# (NOT) FREE TO LEAVE: PREVENTING TERRORISM WITH HONEST CONSENT SEARCHES

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## INTRODUCTION

Suppose you were to walk down the steps into a New York City subway station carrying a large backpack. Upon entering the station, you see three uniformed police officers and a large sign declaring that "backpacks and other containers are subject to inspection." As a proud civil libertarian, you clutch your bag, stare the police officer in the eye, and look at the steps indecisively. What do you think will happen next? The Second Circuit insists that "an individual may refuse the search provided he leaves the subway."[1] Yet no one has informed you of your legal rights, so it is difficult to avoid being compelled to consent "to a search when surrounded by police at close quarters."[2] Nonetheless, this consent is considered freely given and constitutes a valid waiver of your Fourth Amendment rights.[3]

Police have an important role to play in preventing terrorist attacks on mass transit facilities. Police can set up search programs for social problems ranging from drugs in schools to terrorism, so long as the main purpose is not enforcing the criminal laws or col-

1. MacWade v. Kelly, 460 F.3d 260, 270 (2d Cir. 2006) (noting that the voluntary nature of the search indicates that the NYPD Contain Inspection Program's primary purpose is to prevent terrorists from boarding subway trains with explosives).

2. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (arguing that such consent is "absurd, meaningless, and irrelevant").

3. *See MacWade*, 460 F.3d at 270, 273 (describing the search as "voluntary" and noting that "passengers . . . may decline to be searched"); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

lecting evidence.[4] Such "special needs" searches, which can be conducted without a warrant or probable cause, are important tools wielded by law enforcement when protecting populations from terrorism.[5]

It is well established that countries across the world face a grave threat from terrorist attacks on transportation and infrastructure.[6] Leading counterterrorism experts agree that search programs are effective law enforcement tools for preventing such attacks. These experts argue that a system of checkpoints "incrementally increases security and that taken together, the [search] programs . . . [have] made it more difficult for terrorists to operate."[7] Specifically, the "flexible and shifting deployment of checkpoints deters a terrorist attack because it introduces the variable of an unplanned checkpoint inspection," which in turn "creates an incentive for terrorists to choose . . . an easier target."[8] Thus special needs searches represent "reasonably effective" ways for police to deter terrorism,[9] and eliminating them completely is not the appropriate reform.

Although special needs search programs may be vital to preventing terrorist attacks, they are largely premised on implied

4. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) ("Given that the School District's Policy is not in any way related to the conduct of criminal investigations, respondents do not contend that the School District requires probable cause before testing students for drug use.") (reference omitted).

5. *See MacWade*, 460 F.3d at 268, 271.

6. For instance, New York City alone has experienced three relatively recent attempts to bomb its subway system: in 1997, police uncovered a plot to bomb Brooklyn's Atlantic Avenue subway station, see *id.* at 264; in 2004, police apprehended terrorists attempting to blow up the Herald Square subway station in Midtown Manhattan, see *id.*; and in 2010, police thwarted yet another plot to bomb Manhattan subway lines, see Colin Moynihan, *New Charges in Subway Bomb Plot*, N.Y. TIMES (Aug. 6, 2010), http://www.nytimes.com/2010/08/07/nyregion/07subway.html. Globally, other major cities have experienced massive terrorist attacks on their transportation systems: in 1995, twelve people died in a terrorist attack on the Tokyo subway system, see Norimitsu Onishi, *After 8-Year Trial in Japan, Cultist is Sentenced to Death*, N.Y. TIMES (Feb. 28, 2004), http://www.nytimes.com/2004/02/28/world/after-8-year-trial-in-japan-cultist-is-sentenced-to-death.html?pagewanted=all&src=pm; in 2004, over 240 people died from terrorist attacks on commuter trains in Madrid and Moscow, see *MacWade*, 460 F.3d at 264; and in 2005, at least fifty-six people died from a series of coordinated terrorist attacks on the London subway and bus systems, see *id.* Most famously, on September 11, 2001, 2,752 people died after terrorists hijacked commercial airplanes and crashed them into the World Trade Center and Pentagon. *See Accused 9/11 plotter Khalid Sheikh Mohammed faces New York trial*, CNN (Nov. 13, 2009), http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html.

7. *MacWade*, 460 F.3d at 267 (internal quotation marks omitted).

8. *Id.* at 266–67 (alteration in original) (internal quotation marks omitted).

9. *See id.* at 273–75.

coercion—"[t]he improper use of power or trust in a way that deprives a person of free will."[10] In subway searches, uniformed officers acting from positions of authority "request" consent, individuals watch those before them acquiesce, and the threat of arrest lurks menacingly in the background throughout.[11] Moreover, in many checkpoint searches, once an individual is selected, officers have virtually unlimited discretion to request consent for more intrusive searches, enlarging the scope of the initial consent.[12] Yet courts have considered consent when evaluating special needs searches, and treated these intrusions as voluntary, "so long as . . . the passenger has been given advance notice of his liability to such a search so that he can avoid it."[13]

Consider the following drug-testing cases. In *Skinner v. Railway Executives' Association*, the Supreme Court upheld the constitutionality of mandatory drug testing of railroad employees because the employees consented to drug testing by choosing to work for a highly regulated industry.[14] In *Vernonia School District 47J v. Acton*, the Court upheld the mandatory drug testing of student athletes because they had chosen to participate in school sports and thereby consented to be drug tested.[15] The Court later made the same argument to uphold the drug testing of participants in all student activities.[16] Even outside the drug-testing context, the Court upheld border checkpoint searches, in part because travelers were able to obtain advance notice of the checkpoint's location,[17] and, therefore, implied their consent to search by approaching the checkpoint. Conversely, the Court struck down a drug-testing program for pregnant women, in part because the women were not informed they were to be drug tested and, therefore, never had the

10. BLACK'S LAW DICTIONARY 294, 1666 (9th ed. 2009).

11. *Cf. MacWade*, 460 F.3d at 264–65 (describing the subway checkpoint procedure).

12. *Cf.* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 464–65 (1990) (Stevens, J., dissenting) (noting the "virtually unlimited discretion" of officer to detain driver on the "slightest suspicion" of intoxication).

13. *MacWade*, 460 F.3d at 275 (alteration in original) (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)) (internal quotation marks omitted) (supporting the notion that voluntariness minimizes intrusiveness).

14. *See* 489 U.S. 602, 624–25 (1989).

15. *See* 515 U.S. 646, 657, 664–65 (1995).

16. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 831–32 (2002) (noting that students participating in "competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes").

17. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

opportunity to consent.[18] Yet the Court has also upheld special needs searches that lacked notice,[19] indicating that notice—and therefore consent—is not a constitutionally required element of special needs searches.

If courts were honest about the coercive nature of requests for consent in special needs searches, then the search programs would be unconstitutional. Yet, for all of the reasons discussed herein, consent is a legal fiction. This Note will argue that courts should abandon consent in their reasonableness analysis of special needs searches. Although this may seem to allow coercive searches, special needs searches performed without consent are no more coercive than other searches permitted under current law, and this provides greater honesty in Fourth Amendment law. Moreover, special needs search programs, unlike ordinary police searches, require strict procedural protections—such as stopping people at a predetermined frequency to prevent the arbitrary exercise of authority[20]—expressly designed to limit police discretion.

As the law currently stands, courts do not always consider consent when analyzing special needs searches, indicating that consent is not constitutionally required.[21] Nonetheless, it is important to limit this argument to the special needs context because such searches already have sufficient political and procedural safeguards to prevent abuse. Therefore, the proposed doctrinal shift yields significant benefits while remaining limited in scope.

This Note is organized as follows. Part I demonstrates the fiction of consent in Fourth Amendment law and extends this analysis to the special needs doctrine. Part II argues that removing consent from the reasonableness analysis of special needs searches will enhance doctrinal coherence and the integrity of Fourth Amendment jurisprudence, while ensuring that police have adequate law enforcement tools to protect against terrorism. Part III defends this proposed doctrinal shift by arguing that special needs searches

18. *See* Ferguson v. City of Charleston, 532 U.S. 67, 77 (2001) (specifically distinguishing *Skinner* and *Vernonia* on this basis).

19. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 460 (1990) (Stevens, J., dissenting) (noting that the sobriety checkpoint upheld by the majority was operated at night, in an unannounced location, and was dependent upon surprise).

20. *See* MacWade v. Kelly, 460 F.3d 260, at 273 (2d Cir. 2006) ("[T]he Program is narrowly tailored to achieve its purpose [because, *inter alia*,] . . . police exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority.").

21. *Cf. Sitz*, 496 U.S. at 460 (Stevens, J., dissenting) (noting that the sobriety checkpoint upheld by the majority was dependent upon surprise).

would retain sufficient political and procedural checks to prevent abuse.

## I.
## THE FICTION OF CONSENT IN FOURTH AMENDMENT JURISPRUDENCE

This section analyzes the Supreme Court's consent search jurisprudence and surveys the literature that criticizes the Court's approach as "surreal,"[22] insofar as a police request for consent is likely to be taken as a "command."[23] The purpose of this section is to explain the fundamental flaws in the Court's analysis of ordinary consent-based searches and seizures in order to provide a context for understanding special needs searches. Understanding the flaws in the Court's consent jurisprudence lays the foundation for the argument in Part II that special needs searches, unlike ordinary searches, have sufficient procedural safeguards to dispense with consent as a factor in analyzing the reasonableness of special needs searches.

Subsection A begins by developing the legal standards for consent searches from Supreme Court case law. It then explains the special needs doctrine as developed by Supreme Court and circuit court decisions. Subsection B surveys the literature criticizing consent searches as coercive based upon the social psychological pressures of authority figures, power imbalances in police encounters, racial tensions, and perverse police incentives. It then extends these criticisms of consent searches by arguing that the presence or absence of consent is irrelevant to the constitutionality of special needs searches.

### *A. Searches and Seizures*

This subsection will discuss the constitutional requirements for police searches and describe an exception to those requirements: consent searches. First, this section will cover the major Supreme Court cases on consent searches. Second, it will examine case law

22. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 McGeorge L. Rev. 27, 27 (2008); *see also* United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting) (arguing that the Court's consent search jurisprudence had "an air of unreality"); John M. Burkoff, *Search Me?*, 39 Tex. Tech L. Rev. 1109, 1114 (2007); Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 241–42 (2001); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 Ind. L.J. 69, 89 (2007).

23. H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police 81 (1988).

concerning special needs searches and evaluate the role of consent in those cases.

1. Constitutional Search Requirements and Consent Search Case Law

Constitutionally, police cannot conduct a "search" or "seizure" within the meaning of the Fourth Amendment without a warrant issued by a neutral magistrate based on a showing of probable cause.[24] Although there are various exceptions to the warrant requirement,[25] none is more prevalent than consent.[26] The Supreme Court has held that consent is voluntarily given if "a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter."[27] When determining the validity of a suspect's consent, the Court has looked at factors including the suspect's age and education,[28] whether the officer used a weapon in a "threatening manner,"[29] and whether an officer informed a suspect that he may refuse consent.[30] So long as a suspect voluntarily consents to a police search or seizure—a determination that is based objectively on the totality of the circumstances—the officer is free to search the suspect without individualized suspicion.[31]

The seminal Supreme Court case concerning consent searches is *Schneckloth v. Bustamonte*, where the Court affirmed that consent constitutes a valid exception to the normal Fourth Amendment procedural requirements.[32] *Bustamonte* began as an ordinary traffic stop.[33] After discovering that the driver did not have a license, the

24. *See* U.S. CONST. amend. IV.

25. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (noting the Court has permitted warrantless entry "to prevent the imminent destruction of evidence"); Illinois v. McArthur, 531 U.S. 326, 331–33 (2001) (allowing warrantless seizure as "[i]t involves a plausible claim of specially pressing or urgent law enforcement need, *i.e.*, 'exigent circumstances'"); United States v. Santana, 427 U.S. 38, 43 (1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."); Maryland Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967) (creating the "hot pursuit" exception to the warrant requirement).

26. *See* Simmons, *supra* note 2, at 773 ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.").

27. Florida v. Bostick, 501 U.S. 429, 438 (1991).

28. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980).

29. *See Bostick*, 501 U.S. at 432.

30. *See id.*

31. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

32. *See id.* at 219 ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

33. *See id.* at 220.

officer requested one passenger's consent to search the car.[34] That passenger then not only gave consent, but "actually helped in the search of the car, by opening the trunk and glove compartment."[35] The search revealed stolen checks, which were used to convict a second passenger for possessing a check with intent to defraud.[36] The Court held that the officer's actions did not violate the Fourth Amendment because he obtained consent to search the car; therefore, the stolen checks were admissible evidence.[37] However, the Court went on to require that such consent must be voluntary, where "[v]oluntariness is a question of fact to be determined from all the circumstances."[38] While such a test may appear objective, the Court explained that subjective factors such as education, intelligence, and whether the police gave effective warning are relevant for deciding the voluntariness of consent.[39] The Court later extended this list to include age as well.[40]

The voluntariness test for consent searches is based largely on the unique facts of *Bustamonte*, where the officer obtained enthusiastic consent.[41] Nonetheless, the Court warned against consent obtained by explicit or implicit coercion, for "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."[42] Despite the Court's warning, critics complain that in practice, police may request consent based only on a hunch, in order to practice search techniques they learned in training, or even because of the purported suspect's race.[43] By one estimate, "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."[44]

34. *Id.*

35. *Id.*

36. *Id.* at 219–20.

37. *See id.* at 221, 248–49.

38. *Id.* at 248–49.

39. *See id.* at 248.

40. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980) (finding that race, age, and education are relevant to determining whether a suspect felt free to leave a police encounter).

41. *See Bustamonte*, 412 U.S. at 248–249 (noting the narrow and factual nature of the holding).

42. *Id.* at 228.

43. *See* Maclin, *supra* note 22, at 27.

44. Simmons, *supra* note 2, at 773.

### 2. Special Needs Searches

Unlike ordinary searches, the special needs doctrine applies "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . [such that] a court [is] entitled to substitute its balancing of interests for that of the Framers."[45] Courts apply the special needs exception to the warrant requirement when the purpose of the search program is "distinct from the ordinary evidence gathering associated with crime investigation."[46] Such a search is deemed reasonable only if government interests outweigh the privacy interests at stake.[47] Courts often rely on consent as an important factor in this interest-balancing reasonableness analysis.[48]

One of the earliest usages of the special needs doctrine is found in disputes regarding counterterrorism measures.[49] In *United States v. Edwards*, the Second Circuit considered the constitutionality of employing metal detector and hand searches of carry-on luggage at airports under the Fourth Amendment.[50] The court reasoned that since the purpose of the program was not to serve "as a general means for enforcing the criminal laws," but rather to prevent airplane hijacking by terrorists, it could balance "the need for a search against the offensiveness of the intrusion" rather than require the traditional warrant and probable cause requirements.[51] The Supreme Court soon extended this reasoning to warrantless searches at fixed checkpoints near the Mexican border.[52] These cases helped to establish the idea that there are circumstances "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[53]

45. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

46. MacWade v. Kelly, 460 F.3d 260, 268 (2d Cir. 2006) (quoting Nicholas v. Goord, 430 F.3d 652, 663 (2d Cir. 2005)) (internal quotation marks omitted).

47. *Id.* at 269.

48. *See, e.g.*, *id.* at 273 (holding search program to be minimally intrusive in part because passengers had opportunity to leave subway and thus decline search, and citing a number of other cases for similar propositions).

49. *See* United States v. Edwards, 498 F.2d 496, 499–501 (2d Cir. 1974).

50. *See id.*

51. *Id.* at 500.

52. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556–559 (1976).

53. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

To fall within the special needs exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary, general crime control.[54] Based in part on this primary purpose test, the Court has upheld a variety of warrantless searches, including searches of the property of students in public schools,[55] drug tests of students participating in sports and other extracurricular activities at public schools,[56] drug tests of government employees,[57] drug tests of railroad personnel,[58] searches of probationers' homes,[59] and a checkpoint to obtain information about a recent hit-and-run incident.[60] The Justice Department has also argued that foreign intelligence gathering falls within the special needs doctrine.[61]

Once a special needs program satisfies the primary purpose test, courts must then analyze the reasonableness of the program. Courts typically balance four factors in assessing the reasonableness of a special needs search program: "(1) the weight and immediacy of the government interest; (2) the nature of the privacy interest allegedly compromised by the search; (3) the character of the intrusion imposed by the search; and (4) the efficacy of the search in advancing the government interest."[62] Importantly for this Note, courts often consider consent and the voluntariness of a search when analyzing its intrusiveness to determine whether it is narrowly

54. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001) (finding that the primary purpose of drug testing pregnant women and arresting those who test positive was law enforcement, so the program did not fall within the special needs doctrine); City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (finding that a narcotics checkpoint was intended for general crime control and thus did not fall within the special needs exception to the warrant requirement).

55. *See* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).

56. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002); *Vernonia*, 515 U.S. at 653, 664–65.

57. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989).

58. *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989).

59. *See* Griffin v. Wisconsin, 483 U.S. 868, 876–77 (1987).

60. *See* Illinois v. Lidster, 540 U.S. 419, 427 (2004).

61. *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 38 (2006), *available at* http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf.

> Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of "special needs, beyond the normal need for law enforcement" where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant.

62. MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 830, 832, 834 (2002)) (internal quotation marks omitted).

tailored to the government interest. For instance, the Second Circuit upheld the constitutionality of New York City's subway search program, in part because "passengers receive notice of the searches and may decline to be searched so long as they leave the subway."[63] Similarly, the Supreme Court upheld the constitutionality of border checkpoints, in part because drivers were able to obtain adequate notice of checkpoint locations with an opportunity to avoid them if the drivers did not wish to be searched.[64]

### *B. Criticism of Consent*

This Subsection criticizes consent searches on the ground that they are based more upon intimidation than consent. It begins by analyzing recent Supreme Court cases and continues by examining law review articles and social psychology literature on the subject of consent. It then applies these criticisms of consent to special needs searches.

#### 1. Flaws in the Supreme Court's Consent Search Jurisprudence

Cases after *Bustamonte* reveal a flaw in the Court's consent search jurisprudence, namely that police can take advantage of positions of power when they request citizens' consent. In *Ohio v. Robinette*, the Court upheld the voluntariness of a consent search where consent was given immediately after a traffic stop, despite the fact that the officer did not inform the suspect that the stop had ended.[65] The Court reasoned that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[66] In *Whren v. United States*, decided the prior Term, the Court unanimously upheld pretextual police stops based upon probable cause.[67] When *Whren* and *Robinette* are examined together, it is clear that the Court is permitting police to stop motorists based upon minor traffic violations[68] and then, while the motorists are feeling vulnerable, ask for consent to search. For example, an officer who wants to search a drug suspect can stop him for an unrelated reason, such as failure to signal before turning, and can then try to obtain his consent to

63. *Id.* at 273 (collecting cases).

64. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

65. 519 U.S. 33, 39–40 (1996).

66. *Id.* at 40.

67. 517 U.S. 806, 812–13, 817–19 (1996).

68. The defendant in *Whren* was stopped for waiting "at the intersection for what seemed an unusually long time—more than 20 seconds." *Id.* at 808.

search the car.[69] Only Justice Ginsburg recognized that "traffic stops . . . were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity."[70]

Despite Justice Ginsburg's warning, the Court has continued to encourage police use of consent searches.[71] In *Florida v. Bostick*, two uniformed officers with visible gun pouches boarded a bus during a stopover to search for drugs.[72] During the drug interdiction, the officers obtained Bostick's consent to search his luggage, which yielded contraband.[73] Bostick argued that he did not freely consent to the search since he was seated with little ability to move, during a stopover in a city that was not his destination, while a uniformed police officer towered over him.[74] The Court responded that "Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus"[75] and then went on to state that "the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."[76] Bostick next argued that no reasonable person would consent to a search that he knew would yield drugs, so the consent could not have been voluntary.[77] Yet the Court replied that "the 'reasonable

69. *See id.* at 813 (noting that precedent "foreclose[s] any argument that the constitutional reasonableness of [a] traffic stop[ ] depends on the actual motivations of the individual officers involved").

70. *Robinette*, 519 U.S. at 40 (Ginsburg, J., concurring).

71. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 210–11 (arguing that the *United States v. Drayton* majority believed "that consent searches ought to be encouraged (or at least not discouraged) because they reinforce the rule of law"); *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 5 (4th ed. 2004) (stating, with reference to the Supreme Court, that "[t]he practice of making searches by consent is not a disfavored one").

72. 501 U.S. 429, 431–32 (1991).

73. *See id.* at 432.

74. *See id.* at 435.

75. *See id.* at 436.

76. *Id.* at 436.

77. *See id.* at 437–38; *cf.* Burkoff, *supra* note 22, at 1114 ("How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to *really* consent—'freely and voluntarily'—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?"); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 128 (1999) ("It is inherently improbable that criminal suspects voluntarily would consent to the discovery of the very evidence necessary to seal their legal demise.").

person' test presupposes an *innocent* person."[78] It then went on to give the imprimatur of law to de facto police coercion, declaring that "this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful."[79]

More recently in *United States v. Drayton*, which had very similar facts,[80] the Court reiterated many of these arguments.[81] The Court in *Drayton* explicitly upheld consent searches by three police officers of two defendants with felony-weight narcotics hidden on their persons as "voluntary."[82] *Drayton* is especially striking since one of the defendants "consented" after his co-defendant had already been searched and found to possess drugs.[83]

Unsurprisingly, both cases provoked strong dissents. Justice Marshall, dissenting in *Bostick*, noted that the defendant's only choices were to consent to the search, "obstinately" refuse to answer the officer's questions, which would be suspicious in itself, or get off the bus in an unfamiliar city without his luggage.[84] Marshall went on to argue that it would be unreasonable for the defendant to even attempt to leave since the "gun-wielding" officer was "blocking the aisle."[85] He concluded that "[i]t is exactly because this 'choice'

78. *Bostick,* 501 U.S. at 438 (emphasis in original).

79. *Id.* at 439.

80. 536 U.S. 194 (2002). In *Drayton*, both defendants were on a Greyhound bus from Ft. Lauderdale, Florida to Detroit, Michigan that stopped in Tallahassee, Florida. *Id.* at 197. During the stop, three officers boarded the bus for a drug interdiction and asked passengers for consent to search their person and luggage. *See id.* at 197–99. Although passengers could refuse to consent and exit the bus, the officer did not inform the passengers of this right. *Id.* at 198. During the interdiction, one defendant consented to a search of his person that yielded cocaine. *Id.* at 199. Immediately afterwards, the other defendant consented to a search of his person which also yielded cocaine. *Id.* at 199. The District Court found the consent to be voluntary, noting that the officers were in plainclothes, did not brandish their weapons, did not raise their voices, and did not block the aisle. *Id.* at 200.

81. Citing *Bostick*, 501 U.S. at 436, the *Drayton* Court argued that although the suspects' movements were confined and they did not wish to leave the bus in a location that was not their destination, "this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive." 536 U.S. at 201–02. The *Drayton* Court also reaffirmed the holding from *Bostick* that the "reasonable person test . . . is objective and presupposes an *innocent* person" to reject the argument that the suspect "must have been seized because no reasonable person would consent to a search of luggage containing drugs." *Id.* at 202 (quoting *Bostick*, 501 U.S. at 437–38) (internal quotations omitted).

82. *See Drayton,* 536 U.S. at 207–08.

83. *See id.* at 199.

84. *See Bostick*, 501 U.S. 447–48 (Marshall, J., dissenting).

85. *See id.* at 448

is no 'choice' at all that police engage in this technique."[86] Yet while Marshall merely accused the majority of "sophism,"[87] Justice Souter struck a much harsher tone in his dissent from *Drayton*, finding "an air of unreality" in the majority's application of the consent search doctrine.[88] The Court has at times acknowledged that "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest."[89] Nonetheless, *Bustamonte*, *Robinette*, *Whren*, *Bostick*, and *Drayton* remain good law.

2. Scholarly Criticism of Consent Search Case Law

Although the literature criticizing consent searches is extensive, it generally makes four interrelated arguments. First, the social dynamic of police encounters creates strong psychological pressure for citizens to comply with officers.[90] Outside observers, such as judges, tend to miss these important social factors causing them to overestimate the voluntariness of the consent.[91] Second, the authority of officers creates a power imbalance that coerces citizens into consenting to searches.[92] Third, race exacerbates the two aforementioned issues, particularly when a white officer requests consent to search from a non-white suspect.[93] Fourth, consent searches create perverse incentives for officers since they benefit from finding contraband but face few, if any, repercussions for unnecessary or abusive consent searches.[94] Many of these factors have been documented by extensive empirical research.[95]

a. Social Psychology Research: Consent Relies on Mistaken Assumptions About Human Nature

Decades of social psychology research have confirmed that the likelihood that an individual will comply with requests made by others is deeply affected by two factors: authority and social valida-

86. *Id.* at 450.

87. *Id.*

88. *Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

89. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971). The Court went on to create a judicial remedy for abuses of federal law enforcement power in the form of monetary damages. *See id.* at 397.

90. *See, e.g.*, Nadler, *supra* note 71, at 155; Simmons, *supra* note 2, at 807, 809.

91. *See, e.g.*, Nadler, *supra* note 71, at 155–56.

92. *See, e.g.*, Lassiter, *supra* note 77, at 129–31.

93. *See, e.g.*, *id.* at 128–31.

94. *See, e.g.*, Maclin, *supra* note 22, at 31–32.

95. *See, e.g.*, Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

tion.[96] It is widely accepted that people will obey requests from legitimate authorities.[97] For example, Stanley Milgram, in the guise of conducting an experiment on education, famously had his experimenters ask research participants to act as "teachers" by administering what they believed to be painful electric shocks to other participants acting as "learners."[98] In reality, there were no shocks and the "learners" were actually confederates of the experimenter, but this was not known to the "teachers."[99] Despite eliciting verbal protests and painful screams, in one version of the experiment over 65% of participants obeyed the experimenters and turned the shock dial up to "danger: severe shock" and even "XXX."[100] All of the participants continued to administer what they thought were electric shocks even after the subject protested that he was in pain.[101] Other psychologists have observed that people will continue to obey authority figures irrespective of the command's prudence[102] and that obedience to authority is sometimes viewed as a useful social strategy.[103]

Unsurprisingly, the Milgram experiments inspired a large body of literature criticizing consent searches.[104] Further psychological

96. *See id.* at 173.

97. *See, e.g.*, *id.* at 173–74.

98. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 19 (1974).

99. *See id.* at 24.

100. *See id.* at 35 tbl.2.

101. *See id.* at 23, 35 tbl.2.

102. *See* EDWARD E. JONES, INTERPERSONAL PERCEPTION 124 (1990) (remarking that social roles, such as authority-subordinate roles, are so ingrained that we comply with authorities' requests more or less automatically); ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 9–10 (4th ed. 2001) (noting that airline crew members regularly obey their captain, permitting errors to go uncorrected); H. Clayton Foushee, *Dyads and Triads at 35,000 Feet: Factors Affecting Group Process and Aircrew Performance*, 39 AM. PSYCHOLOGIST. 885, 888 (1984) (observing that a captain's dominance in the cockpit can condition crewmembers not to disagree with the captain's decisions).

103. *See* Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity and Compliance*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 170 (Daniel T. Gilbert et al. eds., 4th ed. 1998) ("[C]onforming to the dictates of authority figures produces genuine practical advantages.").

104. *See, e.g.*, Illya Lichtenberg, Miranda *in Ohio: The Effects of* Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights,* 44 HOW. L.J. 349, 364–65 (2001) (arguing that some of Milgram's experiments support the contention that subjects who consent to searches are responding to coercive "social power" of the authority, not "legitimate power" which is supported by legal authority); Nadler, *supra* note 71, at 176–77 (conceding that there are "obvious differences" between Milgram's studies and consensual searches during bus sweeps, but concluding that the experiments support the theory that authority leads to coercion since in each case "people are coerced to comply when they would prefer to refuse" due to the "symbols

studies indicated that compliance rates increase by 36% to 56%, depending on the task involved, when the requester is wearing a uniform.[105] When the psychological power of legitimate authority and a uniform are combined in, say, a routine traffic stop, individuals will "automatically comply" with police requests.[106] In fact, another study revealed that over 90% of citizens stopped for traffic violations on Ohio interstates consented to a search.[107] A study participant explained, "I knew legally I didn't have to [consent], but I kind of felt like I had to."[108] Such research belies the notion expressed by the *Bustamonte* Court that consent to search a car during a traffic stop is voluntary.[109]

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of authority" that are present); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches,* 69 WASH. U. L.Q. 175, 188–89 (1991) (acknowledging that it is "risky" to apply Milgram's experiment to consent searches, but nevertheless concluding that Milgram demonstrates that "police authority" is the main reason that individuals consent to searches); Strauss, *supra* note 22, at 239 (using Milgram's experiments as evidence that individuals are likely to obey a "request" made by authorities even if they are likely to be harmed by complying); Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte: *Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent,* 1997 U. ILL. L. REV. 215, 241, 243 (1997) (arguing that Milgram's experiments demonstrate that individuals obey legitimate authority "to an astonishing degree," thus challenging *Bustamonte*'s premise that psychological coercion is only significant in a custodial context); Dennis J. Callahan, Note, *The Long Distance Remand:* Florida v. Bostick *and the Re-Awakened Bus Search Battlefront in the War on Drugs,* 43 WM. & MARY L. REV. 365, 414–15 (2001) (using the Milgram experiments as evidence that individuals have difficulty defying authority in the context of a bus search, and proposing a *Miranda*-like warning to reduce the coercive effects); Jeremy R. Jehangiri, Student Article, United States v. Drayton: *"Attention Passengers, All Carry-On Baggage and Constitutional Protections Are Checked in the Terminal,"* 48 S.D. L. REV. 104, 126–27 (2003) (using Milgram's experiments as evidence of the "coercive effects" of suspicionless bus searches).

105. *See* Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 49–51 & tbl.1 (1974) (finding much higher compliance rates for requests by security guards than for milkmen or civilians); Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 506 (1984) (finding an 82% compliance rate for requests by a fireman in comparison to 50% compliance for requests by business executives); *see also* Barrio, *supra* note 104, at 240 (concluding that the security guard uniform in the Bickman study created an "almost hypnotic power" over the experiment's subjects).

106. Strauss, *supra* note 22, at 240, 242; *see also* Simmons, *supra* note 2, at 809 ("When combined with the Milgram experiments, the Bickman study completes a persuasive combination of psychological evidence that the current rules of consent are misguided.").

107. *See* Nadler, *supra* note 71, at 202 & n.160 (summarizing research by Illya D. Lichtenberg).

108. *Id.* at 202.

109. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

While psychological research on obedience to authority can partly explain the otherwise puzzling phenomenon of guilty suspects consenting to police searches, social validation plays an important role as well. In new or ambiguous situations, individuals often engage in "social learning" wherein they decide the correctness of their actions by following others' actions.[110] This cognitive strategy has been observed in pedestrians deciding whether to look upwards at a building[111] and bar patrons deciding whether to tip the bartender.[112] The research generally demonstrates that "[p]eople are especially likely to comply with a request when it appears that other people like themselves have already done so."[113] In an especially chilling demonstration of this phenomenon, over 900 people calmly committed mass suicide in Jonestown, Guyana in 1978 after one young woman volunteered to drink a cyanide-laced drink.[114]

Despite these widely acknowledged and deeply researched concepts of social psychology, the Court continues to insist that consent given to police officers "should be given a weight and dignity of its own" that "dispels inferences of coercion."[115] This seeming disconnect can be explained by yet another psychological concept: actor-observer bias. Although individuals are generally able to recognize situational forces that affect their own behavior, there is a "vast scientific literature" establishing that people are strongly inclined to explain others' behavior in terms of internal causes while ignoring situational factors.[116] This could be because the situational factors are "invisible" to the observer, and therefore not credited,[117] or because the observer simply cannot imagine herself in the actor's shoes.[118] For example, in one experiment participants perceived a videotaped confession as more voluntary when viewed from the interrogator's perspective and less voluntary when viewed from the defendant's perspective.[119] This observational cognitive

110. *See* Cialdini & Trost, *supra* note 103, at 155.

111. *See* Stanley Milgram et al., *Note on the Drawing Power of Crowds of Different Size*, 31 J. PERSONALITY & SOC. PSYCHOL. 79, 79–81 (1969).

112. *See* Nadler, *supra* note 71, at 180.

113. *Id.*

114. *See* CIALDINI, *supra* note 102, at 130–32.

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

116. Nadler, *supra* note 71, 168–69.

117. *See* Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 25 (1995).

118. *See, e.g.*, G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 189, 208 (2001).

119. *See id.*

bias may explain why the Court has had such difficulty recognizing that the consent of defendants in cases like *Robinette*, *Bostick*, and *Drayton* was less than voluntary.[120]

b. Legal Scholarship: Consent Ignores Power Imbalances

While understanding the complex psychological pressures present in police interactions may require scientific studies, much of the implicit coercion in police search requests is more mundane. Throughout any encounter with the police lies the unspoken knowledge that the officer can arrest the suspect and even charge him with obstruction of justice for refusing to cooperate.[121] If a citizen refuses to consent to a search, the officer may exert her coercive power, whether implied or explicit, to achieve compliance.[122] Thus the officer's ability to use coercion, despite the legal constraints of the Fourth Amendment, creates an "asymmetrical power relationship in the police-citizen encounter."[123] This "inherent imbalance of power in police confrontations" causes citizens to trade cooperation[124] for the avoidance of potential "unpleasant, though unknown, consequences."[125]

The Ohio highway study discussed above provides empirical support for this interpretation of consent searches.[126] Of the more than 90% of participants who consented to be searched, over 95% said that they were afraid of what would happen to them if they did not consent.[127] Such fears included having their trip unduly delayed, being searched anyway, incurring damage to their car, being arrested, being beaten, or even being killed.[128] Moreover, nearly all the respondents thought that the police would not have honored their refusal.[129] It seems that they were right, since two participants reported being searched despite their explicit refusal

120. *See* Nadler, *supra* note 71, at 171–72.

121. *See, e.g.*, Lassiter, *supra* note 77, at 81.

122. *See* Nadler, *supra* note 71, at 201-03 (summarizing research by Illya D. Lichtenberg).

123. *Id.*

124. Lassiter, *supra* note 77, at 81.

125. UVILLER, *supra* note 23, at 81.

126. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

127. *See id.*

128. *See id.*

129. *See id.*

to consent.[130] It is difficult to find a clearer rebuttal to the Court's idea that consent "dispels inferences of coercion."[131]

c. Racial Disparities Exacerbate the Power Imbalance

Many commentators have noted that these inherently coercive effects are exacerbated by racial difference. For instance, Tracey Maclin argues that "for most black men, the typical police confrontation is not a consensual encounter."[132] There are two main reasons for this. First, based on prior experience with police, a black suspect may have a lower "comfort level" in distinguishing between police commands and discretionary requests.[133] Second, black defendants often have fewer resources, leaving them at a disadvantage in the legal process.[134] These factors are often both in play in routine traffic stops. Indeed, much has been written on "driving while black."[135] In the 1990's, John Lamberth definitively showed that 73.2% of those stopped and arrested on the New Jersey Turnpike were black, while only 13.5% of the cars on the road had a black driver or passenger.[136] Moreover, blacks comprised 35% of those stopped, 19.45 standard deviations greater than the expected rate given the low frequency of blacks on the road.[137] These "statistically vast" disparities led Lamberth to conclude that police engaged in a

130. *See id.*

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

132. Tracey Maclin, "*Black and Blue Encounters" — Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 272 (1991).

133. Lassiter, *supra* note 77, at 81.

134. *See id.* at 81–82.

135. *See, e.g.*, *id.* at 115–24; David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,* 87 J. CRIM. L. & CRIMINOLOGY 544, 546 n.10 (1997) (describing the Washington, D.C. origins of the phrase); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 [hereinafter Harris, *The Stories*] (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards,* 28 COLUM. HUM. RTS. L. REV. 551 (1997) (discussing "D.W.B.: Driving While Black"); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice,* 6 J. L. & POL'Y 291 (1997); Harriet Barovick & Elizabeth Rudolph, *DWB: Driving While Black,* TIME, Jun. 15, 1998, at 35; Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, 59, *available at* http://www.newyorker.com/archive/1995/10/23/1995_10_23_056_TNY_CARDS_000372419?currentPage=all; Tracey Maclin, *Can a Traffic Offense Be: D.W.B. (Driving While Black)?,* L.A. TIMES (Mar. 9, 1997), http://articles.latimes.com/1997-03-09/opinion/op-36359_1_traffic-stop.

136. *See* Harris, *The Stories*, *supra* note 135, at 279 (discussing Dr. Lamberth's research).

137. *Id.*

"discriminatory policy, official or de facto, of targeting blacks for stop and investigation."[138]

These racial disparities become especially important in consent searches, which some argue are the "handmaiden[s] of racial profiling."[139] Consent searches, which do not require individualized suspicion, are "more likely to be directed at poor young black men than wealthy white elderly women."[140] Although the Court has taken race into account when assessing whether a suspect felt free to leave a police encounter,[141] courts do not generally accept that a racial power imbalance vitiates the voluntariness of consent.[142]

After the terrorist attacks of September 11, 2001, much of the racial profiling debate has shifted towards Middle Eastern men.[143] Shortly after the attacks, the Justice Department developed a list of approximately 5,000 young aliens from Middle Eastern nations between the ages of eighteen and thirty-three to be questioned by local police regarding their knowledge of terrorism "on a consensual basis."[144] However, a leaked memo later "suggested that the interviews were a potential vehicle to identify immigration violators . . . [who] would be detained and held without bond."[145] While it is unclear whether this program constitutes racial profiling, Samuel Gross and Debra Livingston argue that "the Justice Department's program *would* involve ethnic profiling if it was undertaken even in part based upon a general belief that Middle Eastern men are more likely to commit acts of terrorism than people of other ethnic groups—if it was based upon a global assumption about the criminal propensities of people of Middle Eastern descent."[146] To the extent that Middle Eastern men feel that "the government is sup-

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

139. George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 542 (2003).

140. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 31 (1999).

141. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980) (noting that defendant's race and gender were "not irrelevant" when establishing whether she voluntarily consented to a seizure).

142. *See* Lassiter, *supra* note 77, at 128–31.

143. *See* Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 472–73 (2003) (noting the changed attitudes of the public and public figures regarding racial profiling of Middle Eastern men due to the September 11 attacks).

144. *Id.* at 479–81 (internal quotations omitted).

145. *Id.* at 482–83.

146. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1421 (2002).

porting suspicion based on background, not behavior,"[147] they will experience a lower comfort level with law enforcement.[148] As a result, many Middle Easterners may feel "powerless to reject the government's request for a 'voluntary' interview."[149]

d. The Consent Doctrine Skews Police Incentives

While most of the academic criticism of the consent search doctrine focuses on the suspects, it is important to recognize the effects of the doctrine on police as well. Consent searches have become "a dominant—perhaps *the* dominant—type of lawful warrantless search,"[150] potentially because it is much easier for police to obtain consent than to get a search warrant.[151] "In the routine case, police are likely to rely on the consent search to save the time and avoid the difficulty involved in going though the rather elaborate procedure required to obtain a search warrant."[152] Moreover, "[i]f police are routinely rewarded with consent, they have little incentive to develop individualized probable cause"[153] since "[i]n most jurisdictions, a request for consent need not be based upon any suspicion of criminal conduct."[154] Finally, so long as "the consenting party does not carefully condition or qualify his consent . . . the search pursuant to consent may often be of a somewhat broader scope than would be possible under a search warrant."[155] In short,

147. Jodi Wilgoren, *A Nation Challenged: The Interviews; Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain*, N.Y. TIMES (Nov. 15, 2001), http://www.nytimes.com/2001/11/15/us/nation-challenged-interviews-prosecutors-begin-effort-interview-5000-but-basic.html?pagewanted=all (reporting reactions to Department of Justice's questioning of 5,000 Middle Eastern men).

148. *Cf.* Lassiter, *supra* note 77, at 81, 129 (arguing that negative prior experiences with and targeting by law enforcement can cause black suspects to experience "a lower comfort level" in interpreting official requests for consent as anything but demands).

149. Maclin, *supra* note 143, at 478.

150. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.01, at 261 (4th ed. 2006). Warrantless searches are also permissible based on various types of exigency. *See supra* note 25.

151. *See, e.g.*, RICHARD VAN DUIZEND, ET AL., THE SEARCH WARRANT PROCESS 68–69 (1985) ("[L]istening to some law enforcement officers would lead to the conclusion that consent is the easiest thing in the world to obtain.").

152. LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 159 (1967); *see also* Strauss, *supra* note 22, at 259 ("[E]ven if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid.").

153. Thomas, *supra* note 139, at 542.

154. Maclin, *supra* note 22, at 31.

155. 4 LAFAVE, *supra* note 71, § 8.1, at 5.

police are incentivized to use consent searches since they circumvent the Fourth Amendment's procedural limitations.

### 3. Flaws in Consent in the Special Needs Doctrine

As in the case of ordinary searches and seizures, consent is a crucial element of special needs search programs. This subsection will criticize as unrealistic courts' reliance on consent as a factor for determining the reasonableness of a special needs program. Further, it will argue that the procedural safeguards built into special needs searches make consent unnecessary as a check on reasonableness in this context.

Using police requests for consent to search as part of a special needs program suffers from two flaws. First, doing so is doctrinally incoherent since courts at times place great emphasis on the supposed voluntariness of the search[156] but at other times ignore it completely.[157] Since courts have upheld special needs programs both with and without consent, consent cannot be relevant to the constitutionality of special needs searches. Second, consent searches in special needs programs are just as psychologically coercive as all other consent searches.[158] However, if the special needs program sufficiently limits police discretion, it may prevent police from abusing consent searches or using them based on race.[159]

#### a. Doctrinal Incoherence

Supreme Court cases evaluating the reasonableness of programmatic searches express extraordinary ambivalence about the role of consent. Justice Kennedy has noted that "[a]n essential, distinguishing feature of the special needs cases is that the person searched has consented."[160] Yet the Court has also upheld a special needs search program premised on surprise, where the individual

156. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 207 (2002); 4 LAFAVE, *supra* note 71, § 8.1, at 5.

157. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 463–64 (1990) (Stevens, J., dissenting) (noting that the Court upheld sobriety checkpoints despite a lack of notice).

158. *See supra* Part I.B.2.a.

159. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006) ("[P]olice exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority . . . .").

160. Ferguson v. City of Charleston, 532 U.S. 67, 90 (2001) (Kennedy, J., concurring).

had no opportunity to avoid the search.[161] The Court's schizophrenic approach to consent in special needs searches demonstrates the irrelevance of consent to the underlying doctrine.

In *United States v. Martinez-Fuerte*, the Court considered it relevant that individuals are "not taken by surprise."[162] After noting that motorists saw repeated signage for a mile warning of the upcoming immigration checkpoint, the Court reasoned that motorists effectively knew, or could come to know, where they would and would not be stopped.[163] Similarly, in *Vernonia School District 47J v. Acton* and *Board of Education v. Earls*, the Court held that students consented to drug testing by choosing to play on sports teams[164] or participate in other after-school extracurricular activities.[165] The Court underscored the importance of consent in *Ferguson v. City of Charleston*, where it struck down a state hospital's drug testing program as an unreasonable search since "the hospital s[ought] . . . to conduct drug tests and to turn the results over to law enforcement . . . without the knowledge or consent of the patients."[166]

While the Court may have found consent constitutionally relevant for immigration checkpoints, it has ignored consent entirely in other checkpoint cases. In *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint that only ran after midnight, in an unannounced location, with no warning signage.[167] Given the program's design, it is impossible to contend that the motorists consented to be searched; in fact, surprise was "crucial to its method."[168] Conversely, in *City of Indianapolis v. Edmond*, the Court struck down a narcotics checkpoint program whose checkpoints were "clearly marked" by warning signs.[169] It is difficult to reconcile *Sitz* and *Edmond* with the Court's recognition that motor-

161. *See Sitz*, 496 U.S. at 463 (Stevens, J., dissenting) (criticizing the majority for upholding a sobriety checkpoint where drivers have no "advance notice of the location" or any "opportunity to avoid the search").

162. 428 U.S. 543, 559 (1976).

163. *See id.* at 545–46, 559.

164. *See* 515 U.S. 646, 657 (1995) ("[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

165. *See* 536 U.S. 822, 831–32 (2002) ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.").

166. 532 U.S. 67, 77 (2001).

167. 496 U.S. 444, 460 (1990) (Stevens, J., dissenting).

168. *Id.*

169. 531 U.S. 32, 52 (2000) (Rehnquist, C.J., dissenting); *see also id.* at 48 (majority opinion).

ists were "not taken by surprise" at checkpoints when upholding the *Martinez-Fuerte* program.[170]

The Court has proven equally ambivalent about consent in drug-search cases. In *Skinner v. Railway Labor Executives' Association*, the Court upheld employee drug-testing, even when the employees never actually consented.[171] The Court reasoned that since "an employee consents to significant restrictions in his freedom of movement where necessary for his employment, . . . [a]ny additional interference . . . to procure a blood, breath, or urine sample for testing" as a condition of employment is not unreasonable.[172] Such consent can hardly be deemed voluntary, making *Skinner* little different from *Ferguson*. Yet the Court upheld the workplace drug-testing program in *Skinner*, while striking the hospital program in *Ferguson*. Since the presence or absence of meaningful consent seems in practice to have little bearing on whether a special needs search program is upheld, consent cannot be relevant to the constitutionality of special needs searches.

b. Implicit Coercion

Police requests for consent in special needs searches face many of the same problems that undermine the voluntariness of the consent in standard consent searches. For instance, most special needs searches are conducted by uniformed officers acting in positions of authority.[173] As the Milgram, Bickman, and Ohio interstate studies show, individuals typically find it psychologically difficult to avoid complying with police requests in such circumstances.[174] Those stopped and asked for consent to search typically see others searched before them,[175] so they are further pressured into comply-

170. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); *see also* Kevin E. Meehan & George M. Dery, III, *The Supreme Court's Curious Math: How a Lawful Seizure Plus a Non-Search Add Up to a Fourth Amendment Violation in* City of Indianapolis v. Edmond, 32 U. MEM. L. REV. 879, 914–20 (2002) (arguing that the Court's holding in *Edmond* is inconsistent with *Sitz* and *Martinez-Fuerte*).

171. 489 U.S. 602, 611, 634 (1989).

172. *Id.* at 624–25.

173. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (noting that "uniformed police officers stop every approaching vehicle"); *Martinez-Fuerte*, 428 U.S. at 546 (detailing searches conducted by "a Border Patrol agent in full dress uniform"); MacWade v. Kelly, 460 F.3d 460, 264 (2d Cir. 2006) ("A 'checkpoint' consists of a group of uniformed police officers standing at a folding table near a row of turnstiles disgorging onto the train platform.").

174. *See supra* Part I.B.2.a.

175. *See, e.g.*, *Sitz*, 496 U.S. at 448 ("During the 75-minute duration of the checkpoint's operation, 126 vehicles passed through the checkpoint."); *Martinez-*

ing by a need for social validation.[176] Moreover, individuals are aware that the officer requesting their consent to search can arrest them and accuse them of obstructing justice at any point in the encounter.[177] Given these reasons, it is not surprising that "hardly anyone feels free to walk away from a police officer without the officer's permission."[178]

The Court's schizophrenia with respect to consent in special needs searches can perhaps be explained by its inability to acknowledge these implicitly coercive factors. Judges, like everyone else, tend to attribute others' behavior to internal motivations rather than situational factors.[179] This actor-observer cognitive bias helps explain why the Court is of two minds about consent in special needs searches. However, there is a silver lining to the special needs doctrine. Unlike standard consent searches, which operate virtually free of legal requirements,[180] special needs searches require strict procedural safeguards to compensate for their lack of individualized suspicion.[181] By eliminating police discretion over whom to stop, special needs programs significantly reduce the ability of police officers to abuse consent searches, particularly those based on race.[182] Nonetheless, some police discretion often remains regarding secondary screening.[183] For example, in *Martinez-Fuerte*, Border Patrol officers had "wide discretion in selecting the motorists to be diverted,"[184] perhaps allowing some degree of abuse to continue.[185]

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*Fuerte*, 428 U.S. at 546 ("[T]he checkpoint brings [traffic] to a virtual, if not complete, halt.").

176. *See supra* Part I.B.2.a.

177. *See supra* Part I.B.2.b.

178. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 n.102 (2002).

179. *See supra* Part I.B.2.a.

180. *See supra* Part I.B.2.d.

181. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 452 (1990) (finding checkpoint constitutionally indistinguishable from upheld program because "[h]ere, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (noting that checkpoint operations involve little "discretionary enforcement activity"); MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006) ("[P]olice exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority.").

182. *See supra* Part I.B.2.c.

183. *See Sitz*, 496 U.S. at 464–65 ("A Michigan officer who questions a motorists at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion.") (Stevens, J., dissenting).

184. *Martinez-Fuerte*, 428 U.S. at 563–64.

## II.
## REEXAMINING POLICE CONSENT SEARCHES

In response to the implicit coercion in police requests to search, some commentators have proposed a *Miranda*-like warning advising citizens of their right to refuse a request to search,[186] while others find a warning inadequate,[187] and a few even propose eliminating consent searches altogether.[188] Consent should be eliminated as a factor in the reasonableness analysis of special needs searches but not ordinary searches and seizures. Special needs searches are already tightly regulated by the courts, which require strict procedural protections to prevent police abuse. Moreover, since consent to police searches is already implicitly coerced, abandoning consent in special needs searches entails little, if any, loss of liberty. However, the Fourth Amendment must still protect against unreasonable police searches and seizures. Therefore, although it may be a myth that consent to police searches can ever truly be freely given, consent should remain a factor in the analysis of ordinary searches because the very notion of policing entails a license to use coercion in certain circumstances as a means of ensuring safety.

### *A. Abandoning Consent for Special Needs Searches*

Special needs search programs are an effective means for law enforcement to protect public safety against dangers ranging from terrorism to drunk driving.[189] Yet, as discussed above, the Court cannot seem to make up its mind whether consent should affect the constitutionality of a special needs search.[190] When programmatic searches request consent, such consent can hardly be deemed voluntary in light of the psychological pressures citizens face from uniformed police officers who are requesting consent from dozens of people and can arrest citizens at any time.[191] Therefore, aban-

185. *See id.* at 563 (holding such discretion constitutional, even if "such referrals are made largely on the basis of apparent Mexican ancestry"). *But see infra* Part III.B.

186. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1030 (2002); Rebecca A. Stack, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 205–08 (1991); Carol S. Steiker, "*How Much Justice Can You Afford?*"—*A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1294 (1999).

187. *See, e.g.*, Nadler, *supra* note 71, at 204–06; Strauss, *supra* note 22, at 254.

188. *See, e.g.*, Lassiter, *supra* note 77, at 131–34.

189. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990); MacWade v. Kelly, 460 F.3d 260, 266, 273–75 (2d Cir. 2006).

190. *See supra* Part I.B.1.

191. *See supra* Part I.B.2.b–c.

doning consent in the reasonableness analysis of special needs searches succeeds in making Fourth Amendment doctrine more coherent while also bringing courts' analysis more in line with social reality. Since consent to police requests to search is already implicitly coerced,[192] this doctrinal shift entails few costs of civil liberties while bringing the significant benefit of making police search law more honest.[193]

This subsection first demonstrates how procedural protections that are constitutionally required for special needs searches protect against police abuse. It then shows how special needs searches without consent would operate in practice.

1. Political and Procedural Protections in Special Needs Searches

Special needs search programs aimed at protecting the general populace differ from individualized searches in two important ways: transparency and the number of people affected. When an individual is stopped for an ordinary search, it is a highly personal experience, and he may never even tell anyone about it.[194] Conversely, police at a checkpoint stop everyone who attempts to pass by, or at least a preset percentage of them, affecting hundreds or even thousands of people.[195] Thus special needs searches "convert searches and seizures from takings, burdening only isolated individuals, into taxes, burdening classes of people" in a very visible manner.[196] As a result, "[g]roup searches and seizures, unlike individual ones, are largely self-regulating,"[197] since police will face political pressure if they subject large numbers of citizens to harsh and intrusive tactics.[198] Importantly, for purposes of this Note, this political mechanism operates entirely independently from whether or not

192. *See supra* Part I.B.2.

193. *See infra* Part III.A–B.

194. *See* OFFICE OF ATT'Y GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 78 (1999) [hereinafter STOP & FRISK REPORT].

195. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448, 453 (1990) (noting that during a seventy-five minute period "126 vehicles passed through the checkpoint" and a "uniformed police officers stop[ped] every approaching vehicle"); MacWade v. Kelly, 460 F.3d 260, 264 (stating that the New York City subway system "carries more than 4.7 million passengers" on an average weekday, and "approximately 1.4 billion riders" per year).

196. Stuntz, *supra* note 178, at 2165–66.

197. *Id.* at 2164.

198. *See id.* at 2166.

police request consent. In fact, five states have effectively banned the use of consent searches after public outcry.[199]

In addition to the check against police abuse that the political process provides, the Constitution mandates further procedural safeguards for special needs searches. To be reasonable under the Fourth Amendment, a special needs search program must be sufficiently narrowly tailored to the government interest in order to minimize the privacy intrusion.[200] In practice, courts typically focus on the degree of discretion officers have in conducting the search. For instance, the New York City subway search program was held constitutional in part because "police exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority."[201] Similarly, many special needs searches simply stop everyone who falls within the scope of the program, affording no opportunity for illegal discrimination.[202] It is the strength of these procedural safeguards, not police requests for consent, that prevents racial discrimination.

### 2. Special Needs Searches Without Consent

In practice, eliminating consent as an element of special needs searches would not significantly affect citizens' lives. In the subway search context, passengers would be required to permit police to search their bags, even if they offered not to ride the subway. Unlike a *Terry* frisk, this search would be limited to the bag, since officers "must limit their inspection to what is minimally necessary to ensure that the . . . item does not contain an explosive device."[203] Therefore, the procedural protections required for the special needs doctrine result in much less intrusive searches than could be permitted under current law.

199. *See* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187–88 (2006) (noting that Hawaii, Minnesota, New Jersey, and Rhode Island banned consent searches, and California Highway Patrol adopted regulations prohibiting consent requests).

200. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) ("[W]e generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests.").

201. MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006).

202. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 660 (1989); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 609 (1989); United States v. Martinez-Fuerte, 428 U.S. 543, 546 (1976).

203. *MacWade*, 460 F.3d at 265 (alteration in original) (internal quotation marks omitted).

In other areas of special needs search law, the practical impact of this proposed doctrinal shift would be similarly minimal. In the drug-testing cases, an employee who refused to consent to the drug test could be fired or suspended for long periods,[204] so calling the drug tests mandatory instead of consensual is simply being honest. For highway searches, the Court has already upheld a nonconsensual checkpoint,[205] and in the Ohio interstate study discussed above, two drivers who refused to consent had their cars searched anyway.[206] A study by the New York State Attorney General's office found that police regularly physically detain and even frisk based on the fact that a suspect "was observed entering and exiting a known drug location," got "in and out of a vehicle several times," had a bulge in his clothing, was pacing nervously, wore "suspicious clothing," or was "out of place" in a given location,[207] despite the fact that none of these stated rationales rise to the level of reasonable articulable suspicion.[208] William Stuntz argues that, in practice, courts will uphold such searches unless "a police officer behaves with a higher level of coercion than is ordinary and reasonable in a brief street encounter."[209] Even where police behave unreasonably, such conduct is often never reported.[210] Eliminating consent in special needs searches therefore brings greater honesty to police practices while entailing few costs to civil liberties.

Nonetheless, there are instances where an individual would prefer not to consent to a police search program for perfectly legitimate reasons. For example, in the opening hypothetical, the backpack could contain any manner of legal items that most "would prefer to keep private, such as personal grooming items, medications, sexual aids, or controversial printed matter, to name just a few."[211] In such circumstances, it would seem that eliminating consent extracts real social costs. In reality, nothing could be further from the truth. First, as the New York State Attorney General's report suggests, police can often manufacture a basis to conduct a

204. *Von Raab*, 489 U.S. at 663; *Skinner*, 489 U.S. at 610–11.

205. *Sitz*, 496 U.S. at 463 (Stevens, J., dissenting) (noting the checkpoint upheld by the majority is reliant on surprise).

206. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

207. *See* STOP & FRISK REPORT, *supra* note 194, at 137–38, 41 tbl.II.A.1.

208. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (requiring "reasonable and articulable facts" sufficient for a "man of reasonable caution" to believe that the search was appropriate).

209. Stuntz, *supra* note 178, at 2170 n.102.

210. *See, e.g.*, STOP & FRISK REPORT, *supra* note 194, at 76–78.

211. Nadler, *supra* note 71, at 208 n.188.

*Terry* stop and frisk.[212] No matter how personal or embarrassing the contents of the backpack, most people would have great difficulty refusing consent after being stopped and frisked.[213] Second, no one other than the officer conducting the search would see the embarrassing item,[214] and "[o]fficers may not attempt to read any written or printed material."[215] Third, although the search would not require consent, the Supreme Court has left open the possibility that a search conducted in a "particularly offensive manner" may be unreasonable.[216] Finally, since the search would likely happen with or without a consent requirement[217] and would incur minimal social costs,[218] it is better for the law to be honest and abandon the consent requirement for special needs searches since it is the procedural protections, not consent, that protect civil liberties.

### *B. Consent Should Remain a Valid Exception to the Fourth Amendment Requirements for Ordinary Searches and Seizures*

Although police requests for consent to search are implicitly coercive for a variety of psychological and institutional reasons,[219] implicit pressure is the most sensible way for police to provide public safety. Liberal society is premised on the idea that individuals have conceded the coercive authority necessary to enforce rights to the government in return for evenhanded application of the law.[220] As sociologist Max Weber explained, the most stable and least costly system of governance is one premised on laws accepted by citizens

212. *See* STOP & FRISK REPORT, *supra* note 194, at 137–45; *see also Terry*, 392 U.S. at 10 (favorably noting the argument that officers require "an escalating set of flexible responses, graduated in relation to the amount of information they possess" when "dealing with the rapidly unfolding and often dangerous situations on city streets").

213. *See supra* Parts I.B.2.a–b.

214. *See* MacWade v. Kelly, 460 F.3d 260, 265 (2d Cir. 2006).

215. *Id.*

216. United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008) (quoting United States v. Flores-Montano, 541 U.S. 149, 155 n.2 (2004)) (internal quotation marks omitted).

217. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

218. *See MacWade*, 460 F.3d at 265 (stating "a typical inspection lasts for a matter of seconds").

219. *See supra* Part I.B.2.

220. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press, 3d ed. 1988) (1690) (arguing that people concede power to government in exchange for protection of property and safety).

as a source of legitimate authority.[221] Honestly admitting that police engage in implicit social pressure is vastly preferable to requiring police to use only physical coercion to enforce the law. Since citizens are ultimately the source of laws in a democratic society, they will accept enforcement of those laws by the police. And because citizens have been socialized to accept the police as the legitimate enforcers of the laws, they will accede to police requests for consent rather than force police to use physical coercion.

## III.
## THE BENEFITS AND DEFENSES OF HONEST COUNTERTERRORISM POLICING

This section argues that the proposal presented in Part II makes policing more honest, which will induce greater compliance with the law. It then defends the argument presented in Part II against two criticisms. First, this section addresses the argument that removing consent from special needs reasonableness analysis will result in racially discriminatory enforcement and abusive police practices. Second, this section addresses the argument that abandoning the theoretical ideal of consent will lead to more coercive policing and greater infringements on civil liberties.

### *A. The Benefits of Honest Policing*

Perhaps honesty is the greatest consequence of abandoning consent in special needs searches. Honesty is important both theoretically and empirically. According to standard moral theories, criminal law punishes violators because they are culpable and as a means to deter future wrongdoing.[222] Many scholars claim that the law also has an "expressive" function, that is, that laws express and shape norms and values.[223] However, if people perceive these

221. *See generally* MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY (1962) (explaining that valid and legitimate authority results in a more stable form of government); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1964) (same).

222. *See, e.g.*, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–56 (1997).

223. *See, e.g.*, Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1593–94 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–55 (1995); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039 (1999); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meaning, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD.

norms to be unjust or hypocritical, then they will be less likely to obey the law.[224]

Multiple studies have demonstrated that people are less likely to obey norms perceived to be unjust. Psychologist Tom Tyler's work suggests that citizens' attitudes toward the law and those who enforce it depend not on the outcomes of their encounters, but on whether they felt they were treated fairly.[225] Yet empirical research shows that those subject to consent searches overwhelmingly feel negatively affected by the police encounter—resulting in feelings of violation and embarrassment as well as a sense that their personal rights have been infringed.[226] These negative experiences often cause people to have lasting negative attitudes towards the police.[227]

By pretending to ask for consent to search, police may be decreasing individuals' respect for the law, which in turn may create lawbreakers rather than deter crime. There is experimental support for the idea that diminished respect for a law will induce people to break not only that law, but other laws as well. In one study, participants were asked over the phone about both their and others' experiences with the IRS.[228] Those who had friends, neighbors, or coworkers who were made to pay more taxes than they supposedly owed expressed both lower perceptions of the fairness of the tax

725, 726 (1998); Robinson & Darley, *supra* note 223, at 471–73; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

224. *See* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship,* 87 GEO. L.J. 1059, 1090–91 (1999) (arguing that, for people who distrust the legal system, violation of the law is often "romanticized, idealized, condoned, or even celebrated"); *cf.* COLE, *supra* note 140, at 171–72 (1999) (noting that those who view police performance unfavorably are less likely to comply with the law).

225. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 41–68 (1990) (explaining how people's perceptions about the fairness or unfairness of procedures used by law enforcement have a significant effect on their satisfaction with authority generally); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 378, 379 tbl.3 (2001) (finding that people have more trust in the police and courts when officers and judges make their decisions using fair procedures). Tyler's research prompted Professor Stuntz to propose a "manners" test for the constitutionality of a police seizure based on dignity. *See* Stuntz, *supra* note 178, at 2172–76.

226. *See* Nadler, *supra* note 71, at 212 (noting that 74% of respondents in Illya Lichtenburg's Ohio interstate study expressed negative feelings about their consent search experience).

227. *See id.* at 212–13.

228. *See* Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement*, *in* WHY PEOPLE PAY TAXES 259, 263–76 (Joel Slemrod ed., 1992) (describing the results of a 1988 telephone survey about tax compliance).

code generally and greater intentions to cheat on their taxes in the future.[229] In another study, participants were initially shown newspapers articles written to be just, unjust, or neutral.[230] Participants were then asked to fill out a questionnaire indicating their likelihood to engage in a variety of illegal behaviors unrelated to the topic of the article.[231] Those shown the unjust newspaper article expressed a greater willingness to break the law.[232] This led the experimenter to conclude that "the belief that a particular law is unjust increases the likelihood of flouting the law in one's own daily life (even laws that are unrelated to the unjust law in question)."[233] Therefore, by eliminating the legal hypocrisy through abandoning consent in special needs searches, a doctrinal shift can promote greater respect for and compliance with the law.

### *B. Political and Procedural Checks on Discrimination*

Removing consent from the reasonableness analysis of special needs searches will not result in police discrimination or abuse for two reasons. First, the high visibility and social costs of programmatic searches will ensure a political check on their use.[234] Second, despite lacking a consent requirement, special needs searches still need strong procedural safeguards to be reasonable under the Fourth Amendment.[235]

The political process is an effective check on police abuse in programmatic searches because police will face political pressure if they use unduly harsh tactics against large numbers of people.[236] However, the political process could be less effective at preventing racial discrimination. There are two ways police could use special needs searches in a discriminatory manner. First, they could locate

229. *See id.* at 276.

230. For example, the just version of a newspaper article on civil forfeiture "[e]mphasized the law enforcement benefits," while the unjust version "[e]mphasized the civil liberties concerns surrounding civil forfeiture laws." Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1412–13 & tbl.1 (2005). Neutral articles "were filler stories" on topics such as "movie ushers." *Id.* at 1412.

231. *See id.* at 1411, 1414.

232. *See id.* at 1414–16.

233. *Id.* at 1410.

234. *See* Stuntz, *supra* note 178, at 2165–66.

235. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 273 (2006) (upholding New York City's subway search program, in part, because police "search only those containers capable of concealing explosives," "do not read printed or written material or request personal information," and "exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority").

236. *See supra* Part II.A.1.

the checkpoint in a predominantly minority neighborhood. Second, they could only stop people of a certain race at checkpoints (i.e., engage in racial profiling). With respect to the former, the transparency of the police tactics against an entire neighborhood could still provoke a sufficient political check, since "[v]isiblity is a powerful regulatory tool."[237] With respect to the latter, William Stuntz argues that the risk of racial profiling in a search program is less than for individualized searches, since individual searches can be done pretextually.[238] Nonetheless, such political protections can break down when the discrimination is directed against disliked minorities who cannot effectively exert electoral pressure.[239] For instance, if the New York City subway search program only stopped Middle Eastern-looking men, it is not clear this group has sufficient political clout to do anything about it.[240] Therefore, the political process alone is insufficient to prevent racial discrimination in special needs searches. However, when political checks are combined with the procedural protections courts require for programmatic searches, racial discrimination can be effectively prevented.

Constitutionally mandated procedural limitations on special needs searches are primarily designed to limit police discretion in

237. Stuntz, *supra* note 178, at 2167. *But see* Matthew J. Spriggs, Note, *"Don't Tase Me Bro!" An Argument for Clear and Effective Taser Regulation*, 70 OHIO ST. L.J. 487, 487–88 (2009) (discussing the controversy that developed after six campus officers tased a student in public and in front of cameras).

238. *See* Stuntz, *supra* note 178, at 2176–80.

239. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); JOHN HART ELY, DEMOCRACY AND DISTRUST 172 (1980) (arguing for a democratic process-based approach to Fourth Amendment law as a prophylactic against unequal treatment).

240. It is worth mentioning that public choice theory predicts the precise opposite, since a small, homogenous group facing concentrated costs would have lower organizing costs to form an interest group to combat these costs. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 22–36 (1965) (explaining advantages that concentrated interests, such as regulated industries, have over diffuse interests in the political process). *See generally* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (offering an economic model wherein relatively small groups provides the "supply side" of regulation); Gordon Tullock, *Some Problems of Majority Voting*, 67 J. POL. ECON. 571 (1959) (explaining the development and effects of coalitions among concentrated benefit-receivers vs. diffuse cost-bearers). Nonetheless, "[i]f the cost-bearers are sufficiently few . . . or if there are barriers to their coalescing to fight the relevant government action," such as some targets not being citizens, then "the government is likely to find it temping to concentrate costs." Stuntz, *supra* note 178, at 2165 n.87.

order to prevent police abuse and discrimination.[241] Nonetheless, some opportunities for racial discrimination still exist. Within special needs programs, officers often have "wide discretion" to select individuals for secondary screening.[242] However, unlike individualized searches, special needs searches are performed with many others watching and regularly affect many people.[243] Therefore, the political process will help protect against police abusing their discretion for secondary screenings. Moreover, the experience of the search is likely to be less "harmful" for individuals when others around them also are stopped.[244] In such circumstances, the procedural and political checks work together to prevent both police abuse and racial discrimination. Importantly, consent has no role to play in either mechanism.

### *C. Fighting Hypocrisy in the Law: Lessons from* Terry v. Ohio

This subsection responds to the claim that abandoning the ideal of consent will lead to greater infringements on civil liberties by arguing that the benefits of legal honesty outweigh the loss of theoretical legal protections.[245] Specifically, a more honest law that better reflects social reality will provide greater legal protection in practice than idealized legal principles. This subsection proceeds by examining a similar debate concerning another type of proactive policing: stops and frisks.

In *Terry v. Ohio*, the Supreme Court held that police stops, and associated frisks, may be conducted on less than probable cause.[246] The *Terry* Court recognized that although these activities are searches and seizures within the meaning of the Fourth Amendment,[247] police were engaging in them with impunity, possibly in a racially discriminatory manner.[248] So, although the Court appeared to lower the legal requirement from probable cause, and was heav-

241. *See supra* Part II.A.2.

242. United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976).

243. *See* Stuntz, *supra* note 178, at 2167.

244. *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996) (proposing that the Fourth Amendment is intended to prevent "targeting harm"—singling out an individual "for unfavorable treatment without a legitimate basis"—in addition to "privacy harm").

245. *See supra* Part II.B.

246. 392 U.S. 1, 21 (1968).

247. *See id.* at 18–19.

248. *See id.* at 14–15 & n.11.

ily criticized for doing so,[249] the Court actually raised the practical threshold from effectively nothing to "reasonable . . . articulable suspicion."[250] Far from "tak[ing] a long step down the totalitarian path,"[251] *Terry* brought the law of police stop and frisks more in line with reality, while permitting police to engage in necessary preventive policing.[252] Moreover, it created additional legal safeguards to protect against police abuse and racial discrimination.

Removing consent from the reasonableness analysis of special needs searches would extend the reasoning of *Terry* and have similar salutary effects. As in *Terry*, this doctrinal shift appears to lessen "beneficial aspects" of Fourth Amendment protections that "minimize intrusiveness."[253] But, in reality, requiring police to request consent provides little, if any, protection to individuals.[254] The real limitations on police power in special needs searches come from the political process and procedures that limit police discretion.[255] Therefore, acknowledging the current implicit social coercion in police requests for consent would not lessen individuals' civil liberties and would alter legal doctrine to better reflect reality. Much like *Terry*, removing consent appears to lower the legal standard but actually raises it. Moving away from consent as a factor in courts' reasonableness analysis enables courts to focus on the remaining procedural requirements for special needs searches that actually protect citizens' civil liberties. Just as *Terry* honestly admitted police officers' ability to detain and frisk suspects without facing any major legal hurdles,[256] this doctrinal shift will permit effective protection against terrorism, while avoiding current legal hypocrisy.

249. *See, e.g.*, *id.* at 35–39 (Douglas, J., dissenting); Scott E. Sundby, *Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 411–14 (1988) (discussing *Terry* and criticizing the Court for failing to articulate a coherent and systematic view of when the reasonableness test applies); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 965–73 (1999) (criticizing *Terry* for brushing over the racial component of the program).

250. *See Terry*, 392 U.S. at 33 (Harlan, J., concurring); *id.* at 21 (majority opinion).

251. *Id.* at 38 (Douglas, J., dissenting).

252. *See id.* at 33 (Harlan, J., concurring) ("There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.").

253. MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006).

254. *See supra* Part I.B.2.

255. *See supra* Part III.B.

256. *See Terry*, 392 U.S. at 14–15.

## CONCLUSION

The Supreme Court has already laid the groundwork for abandoning consent in special needs searches. In *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint that did not include a consent requirement.[257] By ignoring consent, the Court freed itself to focus on the meaningful procedural safeguards necessary to ensure civil liberties in special needs searches.[258] The Court need only take its analysis one step further by acknowledging that police requests for consent in special needs searches are implicitly coerced.[259] By doing so, the Court can end the hypocrisy of current legal doctrine and bring honesty to the law.

257. 496 U.S. 444, 463 (1990) (Stevens, J., dissenting).
258. *See id.* at 450–55 (majority opinion).
259. *See supra* Part I.B.2.