extension of the second—namely, that vision informs meaning, and that we cannot discuss such things as "goodness" or "voluntariness" without reference to what it is we are after.

The discussion that follows amplifies what I am suggesting by these syllogisms. I contend that much of the scholarly angst over consent searches is misplaced because it arises from treating "voluntariness" as an independent concept (like "blue-ness") that we attach to this thing called "consent." But consent in the Fourth Amendment context gets its meaning from our vision of what is defensible or worthwhile in a police-civilian encounter, and voluntariness as a statement of approbation simply reflects the correspondence between the observable facts (more precisely, the record evidence) and the vision that we seek to defend or pursue.

One way to conceptualize this critique is to interpret the scholarly angst that I describe here as a symptom of a misguided adherence to the fact-value distinction. If we hold to that distinction, the incentive is to treat "voluntariness" as an assertion of

12. The logical fallacy discussed in the text is not limited to functional referents like "carpenters" or "lawyers" or "football players." I have included the insect syllogism to show this. "Large insect" has meaning insofar as we all have experienced insects and agree that in an absolute sense they are small animals. The fallacy in the insect syllogism does not depend on some understanding of the function of insects. Just as our understanding of insects is hardly exhausted by our recognition that they are animals, so too with consent: this concept is hardly exhausted by our recognition that an act of consent grants some sort of permission to another.

13. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 58–59 (2d ed. 1984).

fact, which is to say, more than a mere value statement, more than a subjective assertion akin to an expression of taste. This incentive derives from the understandable desire that “voluntariness” have some analytical traction, which it cannot have if it merely reflects subjective sentiments. The implication of my discussion is that the fact-value distinction in this context is misleading, if not false. It is impossible to treat an idea like “voluntary consent” as a purely factual statement, just as it is unpalatable to treat it as nothing more than an expression of opinion (that is, as a value statement only). We can evaluate as true or false a state of affairs purporting to reflect a search conducted through voluntary consent—that is to say, we can treat that evaluation as expressing a *fact*—but only by reference to value, which is to say, our vision of what we are willing to defend or pursue in a police-civilian encounter.¹⁴

B. Consent and Reasonableness

The thesis that Fourth Amendment consent jurisprudence is moving, or ought to move, towards a *new* paradigm of “reasonableness” is odd. To see why, consider the 1990 case of *Illinois v. Rodriguez*.¹⁵ *Rodriguez* is a third-party consent-search case.¹⁶ The police entered Rodriguez’s home while he was asleep. “They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with . . . cocaine.”¹⁷ The police then went into Rodriguez’s bedroom where he was sleeping and found more cocaine in two open attaché cases.¹⁸ The police had neither an arrest nor a search warrant.¹⁹ What the police did have, or so they thought, was consent—not Rodriguez’s, who was, after all, asleep, but his former girlfriend’s.²⁰ It was she, an alleged victim of a battery by Rodriguez, who unlocked the apartment door with a key she was not supposed to have and ushered the officers inside.²¹ She didn’t live there; at best, she was “an infrequent visitor.”²² Her name was not on the lease, and she did not contribute to the rent.²³ Because Rodriguez, being asleep at the time, surely did not consent to the police entry, and his former girlfriend was, as the Court put it, “obviously” not empowered to grant the police permission to do so, the trial court suppressed the fruits of the search.²⁴

14. Cf. HILARY PUTNAM, REASON, TRUTH, AND HISTORY 127–47 (1981) (defending the collapse of the fact-value distinction).

15. 497 U.S. 177 (1990).

16. Although third-party consent-search cases are relatively rare, they are doctrinally significant because of how their existence shapes the consent-search analysis. The Court in *Bustamonte*, the watershed decision addressing what constitutes a valid consent to search, diverted its analysis away from notions of waiver because to do otherwise threatened the doctrinal integrity of third-party consent searches, which had already been sanctioned. See 412 U.S. 218, 245–46 (1973).

17. *Rodriguez*, 497 U.S. at 180.

18. *Id.*

19. *Id.*

20. *Id.* at 179.

21. *Id.* at 180.

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

23. *Id.*

24. *Id.* at 182.

Under any meaningful conception of voluntariness, the trial court's suppression ruling is unassailable. Rodriguez never "voluntarily" consented to the search and never voluntarily authorized his former girlfriend to consent to a search. But is voluntariness even the point here? The Court's reasoning in remanding the case shows why Simmons's "new" paradigm is not new at all. Justice Scalia, writing for the Court, began by noting that waivers of trial rights must be knowing and intelligent, a standard stretching back to *Johnson v. Zerbst*.²⁵ There is a difference between "trial rights that derive from the violation of constitutional guarantees," Scalia observed, and "the nature of those constitutional guarantees themselves."²⁶ Rodriguez had a trial right to exclude evidence acquired in violation of the Fourth Amendment. Having that trial right to litigate a Fourth Amendment claim meant that he could consent to the admission of that evidence, either openly or by failing to object. That power of consent belonged only to him. Only he, with the guiding hand of counsel, could consent to dispense with his trial right to exclude illegally-seized evidence. A third party could not consent to admission of that evidence on his behalf.

But things are different when it comes to the protections of the Fourth Amendment outside of the courtroom. The doctrine of third-party consent holds that another person with common authority over the premises or place to be searched may grant permission to search.²⁷ A consent search, therefore, cannot be rooted in "voluntariness" or any other subjective state of mind; law enforcement may use it only as a tool, subject to reasonable use.²⁸ Hence, we get Scalia's crucial point in the opinion: a defendant "is assured by the Fourth Amendment . . . not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"²⁹ Because the scope of the right protected by the Fourth Amendment is governed by the concept of reasonableness, the police action that led to a defendant's arrest need only satisfy a standard of reasonableness, and not some standard associated with the validity of consent. The Court remanded the case because, even though reasonableness is precisely what the Fourth Amendment demands, "the Appellate Court found it unnecessary to determine whether the officers reasonably believed that [the former girlfriend] had the authority to consent."³⁰ "[W]hat is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of *unreasonable* searches has been violated."³¹

25. 304 U.S. 458 (1938). *Johnson* requires that waivers be knowing, voluntary, and intelligent, and instructs courts to "indulge every reasonable presumption against waiver." *Id.* at 464 (internal quotation omitted).

26. *Rodriguez*, 497 U.S. at 183 (emphasis in original).

27. See *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). See generally Mary Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1649-50 (1987).

28. See *infra* note 88 for a discussion of *Stoner v. California*, 376 U.S. 483 (1964), one notable instance of unreasonable law enforcement use of that tool.

29. *Rodriguez*, 497 U.S. at 183.

30. *Id.* at 189.

31. *Id.* at 187 (emphasis in original).

C. Consent and Waiver

Reasonableness, not voluntariness, is the touchstone of Fourth Amendment jurisprudence.³² Reasonableness, in practice if not in words, has always been the touchstone of Fourth Amendment analysis. There never was an old paradigm, and there is no sensible way for there to be a new one. What we had—still have, one might say—was sloppy phraseology.

It is tempting to think that consent implies waiver and waiver calls for consent. Simmons is not the only scholar to build a critique of consent searches on this entwining of consent and waiver.³³ When you consent to a search, the thinking goes, you waive your right to the protections afforded by the Fourth Amendment.³⁴ Conversely, when you waive the right to invoke the Fourth Amendment, you are consenting to law enforcement activity that might otherwise be illegal. This entwining of consent and waiver purports to be an analytic proposition, one that is true because of the very nature of things.

Here is what is important about this conceptual move: if waivers of constitutional rights must be knowing and intelligent to be valid,³⁵ then welding consent to waiver prompts us to ask how we can validate a consent to search without some indication, if not outright proof, of *informed* consent.³⁶ How is a consent to search *voluntary*—and thus a valid waiver of a constitutional right—when the consenting party knows that the consent will ineluctably lead to a reasonably thorough search, which in turn will result in the discovery of the contraband? Aren't all searches that produce contraband or damaging evidence presumptively, if not by definition, non-consensual? After all, people do not usually facilitate their arrest by voluntarily waiving their constitutional

32. *E.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“We have long held that the ‘touchstone of the Fourth Amendment is reasonableness.’” (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))). See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

33. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1 (1991); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 778 (1989) (observing that critics of the Court’s Fourth Amendment jurisprudence misunderstand the role of waiver in constitutional adjudication). Curiously, Professor Stuntz adopts the “voluntariness” phraseology but recognizes that the inquiry focuses on police conduct: “the voluntariness standard invites scrutiny not of the defendant’s choice to consent but instead of the police officer’s conduct.” Stuntz, *supra*, at 787–88 (footnote omitted). Exactly how a “voluntariness” inquiry permits that sort of focus, Stuntz doesn’t say. It would seem more linguistically rational to assert that the consenting party’s voluntariness has a very minor role in the analysis. I take Stuntz’s curious locution to reflect how wedded scholars are to the “voluntariness paradigm” as a rhetorical device.

34. *Bustamonte*, 412 U.S. at 235 (noting that “it is said” that a voluntary consent constitutes waiver of Fourth Amendment rights).

35. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

36. This was the essence of Justice Marshall’s dissent in *Bustamonte*, 412 U.S. at 278–89 (Marshall, J., dissenting), where the Court disavowed requiring informed consent to validate a consensual search.

rights. And in the *Rodriguez* scenario, how can one party's constitutional rights be waived by another party who does not, in fact, have authority to consent to a search?³⁷

Essential to clear thinking here is detaching the two notions of consent and waiver. Seemingly we must do this to make sense of third-party consent cases like *Rodriguez*. We invite trouble when we conceptualize cases like *Rodriguez* as third parties *waiving* the constitutional rights of another, the actual target or victim of a search. *Rodriguez* displays what clear thinking on the matter should reveal. Consent has nothing to do with relinquishing a constitutional right, vicarious or otherwise. The act of consenting (or, at least, the reasonable expression of consent) is itself an act that justifies. It renders a state of affairs legitimate and justifiable. Thus, in the case of a consensual search, the police response to that act of consent is not unreasonable. And since a search and seizure that is not unreasonable does not violate anyone's constitutional rights, it would be wrong to understand consent as a waiver of any constitutional rights. In other words, there is no waiver in such circumstances because there was nothing to waive.

Commentators nonetheless criticize the Court either for not staying faithful to a coherent, linguistically valid notion of waiver, or for spawning confusion by disregarding that which is supposedly central to the analysis: voluntariness.³⁸ The impulse to treat "voluntariness" seriously is understandable. A voluntariness test posits the existence of a neutral way to assess a police-civilian encounter—neutral in the

37. This is exactly the position *Rodriguez* took in presenting his case to the Supreme Court. Professor Davies reports that "Rodriguez's attorneys had argued [the former girlfriend's] 'seeming consent' had no effect on Rodriguez's right to privacy in his home under the Fourth Amendment because consent should be understood to operate as a waiver or release of a citizen's own privacy interests under the Fourth Amendment; therefore, Rodriguez's right could not be 'vicariously waived' by [the former girlfriend]." Davies, *supra* note 33, at 22 (footnote omitted).

38. Professor Davies, for example, asserts that under a proper understanding of consent, "it is axiomatic that the inquiry begins and ends with the question of whether a person who actually had authority to consent *voluntarily* gave consent." Davies, *supra* note 33, at 11 (emphasis added). Davies does not make clear in what sense he is using the term "voluntarily." The phrase "authority to consent" suggests that a grant of permission is eligible for legal enforcement. The phrase "voluntarily gave consent" suggests that an eligible grant must satisfy some set of conditions before a court will actually enforce it. What exactly those conditions are, Davies does not say. But what will become clear in this discussion is that the legal analysis comes down to a struggle over what conditions make an eligible expression of consent legally enforceable. It is singularly unhelpful to say that "voluntariness" is the analytical key to that struggle. What we regard as "voluntary" depends upon what conditions justify the enforcement of an expression of consent. The nature of these conditions inevitably turns on normative judgments about our law enforcement expectations. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002) ("What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent . . ."); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134-41 (2003) (arguing that the Court's consent-search jurisprudence reveals that the Court is "blinking" at reality); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221 (Fall 2001 & Winter 2002) (criticizing the Court's application of a voluntariness test because "it fails to acknowledge the simple truism that many people, if not most, will always feel coerced by police 'requests' to search").

sense that the analysis transcends our momentary impulses and prejudices favoring or disfavoring certain police methods. But once we detach consent from waiver, we can scrutinize the term consent unburdened by preconceptions we might harbor about what makes a waiver valid. We liberate ourselves from the expectation that voluntariness ought to have some analytical muscle and get less exercised by the fact that outcomes seem completely disconnected from whether the consent was indeed voluntary in some metaphysical sense.

So we have two options. We might understand consent to refer to a subjective condition: a psychological state whereby the consentor either voluntarily endorses, or acquiesces to, the conduct of another that affects the consenting person directly. Commentators typically embrace this understanding when critiquing consent-search jurisprudence.³⁹ Voluntariness in this sense refers to a person's inner experience. On this view of consent, the person's inner experience gives consent its moral force. Consent has moral force because it expresses one's *will*. To will means to endeavor to bring about something one desires, to have a conscious aim and objective to pursue some end. Consent-as-willing simply cannot be reconciled with consent-search jurisprudence. As we have seen, offenders do not will their own undoing when they "consent" to a search. The consent-as-willing idea thus invites the angst that plagues most of the criticism directed at consent-search jurisprudence.

But let us consider the other conceptual option. We might understand consent not as an expression of will, a subjective condition, but as an expressive *act* that brings about a legal relationship defining the acceptable limits of a particular encounter between or among individuals. Consent, on this latter understanding, is an act of granting permission, and need not be an expression that accurately mirrors the person's precise psychological state. As a matter of policy, we could insist upon a tight correspondence between expression and inner mental state, but there is nothing intrinsic in or essential to the concept of consent that demands such correspondence. All that the act of consenting must purport to do, at a minimum, is to mirror some aspect of the person's psychological state. Consent understood as an act requires almost nothing from the concept of voluntariness, other than some imprecise injunction against compulsion.

Which conceptualization best fits the Fourth Amendment?

D. Schneckloth v. Bustamonte and the Myth of the Voluntary

We can approach the question directly by consulting what most criminal law practitioners and commentators would regard as the leading case on the issue, *Schneckloth v. Bustamonte*.⁴⁰ Bustamonte argued that the search of a car in which he and five others were riding violated the Fourth Amendment because the police officer said nothing about the indisputable right of the occupants to withhold consent before securing permission to search. Informed consent, the argument posits with commonsensical force, produces "voluntary" consent; ignorance does not. Surprisingly, given how the case turned out, Justice Stewart did not disavow the framing of the issue in voluntariness terms. Quite the contrary, he insisted on understanding *valid* consent to mean *voluntary* consent: "The precise question in this

39. See *supra* note 38.

40. 412 U.S. 218 (1973).

case is what must the state prove to demonstrate that a consent was ‘voluntarily’ given.”⁴¹ This rhetorical maneuver could lead a casual reader to believe that a voluntariness test is at work. After all, Stewart was quick to establish that the voluntariness inquiry in the due-process confession context—because it provided the “most extensive judicial exposition of the meaning” of the term—would provide the analytical scaffolding for the task at hand.⁴² But what he drew from that murky and unsatisfying body of precedent was nothing more than the prosaic command that a judicial evaluation of consent to search must incorporate “the totality of all the surrounding circumstances.”⁴³ This totality-of-the-circumstances phraseology, by itself, tells us little about the commonalities or differences in how courts should approach the supposed voluntariness question in the Fourth and Fifth Amendment contexts. Several years before *Bustamonte*, Justice Frankfurter in *Culombe v. Connecticut*⁴⁴ attempted to flesh out the voluntariness requirement in Fifth Amendment cases by advocating an analytical approach that embraced all the surrounding circumstances to spotlight the inner experience of the confessant. *Culombe* is intriguing precisely because Frankfurter genuinely attempts to grapple with the metaphysics of a voluntary and freely given confession. But Justice Stewart clearly did not regard the totality-of-the-circumstances approach in the Fourth Amendment context to function in that deep, metaphysical way. At most, subjective considerations are merely evidentiary in nature. They may help capture the quality of the consenting act—surely enhanced by the awareness of the right to withhold consent—but do not “establish such knowledge as the *sine qua non* of an effective consent.”⁴⁵ That must be so, Stewart reasons in *Bustamonte*, because what is “voluntary” is a matter determined by the type and amount of coercion, duress, or other pressure that the government may validly apply.⁴⁶

With this observation Stewart is able to conceptualize voluntariness as the crucible in which “two competing concerns must be accommodated”: the government’s need to search, and the individual’s incontrovertible right to be free from intolerable coercion.⁴⁷ So, voluntariness does nothing else but “reflect[] a fair accommodation” of these two considerations, which is just verbal gymnastics to say that voluntariness is a label pinned on a so-called consent search that strikes a judicial officer as reasonable.⁴⁸ A fair accommodation of the government’s crime-fighting needs and the individual’s privacy rights, Stewart concludes, compels the holding that voluntariness in the Fourth Amendment context does not call for *informed* consent, or any other legally-enforced ritual to cleanse the taint of law enforcement coercion from the granting of permission to search.⁴⁹ After all, Stewart observes, “the nature of a person’s subjective

41. *Id.* at 223.

42. *Id.*

43. *Id.* at 226.

44. 367 U.S. 568 (1961).

45. *Bustamonte*, 412 U.S. at 227.

46. *Id.* at 224–29.

47. *Id.* at 227.

48. *Id.* at 229.

49. *Id.* at 241–46. Justice Stewart seemingly understood well that informed consent puts the focus on the citizen and tends to shift it away from the conduct of law enforcement. Cf. Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 690–91 (1975) (Informed consent

understanding” is too recondite and inaccessible to courtroom proof to be a key ingredient in that consent analysis.⁵⁰ Justice O’Connor echoes this observation in the confession context when she remarks, “[i]t is difficult to tell with certainty what motivates a suspect to speak.”⁵¹

Why the departure in the search-and-seizure context from the early Frankfurteresque juridical fastidiousness, obsession even, over voluntariness in the confession context? Why in the Fourth Amendment context is there the disingenuous nod at this seemingly crucial aspect of Anglo-American jurisprudence when so much angst has plagued the Court over that very same term in the confession context? The answer, of course, is that the angst would be misplaced. We worry about the false confession, a palpable reality that, whenever revealed, rocks the foundations of the adjudicatory enterprise and satirizes the law’s authority as the purveyor of justice. No innocent suspect freely and voluntarily confesses to a crime. The false confession is a testament to the reality of the distinction between the voluntary and the involuntary. And so we worry about *why* one confesses, and worry in a way that would be peculiar in the search-and-seizure context.

Peculiar, because the discourse of truth or falsity when a search produces incriminating evidence would amount to what philosophers call a category mistake. To be sure, the litigation of a Fourth Amendment claim often depends on credibility and reliability judgments. But the *act* of granting permission to search implicates nothing about truth or about reliability. However, the act of confessing is different. The confessional act only begins the crucial inquiry into whether that act has produced a reliable account of an event. The act of granting permission to search thus arouses far less concern over motivation than does the act of confessing. In the confession context, motivation to do that which, at least immediately and materially, is ostensibly self-destructive is a matter of both fascination and juridical concern. All this, if nothing else, reduces the urgency of the distinction between the voluntary and the involuntary in the Fourth Amendment context.

There’s more to it, though. In either the search-and-seizure or the interrogation context, the authority of the State pressed into action by the gun-wielding, badge-toting law enforcement officer works its way into the encounter, usually through nothing more than a psychological advantage. The undeniable aspiration is to subjugate the individual’s will to that of the sovereign bent on detecting or preventing crime. But consent searches operate on the premise that criminals are not entitled to conceal that which would lead to their undoing. The entitlement to evidence bearing on guilt belongs to the sovereign, whether unearthed by subpoena, judicial warrant, police action predicated on reasonable suspicion or probable cause, or mere acquiescence couched in terms of “consent.” More muted is this supposed sense of sovereign entitlement when it comes to confessions: evidence that exists within the recesses of

“emphasize[s] a patient’s or subject’s actual state of mind, knowledge or understanding . . . rather than . . . the conduct required of the therapist or experimenter.”)

50. *Bustamonte*, 412 U.S. at 230; *see also* *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (police not required to inform detainee he is “free to go before a consent to search may be deemed voluntary”). *But see Bustamonte*, 412 U.S. at 282 (Marshall, J., dissenting). Justice Marshall, in dissent, understood consent as “a mechanism by which substantive requirements, otherwise applicable, are avoided.” *Id.* No doubt this is true, but the way that consent *functions* does not imply that it must be understood or analytically deployed in terms of waiver principles.

51. *Oregon v. Elstad*, 470 U.S. 298, 314 (1985).

consciousness or even embedded in the soul itself. A government justifying itself through the morality of freedom and human dignity cannot so cavalierly adopt a unitary doctrine of consent, valid in both the search-and-seizure context and the confession context. Unlike the latter, the former raises no compelling specter of government rendering abjectly helpless and hopeless an individual who in that abject moment becomes the "willed" instrument of his own defeat.

Justice Frankfurter was the most eloquent and expansive Justice in openly declaring the law's angst over this deployment of State power to reach into the individual's soul to "suction" out a confession.⁵² Chief Justice Warren, dubious over the ability to detect the blurred voluntariness/involuntariness line, was the most forthright in his aim to do something about the omnipresence of compulsion in any custodial interrogation.⁵³ The *Miranda* warnings are, in effect, a device to ensure that individuals swept into the custodial-interrogation process learn of their power to withhold consent, since that power allows interrogated individuals some measure of control over the flow and intensity of the questioning. Precisely that awareness of the power to control the flow and intensity of a police-civilian street encounter is rebuffed in *Bustamonte*.⁵⁴ This power to withhold consent to a search is there, but the search target's disadvantages of ignorance, fear, and resignation are accepted as vulnerabilities we expect law enforcement to exploit to good effect. However much we speak of the Fourth Amendment as a guarantor of privacy, it never has and never will attain the stature of the Fifth Amendment's barrier to the State's desire to invade the most sacred realm of all, the individual soul. Confessions, unlike physical evidence, are entwined with the human soul, which is why we use the imagery of baring one's soul when talking about confessions.

The penetration into the soul that transforms the criminal self into the confessing self is the stuff of terrific angst. What contraband may be hidden in a car trunk could never, and perhaps ought never, compete with this penetration. Hence, the conceptual demands we place on the distinction between the voluntary and the involuntary must perforce be greater in the confession context than in the search-and-seizure context. Even in that former context, the morass of psychological and philosophical ambiguity and conceptual imprecision so threatens to drown the judicial impulse to use practical reasoning to aid law enforcement that the distinction often becomes vacuous rhetoric, just as it is in the search-and-seizure context.

52. *Culombe v. Connecticut*, 367 U.S. 568, 576-77 (1961).

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

54. See *supra* notes 47-50 and accompanying text.

We need only look to such cases as *Oregon v. Elstad*⁵⁵ and *Colorado v. Connelly*⁵⁶ to see that this is so—that *Miranda*, whatever the original understanding might have been, is read now not as a vindication of voluntariness or free will itself, but as a method of creating the power to withhold consent in a police-civilian encounter by mandating the suspect’s awareness of that power. Treating *Miranda* as a tool to modulate the interrogation process is not to affirm the existence of voluntariness and free choice. In fact, treating *Miranda* that way reflects the opposite; it reflects the ephemeral quality of voluntariness and free will because it puts into the hands of the interrogated subject the power to draw his or her own voluntariness/involuntariness line. That is why, in my view, the so-called “voluntariness paradigm” is, in all criminal-law contexts, just the phraseology of a default position by rhetoricians whose job it is to prop up the fragile moral infrastructure of our criminal-justice enterprise. And so, in *Elstad* and *Connelly*, for example, the power to withhold consent was deemed to have been undiminished and fully respected by law enforcement, even though in both cases there existed an undeniable psychological impetus to disgorge incriminating information. The Court, shoving aside the psychological dimensions of these cases, underscored that the abstract awareness of the power to withhold consent was all that mattered, and that awareness was injected into the encounters through proper *Miranda* warnings. For analytical purposes, *Elstad*’s and *Connelly*’s volitions were intact—maybe not fully functioning (at least in *Connelly*’s case), but intact nonetheless by the posited reality that volition exists until and unless government affirmatively acts to strip the suspect of it.

II. THE POWER TO WITHHOLD CONSENT

Let us now widen our inquiry for the moment, beyond so-called consent-search cases. I suggest this because, though not forcefully phrased in these terms, much of Fourth Amendment jurisprudence partakes in the study of the power to withhold consent and the concomitant power to consent. By widening our inquiry we might see that, had the Court in *Bustamonte* tried to imbue the notion of voluntariness with any meaningful substance—had Justice Stewart embarked on the metaphysically laden project Justice Frankfurter pursued in *Culombe*—it would have laid the groundwork to destroy the entire Fourth Amendment edifice.

55. 470 U.S. 298 (1985). In *Elstad*, the suspect was questioned at his home about a burglary. He gave an incriminating answer. That answer was inadmissible at trial because no *Miranda* warnings preceded it. But there was a later admission, one far more detailed. That later statement was given at the police station, after *Miranda* warnings. The Court held that the earlier *Miranda* violation did not taint the later statement given after proper *Miranda* warnings had been issued. *Id.* at 318.

56. 479 U.S. 157 (1986). In *Connelly*, the defendant traveled from Boston to Colorado to confess to a killing because God told him he must. That psychological impetus to confess, brought on by a mental illness (akin to an alien compulsive force, and uncontested by the government), was irrelevant to the “voluntariness” question because it implicated nothing about the police conduct in procuring the confession. *Id.* at 170.

A. Consent and Seizure

To begin with, the power to withhold consent, in the present-day Fourth Amendment locution, derives from one's "reasonable expectation of privacy," the well-known formulation by Justice Harlan in *Katz v. United States*.⁵⁷ Shutting the phone-booth door was Katz's exercise of his power to withhold consent—the withholding of consent to have others, especially the government, listen in on his conversation. When Dollree Mapp argued for the exclusionary rule, she was demanding that the judicial system vindicate her power of non-consent, her power to say *no* to the law enforcement officers who insisted on searching her home.⁵⁸ The Supreme Court ruled that the proper vindication of that power to withhold consent, when the government improperly overrides it, is the evidentiary exclusion of the seized evidence.⁵⁹ When Officer McFadden approached Terry and his two companions and conducted a pat-down search, the Court said that the thirty-nine year police veteran had the authority to take away their power to withhold consent because reasonable suspicion existed that criminal activity was afoot.⁶⁰

What, then, is a valid search? What is a valid seizure? One might put it in consent terms, that they are instances of government action against individuals who, because of some reliably observable set of circumstances, lost some measure of their power to withhold consent in a law enforcement encounter. The issuance of a warrant (search or arrest warrant) is simply one notable instance where the individual has lost some measure of the power to withhold consent. The pat-down search justified by reasonable suspicion is but another. How much of that power is lost in any particular circumstance depends, in large part, on the type and level of suspicion that law enforcement reasonably harbors. When one has an undiminished power to withhold consent—say, because law enforcement's level of suspicion is too low, or because no important and valid public purpose is gained by diminishing that power to withhold consent—the government presumably may not, under the Fourth Amendment, forcibly search or seize that individual or her belongings.

All this suggests that we might well think that consent searches are justified because they involve the individual's free choice to *not* invoke the power to withhold consent. Our power to withhold consent, which may diminish or disappear upon sufficiently high levels of suspicion, necessarily implies the power to grant consent. No surprise, then, that the validity of *consent* as an act to justify a search often devolves into an inquiry over whether a Fourth Amendment seizure has occurred.⁶¹

The case of *Florida v. Royer*⁶² exemplifies this. There, two detectives stopped Royer, traveling under an assumed name, from boarding a plane; he supposedly fit a "drug-courier profile."⁶³ They took Royer's ticket and his driver's license, questioned

57. 389 U.S. 347, 360 (1967).

58. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

59. See *id.* at 660.

60. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

61. See, e.g., *United States v. Drayton*, 536 U.S. 194, 203–05 (2002); *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 501–07 (1983); *United States v. Mendenhall*, 446 U.S. 544, 557–59 (1980).

62. 460 U.S. 491 (1983).

63. *Id.* at 493–94.

him, and then “asked him to accompany them to a small room . . . adjacent to the concourse.”⁶⁴ The detectives also brought Royer’s two suitcases into the room.⁶⁵ Royer unlocked one of the suitcases and gave detectives permission to pry open the other.⁶⁶ Marijuana was in both suitcases.⁶⁷ The Court nominally framed the case in consent terms, stating that permission to search must be “freely and voluntarily given,” but it quickly traversed into the land of *Terry v. Ohio*⁶⁸ to determine whether Royer had been seized beyond what *Terry* permits.⁶⁹ That is, the power to walk away from a police encounter creates the conditions for a freely and voluntarily given consent to search. In response to Royer’s motion to suppress, the State argued that the detectives never impermissibly seized Royer.⁷⁰ Put in our terms, the detectives never took away Royer’s power to withhold consent and, to the extent that they might have done so, they were justified. The Court disagreed, citing among many reasons the fact that the detectives never told Royer he could leave the room and catch his plane, and that he was taken into a room that was hospitable to the law enforcement goal of securing consent.⁷¹ So, the impermissible deprivation of Royer’s power to withhold consent invalidated his purported exercise of the power to consent.

A fractured Court came to the opposite conclusion in *United States v. Mendenhall*,⁷² another airport drug-courier case, but the analytical methodology was the same. Mendenhall was taken into a room, just as Royer was, after federal agents identified her as a possible drug courier.⁷³ She, too, was carrying false identification.⁷⁴ The difference, though, was that Mendenhall never lost her power to withhold consent—no luggage was involved, her identification was returned to her, and she could have, according to Justice Stewart, “end[ed] the conversation in the concourse [with the agents] and proceed[ed] on her way”⁷⁵ That meant her consent to go into a room and be searched and questioned further was enforceable against her. Although the Court spoke of the consent as “voluntary,” no reader of the opinion can miss the fact that this conclusion only reflected the Court’s judgment that Mendenhall had never lost her power to withhold consent. Retaining that power to withhold consent, not some added metaphysical notion of voluntariness, made the consent enforceable.

64. *Id.* at 494.

65. *Id.* at 494–95.

66. *Id.* at 495.

67. *Id.*

68. 392 U.S. 1 (1968).

69. *See* Royer, 460 U.S. at 497.

70. *See id.*

71. *See id.* at 501–07. This last facet of the Court’s analysis hearkens back to *Miranda*, where the Court spoke of the coercion arising from a situation where an “individual [is] swept from familiar surroundings into police custody, surrounded by antagonistic forces” *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

72. 446 U.S. 544 (1980).

73. *Id.* at 547–48.

74. *Id.*

75. *Id.* at 555. Stewart and Rehnquist concluded that Mendenhall had not been seized when she was accosted on the airport concourse. *See id.* Three concurring Justices thought the issue was extremely close. *Id.* at 560 (Powell, J., concurring). The four dissenters criticized the plurality for accepting a conclusion that no lower court in the case had accepted. *See id.* at 567–69 (White, J., dissenting).

The Court put an exclamation point on *Mendenhall* in the much-maligned case of *United States v. Drayton*,⁷⁶ its second drug and gun interdiction case at a bus station.⁷⁷ Drayton and his friend were sitting next to each other on a Greyhound bus when a police officer asked them for permission to search their luggage.⁷⁸ The friend said, “[g]o ahead.”⁷⁹ Because the two passengers were wearing baggy pants and heavy jackets in warm weather, the officer asked the friend “if he had any weapons in his possession,” followed by a request to search.⁸⁰ “Sure,” the friend said.⁸¹ A pat-down search revealed drug packages taped to his thighs.⁸² Once the friend was removed from the bus, under arrest for carrying drugs, the officer asked Drayton for permission to search.⁸³ Drayton lifted his hands, a gesture of consent, and drugs were found taped to his thighs.⁸⁴ In what sense Drayton “voluntarily” agreed to suffer the same fate as his friend—something that he witnessed happen just seconds before—is impossible to articulate. According to the Court, that psychological mystery (if a mystery it is) is not a matter in need of unraveling. To hlast the Court for characterizing Drayton’s gesture of consent as *voluntary*—who can really say that it was?—is to demand from the Court the conquering of a linguistic challenge it never set for itself. What could be articulated and analyzed from the observable facts was not whether Drayton acted “voluntarily,” but whether he had ever lost the power to withhold consent. Not the awareness of it, but the existence of it by virtue of where the law enforcement officers (three of them) were positioned on the bus (the aisle was left open to allow people to step out) and what was communicated, with words and conduct (no threats, polite tone, no display of guns).⁸⁵

Existence of the power to withhold consent? In what sense can such a thing exist? Is it possible to have that power when you do not know you have it? It’s a safe bet that if we asked Christopher Drayton, he would say, “Power? What power?” To Christopher Drayton, the *awareness* of the power to withhold consent produces the *existence* of that power; and the corollary is true—unawareness means nonexistence. It is hard to get around the metaphysical force of this entwining of awareness and existence. But legal judgment is not metaphysics. In the world of good guys and bad guys, the power of nonconsent exists in the air, as a matter of atmospherics; it exists if the mythical reasonable *innocent* person would believe that this power exists. So, in *Drayton*, the *existence* of the power of nonconsent—the atmospheric existence, let us say—validated

76. 536 U.S. 194 (2002).

77. In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court upheld against a Fourth Amendment challenge random searches in the cramped confines of a bus. The coercive conduct of the police, not the oppressive environment in which the encounter takes place, the Court reasoned, is the analytical focus. *See id.* at 436.

78. *Drayton*, 536 U.S. at 198–99.

79. *Id.* at 199.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* at 203–04.

as consensual what clearly was not, psychologically speaking, consensual at all: a clear instance of expressive acquiescence trumping subjective unwillingness.⁸⁶

Yes, it is true that the *Drayton* reasonable person standard may well cross the line into the circular and positivist idea that something exists because the law says it exists, and that existence then warrants the law's deployment of it to validate the government's actions. But if we understand the reasonableness inquiry not strictly in terms of what a civilian might experience in a police encounter, but instead as an open-ended normative inquiry into what law enforcement methods we ought to treat as acceptable, we can break that circle and thereby expressly merge constitutional argument with political debate.⁸⁷

B. The Reasonableness of Law Enforcement

The granting of consent to a particular police-civilian encounter which occurs against the backdrop of the power to withhold consent obviates the need for the police to garner some acceptable level of suspicion. To say that this granting of consent is a "waiver" of the Fourth Amendment isn't quite right,⁸⁸ just as it isn't quite right to say

86. See *id.* at 203–05. No wonder Justice Ginsberg said the majority's opinion had "an air of unreality" about it. *Id.* at 208 (Ginsberg, J., dissenting).

87. Professor Nadler insists that consent-search jurisprudence requires that we ask how a "reasonable person" would "feel" during a police-civilian encounter. That inquiry, she insists, ought to be influenced by empirical findings regarding how people react to authority. See Nadler, *supra* note 38, at 163. But that approach assumes the Court's reasonable person test is actually centered on the inner experience of the target of the search, an assumption that fundamentally misconceives the Court's approach to the Fourth Amendment. If a "reasonable" person not carrying drugs would feel free to say "no" to the police request for a search, then surely a person like *Drayton*, one with a heightened incentive to think "reasonably," would actually refuse the request. Thus, to say that *Drayton* felt coerced (which is impossible to deny), but that a "reasonable" person would not have felt coerced, is to say something that is completely absurd. It is to say that the person with the most incentive to act "reasonably" did the exact opposite. So *Drayton* itself belies Nadler's premise.

88. Professor Davies contends that the consent-as-waiver idea animates such cases as *Stoner v. California*, 376 U.S. 483 (1964), *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), and *United States v. Matlock*, 415 U.S. 164 (1974). See Davies, *supra* note 33, at 29–35. He is mistaken. Since I discuss *Bustamonte* and *Matlock* elsewhere in this Article, I'll confine my comments here to *Stoner*. In *Stoner*, the police entered defendant's motel room when the motel clerk, who was "more than happy to give [the police] permission," opened the door. *Stoner*, 376 U.S. at 485. The analysis hinged not on any notion of waiver, but on these two propositions: (1) *Stoner's* privacy in the motel room fell within the ambit of the Fourth Amendment, see *Stoner*, 376 U.S. at 490 (stating that "[n]o less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures") (citations omitted), and (2) the police officers could not reasonably believe that a motel clerk had the authority, under these circumstances, to let them into his room absent a warrant, see *id.* at 490 (stating "[t]hat protection [against unreasonable searches and seizures] would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel"). Davies misreads *Stoner* when he says that "[i]t is evident that *Stoner* stands squarely against any claim that mere 'seeming consent' could legitimate a police intrusion into the privacy of a home." Davies, *supra* note 33, at 30. It may be true, as Davies points out, that "only a person whose own right is implicated can possess authority to consent,"

that consent is a form of surrendering our expectation of privacy.⁸⁹ Much like its corollary (the power to withhold consent), the power to grant consent is a manifestation of a particular legal relationship which exists between the government and the individual during a particular encounter. One can withhold consent and thereby force a police officer to retreat from an encounter and seek some other way to accomplish the search, or one can consent. The legal relationship changes depending on which power is invoked.

That legal relationship is always governed by the Fourth Amendment, including the basic principle of *Katz* that a reasonable expectation of privacy defines what is meant by a search. No less than when consent is withheld—a power derived from the Fourth Amendment—granting consent speaks directly to the reach and limits of the Fourth Amendment. The notion of waiver or the surrendering of one's reasonable expectation of privacy suggests that the legal relationship resulting from the consent exists outside the Fourth Amendment's purview, but that is simply not so. How courts treat the withholding or granting of consent is itself an expression of, and is informed by, the scope of the Fourth Amendment's protections. It is in that sense that the exercise of one's power to grant consent—being that it is a corollary of the power to withhold consent—derives from our reasonable expectation of privacy, and is therefore an *exercise* of, not a surrender or waiver of, our rights under the Fourth Amendment.⁹⁰

Even under this conceptualization of the Fourth Amendment, we still intuitively grab onto the idea that the granting of consent must be “voluntary.” Since the granting of consent is a corollary to the power to withhold consent, and thus an exercise of the Fourth Amendment's protections, we understandably want to endow the granting of consent with some dignity, with some meaningful content—hence the urge to speak in the language of voluntariness.

But what about voluntariness and the power to *withhold* consent? If voluntariness ought to matter when it comes to granting consent, then it surely must matter when it comes to withholding consent. And yet it is hard, if not impossible, to treat the concept of voluntariness and consent seriously in the face of how the Court treats the power to withhold consent.

First, recall the cases we discussed above: *Royer*, *Mendenhall*, and *Drayton*. These cases all involve the analytical dependency of the power to grant consent upon the existence (*not* the awareness) of the power to withhold consent. What they show quite clearly is that the power to withhold consent is governed by objective considerations, particularly the observable conduct of the law enforcement agents; the particulars of the search target's mental and emotional states are irrelevant, except in the very limited sense that such particulars might bring a different shade to how the Court reacts to the events leading up to the act of consent. This objective approach to the power to withhold consent harmonizes with the objective inquiry associated with the *Katz* reasonable-expectation-of-privacy test—an unsurprising fact, given that the scope of the power to withhold consent derives from the *Katz* test.

id., but that does not undercut the understanding of the Fourth Amendment that holds that consent is not the linchpin to the analysis. An ingredient in the analysis? Yes. Dispositive? Not at all. That is one message of *Rodriguez*, and *Stoner* does nothing to undercut it.

89. For a clear-cut example of this assertion, see Davies, *supra* note 33, at 28 (“[C]onsent amounts to a citizen's surrender of an expectation of privacy.”).

90. This conceptual point is distinct from the interpretive question of how much power to withhold consent the Fourth Amendment should grant.

Second, consider *Illinois v. Wardlow*,⁹¹ where a youth standing on a street corner, imbued as a constitutional matter with his full power to withhold consent intact, saw a four-car police caravan and ran.⁹² Assuming he ran to avoid a police encounter, which is exactly how the pursuing officers saw the situation,⁹³ Wardlow was doing nothing more than expressing nonconsent to any possible police-civilian encounter. Perhaps the way he expressed his nonconsent was unusual or suspicious—undoubtedly, a reasonable police officer would find flight at least somewhat suspicious or indicative of a guilty conscience. But no matter how one regards the flight, the brute fact remains that running is both lawful and one way to express nonconsent. I want to repeat: Wardlow undoubtedly had the power of nonconsent—he'd done nothing to allow the police to seize him before he ran. But the way he expressed his nonconsent, the way he exercised his indisputable right to avoid a police-civilian encounter, in and of itself generated the justification for a *Terry* stop, a justification that did not otherwise exist.⁹⁴ It does not take a robust conception of consent to see that *Wardlow* treats the power of nonconsent—the essence of the legal notion of seizure—with utter contempt. Contempt, not with words, but with neglect. The power of nonconsent can be lost by how it is used. The Court approved the exercise of the power of nonconsent when it takes the form of staying put and remaining silent when a police officer approaches, of verbalizing a “refusal to cooperate,”⁹⁵ or of ignoring the officer and “going about [your] business”⁹⁶; unprovoked flight, however, is an unacceptable exercise of that power. And so, *reasonableness*—in this case, the officer's reasonableness in interpreting Wardlow's expression of nonconsent as suspicious—was the real issue in the case, just as it was in the so-called consent cases of *Bustamonte* and *Rodriguez*.

We may lose our power to withhold consent on the flimsiest of grounds, with law enforcement taking that power from us with disreputable motives—I have in mind, of course, *Whren v. United States*,⁹⁷ where the Court countenanced pretextual traffic stops. We may lose our power to withhold consent when the pursuit of other law enforcement goals, such as immigration control, commands our allegiance—here, I have in mind *INS v. Delgado*,⁹⁸ where immigration officials blocked the doors to a workplace during an investigative sweep. The Court emphasized that the employees' movements were restricted not by the government—the immigration officials did not disrupt their work except for brief questioning—but by their voluntary obligations to their employers. The analytical focus was clearly not on the psychological stresses of the situation. It had nothing to do with the inner lives of the workers. It had to do with the conduct of the government agents and the perceived need to enforce immigration laws. Again, reasonableness.

Consider finally those cases involving undercover informants. The question in those cases could be put in consent terms: whether the decision to speak to the government agent was consensual, even though the speaker was deceived into believing he was

91. 528 U.S. 119 (2000).

92. *See id.* at 121–22.

93. *See id.* at 122.

94. *See id.* at 124–25.

95. *Id.* at 125.

96. *Id.*

97. 517 U.S. 806 (1996).

98. 466 U.S. 210 (1984).

talking to a friend and not a government informant. Framing the issue in consent terms works here because the power to withhold consent remained intact—with one important caveat. The power to withhold consent associated with the Fourth Amendment does not include the right to be informed that the person with whom you are talking is, in fact, a government agent—an astounding notion, considering the ubiquity of undercover operations these past many decades.⁹⁹ Indeed, the government is entitled to deceive you into thinking that the person with whom you are talking is *not* a government agent. That deception cannot be squared with a minimally viable understanding of voluntary consent. If at all, that deception could only be squared with a valid understanding of acceptable police investigation.¹⁰⁰ That the Supreme Court has repeatedly upheld the use of covert government agents thus reveals not the vibrancy of the risk-assumption theory—the conventional understanding in this area—but the judgment that covert operations in crime-fighting are essential, and thus reasonable.¹⁰¹ The inner states of the search targets—their being deceived, not just uninformed—is completely beside the point,¹⁰² despite the clear loss of the power to withhold consent.¹⁰³

99. See, e.g., *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1967); *Lewis v. United States*, 385 U.S. 206 (1966).

100. The Court suppresses the *uninformed-consent* aspect of undercover operations with the vacuous notion of assumption of the risk—namely, that the aggrieved party has assumed the risk that a friend may not actually be a friend, but may be a government agent. That risk-assumption rationalization—and that is all it is, a rationalization—brings us back to consent searches. The Supreme Court in *United States v. Matlock*, 415 U.S. 164 (1974), suggested that third-party consent searches are justified on an assumption-of-the-risk theory. The considerations that lead to the judgment that a target of a search has assumed the risk that another might consent to a search are precisely the sorts of considerations that one would take into account in evaluating whether the law enforcement conduct was not unreasonable. Some have understood the assumption-of-the-risk theory to refer to the elimination of an expectation of privacy, much like when a suspect unwittingly invites a police informant or undercover officer into the home and then speaks about matters that are highly incriminating. This line of thinking leads to the conclusion that a consent search is not even a search at all for Fourth Amendment purposes—a rather tortuous and inadvisable way to speak about searches. The risk-assumption theory is vacuous because any activity conducted where there is a societal judgment of no reasonable expectation of privacy necessarily entails an assumption of the risk that one's conduct or words will be collected as evidence. The risk-assumption theory adds nothing to the *Katz* reasonable-expectation-of-privacy locution. Indeed, conceptualizing the risk-assumption theory this way allows for a more honest critique of the *Hoffa* and *White* holdings. Although we may not have a reasonable basis for expecting that our words will remain forever private and that "friends" will never betray us, the intrusion of a government informant into one's private realm could still be evaluated as unreasonable governmental activity.

101. See H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137 (1987). See generally WAYNE R. LAFAVE, SEARCH AND SEIZURE §§ 8.1(a)–(b), 8.2(n), at 711 (3d ed. 1996) (supporting the proposition that deception to induce "consent" is proper if the deception is "fair").

102. That the emotional experience aroused by a government intrusion is not the focal point of the analysis can be seen by comparing the outcomes in *Kyollo v. United States*, 533 U.S. 27 (2001), and *California v. Greenwood*, 486 U.S. 35 (1988). It is a safe bet that most law-abiding people would regard the rummaging through of our garbage to be a far greater intrusion than the

III. FAIR BARGAINING AND THE FOURTH AMENDMENT

What does all this mean? We can say for certain, as a doctrinal matter, that Fourth Amendment jurisprudence has never committed itself—and after *Katz* could not have committed itself—to a vision of consent as a subjective condition. Believing that it does, or that it ought to, inevitably produces straw-man attacks on the Court's consent-search jurisprudence. We should see by now that the Court never could, let alone never did, adopt a subjective approach to consent searches, that "voluntariness" never could be a meaningful concept, that the scholastic effort to take the voluntariness locution seriously takes our eyes off the ball. What we have seen is that consent searches analytically depend on the power to withhold consent, a matter that preoccupies most of Fourth Amendment jurisprudence. To insist upon a subjective approach in the consent-search arena, therefore, is to insist upon a subjective approach throughout most, if not all, of search-and-seizure law. But once the *Katz* formulation is accepted, the power to withhold consent cannot be analyzed other than from an objective "reasonableness" standpoint. If it were otherwise—if, that is, a particular suspect's power to withhold consent must be evaluated in terms of a best-interest model (which an honest subjective approach must commit itself to)—then virtually all police encounters, as an empirical matter, would be deemed "seizures" for Fourth Amendment purposes.¹⁰⁴ After all, what maddens us about the voluntariness locution in consent-search cases is precisely the unreality of it—most everyone would feel coerced by the sorts of police encounters that are described everyday in our courthouses. And if almost all police encounters constitute Fourth Amendment "seizures"—that is, the power to withhold consent is regarded as empirically and doctrinally nonexistent—then the power to consent disappears as well. It is pure naiveté to think, and unfair to expect, that the Court had charted, or would ever chart, such a doctrinal path, one that strips law enforcement of the ability to seek consent to search without any predicate of suspicion. Yet that is what is implied when we naively take the voluntariness paradigm seriously.

I say that it is not only naive but also unfair to expect that such a doctrinal path had been or would be pursued, because what drives this doctrinal and theoretical point, it is plain to see, is the inescapable realities of law enforcement. Understanding consent as a subjective condition inexorably leads into fair-bargaining conceptions—"voluntariness with a vengeance," as Justice Harlan put it in his *Miranda* dissent¹⁰⁵—where rights are relinquished for benefits received in return. That is how criminal-defense lawyers in

detection of heat emanating off of the walls of our home.

103. Anthony G. Amsterdam recognized long ago that Fourth Amendment jurisprudence focuses not on the personal rights of the individual but on the regulation of law enforcement. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

104. See *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The *Bostick* Court explicitly rejected the subjectivist approach to evaluating the power to withhold consent. See *id.* ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a *reasonable person* would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required.") (emphasis added) (citation omitted).

105. *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

their advisory capacity would like to treat waivers, which is why they tell clients not to say a word when they are threatened with being taken into, or are already in, custody. Rights are valuable and thus worth concessions in a bargaining process with the prosecutorial authorities. But fair bargaining is exactly what an on-the-field police-civilian encounter is *not* about. If it were, then we would gravitate towards rules approaching something like an informed-consent doctrine. We would take *Johnson v. Zerbst*¹⁰⁶ out of the courtroom and have it set the ground rules whenever the police seek out evidence of criminality. Trickery, pressure, coaxing—a whole host of tactics that exploit a palpable psychological power imbalance that favors law enforcement—would be an anathema in this fair-bargaining world, because the benchmark of legitimacy would be rational calculation. Consent and waiver would be entwined insofar as consent would be legally valid so long as the concomitant waiver reflects a rational calculation that the waiving party's interests are actually being advanced by the waiver. In the Fourth Amendment arena, this rational calculation would minimally entail the civilian's awareness that the police encounter could be ended merely by her saying so. *Bustamonte* makes explicit what the entirety of Fourth Amendment jurisprudence always has shown: the fair-bargaining model, the idea of rational calculation in the algebra of consent, has no traction when it comes to search-and-seizure law.

And it ought not have traction, since the fair-bargaining model is absurd in the Fourth Amendment context.¹⁰⁷ It is absurd because the police-civilian encounter primarily concerns evidence collection, crime prevention, and crime solving; because it is entirely unnecessary to vindicate what we aspire to for the Fourth Amendment; and because efforts to promote rational calculation in civilian-police encounters—even if that were a value society wanted to promote—would be too messy to enforce.¹⁰⁸ So it would be absurd to treat consent as mandating considerations of a person's psychological state and personal attributes that bear on subjective acquiescence to a search; such considerations are properly evidentiary in nature, suggestive but hardly dispositive of the true issue that is at stake when evaluating a Fourth Amendment consent scenario. The true issue has never been—and, as a realistic matter, could never be—voluntariness; the true issue is and always has been the acceptability of law enforcement methods, the *way* that law enforcement secures the outward expression of consent.¹⁰⁹

106. 304 U.S. 458 (1938).

107. See *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *United States v. Watson*, 423 U.S. 411 (1976). That the fair-bargaining model is inapt in the Fourth Amendment realm does not mean *Bustamonte* is immune from criticism. It may be more prudent to choose a social arrangement whereby police officers must warn citizens of their right to withhold consent. That is not a conceptual issue; it is a policy judgment.

108. *Miranda* warnings can be given without any nuanced judgment on the part of law enforcement officers. They read the rights from a card. But that rote rendition of rights is not possible in an on-the-street encounter involving an effort to accomplish a search. In situations where law enforcement does not yet have adequate grounds to conduct a search, a warning to a target of a search that she may refuse consent would be accurate. But where law enforcement has enough information to secure a warrant, the warning would be misleading since a right-to-refuse warning implies that consent is the *only* way the officer could accomplish the search.

109. See *Bostick*, 501 U.S. at 435 (stating that a police-civilian encounter is consensual “as

IV. VOLUNTARINESS AND CHOICE

Consent is not valid if given only in acquiescence to a claim of lawful authority, such as when an official conducting the search misrepresents that he has a warrant or the possibility of getting one;¹¹⁰ nor can consent justify a search if the search was conducted under a defective warrant.¹¹¹ As we saw with *Royer*, if consent is given *during* an illegal seizure, it is invalid.¹¹² These scenarios show that voluntariness, if it has any referential meaning at all, signals the existence of an actual perceived choice to grant or withhold consent. The whole overborne-will idea—of limited relevance today, since physical brutality to extract “consensual” disgorgement of evidence is far less prevalent today than in earlier times—is nothing more than an acknowledgment that consent, at the very least, requires the existence of a choice. Maybe not a palatable choice, and certainly not a choice unburdened by pressures and harsh consequences, but an actual choice nonetheless.¹¹³ Therefore, it would be wrong to understand *Bumper v. North Carolina*,¹¹⁴ for example, where consent was given after law enforcement officers said they had a search warrant, as a case where *voluntariness* demands a certain quality in the decision-making process beyond the brute existence of a choice to grant or withhold consent.¹¹⁵

Once we get beyond those outlying situations where, by deed or words, the capacity for choosing has been severely eroded, we must understand voluntariness to be a word without a genuine referent. It does not actually mirror anything that exists in the real world. There is no observable fact that we can call *voluntary* in the way that we can call a chair a *chair*. Voluntariness is not even a linguistic tool—let alone a misguided one, as Professor Simmons insists—that frames the constitutional inquiry into whether government-engineered coercive influences are sufficiently great to say that the target of the search ought not take ownership of her expressive consent (that is, the granting of permission to search). Professor Simmons’s so-called voluntariness paradigm is

long as the police do not convey a message that compliance with their requests is required.”).

110. See *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968).

111. See *id.* at 549.

112. See *Florida v. Royer*, 460 U.S. 491, 501–08 (1983).

113. The overborne-will theory is nicely captured in Justice Frankfurter’s description in *Culombe* of the prisoner’s predicament while at the police station:

In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued . . . inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks.

Culombe v. Connecticut, 367 U.S. 568, 575–76 (1961).

114. 391 U.S. 543 (1968).

115. The Court spoke in terms of consent being valid only when “freely and voluntarily given,” but it is clear that the nonexistence of a realistic choice—the taking away of the power to withhold consent—is the critical feature of the decision. See *id.* at 550. As the Court put it, “[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.” *Id.*

nothing more than an offshoot of the criminal law's embrace of the free-will idea—not as an empirically verifiable reality, mind you, but as a presupposition upon which to build the moral edifice of the criminal law.¹¹⁶ And so, free will being the ephemera that it is, the notion of voluntariness could hardly be otherwise.

The conceptual key to understanding the jurisprudence of consent searches, therefore, is not the notion of voluntary waiver; that path leads to a quagmire of meaningless conceptual puzzles. Rather, the key is understanding consent as an expressive idea, one that concerns itself with the outward signs of one party granting permission to another.¹¹⁷ “Voluntariness” is but a label we can place upon *that* observable phenomenon—in the Fourth Amendment context, an interaction that transpires between law enforcement and a private citizen who may, but need not be, a target of suspicion.¹¹⁸ We can see signs, physical and verbal, that indicate the granting or withholding of permission to search.¹¹⁹ Like all observations, this one involves evaluation, normative considerations that, in the case of a contested search, lead us to judge the purported granting of permission as valid or invalid. It is thus a mistake to posit that the Court purports to engage in some sort of metaphysical inquiry into voluntary consent. The analytical focus is not the quality of the consent per se, but the police practice to override any resistance to giving that consent—a fact which characterizes both consent-search and *Miranda* jurisprudence.

It is thus pointless to lament that the Court never expends genuine effort to nail down some concrete understanding of voluntariness, beyond the bare necessity that some actual choice be presented to the supposed consenting party. Fourth Amendment analysis as a purely intellectual exercise loses nothing if all references to voluntariness are excised. Perhaps for clarity's sake we would be better off unshackling ourselves from metaphysical terms like “voluntariness.” But regardless of that, to say, with Professor Simmons, that voluntariness defined the old paradigm is to pin on the Court a mode of analysis that it never actually embraced. Metaphysical notions like voluntariness have always been mere lexical paraphernalia of the actual inquiry into police methods we accept as legitimate crime-fighting tools. What happened in *Bustamonte* and all of the other consent-search cases is what happened in *Rodriguez*: the Court evaluated a civilian-police encounter and inquired into whether the crime-

116. See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74 (1968).

117. The Court's treatment of the consent issue in *Florida v. Jimeno*, 500 U.S. 248 (1991), leaves no doubt that consent is best understood in the expressive sense, not the internal sense. The issue in *Jimeno* was the scope of the consent. Jimeno argued that he consented to a car search but did not consent to the opening of a paper bag found during the search. See *id.* at 249. The Court upheld the search because Jimeno's granting of permission—what he *expressed*—governed the scope of the search, not Jimeno's private intentions, or what he *thought* was the scope of the consent. See *id.* at 251–52.

118. Cf. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (stating that seizure occurs only if a “reasonable person would have believed that he was not free to leave”). *Mendenhall*'s objective test was endorsed only by Justices Stewart and Rehnquist, but four years later commanded the support of the full Court. See *INS v. Delgado*, 466 U.S. 210, 214 (1984).

119. The scope of a consent search may not exceed the scope of the consent given, and that scope is determined by asking how a reasonable person would have understood what was communicated between the consenting party and the searching party. See *Jimeno*, 500 U.S. at 250–51.

fighting methodology was minimally acceptable.¹²⁰ The Court might dress up the analysis with evocative metaphysical notions, but only naiveté or the desire to erect a straw-man critique prevents one from seeing that the Court purports to do nothing more, and nothing less, than assess reasonableness, which is exactly Professor Simmons's purported "new" paradigm.¹²¹

That evaluative judgment must reflect the inelegant fact that law enforcement is at war with criminals. Law enforcement officers look for evidence of crime; criminals try their best to conceal that evidence. In this "competitive enterprise of ferreting out crime,"¹²² criminals have a decided preference not to consent to a search. Law enforcement officers contrive ways to induce consent. More often than not, the entire evaluative enterprise boils down to a nitty-gritty judgment about what kinds of coercion and what kinds of pressure, trickery, and deceit law enforcement may employ to get the criminal to grant what he does not want to grant—permission to search. Of course, the same goes for extracting damaging admissions and confessions. Coercive methods to get suspects to do what they do not want to do—incriminate themselves—are evaluated to arrive at a pragmatic judgment that is broadly framed by the language of the Constitution.¹²³ It simply makes no sense to take "voluntariness" seriously when the purpose of an endeavor is to get offenders to do that which they do not want to do.

This exercise in evaluating the tug-of-war of crime prevention and crime solving reveals how the concept of consent can expand or contract. If a police officer has probable cause to search but cannot contact a magistrate, a court could legitimately find consent on sparser evidence than in a situation where a police officer had nothing more than a hunch when eliciting the consent to search. Similarly, a heavier burden to establish consent would be appropriately placed on the prosecution where the police officer could have obtained a warrant but did not, relying on consent instead. Within

120. See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

121. Simmons, *supra* note 8, at 775. "Reasonableness" is not an empirical or psychological inquiry. It should be understood normatively, as expressing what is legitimate or justifiable. A person might be entirely reasonable in believing that her actions on a secluded beach in the middle of the night are unobserved. But that hardly merits the claim that her illegal actions on that secluded beach, if observed by law enforcement, come within the protective umbrella of the Fourth Amendment. See *Oliver v. United States*, 466 U.S. 170, 171 (1984). Her actions occur in public. Statistical likelihood of being observed might favor her psychological state of security that she is doing something "private," but the normative judgment that activities on public lands are not "private" prevails in the constitutional analysis. Empirical considerations might serve an evidentiary function in concluding that a subjective expectation of privacy was unwarranted. So, one might believe that one's trash or one's backyard activities are private, but the realities of modern-day life could undercut the reasonableness of those subjective expectations. See *Florida v. Riley*, 488 U.S. 445, 449–51 (1989); *California v. Greenwood*, 486 U.S. 35, 39–40 (1988); *California v. Ciraolo*, 476 U.S. 207, 212 (1986).

122. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

123. This focus on law enforcement methods to sever a search target's first- and second-order preferences explains why evidence may be suppressed upon a finding of invalid consent even though that evidence could have been acquired by some other legitimate means. See *Kyllo v. United States*, 533 U.S. 27, 34 n.2 (2001) ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.").

the Fourth Amendment context there is nothing fixed about the concept of consent, because there the concept is but a tool to extend or limit the reach of that constitutional right.¹²⁴

Consent, then, is dynamic, not static. It is a functional idea, not lexical. It functions in the Fourth Amendment context to define the establishment of a legal relationship between a civilian target of a search and law enforcement. Words of consent are not significant because of what they might say about a suspect's psychological condition, or about the suspect's cost-benefit analysis. They are significant because of what those words *do*.¹²⁵ Consent can empower the civilian by, for example, facilitating travel in the post-9/11 age of security threats. More often, consent empowers law enforcement: it is an act whereby the criminal suspect empowers the suspicious police officer to gain the upper hand in the law enforcement struggle. The *Bustamonte* Court understood consent in this way when it said that permission granting ought to be encouraged, not discouraged.¹²⁶

It is thus tempting to argue that consent-search jurisprudence resurrects the nineteenth-century property-based reasoning of *Boyd v. United States*,¹²⁷ where the Court evaluated the propriety of a search or seizure in terms of who had a superior property interest in the thing to be searched or seized. That mode of reasoning is anachronistic, of course, having long given way to privacy-based reasoning.¹²⁸ But consent searches do not fit comfortably within a privacy-based notion of the Fourth Amendment, which may be one reason why there is so much academic angst over them. The huge advantage given to law enforcement in extracting "consent" from a search target suggests an underlying view that the contraband that the police are endeavoring to uncover more properly belongs to society, whose superior interest in crime detection clearly trumps an offender's interest in crime-avoidance.

124. When we enter this world, waiver ceases to take on the imagery of a relinquishment of a possession. In the Fourth Amendment context, the target of the search is not so much relinquishing her possession of a right, but rather is foregoing the opportunity to *trigger* the enforcement of a right. This conceptualization explains why consent is found in those cases where a person fails to object to a search. *See, e.g., United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667–70 (5th Cir. 2003); *United States v. Wesela*, 223 F.3d 656, 661 (7th Cir. 2000); *United States v. Patten*, 183 F.3d 1190, 1195 (10th Cir. 1999); *United States v. Esparza*, 162 F.3d 978, 980 (8th Cir. 1998); *United States v. Dunkley*, 911 F.2d 522, 525–26 (11th Cir. 1990) (per curiam); *United States v. Morales*, 861 F.2d 396, 399–400 (3d Cir. 1988).

125. Understanding consent in this functional way—by what it *does*, not by what it presumably *is*—reveals why critics misfire when they lament that a lax consent-search doctrine betrays our commitment to ensuring that waivers are knowing, intelligent, and voluntary. *See Davies, supra* note 33, at 11. Consent certainly does function to eliminate what otherwise might be a viable Fourth Amendment argument, just as a waiver would. Simply because consent, in its operation, functions in the same way as a waiver would function does not mean that consent in a Fourth Amendment scenario must be evaluated under the same standards as a waiver in a courtroom scenario. For more on the functional treatment of language use, as opposed to a lexical or purely conceptual understanding of language, see JURGEN HABERMAS, *ON THE PRAGMATICS OF COMMUNICATION* (1998).

126. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

127. 116 U.S. 616 (1886).

128. *See Warden v. Hayden*, 387 U.S. 294 (1967).

CONCLUSION

To treat consent as a waiver in a Fourth Amendment context produces judgmental pronouncements of hypocrisy. How hypocritical it is, the criticism goes, to applaud the Fourth Amendment as a bulwark for privacy, and yet permit with such laxity the waiver of its enforcement.¹²⁹ The conceptual flaw in this criticism, of course, rests with the fallacious equation of consent and waiver. If consent is to be entwined with anything, it is not to be entwined with waiver, but rather, with a substantive vision of the Fourth Amendment itself. Because the function of consent is to define a legal relationship, and because the evaluative norm in Fourth Amendment jurisprudence is and always has been reasonableness, the litigation of consent searches tests the boundaries of the Fourth Amendment itself. Consent to search is not a waiver of the right to insist upon enforcement of the Fourth Amendment guarantees. Foregoing a Fourth Amendment challenge *in a courtroom* would be such a waiver. Saying that there has been consent to search is saying something about a legal relationship between civilian and law enforcement whereby the search that ensues is itself not unreasonable. Consent is tantamount to a waiver of the Fourth Amendment only if we understand the search to be a priori unreasonable. But there is no a priori position we can take in a police-civilian encounter because it is the encounter itself that must be evaluated in order to say something meaningful about its Fourth Amendment implications and ramifications. Waiver is, if anything, purely epiphenomenal, derivative of the finding of consent; and that finding of consent, in turn, speaks directly to the reach and limits of the Fourth Amendment.

* * *

We can and should critique Fourth Amendment jurisprudence in terms of what sorts of law enforcement methods are appropriate in a free and democratic society. Such critiques mean we must defend judgments about how much government intrusion law-abiding people are willing to accept.¹³⁰ Surely no one could rationally suggest that this

129. See, e.g., Stuntz, *supra* note 33, at 764. This must mean, Professor Stuntz argues, that constitutional guarantees enshrined in the Fourth, Fifth, and Sixth Amendments exist to protect the innocent, not the guilty. This is true, and trite. I take Professor Stuntz's point as an observation that hardly needs elaborate argumentation to justify. The constitutional rights flowing from these provisions reflect values and promote policies that define and shape our communal and private lives. They do not exist for the sake of those who breach community norms. They do not exist to make life difficult for law enforcement officers. They often protect the guilty, and they often impede law enforcement, but their *raison d'être* is to make life more worthy of living. So, when a drug dealer moves to suppress the seizure of a cache of drugs, the drug dealer is seeking the protections of the Fourth Amendment in his capacity as a person living within a society that places certain limits on governmental activity. To say that he is a proxy for us law-abiding citizens is a cute locution that merely captures the fact that society at large benefits in having Fourth Amendment guarantees in our Constitution, even though society does not benefit in letting the drug dealer evade criminal prosecution.

130. To be more blunt about it, a proper understanding of consent brings into focus our collective judgment about how aggressively law enforcement may attack criminality, which is entirely appropriate, since "the [F]ourth [A]mendment is quintessentially a regulation of the police . . ." Amsterdam, *supra* note 103, at 371; see also Thomas Y. Davies, *Recovering the*

judgment should take the point of view of the law violator who wishes to keep information out of the hands of the government.¹³¹ Thus, drug-sniffing dogs in airports may be very intrusive to drug traffickers; but the intrusion is nil for business and vacation travelers. Upholding such searches is, therefore, a defensible application of the Fourth Amendment.¹³² Drug- and weapons-interdiction programs of the sort at issue in *Drayton* and *Bostick* are more controversial.¹³³ We can quarrel about the judgment in these cases from the point of view of legitimate bus travelers.¹³⁴ We can and should concern ourselves about the race and class implications of such interdiction programs. But what we ought not quarrel over is whether the “consent” of the defendant in *Drayton* was in some metaphysical sense “voluntary.” If the interdiction program smacks of a police-state environment, and thus pollutes our culture in a way that is intolerable,¹³⁵ in whole or in part because of its coercive nature, then announcing the judgment that the consent given is “involuntary” is legitimate. The wording may be ill-advised, but the judgment itself might well not be.

And yet I hesitate to jettison altogether the rhetoric of voluntariness and free will, even though, as I have argued, these concepts refer to nothing actual. I philosophically cannot quarrel that Fourth Amendment analysis would probably be more honest if we did so. But I balk because I think there is value to the *attitude* these words evoke, a certain presumption, if you will, that government action must be justified with arguments beyond short-term law enforcement necessity. I do not regard this as squishy sentimentalism. I wonder what we might lose in making the entire Fourth Amendment adjudicatory enterprise turn strictly on “models of reasonableness.” If concepts, facts, and observations are interdependent—and they surely are, inasmuch as concepts come

Original Fourth Amendment, 98 MICH. L. REV. 547, 556 (1999) (“[T]he larger purpose for which the Framers adopted the text . . . [was] to curb the exercise of discretionary authority by officers.”). To move the analysis away from issues of subjective consent and focus instead on the conduct of the authorities hardly ought to be seen as a bad thing in itself. Cf. Goldstein, *supra* note 49, at 686 (“The law must establish standards of conduct for the authorities, not for the citizens . . .”).

131. See *United States v. Place*, 462 U.S. 696 (1983). Cf. Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1133 (1996) (“The Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent . . .”); Louis Michael Seidman, *The Problems with Privacy’s Problem*, 93 MICH. L. REV. 1079, 1087 (1995) (arguing that the Fourth Amendment appropriately focuses on the harm of governmental “violence, disruption, and humiliation,” and thus is concerned with preserving dignity, not information); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) (arguing that the focus of the Fourth Amendment’s protections ought not be on “informational privacy,” but rather on “force and coercion,” as that would “better protect the interests most people value most highly”).

132. See *Place*, 462 U.S. at 710.

133. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002); *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989), *rev’d sub nom Florida v. Bostick*, 501 U.S. 429 (1991).

134. Even on an objective standard, it is more than defensible to stake out the bright-line rule that the interdiction programs like those in *Bostick* and *Drayton* are constitutionally invalid, as the Florida Supreme Court did in *Bostick*. See *Bostick*, 554 So. 2d at 1157.

135. Cf. Scott E. Sundby, “Everyman”’s Fourth Amendment: *Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) (arguing that the “animating principle [of the Fourth Amendment] . . . is the idea of reciprocal government-citizen trust”).

into being through observations and acquired facts, and concepts in turn permit effective observation and fact acquisition¹³⁶—then the concept of “voluntariness” can at the very least aid lawyers and judges as to what facts and observations should count in the argumentation over whether a consent search is reasonable. And, more abstractly, perhaps there is value in the slippery debate—tacit as it usually is—over what vision of the “person” we harbor and want to promote when we confront issues arising from a police-civilian encounter. Maybe the voluntariness rhetoric functions in that mysterious way, prompting us to ask, *what image of the autonomous person do we endorse?*

But all this does not change the fact that the urge to go metaphysical in the strong way I have discussed in this article—that is, to go beyond the attitudinal and to critique how police-civilian encounters are evaluated from that metaphysical vantage point—should still be avoided.¹³⁷ That analytical orientation steers Fourth Amendment jurisprudence towards a frozen and stultifying discourse; it suggests a fetishism for words without due regard for the real-world struggles that underlie constitutional litigation.¹³⁸ It is an analytical orientation that faults the Supreme Court for an inability to tell us what it means to act with free will, for the upshot of taking the so-called “voluntariness paradigm” seriously is to indulge in the false belief that an act of free will can actually be identified.¹³⁹ And so to critique Supreme Court jurisprudence in this way bespeaks a desire to avoid the unavoidable—a straightforward debate over the contested issue of how we want to live, of the relationship we want to have with our government, and of how we want the government to regard us. It would be better, for example, if we debated the scope of the consent-search doctrine not with references to voluntariness, but with a real-world concern over whether law enforcement has unwarranted latitude in how it approaches and interacts with certain segments of the American population. If we get away from metaphysical talk, if we recognize “voluntariness” to be just a word without any true referent, at most an expression of an ethical attitude which colors the analysis, then we force ourselves to engage in a debate over these worthy contestable questions.¹⁴⁰ I think the Court has long prompted us to debate the matter in these terms, terms that compel us to confront the democratic quandary of what price we are willing to pay for things that are hardly quantifiable.

136. See PUTNAM, *supra* note 14, at 199 n.10.

137. See West, *supra* note 6, at 425 (“If we are motivationally complex, then we cannot delegate to any ambiguously motivated human act such as consent the task of moral legitimation.”).

138. Cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 74–76 (1997) (noting that “the legal system’s discussion of criminal defendants’ rights has suffered from an air of unreality” because we are more comfortable with abstractions than actual nitty-gritty practices).

139. See generally Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 BUFF. CRIM. L. REV. 599 (2005).

140. Cf. Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 497 (1984) (arguing for what the author calls a “community model” of criminal justice that demands some willingness of individuals to sacrifice “some liberty or privacy” to facilitate effective law enforcement).