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Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches

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NOTES

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I. INTRODUCTION

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

Perhaps the most significant exception to the requirements of the Fourth Amendment is the consent search,² which requires no warrant, exigent circumstances, probable cause, or reasonable suspicion.³

Some scholars have suggested that the Supreme Court's voluntariness standard⁴ for determining consensual searches misperceives the level of coercion inherent in almost any encounter with the police.⁵ Certain state courts have taken measures beyond those mandated by the Supreme Court to try to ensure that the consent given is truly the product of the person's free will and not due to any coercion.⁶ Some courts, legislatures, and police departments have limited or banned consent searches following traffic stops, mainly due to concerns over racial profiling.⁷

This Note argues that an element of privacy should be considered in determining the validity of the consent given to a search request. The element of privacy would be based on a person's expectation of privacy in a particular location as determined by Fourth Amendment case law. This change is necessary to bring the law of

1. U.S. CONT. amend. IV.

2. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 215-16 (2002).

3. Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175, 175 (1991).

4. The voluntariness standard requires that consent be given voluntarily and not as the result of express or implied duress or coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). See *infra* text accompanying notes 86-113 (discussion of consent searches and the *Schneckloth* case).

5. *E.g.*, Strauss, *supra* note 2, at 238-44.

6. *E.g.*, *State v. Ferrier*, 960 P.2d 927, 933 (Wash. 1998).

7. See *infra* text accompanying notes 231-236 (discussion of consent searches following traffic stops).

consent searches into congruence with the hierarchy of privacy protections that are evident in Fourth Amendment jurisprudence.⁸

Part II of this Note describes the primary cases determining whether a search has occurred and how federal courts analyze consent search cases. Part III describes state approaches to the different contexts in which consent search issues arise. Part IV presents and analyzes possible doctrinal bases for consent searches, and considers aspects of the concept of voluntariness through reference to psychological research. Part V argues in favor of considering privacy in determining the validity of consent to search.

II. SEARCH AND SEIZURE AND CONSENT SEARCHES

This Part provides background information on the fundamentals of the law of consent and searches. The first section briefly traces the history of the law of searches. The second section analyzes the landmark case of *Katz v. United States*.⁹ The third section describes how the Court used the *Katz* framework to decide cases presenting a variety of factual settings. The fourth section analyzes a recent case, *Kyllo v. United States*,¹⁰ which may alter the *Katz* framework. The final two sections analyze, respectively, the basis of consent searches, including the landmark Supreme Court case *Schneekloth v. Bustamonte*,¹¹ and the factors that courts use to determine voluntariness.

A. Common Law Trespass Test

The Supreme Court used a physical invasion test,¹² also referred to as the trespass test, to decide early search cases.¹³ In the 1928 case *Olmstead v. United States*, the Court held that wiretapping did not amount to a search or seizure.¹⁴ To reach this result, the

8. "[Contemporary Fourth Amendment] jurisprudence analyzes issues under the aegis of privacy." Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 825 (1999). For a description of the hierarchy of privacy expectations and protections in different locations under Fourth Amendment jurisprudence, see *infra* text accompanying notes 301-326.

9. 389 U.S. 347 (1967).

10. 533 U.S. 27 (2001).

11. 412 U.S. 218 (1973).

12. Sean D. Thueson, Case Note, *Fuzzy Shades of Gray: The New "Bright-Line" Rule in Determining When the Use of Technology Constitutes a Search*, 2 WYO. L. REV. 169, 176 (2001).

13. *Katz*, 389 U.S. at 353; Bradley L. Leger, Case Note, *Thermal Imaging and the Fourth Amendment: The Government's "High-Assault" on a "Once Treasured Haven"*, 43 S. TEX. L. REV. 837, 842 (2001).

14. *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

Court focused on the absence of physical entry onto the defendant's property. The Court stated, "The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."¹⁵ The Court stated that no cases it cited or that had been brought to its attention held the Fourth Amendment to be violated unless there was "an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage.'"¹⁶

B. Katz: The Demise of the Trespass Test?

Katz v. United States, decided in 1967, rejected the trespass test and articulated a different analysis for search cases.¹⁷ Katz was convicted for transmitting wagering information by telephone in violation of a federal statute.¹⁸ At trial, the government introduced evidence of Katz's voice during telephone conversations which had been overheard by FBI agents.¹⁹ The agents had attached an electronic listening and recording device to the outside of the public telephone booth in which Katz conducted his conversations.²⁰ The Ninth Circuit affirmed Katz's conviction, holding that there had been no Fourth Amendment violation since " '(t)here was no physical entrance into the area occupied by (the petitioner).'"²¹

Katz phrased the issues on certiorari as: (1) whether a public telephone booth is a constitutionally protected area, so that the evidence obtained violated the booth user's right to privacy, and (2) whether physical penetration of a constitutionally protected area is necessary before a search and seizure violates the Fourth Amendment.²² The Supreme Court "decline[d] to adopt [petitioner's] formulation of the issues."²³ The Court noted that both parties had attached great significance to whether the phone booth was a constitutionally protected area.²⁴ However, the Court stated that "the

15. *Id.* at 464. The Court also stated that "[t]he language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office. . . ." *Id.* at 465.

16. *Id.* at 466.

17. 389 U.S. 347, 348 (1967).

18. *Id.* at 348.

19. *Id.*

20. *Id.*

21. *Id.* at 348-49 (citing *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966)).

22. *Id.* at 349-50.

23. *Id.* at 350.

24. *Id.* at 351.

Fourth Amendment protects people, not places.”²⁵ The majority pointed out that what a person knowingly exposes to the public, even in his office, is not protected by the Fourth Amendment, while what a person attempts to keep private, even in public, may be protected.²⁶ The government noted that the telephone booth was constructed partly of glass and Katz could be seen from outside; therefore he was as visible inside the booth as he had been outside.²⁷ The majority dismissed this argument, stating that Katz intended to keep his words private, not his actions, and that he was entitled to assume that his words would not be broadcast to the world.²⁸

Having determined that the interception of the telephone conversations was a search and seizure, the Supreme Court then considered whether the search complied with the Constitution.²⁹ The Court determined that the search would have been permissible with a warrant, but that the warrantless search and seizure was unreasonable and therefore a violation of the Fourth Amendment.³⁰

Justice Harlan’s concurrence presented a different interpretation of the precedent.³¹ He explained, “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”³² This formulation, soon referred to as the *Katz* test³³, became the new standard for the legitimacy of government searches.³⁴

One commentator has argued that *Katz* stands for the proposition that courts should consider the results of the search and not the method of the search.³⁵ Professor Simmons admits that this result is contrary to some recent cases interpreting *Katz*, but argues

25. *Id.*

26. *Id.*

27. *Id.* at 352.

28. *Id.*

29. *Id.* at 354.

30. *Id.* at 356, 359.

31. *Id.* at 361 (Harlan, J., concurring).

32. *Id.*

33. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (critiquing the two-part *Katz* test).

34. Justice Harlan’s test was eventually accepted by the Court. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(b) (4th ed. 2004) (citing *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979)); Reginald Short, Comment, *The Kyllo Conundrum: A New Standard to Address Technology that Represents a Step Backward for Fourth Amendment Protections*, 80 DENV. U. L. REV. 463, 467 (2002).

35. Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1306 (2002).

that it is more consistent with the original intent of the case.³⁶ He states that advancing technology has led to inconsistent results in search cases and to the gradual erosion of Fourth Amendment protections.³⁷ He argues that using an approach based on results instead of method will help alleviate these problems.³⁸ Even the Court recognized problems with the *Katz* test. Justice Harlan eventually realized that the subjective expectation of the privacy prong could be defeated if the government simply posted signs announcing surveillance. While the test was never overruled, the Court has recently criticized it. Moreover, some commentators have argued that in the recent Supreme Court case *Kyllo v. United States* the Court claimed to be applying *Katz*, but did not actually do so.³⁹

C. Post-Katz Developments

Following the *Katz* decision, the Supreme Court applied the test set out in the Harlan concurrence to cases questioning whether the government conduct at issue amounted to a search. For example, *Oliver v. United States* held that an asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable.⁴⁰ In *California v. Greenwood*, the Court held that there was no search when the police examined garbage that had been left on the curb.⁴¹ Emphasizing that garbage bags left on the curb are readily accessible to members of the public, the Court stated that the garbage was sufficiently exposed to defeat the defendants' claim to Fourth Amendment protection.⁴² In later cases, the Court held that a luggage sniff by a drug detection dog was not a search,⁴³ but a squeeze of luggage was a search.⁴⁴

The Court in *Florida v. Riley* found that there was no search where a police helicopter 400 feet off the ground viewed the inside of

36. *Id.*

37. *Id.*; see also Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 335 (1998) (arguing that the overall tendency of the Court has been to reduce individual protections in the face of advancing technology), cited in Jeffrey W. Childers, *Kyllo v. United States: A Temporary Reprieve from Technology-Enhanced Surveillance of the Home*, 81 N.C. L. REV. 728, 739 (2003).

38. Simmons, *supra* note 35, at 1306.

39. *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *infra* note 79.

40. *Oliver v. United States*, 466 U.S. 170, 183-84 (1984).

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

42. *Id.*

43. *United States v. Place*, 462 U.S. 696, 707 (1983).

44. *Bond v. United States*, 529 U.S. 334, 338 (2000).

defendant's greenhouse.⁴⁵ It noted that any member of the public could have been where the police were, that there was no violation of the law, and that "no intimate details connected with the use of the home or curtilage were observed."⁴⁶ In *Dow Chemical v. United States*, the Court held that aerial photography of the company's premises was not a search.⁴⁷ It allowed that some surveillance with devices not generally available to the public might be a search.⁴⁸ However, the Court stated that the photographs at issue were not sufficiently revealing of intimate details to raise constitutional concerns.⁴⁹

D. *Kyllo v. United States*

In *Kyllo v. United States*, a government agent suspected that Kyllo was growing marijuana in his home.⁵⁰ Agents used a thermal imager to search for evidence of the high-intensity lamps typically required for indoor marijuana cultivation.⁵¹ The agents performed the scan from the agent's vehicle across the street from Kyllo's house.⁵² It showed that the roof over the garage and a side wall were warmer than the rest of the house and the other houses in the triplex.⁵³ Based on informant tips, utility bills, and the thermal imaging, a magistrate issued a search warrant for Kyllo's home.⁵⁴ The search yielded 100 marijuana plants that were grown inside Kyllo's home.⁵⁵

Kyllo attempted to have the evidence suppressed and entered a conditional guilty plea.⁵⁶ The Ninth Circuit applied the two-part *Katz* analysis of subjective and objective expectation of privacy.⁵⁷ It held that Kyllo lacked a subjective privacy expectation since he took no affirmative action to conceal the waste heat emissions.⁵⁸ In its analysis of objectively reasonable expectation, the court noted that a

45. *Florida v. Riley*, 488 U.S. 445, 450-52 (1989).

46. *Id.* at 451-52.

47. *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986).

48. *Id.* at 238.

49. *Id.*

50. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

51. *Id.* For a recreation of the scan, see David Schenk, *Watching You*, NAT'L GEOGRAPHIC, Nov. 2003, at 27.

52. *Kyllo*, 533 U.S. at 30.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *United States v. Kyllo*, 190 F.3d 1041, 1045-47 (9th Cir. 1999).

58. *Id.* at 1046. In this analysis, the Court analogized the waste heat to the odor emitted by illicit drugs detected by a trained police dog in *Place*. *Id.* See *supra* text accompanying note 43.

heightened privacy expectation in the home has been recognized for purposes of the Fourth Amendment.⁵⁹ However, it also stated that activities within a residence are not protected from outside, non-intrusive government observation merely because they are confined to the home.⁶⁰ The court believed that the crucial inquiry for whether technology was used for an impermissible warrantless search was whether the technology had revealed "intimate details."⁶¹ Based on this standard of objective reasonableness, the Ninth Circuit held that the scan did not expose any intimate details of Kyllo's life, and accordingly there was no violation of the Fourth Amendment.⁶²

The Supreme Court, per Justice Scalia, reversed the Court of Appeals decision.⁶³ It stated that the *Katz* test has often been criticized as circular, and hence subjective and unpredictable.⁶⁴ The Court held that it believed "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technology in question is not in general public use."⁶⁵ The majority rejected the position of the dissent and the government that since the imager only detected heat radiating off of the external surface, the technique should be upheld.⁶⁶ It noted that such a mechanical interpretation of the reasonable expectation of privacy test was rejected in *Katz* since the device only detected sound waves that reached the exterior of the phone booth.⁶⁷

The majority also emphasized that it was important to the holding that the area imaged was Kyllo's home.⁶⁸ The Court also rejected the contention that the imaging was constitutional since it did not reveal private activities in private areas.⁶⁹ It stated, "In the home,

59. *Id.* at 1046 (citing *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 n.4 (1986)).

60. *Id.* at 1046-47 (citing *Florida v. Riley*, 488 U.S. 445, 449 (1989) (plurality opinion)).

61. *Id.* at 1047. For this proposition, the court cited *United States v. Ishmael*, 48 F.3d 850, 855 (5th Cir. 1995) (quoting *Dow Chemical*, 476 U.S. at 238).

62. *Id.* at 1047. The court noted, "Like the Court in *Dow Chemical*, we reject Kyllo's attempt to rely on 'extravagant generalizations' about the potential invasions of privacy that this sort of advanced technology may someday present. *Id.* (quoting *Dow Chemical*, 476 U.S. at 239).

63. *Kyllo v. United States*, 533 U.S. 27, 41 (2001).

64. *Id.* at 34. For this proposition, the majority cited multiple authorities including Justice Scalia's concurrence in *Minnesota v. Carter*, 525 U.S. 83 (1998). *Id.*

65. *Id.*

66. *Id.* at 35.

67. *Id.*

68. *See id.* at 34 (emphasizing that there is a "ready criterion . . . of the minimal expectation of privacy" when a home is involved); *supra* text accompanying note 65 (noting the Court's concern about gaining information from a home's interior with technology not publicly available).

69. *Id.* at 37.

our cases show, all details are intimate details, because the entire area is held safe from prying governmental eyes.”⁷⁰ The majority rejected the dissent’s standard, stating, “The people in their houses, as well as the police, deserve more protection.”⁷¹ Further, the Court reiterated, “We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’”⁷² This focus on the home seems to go further than previous cases in determining that a search has occurred.

The dissent favored an approach that would uphold the search since it simply gathered information exposed to the public from the outside of the home.⁷³ The dissent pointed out that the imaging “did not accomplish ‘an unauthorized physical penetration into the premises’”⁷⁴ The dissent analogized the imager to a device in the *Katz* scenario that would only pick up the volume of sound that left the booth, which was available to the public.⁷⁵ The device in *Katz*, unlike the thermal imager, allowed the police to obtain information otherwise available only to those in the private area.⁷⁶ The dissent also pointed out that conditioning protection on whether the device is in general public use would lead to an increasing threat to privacy as the use of advanced surveillance equipment becomes more prevalent.⁷⁷

Several commentators have criticized the *Kyllo* decision for misapplying *Katz*,⁷⁸ while some argue that the Court did not apply *Katz* at all.⁷⁹ Others have criticized the decision for not providing sufficient guidance for future decisions in the lower courts about the term “device not in general public use.”⁸⁰ The Supreme Court has not

70. *Id.* (emphasis in original).

71. *Id.* at 39.

72. *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

73. *Id.* at 42-43 (Stevens, J., dissenting).

74. *Id.* at 43 (Stevens, J., dissenting) (quoting *Silverman v. United States*, 365 U.S. 505, 509 (1961)).

75. *Id.* at 49-50 (Stevens, J., dissenting).

76. *Id.* (Stevens, J., dissenting).

77. *Id.* at 47 (Stevens, J., dissenting). The majority, however, was clearly concerned with this problem. “The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” *Id.* at 34. The majority showed concern with the advancement of technology. “While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.” *Id.* at 36.

78. Childers, *supra* note 37, at 754.

79. Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia’s Fourth Amendment*, 79 WASH. U. L.Q. 1013, 1022 (2001) (“More importantly, the *Kyllo* majority did not apply the *Katz* test to the case before it.”).

80. Short, *supra* note 34, at 481 (citing Sarilyn E. Hardeee, *Why the United States Supreme Court’s Ruling in Kyllo v. United States is Not the Final Word on the Constitutionality of Thermal Imaging*, 24 CAMPBELL L. REV. 53, 69 (2001); Thueson, *supra* note 12, at 192-95).

established a standard or definition for this term. The threat to privacy is likely to "grow, rather than recede, as the use of intrusive equipment becomes more readily available."⁸¹ Other commentators have criticized the Court's reversion to a property-based standard as it failed to provide courts with sufficient guidance on how to evaluate facts presenting technologies which do not operate in a fashion analogous to a physical invasion.⁸²

Another criticism of *Kyllo* is that the opinion reached beyond the facts of the case by basing the result on technologies that will be developed in the future and, in this respect, the Court failed to exercise judicial restraint.⁸³ However, this critique conflicts with their expectations of a rule that defines a standard addressing the application of new technologies.⁸⁴ It is difficult to formulate a rule for new technologies without anticipating the new technologies. If the rule announced by the Court is limited to the facts of one case, it will be of little use when applied to new technologies.⁸⁵

E. Consent Searches: Schneckloth v. Bustamonte

The fundamental case analyzing the constitutionality of consent searches is *Schneckloth v. Bustamonte*.⁸⁶ In *Schneckloth*, police stopped an automobile with six passengers because the car's headlight and the license plate light had burned out.⁸⁷ The driver was unable to produce a driver's license, and only one of the five other

81. Thueson, *supra* note 12, at 193-95 (quoting *Kyllo v. United States*, 533 U.S. 27, 47 (Stevens, J., dissenting)).

82. Short, *supra* note 34, at 483.

83. Childers, *supra* note 37, at 755 (citing Thueson, *supra* note 12, at 201); Short, *supra* note 34, at 482 (citing same). *But see* LAFAVE, *supra* note 34, § 2.2(d) (applauding the Court for not waiting until technologies become more advanced); Childers, *supra* note 37, at 755 (same).

84. Thueson, *supra* note 12, at 202; Short, *supra* note 34, at 485.

85. One commentator supports advancing carefully in announcing new principles:

The Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old, still less to say how much the old must be displaced and whether or how the old and new can be accommodated. If the Court declines to give birth to the new principle, it will never acquire the experience or the insight to answer these latter questions. If it attempts to answer them at the moment of the new principle's birth, it is not likely to answer them wisely. Clarity and consistency are desirable, certainly, to the extent that they can be achieved. But the temptation to achieve them by ignoring the complex and the unpredictable quality of real problems is fortunately less beguiling to Justices perennially faced with responsibility for solving those problems than to the Justices' academic critics.

LAFAVE, *supra* note 34, § 2.1(b) (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 352 (1974)).

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

87. *Id.* at 220.

men, Joe Alcala, had a license.⁸⁸ Alcala explained that the car belonged to his brother.⁸⁹ After the officer asked the men to exit the car and two additional policemen arrived, the officer asked Alcala for permission to search the car, and Alcala responded, "Sure, go ahead."⁹⁰ Alcala helped the police search by opening the trunk and glove compartment.⁹¹ No one was threatened with arrest and the officer testified that the encounter was "very congenial."⁹² The police found stolen checks in the automobile.⁹³

The checks were admitted into evidence in Bustamonte's trial, and he was convicted.⁹⁴ The state appellate court applied a consent test that considered whether the consent was voluntary in light of all the circumstances.⁹⁵ The Court found that the circumstances suggested that the consent was in fact voluntary.⁹⁶ On appeal of the district court's denial of Bustamonte's federal habeus corpus claim, the Ninth Circuit set aside the district court's order.⁹⁷ The court stated that the state was obliged to demonstrate that the consent had been given with an understanding that it could be freely and effectively withheld; absence of coercion and a verbal expression of consent would not suffice.⁹⁸

The Supreme Court stated the inquiry in the case as follows: "what must the state prove to demonstrate that consent was 'voluntarily' given."⁹⁹ First, the Court agreed with the California state courts that the voluntariness of consent is to be determined by the totality of the circumstances.¹⁰⁰ The Court considered the ambiguity of the very concept of "voluntariness" to be a particularly difficult issue.¹⁰¹ It then stated that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 221.

96. *Id.*

97. *Id.*

98. *Id.* at 221-22.

99. *Id.* at 222.

100. *Id.* at 224.

101. *Id.* The Court noted that all statements are "voluntary" in the sense of representing a choice of alternatives. *Id.* However, if the voluntariness incorporates a question of whether the statement would have been made even absent inquiry, then virtually no statements would be voluntary. *Id.* For a criticism of the concept of voluntariness, see *infra* Part III.C.

consent."¹⁰² If the state must prove that the subject of the search knew that he had a right to refuse consent, there would be serious doubt whether law enforcement could continue to conduct consent searches.¹⁰³

The Supreme Court also considered an alternative, which it stated would go far toward proving knowledge of the right to refuse consent: obligating governmental agents to advise the subject of a search that he has the right to refuse.¹⁰⁴ The Court rejected that approach, noting that it had been almost universally rejected by other authorities.¹⁰⁵ The Court found it impractical to introduce these warnings, claiming that an effective warning would necessitate detailed requirements.¹⁰⁶ Consent searches are part of standard investigatory techniques; the situations in which they are used are a "far cry" from trial and "immeasurably far removed" from "custodial interrogation" where warnings are required.¹⁰⁷

The Court then considered the claim that consent is a waiver of a person's rights and the state must, under the doctrine of *Johnson v. Zerbst*,¹⁰⁸ demonstrate "an intentional relinquishment or abandonment of a known right or privilege."¹⁰⁹ However, the majority distinguished this doctrine, explaining that it generally applied in the context of the protection of a defendant's right to a fair trial, not in the context of the Fourth Amendment prohibition on unreasonable searches and seizures.¹¹⁰ The Court stated that its holding was a narrow one: when the subject of a consent search is not in custody, the state must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."¹¹¹

The dissent claimed that consent cannot be considered a meaningful choice unless the subject was aware of the right to refuse consent.¹¹² Based on evidence that the FBI had a longstanding practice of warning suspects and that there was no suggestion from

102. *Id.* at 227.

103. *Id.* at 229. *But see id.* at 287 (Marshall, J., dissenting) (stating that the FBI had for many years informed subjects of their right to refuse consent and that reported cases suggested that where police had informed subjects the warning had not disrupted the casual flow of events).

104. *Id.* at 231.

105. *Id.*

106. *Id.*

107. *Id.* at 232.

108. *Johnston v. Zerbst*, 304 U.S. 458, 464 (1938).

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

110. *Id.* at 235-241.

111. *Id.* at 248.

112. *Id.* at 284-85 (Marshall, J., dissenting).

reported cases that warning subjects of their rights had disrupted the casual flow of events, the dissent believed that nothing disastrous would result from requiring warnings.¹¹³

F. Factors in the Voluntariness Analysis

Courts have considered multiple factors in deciding whether consent is voluntarily given. Those factors include (1) “claim of authority”,¹¹⁴ (2) “show of force and other coercive surroundings”,¹¹⁵ (3) “threat to seek or obtain a search warrant”,¹¹⁶ (4) “prior illegal police action”,¹¹⁷ (5) “maturity, sophistication, physical, mental or emotional state”,¹¹⁸ (6) “prior or subsequent refusal to consent”,¹¹⁹ (7) “confession or other cooperation”,¹²⁰ (8) “denial of guilt”,¹²¹ (9) “warning or

113. *Id.* at 287-88 (Marshall, J., dissenting).

114. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.2(a) (4th ed. 2004). If there is an express or implied false claim that the officers can immediately search in any event, it is likely that there will be a finding of no consent. *Id.*

115. *Id.* § 8.2(b). It is unlikely that one coercive factor will invalidate consent, but several in combination likely will. *Id.* Further, in an otherwise close case of consent, a single coercive element may well invalidate consent. *Id.*

116. *Id.* § 8.2(c). Courts have experienced “considerable difficulty” in this situation. *Id.* Threat to seek a warrant is less likely to invalidate consent. *Id.* Threat to obtain a search warrant is less likely to invalidate consent if police then had probable case, while it is likely to invalidate consent if there were not grounds upon which a warrant could issue. *Id.*

117. *Id.* § 8.2(d). For this factor, some courts use a totality of the circumstances voluntariness test, while other analyze the facts under the fruit of the poisonous tree doctrine. *Id.*

118. *Id.* § 8.2(e). Courts take account of these conditions at the time consent was given, and are less likely to find valid consent the more immature and impressionable the subject of the search. *Id.*

119. *Id.* § 8.2(f). Prior refusals to consent are properly taken into account as a factor, although their relative weight may depend upon “the reasons underlying it as they relate to the subsequent police efforts.” *Id.* For example, in *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974), when the defendant refused consent because he did not own the private plane he had arrived on, it was proper for the agents to repeat their request as to his personal belongings on the plane. *Id.*

120. *Id.* § 8.2(g). It is more likely that consent will be obtained after a valid confession, whether it is “an admission that highly incriminating evidence is in fact located in the place which the police now wish to search” or when the confession “is simply an acknowledgement by the person that he committed the crime which the police are investigating.” *Id.* “Similarly, other information tending to show why the person, at the time of the consent, believed it advantageous to cooperate with the police is also highly relevant.” *Id.* “Courts also tend to attach significance to the post-consent cooperation of the consenting party in facilitating the search.” *Id.*

121. *Id.* § 8.2(h). The court in *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954), held that “a consent is inherently involuntary if it was given by a person denying his guilt but the search resulted in the discovery of highly incriminating evidence.” *Id.* However, the *Higgins* approach has not gained general acceptance. *Id.*

awareness of Fourth Amendment rights",¹²² (10) "Miranda warnings",¹²³ (11) "right to counsel",¹²⁴ (12) "implied" consent by engaging in certain activity",¹²⁵ (13) "deception as to identity",¹²⁶ and (14) "deception as to purpose."¹²⁷

In *Bumper v. North Carolina*, the Court held that a consent search cannot be justified "when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant."¹²⁸ Whether the suspect was in custody is also relevant. In *United States v. Watson*, the Court held that failure to warn the defendant "is not to be given controlling significance" where the defendant "had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station."¹²⁹ In *Gentile v. United States*, the Court denied certiorari

122. *Id.* § 8.2(i). The Court held in *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973), that knowledge of the right to refuse is a factor to be taken into account in the voluntariness inquiry, but does not have to be proven by the prosecution. *Id.*

123. *Id.* § 8.2(j). The prevailing view is that it is not necessary that a consent to search during a custodial interrogation be preceded by a *Miranda* warning. *Id.*

124. *Id.* § 8.2(k). It is more likely that the right to counsel argument will be stronger once adversary judicial proceedings have been instituted against the defendant, since this situation is "closer to others in which the Court has recognized a right to counsel." *Id.* Still, "[e]ven if the circumstances are such that there is no Sixth Amendment right to counsel at the time that a person is asked to consent to a search, it would be highly relevant under the *Schneekloth* voluntariness test that the consent was obtained following a police refusal to grant the person's request to consult with counsel." *Id.*

125. *Id.* § 8.2(l). Courts have upheld searches where the person allegedly consenting never explicitly stated his consent. For example, the Supreme Court justified official inspections of business premises by stating that the "businessman in a regulated industry in effect consents to the restrictions placed upon him." *Id.* (citing *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)). Airport searches and jail visitor searches where signs announce that all passengers or visitors were subject to search have been upheld. *Id.*

126. *Id.* § 8.2(m). In this situation the police seeking consent use deceit or misrepresentation. *Id.* The Supreme Court decisions "collectively appear to support the following proposition: when an individual gives consent to another to intrude into an area or activity otherwise protected by the Fourth Amendment, aware that he will thereby reveal to this other person either criminal conduct or evidence of such conduct, the consent is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the other person's identity as a police officer or police agent." *Id.*

127. *Id.* § 8.2(n). This is the situation where a known official "engage[s] in deception which leads the consenting party to conclude that the official's objective is other than criminal prosecution or that the official's objective relates to a form of criminal activity different from that which actually prompted the official to seek consent. *Id.* In these cases there is often a "case-by-case assessment of the 'fairness' of the deception used by law enforcement agents in concealing their true purpose." *Id.*

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

129. *United States v. Watson*, 423 U.S. 411, 424-25 (1976). See also YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* 339 (10th ed. 2002) (discussing custody as a factor in determining validity of consent).

where the defendant was given Miranda warnings but not Fourth Amendment warnings before consent was obtained.¹³⁰ According to the Court, the subject of the search has the ability to control the scope of the search.¹³¹ The standard for determining the scope of a subject's consent is "that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"¹³²

A recent case considered the consent search issue in the context of the search of a bus. In *United States v. Drayton*, officers boarded a bus bound from Ft. Lauderdale to Detroit during a stopover.¹³³ Drayton's companion, Brown, agreed to a search of his person and was arrested after the officers found drug packages.¹³⁴ An officer then asked Drayton for consent to search him, to which Drayton responded by "lifting his hands about eight inches from his legs."¹³⁵ The officer found packages of cocaine on Drayton and arrested him.¹³⁶

The Court ruled that the encounter had been a voluntary one.¹³⁷ The Court stated that nothing the officer said indicated a command, noting that the officer asked the passengers for permission to search the bags and their persons.¹³⁸ The officer asked if Drayton and Brown objected before he searched them.¹³⁹ He provided Drayton with no indication that he was required to consent to a search; rather, he asked for permission to perform the search.¹⁴⁰ Based on these facts, the Court held that the searches were voluntary.¹⁴¹

There has been some confusion over whether the factors announced in *Schneckloth* and other consent cases are to be applied subjectively or objectively.¹⁴² In the case of a subjective standard, the court would consider the suspect's beliefs or perspective.¹⁴³ Under the

130. *Gentile v. United States*, 419 U.S. 979, 979 (1974). See KAMISAR, *supra* note 129, at 339 (discussing *Gentile*, 419 U.S. at 979.).

131. *Gentile*, 419 U.S. at 979-80.

132. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). See KAMISAR, *supra* note 129, at 340 (discussing *Florida v. Jimeno* and the "scope of a suspect's consent").

133. *United States v. Drayton*, 536 U.S. 194, 197 (2002).

134. *Id.* at 199.

135. *Id.*

136. *Id.*

137. *Id.* at 206.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 207.

142. Strauss, *supra* note 2, at 229, 235.

143. *Id.* at 229.

objective standard, a court would consider what a reasonable person would believe or whether police acted reasonably in a given situation.¹⁴⁴ Recent Supreme Court Fourth and Fifth Amendment cases have shown a tendency to favor objective standards over subjective standards.¹⁴⁵ For example, in *Colorado v. Connelly* the Supreme Court ruled that actual police coercion was necessary for a finding that a confession is not voluntary.¹⁴⁶ The Eleventh and the D.C. Circuits have rejected invitations to apply *Connelly* to voluntariness in the context of consent searches,¹⁴⁷ but the Fourth Circuit cited *Connelly* in holding that the relevant question for the consent voluntariness inquiry is whether there actually was coercion.¹⁴⁸ The Second Circuit has held that the test for determining consent is an objective one.¹⁴⁹ While these cases did not on their face overrule the subjective voluntariness standard established in *Schneckloth*, they have created some uncertainty and may explain why the courts pay less attention than might be expected to subjective factors in assessing voluntariness.¹⁵⁰

III. JUDICIAL AND ADMINISTRATIVE APPROACHES TO CONSENT SEARCHES

This Part considers the approaches of different jurisdictions to various types of consent search situations. The first section discusses the approach of the State of Washington's courts to home consent searches, focusing in depth on the seminal case discussing the new approach to home consent searches taken by that state.¹⁵¹ It then describes the ensuing case law in Washington. The second section analyzes the approaches that other states have taken to consent searches. The third section focuses on recent judicial and administrative treatment of requests for consent following traffic stops and the additional problems that they may create.

144. *Id.*

145. *Id.*

146. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); Strauss, *supra* note 2, at 232. In *Connelly*, a man approached a police officer and confessed to a murder, and repeated the confession several times despite Miranda warnings. *Connelly*, 479 U.S. at 160. A psychologist testified that the defendant suffered from schizophrenia and command hallucinations that made him unable to make a free and rational choice. *Id.* at 160-61.

147. *United States v. Hall*, 969 F.2d 1102, 1108 n.6 (D.C. Cir. 1992); *Tukes v. Dugger* 911 F.2d 508, 516-17 n.13 (11th Cir. 1990); Strauss, *supra* note 2, at 234.

148. *United States v. Quezada*, No. 91-500, 1991 U.S. App. LEXIS 22712, at *2 (4th Cir. Sept. 30, 1991); Strauss, *supra* note 2, at 234.

149. *United States v. Garcia*, 56 F.3d 418, 423 (2d Cir. 1995); Strauss, *supra* note 2, at 233.

150. Strauss, *supra* note 2, at 232-33, 235.

151. *State v. Ferrier*, 960 P.2d 927 (Wash. 1998).

A. Knock and Talk: State v. Ferrier

In *State v. Ferrier*, police obtained information from Ferrier's son that his mother was growing marijuana at her house.¹⁵² However, his credibility was not ascertainable since he had no record as an informant.¹⁵³ The police drove by the house and confirmed that the house matched the description they were given.¹⁵⁴ Four police officers went to Ferrier's residence.¹⁵⁵ They were all armed and each wore a black "raid jacket" with the word "police" in yellow letters on the front and back.¹⁵⁶ Two of the officers proceeded to the back of the house to "secure the premises," and the other two proceeded to the front entrance.¹⁵⁷

The officers testified that Ferrier opened the door after they knocked.¹⁵⁸ They testified that they immediately identified themselves as police officers and she then invited them into her home.¹⁵⁹ The officers in the house then radioed the officers in back, and they entered the home as well.¹⁶⁰ The officers told Ferrier that they had information that she was growing marijuana and they requested permission to search.¹⁶¹ The officers indicated that they went over a "consent to search" form with Ferrier before she signed.¹⁶² The form did not inform her that she had the right to refuse consent.¹⁶³ The officers did not inform Ferrier of her right to refuse consent or any other right.¹⁶⁴ Ferrier eventually led the officers to a locked room, which she opened for them to search.¹⁶⁵ Officers testified that Ferrier was crying during the time the officers were searching the room and that she appeared frightened and nervous the entire time they were on the premises.¹⁶⁶

152. *Id.* at 928.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 928-29.

159. *Id.* at 929.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

Ferrier testified that the officers stepped into the house while they said that they wanted to talk to her about her son.¹⁶⁷ She stated that she was scared and that the police told her that they were going to take her grandchildren to Protective Services.¹⁶⁸ She testified that she only signed the consent to search form because she did not want them to take her grandchildren away.¹⁶⁹

The search resulted in the seizure of marijuana plants and other evidence of marijuana cultivation.¹⁷⁰ Ferrier was charged with manufacturing a controlled substance.¹⁷¹ Ferrier moved to suppress all of the evidence found in her home, and the trial court denied the motion.¹⁷² Ferrier and the state stipulated as to the facts and the trial court found her guilty of the charged crime.¹⁷³ Ferrier appealed the conviction to the Court of Appeals, which affirmed the trial court judgment.¹⁷⁴ The Washington Supreme Court then granted Ferrier's petition for review.¹⁷⁵

The Washington Supreme Court first rejected Ferrier's claim that the knock and talk procedure violated her rights under the Fourth Amendment to the United States Constitution.¹⁷⁶ The majority noted that failure to warn had been merely a factor and was not necessarily dispositive in assessing the voluntariness of her consent.¹⁷⁷ It then considered the claim under Article I, Section 7 of the Washington State Constitution.¹⁷⁸ The court applied the six nonexclusive criteria identified in *State v. Gunwall*¹⁷⁹ to determine whether Article I, Section 7 goes further than the Fourth Amendment

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* (referencing *State v. Ferrier*, No. 19280-2-II (Wash. Ct. App. Nov. 27, 1996)).

175. *State v. Ferrier*, 960 P.2d 927, 929 (Wash. 1998).

176. *Id.* at 929-30.

177. *Id.* at 930. For this proposition, the court cited *State v. Shoemaker*, 533 P.2d 123 (Wash. 1975) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Heimforth*, 493 F.2d 970 (9th Cir. 1974)). The Court also noted, however, that it was not obliged to consider the question since Ferrier had cited no authority for her contention, and it would be improper to apply the federal Constitution before the Washington Constitution. *Ferrier*, 960 P.2d at 930 & n.4.

178. *Id.*; see WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). The Court noted that "unlike the Fourth Amendment, Const. art. 1, § 7 'clearly recognizes an individual's right to privacy with no express limitations.'" *Ferrier*, 960 P.2d at 930 (citations omitted) (emphasis added by *Ferrier* court).

179. *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

in protecting Ferrier's privacy interests.¹⁸⁰ Since the court was analyzing the same provision that was at issue in *Gunwall*, it adopted the analysis of factors one, two, three, and five from that case.¹⁸¹

Concerning the fourth factor—preexisting state law—the majority found many state cases indicating that Washington had historically afforded individuals an increased level of privacy in similar situations.¹⁸² These included cases prohibiting warrantless infrared surveillance of a home,¹⁸³ warrantless search of curbside trash,¹⁸⁴ warrantless obtaining of phone records or installation of a pen register;¹⁸⁵ and finding an Article I, Section 7 violation in a warrantless intrusion into a student's dormitory room.¹⁸⁶ The court found that preexisting state law supported independent review of the case under Article I, Section 7.¹⁸⁷

The court noted that for the analysis of the sixth *Gunwall* factor—whether the privacy interest at issue is a matter of particular state or local concern—privacy in the home is a matter of local concern and that there is no need for national uniformity on the issue.¹⁸⁸ Rejecting one of the State's contentions, the majority stated that “[t]he core of [Ferrier's] argument is that the police here violated her

180. *Ferrier*, 960 P.2d at 930. The six factors are (1) the state constitution's textual language; (2) significant textual differences between parallel state and federal constitutional provisions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) whether the privacy interest at issue is a matter of particular state or local concern. *Id.* at 930-31 & n.5; *see also Gunwall*, 720 P.2d at 811 (stating the same six factors).

181. *Ferrier*, 960 P.2d at 930.

182. *Id.* at 930-31.

183. *Young*, 867 P.2d at 593. *But see* *United States v. Kyllo*, 533 U.S. 27, 27 (2001) (“Where. . .the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search,’ and is presumptively unreasonable without a warrant.”).

184. *State v. Boland*, 800 P.2d 1112, 1112-15 (Wash. 1990). *But see* *California v. Greenwood*, 486 U.S. 35, 35 (1988) (“The Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home.”).

185. *Gunwall*, 720 P.2d at 808 (Wash. 1986). *But see* *Smith v. Maryland*, 442 U.S. 735, 735 (1979) (“The installation and use of the pen register was not a ‘search’ within the meaning of the Fourth Amendment and hence no warrant was required.”).

186. *State v. Chrisman*, 676 P.2d 419 (1984). The Washington State Court's opinion in *State v. Chrisman*, 619 P.2d 971 (Wash. 1980), which found a violation of the Fourth Amendment to the U.S. Constitution, was reversed and remanded by the United States Supreme Court in *Washington v. Chrisman*, 455 U.S. 1 (1982). *Chrisman*, 676 P.2d at 421. On remand, the Washington Supreme Court reached the same result as in the first case, based on article I, section 7. *Id.*

187. *Ferrier*, 960 P.2d at 931.

188. *Id.*

expectation of privacy in her home because they conducted the knock and talk in order to search her home"¹⁸⁹

Having satisfied the need for an independent analysis, the court then considered whether the knock and talk violated Article I, Section 7.¹⁹⁰ The court found it important that Ferrier was in her home when the police initiated contact and that the police used the procedure to avoid the necessity of obtaining a warrant.¹⁹¹ However, the most important factor was that the police did not advise Ferrier that she had the right to refuse consent.¹⁹² Based on these facts, the majority found that the knock and talk violated Ferrier's state constitutional right to privacy in her home since she was not advised that she could refuse consent.¹⁹³

The court then stated that central to its holding was the belief that any knock and talk is coercive to some degree.¹⁹⁴ It noted that the great majority of home dwellers would not question the absence of a search warrant.¹⁹⁵ Therefore, the majority agreed that Ferrier's testimony that she was afraid and nervous seemed reasonable, and that it was not surprising that an officer testified that virtually everyone confronted by a knock and talk agrees to the search.¹⁹⁶

The majority then stated that the coercive effects of the knock and talk procedure could be mitigated by requiring officers to warn homeowners of their right to refuse consent to a warrantless search.¹⁹⁷ The court stated that because citizens of Washington are entitled to the expectation of privacy in the home due to its heightened constitutional protection, public policy supports a rule governing knock and talk searches.¹⁹⁸ The court stated:

189. *Id.* at 932.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 932-33.

194. *Id.* at 933.

195. *Id.* The Court believed that the majority of citizens "would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search." *Id.*

196. *Id.*

197. *Id.* The Court also stated that its decision was consistent with that of the New Jersey Supreme Court, which held under article 1, section 7 of its state constitution that "where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an *essential* element of which is knowledge of the right to refuse consent." *Id.* (quoting *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975)).

198. *Ferrier*, 960 P.2d at 934.

We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.¹⁹⁹

The court noted that it was simply stating the obvious—that the only way to give the protection substance is to require a warning of its existence.²⁰⁰

Faced with several opportunities to expand the *Ferrier* doctrine, the Washington courts have limited the rule to the situation of a request to search the home.²⁰¹ In *State v. Williams*, the Washington Supreme Court held that warnings were not required when authorities sought entry to arrest an occupant pursuant to an arrest warrant.²⁰² Likewise, in *State v. Bustamante-Davila* it held that the warnings were not required when an INS agent entered a home to serve a deportation order.²⁰³ Finally, in *State v. Khounvichai*, the court found it unnecessary for the police to give warnings when they request entry into a home to question or gain information from an occupant.²⁰⁴

B. Approaches of Other States' Courts

Several other states have consent search doctrines with heightened standards for providing knowledge of the right to refuse. As noted by the *Ferrier* court, New Jersey, based on its own constitutional provision,²⁰⁵ makes knowledge of the right to refuse consent an essential element of the voluntariness inquiry.²⁰⁶ Based on

199. *Id.*

200. *Id.* at 933.

201. *State v. Khounvichai*, 69 P.3d 862, 867 (Wash. 2003) (“As this Court stated in *Williams*, [w]e do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home.”) (quoting *State v. Williams*, 11 P.3d 714, 720 (Wash. 2000)).

202. *State v. Williams*, 11 P.3d 714, 720 (Wash. 2000).

203. *Id.* at 865; *Williams*, 11 P.3d at 720; *State v. Bustamante-Davila*, 983 P.2d 590, 599 (Wash. 1999).

204. *Khounvichai*, 69 P.3d at 867.

205. The New Jersey Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. CONST. art. I, para. 7.

206. *Ferrier*, 960 P.2d at 933 (citing *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975)).

its state constitution,²⁰⁷ Mississippi requires knowledgeable waiver before consent to a search.²⁰⁸ Prior to consent, "it must clearly appear that [an individual] voluntarily permitted, or expressly invited and agreed to the search, being *cognizant of her rights in the premises* when the officer proposed to her, by asking her permission, to make the search without a warrant."²⁰⁹ The Hawaii Supreme Court held in *State v. Trainor*²¹⁰ that whether a person consented to an encounter for the purposes of satisfying article I, section 7 of the Hawaii Constitution²¹¹ "involve[s] a determination as to (1) whether the person was timely advised that he or she had the right to decline to participate in the encounter and could leave at any time, and (2) whether, thereafter, the person voluntarily participated in the encounter."²¹² One state has disagreed with *Ferrier* and one has expressly declined to follow it.²¹³

A greater number of states have provided protections for motorists who have been stopped and asked for consent to search their vehicles. The United States Supreme Court specifically addressed the traffic stop situation in *Ohio v. Robinette*.²¹⁴ In that case, the Ohio Supreme Court ruled that police officers must inform motorists that their legal detention had concluded before engaging in consensual interrogation.²¹⁵ The Supreme Court, however, reversed the decision, stating that it would "be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."²¹⁶

207. "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized." MISS. CONST. art. III, para. 23.

208. *Penick v. State*, 440 So.2d 547, 549 (Miss. 1983).

209. *Id.* (quoting *Smith v. State*, 98 So. 344, 345 (Miss. 1923) (emphasis added), *cited in* *Graves v. Mississippi*, 708 So.2d 858, 863 (Miss. 1997)).

210. 925 P.2d 818, 823 (Hawaii 1996).

211. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted." HAW. CONST. art. I, § 7.

212. *Trainor*, 925 P.2d at 823.

213. See *Hadl v. State*, 47 S.W.3d 897, 900 (Ark. Ct. App. 2001) (disagreeing with *Ferrier*); *Scott v. State*, 782 A.2d 862, 876 (Md. Ct. App. 2001) (expressly declining to follow *Ferrier* and *Johnson*).

214. 519 U.S. 33 (1996).

215. *State v. Robinette*, 653 N.E.2d 695, 697 (Ohio 1995).

216. *Robinette*, 519 U.S. at 39-40.

In *State v. George*,²¹⁷ the Minnesota Supreme Court, based on Article I, Section 10 of the Minnesota Constitution,²¹⁸ mandated more careful review of the practice of using traffic stops to request consent to search the vehicle.²¹⁹ One commentator correctly notes several reasons for the Court's heightened scrutiny of these traffic stops.²²⁰ First, the technique can be used against virtually any vehicle operator as "very few drivers can traverse any appreciable distance without violating some traffic regulation."²²¹ Second, police can use the technique solely as a pretext for seeking drugs or weapons, even when there is no reasonable suspicion of possession of such items and when the traffic stop otherwise would not have occurred.²²² Third, the wide discretion given to police means that they can "target members of groups identified by factors that are totally impermissible as a basis for law enforcement activity."²²³ Fourth, because of the traffic stop, the driver from whom consent is sought may be "unaware that he had a right to refuse consent to the search or to leave."²²⁴ Finally, as a result of extensive police training on this technique, there is an "increasing use by state troopers and police officers of subtle tactics to get motorists and others to 'consent.'"²²⁵

In *State v. Fort*, the Minnesota Supreme Court held that a request for consent to search which had no reasonable relation to the stop and was not supported by reasonable articulable suspicion was "beyond the scope of the traffic stop."²²⁶ Since an expansion of the duration or scope of a traffic stop without reasonable articulable suspicion is not permitted in Minnesota, the Court granted the defendant's motion to suppress.²²⁷

The New Jersey Supreme Court in *State v. Carty* upheld a lower court decision which required reasonable and articulable

217. 557 N.W.2d 575 (Minn. 1997).

218. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." MINN. CONST. art. I, § 10.

219. LAFAVE, *supra* note 34, § 8.2(b), at 636.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. See *State v. Fort*, 660 N.W.2d 415, 416, 419 (Minn. 2003) ("We ... conclude that the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion.").

227. *Id.* at 419.

suspicion as a prerequisite for requesting consent to search.²²⁸ The court held that “unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional.”²²⁹ The majority stated that its holding was inconsistent with the State Police Standard Operating Procedures and a consent decree entered into by the state police in 1999.²³⁰

C. Law Enforcement Responses to Charges of Discrimination: Consent Searches Following Traffic Stops

Law enforcement authorities have taken steps to limit consent searches following traffic stops in order to discourage racial profiling.²³¹ Beginning in the summer of 2001, in addition to requiring state trooper to have a reasonable articulable suspicion that a search is warranted, New Jersey began requiring them to obtain their supervisor’s approval before conducting a consent search.²³² In January 2003, the Maryland State Police reached a partial settlement in a racial profiling lawsuit, which, in part, required state troopers to inform drivers that they have a right to refuse and to have them waive that right in writing.²³³ In fact, many troopers had already warned motorists before asking for consent and had them waive the right in writing.²³⁴ In April 2001, the California Highway Patrol commissioner ordered a six-month moratorium on consent searches.²³⁵ In February 2003, in the settlement of a class-action suit alleging racial profiling, the California Highway Patrol “became the nation’s first law

228. *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002).

229. *Id.*

230. *Id.*

231. In addition to those mentioned here, it is likely that more will follow. In June 2001, at least eight agencies were collecting data on racial profiling by order of a federal court or under agreement with the U.S. Justice Department. Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, WASH. POST, June 28, 2001, at A01. Further, 400 of the nation’s 18,000 police agencies were collecting data. *Id.*

232. David Kocieniewski, *Officials Say Figures Show that Profiling is Decreasing*, N.Y. TIMES, March 9, 2002, at B5.

233. Jo Becker, *Maryland State Police Reach Deal on Profiling*, WASH. POST, Jan. 3, 2003, at A01. The agreement also required the state police to make use of information they collect about stops, investigate them further and take appropriate action. *Id.* State troopers must also make copies of a brochure on how to file racial profiling complaints available to drivers. *Id.*

234. *Id.*

235. Assoc. Press, *CHP Director Suspends ‘Consent’ Car Searches Patrols*, L.A. TIMES, Apr. 20, 2001, § 1, at A23.

enforcement agency to voluntarily agree to stop asking motorists for permission to search their vehicles.”²³⁶

IV. CONSENT SEARCHES: THEORY, APPLICATION, AND OBEDIENCE

This Part will consider the various aspects of the consent search. The first section will analyze the doctrinal basis of consent searches and examine the concept of voluntariness as the standard used to determine of whether consent was voluntarily given. The second section will present problems that have been identified in judicial application of the totality of the circumstances test to the facts of particular cases. The final section will suggest possible problems with the idea of voluntariness of consent.

A. Basis and Theory of Consent Searches

The Supreme Court has suggested several justifications for the consent search exception to the general warrant requirement. The Court stated in *Schneckloth v. Bustamonte*, “[A] search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.”²³⁷ However, this goes no further to justify consent searches as an independent technique than it does any other effective law enforcement tool.

Another possible basis for the consent search is respect for the autonomy of the individual.²³⁸ The decision to consent is that of the individual and should be given effect.²³⁹ One commentator notes that consent searches are privately authorized,²⁴⁰ which suggests that in the context of consent searches there is greater concern for the autonomy of the individual. This argument is supported by insights gleaned from libertarian tort theory, which suggests that a person exercises absolute dominion over himself and that an actor “owns”

236. Maura Dolan & John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling*, L.A. TIMES, Feb. 28, 2003, § 1, at A1. The CHP will be required to monitor its officers by collecting data on every traffic stop, including the race of the motorist, whether a search was conducted, and what was found. *Id.* The CHP, which denies it stops motorists because of their ethnicity, will continue to search where it has probable cause to suspect a crime. *Id.*

237. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

238. Strauss, *supra* note 2, at 268.

239. *See id.* (making, and ultimately rejecting, the autonomy argument).

240. *See Rotenberg, supra* note 3, at 175 n.4 (“The private consent of some private person makes each individual consent search valid. Without this authorization, it is nothing.”).

both his "goods" and his "bads."²⁴¹ A similar theory emphasizing individual will is applied in contract law.²⁴² In the case of the consent search, authorities recognize the dominion that the individual exercises over herself and respect both her good decisions and bad decisions.²⁴³ Thus, even an ill-advised or foolish decision would have to be honored, in order to fully respect the individual.²⁴⁴

This individual autonomy basis may also explain third-party consent searches as well.²⁴⁵ The third-party search might be seen as validation of a previous, implicit consent through the knowledge that the other owners have access to the property.²⁴⁶ However, the foregoing rationale does not explain apparent authority consent searches.²⁴⁷ The fact that the police acted reasonably in believing that the subject of the search granted them consent does not relate to the autonomy of the individual and his private decision to consent to the search. Rather, this standard considers the reasonableness of the police actions, implicating the possible rationale for voluntariness of constraining police activity to prevent misconduct.²⁴⁸

One may also question the basis for the voluntariness standard. The Court in *Schneckloth* discarded the knowing and

241. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 555-56 (2003). ("The premise of the theory is that a person exercises absolute dominion over himself—his body and his reputation The downside is that the actor owns his 'bads' as exclusively as he owns his goods.").

242. See Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 790 (2002) ("According to [libertarian] theory, respecting individual will is an end in itself").

243. This may go toward explaining the part of the voluntariness analysis in *State v. Ferrier*. It seems somewhat incongruous to think of the crying *Ferrier* as being respected as an autonomous being fully in control of her actions. See note 166 and accompanying text. However, this may simply be one of the bads that are owned by the individual. To not respect this decision may be seen as equally intrusive of her autonomy as to not respect one about which she is more confident.

244. See *Scott v. State*, 782 A.2d 862, 875 (Md. 2001) ("In hindsight, [defendant's consent to the search] was a foolish decision, from his point of view, but the issue is not whether the consent was an intelligent one, only whether it was voluntary.").

245. See *United States v. Matlock*, 415 U.S. 164, 170 (1974) ("The consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared").

246. See *id.* at 171 n.7:

Common authority . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

247. See *Illinois v. Rodriguez*, 497 U.S. 177, 185-86, 188-89 (1990) (holding that a consent search may be upheld on the basis that the officers had a reasonable belief that the person from whom they obtained consent has authority over the premises).

248. See *infra* notes 254-255 and accompanying text.

intelligent waiver standard in favor of the voluntariness standard on the basis that the waiver protects trial rights, which serve a different purpose than the Fourth Amendment rights.²⁴⁹ The Sixth Amendment trial rights are intended to preserve a fair trial.²⁵⁰ The Court has suggested that the voluntariness standard is the result of balancing the need for consent searches and assuring absence of coercion.²⁵¹ However, while the test's factors consider the police actions in the specific case, there is no consideration of the specific need for the search in that case.²⁵² But since the results of the search are well-known at the time of the suppression hearing, it is likely that they will be a factor in the decision. This is true even though the results of a search are not explicitly a factor that courts use to determine voluntariness. Further, there is reason to question how society's need for searches relates to voluntariness.²⁵³

There is some language in the *Schneckloth v. Bustamonte* opinion suggesting that the basis for the voluntariness standard is the prevention of police misconduct as the standard disallows coercion.²⁵⁴ This coercion would most likely be caused by police officers, suggesting that the courts might utilize the voluntariness standard to avoid police misconduct. Prevention of police misconduct would ensure to some degree that the consent decision is the product of the person's free will. This seems to be a likely basis for the apparent authority

249. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-43 (1973). The knowing and intelligent waiver standard was enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

250. *Schneckloth*, 412 U.S. at 236.

251. *Id.* at 227. ("As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.")

252. Instead, there is often a general statement of the need for and utility of consent searches, and consideration of the ramifications on effective police work of changing consent law. See, e.g., *Schneckloth*, 412 U.S. at 227 ("In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."). The *Schneckloth* Court stated that if the prosecution were required to prove that the subject of the search knew that he had a right to refuse consent, it "would, in practice, create serious doubt whether consent searches could continue to be conducted," except in "rare cases where it could be proved from the record that a person in fact affirmatively knew of his right to refuse." *Id.* at 229-30.

253. One commentator has criticized considering law enforcement interests in the voluntariness inquiry. Society's need for searches "arguably has nothing to do with the voluntariness of consent." Strauss, *supra* note 2, at 258 n.171 (quoting ALAN WERTHEIMER, COERCION 117 (1987)).

254. "Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact 'voluntary' or was the *product of duress or coercion, express or implied*, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227 (emphasis added). "The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be *free from any aspect of official coercion* cannot be resolved by any infallible touchstone." *Id.* at 229. (emphasis added).

cases, since if the officers behave reasonably, the search will be valid.²⁵⁵ If the officers did nothing wrong in their determination of who had authority to consent, the search should be upheld.

B. Problems in the Application of the Law

One commentator has criticized judges' analysis of factual scenarios presented in consent search cases.²⁵⁶ She found that out of hundreds of cases, only a handful analyzed the suspect's particular subjective factors.²⁵⁷ Of these, only a few judges found the suspect's particular subjective factors to be compelling.²⁵⁸ In most cases where consent was found to be involuntary, the court instead focused on egregious police misconduct.²⁵⁹ One commentator has argued that in practice, "courts find consent to be voluntary in all but the most extreme circumstances."²⁶⁰ In general, four types of police misconduct lead to a finding of involuntary consent: (1) threats to the suspect or the suspect's family, (2) deprivation of necessities until consent, (3) asserting an absolute right to search, and (4) an unusual and extreme show of force.²⁶¹

The Court has also been faced with practical arguments suggesting that the voluntariness standard does not comport with how one would expect a person possessing contraband or evidence of a crime to behave. The Supreme Court has considered why a person would voluntarily consent to a search when it is so likely that contraband would be found.²⁶² It noted that the reasonable person in the reasonable person test is an innocent person.²⁶³ However, in other

255. See *Illinois v. Rodriguez*, 497 U.S., 177, 185-86, 188-89 (1990) ("[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable").

256. Strauss, *supra* note 2, at 221-35.

257. *Id.* at 222.

258. *Id.*

259. *Id.* at 225.

260. Strauss, *supra* note 2, at 223 (citing DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32 (1999)).

261. Strauss, *supra* note 2, at 225.

262. See *Florida v. Bostick*, 501 U.S. 429, 437-38 (1991) ("We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the "reasonable person" test presupposes an *innocent* person.").

263. *Id.*

areas of criminal law, the law distinguishes the innocent person from the reasonable person.²⁶⁴

One possible problem with the application of consent doctrine to consent searches is the confusion over whether the voluntariness standard is subjective or objective.²⁶⁵ Recent Supreme Court cases have emphasized objective standards under certain areas of the Fourth and Fifth Amendments, focusing either on what a reasonable person would believe or whether police acted reasonably under the circumstances.²⁶⁶ The confusion over the proper standard has led to imprecision in court rulings on voluntariness in consent searches.²⁶⁷

C. Obedience Theory

Even if the doctrine of consent searches is sound and the law is rigorously applied to the facts of the case, the use of psychological research in conjunction with the concept of voluntariness calls into question the validity of the concept as applied in the consent search scenario.²⁶⁸ Commentators have suggested the applicability of a famous psychological study by Stanley Milgram.²⁶⁹

In 1960, Milgram recruited a number of individuals to participate in an experiment that they were told was intended to study the effects of punishment on learning.²⁷⁰ One of the individuals was the confederate of the experimenter, and he became the “learner”

264. *E.g.*, MODEL PENAL CODE § 2.02(2) (2003). The risk that a reckless actor disregards must be one that is a gross deviation from the standard of care that a *law-abiding* person would observe in the actor's situation. *Id.* § 2.02(2)(c). The risk of which a negligent actor should have been aware must be one that his failure to perceive it involves a gross deviation from the standard of care that a *reasonable* person would observe in the actor's situation. *Id.* § 2.02(2)(d).

265. *See* Strauss, *supra* note 2, at 227, 229, 232-33 (“[S]ome lingering questions [exist] as to which perspective—subjective or objective—should be utilized . . .”).

266. *Id.* at 229.

267. *See id.* at 235 (The lack of clear standard has “led to confusion at best and inadequate protection for suspects’ Fourth Amendment rights at worst.”).

268. *See* Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 233 (1997) (“The most baffling aspect of the Supreme Court’s conception of voluntary consent is that it virtually ignores the well-documented observation that most people mechanically obey legitimate authority.”).

269. *E.g.*, *id.* at 233. This assertion was first made by Professor Rotenberg. *See* Rotenberg, *supra* note 3, at 188-89 (discussing research showing a natural tendency to consent to authority figures). Barrio notes that “[o]ne of the purposes of this note is to expand upon professor Rotenberg’s novel argument by offering the Milgram experiments not only as evidence that consent searches raise a significant risk of psychological coercion, but also as concrete proof for the proposition that consent searches require prophylactic Fourth Amendment warnings.” Barrio, *supra* note 268, at 216 n.2.

270. *Id.* at 233-34.

in the experiment, while the other individual was the "teacher."²⁷¹ The teacher was to administer electric shocks of increasing intensity when the learner failed to answer a question correctly.²⁷² The teacher was given a mild shock to increase the credibility of the experiment.²⁷³ A fake shock generator had switches with messages marked from "Slight Shock," "Moderate Shock," "Strong Shock," "Very Strong Shock," "Intense Shock," "Extremely Intense Shock," and "Danger: Severe Shock," and at the far right of the panel two switches marked "XXX."²⁷⁴

A prerecorded tape of the learner's feigned discomfort increased from a grunt at seventy-five volts to agonized screams at 270 volts, to refusal to continue the experiment at 300, and beyond that, silence.²⁷⁵ The teacher was instructed to treat silence as an incorrect answer.²⁷⁶ The experimenter had four statements to use if the teacher vacillated: "Please continue," "The experiment requires that you continue," "It is absolutely essential that you continue," and "You have no choice but to continue."²⁷⁷ The discomfort of the learner led the teacher to want to stop administering the shocks, but the experimenter, a legitimate authority figure, used the statements to pressure the teacher to continue punishing the learner.²⁷⁸ The aim of the experiment was "to measure the point at which the teacher's moral resolve exceeded the pressure of obedience."²⁷⁹

Milgram found a surprising level of obedience. 65 percent of the teachers reached the maximum level of voltage: the switch marked "XXX."²⁸⁰ Subjects obeyed even when they heard that the learner had a heart condition.²⁸¹ However, when the teacher and learner were in the same room, the percentage who reached the maximum was only forty, and when the learner was required to have tactile contact, the obedience rate dropped to 30 percent.²⁸² Prior to the experiment, psychiatrists and lay persons predicted that only 1 or 2 percent would

271. *Id.* at 234.

272. *Id.*

273. *Id.*

274. *Id.* at 235.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 236.

281. Strauss, *supra* note 2, at 237.

282. *Id.*

shock the learner to the maximum level.²⁸³ Milgram believed that the learners were exhibiting the phenomenon of obedience to authority.²⁸⁴ He theorized that three factors accounted for the high level of obedience observed.²⁸⁵ First, social forces “prepare” individuals for obedience because obeying authority is emphasized to children by parents and teachers.²⁸⁶ Second, the subjects came to view themselves as “the instrument for carrying out another person’s wishes,” and this undermined their resolve to challenge the experimenter’s authority since they no longer saw themselves as responsible for their actions.²⁸⁷ Finally, Milgram argued that situational determinants locked the subjects into a pattern of obedience.²⁸⁸ These determinants included politeness, a desire to uphold the initial promise to the experimenter, the awkwardness of refusing to complete the experiment, anxiety, and the sequential nature of the task.²⁸⁹

Commentators have also analyzed another study supporting Milgram’s view that authority is contextual in nature.²⁹⁰ In 1974, Leonard Bickman conducted an experiment proving that the degree of obedience an authority figure receives depends in large part on the uniform that the person wears.²⁹¹ Bickman arranged for three experimenters in three different uniforms to accost random pedestrians on the street.²⁹² The experimenters commanded that the pedestrian perform a certain standardized task, from picking up a bag to giving a stranger money for parking.²⁹³ The three uniforms were that of a civilian (consisting of a sports jacket and tie), a milkman in uniform, and a uniformed guard.²⁹⁴ Bickman found that the guard received the highest levels of obedience, with 75 percent of subjects obeying, compared with 47 percent for the milkman and 29 for the civilian.²⁹⁵

Commentators have maintained that the results of these experiments suggest a powerful ability of uniformed authority figures

283. Rotenberg, *supra* note 3, at 188 n.61 (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 31 (1974)).

284. Barrio, *supra* note 268, at 236.

285. *Id.*

286. *Id.*

287. *Id.* at 237.

288. *Id.*

289. *Id.*

290. *Id.* at 238.

291. *Id.*

292. *Id.*

293. *Id.* at 239.

294. *Id.*

295. *Id.*

to cause acquiescence in citizens.²⁹⁶ Several observers have attributed the coercive nature of consent searches to this concept and, accordingly, have proposed solutions.²⁹⁷ One proponent of the application of the foregoing studies to consent searches has argued that citizens will view requests to search as commands.²⁹⁸ This commentator offers several solutions based on this experimental evidence—including informing subjects before requesting consent that they have the right to refuse—and ultimately advocates the elimination of consent searches.²⁹⁹ The results of these studies undercut the Court's perception of the voluntariness of consent when asked by uniformed authority figures.³⁰⁰

V. THE ARGUMENT FOR PRIVACY AS A CONSIDERATION IN CONSENT SEARCHES

This Part will present the argument for including the level of privacy objectively expected by the individual as a factor in the totality of the circumstances. The first section will lay out a hierarchy of protection under various Fourth Amendment contexts and will present the underpinnings of the argument for consideration of location in the consent search case. The second section will address the benefits of including privacy as a factor in the determination of whether a search was consensual. The third section will consider the inclusion of an element of privacy compared to the alternative of providing a prophylactic warning.

296. See *id.* at 240 (“[T]he guard’s uniform conveyed the sense that its wearer was someone who had a responsible job and could be trusted.”); Rotenberg, *supra* note 3, at 193 (“Both law and psychology point to the same conclusion—consent in reality is consentless.”); Strauss, *supra* note 2, at 288-89 (“[T]his seems to be one small step removed from recognizing that . . . police officers in uniform convey . . . authority and power . . .”).

297. See Barrio, *supra* note 268, at 233-244 (arguing for a Fourth Amendment warning requirement); Craig M. Bradley, *The Court’s Curious Consent Search Doctrine*, 38 TRIAL 72 (October 2002) (arguing for an advisory requirement); Herbert Gaylord, Case Note, *What Good is the Fourth Amendment? “Knock and Talk” & People v. Frohriep*, 19 COOLEY L. REV. 229, 229-234 (2002) (analyzing “knock and talk” caselaw); David M. McGlaughlin, *Consent to Search and Knowledge of the Right to Refuse*, 23 PA. LAW. 43, 43 (2001) (arguing suspect should be informed of his right to refuse consent); Rotenberg, *supra* note 3, at 175-177 (advocating for a series of controls to restrain consent doctrine); Strauss, *supra* note 2, at 237-240 (arguing consent should be universally rejected); Robert H. Whorf, *“Coercive Ambiguity” in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK L. REV. 379, 379 (1997) (arguing police should be required to tell a motorist he is “free to go” before requesting consent).

298. Strauss, *supra* note 2, at 240-42.

299. *Id.* at 252-56, 258-72.

300. See Barrio, *supra* note 268, at 218, 240 (“[O]bedience theory casts serious doubt on the continued vitality of what *Schneekloth* characterized as *Miranda*’s central holding: that custody is a necessary prerequisite for a finding of psychological coercion.”).

A. A Hierarchy of Privacy Protections

Fourth Amendment case law has created a hierarchy of privacy protections, which depend greatly on one's location at the time of the search or seizure. Some of these apply a higher standard to the showing of reasonableness, while others operate as categorical rules preventing the operation of a search or seizure that intrudes into a specified area. This section examines language explaining this hierarchy and provides an overview of the contours of the hierarchy.

1. Treatment of the Home in Search Cases

The home is still accorded significant deference in search cases, even if not as much deference as is granted to the privacy of the home in other areas of Fourth Amendment jurisprudence. Further, *Kyllo* may signal an increase in the level of privacy that the courts will approve of for an individual in the search context. Even before *Kyllo*, the Court emphasized the importance of privacy in the home. Justice Harlan's concurrence in *Katz*, which came to be the majority position on the issue,³⁰¹ revealed that the Fourth Amendment did protect people in some places more than others. In fact, Justice Harlan read the Court's opinion as retaining some of the previous concepts from the property-based conception of searches. He interpreted the opinion to hold that "an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy."³⁰² He noted that deciding what protection the Fourth Amendment affords to people generally requires reference to a place.³⁰³ Therefore, *Katz* reveals a heightened consideration of privacy in the home even in the majority opinion.³⁰⁴

One commentator has asserted that the Court never actually abandoned the trespass test.³⁰⁵ He states that Harlan's concurrence implies that consideration of the method of the search as a factor—not

301. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) ("The *Katz* test [is] whether the individual has an expectation of privacy that society is prepared to recognize as reasonable . . ."); Short, *supra* note 34, at 467 ("The two-part test proposed by Justice Harlan in his concurring opinion in *Katz* eventually came to be recognized as the new measuring stick for the legitimacy of government searches.").

302. *Katz v. United States*, 389 U.S. 347, 360 (1967) (internal citations omitted).

303. *Id.* at 361 ("As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here the answer to that question requires reference to a 'place.'").

304. See *id.* at 351 ("In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area.").

305. Simmons, *supra* note 35, at 1314.

a “place-based analysis”—was the true evil that Katz set out to dispel.³⁰⁶ While the *Katz* majority emphasized that “the Fourth Amendment protects people, not places,”³⁰⁷ the sanctity of the home survived the apparent rejection of the physical invasion test.

Cases following *Katz* and preceding *Kyllo* reiterated the Court’s elevated concern for the home.³⁰⁸ In *Oliver v. United States*,³⁰⁹ the Court juxtaposed the home with an area which received a lesser privacy interest. It used the comparison of the curtilage and the home to open fields to demonstrate that the open fields doctrine was consistent with a reasonable expectation of privacy analysis.³¹⁰ The Court stated that the curtilage was treated similarly to the home because of the “intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’”³¹¹ Courts have defined curtilage “by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.”³¹² The curtilage therefore receives more protection than open fields but less than the home itself.³¹³ *Oliver* demonstrates an analytical structure that grants special status to the home, as part of the hierarchy of locations that merit varying degrees of protection from government intrusion.

Kyllo reiterated the Court’s determination to accord special importance to the home in search and seizure jurisprudence. The decision focused upon the fact that the technology at issue had been focused upon the home.³¹⁴ The Court stated, “In the home, our cases

306. *Id.* “Many courts properly reject the idea that *Katz* supplanted a ‘place-based analysis,’ since the location of the search and the defendant’ relationship to that location are still a significant factor in determining whether or not the search was valid.” *Id.* To support this point, the author cites *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (“[By] focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.”). *Id.* at 1314 n.43.

307. *Katz*, 389 U.S. at 350.

308. *See, e.g.*, *United States v. Karo*, 468 U.S. 705, 714 (“At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”).

309. 466 U.S. 170 (1984).

310. *Id.* at 180.

311. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

312. *Id.*

313. *See id.* (“[T]he home will remain private . . . [c]onversely . . . no expectation of privacy legitimately attaches to open fields.”).

314. *See Kyllo v. United States*, 533 U.S. 27, 33, 37-40 (2001) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961) for the proposition that “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”).

show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”³¹⁵ The *Kyllo* case seems to move closer to older ideas of property-based protections of the right to privacy. Whatever the implications the decision has on the future of the *Katz* reasonable expectation of privacy test, *Kyllo* demonstrates a high level of solicitude for privacy in the home.

2. Treatment of the Home in Other Fourth Amendment Contexts

The home also receives special treatment in other areas of Fourth Amendment law. For example, in *Payton v. New York*, the Court held that the police could not enter the home to arrest a suspect without either an arrest warrant or exigent circumstances.³¹⁶ The Court first stated, “[T]he Fourth Amendment draws a firm line at the entrance to the house.”³¹⁷ The Court then noted, “[in no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”³¹⁸ In public places, however, there is no requirement that the police have a warrant.³¹⁹ In the case of arrest with a warrant, there is a strong basis for the entry into the home because of the determination of probable cause by a “neutral and detached magistrate.”³²⁰ The Court has further protected the home in arrest and search cases by insisting that the police knock and announce before entering the home to serve the warrant.³²¹ The protection of the home in home arrest cases seems

315. *Id.* at 37.

316. *Payton v. New York*, 445 U.S. 573, 589 (1980).

317. *Id.*

318. *Id.* at 589. The Court also stated that the principles embodied in the Fourth Amendment apply to all government invasions of “the sanctity of a man’s home and the privacies of life.” *Id.* at 585.

319. *United States v. Watson*, 423 U.S. 411, 417 (1976). “The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . .” *Id.* (citing *Carroll v. United States*, 267 U.S. 132, 156 (1925)).

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

321. Authorities may break open the doors of a dwelling, but generally must first announce their presence and authority. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). Whether they did so is part of the Fourth Amendment reasonableness inquiry. *Id.* Warrant execution is also addressed by federal statute:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (2003).

even stronger than in other Fourth Amendment areas, since there is a categorical rule for arrests.

3. Automobile Stops and Searches and Open Fields

The Supreme Court has held there is a lower burden for the search of an automobile than a home or office, since a citizen has a significantly lower expectation of privacy in an automobile than in one's home or office.³²² The mobile nature of the vehicle makes it readily movable and makes destruction of evidence easier.³²³ In the case of open fields, the owner has been held to have no legitimate expectation of privacy in that area.³²⁴ As noted above, in *Oliver v. United States*, the Court held that no legitimate expectation of privacy attaches to open fields.³²⁵ Open fields are not part of the cartilage of the home and have not traditionally been treated as deserving as much protection as, for example, the areas that are closer to the home.³²⁶

B. The Proposal

This Note envisions an additional element in the test for voluntariness of consent. This element would be weighed along with the other factors relating to voluntariness that courts currently employ to assess the validity of consent searches.³²⁷ This element would capture the different privacy interests that the Court has delineated in Fourth Amendment jurisprudence, but which have not been applied to consent searches.

Courts would apply the test enunciated in *Katz v. United States* to determine the level of privacy expected by the subject of the search.³²⁸ They would consider whether the person consenting to the search had a subjective and an objective expectation of privacy in the thing searched.³²⁹ If a person is asked in the home to consent to a search of another area on the property, for example, the relevant area for the analysis would be the place the police wish to search, even though consent was requested while the person was in the home. One

322. *California v. Carney*, 471 U.S. 386, 390 (1985).

323. *Id.*

324. *Id.*

325. *Oliver v. United States*, 466 U.S. 170, 179 (1984).

326. *Id.* at 180.

327. For an overview of factors courts currently employ, see *supra* notes 114-130 and accompanying text.

328. See *supra* notes 18-39 and accompanying text.

329. See *supra* notes 32-34 and accompanying text.

possible alternative would be to have categorical rules for certain areas, such as saying that a certain area always should be accorded a certain level of privacy.³³⁰ This alternative, however, has been used in the context of other Fourth Amendment areas, such as arrests, while searches have been governed by the *Katz* inquiry. One advantage of the *Katz* test is that it is flexible enough to allow for determination of a wide range of areas. Also, under the case law that has resulted from *Katz*, courts will have adequate precedent to enable them to decide the level of privacy in different areas.³³¹

The privacy analysis in the consent search context will be easier to apply than that in the case of determining whether a search has occurred. First, courts should not give so much consideration to the type of technology used, or that could be used, since there will not be advanced technology involved. Rather officers will simply be asking for permission to search. One possibility for courts is to consider what levels of technology might have detected what the officers eventually found during the consent search. However, that technique applies only in a case where the search has already taken place and the court is aware that the search found the object to which the defendant is asserting a reasonable expectation of privacy. In the case of a consent search, it would be speculative and time-consuming for courts to consider what technologies could possibly have detected the object found by the search.³³² Rather, courts should read the

330. Categorical rules delineating areas where privacy is expected have been used in other areas of Fourth Amendment law, such as in the case of the general requirement of a warrant in order to make an arrest in one's home. See *supra* notes 316-319 and accompanying text.

331. *Katz* is the standard for the legitimacy of government searches. See *supra* note 34 and accompanying text. A Westlaw search on February 27, 2004, showed 11,705 documents referring to the *Katz* decision. Scholarly commentary has considered a wide variety of areas where one may or may not have a reasonable expectation of privacy. See, e.g., Daniel L. Collum, Comment, *Fourth Amendment and Maritime Drug Searches: Is There a "Legitimate Expectation of Privacy" on Vessels at Sea?*, 1994 U. CHI. LEGAL F. 367, 367-80 (discussing if crewman of vessels at sea have a reasonable expectation of privacy); Alexandra Coulter, Special Project, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311, 1315-33 (1990) (discussing whether airline passengers have a reasonable expectation of privacy); Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of their Apartment Buildings?*, 101 MICH. L. REV. 273, 273 (2002) (discussing whether apartment tenants have a reasonable expectation of privacy).

332. There may be some cases in which the court will find that there is no reasonable expectation of privacy even in a place in which there is normally a high level of privacy expectation. For example, if conspicuous contraband were in a readily observable place in the home, such as prominently displayed in a window, then that fact might defeat an argument that there was a reasonable expectation of privacy in the item. However, courts should not attempt to decide whether the object found might have been detected by some other method, ranging from a heat sensor like that used in *Kyllo* to a flyover of the house from several hundred feet in the air in an airplane or a helicopter. It is this latter consideration that would be difficult since in the

precedent and focus on the place searched and the level of privacy expectation accorded to that area.

Several examples illustrate how the privacy analysis would function in different scenarios. First, consider the situation of a citizen who is approached by the police, who knock on her door and ask to search the shed in her backyard. She consents and the police perform the search of the shed. At a suppression hearing in order to determine the validity of consent, the court would first determine the appropriate cases to consider. Even though consent was requested at the home, the consent was requested for the shed, so that is the relevant location. Therefore, the court would consider the cases on privacy in structures such as a shed outside the curtilage.

Second, consider a factual situation similar to that in *Florida v. Riley*: a search of a greenhouse for items which could be seen from the air.³³³ The level of privacy expectation would depend on the location of the greenhouse. There would be a higher level of privacy accorded to the greenhouse if it were part of or attached to the home than if it were outside the curtilage of the home. The court would analogize this set of facts to the most similar cases it could find in the area. The court would not consider, however, the fact that the items in the greenhouse might have been seen by authorities in an airplane. Were this the *Riley* case, the court would have had to deal with that issue. In this case, though, the court would not speculatively consider all possible methods of detection, but rather would focus on the protection that case law accords to the area searched.

Once the proper analysis of the situation is made, the court considers the expected level of privacy along with the other factors used to assess the voluntariness of consent. The fact that a search is of a location that has a low expectation of privacy will weigh in favor of finding consent; a search of an area with a high level of privacy will weigh in favor of finding no consent. The expected privacy level factor would make the most difference in the result of the outlier cases where there is ambiguity as to whether or not coercion occurred. In cases where the other factors are split between valid consent and invalid consent, a particularly strong or weak expectation of privacy is likely to be much more determinative.

usual *Katz* case that specific method, be it heat sensor or flyover, has been used and the court can focus on that method of search.

333. See *supra* notes 45-46 and accompanying text.

C. Reconciling Inconsistency in Fourth Amendment Caselaw

The privacy or location element in the totality of the circumstances test would improve consistency with the other areas of Fourth Amendment concern. The current test has no explicit consideration of the area at which the consent search is directed, except in the case where the person asked for consent is in custody and to the extent that the location bears upon the issue of coercive surroundings. However, in other areas of the Fourth Amendment, the location of the activity sought to be protected is a primary concern.³³⁴

Recent events in some jurisdictions further modify the balance between the privacy accorded the home and that accorded other areas. For example, several jurisdictions, either through the courts or through department policy, have limited or eliminated the use of consent searches following traffic stops, and many others are investigating their own procedures.³³⁵ These decisions have gone beyond the consent search status quo that puts the home and other areas on the same plane in terms of protection of privacy. They have created a situation where, with respect to the consent search, there is considerably more privacy given to the automobile. This approach is inconsistent with a central principle of Fourth Amendment jurisprudence. The Supreme Court has stated, “[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”³³⁶

Most of the foregoing policies regarding consent searches were adopted due to fears about racial discrimination, not privacy.³³⁷ Racial profiling is a concern which may override other privacy rights and extend beyond Fourth Amendment considerations.³³⁸ However,

334. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 35 (2001) (discussing higher privacy interest in the home); *Payton v. New York*, 445 U.S. 573, 589 (1980) (same); see also *supra* notes 308-319 and accompanying text.

335. See *supra* Part III.C.

336. *United States v. United States Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972).

337. See *supra* notes 231-235 and accompanying text.

338. Namely, the Equal Protection Clause of the Fourteenth Amendment. *Whren v. United States*, 517 U.S. 806, 813 (1996). Some scholars have argued for a conception of the Fourth Amendment that would itself protect certain minority groups from discriminatory conduct. For example, Professors Dan Kahan and Tracey Meares base a theory of criminal procedure based on the constitutional theory insights of John Hart Ely, whose representation-reinforcement theory of the Constitution suggested that the judiciary stringently scrutinize disadvantaging “discrete and insular minorities.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Luna, *supra* note 8, at 808-09. Kahan and Meares utilize this theory to formulate a theory of criminal procedure emphasizing that constitutional limitations are intended to prevent oppression of disempowered groups, and suggesting that judges be especially wary of conduct that focuses on a despised caste. Luna, *supra* note 8, at 809-10; Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of*

while the problem of profiling may be most obvious in the context of consent searches following traffic stops, this problem is equally likely to occur in other circumstances. For example, there is nothing to prevent authorities from conducting home consent searches based on racially discriminatory motives. In fact, a home consent search may present an easier target for discriminatory targeting. In the traffic stop case, there must at least be a valid reason for stopping the vehicle. However, in the home consent search there is no such limitation on the ability of the police to ask for permission to search.

Another consideration in the comparison of the consent search to other areas of search and seizure law concerns exceptions to the warrant requirement. This consideration focuses on what characteristics the consent search shares and does not share with other exceptions to the general warrant requirement, as opposed to characteristics of other types of searches. Most of the exceptions to the warrant requirement for searches and arrests require some sort of justification. Some require an evidentiary justification, such as the protective stop and frisk;³³⁹ while some are based on other concerns, such as the exigent circumstances exception.³⁴⁰ Those that require an evidentiary justification—such as meeting the requirements of probable cause or reasonable suspicion—demand that the police have some amount of evidence that the person searched has committed a

Criminal Procedure, 86 GEO. L.J. 1153, 1157 (1198). Under this theory, the Fourth Amendment becomes a criminal procedure analog to the Equal Protection Clause of the Fourteenth Amendment. Luna, *supra* note 8, at 803-04.

The Supreme Court, however, has been careful to prevent the conflation of the Fourth Amendment and the Fourteenth Amendment in the context of criminal procedure.

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Whren, 517 U.S. at 813.

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

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

340. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (“[A] warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence . . . or the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling.”).

violation of the law. Consent searches, however, require no level of evidentiary burden to justify their use.³⁴¹

The exigent circumstances exception allows the police to enter the home without a warrant if they are in hot pursuit of a felon, or if they have probable cause to believe that there would be escape of a suspect, imminent destruction of evidence, or a risk of danger to the police or other persons inside or outside the dwelling.³⁴² This exception requires an evidentiary showing as well, although it requires more than just a belief that the person committed a crime or that evidence will be in a certain place. Still, this exception seems to be a more compelling justification for invading a homeowner's privacy, since there may be a real risk of harm to the police or bystanders, except in the case of imminent destruction of evidence. In the case of a consent search, it may lead to the discovery of evidence of criminal activity, enhancing crime fighting and law enforcement.³⁴³ However, the chance that the police action will have a large effect in a given case seems less likely than in the case of exigent circumstances.³⁴⁴

The exigent circumstances exception differs from the consent search exception in another important way. If there are exigent circumstances, then the police can enter the home in the same way that they may enter if there is consent. In the arrest warrant situation, however, exigent circumstances give the police a right that they do not otherwise have under *Payton*. The consent search doctrine does not give the police any rights that they do not already have, since they have the same right to ask for consent on a public street, during a traffic stop, or in the home.³⁴⁵ In effect, unlike the exigent circumstances exception, the consent search doctrine operates without

341. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (stating that the State must show that the consent was voluntary to uphold the search; no mention is made of any other requirement); *Rotenberg*, *supra* note 3, at 183. One commentator notes that the implicit assumption that evidence will be found during a consent search "strangely . . . need not correspond with the presence of probable cause or a warrant or any other basis for suspicion." Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 149 (2002).

342. *Olson*, 495 U.S. at 100.

343. This is one of the arguments made to support consent searches. See *Strauss*, *supra* note 2, at 258-59.

344. In the case of exigent circumstances, the police must find one of the exigent circumstances upon which to base the entry. This showing suggests a present risk to society. The results of the consent search, which does not even require reasonable suspicion, seem speculative at best, given the lower chance that a given search will result in contraband or other evidence based upon which to arrest and charge a defendant. See *supra* note 341 and accompanying text.

345. This statement excludes the states that have decided otherwise under state law, as part of a settlement of a lawsuit, or as part of their regulations. See *supra* Part III. This general rule is accurate in most states and under federal case law.

regard to the hierarchy of areas that receive varying degrees of protection under the Fourth Amendment.

The question becomes whether courts should have enough faith in the legitimacy of consent searches to allow them to overcome the strong presumption of granting individuals more privacy in certain locations. Exceptions based on the safety of officers, safety of the public, or decisions that are well-grounded and judicially-countenanced *ex ante* provide a fair argument for abrogating the location distinction, even though, as seen above, they do not do so to the extent that consent searches do. However, given the concerns raised by the Milgram and Bickman studies, there is evidence that consent is not a reliable enough basis upon which to ignore the hierarchy of privacy.³⁴⁶

VI. CONCLUSION

Consent searches are a valid and effective tool of law enforcement. However, the manner in which their validity is currently decided ignores the different levels of privacy that a person may expect depending on the circumstances of the search and does not comport with the privacy analysis employed in other areas of Fourth Amendment jurisprudence. A change in the analysis of validity of consent searches will create more robust protection of privacy interests in those situations in which courts have determined that constitutional privacy interests are heightened. Courts should reaffirm that privacy is an issue in each area of Fourth Amendment application and that, to reflect this principle and bring the consent search doctrine into consonance with the rest of search and seizure law, the test for consent searches should take into account the privacy expectations of the person searched.

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346. *See supra* Part IV.

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