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Making the Impractical, Practical: A Modest and Overdue Approach to Reforming Fourth Amendment Consent Search Doctrine

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MAKING THE IMPRACTICAL, PRACTICAL: A MODEST AND
OVERDUE APPROACH TO REFORMING FOURTH
AMENDMENT CONSENT SEARCH DOCTRINE

ABSTRACT

At some point in your life, you may have a personal encounter with a police officer. During that moment, you may feel utterly powerless, especially if you do not know your rights. One important right that police are not required to inform people of is their right to deny an officer's request to search their property. Forty-eight years ago, the Supreme Court made its position clear in *Schneckloth v. Bustamonte* that requiring law enforcement to provide citizens with this warning would be "thoroughly impractical." Since then, the relationship between law enforcement and society—especially communities of color—has gradually deteriorated, and states have slowly turned away from *Schneckloth*'s rationale. As such, this Note revisits *Schneckloth* and takes a closer look at the inconsistencies within the Court's current consent search doctrine. This Note also explores the Court's problematic and unrealistic "totality of the circumstances" approach and the realities of consenting as a person of color. Ultimately, this Note proposes that all states adopt a modest approach to consent searches by requiring all police officers to provide warnings before requesting consent.

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INTRODUCTION

Whether you are walking down the street, driving in your car, or sitting in your living room, everyone is susceptible to being confronted by law enforcement and asked some version of the question, “*Do you mind if I just take a look?*” Although a seemingly innocent question, how an individual responds is crucial to determining how events transpire afterwards. Maybe you think police should be allowed to search your property only after you respond with an unequivocal “yes” to the officer’s request. While reasonable, in reality, responses from “I guess” to simply raising one’s hands above their head and not objecting to the search have allowed police to legally conduct numerous consent searches daily.¹

Consent searches are not only common practice among law enforcement across the nation,² but the Supreme Court explicitly affirms the value and necessity of these searches.³ While valuable and arguably necessary, one must ask what role consent searches play in exacerbating the ever-growing tensions between police and the general public, particularly within minority communities. In recent years, news outlets, social media, and “Black Lives Matter”⁴ protests across the nation have brought to the forefront the disturbing reality of how police brutality, abuse of power, and a lack of accountability have resulted in countless deaths of unarmed minorities at the hands of law enforcement.⁵ From the murder of Michael Brown in 2014, to

1. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 199 (2002).

2. *See infra* note 31 and accompanying text.

3. *See Drayton*, 536 U.S. at 207 (“In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent.”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (explaining how consent searches are actually valuable because, in situations where a search “proves fruitless,” the target of the search is able to avoid the “stigma and embarrassment” of arrest or a “more extensive search pursuant to a warrant”).

4. Black Lives Matter Global Network Foundation, Inc., founded in 2013 after the acquittal of George Zimmerman, is a global organization that was created to stand against white supremacy and fight for the safety and lives of Black Americans nationwide. Black Lives Matter About Page, <https://blacklivesmatter.com/about/> (last visited Nov. 4, 2021).

5. Alec Kraus, *The Consent Search Warning Argument: Procedural Justice and What a Warning Might Do for Police Legitimacy*, *Honors Theses*, W. MICH. UNIV., 1, 3 (2016).

George Floyd in 2020, people across the nation have been forced to acknowledge the need for police reform in order to address the injustices Americans have either witnessed or experienced over the years.⁶

While media headlines and protests have mostly focused on police brutality,⁷ the conversation does not—and should not—stop there. Although state legislatures are now looking closer at issues such as eliminating qualified immunity⁸ and “defunding the police,”⁹ one area that should not be overlooked is consent searches. In 2015, approximately 53.5 million individuals over the age of sixteen experienced some form of contact with police during the prior year.¹⁰ And in each of these interactions police naturally possessed the authority to legally seek consent to search the individual’s property.¹¹ While consent searches are a widely recognized exception to the Fourth Amendment,¹² many acknowledge that “most people don’t willingly consent to police searches.”¹³ And the cases that do make it to court rarely result in the invalidation of consent searches on grounds that the search was involuntary.¹⁴

This Note seeks to add to existing legal scholarship on consent searches by pushing for a change that is long overdue: having all states implement a model statute requiring police officers to inform individuals of their right to deny consent before conducting consent searches. In *Schneckloth v. Bustamonte*,¹⁵ the Supreme Court’s seminal consent search case, the Court made its position clear¹⁶ that the Constitution does not require “informed consent.”¹⁷ Since then, scholars have argued, *inter alia*, that the Supreme Court should overturn *Schneckloth*,¹⁸ that “voluntariness” should be reviewed *de novo* on

6. See, e.g., *infra* notes 190–92 and accompanying text.

7. Kraus, *supra* note 5, at 3.

8. See *infra* notes 193–202 and accompanying text.

9. See *infra* notes 204–06 and accompanying text.

10. ELIZABETH DAVIS, ANTHONY WADE & LYNN LANGTON, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, 1 (2018).

11. See, e.g., *Drayton*, 536 U.S. at 201 (“Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.”).

12. See *infra* note 27 and accompanying text.

13. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2001).

14. *Id.* at 221.

15. 412 U.S. at 218.

16. See *infra* notes 56–59 and accompanying text.

17. Informed consent means consent that is given only after being informed of one’s constitutional right to deny consent. See, e.g., James C. McGlinchy, Note, “Was That a Yes or a No?” *Reviewing Voluntariness in Consent Searches*, 104 VA. L. REV. 301, 318 (2018).

18. See, e.g., Brian Gallini, *Schneckloth v. Bustamonte: History’s Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233 (2012).

appeal,¹⁹ and that consent searches should be eliminated altogether.²⁰ This Note instead urges states to reevaluate their perceived notions of the importance of informed consent searches and adopt the informed consent legislation that the *Schneekloth* Court deemed “impractical.”²¹

Part I of this Note contextualizes Supreme Court jurisprudence on consent searches and their place within the Fourth Amendment. Part II takes a critical look at the problematic discord between the Supreme Court’s stance on consent, focusing on the “voluntariness” test the Court established and the reality of consent searches. Part III analyzes the impact of recent police brutality protests on current and future criminal justice reform. Part IV sets out a modest proposal of legislative reform for all states to adopt. And the Conclusion addresses anticipated concerns about implementing such a proposal. Developed by analyzing current informed consent policies adopted by various states and police departments, the model statute proposes a uniform approach to consent searches that is most effective if adopted by every state.

I. HOW WE GOT HERE: THE SUPREME COURT’S FAULTY INTERPRETATION OF CONSENT

The Fourth Amendment of the U.S. Constitution guarantees to every individual “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”²² As unambiguously expressed by the Supreme Court, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, *free from all restraint or interference of others*, unless by clear and unquestionable authority.”²³ Where the Fourth Amendment is implicated, the “central inquiry” is whether the government’s invasion of an individual’s reasonable expectation of privacy was reasonable given the circumstances.²⁴ The underlying presumption is that searches and seizures are reasonable only if conducted pursuant to a valid warrant based on probable cause.²⁵

Notwithstanding this formal interpretation of the Fourth Amendment, the Supreme Court has recognized certain exceptions to the

19. See, e.g., McGlinchy, *supra* note 17, at 301.

20. See, e.g., Strauss, *supra* note 13, at 211.

21. See *infra* note 60 and accompanying text.

22. U.S. CONST. amend. IV.

23. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis added).

24. Terry v. Ohio, 392 U.S. 1, 19 (1968).

25. Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 516 (2016).

warrant requirement.²⁶ One such exception to the Fourth Amendment warrant and probable cause requirements is consent searches.²⁷ As mentioned earlier, in a standard scenario, a police officer asks an individual for their consent to search either their car, their house, or other property for whatever reason the officer proffers.²⁸ Individuals have two options: expressly give or deny consent.²⁹ They can permit the officer to search their property or tell the officer that they are invoking their constitutional right to deny the officer permission to conduct the search.³⁰

It is estimated that over ninety percent of warrantless searches occur via the consent exception to the traditional requirements of the Fourth Amendment.³¹ Given the frequency of consent searches, it is important to make clear at the outset that not all police searches are *valid* searches—there are many circumstances where an individual’s “yes” does not actually mean “yes.”³² It is this disturbing reality of consent searches that serves as the premise for this Note. But in order to truly understand the realities of consent searches and where they fail, it is important to first see how the Supreme Court’s handling of consent searches, beginning over forty years ago, shaped how they are conducted today.

A. *Schneckloth v. Bustamonte: The Supreme Court’s Seminal Consent Search Case*

The Supreme Court first recognized the validity of consent searches in 1946.³³ But it was not until the Court decided *Schneckloth* in 1973 that the Court set forth the standard for voluntary consent searches.³⁴

In *Schneckloth*, a police officer executed a routine traffic stop after noticing a vehicle with a burned out headlight and license plate

26. See *Schneckloth*, 412 U.S. at 219 (“It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is ‘*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’”) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

27. *Id.*

28. See, e.g., *Drayton*, 536 U.S. at 198 (involving an officer searching luggage on a bus to deter the transportation of contraband); *Schneckloth*, 412 U.S. at 220 (involving an officer requesting permission to search a vehicle after pulling it over for a traffic violation).

29. See *Schneckloth*, 412 U.S. at 233 (searches carried out on the basis of consent that is not voluntarily given will be deemed invalid).

30. *Id.*

31. Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005).

32. See McGlinchy, *supra* note 17, at 305.

33. See *Davis v. United States*, 328 U.S. 582 (1946); see also *Zap v. United States*, 328 U.S. 624 (1946).

34. Strauss, *supra* note 13, at 216.

light.³⁵ Neither the driver nor four of his five passengers, including Bustamonte, were able to produce a driver's license.³⁶ In that moment, the officer asked everyone to exit the vehicle and asked for consent to search the car.³⁷ One of the passengers responded, "[s]ure, go ahead," and then proceeded to assist the officer by opening the trunk of the car.³⁸ None of the passengers were threatened with arrest prior to the officer conducting his search.³⁹ The search ultimately uncovered three stolen checks which were later submitted into evidence and used to convict Bustamonte of possession of a completed check with intent to defraud.⁴⁰ Bustamonte unsuccessfully moved to suppress the evidence used against him on the grounds that "the search was obtained in a coercive atmosphere, . . . the consent was therefore involuntary[,] and [therefore] the . . . search [was] consequently illegal."⁴¹

On appeal to the Supreme Court, both sides conceded that not only were consent searches constitutionally permissible, but that the State was required to prove that the consent was "freely and voluntarily given."⁴² The issue before the Court was what exactly the State had to prove in order to demonstrate that consent was in fact "voluntarily" given.⁴³ In order to determine how best to conceptualize what "voluntary" meant, the Court sought guidance from its line of Fifth and Fourteenth Amendment cases involving the voluntariness of a defendant's confession during police interrogations.⁴⁴ The Court concluded that, because "[t]hose cases yield no talismanic definition of 'voluntariness,'"⁴⁵ it would instead base its view of voluntariness on two competing policy considerations: (1) the need for law enforcement to conduct consent searches and (2) ensuring the absence of coercive, unfair, and even brutal police tactics.⁴⁶ The Court also found it particularly persuasive that in its "confession" cases, the Court opted to assess the totality of the circumstances instead of basing its decision on one controlling factor.⁴⁷ As a result,

35. *Schneckloth*, 412 U.S. at 220.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *People v. Bustamonte*, 76 Cal. Rptr. 17, 18 (Ct. App. 1969).

41. *Id.* at 20.

42. *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

43. *Id.* at 223.

44. *Id.*

45. *Id.* at 224.

46. *Id.* at 225, 227.

47. *Id.* at 226.

the Court concluded that “‘voluntar[iness]’ . . . is a question of fact to be determined from the totality of all the circumstances.”⁴⁸

One very crucial aspect of the *Schneckloth* Court’s decision was whether voluntary consent required an individual to be knowledgeable of their right to deny an officer’s request to search their property.⁴⁹ Unlike the Ninth Circuit, which vacated the order denying Bustamonte’s writ for habeas corpus because the State failed to show that the defendant was knowledgeable of his right to refuse consent,⁵⁰ the Supreme Court unequivocally stated that an individual’s “knowledge of the right to refuse consent [was but] *one* factor to . . . take[] into account.”⁵¹ The State need not prove that the target of a consent search had such knowledge in order for the target’s consent to be valid. So, courts may deem consent voluntary without the police having advised the individual of their right to say “no.”⁵²

As previously mentioned, in order for the Court to conceptualize “voluntariness” in the context of consent searches, the Court sought guidance from its confession cases.⁵³ For a confession to be voluntary, the Fifth Amendment requires officers to read suspects their *Miranda* rights.⁵⁴ In *Miranda*, the Court recognized that because of the inherently intimidating and coercive nature of police interrogations, certain procedural protections are necessary to protect a suspect’s Fifth Amendment rights.⁵⁵ In *Schneckloth*, though, the Court refrained from importing the same Fifth Amendment protections to Fourth Amendment consent searches.⁵⁶ The Court first expressed that requiring informed consent would “create serious doubt whether consent searches could continue to be conducted.”⁵⁷ Requiring proof of an individual’s knowledge would, according to the majority, impose a heavy burden on the State and would make introducing evidence found during a search more difficult.⁵⁸ The majority not only

48. *Schneckloth*, 412 U.S. at 227.

49. Strauss, *supra* note 13, at 219.

50. *Bustamonte v. Schneckloth*, 448 F.2d 699, 700–01 (9th Cir. 1971), *rev’d*, 412 U.S. 218 (1973).

51. *Schneckloth*, 412 U.S. at 227 (emphasis added).

52. Burke, *supra* note 25, at 521.

53. *Schneckloth*, 412 U.S. at 223.

54. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (*Miranda* explains that before subjecting a suspect to interrogation, they must first be informed of their Fifth Amendment right to remain silent. Anything they say can and will be used against them in court. The suspect has the right to have counsel present. And if the suspect cannot afford counsel, one will be provided to them.).

55. *Id.* at 458.

56. Strauss, *supra* note 13, at 219.

57. *Schneckloth*, 412 U.S. at 229.

58. *Id.* at 230 (“Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that

dismissed a proof of knowledge requirement, but it rejected the idea of having officers advise individuals of their right to refuse consent.⁵⁹ Indeed, the Court went as far as saying that “it would be *thoroughly impractical* to impose on the normal consent search the detailed requirements of an effective warning.”⁶⁰ To explain why an informed consent requirement would be impractical, the Court expressed that:

Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person’s home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, . . . a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably far removed from “custodial interrogation” where, in *Miranda v. Arizona*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.⁶¹

Extremely reluctant to extend *Miranda*’s rationale, the Court drew a distinction between police interrogations—which require certain safeguards to avoid coercion—and consent searches, which usually occur on “familiar territory” rather than a police station, therefore decreasing the presumption of coercion.⁶² Operating under this belief that there is a “vast difference” between Fifth Amendment trial rights and the rights guaranteed under the Fourth Amendment,⁶³ the Court rejected the argument that voluntary consent required proof of a formal “waiver” of one’s Fourth Amendment right.⁶⁴ Because the “knowing and intelligent waiver” requirement had been applied only to constitutionally protected rights meant to ensure a criminal defendant’s fair trial,⁶⁵ the Court saw no reason to extend this standard to consent searches.⁶⁶

search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness.”).

59. *Id.* at 231.

60. *Id.* (emphasis added).

61. *Id.* at 231–32 (citations omitted).

62. *Id.* at 247.

63. *See Schneckloth*, 412 U.S. at 241.

64. *Id.* at 235.

65. *Id.* at 237.

66. *See id.* at 241.

The *Schneckloth* majority, therefore, found no reason to depart from the status quo—holding that consent must be voluntary, and not a result of duress or coercion, express or implied.⁶⁷ The voluntariness of consent is measured by analyzing the totality of the circumstances, and because officers are not required to inform individuals of their right to deny consent, knowledge of that right is only *one* factor to take into account.⁶⁸

*B. Schneckloth Extended: Ohio v. Robinette*⁶⁹ and *United States v. Drayton*⁷⁰

1. Ohio v. Robinette

Twenty-three years after deciding *Schneckloth*, the Supreme Court had to decide whether the Fourth Amendment required officers to advise individuals that they are “free to go” before their consent can be deemed voluntary.⁷¹ In *Robinette*, police initially stopped the defendant for speeding.⁷² After checking and then returning the defendant’s driver’s license, the officer asked whether the defendant had illegal contraband, weapons, or drugs in his car.⁷³ The defendant responded “no” and consented to the officer searching his vehicle which subsequently revealed controlled substances.⁷⁴

On appeal to the Supreme Court, the Court unequivocally rejected the *per se* rule established by the Supreme Court of Ohio and held that advising defendants they are “free to go” is unnecessary to obtain valid consent.⁷⁵ Reaffirming its decision in *Schneckloth*, the Court emphasized that voluntariness under the Fourteenth Amendment is determined by evaluating the circumstances surrounding each encounter.⁷⁶ Though narrow in its holding, the Court’s decision presumes that there are circumstances when an individual stopped by police would feel free to leave before being expressly told that they have the right to do so.⁷⁷ Ultimately, the Court maintained its

67. *Id.* at 248.

68. *See id.* at 249 (emphasis added).

69. 519 U.S. 33 (1996).

70. 536 U.S. 194 (2002).

71. *See Robinette*, 519 U.S. at 35.

72. *Id.*

73. *Id.* at 35–36.

74. *Id.* at 36.

75. *Id.* at 39–40. The Supreme Court of Ohio held that under these circumstances, “consensual interrogation[s] must be preceded by the phrase ‘At this time you legally are free to go’ or by words of similar import.” *Id.* at 36.

76. *Robinette*, 519 U.S. at 39–40.

77. Burke, *supra* note 25, at 527.

position that for the most part, *per se* rules are never appropriate in the Fourth Amendment context,⁷⁸ and the totality of the circumstances standard remains the best approach.⁷⁹

2. United States v. Drayton

Six years after *Robinette*, the Supreme Court had to determine whether the Fourth Amendment required police officers to advise bus passengers of their right not to cooperate with questioning and consent searches.⁸⁰ In *Drayton*, defendants Christopher Drayton and Clifton Brown, Jr. were on board a Greyhound bus when police officers boarded as part of a routine drug and weapons search.⁸¹ According to one of the officers, “passengers who declined to cooperate . . . or who chose to exit the bus at any time would have been allowed to do so,” but “most people are willing to cooperate.”⁸² After obtaining consent to search the defendants bag, one officer asked for consent to search Brown’s person.⁸³ Brown responded, “[s]ure,” and after detecting “hard objects similar to drug packages detected on other occasions,” officers took Brown into custody.⁸⁴ Similarly, officers asked to search Drayton’s person, and instead of articulating his consent, Drayton merely lifted his hands so officers could pat him down.⁸⁵ Officers subsequently arrested Drayton after detecting the same hard objects on his person.⁸⁶ A further search revealed that these “hard objects” were in fact bundles of drugs.⁸⁷

At trial, the defendants unsuccessfully moved to suppress the drug evidence, claiming that their consent to the search was invalid.⁸⁸ Finding in favor of the defendants, however, the Court of Appeals held that bus passengers “do not feel free to disregard police officers’ requests to search absent ‘some positive indication that consent could have been refused.’”⁸⁹ After granting certiorari, the Supreme Court first emphasized that under the circumstances, a reasonable person would not have felt barred from leaving the bus or denying consent to the encounter.⁹⁰ Because the officers did not use force or

78. See *Robinette*, 519 U.S. at 39–40.

79. *Id.*

80. *Drayton*, 536 U.S. at 197.

81. *Id.*

82. *Id.* at 198.

83. *Id.* at 199.

84. *Id.*

85. *Id.*

86. *Drayton*, 536 U.S. at 199.

87. *Id.*

88. *Id.* at 199–200.

89. *Id.* at 200 (quoting *United States v. Washington*, 151 F.3d 1354, 1357 (1998)).

90. *Id.* at 204.

intimidating movements, did not waive their weapons, did not block the bus exits, and did not threaten the defendants, the encounter was not coercive.⁹¹ Consistent with its decisions in *Schneckloth* and *Robinette*, the Court made clear that a presumption of invalidity will not attach if citizens consent without a disclosure from police that they are free to refuse to cooperate.⁹² According to the Court, “police officers act in full accord with the law when they ask citizens for consent.”⁹³ And because it is up to the citizen to make police aware of their wishes, “when this exchange takes place, it dispels inferences of coercion.”⁹⁴

II. CURRENT CONSENT DOCTRINE: PROBLEMATIC AND INCONSISTENT

Since 1973, the Supreme Court has espoused a narrative that the voluntariness of one’s consent is best determined by examining the totality of the circumstances.⁹⁵ Although the Court continues to maintain this interpretation of the Fourth Amendment, *Schneckloth* has not gone without critique.⁹⁶ Not only was the decision criticized when it was announced, the decision is still subject to harsh criticism today.⁹⁷ This section takes a closer look at the discord between the Court’s reasoning in *Schneckloth*, the “totality of the circumstances” approach as applied, and the reality of consent searches.

A. *The Court Got It Wrong: Criticisms of Schneckloth’s Rationale from the Bench*

Some of the first arguments in strong opposition to the Court’s ruling in *Schneckloth* came from dissenting Justices Brennan and Marshall.⁹⁸ In his dissent, Justice Brennan expressed one of the more common criticisms of the majority’s ruling: that there is no way an individual can waive a constitutional guarantee without first knowing it existed.⁹⁹ Taking a similar position, Justice Marshall questioned how “a decision made without knowledge of available alternatives can be treated as a choice at all.”¹⁰⁰ To Justice Marshall, the concept is

91. *Id.*

92. *Drayton*, 536 U.S. at 207.

93. *Id.*

94. *Id.*

95. *Schneckloth*, 412 U.S. at 227.

96. See Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 52 (2008).

97. *Id.*

98. See *Schneckloth*, 412 U.S. at 276–77.

99. *Id.* at 277.

100. *Id.* at 284.

simple: giving consent means making a “knowing” choice, and consent cannot be reliable if the individual did not know they could refuse consent.¹⁰¹

Whereas the *Schneckloth* majority justified its holding by asserting that “it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,”¹⁰² Justice Marshall logically contended that this argument of practicality was unwarranted.¹⁰³ Using the example of the FBI’s routine use of consent search warnings, Justice Marshall emphasized the possibility that police can give warnings when asking for consent without anything “disastrous” happening.¹⁰⁴ By refusing to implement an effective warning requirement, the Court not only allows police to continue “capitaliz[ing] on the ignorance of citizens,” but it also ignores the limitations the Fourth Amendment places on police behavior.¹⁰⁵

*B. And What Happened to Miranda v. Arizona?*¹⁰⁶

One of the most important factors that influenced the *Schneckloth* decision was the Court’s desire not to create a second *Miranda*.¹⁰⁷ In *Miranda*, the Court held that police officers are required to inform persons subjected to custodial interrogations of their right to remain silent and their right to counsel.¹⁰⁸ Given the inherently coercive and intimidating nature of police interrogations, knowledge of these rights before interrogations can begin is necessary to protect the basic rights enshrined in the Fifth Amendment.¹⁰⁹ In *Schneckloth*, however, the Court did not possess the same level of skepticism about consent searches being inherently coercive like police interrogations.¹¹⁰ Instead, the Court reasoned that since consent searches “normally occur on a person’s own familiar territory,” there cannot be any inherently coercive tactics being used.¹¹¹ As discussed in further detail below, the Court’s assertion here is simply untrue.¹¹²

101. *Id.* at 284–85.

102. *Id.* at 231.

103. *Id.* at 286.

104. *Schneckloth*, 412 U.S. at 287.

105. *Id.* at 288.

106. 384 U.S. at 436.

107. Maclin, *supra* note 96, at 54.

108. *Miranda*, 384 U.S. at 467–73.

109. *Id.* at 467–68.

110. *Schneckloth*, 412 U.S. at 246 (“The considerations that informed the Court’s holding in *Miranda* are simply inapplicable in the present case.”).

111. *Id.* at 247.

112. See discussion *infra* Section II.D.

Whether consent searches occur on the side of the road or in front of an individual's home, it is inevitable that individuals will feel some level of coercion given the mere fact that they are dealing with police.¹¹³ Defendants have testified,¹¹⁴ and courts have acknowledged¹¹⁵ that an officer's request for consent is routinely perceived as an imperative backed by law rather than an option.¹¹⁶

The Court also justified distinguishing *Miranda* from *Schneckloth* by arguing that there is a "vast difference" between Fifth Amendment rights necessary to ensure a fair criminal trial and the rights guaranteed by the Fourth Amendment.¹¹⁷ While the "knowing and intelligent" waiver requirement is appropriate under the Fifth Amendment, the Court was concerned that extending this requirement to consent searches would inhibit the ability of police to conduct consent searches.¹¹⁸

The inconsistencies in the Court's approach in *Miranda* compared to *Schneckloth* are concerning.¹¹⁹ And after *Schneckloth* was decided, scholars agreed that the Court's decision represented a deviation from how the *Miranda* Court would have treated consent law.¹²⁰ Scholars have argued that this drastic shift in the Courts' perspective is also ill-founded since circumstances surrounding consent searches are not all that different from those at issue in *Miranda*.¹²¹ In fact, consent searches might even be more inherently

113. Strauss, *supra* note 13, at 235.

114. *Id.* at 241.

115. *Id.*

116. *Id.*

117. *Schneckloth*, 412 U.S. at 241.

118. Strauss, *supra* note 13, at 220.

119. Maclin, *supra* note 96, at 54.

120. It is important to note the historical and political factors that were at play during this time. *Miranda*, written at the height of the Warren Court's power, represented the Court's landmark criminal procedure decision at the time. Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 238 (2007). In contrast, when the Burger Court decided *Schneckloth*, the Court "was simply not in the business of expanding the rights of criminal defendants." Gallini, *supra* note 18, at 268.

Between *Miranda* in 1966 and *Schneckloth* in 1973, the composition of the Court also changed drastically. Nixon's four newly appointed conservative Justices, along with *Miranda* dissenters Justices Stewart and White, made up the *Schneckloth* majority. And unsurprisingly, the remaining members of the *Miranda* majority (Justices Brennan, Douglass, and Marshall) dissented. Lynch, *supra*, at 238.

121. See, e.g., Strauss, *supra* note 13, at 219 n.29 ("Except where consent is requested in a person's home, it is often sought in areas unfamiliar and intimidating. How many of us feel like we are on 'familiar territory' when pulled over to the side of the road by a police car or two?"); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 (2002) ("[O]bservers outside of the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse. Members of the Court are themselves such outside observers . . .").

coercive than the Court admits.¹²² What is even more puzzling is that one of the underlying motivations for the *Miranda* decision was the Court's desire to avoid the complications faced when trying to apply a voluntariness standard, whereas the *Schneckloth* majority made no effort to reconcile the cases, and instead "blithely" adopted this approach.¹²³ Unlike in *Miranda*, where the coercive aspects of police interrogation tactics were at the forefront of the Court's mind, the Court in *Schneckloth* showed no concern for limiting opportunities for police abuse of authority.¹²⁴

C. *The Totality of the Circumstances Test as Applied*

Another problematic aspect of the Court's rationale in *Schneckloth* is that it left courts, police officers, and litigants with a vague "totality of the circumstances" approach that has proven rather difficult to implement and understand.¹²⁵ This lack of understanding and uniformity has led to consent search doctrine not working as it should and courts reaching improper conclusions as a result.¹²⁶

In *Schneckloth*, the Court stated that when looking at the surrounding circumstances, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."¹²⁷ Engaging in this subjective analysis should seem necessary, since determining if a defendant voluntarily consented implicates specific characteristics of that person.¹²⁸ However, while the Court's statement suggests that defendants can attempt to invalidate their consent based on subjective factors, such as intelligence or level of education, courts rarely analyze these factors.¹²⁹ Even in cases where these subjective traits are taken into consideration, they are hardly dispositive and rarely used to exclude evidence.¹³⁰ Instead, consent searches are regularly upheld "except in extreme cases that almost always focus not on subjective factors of the suspect, but on the behavior of the police."¹³¹

122. Matthew Phillips, Note, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1188 (2008).

123. Lynch, *supra* note 120, at 239.

124. *Id.*

125. Strauss, *supra* note 13, at 220–21.

126. Phillips, *supra* note 122, at 1189.

127. *Schneckloth*, 412 U.S. at 229.

128. Simmons, *supra* note 31, at 778.

129. Phillips, *supra* note 122, at 1189.

130. *Id.*; see also Strauss, *supra* note 13, at 222 (finding "only a handful of cases—out of hundreds of decisions—in which the court analyzed the suspect's particular subjective factors. [And of those cases,] only a few courts found them compelling" after reviewing years of post-*Schneckloth* consent search decisions); Maclin, *supra* note 96, at 62.

131. Strauss, *supra* note 13, at 227.

In 2006, Brian Sutherland conducted a study to test the effect of subjective factors on federal district court decisions to suppress evidence obtained after consent searches.¹³² The main motivation behind this study was to confirm or dispel yet another critique of *Schneckloth* that argues that “voluntariness” is nothing more than legal fiction.¹³³ As such, a strong correlation would show that courts routinely give weight to certain subjective factors, while a weak correlation would illustrate that these factors are given “inconsistent weight, are inconsistently utilized, or are less important than other factors, such as police misconduct.”¹³⁴ Since the totality of the circumstances standard allows courts to rely on any factor relevant to the voluntariness inquiry, Sutherland focused on factors that were “relevant and predictive of the trial court’s decision, susceptible to reliable and valid measurement, and appear in many or more judicial opinions in the sample.”¹³⁵ The factors used for the study were: police use of a consent form, whether the defendant was in custody, Fourth Amendment violations prior to asking for consent, whether the defendant was at home, evidence of language barriers, police use of threats, and whether police brandished their weapons.¹³⁶

Of the 142 cases in Sutherland’s sample, federal district courts granted the defendant’s motion to suppress evidence for lack of voluntary consent in only thirty-five cases.¹³⁷ The sample data indicated that the factor most likely to lead a court to invalidate consent is a Fourth Amendment violation by the police.¹³⁸ Meanwhile, subjective factors related to each defendant barely received any discussion in the district courts’ decisions.¹³⁹ Sutherland concluded that the study supported the argument that “voluntariness” is merely legal fiction.¹⁴⁰ Instead of courts actually taking into account “the possibly vulnerable subjective state of the person who consents” like *Schneckloth*

132. Brian A. Sutherland, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2195 (2006).

133. *Id.* at 2199. Critics making this “legal fiction” argument emphasize that the Court’s flawed understanding of voluntariness ignores psychological insights into consent and compliance. See Nadler, *supra* note 121, at 155 (noting 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”).

134. Sutherland, *supra* note 132, at 2195.

135. *Id.* at 2206.

136. *Id.* at 2209–12.

137. *Id.* at 2214.

138. *Id.*

139. Sutherland goes on to highlight that, in ninety-four of the 142 cases in the sample, the district court did not review any of the subjective traits relevant to the defendants. *Id.* at 2215.

140. Sutherland, *supra* note 132, at 2195.

appeared to instruct,¹⁴¹ courts are more likely to find consent voluntary solely in the absence of police misconduct.¹⁴²

Sutherland's study serves as just one example that illustrates how *Schneckloth* missed the mark by dismissing the need for a more rigid standard—like in *Miranda*—and instead focusing on an analysis of surrounding circumstances.¹⁴³ Although the Court reasoned that its decision served to balance the need for consent searches and the need to protect citizens from coercion, in practice, the doctrine “has moved towards a purely objective analysis of the officer's actions.”¹⁴⁴

D. The Undeniably Coercive Reality of Consent Searches

Probably the most concerning aspect of current consent doctrine and the voluntariness standard is how detached it is from the reality of consent searches.¹⁴⁵ It is no secret that most individuals would not feel free to deny a police officer's request.¹⁴⁶ It is also not hard to understand why people are more likely to feel coerced when dealing with police officers.¹⁴⁷ Yet, from *Schneckloth* to *Drayton*, the Supreme Court rendered judgments about the voluntariness of each defendant's actions by trying to use their own intuition to decide what a reasonable person would have done under those specific circumstances.¹⁴⁸ Where the Courts' reasoning falls short, however, is in its failure to give proper weight to the psychological state of an individual (how the individual feels) rather than focusing on their free will to refuse consent.¹⁴⁹

141. *Schneckloth*, 412 U.S. at 229.

142. Sutherland, *supra* note 132, at 2195.

143. See Nadler, *supra* note 121, at 155 (explaining the results of several studies which indicate the *Schneckloth* rule does not reflect the psychology of the situation which compels individuals to act as if they cannot choose to refuse the police officer's search).

144. Phillips, *supra* note 122, at 1189; see Nadler, *supra* note 121, at 162 (“The *Schneckloth* Court's emphasis on balancing order and liberty has receded in the background.”); Simmons, *supra* note 31, at 779 (“It is an open secret that the subjectivity requirement of *Schneckloth* is dead.”). But see John M. Burkoff, *Search Me?*, 39 TEX. TECH. L. REV. 1109, 1132–36 (2007) (arguing that under the Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), courts may be more inclined to consider subjective factors, such as “widely shared social expectations”).

145. See Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 176 (1991) (arguing that current guidelines for consent searches are unreasonable when compared to the reality of its components).

146. Strauss, *supra* note 13, at 236 (“Numerous scholars and even judges have made the very basic observation that most people would not feel free to deny a request by a police officer.”).

147. Nadler, *supra* note 121, at 174.

148. *Id.* at 168.

149. *Id.* at 166, n.28.

Looking from the outside in, it might never make sense why an individual in possession of incriminating evidence would turn around and consent to a search of their property.¹⁵⁰ But the reality is, more often than not, people will acquiesce to police requests in situations where there is no benefit in doing so.¹⁵¹ Setting aside for a moment the fact that many people are likely unaware that they can refuse consent requests, many consent to searches not because they actually want to, but because of the police officers' inherent authority.¹⁵² And as authority figures, police do not have to use coercive statements to get what they want;¹⁵³ the uniform, badge, gun, and power already leave individuals interpreting "requests" as commands.¹⁵⁴

1. *Consenting as a Person of Color*

People of color in America do not get treated the same by police compared to their white counterparts.¹⁵⁵ Still, current consent doctrine fails to properly account for the subjective reality of people of color "who may feel that they have no choice but to obey even a 'request' from a police officer."¹⁵⁶ Unfortunately, many people of color—especially African Americans—know that refusing to comply with police requests can be deadly.¹⁵⁷ In his dissent, Justice Alan Page articulated that as a Black man, he knew that "it [was] best to comply carefully and without question to the officer's request," which is a lesson he has also taught to his children.¹⁵⁸

Justice Page's sentiment expressed twenty two years ago still rings true for many people of color today.¹⁵⁹ It should therefore not

150. *Id.* at 187.

151. Strauss, *supra* note 13, at 239.

152. See Nadler, *supra* note 121, at 173 (explaining that whether an individual acquiesces turns on whether the requester holds a position of authority because those with authority greatly influence our decisions).

153. *Id.* at 189.

154. Maclin, *supra* note 96, at 28 n.6.

155. Strauss, *supra* note 13, at 243.

156. *Id.* at 235.

157. *Id.* at 242–43. For example, in July of 2015, Sandra Bland was initially pulled over during a routine traffic stop. After Bland questioned why the officer later ordered her to put out her cigarette, the situation escalated, and Bland was violently arrested. Three days later officers found Bland dead in her jail cell. Brett Parker, *Consent Searches and the Need to Expand Miranda Rights*, STANFORD POLITICS (Sept. 23, 2015), <https://stanfordpolitics.org/2015/09/23/consent-searches-need-expand-miranda-rights> [http://perma.cc/97D6-2CJ8].

158. State v. Harris, 590 N.W.2d 90, 106 n.4 (Minn. 1999).

159. John Blake, *George Floyd. Ahmaud Arbery. Breonna Taylor. What Can Black Parents Possibly Tell Their Kids Now About Staying Safe?*, CNN (May 29, 2020), <https://www.cnn.com/2020/05/29/us/black-parents-children-safety-talk-blake/index.html> [http://perma.cc/V6YQ-NLV3].

be surprising that law enforcement themselves have recognized that consent searches may occur in racially discriminatory ways.¹⁶⁰ In 2005, the Department of Justice found that of the roughly five percent of drivers searched during traffic stops, 9.5% were Black and 8.8% were Hispanic, whereas only 3.6% were white.¹⁶¹ And in 2017, the District of Columbia Police Complaints Board reported that 76% of those alleging improper consent searches were Black.¹⁶²

Still, the Court's naïve assertion that all persons are equally able to "just say no" when police request consent to search ignores the reality of many vulnerable populations.¹⁶³ This is also evidenced by the Court's focus on how "a reasonable person" would feel during a consent search.¹⁶⁴ The fact is, most people of color are apprehensive about engaging with police.¹⁶⁵ As one scholar notes, "when black people encounter the police, [they] don't know whether justice will be meted out or whether judge, jury, and executioner is pulling up behind them."¹⁶⁶ Ultimately, the analysis used by courts who follow *Schneckloth* and *Drayton* "directly conflicts with the black experience" and leaves people of color without the necessary protections the Fourth Amendment purports to afford.¹⁶⁷

2. *The Frequency and Favorability of Consent Searches*

The issues discussed thus far would be of little significance if consent searches did not occur frequently. To the contrary, law enforcement agencies rely heavily on consent searches to uncover criminal activity.¹⁶⁸ While the exact number of consent searches

160. McGlinchy, *supra* note 17, at 309.

161. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007), <https://www.bjs.gov/content/pub/pdf/cpp05.pdf> [<http://perma.cc/C7WQ-5KU9>].

162. GOV'T OF D.C., OFFICE OF POLICE COMPLAINTS, PCB POLICY REPORT #17-5: CONSENT SEARCH PROCEDURES 1 (2017), <https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Consent%20Search%20Report%20FINAL.pdf> [<http://perma.cc/8938-H6U5>].

163. Strauss, *supra* note 13, at 244 ("It is no more based in reality than the tooth fairy or Santa Claus.").

164. *See, e.g., Drayton*, 536 U.S. at 204 ("Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.").

165. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 985 (2002).

166. *Id.* (quoting ROBERT L. JOHNSON & DR. STEVEN SIMRING, THE RACE TRAP: SMART STRATEGIES FOR EFFECTIVE RACIAL COMMUNICATION IN BUSINESS AND IN LIFE 127 (2002)).

167. Anthony J. Ghiotto, *Traffic Stop Federalism: Protecting North Carolina Black Drivers from the United States Supreme Court*, 48 UNIV. BALT. L. REV. 323, 381 (2019).

168. Nadler, *supra* note 121, at 153; *see also* Maclin, *supra* note 96, at 30 ("There is no disagreement that police prefer consent searches to other types of investigative techniques.").

conducted annually is unknown,¹⁶⁹ it is estimated that over ninety percent of warrantless searches occur through consent.¹⁷⁰ Police officers favor consent searches because, *inter alia*, they are easy and they reduce the administrative hassle of attempting to execute a search warrant.¹⁷¹ Consent searches give officers more discretion and power in situations where individuals would be reluctant to deny officer requests,¹⁷² and they reduce the risk of evidence being suppressed in court.¹⁷³ However beneficial consent searches may be to police, evidence increasingly suggests that there are more cons than pros to this approach.¹⁷⁴

Not only do consent searches increase the risk of officers abusing their power, but they also are no more effective than other methods of conducting searches.¹⁷⁵ Instead of yielding actual results, consent searches continue to expose innocent individuals¹⁷⁶ to “unnecessary police intrusion.”¹⁷⁷

While the Court may never admit it, scholars have certainly not shied away from labeling Fourth Amendment consent doctrine as “legal fiction.”¹⁷⁸ The Fourth Amendment appears to protect individuals by requiring police to obtain search warrants unless an individual voluntarily consents to being searched.¹⁷⁹ Yet, courts routinely ignore the psychological implications involved in giving consent,¹⁸⁰ courts are more inclined to find in favor of police during suppression hearings,¹⁸¹ and courts have shifted towards a purely objective analysis of “voluntariness.”¹⁸² So not only are individuals subject to unnecessary police intrusion, but they are often left without protection from the courts. On top of all this, current consent doctrine does not

169. Nadler, *supra* note 121, at 209 (explaining that it is difficult to tell how many consent searches occur nationwide because most police departments do not keep a record of every time their officers request consent to search).

170. Simmons, *supra* note 31, at 773.

171. Maclin, *supra* note 96, at 31.

172. McGlinchy, *supra* note 17, at 308.

173. Maclin, *supra* note 96, at 31.

174. *Id.* at 33.

175. McGlinchy, *supra* note 17, at 310; *see also* Phillips, *supra* note 122, at 1205 (asserting “the sheer ineffectiveness of consent searches” as a law enforcement tool).

176. Nadler, *supra* note 121, at 210.

177. McGlinchy, *supra* note 17, at 310.

178. *E.g.*, Sutherland, *supra* note 132, at 2195; *see, e.g.*, Simmons, *supra* note 31, at 775 (highlighting “the nearly unanimous condemnation of the Court’s rulings on consensual searches. . .”).

179. U.S. CONST. amend. IV.

180. *See supra* notes 149–54 and accompanying text.

181. *See* Strauss, *supra* note 13, at 246–47 (explaining how judges will usually accept as true police testimony about receipt of consent, even when judges suspect the officer is lying).

182. *See* sources cited *supra* note 144 and accompanying text.

prevent police from trying to pressure individuals to change their minds after initially denying consent to search.¹⁸³ Unlike with confessions, police are permitted to try and “wear[] down” individuals who deny consent until the officer gets what they want.¹⁸⁴ How can this be what the Fourth Amendment intended?

Well, it is not. Unsurprisingly, several states have since departed from *Schneckloth*'s logic given the stark inconsistencies between consent jurisprudence and the realities of consent searches.¹⁸⁵ In Mississippi, for example, its Supreme Court established a “knowledgeable waiver” requirement before individuals can consent to a search.¹⁸⁶ The New Jersey Supreme Court went as far as requiring the government to prove that defendants knew that they could deny consent.¹⁸⁷ And similarly, the Supreme Court of Washington determined that warnings of the right to deny, limit, and withdraw consent were required when officers sought consent to search someone's home.¹⁸⁸

It is clear that the Court's current interpretation of the Fourth Amendment's reach is flawed and misguided.¹⁸⁹ However, because it is unlikely that the Court will rectify the issues presented by the current consent doctrine, it is time to shift the responsibility to the states. In order for individuals to receive the fullest protection afforded under the Fourth Amendment, it is time for all states to move towards adopting, at minimum, an informed consent requirement. Before delving into the specifics, it is worth taking a moment to frame this proposal in the context of the present-day relationship between law enforcement and the rest of society, as well as illustrate how an informed consent requirement is a modest step towards necessary change.

III. 2020: THE DAWN OF A NEW ERA FOR CRIMINAL JUSTICE REFORM

The brutal murder of George Floyd sent shockwaves throughout the nation.¹⁹⁰ Video footage of Floyd's murder spurred a national

183. Strauss, *supra* note 13, at 250–51.

184. *Id.* at 251.

185. See Gallini, *supra* note 18, at 273–74.

186. *Graves v. State*, 708 So. 2d 858, 863 (Miss. 1997).

187. *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975). Note that this is exactly what the *Schneckloth* court deemed “impractical.” *Schneckloth*, 412 U.S. at 231.

188. *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998) (en banc).

189. See George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L. J. 525, 541 (2003) (“Consent is an acid that has eaten away the Fourth Amendment.”).

190. On May 25, 2020, Minneapolis police arrested George Floyd after a store employee accused Floyd of purchasing cigarettes with a counterfeit bill. Within seventeen minutes of police arriving, Floyd lay unconscious, unable to breathe, and pinned underneath

uprising, with masses of people in different states joining together to protest police brutality and the unjust killings of unarmed Black Americans.¹⁹¹ Although most protests were peaceful, they undeniably “triggered civil unrest in America at a scale not seen since the assassination of Martin Luther King Jr. in 1968.”¹⁹² Not only did these protests spark overdue conversations about police brutality and racial inequality in America, but they also prompted discussions about eliminating “qualified immunity.”¹⁹³

Qualified immunity doctrine protects government officials from civil liability unless they violate a “clearly established” federal law.¹⁹⁴ Established out of thin air by the Supreme Court six years before *Schneckloth*,¹⁹⁵ qualified immunity aims to protect law enforcement from frivolous lawsuits and allow room for mistakes when police make split-second decisions in dangerous situations.¹⁹⁶ In practice, however, this doctrine has allowed police officers to violate an individual’s constitutional rights, yet avoid liability because no prior court established police liability based on similar facts.¹⁹⁷

While the Supreme Court has routinely upheld this doctrine, recent events have prompted the nation to take another look at its problematic nature.¹⁹⁸ In the height of police brutality protests, Democratic lawmakers proposed a bill—the George Floyd Justice in Policing Act of 2020—that would serve to finally hold police accountable for their actions and combat police misconduct.¹⁹⁹ On the other

former police officer Derek Chauvin’s knee. Evan Hill, Drew Jordan, Robin Stein, Ainara Tiefenthäler, Christiaan Triebert & Haley Willis, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/E949-GYLS>].

191. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump> [<https://perma.cc/M33H-WWHL>].

192. *Id.*

193. Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html> [<https://perma.cc/T84U-5SBP>].

194. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018).

195. The Supreme Court first introduced the doctrine of qualified immunity in *Pierson v. Ray*, 386 U.S. 547 (1967). The Court later expanded the doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800, 800 (1982).

196. Nina Totenberg, *Supreme Court Will Not Reexamine Doctrine That Shields Police in Misconduct Suits*, NPR (June 15, 2020, 9:55 AM), <https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui> [<https://perma.cc/E8VS-TK5R>].

197. *See, e.g., Jessop v. City of Fresno*, 936 F.3d 937, 943 (9th Cir. 2019) (holding that police officers who deliberately stole plaintiff’s property while executing a search warrant were immune from liability because there was no “clearly established” constitutional protection governing those exact circumstances).

198. *See infra* notes 199–202 and accompanying text.

199. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

side of the nation, Colorado Governor Jared Polis signed into law the “Law Enforcement Integrity and Accountability Act” that, *inter alia*, prohibits law enforcement from using qualified immunity as a defense against liability.²⁰⁰ By passing this bipartisan police reform bill, Colorado became the first state to specifically remove qualified immunity as a defense available to police.²⁰¹ And while the Supreme Court refuses to reconsider qualified immunity,²⁰² conservative Justice Clarence Thomas and liberal Justice Sonya Sotomayor have both openly challenged the legitimacy of the doctrine.²⁰³

In addition to forcing the nation to re-examine the negative impacts of qualified immunity, the untimely deaths of unarmed Black Americans throughout 2020 sparked a movement to “defund the police.”²⁰⁴ Recognizing that police officers are not always the most appropriate first responders, advocates proposed reallocating money from police departments to mental health, social services, housing, and education programs.²⁰⁵ By reducing funding for law enforcement, resources would finally go towards programs and initiatives that are better suited to address many of the issues police respond to daily.²⁰⁶

There is no doubt that 2020’s unforgettable events catalyzed discussions about police reform in unprecedented ways.²⁰⁷ Prior to 2020, very few states had any measures in place to achieve what

200. S.B. 20-217, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2020).

201. Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020, 11:31 AM), <https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity> [<https://perma.cc/L6MF-PTDQ>].

202. Totenberg, *supra* note 196 (“In an unsigned order [rendered on June 15, 2020], the [C]ourt declined to hear cases seeking reexamination of the doctrine of ‘qualified immunity.’”).

203. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) (“[O]ur § 1983 qualified immunity doctrine appears to stray from the statutory text. . . .”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting) (“[The Court’s] one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.”).

204. Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html> [<https://perma.cc/M7DD-D7E8>].

205. *Id.*

206. Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does It Have Merit?*, BROOKINGS: *FIXGOV* (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit> [<https://perma.cc/F7FD-VR9Q>].

207. *Id.* (“George Floyd’s death has galvanized much of America to move the needle toward police reform ideas—such as defunding the police—that were previously viewed as radical.”); *see also* Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, THE NEW YORKER (Aug. 14, 2020), <https://www.newyorker.com/news/our-columnists/defund-the-police> [<https://perma.cc/4ZEL-FCER>] (“The repeated failures of substantive and meaningful reform have brought us to the point where concepts like ‘defunding’ and ‘abolition’ have permeated mainstream conversations.”).

“defunding the police” advocates for.²⁰⁸ Although continued reform will be a gradual process, today’s society is arguably very different than the society that welcomed qualified immunity doctrine and *Schneckloth*.²⁰⁹ Americans are not only calling for change, but those in power are finally listening.²¹⁰ And while calls for police reform are not new, the circumstances in which these demands are being made certainly are.²¹¹ If there is anything that can be gleaned from recent events, it is that there is no time better than the present to implement policing reform that may have been seen as too radical, unnecessary, or impractical in the past.

IV. THE TIME IS NOW: A MODEST PROPOSAL FOR NECESSARY CHANGE

Recall that in *Schneckloth*, the Court expressed that “it would be *thoroughly impractical* to impose on the normal consent search the detailed requirements of an effective warning.”²¹² Unpersuaded by the Courts’ rationale, several states have interpreted their own Constitutions to require informed consent warnings.²¹³ Here is how a few states require their officers to conduct consent searches:

- (1) In Colorado, police officers must inform both motorists and pedestrians of their right to refuse search requests.²¹⁴ In addition, judges must consider whether an officer informed the individual of their rights when reviewing the legitimacy of the arrest and determining the admissibility of evidence.²¹⁵

208. See Searcey, *supra* note 204.

209. See *infra* notes 210–11 and accompanying text.

210. See Jennifer Borresen, Janie Haseman & Karina Zaiets, *Cities and States Across the US Announce Police Reform Following Demands for Change*, USA TODAY (June 18, 2020, 10:12 AM), <https://www.usatoday.com/in-depth/news/2020/06/18/2020-protests-impact-city-and-state-changes-policing/5337751002> [<https://perma.cc/46YG-W6KD>] (discussing how cities and states across the nation have taken tangible steps towards substantive police reform. For example, Phoenix, Arizona has banned the use of neck restraints, San Jose, California requires additional training or education and implemented changes to protest protocol, and Cambridge, Massachusetts requires officers to intervene when they see other authorities using excessive force.)

211. Protests began in the midst of the Coronavirus pandemic. The pandemic paralyzed society, forced citizens to stay indoors, and shifted the focus to the undeniable police misconduct and racial injustice taking place across the nation. Altman, *supra* note 191.

212. *Schneckloth*, 412 U.S. at 231 (emphasis added).

213. See *supra* notes 185–88 and accompanying text.

214. Joseph Boven, *Colorado’s New Informed-Consent Bill Celebrated as Tool to Fight Racial Profiling*, COLORADO INDEPENDENT (May 4, 2010), <https://www.coloradoindependent.com/2010/05/04/colorados-new-informed-consent-bill-celebrated-as-tool-to-fight-racial-profiling> [<https://perma.cc/95GJ-NQGZ>].

215. COLO. REV. STAT. § 16-3-310 (2010).

- (2) In New York City, officers must first properly identify themselves and provide individuals with their business cards.²¹⁶ Then, officers must explain that a search will not be conducted if a person refuses to provide consent to the search. Additionally, officers are required to document all consent search requests.²¹⁷
- (3) In North Carolina, several police departments incorporated the use of written consent warnings to ensure citizens have a full understanding of their rights.²¹⁸ By signing the form, citizens allege that they understand they have the right to deny consent, they “knowingly, intelligently, and freely” give consent, and they understand the implications of giving consent.²¹⁹
- (4) In New Jersey, the State has the burden to prove that the individual voluntarily gave informed consent.²²⁰ As such, New Jersey State Police developed a “Consent to Search” form that, once signed, authorizes police to conduct a search, while still giving the individual the right to withdraw consent at any time.²²¹ In addition, officers are only allowed to request consent during traffic stops if they have at least an articulable suspicion the search will yield illegal contraband.²²²

Clearly, requiring police to obtain informed consent is not impractical. States like Colorado, New Jersey, New York, and North Carolina illustrate that the only way to truly exercise rights is by knowing what they are. Therefore, the only way all states can truly align themselves with the intentions of the Fourth Amendment is by imposing restrictions on police conduct via an informed consent requirement.

As such, this Note proposes that all states²²³ interpret their Constitutions to require the following legislation:

216. *What is the Right to Know Act?*, N.Y.C. CIVILIAN COMPLAINT REV. BD. (Oct. 16, 2018), <https://www1.nyc.gov/site/ccrb/complaints/right-to-know-act.page> [<https://perma.cc/C45H-CWMC>].

217. *Id.*

218. *See, e.g.*, Asheville Police Dep’t Pol’y Manual, § 605.1 (2019), <https://www.powerdms.com/public/ASHV/documents/18> [<https://perma.cc/W3MZ-UFBZ>].

219. Polly McDaniel, *Asheville Police Department Implements Written Consent to Search*, CITY OF ASHEVILLE (Oct. 30, 2019), <https://www.ashevilenc.gov/news/asheville-police-implements-written-consent-to-search> [<https://perma.cc/EN6Z-8NGQ>].

220. *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

221. *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002).

222. *Id.*

223. Although individual police departments are free to adopt informed consent requirements, true reform must occur on a broader, statewide level so all citizens can receive this necessary protection.

1. Police officers may conduct warrantless searches where consent is freely and voluntarily given by the individual with authority to grant such consent.
2. In order for consent to be voluntary, officers must first inform the individual granting consent that:
 - a. They have the right to refuse consent prior to the search;
 - b. Consent may be withdrawn at any point during the search;
 - c. The officer will honor the individual's decision to deny consent; and
 - d. If consent is given, any illegal evidence obtained may be used against the individual in court.
3. If an individual denies consent, the officer must not attempt to change the individual's mind and must end the encounter immediately. If consent is granted but later withdrawn, the officer must immediately end the search, absent the development of probable cause.
4. Police officers may obtain consent verbally or through a written consent form.
 - a. When obtaining consent, the officer must capture this consent via the officers body camera.
 - b. When obtaining written consent, at minimum, the form must:
 - i. State the same language asserted in subsection (2)(a)–(d) above;
 - ii. State that the individual is knowingly, intelligently, and freely giving consent; and
 - iii. Contain both the officer's and the individual's signatures.
5. Prior to terminating the encounter, police officers must provide motorists and pedestrians with their card or other form of identification.
6. Officers must document the circumstances surrounding all consent requests, whether consent is granted or denied.
7. Individual police departments must create a system of administrative supervision and oversight to review the circumstances surrounding each consent search.
8. If a defendant moves to suppress evidence found during a search, the State has the burden to prove the defendant provided informed consent.

9. When determining the voluntariness of consent, compliance with the above requirements is a threshold inquiry. Failure to comply must automatically render the consent involuntary and the search therefore invalid.
 - a. After answering this threshold inquiry, courts must then consider both subjective and objective factors to determine the true voluntariness of the consent.

V. ANTICIPATED CONCERNS ABOUT IMPLEMENTING AN INFORMED CONSENT APPROACH

The mere fact that all states have not adopted this approach to consent searches begs the question, why?

One misguided critique of this approach is that requiring officers to provide informed consent warnings will lead to decreased rates of consent.²²⁴ The concern here is that by telling citizens they have the right to deny consent, individuals will then exercise that right, ultimately impeding law enforcement's ability to conduct searches.²²⁵ Pursuant to a consent decree New Jersey entered into with the U.S. Department of Justice, an independent task force monitored consent rates over an eight year period from 1999–2007.²²⁶ During that time, New Jersey's consent requirements were as stringent as they are today, and yet reports indicated that motorists still consented to searches approximately 88.3% of the time.²²⁷ Not only were motorists still consenting at high rates, but New Jersey's warning requirement was far more rigid than the simple warnings *Schneckloth* rejected, yet there was little to no effect on the rate of consent.²²⁸ The argument that consent warnings will negatively impact law enforcement's effectiveness is also undercut by the reality that consent searches are not even the most effective methods police have to conduct searches.²²⁹ And probably the strongest yet simplest indicator that consent warnings will not hinder law enforcement from doing their job is that they themselves contend that providing warnings will not further complicate their duties.²³⁰

A second concern about implementing an informed consent approach is that it will not have any effect on the inherently coercive

224. Articulated first in *Schneckloth*, the Court appears to have assumed that if warnings were required, soon all citizens would refuse to consent to a search. 412 U.S. at 229.

225. *Id.*

226. Phillips, *supra* note 122, at 1200–01.

227. *Id.* at 1201.

228. *Id.* at 1201–02.

229. McGlinchy, *supra* note 17, at 310; Maclin, *supra* note 96, at 33.

230. Strauss, *supra* note 13, at 253.

nature of police encounters.²³¹ The argument here is that ultimately, whether or not police officers give warnings before asking for consent does not change the fact that it is still an encounter with police. Police officers are still regarded as authority figures and therefore do not have to rely on coercive statements in order to create a coercive environment.²³² Similarly, some scholars point out that a warning requirement would be futile because police could still pressure subjects into consenting by repeatedly asking for consent even after the individual declines.²³³ Warnings would also be ineffective if the police could later lie about the encounter or misremember facts.²³⁴

By adopting the proposed standard detailed in Part IV, concerns about police coercion should inevitably decrease given the proposed administrative review requirement and procedural protections afforded to defendants at trial. Take New Jersey for example: in addition to mandated consent warnings, the state requires its police departments to track all consent requests and to impose several levels of supervision for consent searches.²³⁵ New Jersey police departments are now required to have a system of data tracking, supervision, and oversight to limit the negative effects of its previous consent procedures.²³⁶ From both a logical and common sense perspective, adopting these provisions should certainly alleviate coercive police encounters and make citizens feel more empowered to exercise their rights.²³⁷ Warnings may not completely solve coercion problems,²³⁸ but informing citizens of their rights, documenting all consent requests, and subjecting all requests to supervision and oversight is surely one step closer to ensuring citizens are “secure in their persons”²³⁹ and safe from unreasonable searches and seizures.

Taking a more radical approach, some argue that implementing this type of proposal would be pointless because the larger problem is consent searches as a whole.²⁴⁰ Here, scholars contend that the current consent doctrine is far too flawed and inconsistent with the Fourth Amendment to attempt “piecemeal” reform.²⁴¹ Proponents of

231. Nadler, *supra* note 121, at 205.

232. *Id.* at 189, 205.

233. *See, e.g.*, Phillips, *supra* note 122, at 1210; Strauss, *supra* note 13, at 254–55.

234. Phillips, *supra* note 122, at 1210; Strauss, *supra* note 13, at 251–52, 255.

235. Phillips, *supra* note 122, at 1199–1200.

236. *Id.* at 1200.

237. *See id.* at 1210.

238. *See* Parker, *supra* note 157 (arguing that, while informed consent requirements will not make police-citizen encounters completely equal, they would help rid the atmosphere of intimidation inherent in police encounters).

239. U.S. CONST. amend. IV.

240. *E.g.*, Strauss, *supra* note 13, at 258.

241. *Id.*

this position point out that even if warnings were helpful, people are still unlikely to invoke their right to deny consent, just as people often waive their Fifth Amendment *Miranda* rights.²⁴² So instead of trying to figure out how to fix consent doctrine, the better approach would be to eliminate it altogether because “stop gap” measures such as consent warnings will do no more than prevent true change.²⁴³

Even if this argument has merit, it would be unwise to discuss it in full simply because it is far too unlikely that consent searches will ever be eliminated.²⁴⁴ Recall that the Supreme Court explicitly recognizes consent as an exception to the Fourth Amendment warrant requirement.²⁴⁵ As unlikely as it might be that the Supreme Court will adopt an informed consent requirement, a complete overhaul of the consent exception is far more improbable.

And finally, probably the biggest critique of this approach comes from the Supreme Court itself.²⁴⁶ Recall that according to the Court in *Schneckloth*, requiring officers to inform individuals of their right to deny consent “would be thoroughly impractical.”²⁴⁷ By now, this Note has illustrated in various ways how this argument is extremely misguided. Echoing Justice Marshall, absolutely nothing negative would happen if police took an additional minute or two to inform individuals of a right the Constitution already gives them.²⁴⁸ And logically, if the opposite were true, the states that have since departed from *Schneckloth*'s rationale would have denounced this approach long ago.

It is true that even if something is practical, that does not automatically mean it should be adopted.²⁴⁹ And that is exactly why the modest approach to consent searches this Note proposes does not hinge merely on its practicality. This Note urges states to adopt this proposal not only because it is a necessary step towards healing the wounds law enforcement continues to inflict upon society, but because there is no other way to interpret the Fourth Amendment.²⁵⁰ Informed consent requirements may not decrease the rate of consent, but they will certainly give citizens greater autonomy over how they want interactions with police to go.²⁵¹ Too many

242. *Id.* at 253–54.

243. *See id.* at 271.

244. *See Parker, supra* note 157.

245. *Schneckloth*, 412 U.S. at 219.

246. *Id.* at 231.

247. *Id.*

248. *Id.* at 287–88 (Marshall, J., dissenting).

249. Phillips, *supra* note 122, at 1206.

250. *See Parker, supra* note 157 (“*Schneckloth* represents a failure of constitutional interpretation.”).

251. *See id.*

individuals are subjected to unnecessary encounters with police, while too few police are held accountable for their actions.²⁵²

CONCLUSION

It is clear that the Court's current interpretation of the Fourth Amendment's reach is flawed and unfounded. "There is no war between the Constitution and common sense."²⁵³

If the U.S. Constitution provides citizens with the right to deny consent, then citizens must be knowledgeable of that right. People simply cannot exercise a right that they are unaware of. But while the Supreme Court continues to ignore this truth, states do not have to. Several states have already departed from *Schneckloth's* logic given the inconsistencies between consent doctrine and the realities of consent searches.²⁵⁴ Criminal justice reform, albeit gradually, is finally moving in the right direction,²⁵⁵ and it is time that the Fourth Amendment consent doctrine does the same. No longer can, and should, states ignore the outcries of their citizens, especially their citizens of color. So instead of waiting on the Court, it is time that each state adopt this Note's modest proposal and impose restrictions on police conduct via an informed consent requirement. *Schneckloth's* rationale might have seemed logical back in 1973, but it has no place in society today.

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252. *See, e.g., id.*

253. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

254. *See Gallini, supra* note 18, at 273–74.

255. *See, e.g., Borresen, Haseman & Zaiets, supra* note 210.

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