

AN ESSAY ON CONSENT(LESS) POLICE SEARCHES

DANIEL L. ROTENBERG*

Police searches that are *publicly*¹ authorized must meet the minimum requirements of the United States Constitution. The fourth amendment requires that searches be reasonable,² but often they must also be based on probable cause, conducted pursuant to a search warrant, and confined by particularity of both place to be searched and item to be seized.³ The one irreducible factor, however, is reasonableness. So much for the obvious. Consent searches present a different story; they are *privately*⁴ authorized. For this reason, one could argue, no constitutional limitation—neither the fourth amendment nor the two due process⁵ amendments—is implicated. Of course, this is not the law; the Supreme Court has held that consent searches must satisfy the reasonableness standard of the fourth amendment.⁶ The Court, however, has not imposed a probable cause prerequisite on consent searches; it has neither required a showing of exigency, nor has it insisted that an administrative search warrant be obtained, an area search authorization be established, or that reasonable suspicion be shown. Neither public authorization nor

* Professor of Law, Law Center, University of Houston.

1. This includes searches authorized by a court, administrative agency, police department, and the self-authorization of the police officer. It, thus, includes everything except the consent search.

2. More precisely, the searches must not be unreasonable. The amendment reads in pertinent part: "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

3. *Id.* As originally drafted, the probable cause and warrant language was tied to the reasonableness requirement. Following the reasonableness language in the amendment was the phrase "by warrants issued without probable cause." The Committee of Three changed this phrase to its current language: "and no Warrants shall issue, but upon probable cause." The Supreme Court has used the reasonableness requirement by itself. For example, a "*Terry* stop" must be reasonable, but probable cause and a warrant are not required. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968). Justice Douglas, dissenting in *United States v. Matlock*, disagreed that reasonableness could be separated from probable cause and warrant requirements and discussed the historical development in this regard. *United States v. Matlock*, 415 U.S. 164, 180 n.1 (1974).

4. To the extent that the Constitution and the Supreme Court validate the consent search, then conceptually it is publicly authorized; but this is not the point. The private consent of some private person makes each individual consent search valid. Without this authorization, it is nothing.

5. An alternative analysis to the use of the fourth amendment as a control on privately authorized searches would be one of the due process approaches, e.g., fundamental fairness.

6. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

prior suspicion of the slightest degree by the police department, or even the policeman himself, is a condition to a police officer's approaching a citizen—even at the entrance to his home—and requesting consent to search. Given consent, the search power is awesome. A defender of the faith might respond, "So what? If a person consents to have his fourth amendment interests searched by police, then obviously the search is reasonable." Perhaps. What if, however, consent searches typically are not based on actual consent?⁷ A case can be made that the current consent search is not only mislabeled, but is constitutionally unreasonable. This essay tries to make that case and to suggest some changes.

I. THE CASE

Because of its perspective, this essay does not even try to make a case *for* consent searches or to undertake an even-handed presentation for and against them. I leave that to others. The focus here is on the unreasonableness of the searches derived from an examination of several specific components of consent analysis: the meaning of "consent" and its important modifier "voluntary"; the possibility for "third party" consent; the scope of a consent search; a person's motivation to consent; and the extent police need and use the practice.⁸

A. Consent

The Supreme Court has not spoken extensively or often on consent searches.⁹ Neither its leading case, *Schneekloth v. Bustamonte*,¹⁰ nor

7. The adjectives "actual," "subjective," "true," and "real" are used interchangeably throughout this essay.

8. This essay does *not* examine consent given by a person under police control whether by a "Terry stop," traffic arrest, arrest, custody, or whatever. In *Bustamonte*, 412 U.S. 218 (1973), the Supreme Court expressly reserved decision of the issue although factually the case concerned consent given while the consenter was under police control pursuant to a traffic arrest. This fact was not even acknowledged by the Court. In *United States v. Watson* 423 U.S. 411 (1976), the Court approved consent given by a person while under arrest *in public*. In a case to be decided by the Court in its 1990-91 term, *Florida v. Bostick*, 554 So. 2d 1153 (Fla. 1989), *cert. granted*, 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990) (No. 89-1717), the lower court found consent to be invalid because given during illegal detention. The Court, thus, has the opportunity to clarify the issue.

9. *Davis v. United States*, 328 U.S. 582 (1946) and *Zap v. United States*, 328 U.S. 624 (1946) are cited in *Schneekloth v. Bustamonte*, 412 U.S. at 219, as having "well settled" the question that neither probable cause nor a warrant is needed for a consent search. Although consent can be said to be a factor in the Court's analysis in the two cases, the fact that "businesses were being inspected" seems to be a larger factor. Neither case defines consent for constitutional purposes.

10. 412 U.S. 218 (1973).

subsequent cases, including its most recent effort, *Illinois v. Rodriguez*,¹¹ have discussed the meaning of consent. Contract law alerts us to the difficulty of resolving offer and acceptance ambiguities by reference to subjective analysis alone. The issues are not the same, however. In contract formation disputes, use of the objective approach is instrumental in reaching a just result. In the context of the consent search, the subjective view seems required because the sole validating source of police authority to intrude on a premier constitutional right is the individual's grant of permission. What *is* counts; not what is perceived. Nevertheless, the police can never know if actual consent has been given; they must rely on what is said or done. If they reasonably rely on manifestations of consent, then is not the search reasonable? Still another possibility is to require *both* actual consent and police reasonable belief. If some day the Court resolves this dilemma in favor of the police perspective, as some lower courts have done,¹² this would immediately eliminate true consent as an operative fact.¹³

Whatever way consent is determined, it is easily obtained. Consider one scenario: Two policemen with nothing better to do decide to conduct a search of a randomly selected house. They knock. When the door is answered, they simply ask, "May we search the premises?" A "sure" or "Be my guest"—even if given in surprise or with hesitancy—or a silent motion to enter will suffice. The police need not mention what authority supports their request, the crime they are investigating, or the object of the search.¹⁴

11. 110 S. Ct. 2793 (1990). The Supreme Court has granted certiorari in two cases to be decided in its 1990-91 term. *Florida v. Bostick*, 554 So. 2d 1153 (Fla. 1989), *cert. granted*, 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990) (No. 89-1717); and *Florida v. Jimeno*, 564 So. 2d 1083 (Fla. 1990), *cert. granted*, 59 U.S.L.W. 3405 (U.S. Dec. 3, 1990) (No. 90-622).

12. *See, e.g., People v. Henderson*, 33 Ill. 2d 225, 210 N.E.2d 483 (1965).

13. In *Illinois v. Rodriguez*, 110 S. Ct. 2993 (1990), resolving an issue left open in *United States v. Matlock*, 415 U.S. 164 (1974), the Supreme Court decided that whether a third person had authority to consent for another should be determined by reference to a reasonable or objective appraisal of the facts by the police rather than by reference to any actual, subjective authority. Because the issue in the case was the standard for determining authority and because consent had clearly been given by the third person, the Court did not discuss the issue of what standard determines consent. Nevertheless, the approach and language of the Court's opinion could easily be applied to consent; consent would then be determined by reference to the police perspective rather than the individual's.

14. In the residence context, no preliminary test must be satisfied before the police may approach a resident and ask for permission to search. In the "mobile" context of pedestrian or automobile, a preliminary test must be satisfied in order to "stop" the person to be questioned. Recently in *Alabama v. White*, 58 U.S.L.W. 4747 (U.S. June 11, 1990) (No. 87-789), the Supreme Court in a

B. *Voluntariness*

Whether consent is subjectively or objectively determined, the issue remains whether it was obtained constitutionally—that is, reasonably. In *Bustamonte*, the Supreme Court rejected waiver and accepted voluntariness as the relevant norm. It adopted the concept from the line of confession cases. Its meaning was to be the same. An inquiry into the totality of the circumstances was necessary to ascertain whether the individual had consented voluntarily.¹⁵ The confession cases, however, if not the *Bustamonte* opinion,¹⁶ made it clear that a totality inquiry was unnecessary under two extremes. At one end, certain police practices were so coercive that as a matter of law their use automatically made any confession involuntary;¹⁷ and at the other end, certain persons were so without a will that regardless of police practices their confessions were involuntary.¹⁸ Of the two extremes, the latter has older and stronger roots.

Historically, untrustworthy and factually involuntary confessions antedate the more modern legal involuntary approach.¹⁹ In between the two extremes, the factors relating to involuntariness were so many and so diverse that only a totality analysis made sense: the facts of the individual's mental makeup and history plus the facts of official force, threats, and deception were thrown together into the decisionmaking cauldron. Thus, at the *Bustamonte* juncture in the evolution of consent law, true consent, at both extremes and in the middle was arguably²⁰ essential to

6-3 decision upheld a police stop when an anonymous tip, plus modest corroboration, provided the needed reasonable suspicion. After the valid stop was made, the police requested and received consent to search the car and further consent to search a locked attache case. The police found incriminating evidence. The police have a very effective detection tool in the mobility context when they combine "easy stop" with "ready consent."

15. *Schneckloth*, 412 U.S. at 248-49.

16. This qualification is necessary because the opinion treats the confession cases as if they all were decided by reference to the totality of the circumstances.

17. Several Supreme Court cases support this view. *See, e.g., Rogers v. Richmond*, 376 U.S. 534, 540-41 (1961).

18. *See, e.g., Townsend v. Sain*, 372 U.S. 293, 307-08 (1963).

19. Due process analysis relating to confessions has not been a simple and straightforward development. Nevertheless, through the twists and turns it is possible to identify a natural progression from (1) "untrustworthiness" of the confession to (2) "involuntariness" of the confession, regardless of its reliability, based on the suspect's lack of will to (3) "involuntariness" based on the totality of factors including the suspect's vulnerability and the police tactics to (4) "involuntariness" based on police tactics alone. Of course, the greater the likelihood that a police practice will produce an untrustworthy confession or override an individual's will, the greater the likelihood it will be found as a matter of law to violate due process and any confession obtained will be considered involuntary.

20. Notwithstanding the Court's effort to subsume all older confession cases and the newer evolving consent ones under a totality of circumstances analysis, it is difficult to believe that under

the validity of the consent search. True consent made the search voluntary and therefore reasonable.

In 1986 in *Colorado v. Connelly*,²¹ the Court took a fresh look at the meaning of voluntariness. The case context, however, was confession and not consent, and the issue was whether a confession made by a person without any will whatsoever could be voluntary. The Court said it could. Involuntariness required misconduct—factual or legal coercion—by the police. Phrasing it more broadly, overreaching state action was essential. If this new²² meaning of voluntary is applied to consent,²³ then consent would be valid even though the person consenting did not know what he was saying or doing. Thus, in some instances, a fictional legal construct would replace subjective authority to search.

Because voluntariness does not serve the same purpose for confession and consent, the Court may decide to split what up to now has been one. With confession, voluntariness serves to satisfy the due process mandate of the Constitution. In *Connelly* the Court concluded that absent wrongful behavior, the police may obtain a confession from a person without a will without violating due process. The subsequent trial use of the confession, according to the Court, is a matter of reliability and is governed by rules of evidence. With consent, on the other hand, voluntariness serves to assure that search authority exists—that an individual through the exercise of will, a personal power, has supplied the police with the keys to his kingdom.²⁴

If the Court, however, maintains the continuity of its earlier analysis and applies its new voluntariness thinking to consent searches, it will weaken, if not break, the link that makes those searches reasonable. If the Court should decide to keep its objective, police perspective for the voluntariness aspect of consent, but to take a subjective approach to con-

that approach and at that time, the Court would have found voluntary a confession made by a person without a will—a person functioning as an automaton.

21. 479 U.S. 157 (1986).

22. The *Connelly* opinion does not concede that its approach to voluntariness is new. Justice Brennan, for himself and Justice Marshall, however, points out how “unprecedented” the holding and analysis really are. *Id.* at 174 (Brennan, J., dissenting).

23. The Court is silent on whether its voluntariness analysis also applies to the consent search context.

24. Because voluntariness of a confession and voluntariness of a consent search concern different purposes—self incrimination versus legal authorization for the police to act—and different safeguards—due process versus reasonable search—it makes sense for the Court to treat them differently. Justice Marshall made this point, but to no avail, in his dissent in *Schneekloth*. See 412 U.S. 218, 277 (1973) (Marshall, J., dissenting).

sent itself, then a "will-less" individual although not able to argue that he *could* not consent would still be able to argue that he *did* not consent. Should the Court instead take an objective view of consent parallel to its view of voluntariness, it would transform "voluntary consent" into something that is neither voluntary nor consensual. "Involuntary nonconsent" would become a source of police power to search.

C. *Third Party Consent*

Although the idea of third party consent is not self-defining, it most obviously includes the scenario in which the police, wanting to search a person's privacy interests, receive permission from someone other than the person who is the focus of the search. This kind of third party consent, arguably, is easier to obtain than the traditional two-party variety, because the third party, if he knows the search does not implicate him, may have no reason or only a mild reason for refusing consent. In addition, he may believe in the classic hope that by cooperating with the police he can keep their focus off of him, or in the ideal of civic duty manifested currently by third persons who grant consent to police to search the premises of others for illegal drugs.²⁵ Thus, the dual requirements of "consent" and "voluntary" may be readily met by consent to intrude on someone else's interest. This same ease of consent, however, explains why third party consent is of questionable validity. To conclude that a fourth amendment right to privacy may be lost because a person with no or little stake in the outcome decides to throw it away is bizarre. Ideally, a third person should be allowed to give effective consent only if the interest holder has given permission to the third person to allow a police search or to open his interests to the public and thereby forfeit his privacy.²⁶ Of course, this is rarely done.

The Supreme Court, however, has a different perspective. In only two cases, *United States v. Matlock*²⁷ and *Illinois v. Rodriguez*,²⁸ has the Court both upheld third party consent and discussed the basis of its validity. In *Matlock* the police, after arresting Matlock in front of his resi-

25. Even children are consenting to searches of their parents' privacy. See the report of one incident concerning consent by a 12 year old boy, in the *Houston Chron.*, Oct. 20, 1989, § A, at 21, col. 1.

26. Justice Marshall discusses this argument in his dissent in *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2806 (1990).

27. 415 U.S. 164 (1974).

28. 110 S. Ct. 2793 (1990).

dence, approached the house and sought and received consent to search Matlock's bedroom from a woman, Ms. Graff, who shared the premises. The Court rejected consent based on the concepts of apparent authority from agency law²⁹ and shared legal interests of property law,³⁰ but seemingly validated it when rooted in a common authority or shared use of the protected interest. From this latter argument, the Court concluded that the interest holder had "assumed the risk" that the third party might "permit the common area to be searched."³¹ The significance of the *Matlock* opinion is elusive for several reasons: First, the analysis of this point is strikingly brief with the definition of "shared use" discussed in a footnote;³² second, the footnote's reference to the idea that sharing allows the third party to "permit the inspection in his own right"³³ coupled with the citation in the text to the *Frazier v. Cupp* opinion,³⁴ the primary if not the only precedent cited,³⁵ suggests that the Court may have had in mind a fact situation substantially different from *Matlock*. In *Frazier*, the suspect, Rawls, consented to the police search of a duffle bag in his possession but also used by Frazier. The police inadvertently discovered evidence that implicated Frazier. It is beyond dispute that Rawls was not consenting to have Frazier's interest searched; neither were the police searching for evidence against Frazier. On these facts the Court had no trouble concluding that Frazier assumed the risk that Rawls might let someone look in the bag for items relating to Rawls.³⁶ If *Matlock* had been limited to *Frazier*-type facts, then the case would not have been a third party consent case at all. It was not likely then, and it is clear now after *Illinois v. Rodriguez*,³⁷ that *Matlock* was not that narrow. The facts are not like *Frazier* but are the classic third party consent variety. When Ms. Graff gave consent to search, both she and the police knew that the purpose of the search was to search Matlock's property to

29. *Stoner v. California*, 376 U.S. 483 (1964).

30. *Chapman v. United States*, 365 U.S. 610 (1961).

31. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

32. *Id.*

33. *Id.*

34. 394 U.S. 731 (1969).

35. It is clearly the only case discussed. The Court mentions lower court decisions as well as other Supreme Court cases, although they are not used as precedent.

36. The "plain view" doctrine would authorize the seizure provided probable cause existed to tie the evidence to a proper basis for seizure. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

37. 110 S. Ct. 2793 (1990) (supports consent given by third person who police reasonably believe has authority to consent).

obtain evidence against Matlock.³⁸ With *Frazier* eliminated as apt precedent for *Matlock*, then a third elusive quality of *Matlock* consists of identifying facts, law, or policy to support its "assumption of risk" conclusion. Can something be found?

At the fact level, the Court did not conclude that Matlock actually considered the risk, let alone assumed it, that by sharing premises with Ms. Graff she would give permission to police, bent on finding evidence to convict him of a serious crime, to search his private possessions. It is not credible that Matlock, or the all-purpose reasonable person, would assume such a risk.³⁹ The Court, thus, may have been saying that the risk was assumed as a matter of law, relying for this conclusion on two lines of cases, *Frazier* aside, that the Court neither discussed nor cited in *Matlock*. One line includes post-*Matlock* cases like *United States v. Miller*⁴⁰ in which a bank depositor was held to have no right of privacy in his own financial information that he had turned over to a bank in the course of the usual depositor-bank relationship. After finding no privacy, the Court concluded that the depositor had assumed the risk that the bank might reveal the information to the government. This assumption of risk approach does not fit third party consent search cases, because in consent cases the privacy holder is not relinquishing his fourth amendment interest to a third party, but is bringing that party into the privacy relationship.

A second line of cases includes *United States v. White*⁴¹ in which a third party electronically transmitted a private conversation between White and himself to listening police. Although factually similar or identical to third party consent cases, *White* and cases like it⁴² are so controversial that the *Matlock* plurality may have considered it unwise to refer to them. The common element in *White* and *Matlock* is the fact that at the time that a shared privacy relationship existed, a third party allowed the police to intrude upon it. The plurality in *White* chose not to legally

38. At the time of consent Matlock was sitting out front in a police car. Apparently the police did not seek consent from him. The Court does not attach importance to this or allude to what the consequence would be for third party consent if they had asked and he had refused.

39. It is not credible, either, to believe that a reasonable person would assume the risk that consent to search that person's privacy would be given by a third person to nonpolice government agents or even nongovernmental persons—let alone the police.

40. 425 U.S. 435 (1976).

41. 401 U.S. 745 (1971).

42. See, e.g., *On Lee v. United States*, 343 U.S. 747 (1952) (conversation between On Lee and undercover agent was electronically overheard by listening police).

distinguish the situation in which the third party permits the police to intercept the conversation while it is ongoing from the situation in which the party informs the police after concluding the conversation.⁴³ The first situation is third party consent; the second, third party betrayal. In their dissenting opinions Justice Douglas⁴⁴ and especially Justice Harlan,⁴⁵ writing separately, addressed much of their criticism to the privacy aspect of the conversation. In short, the type of third party consent case illustrated by *White* is as shaky as the type illustrated by *Matlock*. If neither facts nor law support the Court's use of assumption of risk in *Matlock*, perhaps an overriding policy explains its use. If so, its identity is hidden. Assumption of risk stands alone—a fictional means to accomplish an unknown goal.

In *Illinois v. Rodriguez*,⁴⁶ the second of the two third party consent cases, the Supreme Court in a short and easily constructed opinion by Justice Scalia⁴⁷ also found third party consent valid.⁴⁸ The police entered Rodriguez' apartment, discovered cocaine and drug paraphernalia in plain view, and arrested the suspect for drug possession. The police had access to the apartment through the cooperative efforts of Ms. Fischer, who unlocked the door to the apartment and gave the police consent to enter. Ms. Fischer was a former girlfriend who had lived with Rodriguez and who still had a key to his apartment.⁴⁹ The Court accepted the lower courts' finding that at the time she gave consent, she "did not have common authority over the apartment."⁵⁰ Under *Matlock* the search would have been invalid because without a shared interest, the privacy holder did not assume the risk and therefore could not be found to have acquiesced in any third person's consent. Obviously, *Rodriguez* presents a new approach. Two factors are relevant: one, consent, whatever that may be, presumably must be given by the third person even though that person may be a total stranger to the privacy holder

43. *White*, 401 U.S. at 751.

44. *Id.* at 756, 763-65 (Douglas, J., dissenting).

45. *Id.* at 768 (Harlan, J., dissenting).

46. 110 S. Ct. 2793 (1990).

47. Justice Marshall dissented and was joined by Justices Brennan and Stevens. *Id.* at 2802.

48. Because the lower court had found it unnecessary to determine if the police reasonably believed the third person had authority to consent, the case was remanded for consideration of the fact issue.

49. Earlier on the day of the search Ms. Fischer had called the police from her mother's residence to report that Mr. Rodriguez had recently assaulted her. When the police arrived she offered to assist them in gaining entrance to his apartment so they could arrest him.

50. *Rodriguez*, 110 S. Ct. at 2795-96.

and privacy interest; and two, the police must reasonably believe that the third person had authority over the premises.

Because *Rodriguez* neither expressly nor impliedly overruled *Matlock*, both cases represent the current state of the law. Briefly restated, *Matlock* allows a third person search when the privacy holder can be found to have assumed the risk that the third person would give consent; and *Rodriguez* allows the police to rely on the consent of a third person when they have reasonable belief that the person had authority to give consent, even though the privacy holder did not assume any risk and even though the consenter has absolutely no relationship to either the privacy holder or his interest. Elaborating a bit further, under *Matlock* the police search is valid without any reasonable belief on their part provided the privacy holder can be found to have relinquished his right; under *Rodriguez* the search is valid if the police have a reasonable belief even though the privacy holder has not relinquished his right.⁵¹

The burden established by the *Matlock* assumption of risk fiction is heavy. It includes not only the interest holder's relinquishment of his fourth amendment rights, but also the third party's role of assisting the police in making specific a general and unlimited assumption of risk. In addition, the fiction validates a police search of a protected interest that the police often know is not exclusively an interest of the consenter. The *Rodriguez* approach, while supplying strong support for law enforcement, completely ignores the constitutional interest of the privacy holder. To all of this must be added what has been discussed above concerning "consent" and "voluntariness." If objective standards are maintained for these concepts and applied to consent searches and extended to third party consent cases, then a third person's consent will be valid even when he did not and could not subjectively give permission for a police search. "Involuntary nonconsent" in the traditional consent search context now becomes, in the *Matlock* third party context, "involuntary non-

51. In *Rodriguez* the Court used an objective test to support law enforcement; in *Illinois v. Perkins*, 58 U.S.L.W 4737 (U.S. June 4, 1990) (No. 88-1972), it used a subjective test to achieve the same result. In *Perkins* the issue was whether *Miranda* applied to a situation in which a police undercover agent, feigning to be a cellmate, questioned a suspect in his jail cell when the suspect did not know of the deception. The Court found that because the suspect subjectively did not know he was being interrogated by the police, he was not under coercion, and thus *Miranda* did not apply. The issues in *Rodriguez* and *Perkins*, of course, are not the same; nevertheless, an unhappy commentator might see in these cases a pattern by the Court of moving from result to reasoning instead of the more traditional other way around.

consent once removed;" and in the *Rodriguez* third party context, "involuntary nonconsent by a stranger."

D. *The Scope*

The Supreme Court has not addressed the scope of the consent search. It seems natural to assume—and cases make this assumption—that the nature of the consent determines the scope.⁵² Just as the question of whether consent has been given may turn on the subjective intent of the consenter or on the objective, reasonable perception by the police—so the question of scope faces a similar inquiry, with one difference: the scope problem presents not simply an either/or option, but an unlimited range of possibilities.

If consent is to be viewed as a subjective grant of permission, then its scope, presumably, would also be subjective. But, returning to the householder's consent scenario, does a person's consent to an open-ended police request to search, realistically address its scope?⁵³ Does a consenter responding to a surprise inquiry have the time, presence of mind, opportunity to consult knowledgeable others, and experience to think over and resolve such scope issues as: (1) coverage; the entire living area—basement, garage, attic, vehicles—privacy areas of family members or guests, closed containers, the body of the consenter and others who may be present—including strip and cavity searches; (2) duration; from brief to eternal; (3) intensity; if a postage stamp is the search object, whether wallpaper, paneling, and carpeting may be removed; (4) frequency; whether a single consent includes multiple searches; and (5) seizures; whether a consent to search also includes "consent to seize" without the usual probable cause?⁵⁴ To paraphrase some modern lyrics, "If you be-

52. See the discussion and cases cited in 2 W. LAFAYE, SEARCH AND SEIZURE § 8.1(c) (1978). The Supreme Court has granted certiorari in *Florida v. Jimeno*, 564 So. 2d 1083 (Fla.1990), cert. granted, 59 U.S.L.W. 3405 (U.S. Dec. 3, 1990) (No. 90-622), a case which presents the question whether consent to search a vehicle includes consent to search a closed container where the consenter is told the purpose of the search, and the container could conceal the objects being searched for.

53. Ignorance of facts concerning the scope of a search may also be relevant to the question of whether consent was given. Even though lack of knowledge of the law is irrelevant to the consent issue, it does not mean that lack of knowledge of facts is also irrelevant.

54. Under Rule 41 of the Federal Rules of Criminal Procedure the judicial warrant that is authorized is not merely a search warrant, but as the title of Rule 41 indicates it is a search and seizure warrant; the procedures that culminate in the issuance of the warrant include inquiry into not only what is to be searched but also what is to be seized. When consent to search is the authorizing vehicle for a search, attention to the seizure issue, as the text elaborates, may be absent. When a

lieve all this, you'll believe anything."

If consent is determined from the police perspective, and the consentor's subjective limits to the search, as artificial and fictional as they are, do not serve to restrain the police, then the consent search becomes virtually limitless. On the "good" hand, a police officer may restrain himself and choose, for example, to search and seize only those persons or objects that initially prompted his request to search. On the other hand, he may not; if the police have nothing particular in mind to seize, the search could continue until weariness sets in. The end result is that police concerns determine exclusively the scope of consent. Even worse, police department policies may contribute to the individual police officer's discretionary freedom in construing the scope of consent. For example, one department advises its officers that in executing a consent search the police may seize "any letters, papers, materials or other property that they may desire."⁵⁵

The realization that scope is not a function of consent, even conceding generously that consent means what it seems, carries its own significance. Beyond this, however, it reveals two related but separate issues of constitutional dimension. First, the scope is too broad to be constitutionally reasonable. The potential breadth dwarfs the excesses of the general warrants of England and the writs of assistance of the Colonies. At least both warrants and writs were issued by authorities other than those who executed them and were limited by subject matter—the warrants applied to offensive publications and the writs, to illegal imports. Second, the police exercising uncontrolled discretion determine the scope. Stating this another way, government officials are deciding and executing decisions affecting individual rights of high priority without any standards to guide them.⁵⁶

search pursuant to a warrant is being conducted, current law does allow the police to seize matters not covered in the warrant but in plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), but probable cause must exist concerning that which is seized. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). In the consent search context some police departments on their consent forms—which apparently are sometimes but not always used—do not seem to require probable cause and allow for easy police seizure. For example, the Chicago Police Department form anticipates that the police will "obtain and remove . . . items that may be used in connection with a legitimate law enforcement purpose." Chicago Police Dep't, Consent to Search Form No. 11.483 (Rev. Dec. 1987). The Minneapolis Police Department allows seizure of "any letters, papers, materials or other property that they [the police] may desire." Minneapolis Police Dep't, Consent to Search Form No. 1011 (Rev. May 1978).

55. Minneapolis Police Dep't Consent to Search Form No. 1011 (Rev. May 1978).

56. The problem is overbreadth or vagueness as applied to police standards. An illustration is

Perhaps the answer is to add a page to the recent *Rodriguez* analysis and resolve scope questions by reference to police reasonableness. For example, one could ask, "Was the scope of the police search reasonable in light of the subjective consent given them?" As an alternative, the subjective consent could be severed and the inquiry limited to, "Was the scope reasonable, based on the police perspective of the facts in context?" However defensible reasonableness may be in deciding whether authority existed for a third person's consent, as in *Rodriguez*, its use to decide consent and especially its scope is dubious. Reasonableness as a standard by its nature is loose, subject to ad hoc definition, and in the control of any officer who happens to be on the search scene.

E. Motivation

What is baffling about consent to search is why it is ever given. Why should anyone surrender to the police, perhaps without a whimper, an interest recognized both practically and legally to be of the first order and often resulting in the discovery of evidence that incriminates the consentor?⁵⁷ Reasons can be isolated. An innocent person may want the police to search promptly to dissipate suspicion; a naive consentor may think, erroneously of course, that if he consents the police will believe he has nothing to hide and forego the search. Other reasons exist as well.⁵⁸ But whether a consent is rational normally does not matter. Who cares? The consent, not the reason for it, is what matters. This is true whether consent is subjectively determined or serves merely as a trigger for a finding of police reasonableness.

In at least one type of consent search situation, however, the motive

City of Houston v. Hill, 482 U.S. 451 (1987). The doctrine is most often used in first amendment cases, but may also have application when other rights are in jeopardy. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (freedom of movement in addition to first amendment). In the consent search context, if the scope of a consent search is, as argued in this essay, a vague, standardless notion given meaning by the police in the exercise of their unfettered discretion, then the consentor's fundamental right of privacy of the fourth amendment is at the mercy or whim of the individual police officer. Aside from facial attacks on standardless procedures—the validity of which still divides the Court as seen in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)—attacks on the applications of the consent search conducted by individual police officers are feasible based on the same grounds.

57. Consider, County police stopped a truck that was "not staying in one lane." The driver consented to a search that revealed 2,132 pounds of marijuana worth more than \$2,000,000. *Houston Chron.*, Jan. 10, 1990, § B, at 9, col. 1.

58. The consentor may want to get caught. He may think that by cooperating the police will go easy on him; he may believe that he has hidden any incriminating evidence so well that it is beyond the ability of the police to find it.

for consent may be crucial. Presumably, most analysts would concede that a person who consents when a police officer points a loaded weapon at him does not, in fact or law, consent. The fear, even if accompanied by other motives, vitiates it. In the usual scenario in which the police do not display weapons or use threats, is it, nevertheless, possible that a similar fear, a fear of authority, motivates the consentor to consent? We do not know. Empirical studies are either nonexistent or inconclusive. Stanley Milgram's classic study⁵⁹ on obedience, coupled with related studies, however, is suggestive. Milgram found that people are obedient to "legitimate authority"⁶⁰ to a much greater degree than anyone supposed.⁶¹ As he points out, "relationship overwhelms content."⁶² Translating this conclusion and applying it to the consent search context, as risky as such a transference may be,⁶³ means that police authority confronting the individual may be much more instrumental in shaping the

59. S. MILGRAM, *OBEDIENCE TO AUTHORITY* (1974). Milgram conducted an experiment in which a subject was supposedly to impose a painful shock on an innocent victim at the direction of the experimenter. Specifically, the experiment provided that every time the victim, who was located in another room, made an error in a learning task, the subject would move a switch on a gadget that resembled a generator, which gave the victim a shock. As the number of errors increased, so did the intensity of the shock. As the shock intensity reached high levels some subjects hesitated or refused to comply. When this occurred the experimenter admonished the subject that the experiment must continue. Sixty-five percent of the subjects followed orders all the way to the highest shock: 450 volts. *Id.* at 35, Table 2.

60. *Id.* at 175.

61. Prior to the experiment, psychiatrists and lay persons were quizzed as to what they thought the results would show. Predictions by both groups were way off the mark; they thought that only 1 or 2% would obey to the maximum shock level. *Id.* at 31.

62. *Id.* at 175. Milgram replicated his experiment and several other social scientists did as well. The obedience phenomenon was confirmed. Experiments that were conducted before Milgram's publication are briefly cited in his book. *Id.* at 170-71. In addition, see Shanab & Yahya, *A Behavioral Study of Obedience in Children*, 35 *J. PERSONALITY & SOC. PSYCHOLOGY* 530 (1977).

63. Although the Milgram study is still the "definitive work on obedience viewed as a social psychological process," R. BARON & D. BYRNE, *SOCIAL PSYCHOLOGY* 259 (5th ed. 1987) (a leading college text), his study took place in a laboratory, with a controlled group and narrow situation, and concerned obedience to an "order." Transferring significance raises problems. For example, to what extent is a police request similar to an order? In the Milgram study the order was weak: it was not backed by meaningful sanctions and it was issued quietly and softly as in "please continue." In the consent context the question is not neutral, as when a police officer asks someone on the street for "a light." It is clearly leading. Referring to the residence context, the resident knows that the police have isolated his premises, that they are asking for permission to search because they want to search, that they expect to find something of value, and that they are awaiting an affirmative answer. Further, the resident may feel that a refusal will carry sanctions—even if uncertain ones. He may believe that the police will conduct the search anyway—and with less care—and claim later that consent was given. He may believe, too, that if he does not cooperate the police will arrest him. Even if the arrest is illegal, an arrest with all the trauma and inconvenience that goes with it is still an arrest.

decision to consent than the recognition that consent relinquishes protected rights in place and thing.⁶⁴ Referring to the residence context again, the resident-at-the-door sees not simply "legitimate authority," but legitimate *police* authority and often in the form of multiple officials.⁶⁵ In addition, the visible trappings of office are significant—uniform, badge, and holstered handgun.⁶⁶ Two related facts are also relevant: the encounter is face-to-face⁶⁷ and unexpected.⁶⁸ Consider the difference if the police were to request consent by phone or give advance notice that they were on the way and would seek consent when they arrived. Finally, aside from law students⁶⁹ and professional criminals, Americans are not educated to say no to the police. Although these variables, even when packaged together, do not provide a definitive answer, they do hint at an obvious one.

64. Milgram explains his conclusion that "relationship overwhelms content" by saying, "... [a] person responds not so much to the content of what is required but on the basis of his relationship to the person who requires it." S. MILGRAM, *supra* note 59, at 175. The relationship between consenter and police is, of course, complex and depends on the specific persons, but abstractly that relationship viewed from the consenter's perspective may be a mixture of respect for governmental authority, generally, and fear of the police, specifically.

65. Judging from appellate case reports, often when consent is sought, two or more police officers are present. Whether this fact makes consent easier to obtain is not known.

66. Bickman, *The Social Power of a Uniform*, 4 J. APPL. SOC. PSYCHOLOGY 47 (1974); Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPL. SOC. PSYCHOLOGY 501 (1984).

67. The Court has recognized the dangers of face-to-face solicitations between lawyer and client of unequal status in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454 (1978).

68. Interestingly, a reverse non-surprise technique might also be effective in gaining consent to search. For example, a police officer may ask permission to enter a residence just to talk. After he is inside and after some friendly conversation he may then ask for consent to search. The consent may be granted readily, consistent with the philosophy of door-to-door salesmanship, which is that gaining entrance to the residence is the real sales task and not the selling of the product. The foot-in-the-door technique serves to break down initial resistance. See Freedman & Fraser, *Compliance Without Pressure: The Foot-In-The-Door Technique*, 4 J. PERSONALITY AND SOC. PSYCHOLOGY 195 (1966). Although only consent to search is the focus of this essay, the above example also uses consent to gain entrance. Another consent that has appeared in cases is the police use of consent in lieu of arrest to get suspects to the police station for questioning. These consents, of course, raise problems similar to the ones in consent search; whether they are identical is another issue.

69. Even law students, after studying the methods of the police in the Criminal Procedure course, are not eager to rush out to demonstrate their knowledge of the law to the police. They verbalize, at least, a fear of confronting or challenging the police. If they must say "no," they realize the importance of being courteous and having witnesses and, better, electronic devices to record the conversation. There may be an irony at work here. The more one knows the police, at least to a degree, the more readily he may consent to a request to search.

F. *Need and Use*

Notwithstanding the Supreme Court's observation that a "legitimate need for such searches" exists,⁷⁰ the case for need has not been made. Arguments in support of the need for the detection practices of interrogation⁷¹ and "encouragement"⁷² have presumably been instrumental in keeping those practices alive in the face of severe criticism; but no comparable arguments have surfaced to support consent searches.⁷³ Judging from the numerous appellate cases upholding consent searches, their use generally is quite frequent. Anecdotal evidence and a brief survey of several police departments suggest that the consent search tactic is used innovatively, extensively, occasionally, or perhaps not at all. For example, the New Jersey State police developed a drug detection plan whereby they would stop cars for moving violations on a stretch of highway used by out-of-state motorists heading for New York City and then try to obtain consent to search the vehicles for drugs. It worked. Even the police were surprised at how often and readily motorists gave consent.⁷⁴ Extensive use of consent is suggested by the California Attorney General's office advice to California peace officers: "ALWAYS ASK FOR CONSENT TO SEARCH EVEN WHEN YOU HAVE OTHER AUTHORITY FOR THE SEARCH. It can never hurt, and it may help a great deal . . ." ⁷⁵ In Philadelphia, on the other hand, department instructions prohibit the practice when alternatives are available;⁷⁶ in Pitts-

70. *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

71. Police and other enforcement oriented spokesmen naturally articulate this position. See Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16 (1961).

72. See Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874-79 (1963).

73. Although the consent search has a significant present, it has, unlike other searches and other detection practices such as interrogation, no past. Thus, the argument, not a strong one, is not available that the practice has been in the police arsenal for centuries and should remain there.

74. Peterson, *Drug Couriers Easy Targets on U.S. 40*, N.Y. Times, May 8, 1987, at B 1, col. 2. Another illustration is described by a court: "[O]ne officer . . . admitted that during the previous nine months, he, himself, had searched *in excess* of three thousand bags It certainly shocks the Court's conscience that the American public would be 'asked', at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions. This Court would ill-expect *any* citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. And these officers know that . . ." *Florida v. Kerwick*, 512 So. 2d 347, 349 (Fla. Dist. Ct. App. 1987).

75. CALIFORNIA ATTORNEY GENERAL, CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK 3.25 (Rev. May 1987).

76. Philadelphia Police Dep't, Consent to Search Form Procedure, Directive 7, App. A at 1 (1983).

burgh, no police directives exist concerning the consent search.⁷⁷

II. THE CHANGES

Changes to the current consent search approach are easy to identify. One is to retain the search in the police detection arsenal but upgrade its quality. Because initiation of the practice is with the police, upgrading could start there. Controls are clearly needed. The discretion of the field officer who makes the decision to ask for consent should be cabined and structured. For example, a "consent to search warrant" could be required. A police officer who knows in advance that he lacks the traditional legal authorization for a specific search could request a warrant from higher authority—be it a court or the police department itself. In other words, the officer could use either a judicial or an administrative warrant. The warrant would have its usual advantages: It would elevate, centralize, and neutralize the decision concerning when consent could be sought; and it could contain a set of rules governing the police officer's decisions on matters not to be decided solely by an individual's consent—e.g., the time of the warrant's execution, the scope of the search, and the standard for seizure. The warrant also speaks to the individual; it could provide information on the authorization for the request to search, the identity of the officer, the purpose of the search, its limits, and the objects to be seized. The warrant could also explain fourth amendment rights as they relate to the police request.

In instances when the police officer does not anticipate a search will be made and thus a warrant system—whether involving traditional probable cause or consent—will not work, controls are still possible. The department could develop policies that identify situations in which a request for consent is and is not clearly acceptable. In between, police discretion would govern; even here, however, department policies could be formulated to guide ad hoc decisions. Limitations also could be imposed on the methods of obtaining consent and on the execution of both search and seizure.

From the individual's perspective, the basic notion that consent is the operative fact in validating a police search should be rethought. If actual permission is important, then consent by a person who is incompetent, ignorant, or intimidated is insufficient. When consent is valid, it should

77. Pittsburgh Police Dep't, Telephone Communication (Feb. 1988).

only be allowed as a response to a specific and narrow request concerning both search and seizure.

By way of illustration, the following ideas suggest what the content of specific controls might include. 1) A minimum standard should be met, whether with or without a warrant, before consent may be sought—the standard could be a blend of need and level of belief, e.g., “reasonable need and suspicion.” 2) The context of consent should be limited, e.g., to residences. Automobiles are deserving of greater protection from police searches than they currently receive, and containers because of their variety in type and context should not be considered a single category. 3) Consent to search should not be extended to include consent to seize; probable cause should be required. 4) Third party consent given in response to a police officer’s request to search the privacy interests of another should not be valid. 5) Consent should be in writing—either a warrant or consent form would suffice.

If upgrading the consent search by modifying police practices or individual consent or both proves unsatisfactory, then the obvious alternative is to abolish the consent search altogether. If this were done, out of its ashes could evolve a modest substitute that would at least satisfy those persons who want the police to search immediately in order to quash suspicions before they become subject to community rumor, or who want to avoid inconvenient delay and uncertainty while waiting for a later properly authorized search. The idea comes from Justice Harlan’s analysis in *Chambers v. Maroney*.⁷⁸ In arguing against the constitutionality of police searching an automobile on the street or later at the police station without a warrant, he contended that the proper approach is for the police to take the car to the station and obtain a warrant. He then pointed out that any person who found such a practice inconvenient could “consent” to a police search of the car immediately on the street.⁷⁹ Justice Harlan’s suggestion makes it feasible to alter the perspective: a “request” to search from the individual to the police could be honored. Like all distinctions, the difference between consent and request blurs at the margin. Furthermore, the difficulty of determining the scope of the request would remain. The operative fact, however, is important and perhaps workable. A request is initiated by the individual and not the police.

78. 399 U.S. 42 (1970).

79. *Id.* at 64 (Harlan, J., concurring in part, dissenting in part).

III. CONCLUSION

Perhaps the consent search has not received the attention it deserves because it has such a surface simplicity. This essay has argued that consent is a mere mask hiding several complex problems. Both law and psychology point to the same conclusion—consent in reality is consentless. Acknowledging this fact, this essay has suggested that police practices leading to the consent search be subject to controls, standards, and limitations so that when combined with individual “consent,” the result will be a search that is constitutionally reasonable. If this is not possible, or if after the improvements the blush of embarrassment still shows whenever we speak of the consent search as reasonable, then it should be abolished. Even the argument of “need” cannot sustain it. As a gesture to the past, the request search, consent’s cousin so to speak, could take the place of consent in the search arsenal, at least until such time as the requester loses control over the practice.

