

MISPLACED ANGST

ANOTHER LOOK AT CONSENT-SEARCH JURISPRUDENCE

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ABSTRACT FOR
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Conventional scholarship misunderstands the judicial invocation of *voluntariness* when evaluating a purported consensual search. The key is to nail down more precisely what we mean by the term, *consent*. Most commentators mistakenly entwine consent and waiver, wrongly treating the act of consenting (to a search, to questioning, etc.) as an instance where the actor is waiving a constitutional right. That conceptual error promotes the view that consent refers to a subjective condition, a psychological state, which, in turn, spurs the expectation that *voluntariness* refers to a person's inner experience. On this view of consent, the person's inner experience is what gives consent its moral force. From this conceptual framework, the Supreme Court's consent-search jurisprudence is, indeed, a mess (and hence, angst-producing).

I explicate another conceptualization of consent, one that understands it to be an *act*, a speech-act which must be evaluated in terms of how we envision police-civilian encounters ought to occur. *Voluntariness*, then, is more a statement of approbation than a concept with its own substantive content. No one can be satisfied with the Court's consent-search jurisprudence with the expectation that voluntariness actually means more than that. But once we understand the Court to be pursuing a normative vision of what we will and will not tolerate in the cat-and-mouse game of crime fighting, we can appropriately and meaningfully critique its decisions. And so, if we are to have angst over the Court's decisions concerning consent searches—and there may well be good reasons for it—the angst will arise not from metaphysical quarrels over what is voluntary and what is not, but from what the Court is willing to accept by way of police methodology.

Clarifying our terminology and modulating our expectations of what we mean to say when we use metaphysically laden terms sharpens our ability to critique the arguments of others. This article shows this to be true when it comes to critiquing the Supreme Court's consent-search jurisprudence.

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No one has a good word to say about consent-search jurisprudence. At least so it seems.¹ Consent searches, the most common type of warrantless searches law-enforcement officers conduct, are understood to be constitutional so long as the permission to search is “freely given and voluntary.”² In fact, the Supreme Court applauds these grants of permission, not only because they facilitate crime-fighting,³ but also because they supposedly bespeak the law’s valorization of autonomy.⁴ *Consent* is a “master concept” in our culture, a concept that captures the moral grounding of our entire way of thinking about human action.⁵ We associate with

¹Attacks on Fourth Amendment jurisprudence generally is, of course, nothing new. See Silas Wasserstrom & Lous Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 19 (1988) (“Almost no one has a kind word to say about fourth amendment jurisprudence.”). Nonetheless, six members of the Supreme Court—Kennedy, Rehnquist, O’Connor, Scalia, Thomas, and Breyer—think highly of consent searches:

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

United States v. Drayton, 536 U.S. 194, 207 (2002).

²*Florida v. Royer*, 460 U.S. 491, 495 (1983); *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

³*Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

⁴See note 1, *supra*. See generally RICHARD POSNER, *THE ECONOMICS OF JUSTICE*, ch. 4 (1981) (consent as the moral grounding for wealth-maximizing judicial decisionmaking).

⁵Peter H. Schuck, *Rethinking Informed Consent*, 103 Yale L.J. 899, 900 (1994). See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 215 (1989); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 386 (1985); Richard A. Posner, *Colloquy, The Ethical Significance of Free Choice: A Reply to Professor West*, 99 Harv. L. Rev. 1431 (1986). Herzog says that consent “provides perhaps the single most prevalent paradigm structuring our thinking about law, society, morality and politics.” HERZOG, *supra* at 215.

“consent” the amorphous notion of “voluntariness.”⁶ Hence the notion that *voluntariness* is the touchstone of consent-search jurisprudence.

Attacking the so-called “voluntariness paradigm” is somewhat of a sport among Fourth Amendment scholars.⁷ One commentator, for example, argues that the Supreme Court should “officially jettison[] the voluntariness standard” to make room for a new “reasonableness” paradigm.⁸ This new paradigm would eschew the false binary consideration of whether one has acted voluntarily or not and instead demand a presumably more straightforward, if not more honest, constitutional inquiry, one that asks, *what may law enforcement reasonably do to fight crime?*

I don’t intend here to endorse or quarrel with the virtues of adjudicating consent searches through a “reasonableness” lens. How one feels about that approach depends in large measure on what demands for precision we insist upon in constitutional adjudication. After all, “[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.”⁹ My purpose here is to expose the unrealistic expectations that plague some

⁶Herzog, *supra* note 5, at 215; Robert A. Burt, *Democracy, Equality, and the Death Penalty*, XXXVI Nomos 80 (1994). For an ancient but still influential investigation into the voluntary-involuntary distinction, see ARISTOTLE, NICOMACHEAN ETHICS, Book III, ch. 1-4, 8.

⁷Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*, 80 Indiana L.J. 773, 775, n. 9 (2005) (citing articles critical of Supreme Court jurisprudence involving consent searches).

⁸*Id.*

⁹*Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1931). The doctrinal mess that is Fourth Amendment jurisprudence largely springs from the varied “models” of reasonableness that the Supreme Court uses to adjudicate search-and-seizure issues. Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 Utah L. Rev. 977, 978 (2004). The problem is the Court’s inability to articulate a set of principles that coherently govern which particular model of reasonableness to use. Clancy identifies five models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law. *Id.* Clancy contends that the “Court has,

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

I. WHAT IS CONSENT?

A. Encapsulating This Article by Exposing a Logical Fallacy

Let's begin with a logician's mindset. Here is a simple syllogism:

- I. My house is blue.
- II. My house is a building.
- III. That building is blue.

Simple and logical. Propositions I and II lead to the conclusion in III. But compare that syllogism to these two:

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

and

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

Not logical, both. Propositions I and II, even though true, don't justify the conclusion in III. The reason these syllogisms don't work, but the blue-house syllogism does, is that the adjectives

from time to time, attempted to harmonize its analysis by announcing the primacy—or the demise—of a particular model.” *Id.* at 1021. But, he rightly observes, “[n]one of those efforts has been enduring.” *Id.*

“large” and “good” function differently than the adjective “blue.” How we understand “large” and “good” depends on what it modifies. But “blue” is blue: we understand blue-ness noumenally, independent of what it modifies.

Now, consider this one:

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

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

What if we treat “voluntarily” the way we treat “large” and “good” in the insect and carpenter syllogisms? Then the truth of proposition I (D voluntarily consented) is not necessarily linked to the truth of proposition III (D voluntarily granted permission). How we understand “voluntarily” depends on how we understand “consent” beyond the minimalist understanding of consent as an act of granting permission. The truth of proposition I—that D voluntarily consented—may communicate what we accept in a particular police-civilian encounter; it may signify not just a brute description (like blue-ness), but an *evaluation* that implies approval. “Voluntary consent” would thus be a value judgment from a pool of facts that depends on *function*. “Good carpenter” implies something crucial about the function of carpenters, and that

function has nothing to do with our judgment about what makes a good American citizen.¹⁰

“Voluntary consent,” then, implies something about the function of consent, it’s function in a particular human encounter. “Good carpenter” is a meaningful statement of approval inasmuch as we have a vision of what a carpenter does. “Voluntary consent” is a meaningful statement of approval inasmuch as we have a vision of what a particular encounter should be like.

We should nail down three observations. One, “good” and “voluntary” are words of commendation, of approval; they cannot be taken as things in themselves, nor as qualities in some noumenal realm. Two, when we agree on the facts but dispute whether a particular carpenter is a good one, or whether a particular encounter was consensual, we experience a clash of visions—visions over what carpenters do or over how we expect certain interactions to transpire.¹¹ Three, what is “good” and what is “voluntary” are constructions built from the very things they modify. These terms are not just plucked out of our heads to enhance the meaning of a statement concerning carpentry or consent. The meanings of these descriptive words, which of course do serve to enhance the meaning of the respective statements about carpentry and consent, are themselves garnered by our understanding of what we mean by carpentry and consent. This third observation is actually an extension of the second—namely, that vision informs meaning, and that we cannot discuss such things as “goodness” or “voluntariness” without reference to what it is we are after.

¹⁰The logical fallacy discussed in the text is not limited to functional referents like “carpenters” or “lawyers” or “football players.” I’ve included the insect syllogism to show this. “Large insect” has meaning insofar as we all have experienced insects and agree that in an absolute sense they are small animals. The fallacy in the insect syllogism does not depend on some understanding of the function of insects. Just as our understanding of insects is hardly exhausted by our recognition that they are animals, so too with consent: that concept is hardly exhausted by our recognition that an act of consent grants some sort of permission to another.

¹¹See ALASDAIR MACINTYRE, *AFTER VIRTUE* 58-59 (2d ed. 1984).

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

One way to conceptualize this critique is to interpret the scholarly angst that I describe here as a symptom of a misguided adherence to the fact-value distinction. If we hold to that distinction, the incentive is to treat “voluntariness” as an assertion of fact, which is to say, more than a mere value-statement, more than a subjective assertion akin to an expression of taste. This incentive derives from the understandable desire that “voluntariness” have some analytical traction, which it cannot have if it merely reflects subjective sentiments. The implication of my discussion is that the fact-value distinction in this context is misleading, if not false. It is impossible to treat an idea like “voluntary consent” as a purely factual statement, just as it is unpalatable to treat it as nothing more than an expression of opinion (*i.e.*, as a value-statement only). We can evaluate as true or false a state of affairs purporting to reflect a search conducted through voluntary consent—that is to say, we can treat that evaluation as expressing a *fact*—but only by reference to value, which is to say, our vision of what we are willing to defend or pursue in a police-civilian encounter.¹²

¹²*Cf.* HILARY PUTNAM, REASON, TRUTH AND HISTORY 127-47 (1981) (defending the collapse of the fact-value distinction).

B. Consent and Reasonableness

The thesis that Fourth Amendment consent jurisprudence ought to move towards a *new* paradigm of “reasonableness” is odd. To see why, consider the 1990 case of *Illinois v. Rodriguez*.¹³ *Rodriguez* is a third party consent-search case.¹⁴ The police entered Rodriguez’s home while he was asleep. “They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with . . . cocaine.”¹⁵ The police then went into Rodriguez’s bedroom where he was sleeping and found in two open attache cases more cocaine.¹⁶ The police had neither an arrest nor a search warrant.¹⁷ What the police did have, so they thought, was consent. Not Rodriguez’s—after all, he was asleep; but the former girlfriend’s.¹⁸ It was she, an alleged victim of a battery by Rodriguez, who unlocked the apartment door with a key she was not supposed to have and who ushered the officers inside.¹⁹ She didn’t live there; at best, she was “an infrequent visitor.”²⁰ Her name wasn’t on the lease and she didn’t contribute to the rent.²¹ Since Rodriguez, being asleep at the time, surely didn’t

¹³497 U.S. 177 (1990).

¹⁴Although third-party consent search cases are relatively rare, they are doctrinally significant because of how their existence shapes the consent-search analysis. The Court in *Bustamonte*, the watershed decision addressing what constitutes a valid consent to search, diverted its analysis away from notions of waiver because to do otherwise threatened the doctrinal integrity of third-party consent searches, which had already been sanctioned. *See* 412 U.S. at 245-46.

¹⁵497 U.S. at 180.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 179.

¹⁹*Id.* at 180.

²⁰*Id.*

consent to the police entry, and his former girlfriend was, as the Court put it, “obviously” not empowered to grant the police permission to do so, the trial court suppressed the fruits of the search.²²

Under any meaningful conception of “voluntariness,” the trial court’s suppression ruling is unassailable. Rodriguez never “voluntarily” consented to the search and never “voluntarily” authorized his former girlfriend to consent to a search. But is “voluntariness” even the point here? Justice Scalia, writing for the Court, began by noting that waivers of trial rights must be knowing and intelligent, a standard stretching back to *Johnson v. Zerbst*.²³ There is a difference between “trial rights that *derive* from the violation of constitutional guarantees,” Scalia observed, and “the nature of those constitutional guarantees themselves.”²⁴ Rodriguez had a trial right to exclude evidence acquired in violation of the Fourth Amendment. Having that trial right to litigate a Fourth Amendment claim meant that he could consent to the admission of that evidence, either openly or by failing to object. That power of consent belonged only to him. Only he, with the guiding hand of counsel, could consent to dispense with his trial right to exclude illegally-seized evidence. A third party could not consent to admission of that evidence on his behalf.

But things are different when it comes to the protections of the Fourth Amendment

²¹*Id.*

²²*Id.*

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

²⁴497 U.S. at 183.

outside of the courtroom. The doctrine of third-party consent holds that another person with common authority over the premises or place to be searched may grant permission to search.²⁵ A consent search, therefore, cannot be rooted in “voluntariness” or any other subjective mind-state; it can only be a law-enforcement tool, and as such, must be reasonably used.²⁶ Hence, we get Scalia’s crucial point in the opinion: a defendant “is assured by the Fourth Amendment . . . not that no government search of his house will occur unless he consents; but that no such search will occur that is ‘unreasonable.’”²⁷ Because the scope of the right protected by the Fourth Amendment is governed by the concept of reasonableness, the police action that led to his arrest need only satisfy a standard of reasonableness, not some standard associated with the validity of consent. The Court remanded the case because, even though reasonableness is precisely what the Fourth Amendment demands, “the Appellate Court found it unnecessary to determine whether the officers reasonably believed that [the former girlfriend] had the authority to consent.”²⁸ “[W]hat is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*.”²⁹

²⁵See *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). See generally Mary Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Cal. L. Rev. 1593, 1649-50 (1987).

²⁶One notable instance of law-enforcement misuse of that tool is *Stoner v. California*, 376 U.S. 483 (1964), discussed at note 88, *infra*.

²⁷497 U.S. at 183.

²⁸*Id.* at 189.

²⁹*Id.* at 187.

C. Consent and Waiver

Reasonableness is the touchstone of Fourth Amendment jurisprudence, not voluntariness.³⁰ There never was a time when reasonableness was not, in practice, if not in words, the touchstone of Fourth Amendment analysis. There never was an old paradigm. And so there is no sensible way to say that there ought to be a new one. What we had—still have, one might say—was sloppy locution.

It is tempting to think that consent implies waiver and waiver calls for consent. Some scholars build a critique of consent searches on this entwining of consent and waiver.³¹ When you consent to a search, the thinking goes, you waive your right to the protections afforded by the Fourth Amendment.³² Conversely, when you waive the right to invoke the Fourth Amendment, you are consenting to law enforcement activity that might otherwise be illegal. This entwining of consent and waiver purports to be an analytic proposition, one that is true because of the very nature of things.

Here is what is important about this conceptual move. If waivers of constitutional rights

³⁰See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”). See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

³¹See Simmons, *supra* note 7; Thomas Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 Tenn. L. Rev. 1 (1991); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 778 (1989) (observing that critics of the Court’s Fourth Amendment jurisprudence misunderstand the role of waiver in constitutional adjudication); see also *Bustamonte*, 412 U.S. at 278-80 (Marshall, J., dissenting). Curiously, Professor Stuntz adopts the “voluntariness” locution but recognizes that the inquiry focuses on police conduct: “the voluntariness standard invites scrutiny not of the defendant’s choice to consent but instead of the police officer’s conduct.” Stuntz, *supra*, at 787-88. Exactly how a “voluntariness” inquiry permits that sort of focus, Stuntz doesn’t say. It would seem more linguistically rational to assert that the consenting party’s voluntariness has a very minor role in the analysis. I take Stuntz’s curious locution to reflect how wedded scholars are to the “voluntariness paradigm” as a rhetorical device.

³²See *Bustamonte*, 412 U.S. at 235 (noting that “it is said” that a voluntary consent constitutes waiver of

must be knowing and intelligent to be valid,³³ then welding consent to waiver prompts us to ask, how can we validate a consent to search without some indication, if not outright proof, of *informed* consent?³⁴ Indeed, how is a consent to search *voluntary*—and thus a valid waiver of a constitutional right—when the consenting party knows that her consent will ineluctably lead to a reasonably thorough search, which in turn will result in the discovery of the contraband? Aren't all searches that produce contraband or damaging evidence presumptively, if not by definition, non-consensual? After all, people don't usually facilitate their arrest by voluntarily waiving their constitutional rights. And in the *Rodriguez* scenario, how can one party's constitutional rights be waived by another party who does not, in fact, have authority to consent to a search?³⁵

Essential to clear thinking here is detaching the two notions, consent and waiver. It would seem that we must do this to make sense of third-party consent cases like *Rodriguez*. We invite trouble when we conceptualize cases like *Rodriguez* as third parties *waiving* the constitutional rights of another, the actual target or victim of a search. *Rodriguez* displays what clear thinking on the matter should reveal. Consent has nothing to do with relinquishing a constitutional right, vicarious or otherwise, for the act of consenting (or, at least, the reasonable expression of consent) is itself an act that *justifies*. It renders a state of affairs legitimate and

Fourth Amendment rights)..

³³See *Johnson v. Zerbst*, 304 U.S. at 464.

³⁴This was the essence of Justice Marshall's dissent in *Bustamonte*, where the Court disavowed requiring informed consent to validate a consensual search. 412 U.S. at 278-89 (Marshall, J., dissenting).

³⁵That is exactly the position *Rodriguez* took in presenting his case to the Supreme Court. Professor Davies reports that "Rodriguez's attorneys had argued [the former girlfriend's] 'seeming consent' had no effect on Rodriguez's right to privacy in his home under the Fourth Amendment because consent should be understood to operate as a waiver or release of a citizen's own privacy interests under the Fourth Amendment; therefore, Rodriguez's right could not be 'vicariously waived' by [the former girlfriend]." Davies, *supra* note 31, at 22.

justifiable. That means, in the case of a consensual search, that the police response to that act of consent is not unreasonable. And since a search and seizure that is not unreasonable does not violate anyone's constitutional rights, it would be wrong to understand *consent* as a waiver of any constitutional rights. In other words, there is no waiver in such circumstances because there was nothing to waive.

Commentators nonetheless criticize the Court either for not staying faithful to a coherent, linguistically valid notion of waiver, or for spawning confusion by disregarding that which is supposedly central to the analysis—voluntariness.³⁶ The impulse is understandable to treat “voluntariness” seriously. A voluntariness test posits the existence of a neutral way to assess a police-civilian encounter—neutral in the sense that the analysis transcends our momentary impulses and prejudices favoring or disfavoring certain police methods. But once we detach consent from waiver, we can scrutinize the term *consent* unburdened by preconceptions we might harbor about what makes a waiver valid. We liberate ourselves from the expectation that

³⁶Professor Davies, for example, asserts that, under a proper understanding of consent, “it is axiomatic that the inquiry begins and ends with the question of whether a person who actually had authority to consent *voluntarily* gave consent.” Davies, *supra* note 31, at 11. Davies doesn't make clear in what sense he is using the term, “consent.” The phrase, “authority to consent,” suggests that the expression of granting permission is eligible for legal enforcement. The phrase, “voluntarily gave consent,” suggests that the granting of permission must satisfy some set of conditions before a court will elevate what is eligible for legal enforcement into what will actually be enforced. What exactly those conditions are, Davies doesn't say. But what will become clear in this discussion is that the legal analysis comes down to a struggle over what conditions make an eligible expression of consent legally enforceable. It is singularly unhelpful to say that “voluntariness” is the analytical key to that struggle, for what we regard as “voluntary” depends upon what conditions justify the enforcement of an expression of consent; and what those conditions might be inevitably turns on normative judgments about what we expect from our law enforcement. See Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 Am. Crim. L. Rev. 133, 134-41 (2003) (arguing that Court's consent-search jurisprudence reveals Court is “blinking” at reality); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup. Ct. Rev. 153, 155 (2002) (noting the “ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent . . .”); Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 221 (Fall 2001/Winter 2002) (criticizing Court's application of voluntariness test because “it fails to acknowledge the simple truism that many people, if not most, will always feel coerced by police ‘requests’ to search.”).

voluntariness ought to have some analytical muscle, and thus don't get so exercised by the fact that outcomes seem completely disconnected from whether the consent was indeed voluntary in some metaphysical sense.

So we have two options here. We might understand consent to refer to a subjective condition, a psychological state of affairs whereby the person consenting is, in her own mind, voluntarily endorsing conduct of another, or acquiescing to it, and that conduct somehow affects her directly. This is the understanding commentators typically embrace when critiquing consent-search jurisprudence.³⁷ *Voluntariness* in this sense refers to a person's inner experience. On this view of consent, the person's inner experience is what gives consent its moral force. Consent has moral force because it expresses one's *will*. To *will* is to endeavor to bring about something one desires, to have a conscious aim and objective to pursue some end. Consent-as-willing simply cannot be reconciled with consent-search jurisprudence, for, as we've seen, offenders do not *will* their own undoing when they "consent" to a search. The consent-as-willing idea thus invites the angst that plagues most of the criticism directed at consent-search jurisprudence.

But let's consider the other conceptual option. We might understand consent not as an expression of *will*, a subjective condition, but as an *act*, an expressive act, one that brings about a legal relationship that defines the boundaries, the acceptable limits, of a particular encounter between or among individuals. Consent, on this latter understanding, is an *act* of granting permission, and as such, it need not be an expression that accurately mirrors the person's psychological state. We could, as a policy matter, insist upon a tight correspondence between expression and inner mental state, but there is nothing intrinsic in or essential about the concept

³⁷See note 36, *supra*.

of consent that demands it. All that the act of consenting must do, at minimum, is purport to mirror some aspect of the person's psychological state. Consent understood as an *act* requires almost nothing from the concept of voluntariness, other than as some imprecise injunction against compulsion.

Which conceptualization best fits the Fourth Amendment?

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

We can approach the question directly by consulting what most criminal-law practitioners and commentators would regard as the leading case on the issue, *Schneckloth v. Bustamonte*.³⁸ Bustamonte argued that the search of a car in which he and five others were riding violated the Fourth Amendment because the police officer said nothing before securing permission to search about the indisputable right of the occupants to withhold consent. Informed consent, the argument posits with commonsensical force, produces “voluntary” consent; ignorance doesn't. Surprisingly, given how the case turned out, Justice Stewart didn't disavow the framing of the issue in voluntariness terms. Quite the contrary, he insisted on understanding *valid* consent to mean *voluntary* consent: “The precise question in this case is what must the state prove to demonstrate that a consent was ‘voluntarily’ given.”³⁹ That rhetorical maneuver could lead a casual reader to believe that a “voluntariness” test is at work. After all, Stewart was quick to establish that the “voluntariness” inquiry in the due-process confession context—because it provided the “most extensive judicial exposition of the meaning” of the term—would provide the

³⁸412 U.S. 218.

³⁹*Id.* at 223.

analytical scaffolding for the task at hand.⁴⁰ But what he drew from that murky and unsatisfying body of precedent was nothing more than the prosaic command that a judicial evaluation of a consent to search must incorporate “the totality of all the surrounding circumstances.”⁴¹

This totality-of-the-circumstances locution, by itself, tells us little about the commonalities or differences in how courts should approach the supposed voluntariness question in the Fourth and Fifth Amendment contexts. Justice Frankfurter in *Culombe v. Connecticut*⁴² advocated an analytical approach that embraced all the surrounding circumstances to spotlight the inner experience of the confessant. *Culombe* is intriguing precisely because Frankfurter genuinely attempts to grapple with the metaphysics of a voluntary and freely given confession. But Justice Stewart clearly did not regard the totality-of-the-circumstances approach in the Fourth Amendment context to function in that deep, metaphysical way. At most, subjective considerations are merely evidentiary in nature. They may help capture the quality of the consenting act—and surely, awareness of the right to withhold consent enhances the quality of the consenting act—but they are not the *sine qua non* of enforceable consent.⁴³ That must be so, Stewart reasons in *Bustamonte*, because what is “voluntary” is a matter determined by the type and amount of coercion or duress or other pressure that the government may validly apply.⁴⁴ With that observation Stewart is able to conceptualize “voluntariness” as the crucible in which

⁴⁰*Id.*

⁴¹*Id.* at 226.

⁴²367 U.S.568 (1961).

⁴³*Bustamonte*, 412 U.S. at 226

⁴⁴*Id.* at 224-29.

“two competing concerns must be accommodated”—the government’s need to search and the individual’s incontrovertible right to be free from intolerable coercion.⁴⁵ So, “voluntariness” does nothing else but “reflect[] a fair accommodation” of these two considerations, which is just verbal gymnastics to say that “voluntariness” is a label pinned on a so-called consent search that strikes a judicial officer as “reasonable.”⁴⁶ A “fair accommodation” of the government’s crime-fighting needs and the individual’s privacy rights, Stewart concludes, compels the holding that “voluntariness” in the Fourth Amendment context does not call for *informed* consent, or any other legally-enforced ritual to cleanse from the granting of permission to search the taint of law-enforcement coercion.⁴⁷ After all, Stewart observes, “the nature of a person’s subjective understanding” is too recondite and inaccessible to courtroom proof to be a key ingredient in that consent analysis.⁴⁸ Justice O’Connor echoes this observation in the confession context when she remarks, “[i]t is difficult to tell with certainty what motivates a suspect to speak.”⁴⁹

Why the departure in the search-and-seizure context from the early Frankfurterish juridical fastidiousness, obsession even, over voluntariness in the confession context? Why in

⁴⁵*Id.* at 227.

⁴⁶*Id.*

⁴⁷Justice Stewart seemingly understood well that informed consent puts the focus on the citizen and tends to shift the focus away from the conduct of law enforcement. *Cf.* Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 *Yale L. J.* 683, 690-91 (1975) (informed consent “emphasize[s] a patient’s or subject’s actual state of mind, knowledge or understanding . . . rather than . . . the conduct required of the therapist or experimenter”).

⁴⁸412 U.S. at 234. *See also* *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (police not required to inform detainee he is “free to go before a consent to search may be deemed voluntary”). Justice Marshall, dissenting in *Bustamonte*, understood consent as “a mechanism by which substantive requirements, otherwise applicable, are avoided.” 412 U.S. at 282. No doubt this is true, but that fact about how consent *functions* does not imply that consent must be understood or analytically deployed in terms of waiver principles.

⁴⁹*Oregon v. Elstad*, 470 U.S. 298, 314 (1985).

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

Peculiar, because the discourse of truth or falsity when a search produces incriminating evidence would amount to a category mistake. To be sure, the litigation of a Fourth Amendment claim often depends on credibility and reliability judgments. But the *act* of granting permission to search implicates nothing about truth, or about reliability—the act itself is the nub of it. Not so the *act* of confessing. The confessional act only begins the matter; it brings about the crucial issue whether that act has produced a reliable account of an event. The act of granting permission to search thus arouses far less concern over motivation than does the act of confessing, where the motivation to do that which is ostensibly self-destructive (at least immediately so, and materially so) is a matter of both fascination and juridical concern. All this, if nothing else, reduces in the Fourth Amendment context the urgency of the distinction between the voluntary and the involuntary.

There's more to it, though. In either context, the search-and-seizure or the interrogation scenario, the authority of the State pressed into action by the gun-wielding, badge-toting law-

enforcement officer works its way into the encounter, usually through nothing more than a psychological advantage. And the undeniable aspiration is to subjugate the individual's will to that of the sovereign bent on detecting or preventing crime. But consent searches operate on the premise that criminals are not entitled to conceal that which would lead to their undoing. The entitlement belongs to the sovereign; it is the sovereign that is entitled to the evidence bearing on guilt, unearthed either by subpoena, judicial warrant, police action predicated on reasonable suspicion or probable cause, or mere acquiescence couched in terms of "consent." More muted is this supposed sense of sovereign entitlement when it comes to confessions, evidence that exists within the recesses of consciousness or even embedded in the soul itself. A government justifying itself through the morality of freedom and human dignity cannot so cavalierly adopt a unitary doctrine of consent, one equally valid in the search-and-seizure context and the confession context. For the former raises no compelling specter of government rendering helpless and hopeless—reducing to abjectness—an individual who in that abject moment becomes the "willed" instrument of his own defeat.

Justice Frankfurter was the most eloquent and expansive in openly declaring the law's angst over this deployment of State power to reach into the individual's soul to "suction" out a confession,⁵⁰ and Chief Justice Warren, dubious over the ability to detect the blurred voluntariness-involuntariness line, was the most forthright in his aim to do something about the omnipresence of compulsion in any custodial interrogation.⁵¹ The *Miranda* warnings are, in effect, a device to ensure that individuals swept into the custodial-interrogation process learn of

⁵⁰*Culombe*, 367 U.S. at 576.

⁵¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

their power to withhold consent, for that power allows interrogated individuals some measure of control over the flow and intensity of the questioning. Precisely that awareness of the power to control the flow and intensity of a police-civilian street encounter is rebuffed in *Bustamonte*. That power is there, the power to withhold consent to a search, but the search-target's disadvantages of ignorance and fear and resignation are accepted as vulnerabilities we expect law enforcement to exploit to good effect. However much we speak of the Fourth Amendment as a guarantor of privacy, it never has and never will attain the stature of the Fifth Amendment's barrier to the State's desire to invade the most sacred realm of all, the individual soul. Confessions, not physical evidence, have that quality of being intricately in the human soul, which is why we speak of confessions with the imagery of bearing one's soul.

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

We need only look to such cases as *Oregon v. Elstad*⁵² and *Colorado v. Connelly*⁵³ to see

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

that this is so—that *Miranda*, whatever the original understanding might have been, is not about vindicating voluntariness or free will itself, but about bringing into existence the power to withhold consent in a police-civilian encounter by mandating the suspect’s awareness of that power. Treating *Miranda* as a tool to modulate the interrogation process is not to affirm the existence of voluntariness and free choice. In fact, treating *Miranda* that way reflects the opposite; it reflects the ephemeral quality of “voluntariness” and “free will” because it puts into the hands of the interrogated subject the power to draw his or her own voluntariness-involuntariness line. That is why, in my view, the so-called “voluntariness paradigm” is, in all criminal-law contexts, just the locution of a default position by rhetoricians whose job it is to prop up the fragile moral infrastructure of our criminal-justice enterprise. And so, in *Elstadt*⁵⁴ and *Connelly*,⁵⁵ just to point to two notable examples, the power to withhold consent was deemed to have been undiminished, fully respected by law enforcement, even though in both cases there existed an undeniable psychological impetus to disgorge incriminating information. The Court, shoving aside the psychological dimensions of these cases, underscored that the abstract awareness of the power to withhold consent was all that mattered, and that awareness was injected into the encounters through properly given *Miranda* warnings. That meant for analytical purposes that *Elstadt*’s and *Connelly*’s volition were intact—maybe not fully functioning (at least in *Connelly*’s case), but intact nonetheless by the sheer force of the nature of things, by the

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

⁵⁴470 U.S. 298.

⁵⁵479 U.S. 157.

posited reality that volition exists until and unless government affirmatively acts to strip the suspect of it.

II. The Power to Withhold Consent

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

To begin with, the power to withhold consent, in the present-day Fourth Amendment locution, derives from one's "reasonable expectation of privacy," the well-known formulation by Justice Harlan in *Katz v. United States*.⁵⁶ Shutting the phone-booth door was Katz's exercise of his power to withhold consent, the withholding of consent to have others, especially the government, listen in on his conversation. When Dollree Mapp argued for the exclusionary rule, she was demanding that the judicial system vindicate her power of non-consent, her power to say *no* to the law-enforcement officers who insisted on searching her home.⁵⁷ The Supreme Court ruled that the proper vindication of that power to withhold consent, when the government improperly overrides it, is the evidentiary exclusion of the seized evidence.⁵⁸ When Officer

⁵⁶389 U.S. 347, 360 (1967).

⁵⁷*Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁸*Id.* at 660.

McFadden approached Terry and his two companions and conducted a pat-down search, the Court said the thirty-nine year police veteran had the authority to take away their power to withhold consent because reasonable suspicion existed that criminal activity was afoot.⁵⁹

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

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

⁵⁹*Terry v. Ohio*, 392 U.S. 1, 30 (1968).

seizure has occurred.⁶⁰

The case of *Florida v. Royer*⁶¹ exemplifies this. There, two detectives stopped Royer, traveling under an assumed name, from boarding a plane; he supposedly fit a drug-courier profile.⁶² They took Royer's ticket and his driver's license, questioned him, and then "asked him to accompany them to a small room adjacent to the concourse."⁶³ The detectives also brought Royer's two suitcases into the room.⁶⁴ Royer unlocked one of the suitcases and gave detectives permission to pry open the other.⁶⁵ Marijuana was in both suitcases.⁶⁶ The Court nominally framed the case in consent terms, stating that permission to search must be "freely and voluntarily given," but it quickly traversed into the land of *Terry v. Ohio* to determine whether Royer had been seized beyond what *Terry* permits.⁶⁷ That is, the power to walk away from a police encounter creates the conditions for a freely and voluntarily given consent to search. In response to Royer's motion to suppress, the State argued that the detectives never impermissibly seized Royer⁶⁸; put in our terms, the detectives never took away Royer's power to withhold consent, and to the extent that they might have done so, they were justified. The Court disagreed,

⁶⁰See, e.g., *Drayton*, 536 U.S. at 203-05; *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Royer*, 460 U.S. at 501-07; *United States v. Mendenhall*, 446 U.S. 544, 557-59 (1980).

⁶¹*Royer*, 460 U.S. 491.

⁶²*Id.* at 493-94.

⁶³*Id.* at 494.

⁶⁴*Id.* at 494-95.

⁶⁵*Id.* at 495

⁶⁶*Id.*

⁶⁷*Id.* at 497.

citing among many reasons the fact that the detectives never told Royer he could leave the room and catch his plane, and that he was taken into a room that was hospitable to the law-enforcement goal of securing consent.⁶⁹ So, the impermissible deprivation of Royer's power to withhold consent invalidated his purported exercise of the power to consent.

A fractured Court came to the opposite conclusion in *Mendenhall*,⁷⁰ another airport drug-courier case, but the analytical methodology was the same. Mendenhall was taken into a room, just as Royer was, after federal agents identified her as a possible drug courier.⁷¹ She, too, was carrying false identification.⁷² The difference, though, was that Mendenhall never lost her power to withhold consent—no luggage was involved, her identification was returned to her, and she could have, according to Justice Stewart, “end[ed] the conversation in the concourse [with the agents] and proceed[ed] on her way.”⁷³ That meant her consent to go into a room and be searched and questioned further was enforceable against her. Although the Court spoke of the consent as “voluntary,” no reader of the opinion can miss the fact that this conclusion only reflected the Court's judgment that Mendenhall had never lost her power to withhold consent.

⁶⁸*Id.*

⁶⁹*Id.* at 501-07. This last facet of the Court's analysis hearkens back to *Miranda*, where the Court spoke of the coercion arising from a situation where an “individual [is] swept from familiar surroundings into police custody, surrounded by antagonistic forces” *Miranda*, 384 U.S. at 461 (1966).

⁷⁰446 U.S. 544.

⁷¹*Id.* at 547-48.

⁷²*Id.*

⁷³*Id.* at 555. Stewart and Rehnquist concluded that Mendenhall had not been seized when she was accosted on the airport concourse. Three concurring justices thought the issue was extremely close (*id.* at 560 (Powell, J., concurring)), and the four dissenters criticized the plurality for accepting a conclusion that no lower court in the case had accepted. *Id.* at 567-69 (White, J., dissenting).

Retaining that power to withhold consent, not some added metaphysical notion of voluntariness, made the consent enforceable.

The Court put an exclamation point on *Mendenhall* in the much-maligned case of *United States v. Drayton*,⁷⁴ its second drug- and gun-interdiction case at a bus station.⁷⁵ Drayton and his friend were sitting next to each other on a Greyhound bus when a police officer asked them for permission to search their luggage.⁷⁶ The friend said, “Go ahead.”⁷⁷ Because the two passengers were wearing baggy pants and heavy jackets in warm weather, the officer asked the friend “if he had any weapons in his possession,” followed by a request to search.⁷⁸ “Sure,” the friend said.⁷⁹ A pat-down search revealed drug packages taped to his thighs.⁸⁰ Once the friend was removed from the bus, under arrest for carrying drugs, the officer asked Drayton for permission to search.⁸¹ Drayton lifted his hands, a gesture of consent, and drugs were found taped to his thighs.⁸² In what sense Drayton “voluntarily” agreed to suffer the same fate as his friend—something that he witnessed happening just seconds before—is impossible to articulate.

⁷⁴536 U.S. 194.

⁷⁵In *Florida v. Bostick*, 501 U.S. 429, the Court upheld against a Fourth Amendment challenge random searches in the cramped confines of a bus. The coercive conduct of the police, not the oppressive environment in which the encounter takes place, the Court reasoned, is the analytical focus. *Id.* at 436.

⁷⁶536 U.S. at 198-99.

⁷⁷*Id.* at 199.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

And according to the Court, that psychological mystery (if mystery it is) is not a matter in need of unraveling. To blast the Court for characterizing Drayton's gesture of consent as *voluntary*—who can really say that it was?—is to demand from the Court the conquering of a linguistic challenge it never set for itself. What could be articulated and analyzed from the observable facts was not whether Drayton acted “voluntarily,” but whether he had ever lost the power to withhold consent. Not the awareness of it, but the existence of it by virtue of where the law enforcement officers (three of them) were positioned on the bus (the aisle was left open to allow people to step out) and what was communicated, with words and conduct (no threats, polite tone, no display of guns).⁸³

Existence of the power to withhold consent? In what sense can such a thing *exist*? Is it possible to have that power when you don't know you have it? It's a safe bet that if we asked Christopher Drayton he'd say, *power? what power?* To Christopher Drayton, the *awareness* of the power to withhold consent produces the *existence* of that power; and the corollary is true—unawareness means non-existence. It's hard to get around the metaphysical force of this entwining of awareness and existence. But legal judgment is not metaphysics. In the world of good guys and bad guys, the power of non-consent exists in the air, as a matter of atmospherics; it exists if the mythical reasonable *innocent* person would believe that this power exists. And so, in *Drayton*, the *existence* of the power of non-consent—the atmospheric existence, let us say—validated as consensual what clearly was not, psychologically speaking, consensual at all: a clear instance of expressive acquiescence trumping subjective unwillingness.⁸⁴

⁸³*Id.* at 203-04.

⁸⁴*Id.* at 203-05. No wonder Justice Ginsberg said the majority's opinion had “an air of unreality” about it.

Yes, it is true that the *Drayton* reasonable-person standard may well cross the line into the circular and positivist idea that something exists because the law says it exists, and that existence then warrants the law's deployment of it to validate the government's actions. But if we understand the reasonableness inquiry not strictly in terms of what a civilian might experience in a police encounter, but instead as an open-ended normative inquiry into what law enforcement methods we ought to treat as acceptable, we can break that circle and thereby expressly merge constitutional argument with political debate.⁸⁵

* * *

The granting of consent to a particular police-civilian encounter which occurs against the backdrop of the power to withhold consent obviates the need for the police to garner some acceptable level of suspicion. To say that this granting of consent is a "waiver" of the Fourth Amendment isn't quite right,⁸⁶ just as it isn't quite right to say that consent is a form of

Id. at 208 (Ginsberg, J., dissenting).

⁸⁵Professor Nadler insists that consent-search jurisprudence requires that we ask how a "reasonable person" would "feel" during a police-civilian encounter. That inquiry, she insists, ought to be influenced by empirical findings regarding how people react to authority. See Nadler, *supra* note 36, at 163. But that approach assumes the Court's reasonable-person test is actually centered on the inner experience of the target of the search, an assumption that fundamentally misconceives the Court's approach to the Fourth Amendment. If a "reasonable" person not carrying drugs would feel free to say "no" to the police request for a search, then surely a person like Drayton, one with a heightened incentive to think "reasonably," would actually refuse the request. Thus, to say that Drayton felt coerced (which is impossible to deny) but that a "reasonable" person would not have felt coerced, is to say something that is completely absurd. It is to say that the person with the most incentive to act "reasonably" did the exact opposite. So the analytical methodology undergirding *Drayton* belies Nadler's premise that fourth amendment jurisprudence concerns itself with the inner experience of the search-target.

⁸⁶Professor Davies contends that the consent-as-waiver idea animates such cases as *Stoner v. California*, 376 U.S. 483 (1964), *Bustamonte*, 412 U.S. 218, and *United States v. Matlock*, 415 U.S. 164 (1974). Davies, *supra* note 31, at 29-35. He's mistaken. Since I discuss *Bustamonte* and *Matlock* elsewhere in this article, I'll confine my comments here to *Stoner*. In *Stoner*, the police entered defendant's motel room when the motel clerk, who was "more than happy to give [the police] permission," opened the door. 376 U.S. at 485. The analysis hinged not on any notion of waiver, but on these two propositions: (1) Stoner's privacy in the motel room fell within the ambit of the Fourth Amendment ("No less than a tenant of a house, or the occupant of a room in a boarding house [citations omitted], a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.

surrendering our expectation of privacy.⁸⁷ Like the power to withhold consent, its corollary, the power to consent, is a manifestation of a particular legal relationship that exists between the government and the individual during a particular encounter. One can withhold consent and thereby force a police officer to retreat from an encounter and seek some other way to accomplish the search; or one can consent. The legal relationship changes depending on which power is invoked. That legal relationship is always governed by the Fourth Amendment, including the basic principle of *Katz* that a reasonable expectation of privacy defines what is meant by a search. No less than when consent is withheld—a power derived from the Fourth Amendment—granting consent speaks directly to the reach and limits of the Fourth Amendment. The notion of waiver or the surrendering of one’s reasonable expectation of privacy suggests that the legal relationship resulting from the consent exists outside the Fourth Amendment’s purview, but that is simply not so. How courts treat the withholding or granting of consent is itself an expression of, and is informed by, the scope of the Fourth Amendment’s protections. It is in that sense that the exercise of one’s power to grant consent—being that it is a corollary of the power to withhold consent—derives from our reasonable expectation of privacy, and is therefore an *exercise* of, not a surrendering or waiving of, our rights under the Fourth Amendment.⁸⁸

[citation omitted].); and (2) the police officers could not reasonably believe that a motel clerk had the authority, under these circumstances, to let them into his room, absent a warrant (“That protection [against unreasonable searches and seizures] would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.”). *Id.* at 490. Davies misreads *Stoner* when he says that “[i]t is evident that *Stoner* stands squarely against any claim that mere ‘seeming consent’ could legitimate a police intrusion into the privacy of a home.” Davies, *supra* note 33, at 30. It may be true, as Davies points out, that “only a person whose own right is implicated can possess authority to consent,” but that doesn’t undercut the understanding of the Fourth Amendment that holds that consent is not the linchpin to the analysis. An ingredient in the analysis? Yes. Dispositive? Not at all. That is one message of *Rodriguez*, and *Stoner* does nothing to undercut it.

⁸⁷See Davies, *supra* note 31, at 28 (“consent amounts to a citizen’s surrender of an expectation of privacy”).

⁸⁸This conceptual point is distinct from the interpretive question of how much power to withhold consent

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

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

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

Second, consider *Illinois v. Wardlow*,⁸⁹ where a youth standing on a street corner, imbued

should the Fourth Amendment grant.

⁸⁹528 U.S. 119 (2000).

as a constitutional matter with his full power to withhold consent intact, saw a four-car police caravan and ran.⁹⁰ Assuming he ran to avoid a police encounter, which is exactly how the pursuing officers saw the situation,⁹¹ Wardlow was doing nothing more than expressing non-consent to any possible police-civilian encounter. Perhaps the way he expressed his non-consent was unusual, or suspicious—undoubtedly, a reasonable police officer would find flight at least somewhat suspicious or indicative of a guilty conscience. But no matter how one regards the flight, the brute fact remains that running is both lawful and one way to express non-consent. I want to repeat: Wardlow undoubtedly had the power of non-consent—he'd done nothing to allow the police to seize him before he ran. But the way he expressed his non-consent, the way he exercised his indisputable right to avoid a police-civilian encounter, in and of itself generated the justification for a *Terry* stop, a justification that did not otherwise exist.⁹² It doesn't take a robust conception of consent to see that *Wardlow* treats the power of non-consent—the essence to the legal notion of seizure—with utter contempt. Contempt, not with words, but with neglect. The power of non-consent can be lost by how it is used. The Court approved the exercise of the power of non-consent when it takes the form of staying put and remaining silent when a police officer approaches, or by verbalizing a “refusal to cooperate,”⁹³ or by ignoring the officer and “going about [your] business”⁹⁴; but unprovoked flight—that is an unacceptable exercise of that

⁹⁰*Id.* at 122.

⁹¹*Id.*

⁹²*Id.* at 124-25.

⁹³*Id.* at 125

⁹⁴*Id.*

power. And so, *reasonableness*—in this case, the officer’s reasonableness in interpreting Wardlow’s expression of non-consent as suspicious—was the real issue in the case, just as it was in the so-called consent cases of *Bustamonte* and *Rodriguez*.

We may lose our power to withhold consent on the flimsiest of grounds, with law enforcement taking that power from us with disreputable motives—I have in mind, of course, *Whren v. United States*,⁹⁵ where the Court countenanced pretextual traffic stops. We may lose our power to withhold consent when the pursuit of other law-enforcement goals, such as immigration control, commands our allegiance—here, I have in mind *INS v. Delgado*, where immigration officials blocked the doors to a workplace during an investigative sweep.⁹⁶ The Court emphasized that the employees’ movements were restricted not by the government—the immigration officials didn’t disrupt their work except for brief questioning—but by their voluntary obligations to their employers. The analytical focus was clearly not on the psychological stresses of the situation. It had nothing to do with the inner lives of the workers. It had to do with the conduct of the government agents and the perceived need to enforce immigration laws. Reasonableness, again.

Consider finally those cases involving undercover informants. The question in those cases could be put in consent terms: whether the decision to speak to the government agent was consensual, even though the speaker was deceived into believing he was talking to a friend and not a government informant. Framing the issue in consent terms works here because the power to withhold consent remained intact—with one important caveat. The power to withhold consent

⁹⁵517 U.S. 806.

⁹⁶466 U.S. 210 (1984).

associated with the Fourth Amendment does not include the right to be informed that the person with whom you are talking is, in fact, a government agent—an astounding notion, if not for the ubiquity of undercover operations these past many decades.⁹⁷ Indeed, the government is entitled to deceive you into thinking that the person with whom you are talking is *not* a government agent. That deception cannot be squared with a minimally viable understanding of voluntary consent. If at all, that deception could only be squared with a valid understanding of acceptable police investigation.⁹⁸ That the Supreme Court has repeatedly upheld the use of covert government agents thus reveals not the vibrancy of the risk-assumption theory—the conventional understanding in this area—but the judgment that covert operations in crime-fighting is essential, and thus reasonable.⁹⁹ The inner states of the search-target—their being deceived, not just

⁹⁷See *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1967); *Lewis v. United States*, 385 U.S. 206 (1966).

⁹⁸The Court suppresses the *uninformed-consent* aspect of undercover operations with the vacuous notion of assumption of the risk—namely, that the aggrieved party has assumed the risk that a friend may not actually be a friend, but may be a government agent. That risk-assumption rationalization—and that is all it is, a rationalization—brings us back to consent searches. The Supreme Court in *United States v. Matlock*, 415 U.S. 164, suggested that third-party consent searches are justified on an assumption-of-the-risk theory. The considerations that lead to the judgment that a target of a search has assumed the risk that another might consent to a search are precisely the sorts of considerations that one would consider in evaluating whether the law-enforcement conduct was not unreasonable. Some have understood the assumption-of-the-risk theory to refer to the elimination of an expectation of privacy, much like when a suspect unwittingly invites a police-informant or undercover officer into the home and then speaks about matters that are highly incriminating. This line of thinking leads to the conclusion that a consent search is not even a search at all for Fourth Amendment purposes—a rather tortuous and inadvisable way to speak about searches. The risk-assumption theory is vacuous because any activity conducted where there is a societal judgment of no reasonable expectation of privacy necessarily entails an assumption of the risk that one's conduct or words will be collected as evidence. The risk-assumption theory adds nothing to the *Katz* reasonable-expectation-of-privacy locution. Indeed, conceptualizing the risk-assumption theory this way allows for a more honest critique of the *Hoffa* and *White* holdings. Although we may not have a reasonable basis for expecting that our words will remain forever private and that “friends” will never betray us, the intrusion of a government information into one's private realm could still be evaluated as unreasonable governmental activity.

⁹⁹See H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rev. 1137 (1987). See generally WAYNE R. LAFAYE, SEARCH AND SEIZURE §8.1 (a)-(b) at 711 (3d ed. 1996) (deception to induce “consent” is proper if deception is “fair”).

uninformed—is completely beside the point,¹⁰⁰ despite the clear loss of the power to withhold consent.¹⁰¹

III. FAIR BARGAINING AND THE FOURTH AMENDMENT

What does all this mean? We can say for certain, as a doctrinal matter, that Fourth Amendment jurisprudence has never committed itself—and after *Katz* could not have committed itself—to a vision of consent as a subjective condition. Believing that it does, or that it ought to, inevitably produces strawman attacks on the Court’s consent-search jurisprudence. We should see by now that the Court never could, let alone never did, adopt a subjective approach to consent searches, that “voluntariness” never could be a meaningful concept, that the scholastic effort to take the voluntariness locution seriously takes our eye off the ball. What we have seen is that consent searches analytically depend on the power to withhold consent, a matter that preoccupies most of Fourth Amendment jurisprudence. To insist upon a subjective approach in the consent-search arena, therefore, is to insist upon a subjective approach throughout most, if not all, of search-and-seizure law. But once the *Katz* formulation is accepted, the power to withhold consent cannot be analyzed other than from an objective “reasonableness” standpoint. If it were otherwise—if, that is, a particular suspect’s power to withhold consent must be evaluated in terms of a best-interest model (which an honest subjective approach must commit itself to)—then virtually all police encounters, as an empirical matter, would be deemed “seizures” for Fourth

¹⁰⁰That the emotional experience aroused by a government intrusion is not the focal point of the analysis can be seen by comparing the outcomes in *Kyollo v. United States*, 533 U.S. 27 (2001), and *California v. Greenwood*, 486 U.S. 35 (1988). It’s a safe bet that most law-abiding people would regard the rummaging through of our garbage to be a far greater intrusion than the detection of heat emanating off of the walls of our home.

¹⁰¹Anthony G. Amsterdam recognized long ago that Fourth Amendment jurisprudence focuses not on the personal rights of the individual but on the regulation of law enforcement. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367 (1974).

Amendment purposes.¹⁰² After all, what maddens us about the voluntariness locution in consent-search cases is precisely the unreality of it—hardly anyone would feel uncoerced in the sorts of police encounters that are described everyday in our courthouses. And if almost all police encounters constitute Fourth Amendment “seizures”—that is, the power to withhold consent is regarded as empirically and doctrinally nonexistent—then the power to consent disappears as well. It is pure naivete to think, and unfair to expect, that the Court had charted, or would ever chart, such a doctrinal path, one that strips law enforcement of the ability to seek consent to search without any predicate of suspicion. And yet that is what is implied when we naively take the “voluntariness paradigm” seriously.

I say that it is not only naive but also *unfair* to expect that such a doctrinal path had been or would be pursued, because what drives this doctrinal and theoretical point, it is plain to see, is the inescapable realities of law enforcement. Understanding consent as a subjective condition inexorably leads into fair-bargaining conceptions—“voluntariness with a vengeance,” as Justice Harlan put it in his *Miranda* dissent¹⁰³—where rights are relinquished for benefits received in return. That is how criminal-defense lawyers in their advisory capacity would like to treat waivers, which is why they tell clients not to say a word when they are threatened with being taken into, or are already in, custody. Rights are valuable and thus worth concessions in a

¹⁰²See *Bostick*, 501 U.S. at 434. The Court explicitly rejected the subjectivist approach to evaluating the power to withhold consent:

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a *reasonable person* would feel free “to disregard the police and go about is business,” the encounter is consensual and no reasonable suspicion is required.

Id.

¹⁰³384 U.S. at 505.

bargaining process with the prosecutorial authorities. But fair bargaining is exactly what an on-the-field police-civilian encounter is *not* about. If it were, then we would gravitate towards rules approaching something like an informed-consent doctrine. We would take *Johnson v. Zerbst*¹⁰⁴ out of the courtroom and have it set the ground rules whenever the police seek out evidence of criminality. Trickery, pressure, coaxing—a whole host of tactics that exploit a palpable psychological power imbalance that favors law enforcement—would be an anathema in this fair-bargaining world, because the benchmark of legitimacy would be rational calculation. Consent and waiver would be entwined insofar as consent would be legally valid so long as the concomitant waiver reflects a rational calculation that the waiving party's interests are actually being advanced by the waiver. In the Fourth Amendment arena, this rational calculation would minimally entail the civilian's awareness that the police encounter could be ended merely upon her say-so. *Bustamonte* makes explicit what the entirety of Fourth Amendment jurisprudence always has shown: the fair-bargaining model, the idea of rational calculation in the algebra of consent, has no traction when it comes to search-and-seizure law.

And it ought not have traction, since the fair-bargaining model is absurd in the Fourth Amendment context.¹⁰⁵ It is absurd because the police-civilian encounter primarily concerns evidence collection, crime-prevention, and crime solving; because it is entirely unnecessary to vindicate what we aspire for the Fourth Amendment; and because efforts to promote rational calculation in civilian-police encounters—even if that were a value society wanted to

¹⁰⁴304 U.S. 458.

¹⁰⁵See *Robinette*, 519 U.S. at 40 (1996); *United States v. Watson*, 423 U.S. 411 (1976). That the fair-bargaining model is inapt in the Fourth Amendment realm doesn't mean *Bustamonte* is immune from criticism. It may be more prudent to choose a social arrangement whereby police officers must warn citizens of their right to

promote—would be too messy to enforce.¹⁰⁶ And so it would be absurd to treat consent as mandating considerations of a person’s psychological state and personal attributes that bear on subjective acquiescence to a search; such considerations are properly evidentiary in nature, suggestive but hardly dispositive of the true issue that is at stake when evaluating a Fourth Amendment consent scenario. The true issue has never been—and, as a realistic matter, could never be—voluntariness; the true issue is and always has been the acceptability of law-enforcement methods, the *way* that law enforcement secures the outward expression of consent.¹⁰⁷

IV. VOLUNTARINESS AND CHOICE

Consent is not valid if given only in acquiescence to a claim of lawful authority, such as when an official conducting the search misrepresents that he has a warrant or the possibility of getting one¹⁰⁸; nor can consent justify a search if the search was conducted under a defective warrant.¹⁰⁹ And, as we saw with *Royer*, if consent is given *during* an illegal seizure, it is invalid.¹¹⁰ These scenarios show that voluntariness, if it has any referential meaning at all,

withhold consent. That is not a conceptual issue; it's a policy judgment.

¹⁰⁶*Miranda* warnings can be given without any nuanced judgment on the part of law-enforcement officers. They read the rights from a card. But that rote rendition of rights is not possible in an on-the-street encounter involving an effort to accomplish a search. In situations where law enforcement does not yet have adequate grounds to conduct a search, a warning to a target of a search that she may refuse consent would be accurate. But where law enforcement has enough information to secure a warrant, that warning would be misleading, since a right-to-refuse warning implies that consent is the *only* way the officer could accomplish the search.

¹⁰⁷*See Bostick*, 501 U.S. at 435 (police-civilian encounter consensual “so long as the police do not convey a message that compliance with their requests is required”).

¹⁰⁸*Bumper*, 391 U.S. at 548-49.

¹⁰⁹*Id.* at 549.

¹¹⁰*Royer*, 460 U.S. at 501-08.

signals the existence of an actual perceived choice to grant or withhold consent. The whole overborne-will idea—of limited relevance today, since physical brutality to extract “consensual” disgorgement of evidence is far less prevalent today than in earlier times—is nothing more than an acknowledgment that consent, at the very least, requires the existence of a choice. Maybe not a palatable choice, and certainly not a choice unburdened by pressures and harsh consequences, but an actual choice nonetheless.¹¹¹ And so, it would be wrong to understand *Bumper v. North Carolina*,¹¹² for example, where consent was given after law-enforcement officers said they had a search warrant, as a case where *voluntariness* demands a certain quality in the decisionmaking process beyond the bare existence of a choice to grant or withhold consent.¹¹³

Once we get beyond those outlying situations where, by deed or words, the capacity for choosing has been severely eroded, we must understand voluntariness to be a word without a genuine referent. It doesn’t actually mirror anything that exists in the real world. There is no

¹¹¹The “overborne will” is nicely captured in Justice Frankfurter’s description of the prisoner’s predicament while at the police station:

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

Culombe, 367 U.S. at 575-76.

¹¹²391 U.S. 543.

¹¹³The Court spoke in terms of consent being valid only when “freely and voluntarily given,” but it is clear that the nonexistence of a realistic choice—the taking away of the power to withhold consent—is the critical feature of the decision. 391 U.S. at 550. As the Court put it, “[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.” *Id.*

observable fact that we can call *voluntary* in the way that we can call a chair a *chair*. Voluntariness is not even a linguistic tool—let alone a misguided one—that frames the constitutional inquiry into whether government-engineered coercive influences are sufficiently great to say that the target of the search ought not take ownership of her expressive consent (*i.e.*, the granting of permission to search). Professor Simmons’ so-called “voluntariness paradigm”¹¹⁴ is nothing more than an offshoot of the criminal law’s embrace of the free-will idea—not as an empirically verifiable reality, mind you; for the criminal law accepts free will *as if* it exists¹¹⁵—but as a presupposition upon which to build the moral edifice of the criminal law. And so, free will being the ephemera that it is, the notion of voluntariness could hardly be otherwise.

The conceptual key to understanding the jurisprudence of consent searches, therefore, is not the notion of *voluntary waiver*; that path leads to a quagmire of meaningless conceptual puzzles. Rather, the key is understanding consent as an expressive idea, one that concerns itself with the *outward signs* of one party granting permission to another.¹¹⁶ Voluntariness is but a label we can place upon *that* observable phenomenon—in the Fourth Amendment context, an interaction that transpires between law enforcement and a private citizen who may but need not be a target of suspicion.¹¹⁷ We can see signs, physical and verbal, that indicate the granting or

¹¹⁴Simmons, *supra* note 7, at 775.

¹¹⁵*See, e.g.*, HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74 (1968).

¹¹⁶The Court’s treatment of the consent issue in *Florida v. Jimeno*, 500 U.S. 248, leaves no doubt that consent is best understood in the expressive sense, not the internal sense. The issue in *Jimeno* was the scope of the consent. Jimeno argued that he consented to a car search but did not consent to the opening of a paper bag found during the search. *Id.* at 249. The Court upheld the search because Jimeno’s granting of permission—what he *expressed*—governed the scope of the search, not Jimeno’s private intentions—what he *thought* was the scope of the consent. *Id.* at 251-52.

¹¹⁷*Cf. Mendenhall*, 446 U.S. 544 (seizure occurs if a “reasonable person would have believed that he was not free to leave”). *Mendenhall*’s objective test was endorsed only by Justices Stewart and Rehnquist, but four years

withholding of permission to search.¹¹⁸ Like all observation, this one involves evaluation, normative considerations that, in the case of a contested search, lead us to judge the purported granting of permission as valid or invalid. It is thus a mistake to posit that the Court purports to engage in some sort of metaphysical inquiry into *voluntary* consent. The analytical focus is not the quality of the consent *per se*, but the police practice to override any resistance to giving that consent—a fact that characterizes both consent-search and *Miranda* jurisprudence.

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

later commanded the support of the full Court. See *INS v. Delgado*, 466 U.S. 210.

¹¹⁸The scope of a consent search may not exceed the scope of the consent given, and that scope is determined by asking how a reasonable person would have understood what was communicated between the consenting party and the searching party. See *Jimeno*, 500 U.S. at 250-51.

nothing more, and nothing less, than assess reasonableness.¹¹⁹

Perhaps metaphysics lends elegance to the doctrine. The evaluative judgment embedded within the reasonableness test reflects the inelegant fact that law enforcement is at war with criminals. Law-enforcement officers look for evidence of crime; criminals try their best to conceal that evidence. In this “competitive enterprise of ferreting out crime,”¹²⁰ criminals have a decided preference not to consent to a search. Law enforcement officers contrive ways to induce consent. More often than not, the entire evaluative enterprise boils down to a nitty-gritty judgment about what kinds of coercion, what kinds of pressure and trickery and deceit, law enforcement may employ to get the criminal to grant what he does not want to grant—permission to search. Of course, the same goes for extracting damaging admissions and confessions. Coercive methods to get suspects to do what they do not want to do, incriminate themselves, are evaluated to arrive at a pragmatic judgment that is broadly framed by the language of the Constitution.¹²¹ It simply makes no sense to take “voluntariness” seriously when the purpose of

¹¹⁹“Reasonableness” is not an empirical or psychological inquiry. It should be understood normatively, as expressing what is legitimate or justifiable. A person might be entirely reasonable in believing that her actions on a secluded beach in the middle of the night are unobserved. But that hardly merits the claim that her illegal actions on that secluded beach, if observed by law enforcement, come within the protective umbrella of the Fourth Amendment. *See Oliver v. United States*, 466 U.S. 170 (1984). Her actions occur in public. Statistical likelihood of being observed might favor her psychological state of security that she is doing something “private,” but the normative judgment that activities on public lands are not “private” prevails in the constitutional analysis. Empirical considerations might serve an evidentiary function in concluding that a subjective expectation of privacy was unwarranted. So, one might believe that one’s trash or one’s backyard activities are private, but the realities of modern-day life could undercut the reasonableness of those subjective expectations. *See California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988).

¹²⁰*Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

¹²¹This focus on law-enforcement methods to sever a search target’s first- and second-order preferences explains why evidence may be suppressed upon a finding of invalid consent even though that evidence could have been acquired by some other legitimate means. *See Kyollo*, 533 U.S. at 34, n.2 (“The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.”).

an endeavor is to get offenders to do that which they do not want to do.

This exercise in evaluating the tug-of-war of crime-prevention and crime-solving reveals how the concept of consent can expand or contract. If a police officer has probable cause to search but cannot contact a magistrate, a court could legitimately find consent on sparser evidence than in a situation where a police officer had nothing more than a hunch when eliciting the consent to search. Similarly, a heavier burden to establish consent would be appropriately placed on the prosecution where the police officer could have obtained a warrant but did not, relying on consent instead. Within the Fourth Amendment context there is nothing fixed about the concept of consent, because there, too, the concept is but a tool to extend or limit the reach of that constitutional right.¹²²

Consent, then, is dynamic, not static. It is a functional idea, not lexical. It functions in the Fourth Amendment context to define the establishment of a legal relationship between a civilian target of a search and law enforcement. Words of consent are not significant because of what they might say about a suspect's psychological condition, or about the suspect's cost-benefit analysis. They are significant because of what those words *do*.¹²³ Consent can empower the

¹²²When we enter this world, waiver ceases to take on the imagery of a relinquishment of a possession. In the Fourth Amendment context, the target of the search is not so much relinquishing her possession of a right, but rather is foregoing the opportunity to *trigger* the enforcement of a right. This conceptualization explains why consent is found in those cases where a person fails to object to a search. *See, e.g., United States v. Morales*, 861 F.2d 396, 399-400 (3d Cir. 1988); *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667-70 (5th Cir. 2003); *United States v. Wesela*, 223 F.3d 656, 661 (7th Cir. 2000); *United States v. Esparza*, 162 F.3d 978, 980 (8th Cir. 1998); *United States v. Patten*, 183 F.3d 1190, 1195 (10th Cir. 1999); *United States v. Dunkley*, 911 F.2d 522, 525-26 (11th Cir. 1990)(*per curiam*).

¹²³Understanding consent in this functional way—by what it *does*, not by what it presumably *is*—reveals why critics misfire when they lament that a lax consent-search doctrine betrays our commitment to ensuring that waivers are knowing, intelligent, and voluntary. *See Davies, supra* note 31, at 11. Consent certainly *does* function to eliminate what otherwise might be a viable Fourth Amendment argument, just as a waiver would. Simply because consent, in its operation, functions in the same way as a waiver would function does not mean that consent in a Fourth Amendment scenario must be evaluated under the same standards as a waiver in a courtroom scenario.

civilian by, for example, facilitating travel in a post-9/11 age of security threats. More often, consent empowers law enforcement: it is an act whereby the criminal suspect empowers the suspicious police officer to gain the upper hand in the law-enforcement struggle. The *Bustamonte* Court understood consent in this way when it said that permission-granting ought to be encouraged, not discouraged.¹²⁴

It is thus tempting to argue that consent-search jurisprudence resurrects the property-based reasoning of *Boyd v. United States*,¹²⁵ where the Court evaluated the propriety of a search or seizure in terms of who had a superior property interest in the thing to be searched or seized. That mode of reasoning is anachronistic, of course, having long given way to privacy-based reasoning.¹²⁶ But consent searches don't fit comfortably within a privacy-based notion of the Fourth Amendment, which may be one reason why there is so much academic angst over them. The huge advantage given to law enforcement in extracting "consent" from a search target suggests an underlying view that the contraband that the police are endeavoring to uncover more properly belongs to society, with its superior interest in crime-detection, an interest that clearly trumps an offender's interest in crime-avoidance.

IV. CONCLUSION

To treat consent as a waiver in a Fourth Amendment context produces judgmental pronouncements of hypocrisy. How hypocritical it is, the criticism goes, to applaud the Fourth

¹²⁴412 U.S. at 243.

¹²⁵116 U.S. 616 (1886).

¹²⁶*See Warden v. Hayden*, 387 U.S. 294 (1967).

Amendment as a bulwark for privacy, and yet permit with such laxity the waiver of its enforcement.¹²⁷ The conceptual flaw in this criticism, of course, rests with the fallacious equation of consent and waiver. If consent is to be entwined with anything, it is not to be entwined with waiver, but rather, with a substantive vision of the Fourth Amendment itself. Because the function of consent is to define a legal relationship, and because the evaluative norm in Fourth Amendment jurisprudence is and always has been *reasonableness*, the litigation of consent searches tests the boundaries of the Fourth Amendment itself. A consent to search is not a waiver of the right to insist upon enforcement of the Fourth Amendment guarantees. Foregoing a Fourth Amendment challenge *in a courtroom* would be such a waiver. Saying that there has been a consent to search is saying something about a legal relationship between civilian and law enforcement whereby the search that ensues is itself not unreasonable. Consent is tantamount to a waiver of the Fourth Amendment only if we understand the search to be *a priori* unreasonable. But there is no *a priori* position we can take in a police-civilian encounter because it is the encounter itself that must be evaluated in order to say something meaningful about its Fourth Amendment implications and ramifications. Waiver is, if anything, purely epiphenomenal, derivative of the finding of consent; and that finding of consent, in turn, speaks directly to the

¹²⁷*See, e.g.,* Stuntz, *supra* note 31, at 764. This must mean, Professor Stuntz argues, that constitutional guarantees enshrined in the Fourth, Fifth, and Sixth Amendments exist to protect the innocent, not the guilty. This is true, and trite. I take Professor Stuntz's point as an observation that hardly needs elaborate argumentation to justify. The constitutional rights flowing from these provisions reflect values and promote policies that define and shape our communal and private lives. They don't exist for the sake of those who breach community norms. They don't exist to make life difficult for law enforcement officers. They often protect the guilty, and they often impede law enforcement; but their *raison d'être* is to make life more worthy of living. So, when a drug dealer moves to suppress the seizure of a cache of drugs, the drug dealer is seeking the protections of the Fourth Amendment in his capacity as a person living within a society that places certain limits on governmental activity. To say that he is a proxy for us law-abiding citizens is a cute locution that merely captures the fact that society at large benefits in having Fourth Amendment guarantees in our Constitution, even though society does not benefit in letting the drug dealer evade criminal prosecution.

reach and limits of the Fourth Amendment.

* * *

We can and should critique Fourth Amendment jurisprudence in terms of what sorts of law-enforcement methods are appropriate in a free and democratic society. Such critiques mean we must defend judgments about how much government intrusion law-abiding people are willing to accept.¹²⁸ Surely no one could rationally suggest that this judgment should take the point of view of the law-violator who wishes to keep information out of the hands of the government.¹²⁹ Thus, drug-sniffing dogs in airports may be very intrusive to drug traffickers; but the intrusion is nil for business and vacation travelers. Upholding such searches is, therefore, a defensible application of the Fourth Amendment.¹³⁰ Drug- and weapons-interdiction programs of the sort at issue in *Drayton* and *Bostick* are more controversial. We can quarrel about the judgment there, from the point of view of legitimate bus travelers.¹³¹ We can and should concern ourselves about

¹²⁸To be more blunt about it, a proper understanding of consent brings into focus our collective judgment about how aggressively law enforcement may attack criminality, which is entirely appropriate, since “the fourth amendment [is] . . . quintessentially a regulation of the police.” Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 371 (1974). See also Thomas Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 556 (1999) (“the larger purpose for which the Framers adopted the text . . . [was] to curb the exercise of discretionary authority by officers”). To move the analysis away from issues of subjective consent and focus instead on the conduct of the authorities hardly ought to be seen as a bad thing in itself. Cf. Goldstein, *supra* note 47, at 686 (“Law should establish standards of conduct for the authorities, not the citizen”).

¹²⁹See *United States v. Place*, 462 U.S. 696 (1983). Cf. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1020 (1995) (arguing that the focus of the fourth amendment’s protections ought not be on “informational privacy,” but rather on “force and coercion,” as that would “better protect the interests most people value most highly”); Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1133 (1996) (“The Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent . . .”); Louis Michael Seidman, *The Problems with Privacy’s Problem*, 93 Mich. L. Rev. 1079, 1087 (1995) (arguing that the fourth amendment appropriately focuses on the harm of governmental “violence, disruption, and humiliation,” and thus is concerned with preserving dignity, not information).

¹³⁰See *Place*, 462 U.S. 696.

¹³¹Even on an objective standard, it is more than defensible to stake out the bright-line rule that the

the race and class implications of such interdiction programs. But what we ought not quarrel over is whether the “consent” of the defendant in *Drayton* was in some metaphysical sense, “voluntary.” If the interdiction program smacks of a police-state environment, and thus pollutes our culture in a way that is intolerable,¹³² in whole or in part because of its coercive nature, then announcing the judgment that the consent given is “involuntary” is legitimate. The wording may be ill-advised, but the judgment itself might well not be.

And yet I hesitate to jettison altogether the rhetoric of voluntariness and free will, even though, as I have argued, these concepts refer to nothing actual. I philosophically cannot quarrel that Fourth Amendment analysis would probably be more honest if we did so. But I balk because I think there is value to the *attitude* these words evoke, a certain presumption, if you will, that government action must be justified with arguments beyond short-term law-enforcement necessity. I don’t regard this as squishy sentimentalism. I wonder what we might lose in making the entire Fourth Amendment adjudicatory enterprise turn strictly on “models of reasonableness.” If concepts, facts, and observations are interdependent—and they surely are, inasmuch as concepts come into being through observations and acquired facts, and concepts in turn permit effective observation and fact-acquisition¹³³—then the concept of “voluntariness” can at the very least aid lawyers and judges as to what “facts” and “observations” should count in the argumentation over whether a consent search is “reasonable.” And, more abstractly, perhaps

interdiction programs like those in *Bostick* and *Drayton* are constitutionally invalid, as the Florida Supreme Court did in *Bostick*. *State v. Bostick*, 554 So.2d 1153, 1157 (Fla. 1989).

¹³²Cf. Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751, 1754 (1994) (arguing that the “animating principle [of the fourth amendment] . . . is the idea of reciprocal government-citizen trust”).

¹³³See PUTNAM, *supra* note 12, at 199, n. 10.

there is value in the slippery debate—tacit as it usually is—over what vision of the “person” we harbor and want to promote when we confront issues arising from a police-civilian encounter. Maybe the voluntariness rhetoric functions in that mysterious way, pricking us to ask, *what image of the autonomous person do we endorse?*

But all this doesn't change the fact that the urge to go metaphysical in the way I've discussed it in this article—that is, to go beyond the attitudinal and to critique how police-civilian encounters are evaluated from that metaphysical vantage point—should still be avoided.¹³⁴ That analytical orientation steers Fourth Amendment jurisprudence towards a frozen and stultifying discourse; it suggests a fetishism for words without due regard for the real-world struggles that underlie constitutional litigation.¹³⁵ It is an analytical orientation that faults the Supreme Court for an inability to tell us what it means to act with free will, for the upshot of taking the so-called “voluntariness paradigm” seriously is to indulge in the false belief that an act of free will can actually be identified.¹³⁶ And so to critique Supreme Court jurisprudence in this way bespeaks a desire to avoid the unavoidable—a straightforward debate over the contested issue of how we want to live, of the relationship we want to have with our government, of how we want the government to regard us. It would be better, for example, if we debate the scope of the consent-search doctrine not with references to voluntariness, but with a real-world concern over whether

¹³⁴See West, *supra* note 5, at 425 (“If we are motivationally complex, then we cannot delegate to any ambiguously motivated human act such as consent the task of moral legitimation.”).

¹³⁵*Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L. J.* 1, 74-76 (1997) (noting that the “the legal system's discussion of criminal defendants' rights has suffered from an air of unreality” because we are more comfortable with abstractions than actual nitty-gritty practices).

¹³⁶See generally Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 *Buff. Crim. L. Rev.* 599 (2005).

law enforcement has unwarranted latitude in how it approaches and interacts with certain segments of the American population. If we get away from metaphysical talk, if we recognize “voluntariness” to be just a word without any true referent, at most an expression of an ethical attitude that colors the analysis, then we force ourselves to engage in a debate over these worthy contestable questions.¹³⁷ I think the Court has long prompted us to debate the matter in these terms. Terms that compel us to confront the democratic quandary of what price we are willing to pay for things that are hardly quantifiable.

¹³⁷Cf. Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. Mich. J. L. Ref. 465 (1984) (arguing for what author calls a “community model” of criminal justice that demands some willingness of individuals to sacrifice “some liberty or privacy” to facilitate effective law enforcement).