A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment

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The Fourth Amendment is a mirage. On paper—in the rules studied by law students, analyzed by scholars, and proclaimed by jurists—its limitations are many and, oftentimes, significant. Yet the experience of large numbers of Americans is entirely to the contrary, thanks to the rights-annihilating, under-theorized exception of "consent." Under its guise, law enforcement officers routinely conduct what would otherwise be constitutionally-restrained searches and seizures, and they do so without meaningful explanation or assent. Fortunately, change—whether legislative or (ideally) constitutional—could be straightforward. Thanks to other sufficient triggers, consent could be replaced by a narrow, rights-protective doctrine under which law enforcement could continue to accomplish its aims—and in a more fair and evenhanded manner—and that would produce public data that could be mined for evidence of bias or manipulation. In this Article, then, we make the case for the abolition of Fourth Amendment consent except as an emergency doctrine, a move that would improve policing and restore an intended measure of human dignity and autonomy to the people.

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One possibility is that citizens, especially those involved in crimes, have a desire to cooperate with the police to avoid making waves. Another possibility, far more sinister, is that the police have come to recognize that "consent" is the catch-all exception to the Fourth Amendment, so they tailor their testimony accordingly.
– Ruiz v. Florida, 50 So.3d 1229, 1232 (Fla. Dist. Ct. App. 2011).

I. INTRODUCTION

"Consent" is a seemingly simple word that bedevils much of modern life, from information privacy to decision privacy, from subfields such as online advertising and commercial relations to bioethics and routine healthcare.[1] As human civilization has collectively and blessedly moved away from—or at least as its better parts have tried to move away from—control by physical domination,[2] we have unfortunately often replaced it with other forms of coercion that may be less apparent or overt, but that remain divisive, discriminatory, and destructive. And when it comes to policing, with its inherent, massive imbalances of power, the word is ripe for irony and abuse. On its margins, the Supreme Court has acknowledged this.[3] And yet day in, day out, the streets and homes of America are riddled with police officers acting on "consent" that raises far more questions than it provides answers.

A contemporary, run-of-the-mill case might best make the point.[4] On a frigid Maine February morning in 2019, State Police "Trooper" Lee Vanadestine was working patrol.[5] The white, tattooed Vanadestine had developed "resiliency . . . during his more than 25 years serving in the United States military," which he believed "key to how he[] handl[ed] his law

[1] *See Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019). Or, see any of the 2,408 articles in Westlaw's Law Reviews & Journals database that include the word "consent" in their title. WESTLAW, https://westlaw.com (filter search to "Secondary Sources - Law Reviews & Journals"; then search "TI("consent")") (search run on May 4, 2023).

[2] Of course, we are also bedeviled by outright attempts to reverse progress, as evidenced by senseless bloodshed like that in Ukraine. *See* Matthew Mpoke Bigg, *How Russia's War in Ukraine Has Unfolded, Month by Month*, N.Y. TIMES (Feb. 24, 2023), https://www.nytimes.com/article/ukraine-russia-war-timeline.html (on file with the *Ohio State Law Journal*).

[3] *See infra* Part II.

[4] Obviously, we do not personally find it "run of the mill" in a meaningful sense—indeed, we are not convinced there is such a thing when it comes to criminal justice. But, just as obviously, it is "run of the mill" for our current systems.

[5] United States v. Howard, 66 F.4th 33, 37 (1st Cir. 2023).

enforcement work."[6] On this morning, he "activated his emergency lights and pulled over" upon witnessing a vehicle stopped "100 feet off the right side of the road [that] had crashed into a snowbank;" "four people were standing around it."[7] One of those persons was a witness who had stopped to help.[8] Two others were former occupants of the car (one the driver thereof) who spoke with Vanadestine but whose stories "about where they were coming from and heading to," thought Vanadestine, "were not lining up."[9] The fourth was former passenger Yolanda Howard, a young black woman[10] who, according to Vanadestine, walked away upon his approach[11] and thereafter remained some fifty feet from him.[12]

Apparently, one police officer was not sufficient to aid these motorists, and so, within five minutes, Trooper Anthony Keim "arrived on scene to assist

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[6] Scott Thistle, *Veterans Say Military Experiences Help Guide Pandemic Policing*, PORTLAND PRESS HERALD (Nov. 8, 2020), https://www.pressherald.com/2020/11/08/on-the-frontlines-veterans-say-military-experiences-help-guide-pandemic-policing/ [https://perma.cc/H2VQ-QMJQ]. "As a civilian, [Vanadestine] patrols the Maine Turnpike," but upon retirement he will remain in the Air National Guard. *Id.* "He can rattle off cities and regions across Iraq that he's been to, often under fire, with the familiarity of someone who has spent plenty of time in the war-torn country." *Id.* While Vanadestine explains that he sometimes refrained from arrests during the height of the Covid pandemic given the dangers and backlogs of jailing, which seems laudatory, his depiction "holding an M4 rifle while working convoy patrols and convoy security missions in Bagdad" might not be as comforting to some Maine motorists. *Id.* In January of 2021, Trooper Vanadestine engaged in a high-speed pursuit in which he suffered minor injuries upon losing control of his vehicle when he attempted to ram the other car; 68-year-old Geoffrey and Elizabeth Gattis were both killed when "a second wreck occurred as a result of traffic caused by the extensive police chase." *Police Chase Ends Up With Couple Crushed*, TRUCKERS REP. (Jan. 14, 2021), https://www.thetruckersreport.com/truckingindustryforum/threads/police-chase-ends-up-with-couple-crushed.2055087/ [https://perma.cc/USC4-VKLL]; *see also* Melanie Creamer, *Falmouth Couple Remembered by Family and Friends for Their Optimism, Kindness and Work Ethic*, PORTLAND PRESS HERALD (Jan. 13, 2021), https://www.pressherald.com/2021/01/13/falmouth-couple-remembered-by-family-and-friends-for-their-optimism-kindness-and-work-ethic/ [https://perma.cc/GT6V-7PTH]. Trooper Vanadestine retired in 2021. *See* Thistle, *supra*; *Lee R Vanadestine*, OPEN PAYROLLS, https://openpayrolls.com/employee/lee-r-vanadestine-9553 (on file with the *Ohio State Law Journal*).

[7] *Howard*, 66 F.4th at 37.

[8] *See id.* at 37–38.

[9] *Id.* at 38.

[10] Trooper Vanadestine would refer to Howard as "Black." *See id.* at 46; *see also* BL-35, United States v. Howard, No. 22-1111 (1st Cir. Dec. 27, 2022) (docket entry indicating Ms. Howard as federal BOP inmate number 13661-036); BOP Inmate Locator, https://www.bop.gov/inmateloc/ (in the "Number" field, search for "13661-036") (indicating Yolanda R Howard, a 27-year-old black female, as inmate number 13661-036) (search run May 4, 2023).

[11] *Howard*, 66 F.4th at 37.

[12] *Id.* at 38. In Officer Vanadestine's words, Howard "would not go near him." *Id.*

Trooper Vanadestine."[13] Now two strong, the white officers[14] "questioned and checked the identifications of the vehicle's occupants," including Howard—despite her obviously wishing to have no contact with them.[15] Vanadestine "suspected the vehicle or its occupants carried drugs," and the officers' continued investigation located an outstanding arrest warrant for the vehicle's other passenger, but found nothing for Howard,[16] "the Black girl (who) won't come next to me [Vanadestine]."[17]

Based on the outstanding warrant, that passenger was arrested and placed in the front seat of Trooper Keim's cruiser.[18] The vehicle's driver was placed in the front seat of Trooper Vanadestine's.[19] And Howard? "Trooper Keim beckoned over to Howard, who was on the phone, to sit in the cruiser" of a *third* white officer, Trooper George Loder, who had now arrived on scene.[20] After all, Howard "appeared eager to get out of the cold."[21] Now, such a desire seems strange given that she had determinedly "walked through the snow in the opposite direction" when Vanadestine first arrived,[22] and had attempted to maintain a healthy distance ever since.[23] Yet, suddenly, she was apparently eager to join her former companions in their police custody. What is more, she had no objection to the removal of her bag—Trooper Keim "asked" and she "handed [it] over."[24] Nor did she mind, apparently, a pat-down of her person.[25] Indeed, she didn't mind exiting the vehicle—back into the cold—so yet *another* officer (a white female) "could conduct a full pat down."[26]

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[13] *Id.*

[14] Trooper Keim also appears by photographs to be white. *See* Matt Byrne, *In First Month, Maine's Hands-Free Law Drives Tickets*, PORTLAND PRESS HERALD (Oct. 21, 2019), https://www.centralmaine.com/2019/10/21/in-first-month-maines-hands-free-law-drives-tickets/ [https://perma.cc/7TYF-GWAE].

[15] *Howard*, 66 F.4th at 38.

[16] *Id.* at 38–39.

[17] *Id.* at 46.

[18] *Id.* at 38.

[19] *Id.* at 38–39.

[20] *Id.* at 39. Trooper Loder too appears by photographs to be white. *See* Matt Byrne, *Jury Awards $300,000 to Retired Trooper Who Sued State Police for Retaliation*, PORTLAND PRESS HERALD (Dec. 2, 2022), https://www.pressherald.com/2022/12/02/jury-deliberations-begin-in-retaliation-trial-brought-by-retired-state-trooper/ [https://perma.cc/US2V-AM7X] (intriguingly, he seems to have courageously outed Maine-federal violations of privacy).

[21] *Howard*, 66 F.4th at 39. The outside temperature was eight degrees Fahrenheit. *Id.* at 38.

[22] *Id.* at 37.

[23] *See id.* at 38.

[24] *Id.* at 39.

[25] *See id.*

[26] *Id.* This officer—Trooper Jodell Wilkinson—also appears by photograph to be white. *See* Maine State Police, FACEBOOK, https://www.facebook.com/MaineSP/posts/jodell-wilkinson-was-recently-promoted-to-sergeant-in-troop-g-which-patrols-the-/4196939230321576/ [https://perma.cc/YL34-LF5L]. A "hard-charger" and "fierce competitor" who "lead[s] . . . in proactive police," Trooper Wilkinson is highly decorated for drug

And then it was time for Howard's bag. While keeping the allegedly-wishing-to-be-inside-in-the-warm-car Howard in the cold,[27] Sergeant Pappas—that's right, yet another now-on-scene white officer, which makes for at least five[28]—asked Howard "if the items in the back seat . . . belonged to her and if troopers could go through the items quickly."[29] Not waiting for any reply, he added, "Mind if we search those items?"[30] Howard responded, "Huh?"[31] So, he asked again: "Do you mind? Can we search the items?"[32] Howard insists that she replied, "I guess."[33] The officers insist that she replied, "yes."[34] Howard informed them "that she had someone who was willing to come pick her up."[35] Trooper Loder responded, "We'll talk about that if we get to that point."[36]

And so "consent" rolls in America, day-in, day-out.[37] The instances are surely legion, and the cases are plenty. We might discuss *Westfall v. Luna*, arising out of a middle-of-the-night knock and talk that began in a slammed door but—try, try again—that ended in a "consensual" home search after further

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interdiction. *See id.* In her own words, "I enjoy being able to influence people's lives in a positive way." *Id.* As for the additional, fuller pat down, another on-scene officer would later explain—perhaps in court: "a full pat down is required before a person enters a cruiser, even if they are not suspected of committing a crime, to ensure officer safety." *Howard*, 66 F.4th at 39.

[27] *See Howard*, 66 F.4th at 40 (noting that "[b]efore the search began . . . Howard [] . . . was standing unrestrained near Trooper Loder's cruiser").

[28] This officer, Trooper Thomas Pappas, also appears by photograph to be white. *See Trooper of the Year*, ME. STATE TROOPERS FOUND., https://www.mainestatetroopersfoundation.org/trooper-of-the-year/ [https://perma.cc/C9VZ-C3FX]. He has been found to violate constitutional rights, play fast-and-loose with truth in traffic stops, and perhaps engage in racial profiling. *See* Callie Ferguson, *Judges Call Out Illegal Maine State Police Tactics That Get Cases Tossed*, ME. PUB. RADIO (Apr. 25, 2022), https://www.mainepublic.org/courts-and-crime/2022-04-25/judges-call-out-illegal-maine-state-police-tactics-that-get-cases-tossed [https://perma.cc/LX7A-KGRE]; *see also Howard*, 66 F.4th at 40 (noting that "five troopers testified" at the suppression hearing); *id.* at 47 (noting "the presence of five troopers" in custody analysis).

[29] *Howard*, 66 F.4th at 39.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 39 n.2.

[34] *Id.* at 39.

[35] *Howard*, 66 F.4th at 40.

[36] *Id.*

[37] The First Circuit found Howard voluntarily consented to the search of her bag (*see id.* at 37, 48) despite her relative youth (early twenties), learning disability, limited education, and lack of experience with the criminal justice system (*see id.* at 48). Her appeal also concerned Fourth Amendment seizure. While the State had previously conceded a seizure, before the First Circuit it for the first time argued that no seizure took place. *See id.* at 41. The First Circuit did not decide that matter—other than holding that neither the initial encounter nor the initial questioning was a traffic stop (*see id.* at 41–43)—because, it held, there was by then (whenever precisely a seizure might have occurred) reasonable suspicion. *See id.* at 37, 44.

sorties of "forceful knock[ing]" and two phone calls from police dispatch (the first resulting in a hang up): "Corporal Luna . . . testified that, because of the size of the Westfalls' house, 'we do knock a little louder than most.'"[38] Or, we might discuss *United States v. Gregoire*, arising out of an automobile stop for—the horror—failing to signal when merging onto the interstate from the entrance ramp,[39] which ended in a "consensual" *drilling into* his car despite his timely assertions that "I planning to be home" and "Isn't that illegal? You're not supposed to search the car."[40]

But rather than belabor with examples, let us settle for one more and then set the stage for our proposal, which is—roughly stated—to end Fourth Amendment consent other than as an emergency doctrine.[41] That example is *Ruiz v. Florida*, "a paradigm for a type of case that is common in [Florida] courts, where 'consent' to a search is found under objectively questionable circumstances."[42] After magnificently contrasting the State and defense claims of fact,[43] that court said this:

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[38] Westfall v. Luna, No. 21-10159, 2022 WL 3334535, at *2 (5th Cir. Aug. 12, 2022) (per curiam). After homeowner Westfall "consented," she was forcefully thrown to the ground and held there for several minutes. *See id.*

[39] *See* United States v. Gregoire, 425 F.3d 872, 874 (10th Cir. 2005). It would take the Tenth Circuit three pages of analysis to determine whether Utah law required such a signal: "Though the issue is close, we believe that the district court's factual findings that a successful merge with this on-ramp requires a move to the left to enter the travel lane is dispositive." *Id.* at 877. And how did the trial court make that factual finding? Through a site visit to the particular entrance ramp. *See id.* at 878. The Seventh Circuit had previously held to the contrary, believing the Utah statute ambiguous in such a circumstance. *See id.* at 877–78 (that court noted that the Utah Driver Handbook did not require signaling in this instance). The black Gregoire did not find it reassuring that the officer who pulled him over—"part of a Criminal Interdiction Team focusing on drug enforcement, stolen vehicles, and driving under the influence"—was so up on his signal-when-merging law. *Id.* at 878. That officer, Steve Salas, appears by photograph to be white. *See Highway Patrol*, UTAH DEP'T OF PUB. SAFETY, https://highwaypatrol.utah.gov/ [https://perma.cc/ZBA2-SDAD].

[40] *Gregorie*, 425 F.3d at 881. "We think the district court could arrive at a finding that consent was not withdrawn or limited by these somewhat ambiguous statements." *Id.* Hmm.

[41] As developed herein, our target in this paper is to reform the doctrine of Fourth Amendment search by eliminating its consent exception, which exception likewise applies to seizures of things. As for the seizure of persons, there is also a doctrine of Fourth Amendment 'non-seizure events' that sometimes confusingly goes under the consent name, but that is a different animal: so long as a reasonable person would feel free to leave or to otherwise terminate a police encounter, there is no Fourth Amendment seizure of the person. *See* United States v. Drayton, 536 U.S. 194, 201 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."). That doctrine of 'non seizure' is thus not even nominally one of particularized consent, and we do not address it herein.

[42] Ruiz v. Florida, 50 So. 3d 1229, 1230 (Fla. Dist. Ct. App. 2011).

[43] *See id.* at 1230–31. Here are the court's words:

> At the hearing on the motion, detectives testified they received an anonymous tip that a person with dreadlocks was selling narcotics from a certain apartment. The

> Over time, the concept of "consent" to a search has become divorced from its common meaning. In the Fourth Amendment context, "consent" has come to mean that set of circumstances that the law will tolerate as an exception to the probable cause or warrant requirement. What passes for "consent" today would not have survived a motion to suppress 25 years ago. Now, even aggressive conduct by the police will not necessarily vitiate "consent" when viewed as a part of the "totality of the circumstances." . . .
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> The "totality of the circumstances" approach has expanded the concept of "consent" in a way that has had a significant effect on the administration of criminal justice. It allows a trial court to rely on other factors that swallow aggressive police conduct and contract the limits of Fourth Amendment protection.
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> In many cases, the police rely upon a defendant's voluntary consent to justify a search or a stop. One possibility is that citizens, especially those involved in crimes, have a desire to cooperate with the police to avoid making waves. Another possibility, far more sinister, is that the police have come to recognize

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same afternoon that the police received the tip, two detectives drove to the location and parked across the street. After a few minutes, Ruiz left the apartment. He had dreadlocks.

The detectives drove their unmarked car into the parking lot of the complex. They got out of their car and "nonchalantly" or "casually" approached Ruiz. One detective "calmly" asked Ruiz his name and he "calmly" replied that it was "Freddie" and that "he had his identification in his apartment, if (the officer) would like to see it." One detective said that he wanted to see it and Ruiz led the two law enforcement agents up to his apartment. Ruiz went inside and "motioned" or "nodded" at the detectives to enter, so they went inside. Ruiz walked through the living room into the bedroom; one detective followed and waited at the entrance to the bedroom. From this vantage point, the detective saw a scale and silver spoon with cocaine residue in the scoop part of the spoon. The detective asked Ruiz if the substance was cocaine, and Ruiz admitted it was. The detectives then "detained" Ruiz and read him his *Miranda* rights. Ruiz was most cooperative—he told them that additional cocaine was located in a Barbasol shaving cream can and "weed" was inside his dresser drawer.

Ruiz also testified at the suppression hearing. His version of events differed substantially from that of the detectives. Ruiz was on his way back from the store when three officers stopped their vehicle in front of him, jumped out with their guns drawn, and told him not to move. Ruiz did not think he was free to leave. One officer frisked him and asked for his identification. Ruiz said he did not have any identification and the police said they would arrest him if he could not produce some identification. Ruiz said that his identification was in his apartment. The officers escorted him to his apartment. After he opened the door, the officers went inside and searched through everything. Ruiz did not give the officers permission to enter his residence.

Id.

> that "consent" is the catch-all exception to the Fourth Amendment, so they tailor their testimony accordingly.[44]

Indeed. And in the decade since *Ruiz*, court after court has—like the *Ruiz* court itself—held for the State, finding "consent" despite "the story told by the police [being] unbelievable."[45] If that is to stop, the law must change.[46]

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[44] *Id.* at 1231–32. The *Ruiz* court goes on to compare modern consent with post-*Mapp* "dropsies": "'Dropsy' in 1970 has evolved into 'consent' in 2010. The more things change the more they stay the same." *Id.* at 1233. *Remarkable*.

[45] *Id.* at 1233.

[46] Here we acknowledge the many persuasive arguments for change that have been made to date, including, in author alphabetical order, Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 509 (2015) ("Because the Court has relied on the myth of voluntary consent as a proxy for the warrant and probable cause requirements that normally define 'reasonableness' in the Fourth Amendment context, the Court has bypassed the usual substitute proxy for Fourth Amendment reasonableness: an express weighing of the governmental and citizen interests at stake. This Article engages in the reasonableness inquiry that the Supreme Court has avoided."); John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1129 (2007) ("I believe that judges are holding that these searches are consensual strictly as a matter of what might be called knee-jerk, 'result stare decisis.' That is to say that judges are following the lead of the Supreme Court in the application of prevailing consent doctrine, rather than following the consent-search doctrine itself and determining whether such consents have truly been tendered 'freely and voluntarily,' as the law requires." (footnote omitted)); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 82 (1998) ("The power imbalance inherent in police encounters on the open road argues for eliminating consent from the lexicon of traffic stop interrogations. Consent during a traffic stop is plainly implausible when asserted by confident, imposing, law enforcement officials. Voluntariness in consent is not credible where it serves no private motive."); Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 751 (2013) ("This Article is the first to provide an in-depth examination of the use of consent forms . . . . [A] data set consisting of every published appellate case involving a consent form decided between 2005 and 2009 . . . reveals that fewer than five percent of defendants prevailed—less than half the rate at which defendants prevail in Fourth Amendment cases overall."); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 79–80 (2008) ("Instead of banning consent searches or calling for *Miranda*-like warnings, both of which would be beneficial, my suggestion is a more modest proposal . . . . I propose that whenever a person objects or refuses to provide consent . . . that refusal should bar further attempts by the police to seek consent. Furthermore, a refusal to sign a written consent form should also operate retroactively to invalidate an earlier oral consent."); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 ("What is remarkable . . . is the ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other . . . . [T]he Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence."); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37, 37–38 (2004) ("[T]he Court constructs the notion of consent . . . from a male perspective, which maintains social

Our argument for that change proceeds as follows. In Part II, we briefly retrace how we have come to this disappointing place. It is Supreme Court jurisprudence that has—despite a high point or two—largely ignored on-the-ground reality. Thus, in Part III, we contrast those ivory-tower rules with what daily happens throughout our states and cities. Not only do empirics support that we generally lack the will to resist police request, but the Fourth Amendment's blithe "consent" creates odd doctrinal conflict in which more is expected of the citizen on the street than the state lawmaker in the capitol, and it depends upon a reading of our Bill of Rights that seems entirely contrary to their founding purpose. All of which leads to Part IV, in which we articulate and defend a better, much-more-limited consent rule.[47] Along with traditional principles of

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structures of domination and power disparities and perpetuates the subordination of women, minorities, and other disempowered members of society."); Josephine Ross, *Abolishing Police Consent Searches Through Legislation: Lessons from Scotland*, 72 AM. U. L. REV. 2017, 2026 (2023) [hereinafter Ross, *Abolishing Police Consent Searches*] ("It is time to abolish the consent loophole that sanctions otherwise blatantly unconstitutional searches, which legal scholars remain virtually unanimous in condemning."); JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS 2 (2021) ("[C]onsent devices [are] constructed by the Supreme Court to blame the victims of police encounters when officers violate their rights."); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 775–76 (2005) ("This [better] paradigm [for evaluating consent searches] has three characteristics: (1) it is wholly objective and focuses solely on the behavior of the law enforcement official; (2) it differentiates between different levels of compulsion that a law enforcement official might bring to bear on a subject, treating compulsion as a matter of degree rather than as a binary condition; and (3) it differentiates between different kinds of compulsion—or, more accurately, influence—that a law enforcement official might use in acquiring consent."); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 213 (2001) ("[T]he law of consent is unclear and misguided . . . . [T]he subjective views of the suspect are almost invariably ignored by the courts . . . . [C]aselaw fails to consider the reality that most people will feel compelled to allow the police to search, no matter how politely the request is phrased. Such feelings of compulsion are particularly experienced by members of certain racial and cultural groups who fear confrontation with the police. Third, and finally, the current doctrine of consent inherently fosters distrust of police officers as well as the judicial system."); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 541–42 (2003) ("Consent is an acid that has eaten away the Fourth Amendment . . . ; [t]he consent search doctrine is the handmaiden of racial profiling."). The scholarly criticisms of existing Fourth Amendment consent are legion. While we propose something new, our work builds upon this foundation, hoping to 'stand on the shoulders of giants.'

[47] That rule will of course be explained and defended there, but—so as not to hide the ball—it is this:

A. Officers may act upon 'emergency consent' when:
(1) a person initiates contact with law enforcement of her own volition, and
(2) she expresses belief in an emergency situation.
B. Officers may also act upon 'less-volitional emergency consent' when:
(1) a person expresses belief in an emergency situation, and

Fourth Amendment emergency aid,[48] such emergency consent will enable effective policing while much more broadly respecting human diversity and dignity. Finally, in Part V, we explain why no lesser measure of reform will secure our persons and properties against unreasonable search.

II. THE COURT'S INADEQUATE JURISPRUDENCE

On the evening of July 31, 1966, in Burlington, North Carolina, a young, white woman named Loretta Briggs Nelson—who was separated from her husband, stationed in the Army in Oklahoma—was spending time with her boyfriend, Monty Jones, parked on a rural road in her vehicle.[49] That is when, the two would later testify, a black man approached and ordered them out of the car at rifle-point.[50] He then raped her, demanded that she drive them to another location, and there tied the two of them to trees, blindfolded and gagged them, raped her again, and shot each of them in the chest.[51] Although he then drove away in her car, Nelson later "identified [her assailant] from photographs while she was at . . . County Hospital and later in a line up at . . . jail."[52] She was able to make that identification, Nelson explained, because there was a full moon, and because she saw his face in the dome light of her vehicle when the door opened.[53] The man she selected, Wayne Darnell Bumper, was 18 years old at the time of the crime.[54] He did not confess and pleaded not guilty;[55] the State sought the death penalty.[56] Tried before an all-white jury ("[f]ive Negroes were considered as prospective jurors," but were all dismissed),[57] and using evidence

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(2) she provides a knowing and voluntary waiver of her Fourth Amendment rights after being informed of her right to refuse and her right to legal representation in making that decision.

See infra Part IV.

[48] *See infra* Part IV. *See generally* Brigham City v. Stuart, 547 U.S. 398 (2006).

[49] *Victims in Case Give Testimony*, BURLINGTON DAILY TIMES-NEWS, Oct. 25, 1966, at B1. Nelson was 21 years old while Jones was 18. *See High Court Upholds Alamance Conviction*, DURHAM MORNING HERALD, June 22, 1967, at A9.

[50] *Victims in Case Give Testimony*, *supra* note 49.

[51] *Id.* Despite the shooting, Nelson was able to untie herself and Jones, and the two walked to a nearby farmhouse for help. *Id.* When Jones testified (he had been sequestered from the courtroom during Nelson's testimony), he added a robbery to the crimes. *See id.*

[52] *Id.*

[53] *Id.*

[54] *High Court Upholds Alamance Conviction*, *supra* note 49, at A9.

[55] *Id.* ("Evidence was gathered without attempting to get a confession from Bumper.").

[56] *Death Penalty Asked in Criminal Assault*, DURHAM MORNING HERALD, Oct. 26, 1966, at B8.

[57] *Victims in Case Give Testimony*, *supra* note 49, at B1.

that made race an explicit issue,[58] Bumper was convicted and sentenced to life in prison.[59] The North Carolina Supreme Court affirmed.[60]

While that was the evidence, it was hardly the whole story. When Mrs. Nelson identified that photograph of Bumper, his name was apparently written on its back.[61] When she and Jones independently viewed a pretrial lineup that included Bumper, each of them identified the same man.[62] Only that man was *not* Bumper.[63] Thereafter, a local newspaper ran an article identifying a "Wayne Bumper" as the "prime suspect."[64] And then, when the two *simultaneously* viewed a second lineup in which "every man in the lineup was made to speak *his name* for 'voice identification'"?[65] That's right; they identified Bumper as the perpetrator.[66] (Truth is of course impossible to discern these decades later, but one might wish to recall that Nelson's estranged husband was serving in the Army, where he surely would have had access to a rifle and/or to friends having the same, and it might make much more sense for some such to be instructed to 'shoot them in the heart' and then have to inquire onsite just where that organ is located.)[67]

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[58] According to Justice Black's later dissent, "Bumper ordered the girl to undress, stating that 'I want a white girl's p——.'" Bumper v. North Carolina, 391 U.S. 543, 558 (1968) (Black, J., dissenting). While Black references what was presumably trial testimony to emphasize just how horrible was the crime, *see id.*, it seems equally possible such a line would be fabricated to railroad a young, black defendant. Indeed, reading Black's strident dissent that belittles the problems of capital defense, *see id.* at 554, and what would become well-known perils of eyewitness identification, *see id.* at 559 n.9, we cannot help but cringe—he was, of course, once a member in the Klan. *See* Todd C. Peppers, *Justice Hugo L. Black, His Chambers Staff, and the Ku Klux Klan Controversy of 1937*, SUP. CT. HIST. SOC'Y (Apr. 27, 2021), https://supremecourthistory.org/scotus-scoops/justice-hugo-black-ku-klux-klan-controversy-1937/ [https://perma.cc/A89S-RUAY].

[59] *Bumper*, 391 U.S. at 544.

[60] *High Court Upholds Alamance Conviction*, *supra* note 49, at A9.

[61] *See Bumper*, 391 U.S. at 550 n.16. Bumper was at the time serving probation for an unrelated offense. *See Bumper Denies Charges of Robbery, Shooting*, BURLINGTON DAILY TIMES-NEWS, Jan. 30, 1969 at B1.

[62] *See Bumper*, 391 U.S. at 550 n.16.

[63] *Id.*

[64] *Id.*

[65] *Id.* (emphasis in original).

[66] *See id.* One worse, if possible, is Bumper's later trial testimony: this second lineup took place in *two stages*. At the first, Nelson made no identification. *See Bumper Denies Charges of Robbery, Shooting*, *supra* note 61, at B1. At the second, convened five minutes later, each lineup participant was required to say his name. *Id.* The State did not dispute this two-stage process, but alleged it was necessary because Nelson at first refused to look at the lineup participants. *Id.*

[67] *See Bumper*, 391 U.S. at 558–59 (Black, J., dissenting) ("After this, Bumper went over to the young man and felt his chest, asking him where his heart was and if he was scared. He then cooly proceeded to shoot the young man where he thought his heart was. The girl, tied to the tree and blindfolded, heard the shot, and a moment later herself was shot through the left breast close to her heart.").

Bumper's conviction reached the United States Supreme Court on multiple grounds, including the death-qualification that led to removing three of the black prospective jurors.[68] But what caught the Court's attention was the testimony of Bumper's 66-year-old widowed grandmother, Hattie Leath, in whose home that rifle was allegedly found.[69] When four white police officers arrived at the home, located "at the end of an isolated mile-long dirt road," "[o]ne of them announced, 'I have a search warrant to search your house,' [to which] Mrs. Leath responded, 'Go ahead.'"[70] Although such a warrant was never produced, Leath enthusiastically consented to the police entry:

> I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all.[71]

Such enthusiastic—and comprehensive—consent is remarkable. Only . . . those weren't the words of Leath. Instead, explained the United States Supreme Court,

> [t]he transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; *i.e.*, the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the case of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions.[72]

Now that is truly remarkable—and distressing—as was the following set of assertions by the North Carolina Supreme Court:

> [W]e must not become too zealous in protecting the accused that we overlook and ignore those who have been robbed, raped and murdered . . . . Is it unreasonable and unwarranted that the officers, charged with the duty of apprehending the heartless and inhuman perpetrator, should use every energy in locating the weapon used, and apprehending its user? An overwhelming majority of the public would immediately answer that *any* means would be justified. But the officers, recognizing the restraints under which they must work (some might call them unreasonable and unrealistic), make a

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[68] *Victims in Case Give Testimony*, *supra* note 49; *N.C. Jury Exemption Defended*, CHARLOTTE OBSERVER, Apr. 26, 1968, at A10.

[69] *Death Penalty Asked in Criminal Assault*, *supra* note 56, at B8; *Bumper*, 391 U.S. at 544–46.

[70] *Bumper*, 391 U.S. at 546–47.

[71] *Id.* at 547 n.8.

[72] *Id.*

> search . . . . The fact that it did reveal the presence of the guilty weapon . . . justifies the search. Recurring to the fundamental that the object is not to protect criminals and to provide them with the right to perpetrate such a horrible crime without fear of apprehension, it is clear that his rights have not been violated. Rather, his wrongs have been detected.[73]

Fortunately, the Warren Court—by this time including Thurgood Marshall—was having none of it.[74] Critically for our purposes, the Court held that mere "acquiescence to a claim of lawful authority"—in this case the officer's claim to having a search warrant—does not satisfy the federal Constitution.[75] "The situation is instinct with coercion," and "[w]here there is coercion there cannot be consent."[76] So, while "consent . . . freely and voluntary given" would suffice, Mrs. Leath's (at best) acquiescence did not.[77] (Although Bumper denied all the allegations at his retrial—claiming he had never even been to the location of the crime[78]—he was again convicted, this time of armed robbery and assault,[79] and was sentenced to 47–50 years.)[80]

Bumper would prove to be the rights-protective 'high point' in the Court's consent jurisprudence. Five years later, the Court was asked to provide guidance

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[73] North Carolina v. Bumpers, 155 S.E.2d 173, 179–80 (N.C. 1967). The United States Supreme Court was appropriately unimpressed. *See Bumper*, 391 U.S. at 548 n.10.We wondered whether the North Carolina Supreme Court could not even be bothered with the defendant's name, as it referred to him in both citation and opinion as "Bumpers," adding an 's' to the US Supreme Court's version. *See, e.g.*, *Bumpers*, 155 S.E.2d at 174 ("The defendant Wayne Darnell Bumpers was charged in a bill of indictment . . . ."). It is possible, however, that here it was the US high court that erred. *See* Byron Tucker, *Sex Offender Bumpers Charged*, ALAMANCE CNTY. SHERIFF'S OFF. (Aug. 6, 2023), https://www.alamance-nc.com/sheriff/2023/08/06/sex-offender-bumpers-charged/ [https://perma.cc/S3EQ-AM43] ("On July 28th [2023], Alamance County Sheriff's Office Special Victim's Unit (SVU) was notified that registered sex offender, Wayne Bumpers failed to bring in his certified verification letter within three days in person at ACSO, as pursuant to the North Carolina Sex Offender Registry."). That arrest provides a full name of "Wayne Darnell Bumpers" and a date of birth of April 19, 1948, which would make the individual aged 18 at the time of the *Bumper* crime. *See id.* And, according to the North Carolina Inmate Search, "Wayne Darnell Bumpers" is an *alias* for "Wayne Darnell Bumper." *See* N.C. INMATE SEARCH, https://www.ncinmatesearch.org/NC_DPS.html (on file with authors) (follow "Offender Search" hyperlink; then input "Bumper" in last name field and "Wayne" in first name field; then click "Search") (search run Sept. 29, 2023). We have not further looked into the issue, but it is worth noting that in a system wishing to respect human dignity, names matter.

[74] *See Bumper*, 391 U.S. at 548 n.10 ("Any idea that a search can be justified by what it turns up was long ago rejected in our constitutional jurisprudence.").

[75] *Id.* at 548–49.

[76] *Id.* at 550.

[77] *Id.* at 548–50.

[78] *Bumper Denies Charges of Robbery, Shooting*, *supra* note 61.

[79] *Jury in Alamance Convicts Bumper*, GREENSBORO DAILY NEWS, Feb. 1, 1969, at B4.

[80] *Superior Court Has Big Docket*, BURLINGTON DAILY TIMES-NEWS, Mar. 1, 1969, at B1.

in the context of a more mundane crime in *Schneckloth v. Bustamonte*.[81] Early in the morning of January 31, 1967, police officer James Rand of Sunnyvale, California was on routine patrol when he observed a vehicle having only one functioning headlight and no license plate light.[82] Pulling over the vehicle for those traffic infractions, he observed six persons inside the vehicle, including—in the front seat—Joe Alcala (who claimed that his brother owned the car), driver Joe Gonzales (who would later testify for the State), and Robert Bustamonte.[83] After removing all six persons from the vehicle, issuing a traffic citation, and being joined by two other officers (each in his own vehicle), Rand asked Alcala for permission to search, to which Alcala allegedly replied, "Sure, go ahead."[84] "Wadded up under the left rear seat," the officers found three checks that had been stolen during the burglary of a carwash earlier that month.[85]

A panel of the Ninth Circuit thought Bustamonte might have a good argument that Alcala's consent did not satisfy the Fourth Amendment, because Alcala had not been told that he had the right to refuse, and, "[u]nder many circumstances[,] a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."[86] A six-member majority of the Supreme Court, however, held otherwise, holding not only that voluntary consent satisfies the demands of the Fourth Amendment, but that whether such consent was knowing is merely a factor in that totality voluntariness inquiry.[87] (Some states have here diverged to go their own way.)[88] Further, for Justice Stewart and the majority, it would be too cumbersome to require officers to give any notice of the right to refuse consent: just "thoroughly impractical."[89] While one can certainly debate whether voluntary—as opposed to knowing and voluntary—waivers are appropriate for anti-accuracy Fourth Amendment rights, this last bit has always struck us as absurd, especially post-*Miranda*.[90] Whether or not such notice can be meaningfully effective, it would hardly be difficult for an officer to provide. Three justices each wrote a dissent—

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[81] *See generally* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[82] People v. Bustamonte, 76 Cal. Rptr. 17, 19 (Cal. Ct. App. 1969).

[83] *Id.*

[84] *Id.*; *see also* Bustamonte v. Schneckloth, 448 F.2d 699, 699–700 (9th Cir. 1971) (relating the same facts).

[85] *Bustamonte*, 76 Cal. Rptr. at 19. Along with a number of blank checks, the burglars also stole a check protector which imprints amounts on such checks. *Id.* at 18–19. A later warrant-based search located more checks and that machine. *Id.* at 19.

[86] *Bustamonte*, 448 F.2d at 701.

[87] *Schneckloth*, 412 U.S. at 227–29.

[88] *See, e.g.*, State v. Ingram, 914 N.W.2d 794, 820 (Iowa 2018) (requiring consent in the context of an automobile inventory be knowing and voluntary under the Iowa Constitution); State v. Brown, 156 S.W.3d 722, 731 (Ark. 2004) (requiring consent in the context of a home entry be informed under the Arkansas Constitution).

[89] *Schneckloth*, 412 U.S. at 231.

[90] *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring the four famous warnings before custodial interrogation).

William O. Douglas,[91] William J. Brennan Jr.,[92] and Thurgood Marshall[93]—with Justice Marshall's being the most involved, and perhaps also the most strident.[94]

While *Schneckloth* provides the modern Court's core Fourth Amendment consent rule, that Court made no attempt to explain *why* consent searches satisfy the Fourth Amendment.[95] The most plausible account is that police reliance thereon is *reasonable*, satisfying the textual Fourth Amendment criterion.[96]

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[91] *Schneckloth*, 412 U.S. at 275 (Douglas, J., dissenting).

[92] *Id.* at 276 (Brennan, J., dissenting).

[93] *Id.* at 277 (Marshall, J., dissenting).

[94] Marshall's dissent includes this:

> I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.
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> . . . [T]he holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few. In the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights.

Id. at 288–90 (footnote omitted).

[95] *See id.* at 222 (majority opinion) (merely recognizing that the Court had so held and that Bustamonte did not challenge this).

[96] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Fernandez v. California, 571 U.S. 292, 298 (2014) ("It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search."); Florida v. Jimeno, 500 U.S. 248, 250–51 (1991) ("[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." (citing *Schneckloth*, 412 U.S. at 219)); *see also* Maclin, *supra* note 46, at 29 ("[A] third view adopts the position that whether a challenged consent search is valid depends on whether the police conduct is 'reasonable' under the Fourth Amendment."); Simmons, *supra* note 46, at 822 ("The new paradigm is simple: instead of holding that the Fourth Amendment does not apply because the individual has 'voluntarily' waived his rights, we are applying the Fourth Amendment to the search and concluding that as long as the police officer's behavior is appropriate, the search is reasonable and thus constitutional.").

After all, such events are physical intrusions into constitutionally protected areas in order to obtain information, and therefore are "searches."[97]

In cases since *Schneckloth*, the Court has tended to further expand the world of apparently-deemed-reasonable consent searches. The very next year, in *United States v. Matlock*, the Court held that any person having "common authority" over property can generally consent to its search.[98] (Justices Douglas, Brennan, and Marshall dissented).[99] In 1990, the Court went still further in *Illinois v. Rodriguez*, making sufficient that an officer *reasonably believes* such common authority exists, even when reality is to the contrary.[100] (Justices Brennan, Marshall, and Stevens dissented.)[101] Some persons might dislike so broad a notion of "consent" but nonetheless find it difficult to reject the *Rodriguez* Court's claim that its rule naturally follows from this: "in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."[102] Perhaps so. But, as we will demonstrate below, our elimination of non-emergency consent does not run contrary to that claim—instead, it solves the problem at its root.[103]

When it comes to the *scope* of consent, the Supreme Court has also been State-generous. Although a citizen can "delimit as he chooses the scope of the search to which he consents," confirmed the 1991 Court in *Florida v. Jimeno*,[104] the burden of delimiting is placed squarely on the citizen. In *Jimeno*, an officer overhearing one end of a telephone call believed that Jimeno might be en route to a drug transaction, and so the officer pretextually pulled over Jimeno (and Jimeno's wife) when Jimeno failed to make a complete stop before turning right

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[97] *See* United States v. Jones, 565 U.S. 400, 404–05, 411 (2012) (articulating this definition of Fourth Amendment "search").

[98] United States v. Matlock, 415 U.S. 164, 170–71 (1974). "Common authority . . . rests . . . 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." *Id.* at 171 n.7. Common authority does not generally exist, however, for a landlord as to a rented house, for a hotel clerk as to a customer's room, or for a co-tenant when there is a physically-present, objecting co-tenant making a threshold objection. *See id.* (citing authority for landlord and hotel clerk); *Fernandez*, 571 U.S. at 300–01 (explaining authority for physically-present objector).

[99] *See Matlock*, 415 U.S. at 178 (Douglas, J., dissenting); *id.* at 188 (Brennan & Marshall, JJ., dissenting).

[100] Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990).

[101] *See id.* at 189 (Marshall, Brennan & Stevens, JJ., dissenting).

[102] *Id.* at 185–86 (majority opinion).

[103] *See infra* Part IV.

[104] Florida v. Jimeno, 500 U.S. 248, 252 (1991).

at a red light.[105] (It might be telling that the Court termed the pay phone on which Jimeno made his call a "public" telephone—an inapt descriptor to be sure).[106] After informing the Jimenos of the traffic infraction, the officer shared his suspicions and asked permission to search the car, explaining that they "did not have to consent."[107] (Which is, of course, just the sort of notice the *Schneckloth* Court alleged to be "thoroughly impractical").[108] Jimeno did consent, but—not asked—he said nothing particular about the closed paper bag in which the officer then found cocaine, leading the Miami trial court, the Florida appellate court, and the Florida Supreme Court all to hold the search unconstitutional.[109] The officer of course could have requested consent to search the bag, but he didn't, and so Jimeno won. But not before the United States Supreme Court, which considered it "objectively reasonable" for the officer to *assume* that Jimeno's permission to search the car included the bag.[110] After all, "[t]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence . . . ."[111] Justices Marshall and Stevens dissented, thinking a "duped" community hardly "that [which] the Fourth Amendment contemplates."[112]

Once again, perhaps some might be concerned with so ambiguous and manipulable a notion of consent but be hard-pressed to better regulate the ambiguities of human spoken communication through "reasonableness." If so, our more root solution has appeal, and thus—now equipped with this jurisprudential backgrounding—we return to considering the several, serious problems of Fourth Amendment "consent."

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[105] *Id.* at 249–50; *Top Court to Review Restrictions on Police Searches*, MIAMI HERALD, Dec. 4, 1990, at A22.

[106] *Compare Jimeno*, 500 U.S. at 249 ("over a public telephone"), *with* Paul Anderson, *High Court Broadens Police Search Power in Ruling on Dade Case*, MIAMI HERALD, May 24, 1991, at B3 ("on a pay phone"); *see also* Katz v. United States, 389 U.S. 347, 352 (1967) ("No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." (footnotes omitted)).

[107] *Jimeno*, 500 U.S. at 249.

[108] Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973); *see also supra* notes 89–90 and accompanying text.

[109] *See Jimeno*, 500 U.S. at 249–50.

[110] *See id.* at 249.

[111] *Id.* at 252 (alteration in original) (quoting *Schneckloth*, 412 U.S. at 243).

[112] *Id.* at 256 (Marshall, J., dissenting). In the contrasting words of the Florida prosecutor, "I am excited about [the High Court decision] . . . . It gives law officers greater leeway in their ability to conduct searches." Anderson, *supra* note 106.

III. THE FICTIONS AND HARMS OF FOURTH AMENDMENT CONSENT

As we have shown above, the Supreme Court's jurisprudence has resulted in an (at best) decrepit doctrine of Fourth Amendment consent.[113] As a consequence, individuals are left in a miasma with respect to their fundamental rights of privacy and protections against government intrusion. Here we aim to crystallize the errors and harms that result, and we contend that there are three principal problems.

First, the doctrine of consent is based in assumptions about the ability of individuals to freely, rationally, and voluntarily consent, when the practical and empirical evidence prove this to be illusory. As a result, law enforcement is able to bypass intended limitations on its intrusion on individuals, in contravention of the text and purpose of the Fourth Amendment. Predictably, this exacerbates disparate impacts in operation of the criminal justice system—especially along lines of class and race. *Second*, this unmoored doctrine of blithe consent creates doctrinal discord. It is in tension with Supreme Court precedent on conditions that vitiate consent, both from the search warrant context and in the context of federalism and what constitutes improper coercion of the states. *Third*, and relatedly, the Fourth Amendment's current doctrine of consent furthers a hollow conception of rights, a conception in which the State may effectively trespass rights to the point of their elimination. Any such conception does harm to the foundations of our Constitution and government. Indeed, contemporary Fourth Amendment consent has an unfortunate analog in the neighboring Fifth Amendment *Miranda* rights,[114] where the ability to circumvent the substance of the rights has rendered them nearly a dead letter.

A. *The Real World: Illusory Consent*

A principal problem with the doctrine of consent is that it is predicated on a theoretical notion of sophisticated individuals benignly and cooperatively interacting with the police, when practically such consent is illusory. The prototypical case is that an individual is approached by a law enforcement officer (or, commonly enough, officer*s*, plural) wishing to take actions that constitute a Fourth Amendment event. It might be that law enforcement is seeking to conduct a search of an automobile or residence. Or law enforcement may be seeking to seize the individual's property. Prior to doing so, the officer or officers will often ask the individual for consent to whatever intrusion is desired. And if such consent is given—that is, if the individual expresses consent (or indeed fails to express unequivocal non-consent)—then the requirements that law enforcement would otherwise be required to satisfy (for example, that a warrant has been obtained or that there is probable cause) are

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[113] Some might urge it as unintelligible, fundamentally at war with meaningful conceptions of "consent" and human dignity.

[114] *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

obviated. Though these otherwise-applicable requirements may not be onerous or highly demanding,[115] law enforcement would nonetheless prefer to avoid them. And so there is substantial impetus for officers to obtain consent from individuals that are Fourth Amendment targets.[116] Among other perceived benefits, obtaining consent will largely insulate law enforcement's conduct from further scrutiny and legal challenge.[117] Consequently, law enforcement uses an assortment of techniques to press individuals to consent. Prominent devices include communicating that consent will be helpful to law enforcement, which will return in favorable treatment to the individual; communicating that the search or seizure will inevitably occur; and using deception.[118]

On the other side of these interactions are individuals who are the targets of law enforcement investigation, and they often have compelling reasons—or at least may perceive such reasons—to provide assent to search or seizure, even if they value their privacy from government intrusion. Individuals may believe it fruitless to resist, including because they may fail to understand that obtaining a warrant is not entirely within the officer's discretion.[119] Indeed, even if they understand that there are legal barriers, they may believe that, because officers have at their disposal vast resources and legal capabilities, officers will be able to do whatever they want, and thus the individual has no real choice.[120]

Moreover, individuals targeted by officers may believe that there are nontrivial *costs* to refusing consent. They may believe that refusing consent will raise the ire or suspicion of officers, who will then subject them to further action, including coercive or dangerous actions.[121] As Alafair Burke notes, these fears are understandable, given the Supreme Court's jurisprudence in cases like *Virginia v. Moore*,[122] *Atwater v. City of Lago Vista*,[123] and *Whren v. United States*,[124] which have allowed officers to constitutionally subject individuals to onerous arrest processes, even for minor offenses where arrest may not even be

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[115] *See* Kiel Brennan-Marquez & Stephen E. Henderson, *Search and Seizure Budgets*, 13 U.C. IRVINE L. REV. 389, 395–96 (2023) (arguing that overcriminalization and ubiquitous data have "begun to corrode suspicion requirements").

[116] *See, e.g.*, LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG, DETECTION OF CRIME 159 (Frank J. Remington ed., 1967).

[117] *Id.*

[118] *See, e.g.*, *id.*; Kimberly A. Crawford, *Consent Searches: Guidelines for Officers*, 65 FBI L. ENF'T BULL. 27, 27 (1996).

[119] Thomas G. Gardiner, Comment, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIMINOLOGY 163, 163 (1980) ("A citizen may believe that obtaining a warrant is a nondiscretionary procedure and therefore may 'consent' to the search.").

[120] Burke, *supra* note 46, at 526.

[121] *Id.*; Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1767 (2018).

[122] Virginia v. Moore, 553 U.S. 164, 173–76 (2008).

[123] Atwater v. City of Lago Vista, 532 U.S. 318, 323–24, 354–55 (2001).

[124] Whren v. United States, 517 U.S. 806, 813, 819 (1996).

legislatively authorized.[125] Add to this the Supreme Court's jurisprudence on qualified immunity that shields officers from repercussions for a host of shocking actions (shielding from liability all but the "plainly incompetent"),[126] and add to that far-too-commonplace incidents of excessive force by officers,[127] and we see plenty of reasons for individuals to fear further, prolonged contacts with now-frustrated law enforcement. And as Devin Carbado observes, this last consideration is especially the case for people of color.[128]

What is worse—further exacerbating the problem—is that some individuals may proffer consent merely because they do not process any such requests rationally. That is, when confronted with officer requests, individuals may be overcome by the power of authority.[129] On this, Janice Nadler's work is particularly illuminating. She observes that relationships of authority between individuals inform the meaning of such language—and specifically, requests from authority figures may have coercive power regardless of their wording: "[B]ecause a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power."[130] In a similar vein, individuals might consent as a *reaction*, a reflex to a feeling of fear or anxiety. In such cases, the performance of assent is just 'knee-jerk,' nearly independent of what is asked. In sum, for many, their assent to an officer's request is not one of weighing costs and benefits. Rather it is acquiescence, accompanied by a *performance* of the actions of assent.

Law enforcement is keenly aware of both the contours of Fourth Amendment consent doctrine and these vulnerabilities of those targeted. For example, in an article in the *FBI Law Enforcement Bulletin*, FBI agent Kimberly Crawford observes that

> [c]onsent can be an effective weapon in an investigator's arsenal. When asked for permission to search, individuals with plenty to hide often defy common sense and waive their constitutional right to privacy. Evidence confiscated during a consent search is admissible in a subsequent trial, as long as the officer

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[125] Burke, *supra* note 46, at 526 & n.114.

[126] Malley v. Briggs, 475 U.S. 335, 341 (1986); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802 (2018); Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'").

[127] *See, e.g.*, Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1467 (2018).

[128] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1013–14 (2002).

[129] *See, e.g.*, Simmons, *supra* note 46, at 774; Nadler, *supra* note 46, at 155.

[130] Nadler, *supra* note 46, at 189.

> conducting the search follows the fundamental requirements of the consent to search doctrine and is able to prove the same.[131]

The article goes on to explain that even when an individual has not been advised of the right to refuse, even when officers have had their weapons drawn and an individual handcuffed, and even when an individual was under the influence, courts have not found such individual's putative consent invalid.[132] It then goes on to describe the legal contours of the test and how officers can lay the factual groundwork for a finding of consent.[133] Similarly, in the classic law enforcement manual *Tactics for Criminal Patrol*, Charles Remsberg advises officers to seek consent from individuals because consent bypasses constitutional safeguards and will often be given despite being illogical.[134] And he explicates how law enforcement can achieve "consent" most effectively in a variety of different potential encounters: by use of deception and the imprimatur of authority.[135] The statistics likewise bear out that officers understand the boon that is Fourth Amendment consent law. On some estimates, over 90% of warrantless searches are through the consent exception,[136] and the vast majority of all searches are warrantless.[137] It is clear, then, that law enforcement has both taken notice that obtaining consent is legally favorable and has learned how to obtain "consent" satisfying the legal doctrine even when their targets are uninformed, fearful, or otherwise compromised.

What emerges, then, is a doctrine built on a fictional notion of consent that is used to bypass the Constitution's protections against intrusion by the State. And there is still more. Consider a preregistered study by Roseanna Sommers

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[131] Crawford, *supra* note 118, at 27. Indeed, consent searches are a frequently occurring topic in the FBI Law Enforcement Bulletin. *See generally* Jayme Walker Holcomb, *Consent Searches: Factors Courts Consider in Determining Voluntariness*, 71 FBI L. ENF'T BULL. 25 (2002); Jayme Walker Holcomb, *Obtaining Written Consent to Search*, 72 FBI L. ENF'T BULL. 26 (2003); Jayme Walker Holcomb, *Consent Searches: Scope*, 73 FBI L. ENF'T BULL. 22 (2004); Carl A. Benoit, *Questioning "Authority": Fourth Amendment Consent Searches*, 77 FBI L. ENF'T BULL. (2008).

[132] Crawford, *supra* note 118, at 28–30.

[133] *Id.*

[134] CHARLES REMSBERG, TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY & OFFICER SURVIVAL 211–12 (1995).

[135] *Id.* at 212.

[136] Simmons, *supra* note 46, at 773; Bandes, *supra* note 121, at 1760. As others have noted, we lack anything like certain data because police departments do not collect and publish the information. *See, e.g.*, Ross, *Abolishing Police Consent Searches*, *supra* note 46, at 2056. We thank David Owens for raising this point.

[137] Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1666 (2012); TIFFANY, MCINTRYE, JR. & ROTTENBERG, *supra* note 116, at 100; *see also* Hulit v. State, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) ("[B]y finding a general requirement of a warrant to which there are exceptions, the Supreme Court has created a jurisprudential mare's nest. There are so many exceptions to the warrant requirement that most searches and seizures are conducted without warrants and justified under one of the exceptions.").

and Vanessa Bohns, in which they "brought participants into the lab and presented them with a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[138] All participants had a smartphone, almost all reported that they used their phone for emails and personal contacts, and a high majority used their phone for banking.[139] These participants were split into forecasting and experiential groups, with forecasting participants asked how they thought they would behave if subjected to the invasive request, while experiential participants were subjected to the request.[140] In particular, the experiential subset was asked: "Before we begin the study, can you please unlock your phone and hand it to me? I'll just need to take your phone outside of the room for a moment to check for some things."[141] Of the 103 participants subjected to the request, 100 handed over their phone—an astoundingly high percentage.[142] Indeed, over half did so without any hesitation, and less than 10% asked a single question regarding any explanation or justification for the request.[143] By contrast, the forecasting participants vastly overpredicted the human ability to resist. When asked to forecast whether they would have complied with the request if it were posed—a hypothetical inquiry—only 27.6% said they would have.[144] And when asked if it would have been reasonable to do so, only 14.1% said it would have been.[145] Moreover, when asked about the freedom to say no, those who experienced the request felt markedly less free than the forecasters.[146] This all suggests that individuals subjected to officer requests for consent to search or seize will likely comply, with little pushback, in a way that is unpredictable even to themselves.

Of course, as Sommers and Bohns observe, the results of the study may not directly map on to police requests. For example, the study might overestimate an individual's proclivity to comply: participants may have been less worried about invasive searches by a lab than by officers, they may have trusted the ethical compliance measures given that the lab was at a prestigious university, and they may have wanted to ensure they would be compensated for their participation.[147] On the other hand, it might also *underestimate* compliance: law enforcement officers are more authoritative than the survey requesters, individuals may fear that any pushback is akin to admitting wrongdoing in the officer context, and lab participants likely knew there was little consequence to

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[138] Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1980 (2019).

[139] *Id.* at 1982–83.

[140] *Id.* at 1982.

[141] *Id.* at 1983–84.

[142] *Id.* at 1987.

[143] *Id.*

[144] Sommers & Bohns, *supra* note 138, at 1985.

[145] *Id.*

[146] *Id.* at 1986.

[147] *Id.* at 2006.

any refusal in the lab setting—surely far different from what a law enforcement officer can discretionally bring to bear.[148]

Nor are we left to mere supposition because other empirical evidence in the policing domain finds much the same: studies of traffic stops have found individuals assenting to officer search requests around 84–90% of the time.[149] And everyday anecdote demonstrates the same. Consider the prototypical case of an individual who has illegal drugs on their person or in their vehicle. They are stopped by an officer and asked if they consent to a search. And they assent. This makes little rational sense.[150] The chance that the now-permissioned officer will not find the contraband is negligible, so consenting to avoid detection is objectively unreasonable (and we doubt many people subjectively think it). And though refusing consent is no panacea for the individual—the officer may be able to proceed based on probable cause, by obtaining a warrant, or through some other warrant exception[151]—refusing the request seems like the only sensible option. Yet such cases are not rare—they're legion.

In short, there is excellent reason to reject the underlying assumption of the Fourth Amendment doctrine of consent: that individuals are making rational,

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[148] *Id.* at 2007.

[149] Bar-Gill & Friedman, *supra* note 137, at 1662 & n.219 (citing ALEXANDER WEISS & DENNIS P. ROSENBAUM, ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10 (2011)), https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/hsp/annual-evaluation-report-fy10.pdf [https://perma.cc/WAQ2-D9TY]; ALEXANDER WEISS & DENNIS P. ROSENBAUM, ILLINOIS TRAFFIC STOPS STATISTICS STUDY: 2009 ANNUAL REPORT 14 (2010), https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/hsp/annual-evaluation-report-fy9.pdf [https://perma.cc/DZ2F-XCHX]; Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter 170 (Oct. 1999) (Ph.D. dissertation, Rutgers University) (on file with the *Ohio State Law Journal*).

[150] *See, e.g.*, Brett Parker, *Consent Searches and the Need to Expand* Miranda *Rights*, STAN. POL. (Sept. 23, 2015), https://stanfordpolitics.org/2015/09/23/consent-searches-need-expand-miranda-rights/ [https://perma.cc/N3R5-HCZN] (discussing a similar example). It is not that the individual has no possible reason to respond with consent. Rather, the best putative reasons seem objectively mistaken and indicative that no genuine consent is being proffered. For one, the individual may believe that the request is a test in itself—and consenters are less likely to be searched. But this is simply wrong—and suggests that the individual isn't actually consenting, but rather performing so that the search or seizure does not take place. For another, it may be that for some individuals failing to consent is costly in altering their status quo. Alafair Burke notes, for example, that a person on a bus might comply with a search request when refusing would mean they must leave the bus—potentially in the middle of nowhere. Burke, *supra* note 46, at 527. But that's essentially textbook coercion.

[151] Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985) (identifying over twenty exceptions to the warrant requirement).

voluntary choices to comply with law enforcement directives. Far from it.[152] And this will have a predictably disproportionate effect on people of color and the poor. Interestingly, the issue is not that people of color or the poor have a higher rate of consenting to officer requests than others. Existing empirical evidence shows that race is not a differentiating factor in the rate of consent; instead, there is simply a high rate of consent across both the population and subpopulations.[153] As shown above, we *all* are very likely to consent to a requesting officer's authority. The problem of disparate impact thus arises on account of the rampant racial and socioeconomic profiling endemic to the criminal justice system.[154] Consent searches are no exception. Traffic studies in Illinois and New Jersey found that racial minorities were disproportionately subjected to consent searches, even though those searches were significantly less likely to result in contraband.[155] To this end, George C. Thomas III powerfully observes, "The consent search doctrine is the handmaiden of racial profiling."[156] Similar considerations show how the poor are targeted by officers, including in consent searches.[157] And Josephine Ross has explained how, "through a feminist lens . . . 'consent' excuses the otherwise unconstitutional invasion of people's bodies, interrupts their sense of safety, and blames the people searched for waiving their rights."[158] The consent doctrine enfeebles intended constitutional protection against encroachments by the State, and because that State disproportionately targets certain persons and/or has more success in such encroachments of certain persons, those persons are left even more vulnerable.

We think this makes for a damning case. Still, we of course acknowledge that people's intuitions and normative commitments differ. For those worried about government intrusion and individual privacy, this is a terrible state of

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[152] *Accord* Ross, *Abolishing Police Consent Searches*, *supra* note 46, at 2024 ("The Supreme Court's consent doctrine is premised on the lie that people accosted or detained by one or more officers maintain actual agency and choice.").

[153] Sommers & Bohns, *supra* note 138, at 2008–09 (collecting empirical references).

[154] *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); David A. Harris, *Racial Profiling: Past, Present, and Future?*, 34 CRIM. JUST. 10, 10 (2020).

[155] Bandes, *supra* note 121, at 1768 (collecting empirical references).

[156] Thomas, *supra* note 46, at 542.

[157] *See, e.g.*, William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999) ("Privacy, in Fourth Amendment terms, is something that exists only in certain types of spaces; not surprisingly, the law protects it only where it exists. Rich people have more access to those spaces than poor people; they therefore enjoy more legal protection."); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction*,*"* 83 GEO. L.J. 2547, 2564 (1995) (explaining how officers use consent searches to investigate "suspicious" people on buses and trains, which may target the poor because these modes of transportation are used by the poor, and they are more likely to be deemed suspicious).

[158] Ross, *Abolishing Police Consent Searches*, *supra* note 46, at 2024.

affairs. As we have explained, law enforcement can easily circumvent constitutional protections against searches and seizures by simply asking—and that means law enforcement can freely intrude upon us in the most invasive ways. This is compounded by the reality that law enforcement can and does intrude upon us in differently invasive ways, based on our vast publicly accessible data.[159] We are, involuntarily, open books—and law enforcement are voracious readers. But for those who more heavily weight concerns about crime prevention and detection, it may be a great boon that people readily assent to searches, such that law enforcement has unfettered access to private areas—because that makes detecting and preventing crimes easier. We do not attempt here to adjudicate the correct balancing of these interests. Instead, we simply submit that our Constitution sets forth some contours, encoded in the Fourth Amendment.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[160]

Pellucidly, the purpose, with respect to searches and seizures, is to ensure that law enforcement does not have free rein to invade our private lives.[161] Such purpose is made plain by the text—that people have realms in which they should be secure against unreasonable government intrusion, and for government to intrude upon those realms, there must be sufficient justification. The consent doctrine operates under the view that if people offer their voluntary consent to a search, it must be reasonable.[162] But the empirical and practical evidence severely undercuts that.[163] What we see is that when people are asked by law enforcement officers, they act irrationally, contrary to both their own assessment *and* the societal assessment of what is reasonable.

Consider an analogy. Suppose we lived in a world of wizardry. Officers trained in the magical arts could utter an incantation, and targets of investigation—mesmerized—would utter words of "consent" and comply with the officers' facially-polite requests. Thus, all searches and seizures would be inoculated from constitutional scrutiny, no matter how invasive. That, we

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[159] *See, e.g.*, Aaron X. Sobel, *End-Running Warrants: Purchasing Data Under the Fourth Amendment and the State Action Problem*, 42 YALE L. & POL'Y REV. 176, 181–82 (2023).

[160] U.S. CONST. amend. IV.

[161] *See, e.g.*, Camara v. Mun. Ct., 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

[162] *See supra* note 96 and accompanying text.

[163] *See supra* notes 138–146 and accompanying text.

maintain, is not consistent with the Fourth Amendment's command. Such a state of affairs does not "secure [people] in their persons, houses, papers, and effects, against unreasonable searches and seizures."[164] But, as shown above, this fanciful hypothetical is nearly the situation in which we live. In the mine run of cases, people do not rationally consider officer requests to search and seize, and they objectively consent to unreasonable requests. In short, given the actual facts regarding how people relate to law enforcement, such an illusory doctrine of consent betrays the promises of the Fourth Amendment.

B. *Doctrinal Discord: Incoherent Coercion*

As we have developed, the Fourth Amendment's consent doctrine is often a low-to-nonexistent bar to law enforcement action. If an officer asks for consent to conduct a search or seizure, and an individual assents, then that action will most likely be deemed constitutional. The law dictates that consent must be "freely and voluntarily" given, but the Supreme Court's "totality of the circumstances" test is amorphous, and interpreting courts have most often erred on the side of giving law enforcement wide berth in seeking consent.[165] As discussed, we think this wrongheaded. But what's more, it belies what the Court has otherwise set forth as the contours of consent and coercion.

Consider again *Bumper v. North Carolina*.[166] The case involved a defendant accused, tried, and convicted of rape and assault.[167] Key to the prosecution's case was a firearm found during a search of a home.[168] Officers approached the defendant's grandmother and announced they had a warrant to search the home, and she allowed them in to conduct the search.[169] At a suppression hearing, the prosecution contended that the search was justified by her consent.[170] The trial court agreed, and this was affirmed by the North Carolina Supreme Court.[171] The United States Supreme Court reversed, reasoning that consent must be freely and voluntarily given, which is not satisfied by mere acquiescence to a claim of lawful authority.[172] In the Court's words, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."[173]

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[164] U.S. CONST. amend. IV.

[165] *See supra* notes 81–112 and accompanying text.

[166] *See supra* notes 49–80 and accompanying text. *See generally* Bumper v. North Carolina, 391 U.S. 543 (1968).

[167] *Bumper*, 391 U.S. at 544 & n.2.

[168] *Id.* at 546.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 547–48.

[172] *Id.* at 548–49.

[173] *Bumper*, 391 U.S. at 550.

Again, *where there is coercion there cannot be consent*. In *Bumper*, such coercion took the form of officers explicitly claiming to have a warrant.[174] But claiming a warrant is merely one manner of exerting coercion on targeted individuals. Consider other examples: Suppose an officer menacingly growled before and after a search request. Or suppose an officer powerfully rubbed his fist against his other hand, or rested a hand upon a holstered firearm. Or suppose that officers stand together in relatively overwhelming numbers. Or suppose an individual has experience with this particular officer—or other members of her department—and has learned that "no" is simply not acceptable. Flummoxed, frightened, and/or disillusioned, an individual might then "consent." In such cases, the officer's actions should count as coercive acts that vitiate the individuals' uttered words of putative consent. *Where there is coercion there cannot be consent*.

Consider again existing evidence regarding how individuals actually respond to officer requests for searches and seizures[175]—it is clear that most are coerced by the inherent authority of the officer and other aspects of the situation, and thus comply without rationally processing the request. They merely acquiesce to the officer's authority. And that is precisely what the Court in *Bumper* determined was not sufficient to provide valid consent.[176]

One retort is that individuals remain free to refuse, and officers should not be charged with citizen failures to assert rights. But the Court's holding in *Bumper* does not rely on whether a targeted individual asserted rights. If officers claim to have a warrant but do not, the individual need not ask to see the warrant or further interrogate the officer, and the individual's acquiescence is still not consent. Of course, we understand the Court has not gone so far as to extend this kind of reasoning beyond an officer's explicit claim of authority to search. But this is why Justices in the *Bumper* majority thereafter dissented in consent cases,[177] and we too think the post-*Bumper* Courts mistaken. We now have much better information regarding how individuals perceive and respond to officer requests, and that evidence makes clear that, in general, people acquiesce to an officer's authority—in fear, lack of understanding, or abjectness. That simply is not meaningful consent.

Consider also an analogue from the federalism context, weighing state interests versus federal authority in the matter of conditional spending. The Supreme Court has here limited federal authority to direct state action using the power of the purse strings, prohibiting the federal government from making coercive offers to the states. The Court first recognized the tension between state interests and conditional federal spending in *South Dakota v. Dole*.[178] *Dole*

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[174] *Id.* at 546.

[175] *See supra* Part III.A.

[176] *Bumper*, 391 U.S. at 550; *see* Gardiner, *supra* note 119, at 163 (making a similar point on the broader applicability of *Bumper*).

[177] *See supra* Part II.

[178] *See generally* South Dakota v. Dole, 483 U.S. 203 (1987).

involved a federal statute that directed the Secretary of Transportation to withhold five percent of funds allocated to federal highways from states having a legal drinking age under twenty-one.[179] South Dakota, which at the time had a drinking age of nineteen, brought a constitutional challenge, contending that the law violated the Spending Clause and the Twenty-First Amendment.[180] The Court rejected the challenge.[181] In so doing, the Court reasoned that there are four principal limitations on the Spending Clause: (1) that the spending be in pursuit of "the general welfare"; (2) that the conditioning of funds be unambiguous; (3) that the conditions imposed be related "to the federal interest in particular national projects or programs"; and (4) that there be no independent bars to the exercise of spending.[182] The Court found the first three conditions easily met, but recognized potential independent limitations.[183] As for the Twenty-First Amendment—which South Dakota contended prohibited Congress from regulating drinking, leaving that power to the states[184]—the Court held that even if Congress cannot directly regulate in an area, it may use conditions on spending to indirectly regulate, as it did with the condition on highway funds.[185] That said, the Court did recognize that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'"—and thus becomes unconstitutional.[186] In this particular case, however, the Court found that the highway condition, which at most would withhold 5% of the allocable funds from a state, fell short of the compulsive threshold.[187]

Thereafter came *National Federation of Independent Business v. Sebelius*,[188] where the Court further elaborated on the coercion-to-compulsion limitation on federal spending. *Sebelius* considered the constitutionality of various provisions of the Patient Protection and Affordable Care Act, also known as Obamacare.[189] The provision that implicated the relationship between the federal government and states in the area of spending involved Medicare expansion. Specifically,

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[179] *Id.* at 205, 211.

[180] *Id.* at 205.

[181] *Id.* at 206.

[182] *Dole*, 283 U.S. at 207–08.

[183] *Id.* at 208–09.

[184] *Id.* at 209. The Twenty-First Amendment repeals the Eighteenth and provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. CONST. amend. XXI (emphasis added).

[185] *Dole*, 483 U.S. at 210.

[186] *Id.* at 211.

[187] *Id.*

[188] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[189] *Id.* at 530–32; *Patient Protection and Affordable Care Act*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/patient-protection-and-affordable-care-act/ [https://perma.cc/ZYV7-EV4Y].

> the Act require[d] state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States . . . cover[ed] adults with children only if their income [was] considerably lower, and [did] not cover childless adults at all. The Act increase[d] federal funding to cover the States' costs in expanding Medicaid coverage, although States [would] bear a portion of the costs on their own. If a State [did] not comply with the Act's new coverage requirements, it [might] lose not only the federal funding for those requirements, but all of its federal Medicaid funds.[190]

The Court struck down this provision, determining that it amounted to unconstitutional coercion.[191] In so doing, the Court considered whether "'the financial inducement offered by Congress' was 'so coercive as to pass the point at which 'pressure turns into compulsion.'"[192] Here, the Court determined that the inducement—that the state would lose *all* of its Medicaid funds if it did not agree to the expansion—was not merely a "relatively mild encouragement—it [was] a gun to the head."[193] In essence, the Court determined that the states were not given a genuinely voluntary choice in the Medicaid expansion, and thus determined that the Act could not penalize states for their nonparticipation by withdrawing all federal funds.[194]

What, then, should this example from the Court's federalism jurisprudence teach about consent as a doctrine eliminating otherwise-constitutional rights? It demonstrates a Court understanding that mere formal consent is not sufficient. In *Sebelius*, the federal government's offer to the states—spend some money to expand Medicaid or lose all federal Medicaid funds—was a "gun to the head." It was a coercive offer that was an unconstitutional exercise of the spending power. Similarly, then, the Court's reasoning—when coupled with the other evidence we have marshalled—indicates that purported consent should not be *per se* sufficient to circumvent the Fourth Amendment's requirements. The Court's analysis in *Sebelius* was a practical one. It wasn't the case that the states had no option but to accept the Medicaid expansion. The states had the choice of refusing the expansion and foregoing all of the Medicaid money—that was on the table, it just would have been very politically unpopular and fiscally painful because of the important function Medicaid plays in our nation. Analogously, as a practical matter individuals faced with law enforcement's request for consent have no meaningful choice—the request is, often enough, a "gun to the head." And just as the Court recognized that such a coercive choice cannot be used to circumvent the protections states have in our federal system, so too we should recognize that a coercive choice cannot be used to circumvent

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190 *Sebelius*, 567 U.S. at 542 (internal citations omitted).
191 *Id.* at 587–88.
192 *Id.* at 580 (quoting *Dole*, 483 U.S. at 211).
193 *Id.* at 581.
194 *Id.* at 581–82.

the individual rights protected by the Fourth Amendment. In short, we ought not expect more of citizens on the street than in the statehouse.

C. *Reading It Wrong: A Hollow Conception of Rights*

Finally, we contend that in function the consent doctrine not only undermines the rights of the Fourth Amendment, but in so doing it affirms a futile conception of constitutional rights more generally. The structure of Fourth Amendment consent allows a government agent to request of an individual that the agent be allowed to perform what is otherwise forbidden by the Constitution, so long as the rights holder assents. At a philosophical level—and in the legal domain as well—rights are often waivable.[195] But we have shown above that in the Fourth Amendment context the law enforcement request and resulting assent are typically *pro forma*.[196] Officers performatively ask, and individuals performatively assent.

This, we contend, is anathema to the very conception of constitutional rights. Consider a brief version of the (standard) story of our Constitution. At the Philadelphia Convention, given concerns about the fledgling nation's ability to prosper, a principal issue was to identify and rectify the weaknesses of the Articles of Confederation.[197] What emerged was a recognition of the need for a stronger centralized authority, vested in a federal government.[198] At the same time, the Framers observed that this concentration of power could be dangerous to both state and individual interests.[199] Both the recent memory of the perceived trespasses of the British government and the insistence of the Anti-Federalists thus ensured the Constitution would address these concerns.[200] Among other things, this led to the Bill of Rights, which would protect individuals from being trampled by the sheer power of this newly centralized authority.[201] And after the Civil War and upon ratification of the Fourteenth

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[195] *See* Stephen E. Henderson & Kelly Sorensen, *Search, Seizure, and Immunity: Second-Order Normative Authority and Rights*, 32 CRIM. JUST. ETHICS 108, 108 (2013).

[196] *See supra* Part III.A.

[197] Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 CONST. COMMENT. 53, 67–68 (2012) (citing 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 480 (Jonathan Elliot ed. 1891)).

[198] DONALD L. DOERNBERG, C. KEITH WINGATE & DONALD H. ZEIGLER, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS 607 (4th ed. 2008) ("The colonial experience had sensitized the colonists to the problems of a strong and unresponsive central government. The Articles of Confederation reflected that sensitivity too well: they created so weak a central government that the nation was forced to discard it . . . .").

[199] THE FEDERALIST NO. 51 (James Madison).

[200] *See* DOERNBERG, WINGATE & ZEIGLER, *supra* note 198, at 607; Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers*, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111, 112–15 (1993); Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1233 (2015).

[201] *See* sources cited *supra* note 200.

Amendment, it would protect individuals from governmental authority more generally.[202]

On that very brief historical backdrop, it seems disingenuous to create a constitutional structure where the government can request that individuals forfeit their rights, and where mere assent to the request is enough to work such forfeiture. The whole project of the Bill of Rights recognized that the government's power would tend to overwhelm the individual—the Constitution was intended to cabin this power differential, by limiting the government. That is the conception of the constitutional right: a limitation on what government can do meant to protect the individual from certain infringements. But when such a right can be trespassed by the government simply asking individuals to give it up, where the government has such a power differential to render the individual's choice illusory (there is, for example, no attorney standing by), *that is no right at all.* And that empty conception of a right fails to preserve, and indeed harms, our constitutional structure and government. It is nothing more than the State picking off the collective power of the people by coercive approach and "consent," one lonely citizen at a time.

Unfortunately, the Fourth Amendment has not been alone in such "pick 'em off" rights annihilation. In the landmark case of *Miranda v. Arizona*, the Supreme Court considered the problems of coercive, incognito interrogations that led to confessions.[203] The Court recognized that, in practice, police interrogation often uses techniques of psychological domination—including seclusion and isolation, information differentials and deceit, and persistence.[204] All such techniques are meant to affirm the authority of the interrogating officer and the inevitability of a successful prosecution.[205] Together, they render the subject abject, eliciting a confession.[206] The *Miranda* Court—near in time to *Bumper*—held such a state of affairs was unacceptable, and therefore required the now famous *Miranda* warnings prior to all custodial interrogations.[207]

Miranda is rightly considered a watershed case of criminal procedure. The Court looked to actual policing practice to recognize what amounted to a regime of flagrant rights violation, and then took the unprecedented step of setting forth a specifically tailored solution. But as pivotal as it must have seemed, *Miranda* has come to be seen by many as a failure.[208] That is in large part because of the operation of "consent." *Miranda* requires that an interrogation subject be warned, such that the request for interrogation be informed, and, theoretically,

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[202] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (applying the Sixth Amendment jury right as against the states).

[203] Miranda v. Arizona, 384 U.S. 436, 456–57, 492 (1966).

[204] *Id.* at 448–50, 455–56.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 444–45.

[208] *See, e.g.*, Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1230 (2001); Guha Krishnamurthi, *The Case for the Abolition of Criminal Confessions*, 75 SMU L. REV. 15, 54–55 (2022).

that any given permission thus must be voluntary.[209] Yet the empirical evidence reveals that these warnings do little to stem the tide.[210] Some of the very same techniques law enforcement use to psychologically coerce confessions are deployed to psychologically coerce waiver of one's *Miranda* rights, taking us back to square one.

We see a very similar dynamic operate in the context of Fourth Amendment consent. There is a constitutional structure intended to protect individuals from intrusion by the government. But that structure can be circumvented by government request that provokes 'voluntary' consent. The government thus routinely requests, and individuals—even when doing so is irrational and unreasonable—assent. All existing evidence demonstrates that such assent is not meaningfully voluntary—it is a predictable response to daunting government authority. In both cases, we end up not with meaningful *rights*; we are instead satisfied by *performance*, a choreography that circumvents constitutionally mandated protections. That has led one of us to advocate for the abolition of confession evidence in criminal proceedings.[211] And it leads us here to call for substantially curtailing Fourth Amendment consent.

IV. A READY ALTERNATIVE: EMERGENCY CONSENT

So, Fourth Amendment consent-as-we-know-it has got to go. As matters of fairness and limited government, we cannot afford allowing police to interject consent into routine police-citizen interactions.[212] (By "citizen" we merely

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[209] *Miranda*, 384 U.S. at 444–45.

[210] Krishnamurthi, *supra* note 208, at 55 (collecting empirical citations).

[211] *Id.* at 19.

[212] Connecticut has recognized the same, prohibiting police who make traffic stops from requesting consent. *See* CONN. GEN. STAT. ANN. § 54-33o(a)(1) (West 2023) ("No law enforcement official may ask an operator of a motor vehicle to conduct a search of a motor vehicle or the contents of the motor vehicle that is stopped by a law enforcement official solely for a motor vehicle violation."). Instead, consent in that context must be "unsolicited." *Id.* § 54-33o(a)(2)(B). The relevant ABA Standards similarly define consent to be "deciding of [a third party's] own initiative and volition to provide information to law enforcement." ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS (3d ed. 2013), Standard 25-2.1. This is not to say that such reform has been uncontroversial. Connecticut's law has seen attempts at both repeal and amendment. *See, e.g.*, 2023 Conn. S.B. No. 237 (calling for repeal); 2023 Conn. H.B. No. 5239 (calling for limiting amendment). And while an earlier Connecticut law broadly prohibited officer-initiated consent in the search of a person, that law was then amended to permit officer request upon suspicion. *See* CONN. GEN. STAT. ANN. § 54-33b (West 2023) ("A law enforcement official may ask a person if he or she may conduct a search of their person, provided such law enforcement official has reasonable and articulable suspicion that weapons, contraband or other evidence of a crime is contained upon the person, or that the search is reasonably necessary to further an ongoing law enforcement investigation. A law enforcement official who solicits consent to search a person shall, whether or not the consent is granted, complete a police report documenting the reasonable and articulable suspicion for

indicate a non-State actor).[213] And while there can be value in permitting *citizens* to interject consent—not every police-citizen interaction ought to be adversarial, to say the least—experience has taught that this is fraught with the same peril: even when consent must be "voluntary" at law, it will hardly be so on the streets. As we have explored, consent is simply bound to deprive deserving persons of an intended intermediary between themselves and their State. What is more, its operation deprives our entirety—"the people" in Fourth-Amendment speak—of information that we can collectively leverage to better secure our persons and properties, and thus ultimately our dignities and liberties.[214] When police officers cannot search and seize "consensually," they are forced to turn to the judicial branch for warrants. And in this there is critical safeguard, for in these warrants will arise databases that can be mined for evidences of policing biases and unwise and unfair allocations, including those of which no individual officer is even aware. In short, elimination of Fourth Amendment consent can be win-win.[215]

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the solicitation of consent, or the facts and circumstances that support the search being reasonably necessary to further an ongoing law enforcement investigation.").

[213] *See, e.g.*, *Citizen*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/citizen [https://perma.cc/MTV6-D2KL] (defining the word to include "an inhabitant of a city or town" and "a civilian as distinguished from a specialized servant of the state"). We are emphatically not using the term in the limiting sense of the immigration laws. Of course, the Fourth Amendment textually protects the rights of only "the people." U.S. Const. amend. IV; *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (holding the term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). The Supreme Court defines that scope. As for us, we have no desire to limit; a statute, for example, can of course protect more broadly than the Constitution, and we would wish it to.

[214] *See* David Gray, *Collective Rights and the Fourth Amendment After* Carpenter, 79 MD. L. REV. 66, 81–82 (2019) ("[T]he Fourth Amendment means what it says. It guarantees a right 'of the people.' Not a right 'of persons.' . . . Read in this light, the Fourth Amendment is not a defense of individual property rights. It is, instead, a restraint on government power—a restraint designed to preserve the independence and integrity of the people as a whole. It is a bulwark against tyranny." (footnotes omitted)).

[215] For previous calls for abolition see, for example, Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 524 (1991) ("A consent exception simply is not needed. If circumstances truly are exigent, officers may conduct a warrantless search. Otherwise, if police feel a pressing need to search a person, home, vehicle, or container, they can obtain a warrant rapidly by using one of the expedited warrant procedures such as the radio or telefax warrant."); Strauss, *supra* note 46, at 271 ("The power imbalance, the likelihood of coercion, and the difficulty in assessing the voluntariness of the situation all weigh in favor of a per se ban on consent."); Thomas, *supra* note 46, at 557 ("I propose[ ] that, outside the context of public safety requests for consent, the Fourth Amendment should be interpreted so that a search based solely on consent is not a reasonable search."). Most recently, Josephine Ross makes a powerful case, including by analogy to abolition in Scotland, and she provides a model statute to accomplish the task. *See generally* Ross, *Abolishing Police Consent Searches*, *supra* note 46. We think more will need to be done to account for purported emergencies, but our proposals are complementary.

What, then, ought to remain? We merely have to take the Supreme Court at its longstanding word: "[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"[216] Now, application of that "cardinal principle" has hardly been principled.[217] But that should not mean we cannot do better going forward. And one of those longstanding exceptions—even if not always "well-delineated"—is exigency.[218] So, while we ought to eliminate the current doctrine of Fourth Amendment consent, an exigency exception should remain, all of which might be articulated as follows.

First, we recommend no change to the existing doctrine of *emergency aid*, which permits police having reason to believe a person is threatened with imminent serious bodily injury or death to take reasonable action, including home entry.[219] It is always better to prevent harm than to punish it *ex post*, and emergency aid might be the best and most important thing police can do. Second, we recommend that officers be permitted to act upon *emergency consent*, which we envision having two elements: (1) a person initiates contact with law enforcement of her own volition, and (2) she expresses belief in an emergency situation. Critically, the responding officer may not agree that there is an emergency, and it may not be objectively reasonable to think there is any emergency. Imagine, for example, a call to 911 enlisting help that sounds bizarre ('I don't know why, but the aliens have selected my home to invade!'), and that only seems more far-fetched to police who respond to the scene ('Well, no, I can't *see* them or any weapons, but that's because they can turn themselves invisible!'). An unlikely scenario, to be sure (albeit one providing reason to inquire whether other types of assistance might be needed). But even in this toy example, we do not think police should have to turn to a warrant: when a citizen approaches the State and requests help with a purported emergency, it forces police to act too contrary to benign human nature, and in too adversarial a stance, to require they refuse.

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[216] Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[217] *See* Stephen E. Henderson, *In Celebration of Dissents (and Lengthy Textbooks): How Digital Became Different for the Fourth Amendment and Why It Is Time for a Real Warrant Default*, 83 OHIO ST. L.J. 913, 935–38 (2022) (noting the same and arguing for a genuine warrant default for digital evidence).

[218] *See, e.g.*, Kentucky v. King, 563 U.S. 452, 455 (2011) ("It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.").

[219] *See* Brigham City v. Stuart, 547 U.S. 398, 400 (2006) ("[W]e consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. We conclude that they may."). Thus, *ex post* review of emergency aid requires objectively reasonable belief.

And albeit more hesitantly, we'd also permit one further, allowing officers to similarly act when they—agents of the State—initiated the interaction. But here we must tread cautiously, lest the rule swallow our entire purpose explained above, which is to stop Fourth Amendment consent from on-the-ground swallowing much of Fourth Amendment liberty. Thus, we envision this *less-volitional emergency consent* having more limiting elements, including a possible third: officers may act when: (1) a person expresses belief in an emergency situation, (2) she provides a knowing and voluntary waiver of her Fourth Amendment rights after being informed of her right to refuse and her right to legal representation in making that decision, [and maybe] (3) that entire waiver process must be recorded.[220]

It falls to anyone proposing a fundamentally different rule to demonstrate its efficacy, so let us return to the cases of our Introduction and Part II to show our rules' function. First was Trooper Vanadestine and friends, who pulled off the roadway in response to a vehicle well off that roadway, "crashed into a snowbank"; a citizen witness was already on the scene.[221] As to car passenger Howard, who so obviously wanted nothing to do with Vanadestine that she remained as physically distant as possible, there was no reason to believe anyone was threatened with serious bodily injury or death (no emergency aid), Howard did not initiate contact (she was "beckoned over"),[222] Howard did not express belief in an emergency, and Howard was not informed of her rights. Thus, as we have framed the doctrine, officers could not search her bag on the basis of consent, and so they could not access it unless, say, they obtained probable cause to arrest and it was an item immediately associated with her person,[223] or they obtained probable cause to suspect the bag and it fell within the automobile exception,[224] or they obtained a warrant.[225] In short, without probable cause the contents of Yolanda Howard's bag would have remained private that day, and we believe that is the normatively correct outcome. While she in fact apparently had illegal drugs in her bag, the Fourth Amendment's protections apply so that *every* Yolanda Howard maintains her dignity and privacy, and so that the armed

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[220] As mentioned *supra* note 212, Connecticut has limited the operation of consent in the motor vehicle context, and where it operates by citizen initiation, consent requires a writing or recording. *See* CONN. GEN. STAT. ANN. § 54-33o(a)(2)(B) (West 2023) (permitting "the unsolicited consent to . . . search from the operator of the motor vehicle in written form or recorded by body-worn recording equipment or a dashboard camera").

[221] United States v. Howard, 66 F.4th 33, 37–38 (1st Cir. 2023). For context regarding all of the summarized facts, see *supra* Parts I & II.

[222] *Howard*, 66 F.4th at 39.

[223] *See* United States v. Robinson, 414 U.S. 218, 236 (1973) (permitting search of such items found on an arrestee); *cf.* Riley v. California, 573 U.S. 373, 386 (2014) (holding otherwise for mobile phones).

[224] *See* California v. Acevedo, 500 U.S. 565, 580 (1991) (permitting search of containers within an automobile on probable cause without a warrant).

[225] *See* United States v. Chadwick, 433 U.S. 1, 15–16 (1977) (establishing a warrant requirement for closed containers).

(here ex-military) representatives of the State respect the same. That one is a passenger in a vehicle that perhaps swerved off the road should not lead to being hounded by a handful of police officers into sacrificing constitutional rights, and any notion that 'well, it discovered crime so it must be right' is of course a dignity and liberty-obliterating notion that argues for repeal of the Fourth Amendment. Limited government norms are *always* anti-accuracy norms, something the Founders understood as well as anyone.[226]

The same pro-liberty result would occur on the facts of *Westfall v. Luna*, because a neighborhood trespass complaint would not permit consent to home entry;[227] if police wish to enter such a home, they will need to obtain a probable-cause-supported warrant.[228] That is as things should be—it certainly seems preferable to police forcibly throwing the "consenting" party to the ground.[229] And the same for the facts of *United States v. Gregoire*: an alleged failure to use a blinker when merging onto a highway could no longer result in an objected-to drilling into a vehicle's floor.[230] And in this is perhaps one of the greatest strengths of our proposal, which is that fundamental privacy rights would far less often come down to swearing contests between police and the people they are sworn to protect. The court in *Ruiz v. Florida* would no longer find itself powerless to stand against what it believed was widespread police perjury,[231] because under our rule there was—even on those Florida police officers' telling—nothing that would permit consent, and because it would be a much more limited set of circumstances that could be 'testilied' into existence.[232]

Turning to the Supreme Court caselaw of Part II, our test would of course reach the Court's result in *Bumper v. North Carolina*, as that Court rejected police home entry upon mere acquiescence to asserted (warrant) authority;[233] anything that does not constitute Fourth Amendment consent for the Court would not satisfy our much-narrowed rule. And just as obviously it would change the result in *Schneckloth v. Bustamonte*, as that holding is the target of

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[226] *See, e.g.*, Brennan-Marquez & Henderson, *supra* note 115, at 397–99, 407–08 (arguing that among the idiosyncrasies of the Founders leading to the Fourth Amendment was a desire to generally limit policing capacity).

[227] *See* Westfall v. Luna, No. 21-10159, 2022 WL 3334535, at *1–2 (5th Cir. 2022); *see also supra* note 38 and accompanying text.

[228] *See* Payton v. New York, 445 U.S. 573, 603 (1980) (establishing a warrant rule).

[229] *See Westfall*, 2022 WL 3334535, at *2.

[230] *See* United States v. Gregoire, 425 F.3d 872, 874–75 (10th Cir. 2005); *see also supra* notes 39–40 and accompanying text.

[231] *See* Ruiz v. Florida, 50 So.3d 1229, 1233 (Fla. Dist. Ct. App. 2011); *see also supra* notes 42–45 and accompanying text.

[232] It is of course never possible to entirely eliminate this potential, although ubiquitous recording accompanied by robust use and disclosure limitations could do very significant work. *See, e.g.*, Stephen E. Henderson, *Fourth Amendment Time Machines (and What They Might Say About Police Body Cameras),* 18 U. PA. J. CONST. L. 933, 960–71 (2016) (developing an argument for such police body camera recording).

[233] *See* Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968); *see also supra* notes 49–80 and accompanying text.

our critique and resulting proposal.[234] While the *Schneckloth* facts do not read as egregiously as those in *Gregoire*, police pulling over a vehicle for routine traffic infractions (only one operating headlight and no license plate light) could result in a consent search only in rare circumstances: since the police initiated the interaction, the citizen must express belief in an emergency situation, and she must make a knowing and voluntary waiver of her rights *after* being informed of them (and perhaps requiring a recording of the same). As a panel of the Ninth Circuit there recognized, without such protections "a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."[235] Our proposal would put an end to the consent-search 'liberty loophole' currently operating on our nation's highways.

As for the common authority of the *United States v. Matlock* line of cases, our proposal is orthogonal to its doctrine: our concern is whether purported consent should suffice, *not* whether the person so providing has the required control over a particular item or place to be *able* to consent.[236] This is not to say, of course, that the common authority doctrine is unimportant, or that we have nothing to say on the matter; this paper is simply not the place for that discussion. As for our current thesis, a person having common authority over an area or thing—meaning joint access or control for most purposes—could provide operative consent *if* it is consent satisfying our rule. It might be helpful to point out, however, that our rule would not permit the *Matlock* search, in which police entered and searched a home not once, and not twice, but *three times*[237] after (allegedly)[238] obtaining permission in a non-emergency,[239] police-initiated,[240] not-informed-of-rights situation.[241] That is exactly the sort of procedure we aim to change. If police had the probable cause necessary to believe Matlock guilty of a bank robbery, they presumably had the probable cause necessary to search his home for its fruits, and they ought not be able to leverage consent as an end-run around that warrant requirement (we'll have more to say on this in just a moment).

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[234] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973); *see also supra* notes 81–95 and accompanying text.

[235] Bustamonte v. Schneckloth, 448 F.2d 669, 701 (1981).

[236] *See* United States v. Matlock, 415 U.S. 164, 171 (1974); *see also supra* notes 98–99 and accompanying text.

[237] *See Matlock*, 415 U.S. at 179 (Douglas, J., dissenting).

[238] *See id.* at 166 (majority opinion). At the suppression hearing, the relevant tenant denied that she consented when three officers knocked on her door to summon her dressed in a robe and with baby in arms, but the trial court found that she did. *Id.* In the Supreme Court's telling, "she entirely denied that she either gave consent or made the [relevant] statements to the officers . . . ." *Id.* at 177.

[239] *See id.* at 179–80 (Douglas, J., dissenting) (noting the unchallenged district court finding that there was no emergency).

[240] *See id.* at 166 (majority opinion) (explaining the police presence to arrest Matlock for a bank robbery).

[241] *See id.* (explaining the case facts, including no police recitation of rights).

Just as common authority is orthogonal to our thesis, the same is true for its extending cousin of *Illinois v. Rodriguez*, apparent authority, in which police *reasonably believe* that a person has common authority.[242] But here again the facts of that case help explicate our thesis. In *Rodriguez*, Dorothy Jackson called the police to her house, where they met her daughter, Gail Fischer.[243] Fischer, who had injuries that appeared to be from a "severe beating," told police that she had been assaulted by Edward Rodriguez in "our" apartment, where she claimed he was now asleep.[244] Fischer used the term "our" to describe the apartment several times and told the officers she had clothes and furniture there.[245] It is unclear, however, whether she indicated to police that it was her current—rather than previous—home.[246] She agreed to accompany the officers to the apartment and unlock it (using her key) so that they could arrest Rodriguez, and, when they entered, police saw drugs and drug paraphernalia in plain view.[247]

Because physical violence of any kind—obviously including domestic violence—is serious, it is important to consider how our proposal would operate in *Rodriguez*-like situations. First, we make no change to the existing doctrine of emergency aid. So, if police had reason to believe anyone was threatened with imminent serious bodily injury, they could act.[248] If, say, a child or other potentially threatened individual was in the apartment with Rodriguez, that might be triggered. There was no such allegation nor potential on the *Rodriguez* facts. Second, police can of course enter a home in order to make an arrest if they first obtain a warrant,[249] and such a warrant would have been readily forthcoming given the purported testimony of Gail Fischer. But then we would have a judicial record of that contemporaneous testimony, something we lack because police instead operated under today's loose conception of consent, a lack that has forever made *Randolph* a source of contention. Did police goad a *former* roommate Fischer into something appearing as consent?: 'Yeah, okay, you moved out . . . but do you still have any clothes or furniture in there?' Or

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[242] *See* Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990); *see also supra* notes 100–102.

[243] *Rodriguez*, 497 U.S. at 179 (making clear the police were summoned by phone call); *id.* at 189 (Marshall, J., dissenting) (making clear the caller was Jackson).

[244] *Id.* at 179 (majority opinion).

[245] *Id.*

[246] *Id.*; *cf.* Raigrodski, *supra* note 46, at 57 ("Through a feminist gaze . . . the Court could have reached a better understanding as to why Fischer was not named on the lease and did not contribute to the rent, as to why she was not allowed to invite friends and not allowed in the apartment when Rodriguez was away.").

[247] *Rodriguez*, 497 U.S. at 179–80.

[248] *See supra* note 219 and accompanying text; *see also* Georgia v. Randolph, 547 U.S. 103, 118 (2006) (similarly recognizing that the Court's consent-limiting holding "has no bearing on the capacity of the police to protect domestic victims").

[249] *See* Steagald v. United States, 451 U.S. 204, 205–06 (1981) (requiring at least an arrest warrant, and a search warrant when police wish to search a home other than the arrestee's).

did police respect the Fourth Amendment by checking into her story: 'Okay, so it's where you live and so you know he's inside, and you have a key . . . and you are saying your clothes and things are in there?' If police are forced to slow down—even just a bit—in order to create a warrant's probable cause affidavit, such questions will often be settled.[250]

Finally for *Rodriguez*, we might consider the sadly-common situation in which one tenant wishes police presence in order to safely move out.[251] Would our more-limited consent allow for such assistance? Here the citizen initiates contact, and so the answer might be in the affirmative. But does he or she also express a belief in an emergency situation, because *once he or she enters* there might be violence? Or is that just it—there is no emergency now because he or she is *not* inside? Even if the latter, we think this might be a feature, and not a bug. As important as it is for the State to play this peacekeeping role—and we cannot overstate that—might it nonetheless be better for everyone if police first obtained, say, an administrative warrant for such entry, satisfying a magistrate that the entry is indeed based upon citizen desire and is thus not arbitrary or capricious?[252] And, for that matter, might it often be even better yet if some other State actor and *not* a police officer played this role? While that consideration is beyond the scope of this project,[253] the critical point is that we, like the consent-limiting-Court in *Georgia v. Randolph*, are convinced that our rule would not endanger victims of domestic violence.[254] We would not propose it otherwise.[255]

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[250] We might similarly better understand why police believed Rodriguez a drug dealer, an allegation to which Fischer allegedly made no reply. *See Rodriguez*, 497 U.S. at 189 (Marshall, J., dissenting).

[251] Where what is sad, of course, is not the desire for police assistance to avoid harm, but rather that the threatening situation exists in the first place; we all wish there were far less violence in our society.

[252] *See* Camara v. Mun. Ct., 387 U.S. 523, 540 (1967) (developing the administrative warrant rule).

[253] Another matter outside the scope of this project is whether the law of *implied consent*—like that often leveraged in the automobile licensing space and then used in sussing out intoxication—is an unconstitutional condition. We leave that for another day.

[254] *See* Georgia v. Randolph, 547 U.S. 103, 118–20 (2006) (explaining how recognizing the rights of a present, objecting co-tenant does not endanger victims of domestic violence).

[255] We might here quickly dispose of another hypothetical. Imagine a person walks up to an on-duty officer and asks, 'Hey, can you just look in this bag and tell me whether this looks okay to you?' Without more, we don't have effective consent under our rule, because the person has not intimated any emergency. But that strikes us as just fine. One, we'd wager this circumstance is rare. Two, and more critically, there's not yet any good reason for the office *to* look in that bag: non-seizure questioning is of course permitted ('Um, first, *why* do you want me to look?'), and such obvious questions might quickly either entirely resolve the matter, or give reasonable suspicion of armed and dangerous, or give probable cause, or lead to emergency consent. In other words, we aren't sure why police would need—or even want—to immediately look in any such bag.

Lastly, if we turn to the matter of *scope* of consent—as at issue in *Florida v. Jimeno*—we can say more about what we perceive as the record-making benefits of our limited-consent rule.[256] Obtaining any sort of warrant limits courts needing to engage in *ex-post* swearing contests between police officers and citizens regarding what was said and meant thereby. Of course, a warrant (or any other court order) cannot entirely eliminate such debates: a person might contest, say, what an officer claims in a warrant affidavit she said. But a warrant creates a contemporaneous, sworn version of events, a far surer guide than *ex-post* officer believed/claimed recollection. And a warrant and its application capture not only citizen statements argued to establish the requisite justification; they capture what police intend to *do*, itself a dignity-promoting move. Few persons wish, say, their home invaded by the State, and yet there is a meaningful difference between that invasion occurring after consideration by a court, and that invasion occurring merely because an individual executive officer wishes it.

Also, warrants *collectively* could do much more. While the appellate court in *Ruiz v. Florida* was simultaneously convinced that police perjury was often occurring but that the court was powerless to react,[257] a database of such warrants could be carefully mined for just such purpose. Are certain officers obtaining "consent"—meaning encountering persons wishing to sacrifice their constitutional rights—far more often? Is citizen "sharing" and "request" being encountered in certain neighborhoods at rather astounding rates? Is it especially prominent among certain demographics? In our day, pervasive data gathering severely threatens privacy.[258] But as Andrew Ferguson has argued, we can sometimes effectively turn the direction of gathering *towards* the State in order to restore some of the liberty we have otherwise lost.[259] Strictly limiting consent and thereby encouraging warrants would be just such a win, converting what is today typically an officer-on-the-scene unrecorded judgment-call into a preserved court procedure.[260] Collectively, warrants and their applications

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[256] *See* Florida v. Jimeno, 500 U.S. 248, 249 (1991); *see also supra* notes 104–112 and accompanying text.

[257] *See* Ruiz v. Florida, 50 So. 3d 1229, 1233 (Fla. Dist. Ct. App. 2011); *see also supra* notes 42–45 and accompanying text.

[258] *See generally, e.g.*, Stephen E. Henderson, *Our Records Panopticon and the American Bar Association Standards for Criminal Justice*, 66 OKLA. L. REV. 699 (2014).

[259] *See* Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 564 (2019) ("This Article looks to invert the big data surveillance gaze from the citizen to the police. It asks whether the same law enforcement technologies built to track movements, actions, and patterns of criminal activity could also be repurposed to foster data-driven police accountability.").

[260] Even if, say, warrants are relatively easy to obtain, *see generally* Brennan-Marquez & Henderson, *supra* note 115; Tracy Hresko Pearl, On Warrants & Waiting: Electronic Warrants & the Fourth Amendment (Mar. 7, 2023) (unpublished manuscript), https://ssrn.com/abstract=4381730 [https://perma.cc/E3GW-KLYV], they can thus still serve a very important collective-data function.

provide a data benefit that, thanks to modern data science, can be significantly liberty-promoting. Our rule permits this benefit in this sphere of policing.

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Before moving on, let us briefly discuss (and dismiss) a possible objection: that the elimination of Fourth Amendment consent as we know it would lead criminals to engage in societally-detrimental strategic behavior. That is, one might worry that criminal wrongdoers could ensnare officers into conducting a now-illegal search, thereby excluding its fruits from any criminal proceeding.[261]

Imagine Xerxes is a drug dealer who feels the walls closing in on him. A good student of criminal procedure, he decides his best bet is to surrender the drugs, but in a fashion that will see them excluded in any criminal trial. He puts all of his cocaine, 30 one-kilo bags worth, on his coffee table. He walks outside, finds an officer—Officer Yanis—and says, 'You know I really want to talk to you about crime in the neighborhood. Would you come have a cup of coffee and we can discuss?' Officer Yanis, suspicious but intrigued, follows Xerxes into his home. Once they walk in, Officer Yanis is surprised—yet delighted—to see the cocaine (how easy a bust is this?!). That's when Xerxes triumphantly exclaims, 'Ha! You can't use that against me. You don't have a warrant, and I can't consent to your search!'

Two questions naturally arise. One, is Xerxes correct that under our limited emergency-consent rule the numerous bags of cocaine are excluded from evidence? And, two, if so, does this scuttle the practicality of our rule?

As a preliminary matter, we agree with Xerxes that Officer Yanis could not successfully urge emergency aid as grounds for home entry. The officer does not have reason to believe anyone in need of immediate assistance; at best, Officer Yanis would be creating that need by entering the home, and Officer Yanis can simply choose not to do so. Surely they can chat about neighborhood crime somewhere else.

But we think there is reason to doubt that Xerxes's bags of cocaine can be excluded. First, we think there is a strong argument that this is not even a Fourth Amendment event. According to *United States v. Jones*, a search is a "physical intrusion of a constitutionally protected area in order to obtain information."[262] Here, from an objective perspective, Officer Yanis does not physically intrude the home *to obtain information*—Officer Yanis is merely willing to listen to Xerxes since Xerxes wishes to speak.[263] Things would seem different had Officer Yanis suggested they enter Xerxes's home; but, as is, we don't see the requisite objective intent to obtain information. (And as to any subjective

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[261] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920).

[262] United States v. Jones, 565 U.S. 400, 407 (2012) (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

[263] One might analogize the situation to a Fifth Amendment 'threshold confession,' in which a suspect bursts into a police station and begins to confess. As for any immediate questioning in response, an officer should know it reasonably likely to elicit an incriminating response, yet this is very far from the concerns that motivated the *Miranda* Court. *See supra* notes 203–211 and accompanying text.

expectation of privacy, well, Xerxes seems unusually and convincingly eager to dispense with it.)

Moreover, what if—perhaps on slightly different facts—Officer Yanis's entry into the home was a search. Exclusion may still not be warranted. Under our exclusionary rule, there are exceptions for inevitable discovery and, relatedly, independent source.[264] That Xerxes felt the walls closing in suggests that both exceptions could be triggered. (And to the extent we depend upon that motivation, well, drug dealers typically don't otherwise hand over their valuable wares—that motivation was the entire impetus for Xerxes's strategic behavior.) Seen another way, the modern Court suppresses evidence only as a "last resort," and therefore only upon "police culpability."[265] Officer Yanis seems clear of that.

Finally, even if it were the case that such a hypothetical situation would constitute a search and would result in exclusion of the evidence, we reject that this undercuts our proposal. Under our regime, prior to entering Xerxes's home at his invitation, Officer Yanis could obtain what we might call an "invitation warrant"—which would explain that the officer has been invited into an individual's home, is entering on that basis, and will investigate in certain ways. Not only would this safeguard individuals' privacy rights as contemplated by the Fourth Amendment, but it seems generally prudent for officer safety and integrity. In our ever-connected world, it would be easy to construct such a process, and given that we are proposing a substantial change to our current Fourth Amendment regime, such work is not unexpected.

And there's one more—even were all of that not enough, we are wary of making bad law on bad facts, and even warier of making bad law on wild hypotheticals. We think such strategic behavior by criminal wrongdoers highly improbable, and ditto for the hypothetical police conduct ('Let's talk here, Xerxes; what do you have to say to me?'). Whereas, by contrast, the continued victimization of individual rights at the hands of current Fourth Amendment consent is not only highly probable—it is an hourly certainty. And if our

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[264] *Silverthorne Lumber Co.*, 251 U.S., at 392 ("If knowledge of [evidence] is gained from an independent source [it] may be proved like any other[ ].").

[265] Davis v. United States, 564 U.S. 229, 237, 240 (2011) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). In the words of the *Davis* Court:

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis' claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis' Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement.

Id. at 240 (citations omitted).

proposal as adopted were to make for some hard edge cases, we are entirely confident that courts and legislatures can figure them out.

V. NO TIME FOR HALF MEASURES

Taking stock, we have shown that the doctrine of Fourth Amendment consent is broken and in need of repair. We traced how that doctrine evolved from the Court's inadequate jurisprudence, and how this resulted in a multitude of harms—that the doctrine fails to fulfill the text and purpose of the Fourth Amendment, contravenes the Supreme Court's own conception of coercion, and indeed undercuts the very conception of rights undergirding our Constitution. We then proposed a solution to its pathologies: emergency consent.

Of course, as we have noted, we are hardly the first to recognize the problem, and at least several other solutions have been proposed.[266] So, why *this* solution, rather than other options? Here we endeavor to explain.

The first step is to identify the alternatives. We find three candidate solutions in the literature: *First*, we could focus on the "reasonableness" of the officer's request and conduct case-by-case review, asking whether it was appropriate to bypass the warrant and other justificatory requirements.[267] *Second*, we could require *Miranda*-type warnings for Fourth Amendment events, prior to obtaining an individual's consent.[268] *Third*, we could eliminate any kind of consent exception altogether—even emergency consent.[269]

A. *Scrutinizing Reasonableness*

One suggestion is to shift the focus from whether an individual consented to the requesting officer's conduct. This would include examining whether the officer's request was reasonable, looking to the reasons it was made and the scope of the ask.[270] It could also consider the amount and nature of coercion brought to bear.[271] In other words, courts would much more closely scrutinize

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[266] *See, e.g.*, sources cited *supra* note 46.

[267] *See, e.g.*, Burke, *supra* note 46, at 509; Simmons, *supra* note 46, at 775–76.

[268] *See generally* Gerard E. Lynch, *Why Not A* Miranda *for Searches?*, 5 OHIO ST. J. CRIM. L. 233 (2007).

[269] *See, e.g.*, Strauss, *supra* note 46, at 258–72. Another fix is Tracey Maclin's suggestion to restrict officers to one try, meaning to prohibit officers from approaching to seek consent after an individual has rejected a request. *See* Maclin, *supra* note 46, at 80. We are generally in agreement with Maclin that this would be a welcome limitation. But given the very high percentage of assents to officer requests, it would—as Maclin recognizes—not get the whole job done. Furthermore, we worry that the courts' interpretation of what constitutes a rejection of a request, as seen in contexts like revocation of consent and refusal of custodial interrogation, would further erode this proposal's efficacy.

[270] Burke, *supra* note 46, at 557–62.

[271] Simmons, *supra* note 46, at 814–24.

an officer's entire course of conduct leading to, and resulting in, any request for consent.

We do not object to looking at whether the officer's request and conduct were reasonable—after all, reasonableness is the textual Fourth Amendment criterion. We simply have a more categorical view of when such requests fail that standard. Our answer is that absent an alleged emergency, asking an individual to forgo constitutional rights in these contexts *is* unreasonable. Given the facts on the ground, these requests are inappropriate uses of the State's coercive power.

We might separate our argument into several components. First, we think any such tests, by rejecting the categorical answer, suggest that there are reasonable ways to encroach on an individual's privacy, short of the justification otherwise required by the Fourth Amendment (e.g., a warrant, probable cause, or the presence of emergency conditions). But, as we have set forth, on our view of the Fourth Amendment's purpose and text, that is simply incorrect.

Second, such multifactor "reasonableness" tests require difficult and potentially opaque balancing, and thus often fail to provide adequate guidance. They necessarily develop through the common-law method, in fact-specific ways, slowly enabling courts to create a consensus view. For at least some time, there will be lower-court disagreements, which is harmful as a matter of distributive justice as similarly situated defendants receive differential treatment. Sometimes, this is nonetheless the best method because there is no alternative; we simply must wait for wisdom to slowly show itself. But here we have argued what we believe is a clear and workable categorial alternative.

Third, a focus on officer conduct would motivate police to create clever pathways that abide by the formalities set forth by the courts, but that still effectively coerce individual assent. Every time courts decide that some *type* of consent request is acceptable, police departments will react accordingly, framing as many consent requests as possible in this form. But we are deeply skeptical that such moves will actually eliminate the taint of authority and the power differential between the individual and the officer. Consequently, those requests—despite being in now-sanitized form—will still be coercive, and the individual's consent will remain illusory.

Perhaps we are guilty of saying the same thing several times as we have tried to develop the argument; the crux is simply this: we think it categorically unreasonable for police to ask individuals to forgo their rights in these contexts, and we believe we have made that case.

B. Miranda-*Type Warnings*

We have already discussed *Miranda*-type warnings for the Fourth Amendment; indeed, our *less-volitional emergency consent* explicitly requires them.[272] We certainly think, then, that they are half a loaf, better than nothing.

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[272] *See supra* Part IV.

But there is good reason to believe such warnings will be largely ineffectual. Empirical evidence suggests that individuals confronting requests by officers assent *not* primarily because they aren't informed about their legal right to refuse.[273] Rather, it is because they either think that refusing will result in bad consequences (which might legally be the case), or because they process the request as a command on account of the authoritative nature of the officer.[274] And much of this happens at a nonrational level. We do not believe that warnings of one's theoretical rights will sufficiently change whether individuals assent.[275]

And here *Miranda* is a great case study. The empirical evidence shows that a very high percentage of people who receive *Miranda* warnings—despite the fact that it is always objectively better not to submit to interrogation—waive that right.[276] As noted above, law enforcement takes advantage of some of the same authoritative tactics otherwise used *during* interrogation to obtain that assent.[277] Given that consent searches and seizures are highly beneficial to law enforcement, *Miranda*-type warnings for Fourth Amendment events will receive the same two-step. And given the dynamic between individuals and law enforcement in any such request, we must endeavor to remove consent from the equation in all but the cases where it is necessary to serve important needs, which we have developed to be in emergency situations.

C. *Fully Eliminating Consent*

One might also prod our argument from the other direction: if consent is so injurious to our Fourth Amendment rights, why have any place for it at all? What's the need for emergency consent? Here it is helpful to revisit the motivating example we shared above: Suppose an individual connects a bizarre concern, like the presence of aliens in the home, with a request for emergency help.[278] Police are skeptical that this is an emergency—at least for the reasons the individual raises. But in the interest of being helpful, and also to ensure there is no more-routine sort of peril afoot, the police respond and enter the home. Upon entry, they see contraband.

Our view is that (1) this will be very rare, (2) that the police acted properly in responding to the individual's request, and (3) given the timeliness concerns

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[273] *See supra* Part III.A.

[274] *See id.*

[275] *Accord.* Ross, *Abolishing Police Consent Searches*, *supra* note 46, at 2029–30 ("[A] *Miranda*-style warning . . . neither changes the power imbalance nor assures the civilian that a refusal will not provoke negative repercussions."); State v. Carty, 790 A.2d 903, 911 (N.J. 2002) ("[H]indsight has taught us that [a notification-of-rights requirement] has not been effective in protecting our citizens' interest against unreasonable intrusions when it comes to suspicionless consent searches following valid motor vehicle stops.").

[276] Krishnamurthi, *supra* note 208, at 55 (collecting empirical citations).

[277] *Id.*

[278] *See supra* Part IV (explaining our proposed rule).

and the interest in positive citizen-police interactions, that police should not have to obtain a warrant to do so. A warrant would here create a hurdle to police's ability to respond to an individual's time-urgent request for aid, contrary to an important function of the police. In other words, a contrary rule would fail the famous 'Mr. Bumble test': "If the law supposes that . . . , the law is a[n] ass—a[n] idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."[279] Surely those police would be roundly criticized if they refused entry and then great harm ensued thereby, and that intuition seems right to us.

Now, one might suggest that police can respond, but they must thereby forfeit the ability to admit any evidence that they find in the course of responding. But not only might this motivate socially-detrimental strategic behavior on the part of potential defendants,[280] it would—on account of understandable risk aversion—disincentivize police response in emergency situations. And those downsides seem to offer little benefit since we believe the potential for police manipulation of emergency consent is very limited: remember, our core rule requires that the individual must approach the police. That will substantially curb the police's ability to strategically use the rule as a cudgel against the Fourth Amendment.

This once again raises the question, however, regarding the wisdom of our *less-volitional emergency consent*, where officers may obtain emergency consent despite having initiated contact with the individual.[281] We of course expressed hesitation to add this exception, for fear that it may duplicate the problems with consent. But police-citizen interactions can be fast-paced and dynamic, and there may be good reason for officers to initiate contact without, say, probable cause or reasonable suspicion. Suppose an individual seems fearful or otherwise out of it. Officers ask if everything is okay, and the individual states the concern about dangerous aliens. Here, we think the requirements (1) that the individual expresses a belief about the existence of an emergency (and *not* as a response to strategic officer coaching), (2) that the officers supply warnings, and (3) recording of the interaction can collectively mitigate strategic behavior by officers, and that, on the whole, including the exception is the best compromise. Nonetheless, if one disagrees it does not defeat our claims—it would merely mean the law ought to move forward with only our core doctrine of emergency consent.

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[279] CHARLES DICKENS, OLIVER TWIST 506–07 (Paper Mill Press 2018) (1838). Bumble is, of course, a villain, but even stopped clocks tell the time twice a day, and a great line is a great line.

[280] *See supra* Part IV (considering the hypothetical Xerxes).

[281] *See id.*

VI. CONCLUSION

As we were drafting this article during the summer of 2023, we noticed an opinion released by the District Court for the District of Minnesota.[282] The defendants, Anadelia Pacheco-Rivera and Victor Manuel Calixtro-Loya, were traveling in a Toyota Corolla along I-94 in Minnesota.[283] (Or, it might have been Andaelia—not Anadelia—Pacheco-Rivera; at least the slip opinion made available on Westlaw misspells the name either in the caption or in its first sentence.)[284] Whatever her first name—and to be clear we think that *does* matter—Pacheco-Rivera, who was driving, had the audacity to drive six miles over the speed limit, traveling 76 miles per hour in a 70-mile-per-hour zone.[285] *A Toyota Corolla*. *Six miles over the speed limit on an interstate*. For many an American, *ho hum*. But for Pacheco-Rivera and Calixtro-Loya, Spanish speakers who would rely upon an interpreter in the courtroom of Judge Nancy E. Brasel (a former federal prosecutor appointed to the bench by President Donald Trump in 2018),[286] it led to a traffic stop, a license and registration check, and a warning citation.[287] And then Minnesota State Trooper Douglas Rauenhorst, a white officer whose former narcotics canine was named Diesel,[288] decided—despite having no "reasonable, articulable suspicion of . . . criminal activity"[289]— to follow that with something more:

> [Rauenhorst] "Before you go, you don't have anything illegal in the car at all, . . . no drugs or anything like that?"
> [Pacheco-Rivera] "No."
> [Rauenhorst] "Is it ok if I run my K-9 around the car real quick? My drug dog."[290]

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[282] *See generally* United States v. Calixtro-Loya, No. 22-cr-252 (NEB/LIB), 2023 WL 4489670 (D. Minn. July 12, 2023).

[283] *Id.* at *1.

[284] *Id.*

[285] *Id.*

[286] *Nancy E. Brasel*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nancy_E._Brasel [https://perma.cc/5PUB-5R34].

[287] *Calixtro-Loya*, 2023 WL 448970, at *1. The officer making the traffic stop "believed both Defendants understood him speaking English because they responded to him." *Id.* at *3.

[288] *See* Minnesota State Patrol (@MnDPS_MSP), TWITTER (Jan. 9, 2021, 1:17 PM), https://twitter.com/MnDPS_MSP/status/1148672482154622978 [https://perma.cc/N6ML-W86X]; Sam Wilmes, *Trooper Assaulted Following Thursday Stop Identified as Rice County Man*, SOUTHERNMINN.COM (Dec. 21, 2018), https://www.southernminn.com/trooper-assaulted-following-thursday-stop-identified-as-rice-county-man/article_6d28b2ca-b519-5d76-9630-f54cdd4e3731.html [https://perma.cc/2LMC-CULG]. Trooper Rauenhorst's current dog is named Frizko. *Calixtro-Loya*, 2023 WL 4489670, at *1.

[289] *Calixtro-Loya*, 2023 WL 448970, at *1 n.1.

[290] *Id.* at *1.

Pacheco-Rivera's response was neither audible nor "visible on the [officer's] body camera."[291] But it must have been assent, figured Judge Brasel, "as Trooper Rauenhorst says, 'Ok,' and asks them to exit the vehicle."[292]

So consent rolls in America . . . day in, day out.[293] We know of no better way to make our case. That is not, we submit, an America the Founders would have accepted for themselves, and it is not one that we accept. It reads the Fourth Amendment as a hollow proclamation, rather than as a grand declaration of rights that promote human autonomy and dignity. James Otis famously objected to the British writs of assistance because they "place[d] the liberty of every man in the hands of every petty officer."[294] In 2024, it is not writs of assistance but rather the Court's doctrine of Fourth Amendment consent. We can do better, and, hopefully, we have made the case for how that slightly better world can readily be achieved.

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[291] *Id.*

[292] *Id.*

[293] The court held there was voluntary consent:

> Defendants are adults, and no one suggests that they were under the influence of alcohol or drugs at the time of the stop. Trooper Rauenhorst asked in a cordial and relaxed manner about the K-9 search. He did not display his weapon, raise his voice, place restraints on Defendants, or promise them anything before receiving Pacheco-Rivera's consent. Defendants were seated in the car and not under arrest when Pacheco-Rivera consented to the K-9 search, and Trooper Rauenhorst did not ask Defendants to exit the Corolla until after Pacheco-Rivera consented. The stop and K-9 search took place on a busy interstate in daylight. And Defendants never "objected to the search," but rather "stood by silently" as it occurred. "Nothing about this encounter shows that [Pacheco-Rivera's] will was so 'overborne and (her) capacity for self-determination so critically impaired' that '[her] consent to search must have been involuntary.'"

Id. at *2 (alterations in original) (citations omitted).

[294] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (quoting Otis).