

Blaming the Victim: ‘Consent’ Within the Fourth Amendment and Rape Law

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- “[A] man can also force a nonconsenting woman to engage in sex without resort to actual violence. Power will do.” (Susan Estrich, criticizing limits of consent doctrine within the law of rape) [FN2]
- “A police officer who is certain to get his way has no need to shout.” (Justice Souter, criticizing the majority's reinterpretation of the consent exception to the Fourth Amendment) [FN3]

Introduction: The Film Crash Illustrates the Intersection Between Fourth Amendment Intrusions and Rape

Consent is a concept of particular concern both to rape law and to search and seizure. Both areas of law explicitly use the word consent. In most jurisdictions, if an adult voluntarily consents to sexual conduct, then there is no rape. For Fourth Amendment rules on search and seizure, consent constitutes an exception to the warrant and probable cause requirements. [FN4] Ordinarily, the Fourth Amendment forbids police from invading personal privacy without a reason to believe that the individual had committed, was committing, or was about to commit a criminal offense. [FN5] However, if a person voluntarily consents to be stopped or searched, the police need neither a warrant nor a legitimate basis for the intrusion. [FN6] The consent doctrine “amounts to a citizen's surrender of an expectation of privacy.” [FN7] The consent exception rests on the theory that “people should be free to forego certain constitutional protections.” [FN8]

Scholars have condemned the Fourth Amendment consent doctrine for over a decade to little or no effect. [FN9] In this Article, I argue that we should learn from the feminist scholarship on the meaning of nonconsent within rape in order to truly recognize the deficiencies in search and seizure doctrine. While victims of date-rape continue to face obstacles in prosecuting their aggressors, and rape prosecutions are often difficult when coercion is subtle, feminist scholarship has netted improvements. Thanks to feminist criticism, in theory at least, the law protects autonomy and choices within the sexual sphere. Borrowing from rape law and from feminist theory about rape sheds light on how law can corrupt the concept of consent by ignoring how subtle forms of coercive behavior can overcome a victim's resistance and by treating a victim's acquiescence to power as if the victim desires the intrusion. [FN10]

The film *Crash* [FN11] illustrates the interconnection between sexual and nonsexual autonomy within the context of police power. *Crash*, a film that won the Oscar for Best Picture in 2005, brings strangers “crashing” together in Los Angeles through a series of seemingly disconnected scenes, including one where a racist white police officer conducts a traffic stop and then decides to humiliate the driver and passenger. [FN12] Terrence Howard plays the driver, a black man coming home at night with his lighter-skinned wife, played by Thandie Newton. The couple appear well-off, drive a nice S.U.V. and are wearing cocktail attire. The scene is filled with the

usual tension we expect when police exercise their power to investigate crime, but the tension escalates quickly when the passenger is not sufficiently submissive. During the traffic stop, the primary officer, played by Matt Dillon, orders the driver out of the car. After another officer conducts a pat-down of the driver and finds no weapons, the primary officer orders the passenger out of the vehicle and has her stand next to the car for a pat-down.

The aggressive white officer then begins to touch the passenger, as she stands with her hands on the hood of the van dressed in a shimmering dress and heels, in a pat-down that travels down her leg and then moves up under her dress. Viewers understand that the officer uses his hand to penetrate her. This scene brings together the law of rape with the law of search and seizure. Long before the humiliation could be classified as a sexual assault, the officer's actions should also be understood as nonconsensual in the Fourth Amendment sense. It is both a nonconsensual search and a rape. [FN13] This disturbing scene illustrates the problem in divorcing the concept of consent within search and seizure from the concept of consent within rape law, for in both instances the focus should be on the alleged victim and what she wants or does not want done to her.

Newton's character in *Crash* is not subtle in rejecting the officer's advances. Inebriated and angry, she tells the officer to get his hands off of her even when he starts to take her out of the car. In fact, it is the passenger's resistance that arguably causes the officer to treat her as badly as he does. Her refusal to submit combines with the officer's desire to dominate to create an ugly powerplay. Finally, she submits, standing there quietly while the officer finishes his search and continues to touch her in a way that becomes explicitly sexual, although the sexual dynamic existed throughout the entire stop and frisk.

In contrast to Newton's portrayal of the resistant, inebriated passenger, the husband is extremely submissive. He says nothing while the officer violates his wife, even though the officer looks at the husband in a way that suggests that the husband possesses the power to withhold consent. Viewers understand that the husband's silent acquiescence is not because the husband wishes the officer to continue. Even though the officer pretends to give him the power to stop the abuse, in fact, the husband is humiliated by his actual powerlessness, and the officer intends this humiliation. [FN14] When the officer asks for an apology, the husband apologizes and begs the officer politely to allow them to leave.

The racial aspect of the stop, search and assault in *Crash* are obvious in a way that is hardly typical of the nuances and unconscious nature of most contemporary police profiling. [FN15] The officer played by Dillon is portrayed as an outspoken racist who is motivated by sexual domination when he realizes a white or light-skinned black female passenger just performed oral sex on a dark-skinned African-American male driver. [FN16] He wants to teach both the passenger and her husband that he, a white cop, has the power. [FN17] Although there is a second white officer at the scene, he appears ambivalent and less intimidating than the racist officer. Later in the film, the racist police officer demonstrates his bravery, redeeming himself to some viewers as a good cop despite his subjugation of the husband and wife in the scene described.

Police have a great deal of discretion within traffic stops. [FN18] In *Crash*, police witnessed the couple commit the crime of reckless endangerment. Prosecutors and defense attorneys will

recognize that this criminal act provided the officer with the necessary justification to stop the car and detain the passengers. [FN19] Since the officer had probable cause to believe they were committing a crime, even if it was only a minor offense, he had the right to arrest the occupants if he chose. Had the officer chosen to arrest the couple, he would be permitted to search their bodies incident to arrest, although a female officer or warden is generally mandated for the task of searching females. [FN20] In some jurisdictions, strip searches are performed before the suspects are placed in a cell. [FN21] Rather than arresting the couple, the officer used his discretion to allow the couple to leave without any citation at all, once he secured their cooperation and complete subjugation. A court determining whether there was coercion by police might consider that these officers had probable cause to arrest but exercised their discretion in favor of the suspects. A court determining whether these officers overstepped the bounds of the Fourth Amendment might not consider the officer's racist purpose because the Supreme Court has shielded police from such inquiries during suppression hearings. [FN22] If officers have probable cause to stop and arrest, it is irrelevant to the Fourth Amendment whether the officer exercised his power based on racist or sexist motivations. In determining whether a person was coerced to consent, the cases ignore the power of the police to arrest, acknowledging the coercive nature of this power only when the officer articulates a threat of arrest during a request for search consent. The police officer in *Crash* never explicitly threatens the couple with arrest, although the officer informs them at one point that he witnessed them commit the crime of reckless endangerment. In *Crash*, the threat is more amorphous than a specific threat of arrest or physical retaliation but equally ominous. "They had guns," explains the husband later, as he unsuccessfully tries to justify to his wife why he stayed silent and tacitly permitted the officer to continue raping her. The guns were holstered and the threat is vague, as it is in most encounters with the police. At no point do the officers pull out their guns or use excessive force. [FN23] As the cases discussed in this article will illustrate, a holstered gun is not considered coercive. [FN24] The fact that officers did not draw their guns or specifically threaten arrest or retaliation would be salient evidence that the husband and wife were free to decide how much police intrusion they wanted. [FN25]

For those who might protest that sexual assault is a grave invasion of privacy and are insulted at the comparison of a mere pat-down with rape, the *Crash* scene reminds viewers that the exertion of sexual or racial dominance comes in many forms and is hardly confined to the sexual act. [FN26] Just as the passenger in *Crash* did not want to be touched in a sexual manner by the police officer, she also did not want to be touched for a search. However, because of the way the law defines consent in the context of search and seizure law as opposed to rape law, courts could come up with different results regarding the passenger's consent to be searched versus her consent to be touched sexually. The film raises questions about the sense of analyzing consent differently for sexual versus nonsexual touching. In the context of the film, there was one continuous encounter so viewers may graphically see that it makes little sense to erect physical boundaries on the body marking where an individual's autonomy begins and ends. There was a pejorative, leering aspect to the whole frisk in *Crash* overlaid with racial meaning. The search's intrusiveness did not suddenly begin at the time the officer's hand went up her skirt.

This article does not suggest that police officers typically behave like sexually aggressive men or like the racist officer in *Crash*. Instead, the *Crash* analogy helps readers to appreciate the intrusiveness and fear sometimes generated by ordinary police encounters, whether they be

traffic stops or seizures motivated by a quest for drugs. Overall, this scene in *Crash* provides a perfect intersection of Fourth Amendment and sexual assault law. In particular, the film illustrates how questions of consent versus submission to authority might occur in both contexts. In one context, police exert power over individuals to get them to submit to a stop and search. In the second context, police exert power to obtain submission to sexual advances. Ultimately, the *Crash* scene serves to help readers reevaluate coercion in situations where police officers employ the usual force permissible in obtaining cooperation from suspects who, although they subjectively wish to withhold consent, can only guess at the ramifications of resistance or refusal.

One well-known example of an intrusive “consensual” strip-search took place in a Drug Enforcement Agency office in an airport. Sylvia Mendenhall was 22 years old [FN27] at the time that she was approached in an airport by experienced and highly skilled DEA agents, [FN28] escorted to an office, where she waited for a female officer to bring her to a private office to conduct a strip-search. [FN29] Mendenhall then removed her own clothing, including “undergarments.” [FN30] In ruling that Mendenhall’s decision to accompany the officers to the room and take off her clothes was consensual, the Supreme Court either failed to grasp what the event would have felt like to this young woman or, more likely, the Court defined consent in a counter-intuitive manner. The Court considered but rejected the notion that the respondent “may have felt unusually threatened by the officers” because she “was 22 years old, had not . . . graduated from high school, and was a Negro accosted by white officers.” [FN31] Instead, the Court focused on her submissive behavior, the fact that once in the DEA office, she “had twice unequivocally indicated her consent to the search,” and after unsuccessfully protesting that she had a plane to catch, “when assured by the police officer that there would be no problem if nothing were turned up by the search, she began to undress.” [FN32] While the police in Mendenhall appear to have efficiently performed the job for which they were hired--intercepting drugs-- the case illustrates how the current consent doctrine implicates privacy and autonomy.

Even a “Terry” frisk, which the Court describes as less intrusive than a search, merely a pat-down for weapons, may include a male officer feeling a male civilian’s “groin and area about the testicles.” [FN33] Hence, even where officers are motivated by the laudable desire to gather evidence and prosecute crime, the individual who is stopped and searched may still feel powerless, physically invaded by the unwanted attention, and fearful of further loss of liberty or violence.

It is difficult to overstate the importance of the consent doctrine in regulating the balance of power between police and citizens. The overwhelming majority of searches do not involve warrants. [FN34] By some estimates, over 90% of warrantless searches are based upon the consent exception. [FN35] As a practical matter, the consent doctrine has supplanted the written Fourth Amendment for police encounters outside the home. Because consent bypasses the usual Fourth Amendment rules that require sufficient reasons for police to exercise power over civilians, the consent doctrine does an end run around the Constitution’s careful balancing of individual autonomy against state power.

It may seem odd to readers to compare the autonomy rights of an “innocent” woman to a “guilty” suspect. Yet this is precisely the point. Until women who claimed they were coerced

into unwanted sex were accepted as deserving of legal protections, the law failed to reflect the actual experiences of victims of date-rape. Feminist scholarship has been instrumental in starting to change this. There is no similar body of scholarship designed to humanize the victims of nonconsensual search and seizures, with the exception of some recent scholarship on race and criminal justice. [FN36] The public tends to view the victims of police searches as unworthy of the “victim” label because they were caught with drugs or other contraband. This article aims to do for victims of searches what feminists have done for victims of unwanted sexual touching. Certainly there are differences between rape and police searches, many too obvious to mention, but these differences do not require the law to treat like elements as unlike. By borrowing from rape law, readers must grapple with the antipathy they might normally accord to victims of Fourth Amendment violations and consider how this response skews logic and fairness.

This article seeks a return to an earlier understanding of Fourth Amendment protections, when most searches were based on probable cause to believe that there was evidence of a crime. [FN37] The law should acknowledge the type and scope of violation caused by police intrusions, and thereby rediscover autonomy as a guiding principle in determining whether a person has consented to an invasion of his or her privacy.

The following section, Section I, lays out consent as an important element within rape law. I show that feminism has had some success in defining nonconsent in modern law as “against the will” of the person allegedly subjected to unwanted sexual intercourse, a subjective inquiry.

Section II turns to consent within search and seizure. Part A lays out the developments in consent searches from the 1973 seminal case of *Schneekloth v. Bustamonte* [FN38] to the 2002 case of *United States v. Drayton*. [FN39] This part explores what the Court means by voluntary consent and coercion. Part B focuses on the Supreme Court's creation of the reasonable innocent person standard to determine whether there was consent. This test is cynical in that, by design, it excludes the perceptions of the individual suspects who claim violations of their rights.

Section III examines the scholarly work on consent searches, including the work of Tracey Maclin, Janice Nadler, Margaret Raymond, and Ric Simmons, and on police conduct generally, including Devon Carbado and Frank Rudy Cooper. These scholars establish that people usually submit to police, not because they wish to be searched, but for a variety of other reasons, such as ignorance of their rights and fear of the consequences of failing to submit. Part B considers how the arrest of Professor Gates sheds light on consensual searches. Part C argues that requiring police to obtain waivers will not cure the coercive nature of consensual searches and seizures.

Section IV claims that the current state of law is Orwellian and the rape analogy is needed to prevent the word “consent” from being intentionally twisted in order to enhance governmental power.

Section V illustrates the parallels that exist in current rape doctrine. I consider the writings of three influential feminist theorists: Catharine MacKinnon, Susan Estrich and Anne Coughlin. Much of their critique of rape law translates into the realm of search and seizure. They point out that the law is problematic because it: (1) focuses on the force used by the aggressor and fails to focus on the victim's point of view; (2) imagines real rape as something distinct from the more typical way that women are coerced into sexual intimacy; (3) forgets about the subordination of

women to men in society when the law constructs the meaning of consent; and (4) views victims of consensual sex as guilty, thus shaping the definitions and requirements of rape. In this section, I illustrate the parallels that exist to current consensual search doctrine.

Section VI considers the results of importing feminist theory into the Fourth Amendment. In Part A, I adopt a victim perspective that centers on subjects of unlawful searches. In Part B, I argue that autonomy is the Fourth Amendment's primary goal and that it should also be the primary goal behind interpreting consensual searches. This is similar to how rape was redefined as a mechanism for protecting the privacy rights of women.

I. Overview of the Law of Consent within Rape Law

Feminism has much to say about distinguishing coercion from consent in the context of rape law. In this section, I simply provide a thumbnail sketch of how the element of consent interacts with the other elements within rape law to give the reader a basis to make comparisons to rape law as the article turns to the case law on consensual searches in the following section. Then, in Section V, I lay out the work of three respected feminist scholars. That section explores their insights and discusses their relevance to the consensual search doctrine.

Many of the terms in Fourth Amendment consent jurisprudence are the same as in rape law, especially the phrases “voluntary consent” and “coerced submission.” Nonconsent is part of a set of interrelated elements for rape law that traditionally require a prosecutor to prove that the sexual contact was without consent, against the will of the complainant, and accomplished with force or threat of force. [FN40] In many cases defendants claim that there was sexual activity but it was consensual. Whether or not consent is raised by the defense, the burden remains on the government to prove beyond a reasonable doubt that the alleged victim did not consent to the sexual contact.

Feminists argued that rape law's purpose should be protection of female autonomy and self-determination. [FN41] Common law rape, they argued, protected men's interest in women as property and also guarded rules of chastity. [FN42] By disregarding the power imbalance between aggressors and their victims and disregarding subtle forms of threatening behavior, the law allowed men to use coercive means to obtain unwanted sex.

Two common law doctrines interfered with the subjective definition of consent. First, courts interpreted the element of force to require that the man overpower the woman or threaten her with death or physical injury. If a woman submitted to subtle forms of coercion, the law would view her submission as consent. Second, common law courts required rape victims to resist unwelcome advances “to the utmost.” [FN43] Even before the advent of feminist rape scholarship, common law resistance had mutated into a requirement that the victims resist to some degree. [FN44] Still, judges who decided that the victim submitted too readily would rule that the sex was consensual. Both doctrines contradicted the notion that women should choose when to have sexual relations and should choose their partners.

According to feminist critiques, traditional force and resistance requirements created a paradox where a woman could have intercourse against her will, but in the eyes of the law, she was not raped. Many feminist scholars sought to eradicate the force and resistance requirements altogether, some arguing that they reflected antiquated notions of patriarchal dominance and others offering social science statistics to prove that victims who resisted were more likely to be hurt. [FN45] Recognizing that force is an element of rape, scholars sought a reduced requirement that mimicked typical modern robbery statutes where any force against a person turns larceny into robbery. [FN46] Similarly, feminists sought to expand what constituted coercion beyond articulated threats of physical bodily injury.

Feminist scholarship has netted some successes. Nonconsent, the opposite of consent, is often defined within rape law as “against the will of the victim.” [FN47] In Florida, juries are now given the following definition of consent: “Consent means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.” [FN48] This instruction consciously jettisons vestiges of the time when victims had to physically resist their attackers. The instruction also articulates that submission to coercion is not consent, although it does not define coercion. [FN49] Essentially, the jury is asked to determine the alleged victim's subjective state of mind, although the jury is expected to make this determination based on some manifestation of nonconsent, such as a verbal “no,” unless the jury finds that the victim submitted due to coercion. As for the requirement of force, some states now inform jurors that the government need not prove any force beyond that necessary to accomplish the sexual act itself. [FN50]

One case that typifies the modern trend is *Rusk v. State*, [FN51] in which a jury convicted a man of rape and the highest court in Maryland affirmed the conviction. *Rusk* was a date rape situation where the woman engaged in sexual intercourse without any explicit threat of bodily harm. After the woman drove her date home, he took her keys as he invited her upstairs. She testified that she followed *Rusk* upstairs to his room and later undressed because she was afraid of the look in his eyes and of what he might do if she resisted. [FN52] The intermediate appeals court, following precedent, reversed the conviction because the victim did not resist, and therefore there could be no force exerted to overcome her resistance. [FN53] Nor could the intermediate court find the alternative means of proof, namely, “a reasonable fear that if she resisted, he would have harmed her.” This case illustrates how traditional rape law obliterated the victim's subjective wishes by giving precedence to objective questions such as whether her fear was reasonable. Instead of crediting the victim's perspective, the court turned the question of consent into a normative question about the quantity and quality of force used by the aggressor. In reinstating *Rusk*'s rape conviction and holding that resistance is no longer an element of the crime, Maryland's highest court wrote that “the terms ‘against the will’ and ‘without the consent’ are synonymous in the law of rape.” Although the opinion was written in 1979, the high court decision proved that feminist scholarship started to change the law quite early in some jurisdictions. [FN54]

The long-standing effort to transform the law of rape has yielded mixed results, but feminists can claim success in redefining the purpose behind contemporary rape law. Most jurisdictions now recognize individual autonomy as the purpose of prohibiting sexual assault. [FN55] This shift in purpose was one of the primary accomplishments of the rape critique. Once courts made this shift in perspective, rape doctrine could be analyzed against this goal. Connected to this

endeavor, most feminist scholars, including Susan Estrich and Catharine MacKinnon, strived to construct consent as a subjective inquiry. Under this view, sex that is unwanted is nonconsensual, and nonconsensual sex is rape. [FN56] Although there is still much to accomplish, the insights of feminist scholars changed the law in many jurisdictions to make it easier to prove nonconsent for rape and other forms of sexual assault. [FN57] While sexual assault prosecutions continue to face barriers in many instances where consent is raised as a defense, these barriers are not predicated on a lack of feminist understanding of power nor a lack of theoretical comprehension.

It is time to inject this scholarship into the debate over the meaning of consent in the context of the Fourth Amendment rules of search and seizure. While rape law has benefited from feminist scholarship, consensual search law continues to operate in a system that is arguably less protective of individual choice than traditional rape law ever was. Bringing together the law on consensual sex and consensual search should make both more responsive to less obvious forms of threats and control. A robust definition of consent would protect autonomy in both contexts.

II. Consent within Search and Seizure Law

A. Definitions of “Consent,” “Voluntariness,” and “Coercion” in Consensual Search Cases

The Supreme Court found--or created--a consent exception to the Fourth Amendment in a 1973 case called *Schneckloth v. Bustamonte*. [FN58] There the Court made voluntariness the touchstone of the consent exception, allowing searches where the government proves that the consent was “not the result of duress or coercion, express or implied” based on all the circumstances. [FN59]

On the surface, looking at the choice of language, the criteria for consensual searches mirrors rape law. Both search and seizure and rape law use the word “voluntary” to describe consent. [FN60] Both *Schneckloth* and rape law view the totality of the circumstances in determining whether there was consent. More importantly, in both consent-to-search and consent-for-sex, consent “does not include coerced submission.” [FN61] In *Bumper v. North Carolina*, [FN62] a case that predates *Schneckloth*, the Supreme Court stated that the government cannot prove “that the consent was, in fact, freely and voluntarily given . . . by showing no more than acquiescence to a claim of lawful authority.” [FN63] As *Schneckloth* did not repudiate *Bumper*, one can read the concept of coercion to include the notion that acquiescence to a claim of lawful authority would constitute coercion. Hence, from the language used by the Court it would appear that *Schneckloth*'s concept of nonconsent was similar to that encountered in rape law. [FN64] Yet, search law has not looked to rape law in giving meaning to the terms nonconsent, voluntary consent, coercion, or acquiescence. Within the Fourth Amendment consent exception, the words are not given the meaning they are within contemporary rape statutes.

For several reasons, one might expect that it would be easier to prove nonconsent within search law than in rape law. For one, someone accused of rape faces the stigma of conviction and imprisonment. In contrast, if a court decides that a search was accomplished without consent and

violated the Fourth Amendment, the evidence is simply excluded from the trial of the victim of the illegal search. Police are not subject to sanction based on a motion to suppress. Although individuals may bring civil suits, they are rare relative to the number of suppression motions and are not the focus of this article. [FN65]

Another reason one might expect that it would be easier to prove nonconsent within search law is that the burden of proof is lighter in consent searches. In rape, the law assumes consent. The jury must decide if the testimony proves the contrary beyond a reasonable doubt, a high standard. In contrast, the recipient of an illegal warrantless search has no burden of proof, at least in theory. Trial judges are supposed to assume at the start of the hearing that there was no consent. This is in addition to the fact that, unlike rape, Fourth Amendment consent law has no force or resistance elements.

Nevertheless, rape law, for all its continued problems, arguably provides better protection against unwanted intrusion than consent-to-search doctrine. *Schneckloth* involved a traffic stop where the police asked everyone in the car for identification, asked everyone to step out of and away from car, and then received “consent” to search the car. [FN66] The Court accepted the finding of the trial judge that there was voluntary consent, pointing out that “no one was threatened with arrest” before the search and that, according to the officer, “it ‘was all very congenial at this time.’” [FN67] By noting that no one was explicitly threatened with arrest, the Court suggested that a threat of arrest could constitute coercion, the opposite of consent. But by refusing to recognize that the threat of arrest exists where a police officer is congenial, the Court overlooks power differentials between the players. For example, in the film *Crash*, the police officer becomes very polite once the resistance ceases and he can quietly rape the passenger.

One way to interpret *Schneckloth*'s focus on congeniality is that it creates a de facto force requirement. If officers fail to use actual force or threat of force to prove nonconsent, consent will be presumed from mere cooperation. Importing *Schneckloth* into a sexual assault context, how would a judge analyze a situation where a man admits he detained a woman for twenty minutes against her will, but testified that it was all congenial when he asked her for sex? While a common law judge might rule that the man must be acquitted because the force requirement was not met, one would hope that a modern judge would rule in favor of the victim.

The significance of congeniality becoming the standard for whether there was voluntary consent can be gleaned from discussions of rape law. Traditionally, “real rape” imagined a man hitting a woman over the head to gain sex even though most rapes are much more subtle. Feminists criticized rape law because it only recognized obvious forms of force, such as physical violence or use of a weapon, and ignored subtle forms of coercion. [FN68] Like traditional rape law, the consent-search doctrine imagines “real nonconsent” as a police officer with a gun pointed at someone's head. Although the officers in *Schneckloth* indisputably used force in the constitutional sense when they stopped the car and detained the passengers, this force was insufficient to overcome the officer's testimony that he obtained consent in a congenial manner. In this way, the Supreme Court has grafted a physical force requirement onto consent searches reminiscent of early rape law. *Schneckloth*'s reasoning is also reminiscent of rape's common law resistance prong. Finding no coercion because the atmosphere was “congenial” is like finding that there was no coercion because a woman, stopped by an armed individual and detained for a

while, did not fight against her abuser. If a victim of a police stop argues or resists in any way, the atmosphere will not be congenial. It is complete capitulation to authority that produces the congenial effect.

The explicit holding in *Schneckloth* is that officers have no obligation to inform a civilian that she has a right to withhold consent, declining to treat waiver of Fourth Amendment rights as analogous to waiving trial rights. [FN69] A person's subjective knowledge of whether she could say no to an officer's request was germane but not determinate. [FN70] Even though the Court is disinclined to use the word "waiver," [FN71] people who agree to police searches are still waiving their constitutional rights. [FN72] *Schneckloth* simply created a category of waivers for which people need not know they have a right to refuse. After all, when the motorist in *Schneckloth* agreed to the search, he relinquished, that is "waived," his Fourth Amendment right to be free from the intrusion, even if he did not know he was doing so. [FN73]

Schneckloth is at war with itself. The language of *Schneckloth* suggests that courts should give full credence to an individual's subjective experience at the time that cooperation was sought. Even the word "consent" implies that civilians have a right to be free from illegal intrusions absent a desire to welcome the intrusion. Reading the words, one would expect that consent is a subjective inquiry, that an implied threat of arrest could constitute coercion, and that civilians would not be expected to prove resistance as a predicate to establishing lack of consent. But applying these phrases is a different matter. On the surface, the case defined consent-to-search in line with consent doctrine in rape law, holding that consent must not be "the result of duress or coercion, express or implied" based on all the circumstances. As in rape law, consent must be voluntary and voluntariness is defined as being free from coercion. However, the way the Court analyzed the facts in order to uphold the consent search is reminiscent of traditional rape cases where courts used to find consent as a matter of law because the force was insufficient to overcome the will of the victim. [FN74] The *Schneckloth* Court's reasoning disregards the unequal relationship between officer and civilian in determining whether there was consent.

In its defense, the *Schneckloth* case was decided in 1973, when the second wave of feminism had just begun to demand justice in rape cases, but before women entered law school in greater numbers and created change in rape law. As feminism brought about a change in the concept of consent in rape law to make it more understanding of the person without power, the change in consent doctrine under the Fourth Amendment went in the opposite direction. While sexual assault law began to credit the subjective understanding of the person claiming she did not consent, Fourth Amendment law began eliminating the subjective inquiry almost entirely.

B. The Reasonable Innocent Person Test

In 2002, the Supreme Court issued a decision that served to divorce the consensual search exception from the question of whether the intrusion was against the will of the person searched. In *United States v. Drayton*, [FN75] police officers boarded a bus for drug interdiction, searched everyone's luggage, and frisked the two defendants who later sought to suppress the evidence found on them. The Court upheld the pat-frisks based on the defendants' supposed consent, although, as this section makes clear, the individuals in question clearly had no wish to be patted down or searched. [FN76]

The two defendants in Drayton were traveling on an interstate bus with a large quantity of drugs taped to their thighs. [FN77] The men had gone to some lengths to intentionally conceal their illegal goods; it is difficult to imagine any set of circumstances where the men would wish to have police pat them down or search their person. [FN78] Three officers boarded the bus at a stop, and two of them “went to the rear” of the bus “from which they worked their way forward, with one of them speaking to passengers, the other backing him up.” [FN79] The police officer began his “consensual” encounter with the defendants as follows: “I’m Investigator Lang with the Tallahassee Police Department. We’re conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?” [FN80] After obtaining “consent” to search the bag that defendants pointed out, the officer then received “consent” for police to check his person. According to the officer’s testimony, when the officer asked defendant Brown, “Do you mind if I check your person?” the drug smuggler replied “Sure,” and then showed his supposed willingness to be searched by “leaning up” and “opening up his jacket.” After Brown was searched and arrested, defendant Drayton supposedly indicated his consent to undergo the same fate. When the officer asked Drayton, “Mind if I check you?” Drayton responded by lifting his hands about eight inches from his legs enabling the police to pat him down, find the drugs, and arrest him also. Feminists would say this was submission, not consent.

The reasoning in Drayton revisits Schneckloth’s emphasis on the “congenial” atmosphere. The Court upheld the trial judge’s factual determination that the two men voluntarily consented, reasoning in part that since the officers “did not address anyone in a menacing tone of voice,” [FN81] and there was “no threat, no command, not even an authoritative tone of voice,” there was ample reason to conclude that “there was nothing coercive . . . about the encounter.” [FN82] As the dissent in Drayton succinctly stated, a “police officer who is certain to get his way has no need to shout.” [FN83]

While Estrich used the expression “real rape” to describe the paradigm of a stranger with a weapon jumping out of the bushes, [FN84] the Court here creates an expectation of coercive police behavior that I shall call “real police coercion.” A direct threat to arrest the victim of a search is recognized as coercive, just as traditional rape courts viewed threats of physical harm as coercive. It makes no sense for the Drayton Court to separate out situations where police specifically threaten arrest from other encounters where the threat of arrest is unspoken. Anyone in Drayton’s position would have reasonably feared arrest or physical force as a consequence of failing to cooperate with the interdiction. [FN85] Real coercion, the Court suggests, would be a loud and abusive police officer. Anything less than that is consensual. Unless the force is deemed adequate to overcome his resistance, the search victim must resist the advances of the officer. Unless the officer used the kind of physical force that offends the Court, the coercive environment will be ignored and the evidence seized will not be suppressed, even when the civilian’s submission is against the wishes of the person searched. Once again the Drayton Court used the words “voluntary consent,” but by analogizing to rape law, we see that force and resistance requirements are imposed upon those who challenge the government’s position that they consented to a search.

Drayton’s legal definition of consent is more cynical than Schneckloth’s. By the time of Drayton, the consent doctrine gradually mutated from an approach in Schneckloth that combined

subjective with objective components, into a purely objective test. [FN86] Drayton built on prior consent cases in which the Court similarly ignored the subjective aspect of the totality-of-the-circumstances test and focused on whether the police behavior was objectively reasonable. [FN87] The majority in Drayton did not purport to change the law of consent and merely held that police do not need to inform passengers on a bus of their right to refuse consent in order for consent to be valid.

In *Florida v. Bostick*, [FN88] decided shortly before Drayton, the Supreme Court announced that a “reasonable person” test presupposes an innocent person. Defendant Bostick had argued convincingly that “no reasonable person would freely consent to a search of luggage that he or she knows contains drugs.” [FN89] To prevent criminal defendants generally from defeating the government’s claim of consent, the Court embraced the imaginary innocent person.

Even within Bostick’s short majority opinion, the innocent person test created an internal contradiction. The majority wrote that the “question to be decided by the Florida courts on remand is whether Bostick chose to permit the search of his luggage.” [FN90] Yet, this cannot be true, for elsewhere the Court implicitly acknowledged that Bostick (who had drugs) did not wish to be searched. [FN91] Instead, the Court explained that it will not consider whether someone who had drugs consented; the question is whether an imaginary reasonable innocent person would consent. Imaginary innocent persons might consent to show the police they had no drugs and an imaginary innocent person might be motivated to help the police. On remand, the “court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable [innocent] person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” [FN92] If a trial judge determined on remand that an imaginary reasonable innocent person would have consented, then Bostick would have consented as a matter of law, even though the Court knew he did not subjectively choose to consent to the search.

This “reasonable innocent person test” was incorporated into the holding in Drayton, in which the Court held that the bus passengers were not simply obeying a command, but were voluntarily consenting when they allowed the officer to search the place on their bodies where they had carefully secreted drugs. Objectively, there must have been some kind of authority communicated to drug smuggler Drayton to cause him to raise his hands for a search of his person when he certainly knew this would dash his hopes for future profits and land him behind bars. This must have been a submission to authority rather than any voluntary agreement. Creating a mythical innocent person, the Court imagines that this innocent person would be motivated by a desire to help the police protect safety and would therefore freely and voluntarily give up any right to privacy he possesses. Writing for a three-person dissent, Justice Souter wrote there is “an air of unreality about the Court’s explanation that bus passengers consent to searches of their luggage to ‘enhanc[e] their own safety and the safety of those around them.’” [FN93]

The “reasonable innocent person” is even worse than the “reasonable person” test because the archetype excludes the very people whose consent is at issue. Drayton’s perspective is ignored because he allegedly possessed drugs. In the Court’s eyes, all defendants before the courts arguing motions to suppress are guilty (or at least not “innocent”). By definition, the reasonable

person test will never include the perspective of the person standing before the Court. [FN94] In this way, the innocent person test signals the repudiation of all subjective inquiry.

“Officially, the subjective prong is still viable” in determining if a search was consensual, noted Ric Simmons, but after Drayton, “in practice, the voluntariness test for consent has become so inextricably linked to the objective Fourth Amendment test for seizure that it is unlikely that the subjective elements will ever be reaffirmed by the courts.” [FN95] The majority framed this objective question of consent as whether a reasonable innocent person would know “that he or she was free to refuse” the search. [FN96] Scholar Joshua Dressler summarized the current state of consent law in this way: “In reality, the concept of voluntariness is a normative one. The real issue for courts is whether the police methods of obtaining consent are morally acceptable.” [FN97] In other words, if the Court approves of the actions taken by police, it will deem that the individual submitted voluntarily. If the Court finds the actions of police to be unacceptable, then the Court will hold that the civilian merely submitted to a show of authority. In truth, the consent exception has nothing to do with what the victim of the search wanted.

A related hidden issue within consent to search law is whose memory of the event should be credited. The Drayton defendants lost their bid to require that the police search them pursuant to Fourth Amendment standards because the trial judge found that the officers used polite phrases like “Mind if I check you?” or at least a questioning style rather than command phrasing. It is the officers in Drayton who testified to the phrasing and tone of their commands. [FN98] One would expect that the subjects of the search would have different descriptions of what occurred. Even if criminal defendants testify at a motion to suppress, there is little doubt whom trial judges will believe. [FN99]

Different versions of an event may be predicated on perjury or innocently based on how one's perspective influences perception. [FN100] Janice Nadler describes experiments where viewers see a recorded custodial interview as less coercive when the videotape is shot from the police officer's point of view than when it is shot from the suspect's point of view. [FN101] Writing about women's inequality, feminists have noted that perspectives can vary depending upon the power one wields within a situation. [FN102] We expect a date rape encounter to be remembered as more congenial by an alleged perpetrator than by an alleged victim. “Testilying” is a term created to describe the widespread nature of police perjury, [FN103] and the consent doctrine encourages such alterations because a small change in one's memory can save evidence from suppression. [FN104] Moreover, police officers do not necessarily have to testify, for they may write “the suspect consented” within their reports as a matter of course, thereby encouraging guilty pleas rather than suppression motions.

Arguably, the reasonable innocent person test encourages trial judges to disregard the testimony of the accused. With the reasonable innocent person test, the Supreme Court labels the viewpoint of the accused irrelevant to a determination of whether or not he or she consented, rendering it less likely that a judge will give that viewpoint credence.

An innocent person test goes beyond the much-criticized resistance prong of traditional rape law. While traditional rape law created an objective test by assuming that a reasonable person would resist her rapist to the utmost of her ability if she truly did not desire the fornication, the Fourth Amendment reasonable innocent person test goes further in negating the perspective of the

person whose body is the object of the unwanted touch. Not only is the search test objective, it creates a fictitious person who is motivated to help a police officer punish the victim of the unwanted search--in other words, to punish the subject himself.

Imagine the outcry today if a judge ruled, ‘The alleged rape victim did not want to have sexual contact, but this Court concludes that she consented as a matter of law because a reasonable woman would have wanted to engage in sex with this man.’ That would be the effect of importing the “reasonable innocent person” test from search law into rape law. I contend that a similar outcry should be heard when this test is applied in the search context.

III. Scholarly Criticism of Consensual Searches

Several scholars write about the coercive nature of police requests in a way that advances understanding of the fallacy of the Court's jurisprudence. These endeavors shed light on the lack of free choice for people in the position of Drayton, Bostick, Mendenhall, or the couple in the film *Crash*.

A. Power Imbalance, Role-Conditioning, and Race

Margaret Raymond recently analogized the Court's jurisprudence to a “gamesmanship model” by which the Court imagines a fictional world where individuals would be able to freely exercise a choice when police officers make requests. [FN105] Raymond points to many reasons why the current model of suppression is ill-conceived when it demands that individuals refuse requests from police officers. The Court is wrong to expect an individual to resist an officer's requests because it is impossible to know whether one has the right to refuse or not. [FN106] Only the officer knows if he has probable cause to arrest or if he is only on a fishing expedition for incriminating evidence. Likening a civilian's choices to the “heads I win, tails you lose” game, [FN107] Raymond faults the Court for creating an impossible bind for civilians faced with a police officer's request because the individuals would not know if this is a request that is optional or an order that must be followed. [FN108]

Even where the civilian is legally “free to walk away,” the officer might decide to punish the civilian for doing so. A “failure to cooperate often carries with it significant consequences,” Raymond documents, including “seizure, arrest, and charge and conviction of a crime stemming from the failure to cooperate.” [FN109] Where the police lack Fourth Amendment justification for a stop, the civilian should be free to decline the request, but even in these situations, the civilian might lose. “There are certainly police brutality cases in which the triggering incident was the victim's failure to obey police orders.” [FN110] Her analysis illuminates the problematic definition of coercion adopted by the Court in *Drayton* and other cases.

The power to detain and arrest is inherently coercive, and even more so because police are afforded enormous discretion in the field. As long as they can articulate facts that constitute probable cause to believe the subjects have committed a crime, the Fourth Amendment allows

police to arrest people who seem disrespectful while letting others go who committed the same infraction. [FN111] Police power to arrest has increased in recent years with Supreme Court cases that established the authority of police to arrest the driver whenever police pull over an automobile for a misdemeanor traffic infraction. [FN112] A recent case determined that even if an arrest violates state law, such as an impermissible arrest for a seatbelt violation, the arrest is still reasonable for Fourth Amendment purposes. [FN113] This means that police have the discretion to arrest almost anyone who drives. [FN114] Judges and attorneys sometimes speak of the accused receiving an “attitude ticket,” meaning that the police used their discretion to arrest and charge because the officers wanted to teach this defendant a lesson about treating the police with insufficient deference and respect. [FN115] As the police are given ever greater discretion to arrest, the fear of arrest correspondingly grows, and civilians must give up their Fourth Amendment rights if they want to try to avoid an “attitude ticket” or worse.

Frank Rudy Cooper has written that there is a culture of masculinity within police departments that places “an emphasis on demonstrating the aggressive demeanor known as command presence.” [FN116] Command presence policing is aggressive, for it means that police must gain control of the streets. “A corollary of that attitude is that police officers feel the need to punish disrespect.” [FN117] Racialized policing of black men is interconnected to this hyper-masculinity because the “pattern of U.S. masculinity involves a repudiation of contrast figures, most notably, women, gays, and racial minorities.” [FN118] The efforts of a male citizen to be treated with dignity, particularly a man of color, might bring out the officer's aggressions and create a “duel of manhood” where the officer has to punish the perceived disrespect to the officer's authority. Just as the culture of masculinity can apply to women police officers, so a culture of racialized policing may apply to officers of color. Black or Latino officers may also engage in abusive policing of minorities. [FN119] One example Cooper uses to illustrate the legal power of the police to punish disrespect involves a black male attorney who refused to consent to the search of his car. [FN120] In retaliation for asserting his rights, the officer pulled the whole family out of the car in the rain while the officer brought in a drug sniffing dog.

Janice Nadler provides another approach to the issue of inherent police coercion, examining social science data proving that people obey authority because of role-conditioning. People “follow the leader” because “authority-subordinate roles . . . give rise to overlearned patterns of responses.” [FN121] The social science establishes that most bus passengers would feel coerced when police ask them to participate in drug interdiction. “Like the role of the white lab coat in the Milgram experiments, the role of the police officer's displayed badge in Drayton should not be underestimated.” [FN122] Experiments proved that when authority figures made requests, these requests were interpreted as orders. [FN123] Thus, the factors the Court uses to draw its conclusions about whether an environment is coercive, such as the phrasing “may I search” instead of “I will search you,” [FN124] or a gun's being holstered rather than drawn, are divorced from the reality about how power is exerted in real life. [FN125]

Devon Carbado argues that for black Americans, submission should not be equated with consent. [FN126] Carbado sets forth how black Americans are taught to submit to the police in order to improve their chances of surviving an encounter with law enforcement. Black men are over-policed, more likely to be the recipients of police violence, and are often given the presumption of criminality during encounters with the police. [FN127] To survive these encounters, black

Americans learn the “racial conventions of black and white police encounters, the so-called rules of the game,” that include: “Don't move. Don't turn around. Don't give some rookie an excuse to shoot you.” [FN128] “Always be cooperative,” young black men are told; notice that this is essentially the same message as “always consent.” [FN129]

Carbado's depiction of conscious black obedience to police builds on Nadler's depiction of learned roles. Carbado's article also dovetails well with Raymond's gamesmanship model. While Raymond emphasizes the extensive and lawful powers that police have at their disposal and the inability of suspects to know at any particular time whether they are legally free to withhold consent, Carbado emphasizes fear of unlawful police abuse. During a traffic stop, civilians “don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them,” writes Carbado, quoting a manual for black professionals. [FN130] This manual advises black men as follows:

Don't lose sight of your goal. [Your] objective in most racial profiling scenarios [should be] to end the encounter as quickly as possible with a minimum of potential trauma. Getting stopped for no good reason is inconvenient. But being jacked up against your car and searched is an experience that can stay with you for years. Getting handcuffed and taken into custody escalates the nightmare. [FN131]

Words like “trauma” and “nightmare” depict an unspoken threat that is a form of coercion, whether intentional or not. Cooperating because you do not want to be “jacked up against your car” or “handcuffed and taken into custody” is the opposite of voluntary consent.

It may not take much resistance on the part of individuals to cause a police officer to ratchet up the level of intrusion. Recounting an episode that initiated Carbado into the required performance roles handed out to black men when dealing with police, Carbado describes himself as “defiant” when he was once stopped by police because he “insisted on knowing why we were being stopped. ‘We have a right to know, don't we? We're not criminals, after all.’” This was the extent of his acting “defiantly,” perhaps “foolishly” -- his “faux pas.” “[C]onsidering my initial racial faux pas--questioning authority/asserting rights--we got off easy,” muses Carbado in hindsight, since “the officers did not physically abuse us, we did not ‘kiss concrete,’ and we managed to escape jail.” [FN132] The incident lasted twenty minutes and included being forced “against the side of the patrol car. Spread-eagled, they frisked and searched us.” [FN133] Police warned Carbado's brother: “Tell him that if he doesn't want to find himself in jail, he should shut the fuck up.” [FN134] While Carbado recognizes that not all officers are abusive or consumed with avenging perceived challenges to their authority, the victim of a police stop does not know what type of officer he is facing during an encounter. Even a small amount of resistance can lead to an unprovoked escalation of police violence. Officers may perceive standing up for one's dignity as challenging authority and may grow infuriated as a result. Blacks must consent in order “to make the officers racially comfortable.” Uncomfortable officers can create a nightmare.

Carbado explains that prevalent notions of black criminality shift the burden so that black and Hispanic men must disprove guilt. People of color may therefore acquiesce more often than whites, but because of “fear and loathing” as opposed to a true wish to consent. [FN135] “Consenting to a search may be the only way a black person can demonstrate his innocence, particularly if the black person is young, male, “unprofessionally” dressed, and in a high crime

(read: black) neighborhood or predominantly white (read: low crime) area.” [FN136] The message hammered into American black consciousness to always consent to police contradicts the notion that such consent can ever be truly voluntary. [FN137]

As Carbado shows, there is a racial aspect to the Fourth Amendment consent doctrine that must be brought into the open if we intend to dismantle it. Drayton and his companion were black, as was Bostick, as was Mendenhall. Statistics show that minorities are more likely to be stopped due to racial profiling, [FN138] and once stopped, more often targeted for searches. [FN139] Carbado's argument to have the Court consider the race of the suspect in determining consent runs contrary to the current “objective” test. This article goes further than Carbado and asks the Court to consider a subjective test that takes race into account as one aspect of the viewpoint of the person searched.

The scene in *Crash* fits beautifully with Cooper's theory of masculine policing and with Carbado's theory of racial roles. The officer in *Crash* initiated the stop for the purpose of staging what Cooper describes as a masculinity contest, a competition with a weaker male where the officer enacts a command presence in order to prove his manhood and thereby control the streets. [FN140] The husband has digested society's messages that police require consent as the price of disengagement. As Carbado notes, consent “is intended to signal acquiescence and respectability.” [FN141] The opposite of consent--defiance--“can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both.” [FN142] Because the driver performs the learned role of obsequious obedience, the officer rewards him by not arresting the couple, although the Fourth Amendment gives him the discretion to arrest.

In *Crash*, the officer is portrayed as overtly racist, a “bad cop,” making it clear that the masculinity contest can have a racial component. This overt racism signals to film viewers that their sympathies should be with the victims of the stop, since the majority of Americans generally support increased police power except when wielded by “bad cops.” [FN143] As Carbado points out, the public outcry over racial profiling is reserved for situations where the person searched is innocent and the officer is therefore presumed to have racial animus. [FN144] Unfortunately, the presumption of black criminality is hardly confined to overtly racist police, but is rather a widely shared view and not one that is limited to white police officers. [FN145] Having an overtly racist cop makes it easier for the film viewer to conclude that racial dynamics were at play within the encounter, but racial dynamics might exist even with nonracist police officers.

B. The Arrest of Professor Henry Louis Gates

The recent arrest of acclaimed Harvard Professor Henry Louis Gates on the front porch of his home [FN146] illustrates many of the concerns raised by scholars about the balance of power between citizen and officer. The incident garnered much publicity nationally, particularly after President Obama, a friend of Professor Gates, commented upon the arrest. [FN147]

Some facts are in dispute, but according to a police report prepared by the arresting officer, on July 16, 2009 Professor Gates was in his home in Cambridge, Massachusetts, when Sergeant

James Crowley came to his door to investigate “a possible break in progress” at the professor's house. [FN148] Sergeant Crowley wrote that after he climbed the steps leading to the single family home, “through the glass paned front door” he could see “an older black male standing in the foyer,” Professor Gates, whom he later determined to be the home owner. After somehow obtaining Gates' attention, the officer sought Gates' consent to step outside to answer some questions. Sergeant Crowley wrote:

I asked if he would step out onto the porch and speak with me. He replied “no I will not.” He then demanded to know who I was. I told him that I was “Sgt. Crowley from the Cambridge Police” and that I was “investigating a report of a break in progress” at the residence. While I was making this statement, Gates opened the front door and exclaimed “why, because I'm a black man in America?” I then asked Gates if there was anyone else in the residence. While yelling, he told me that it was none of my business and accused me of being a racist police officer. [FN149]

Despite Professor Gates communicating his lack of consent to step onto his porch to speak to the officer, Sergeant Crowley appears to have followed the professor into his residence to speak to him, where he was later joined by another officer. [FN150] There is no indication in the report that Professor Gates invited either police officer in.

While the Sergeant admits in his report that “[he] was led to believe that Gates was lawfully in the residence,” he then “asked” for photo identification. Although Professor Gates eventually provided identification, he continued to berate the officer, telling Sergeant Crowley that he “had no idea who [he] was ‘messing’ with and that [he] had not heard the last of it,” calling the Cambridge police asking to speak to the Chief of Police, and allegedly “continuing to yell” although the tape recordings taken at the time are ambiguous. [FN151] Sergeant Crowley then successfully set up the professor for an arrest for disorderly conduct by luring him outside, telling him that “[he] would speak to him outside.” The Sergeant apparently thought he had sufficient facts to arrest Gates for disorderly conduct, detailing allegations in his report to support the elements of the crime, such as an alarmed crowd. Crowley writes:

As I descended the stairs to the sidewalk, Gates continued to yell at me, accusing me of racial bias and continued to tell me that I had not heard the last of him I warned Gates that he was becoming disorderly. Gates ignored my warning and continued to yell, which drew the attention of both the police officers and citizens who appeared surprised and alarmed by Gates's outburst. For a second time, I warned Gates to calm down while I withdrew my department issued handcuffs from their carrying case. [FN152]

The arrest of Gates should be recognized as a form of attitude ticket. The arrest itself was invalid under Massachusetts law, [FN153] but even if one believes that the elements of the statute were met, the disorderly conduct arrest clearly constituted retaliation for the professor's attitude. The Sergeant punished the professor for failing to consent when asked to go outside and answer questions, and for an overall lack of deference and respect. This lack of respect was overlaid with privilege and rank, such as when Gates allegedly informed the officer that he had no idea who he was messing with, and when Professor Gates ignored the Sergeant and dialed the Chief of Police.

There was no legitimate need to arrest Professor Gates. The district attorney's office refused to file charges. [FN154] As Sergeant Crowley admits in his report, he had previously satisfied himself that Professor Gates was the lawful resident of the home. Even if one credits the Sergeant's description of alarmed citizens, these neighbors would have dispersed had the police simply driven away. There was a “duel of manhood” between the Sergeant and Professor. The Sergeant arrested Gates because once this duel is begun, the officer must win in order to protect his manhood and prove his ability to control the situation. While not as famous or educated as Gates, the Sergeant won the duel because he had the power to arrest.

The Gates incident also increased fears about racialized policing. The picture of the middle-aged professor in handcuffs sent an unwanted message that even a renowned black Harvard professor could end up as another black face behind bars. The President used the incident to mention racial profiling at a press conference. “I don't know, not having been there and not seeing all the facts, what role race played . . . but there's a long history in this country of African Americans and Latinos being stopped by law enforcement disproportionately.” [FN155] While Professor Gates did not follow Carabado's description of “conscious black obedience,” it is difficult to completely discount the history of race relations with police as a back-drop for understanding the dynamic that played out that afternoon in Cambridge. Certainly, Gates himself felt that race played a role; he clearly articulated to the officer that he felt targeted based on race. His arrest could be interpreted in part as punishment for insisting that he was a victim of racial inequality. One aspect of the case that should not be overlooked is the fact that the arresting officer was the opposite of the stereotype of the racist cop. Thus, the event shows that the classic “good cop” may choose to “exercise unquestioned command of the situation” [FN156] by arresting individuals in retaliation for verbal defiance.

In order for Gates to know if he can refuse to accompany the officer outside or to refuse him entrance into his home, he needs to know if the officer has probable cause to seize Professor Gates or enter the premises without consent. In other words, because Gates does not know what facts the police received before they arrived at his door, he cannot know if the request to talk is really a politely worded command. Although Sergeant Crowley claims that before he entered the residence, a neighbor informed him that she saw “two black males with backpacks” try to force entry into Gates' residence, the 911 call relays a much more tentative version and the caller informs the operator that she does not know the race of the suspects. [FN157] Later on, the caller informed the press that Sergeant Crowley never spoke to her at the scene. [FN158] These contradictory versions of the facts raise questions about the legitimacy of the police behavior even before Gates was wrongly arrested. If the Sergeant needed consent from Gates to speak to him and could not order him to answer questions, then Gates was simply exercising his Constitutional right to refuse to answer questions and “walk away.” [FN159] If there is no way to decline consent without repercussions, consent cannot truly be voluntary. If knowing and asserting one's rights backfired for someone as privileged as a Harvard professor, it is virtually impossible for the average individual. [FN160]

Another example of how the consent doctrine operates to give police unfettered discretion to arrest is a scandal uncovered in 2007 involving the New York City police department. For over a decade, the New York City police department systematically increased their arrests for marijuana possession by approaching teenagers and young adults for “consensual conversations” that lead

to “consensual” disclosures of contraband. Police targeted juveniles from minority neighborhoods, often stopping students on their way home from school. Since marijuana possession only became an arrestable offense in New York once the contraband was out in the open, police had to convince civilians to voluntarily show the police what was hidden on their persons, according to a report on the department's practices. [FN161] “Between 1997 and 2007, police arrested and jailed about 205,000 blacks, 122,000 Latinos and 59,000 whites for possessing small amounts of marijuana” even though surveys indicate that “young whites use marijuana more often than young blacks and Latinos.” [FN162] Hundreds of thousands of young people gave up their right to privacy under a deeply flawed doctrine. If Professor Gates was unable to prevent the police from questioning him, it is difficult to discern how high school students can protect their privacy rights. The racial aspect of these “consensual” encounters is particularly opprobrious because the effects of these arrests and convictions may include loss of housing, a job, and a driver's license, and are concentrated in minority neighborhoods. [FN163] Thus, the effects of the consent doctrine may be severe not just on the young persons consenting, but upon their families and neighborhoods.

As the literature explains, there are many reasons why civilians approached by the police might feel coerced into saying yes when they mean no. The role the police officer's badge plays in obtaining obedience, as Nadler states, “should not be underestimated.” [FN164] As Raymond shows, “a failure to cooperate often carries with it significant consequences: seizure, arrest, and charge and conviction of a crime stemming from the failure to cooperate.” [FN165] Once we notice the race of the participants instead of erasing race, the racial dynamic of coercion becomes evident. Civilians know that police have the awesome power to detain, to search, and to arrest. Civilians also recognize that police have wide discretion in exercising this power. [FN166] What people do not know is how any particular officer is going to exercise his discretion. While people know the reason the officer approaches probably has to do with investigating crime, civilians would not know what reasons the officer has for the stop, or whether he has sufficient evidence (either true or false) that would permit him to arrest. Moreover, they do not know what will trigger an officer's anger and so do not know what behaviors to avoid to prevent themselves from becoming the subject of unpleasant attention or worse. [FN167] Also unknown is whether the officer harbors any personal prejudices that might operate against the people stopped. Depending upon one's class, race, and community, some civilians encountering the police may fear a long delay or a ticket, while others fear “physical violence, arrest, or both.” [FN168]

C. Miranda-like Waivers for Consent Searches Would Not Cure Coercion

Waivers, as several scholars recommend, will not cure the broader problem of police coercion. [FN169] These scholars envision the police giving a Miranda-type warning or some type of notice that the civilian may refuse consent. Scholars who focus on the lack of knowledge as if that were the sole problem in consent searches miss the point. Lack of knowledge is just one indicator of the individual's lack of power. It is a relatively small issue within the broader problem of coercion. [FN170] Compare a waiver of trial by jury to a search waiver by someone like Sylvia Mendenhall who was without a lawyer when police asked her if she objected to a strip search. [FN171] When a person waives his right to trial, an attorney will explain the costs and benefits of giving up this right and good attorneys advise their clients in a way that respects

their autonomous decision-making. [FN172] The attorney and judge protect against coercion [FN173] in a manner impossible to recreate in the setting of a search.

Moreover, it would be misleading to tell individuals that they can withhold consent, for that implies that there will be no negative repercussions from telling the officer to leave them alone, when in fact, police may search and/or arrest nonconsenting individuals in many instances even after the suspect has manifested nonconsent. Frank Rudy Cooper offers the following example of how a “consensual encounter” will play out:

So, the officer could say, “Hold it, I’d like to ask you some questions about why you’re in the area.” But what if “None of your business!” was the civilian’s reply? . . . After Terry, an officer who had been challenged [this way] and had only reasonable suspicion a crime was afoot could grab the suspect, throw him against the wall, spread his legs and roughly pat down his groin. [FN174]

As Frank Rudy Cooper notes, “there is an unwritten rule that Terry stops and frisks will be initiated or expanded if a civilian questions police authority.” [FN175] When Terry v. Ohio [FN176] allowed frisks based on the inherent vagueness of the reasonable suspicion standard, the Court knew it was giving a license for police to use this power to humiliate, Cooper argues. [FN177]

Finally, if the victim of the stop is already fearful of the police, words are unlikely to cure the problem. If someone is afraid of a robber with a knife, that fear is not necessarily diminished by the assurance from the robber that everything will be fine. Tracey Maclin writes about the attitude of distrust that has been “prevalent among blacks” even before “the Court sanctioned the practice of stop and frisk notwithstanding the ill effects that the intrusion engendered among blacks.” [FN178] As Carbado wrote, “when black people encounter the police, ‘they don’t know . . . whether judge, jury and executioner is pulling up behind them.’” [FN179] Suspects with this attitude toward the police may not trust officers to comply with the niceties of following waiver instructions.

If warnings truly dispelled coercion, rational people carrying contraband would never consent to searches. As the Miranda history teaches, this is not a likely result. [FN180] Since police routinely lie to suspects by advising them that they will do better if they cooperate by confessing to the crime, a process of interrogation that supplements the Miranda warnings and has been upheld by courts, most people have learned not to trust police assurances. [FN181] Warnings without lawyers to explain them do not dispel coercion; they are simply a script played out within a coercive environment. [FN182] Bostick, a man on the bus who was allegedly informed of his right to refuse, was in the same position as Drayton, a man on a different bus who was not so informed. Both feared they would be worse off if they did not submit. [FN183] Telling people they have a right to refuse consent means almost nothing when there is a huge power imbalance between the parties. If feminists have taught us anything, it is to recognize that power differentials may lead to enormous ramifications, even where we are so accustomed to the disparities that they are invisible to us.

For those who think the answer to this uneven power is to have the police notify a subject of a search that they may refuse, the scene in Crash provides a germane response. Imagine that the

officer in the film took a minute before traveling under the passenger's skirt to warn her: "You have a right to stop me. I only want to do this to women who enjoy it." The warning changes nothing. The officer still holds all the cards. He can arrest; he can retaliate for citizens who fail to consent; he can become violent. All a waiver would do where the person truly feels coerced is mask the coercion. The lack of knowledge requirement should be understood as part of a general disregard for the power differential between police and suspect and part of search law's project to dislocate the legal concept of coercion from the experience of the person facing police pressure.

Most civilians are likely to behave more like the husband in *Crash* than like the wife when police initiate contact, although the wife's outward resistance to the officer's initial demands makes for good drama. Resistance should not be the key to whether there was consent to sex or to a search. From the standpoint of a robust consent doctrine designed to protect autonomy and choice, it should not matter if the wife submitted immediately or argued. Had the wife never said no nor objected out loud, she still would not have been consenting, just as robbery victims may hand over their money without verbal opposition without anyone concluding that they consented to the theft.

The scene in *Crash* accurately portrays some of the potential costs of resisting an officer. Given the enormous power and discretion invested in police, coercion is almost inevitable in any interaction where police make requests of individuals while clearly identifiable as police. Because the wife failed to engage in "the racial survival strategy of performing obedience for the police," the officer retaliated outside the bounds of the Fourth Amendment. The officer in *Crash* decided against issuing an attitude ticket, but only because he found another sinister way to teach compliance. The cost of the film's passenger's resistance was rape.

In *Crash*, when the husband tells his wife, "They had guns," he is talking about a threat that may never come to pass, but that felt real to him under the circumstances. The Supreme Court takes a different view of the situation. Holstered guns are "unlikely to contribute to the coerciveness of the encounter" the Drayton Court reasoned, because it is well known that most officers are armed. [FN184] Moreover, people subject to a traffic stop would not be in fear of the police because the public nature of the stop assures the civilian that the police will not behave badly. [FN185] Despite what the Court may think, however, police guns are emblematic of state power. Whenever a police officer has a gun, holstered or not, it changes the balance of power, making it wrong to read consent into a civilian's submission to sexual or non-sexual touching by a police officer. [FN186]

For either rape or search law, the question to be asked is not whether people understand their rights enough to waive them. Rather, courts, and the justice system more broadly, must understand that civilians lack the ability to consent without coercion when faced with armed police. A true definition of coercion would accept that people faced with requests and orders from police officers understand the power wielded by police better than judges can fathom after the fact.

IV. The Normative Approach to Consent is Orwellian

The *Schneekloth*, *Bostick*, and *Drayton* decisions ignited strong criticism. Janice Nadler opined that “the Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort.” [FN187] “Consent is an acid that has eaten away the Fourth Amendment,” [FN188] wrote Professor George Thomas. Encapsulating the criticism, Ric Simmons stated: “It is no exaggeration to say that the nearly unanimous condemnation of the Court’s rulings on consensual searches is creating a problem of legitimacy which threatens to undermine the integrity of judicial review of police behavior.” [FN189]

Ric Simmons’ answer to the crisis of legitimacy is for courts to stop calling it a “voluntary” test and quit pretending that consensual searches are not coerced. Some coercion is reasonable, Simmons thinks, so courts should admit “that some amount of compulsion will always exist in this encounter, and determine the acceptable level of compulsion.” [FN190] Whether “defendants acted ‘voluntarily’ is irrelevant under traditional Fourth Amendment jurisprudence,” Simmons argued, “because the linchpin of the Fourth Amendment is ‘reasonableness,’ an objective inquiry that focuses on the actions of the law enforcement officer, not on the subjective state of mind of the defendant.” [FN191]

Simmons overlooks the fact that consent constitutes an exception to the requirement that searches be reasonable. Although the reasonable use of force is a touchstone of the Fourth Amendment, the consent exception circumvents the carefully balanced reasonableness tests embedded within the Amendment. To say that the police were reasonable in obtaining consent because they were not abusive when they asked for cooperation is a thoroughly different inquiry than whether the police have good information that leads them reasonably to believe there is evidence of a crime, which is the proper reasonableness inquiry mandated by the Fourth Amendment. When the government succeeds in establishing consent in a given search or seizure, it thereby avoids the Fourth Amendment rigors of a reasonableness inquiry. The current consent exception covertly changes the balance of power from a question of whether police have a legitimate reason to invade privacy to a question of whether courts deem it morally acceptable to invade privacy without a legitimate purpose, based solely on the skill with which police obtain obedience. When the government proves consent, patently unreasonable searches survive.

Moreover, to name it a consent exception implies that “the citizen [will] advise the police of his or her wishes,” as Justice Kennedy described consent in *Drayton*. [FN192] “It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding,” Kennedy wrote in upholding the search. [FN193] It would not be enough for courts to rename the consent exception from “voluntary” to “reasonably compulsive.” Rather, courts must jettison the whole justification for this exception: that consenting individuals choose to allow invasions of their privacy.

In an essay on the politics of language, George Orwell wrote about the “special connection between politics and the debasement of language.” [FN194] Words like democracy or patriotic “are often used in a consciously dishonest way. That is, the person who uses them has his own private definition, but allows his hearer to think he means something quite different.” [FN195] Courts behave in an Orwellian fashion when the law uses a word to create legitimacy while interpreting this word in a way that deceives the listener.

In *Animal Farm*, George Orwell drew a fictional example of how totalitarian regimes twist language in order to legitimize power. [FN196] There, the word “equal” is infamously twisted into: “All animals are equal, but some animals are more equal than others.” [FN197] Orwell’s famous novel illustrates how the redefinition of words serves to transfer of power from individuals to a government.

To determine if the transformation of the word “consent” is Orwellian, one must start with an understanding of the word “consent” and what it connotes to the public at large. “Consent” is defined in the dictionary as “[t]o give assent, as to the proposal of another; agree.” [FN198] Consider what the word consent means in this romantic, fictional passage:

Will her Imperial Highness consent to have me as her husband?' he asked her . . . You wanted a formal proposal, so I just gave you one. Well'

‘Well what?’ [she inquired]

‘Will you consent to marry me?’ She gave him an arch look, her eyes twinkling. Then she reached out and tousled his hair. ‘I’ll think about it’ she replied. [FN199]

The word consent here clearly does not mean “reasonably compulsive.” It connotes voluntary agreement, wishes, and autonomous decisionmaking. To replace the phrase consent to marry with “a determination of whether the level of compulsion was reasonably acceptable” would do violence to the meaning of this passage.

Thus, the public has a working understanding of the word as an agreement based on free will and subjective intent. This understanding legitimizes consent searches because the general public accepts that people should be able to choose to invite more invasion of their privacy than police could legitimately compel.

Next, one must consider whether the transformation of the word “consent” also transfers power away from the individual onto the government. We saw in *Drayton* that consent means that a person submitted to authority under conditions that did not offend the Court and that searches and seizures against the will of the person searched are often deemed consensual. Under the current test, the only real question is whether courts approve the manner in which the individual was coerced into allowing police to touch, grab, search, and/or detain. In this way, the Supreme Court transforms the word “consent” from one that means a person’s choice about who can touch his body and property to one that means that reasonable force was used against the person. This word transformation serves to take power away from the individual searched and give the power to the government. One may see this enhanced government power in two ways: (1) courts themselves are an arm of government, and they now decide whether or not to condone a search against an unwilling but cooperative individual; and (2) since courts almost always decide in favor of the police, [FN200] the courts are transferring further powers onto the police to stop, search, and arrest, by giving the police an escape from the rigors of the Fourth Amendment. By redefining a word, the Court shifted the power balance between police, and government generally, on one side, and individuals and neighborhoods on the other.

Although it was Orwellian to twist the word “consent” into meaning something that justifies more government intrusion, at least the Court has been forthright in one way about this power

grab that enhances state power. Schneekloth declared that the government may have no other way to get useful evidence besides creating a consent exception. “In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” [FN201] Without a consent exception, police would be forced to refrain from gathering important materials when they lacked probable cause or reasonable suspicion. [FN202] The transfer of power from the individual to the government is justified by the government’s need for that power. Totalitarian regimes would also proffer this type of justification to legitimize usurpations of citizen power.

What makes the Supreme Court’s consent doctrine particularly Orwellian is its continued invocation of the shared meaning of consent to mask its new meaning. When the Court wrote that the “burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority,” [FN203] the Court signaled the shared meaning of consent, not the meaning the Court specially created for search law. Similarly, the Court signaled shared meaning when it wrote, “the concept of agreement and consent should be given a weight and dignity of its own” [FN204] although “consent” actually meant an acceptable level of coercion for the Drayton majority. By continuing to call the exception “consent,” the Court need not admit that it is changing the balance of power. By calling it the consent exception rather than the reasonable coercion exception, the Court will not seem to be overreaching when it refuses to apply Fourth Amendment protections.

V. Feminist Theorists Critique Rape Law’s Normative Approach To Unwanted Sexual Contact

Feminists have made some compelling arguments about how rape law was created and applied in a manner that fails to protect women’s autonomy and bodily integrity. Their insights provide valuable tools for probing the deficiencies and inconsistencies in current consensual search doctrine. Turning to rape law for guidance may also help educate a large group of people, for those who follow the inequities of violence against women are not necessarily the same group who follow inequities within policing.

Fourth Amendment scholars who criticize judicial blindness towards police coercion should note that feminism aims to expand the notion of what types of coercion negate consent. Writing about subtle forms of coercion, Dorothy Roberts notes how rape law fails to recognize “implicit threat of violence”: women may fear that men will turn violent even if no threat was made. [FN205] Similarly, Susan Estrich criticizes the judicial response to subtle forms of coercion: “Where threats are inarticulate [the courts] often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.” [FN206] Just as Fourth Amendment scholars critique the narrow definition of coercion, feminist scholars critique rape law’s failure to acknowledge multiple forms of coercion that constitute threats sufficient to compel women to give in to male aggression.

Judicial failure to recognize inarticulate threats as negating consent is interwoven with the question of whether consent is an objective or subjective test. While the scholars discussed below have different theories for reform, their analysis of the problem is strikingly similar. Catharine MacKinnon, Susan Estrich, and Anne Coughlin all define consent in terms of whether the sex was wanted or against the victim's will. They view subjective consent as “the sine qua non of the offense” of rape. [FN207] All three scholars are concerned with how the law interprets the elements of rape so that it is often no longer a question of what the woman wished, but of how much force was used against her and what she did to prove her nonconsent. Their insights will provide a further dimension to current analysis of consensual search doctrine.

A. Catharine MacKinnon

Catharine MacKinnon focuses on the power imbalance between men and women, criticizing how rape law permits much unsought and unwanted invasion of women's integrity by the legal definition of nonconsent. [FN208] This article will focus on five points she makes and show how her critique can apply to consensual searches:

1. The law's focus should be on the victim's point of view rather than the force used by the aggressor;
2. The law errs by making force and threats a normative question about reasonable male behavior;
3. Rape law builds on a model of the deviant perpetrator;
4. The law is constructed to allow men to have free access to certain types of women;
5. Subordination theory describes how structural power imbalances within society bear on whether there is coercion.

Each of these points has its analog within the consensual search arena.

In 1983, MacKinnon wrote a seminal article, advocating a subjective definition of consent and nonconsent. Unlike some feminists who wrote that the investigation should be on the behavior of the person seeking consent, MacKinnon regarded the male point of view or male actions as irrelevant. “Rape is only an injury from the woman's point of view,” she explained. [FN209] One way the law avoids crediting the woman's point of view is by requiring the assailant to utilize a great deal of force in order for the unwanted intercourse to be defined as rape.

Nonconsent in law becomes a question of the man's force or the woman's resistance or both. The problem is this: the injury of rape lies in the meaning of the act to its victims but the standard for its criminality lies in the meaning of the same act to the assailants. [FN210]

In other words, the force requirement, as interpreted by courts, is the antithesis of an approach valuing the woman's point of view, for it focuses on what the man did instead of what the woman thought. Similarly, the resistance requirement focuses on what the woman did to try to overcome the force used against her instead of focusing on what the victim thought would happen if she did not submit. The force requirement, MacKinnon shows, ignores the reality of the female

experience of sexual assault. “Sexual intercourse may be deeply unwanted--the woman would never have initiated it--yet no force may be present.” [FN211] Submission may look like consent, but it is not. Acquiescence may look like consent, but it is not. The law interprets acquiescence and submission as consent, thereby refusing to acknowledge the power differential between men and women in society, the subordination of women to men that affects the ability to manifest nonconsent.

MacKinnon's call for a victim's point of view must be understood as a call for a subjective test of consent. Quantifying the force and resistance in an alleged rape are objective questions in contrast to the subjective question MacKinnon considered rape's core concern: whether a woman wanted to have sexual intercourse. Thus, MacKinnon should be understood as objecting to the way law turned a subjective question of consent into an objective inquiry. By making the question objective rather than subjective, the law condoned much sexual conduct that contravened the wishes of the woman.

Turning to the law on search and seizure, feminists, race theorists and civil libertarians would, like MacKinnon, begin with the victim's point of view, not the police officer's. Just as consent is supposed to define the line between rape and consensual sex, so consent is supposed to define which searches are consensual or nonconsensual within the Fourth Amendment. As MacKinnon observes, consent must be a subjective question if autonomy is to be respected. Consent for searches should be a question of what the individual wanted, since, were it not for this individual's autonomous decision to forgo his Fourth Amendment rights to privacy, the police would violate the Constitution were they to intrude upon his privacy.

As in rape law, nonconsent in search and seizure law “becomes a question of the [police officer's] force or the [victim's] resistance or both.” [FN212] Although search and seizure law has no explicit force requirement, the judicial focus on facts such as whether guns were holstered, threats uttered, and non-“congenial” tones of voice used are all questions of quantity of force. While force was an element of common law rape and written into many rape statutes, the Supreme Court simply created a force element, *sub rosa*, within the consent exception to the Fourth Amendment. One could also say that the Court simultaneously created a resistance requirement within the Fourth Amendment consent exception when it expected individuals to resist authority.

Like rape law, the law of consensual searches fails to credit the point of view of the person being searched. As in rape law, nonconsent in search law becomes a question of the officer's use of force and whether that force is deemed legally sufficient to constitute coercion. As in rape law, the lack of resistance is given too much weight; the fact that a person submits to the police officer is deemed to be consent, regardless of whether that person subjectively wanted the invasion of her person.

MacKinnon's insights easily translate to explain police power: “The problem is this: the injury of [violations of the Fourth Amendment] lies in the meaning of the act to its victims but the standard for its [unconstitutionality] lies in the meaning of the same act to [police officers].” [FN213]

Not only is force an objective component within rape law, it also is treated as a normative question. Although the “line between rape and intercourse commonly centers on some measure of the woman's will,” MacKinnon writes, the “substantive reference point implicit in existing legal standards is the sexual normative level of force.” [FN214] The normative question asks how much force is morally acceptable in society to get someone to submit to sexual contact. Only force or coercion that exceeds certain social norms will be defined as nonconsensual sex. The law adjudicates “the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation.” [FN215]

Fourth Amendment scholars recognize that whether a search is consensual is a normative question. [FN216] Search and seizure law purportedly asks whether a police officer used force severe enough to convey to the reasonable individual that the officer's request is an order that must be obeyed. But the “real issue for courts is whether the police methods of obtaining consent are morally acceptable.” [FN217] Both rape and consensual search doctrine render consent a normative question that has little or nothing to do with the wishes of the person whose consent is sought. The normative question of force in defining nonconsent for rape is this: Was the force used to obtain cooperation from the victim acceptable in our society? If so, then the woman's wishes are irrelevant; her submission will be treated as consent. The normative question in search and seizure law is similar: Was the force used by police to obtain cooperation acceptable in our society? If so, then the suspect's wishes are irrelevant; her submission to the police will be treated as consent.

As in rape, consent search law adjudicates “the level of acceptable force starting just above the level set by what is seen as normal [police aggressive] behavior, rather than at the victim's . . . point of violation.” Courts also allow police to exercise a lot of power and authority over their subjects without viewing the conduct as coercive. For an example of tolerated police aggression, consider that the officers in *Drayton* boarded a bus with guns and badges and made it clear that the bus was not leaving until they had obtained full cooperation from the passengers. [FN218] As with traditional rape cases, courts tolerate a higher level of force by a police officer seeking consent to search than by a civilian offender asking an individual on the street to hand over her wallet. Imagine if *Drayton* involved a robber looking for money by patting a person down. This would not be seen a consensual exchange of cash even if the robber did not display a weapon or utter a threat. [FN219]

Search and seizure law's rejection of the individual's viewpoint is even more pronounced than rape law's rejection. In the search and seizure context, one cannot say, as MacKinnon does about rape, that the line between a violation of the Fourth Amendment and consensual giving up of privacy “commonly centers on some measure of the [subject's] will.” [FN220] While rape law combines the subjective question of a woman's will with objective questions that evaluate the quantity and quality of the force or threats employed, consensual search law has become a totally objective probe that only evaluates the quantity and quality of force employed by police in getting to yes. [FN221] This negates the autonomy of the victim to choose when to allow his body to be touched or his property to be opened for inspection.

Another observation MacKinnon makes that is reflected in search and seizure rules is that rape law “tended to build on a model of the deviant perpetrator,” a model in which the aggressor behaved in ways that put him outside of society's realm of normalcy. This is connected to the normative idea regarding rape, which allows a certain amount of force and maintains that only bad people deserve criminal sanction.

The deviant perpetrator model of rape fits with Carbado's “bad cop” observations that explain why a certain amount of racism is tolerated. Carbado writes:

Race potentially matters in the Fourth Amendment context only when a case involves a “racially bad” cop. Police officers who cannot be so described are presumed to be “racially good,” and their racial interactions with people on the street are presumed to be constitutional. [FN222]

In search and seizure cases, the Supreme Court tends to predicate nonconsent on a model of a deviant police officer, an officer who uses excessive or unnecessary force or makes verbal threats. Consider how courts are more likely to consider a search nonconsensual when the officer violates the Fourth Amendment before he engages in the invasive, yet allegedly consensual, conduct. [FN223] Perhaps the first Fourth Amendment violation makes the officer deviant, and that is why courts suppress the fruits of the ensuing “consensual” search. It is difficult to discern why courts in some situations do not suppress evidence even when there was prior police misconduct, ruling instead that consent cures the earlier violation. [FN224] Of course, courts may view the suspect's deviance as outweighing the officer's deviance in some cases, thus leading courts to deny suppression motions involving police officers who conducted prior unconstitutional searches.

MacKinnon also criticized rape law for dividing women into categories, with some types of women permitted to withhold consent and others not. In MacKinnon's view, “bad girls” are presumed to have consented. [FN225] The categories determine how much sexual access to give men. Through the use of objective criteria, the law gave men full sexual access to certain categories of women while allowing others to withhold consent.

In search and seizure law, the “innocent reasonable person” test also divides subjects into good and bad. Courts find nonconsent only if a good man, an innocent man, would have withheld consent in the same situation. The subjective experiences of guilty men and women are of no value to the law.

In reality, police are given free access to innocent people as well as guilty ones. The consent exception is part of a package of Supreme Court rules removing constitutional protections from people in buses, cars, basketball courts, streets, and other public locations. Consent searches are just the final excuse for police who already have an arsenal of excuses for invading privacy without probable cause.

The statistics show that the people stopped are disproportionately black and/or Hispanic. Starting with *Terry v. Ohio*, the legal trend has gradually left blacks, Hispanics, and other minorities without protections. [FN226] Thus, as MacKinnon writes about rape, the law is constructed to allow certain people to exercise control over their bodies and to create a category of persons who are without legal protection. [FN227]

Central to MacKinnon's theory of subordination applied to rape law is her theory of coercion and how structural power imbalances affect a person's decision to assent or resist. MacKinnon's definition of coercion is much broader than the legal definition. What the law might call consent, MacKinnon would categorize as coercion, or unwanted sex, or rape.

“[C]onsent [in traditional rape law] is a communication under conditions of inequality,” she writes. A person may say yes to sex for many reasons other than a subjective wish to engage in sex. “Women are socialized to passive receptivity; many have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive.” [FN228] Submission should not be equated with consent.

MacKinnon controversially proposes that that yes may in fact mean no because women are “socialized” to “perceive no alternative to acquiescence.” The actions of the individual seducer must be understood against a social backdrop wherein women are raised to believe that it is wrong to fight, that it is flattering to be the object of sexual attention, and that one should not act like a “bitch” by making men feel badly. It is hard to resist a seducer without risking behaving in an unladylike manner.

MacKinnon's view that yes sometimes means no because of socialization has been derided by some. [FN229] Others dismiss her view as unhelpful to the goal of expanding prosecution of rape. [FN230] Nevertheless, it is not controversial to insist that one consider the broader social context when interpreting behavior. For instance, one would hopefully consider the state of race relations if asked to look back at an alleged rape of a black woman by a white man during the South's Jim Crow era. In that context, whether the black woman felt coerced to have sexual relations would relate to her status as part of a subjugated societal group and the aggressor belonging to a societal group that enjoyed unfettered access to persons in the woman's group. Such social analysis, focusing on race, of historic Southern gender relations is no longer controversial. What makes MacKinnon controversial is that she applies social analysis to the present, rather than to the past, and that she posits women as a subjugated social group. Whatever one thinks about the state of sexism in contemporary America, MacKinnon is correct that coercion must not be judged in a vacuum.

Whatever one thinks about MacKinnon's conclusions about the line between consensual sex and rape, her theory of subordination is valuable to Fourth Amendment inquiry. If MacKinnon's subordination theory encountered derision, it was not because she recognized that power differences help determine behavior; this was already a familiar dynamic in guard-prisoner or parent-child relationships. What disturbed some readers was her philosophy that men dominate women in this way. [FN231] While socialized passivity is controversial in describing sex roles, it should not be controversial in describing how individuals are socialized in regard to police officers. The underlying disparity between the power wielded by a police officer and by a civilian is enormous and the resultant passivity is deeply ingrained. [FN232]

There are three situations that MacKinnon believes will cause victims to say yes despite a subjective desire to be left alone. They may be: (1) “socialized to passive receptivity;” (2) “have or perceive no alternative to acquiescence;” or (3) “may prefer [unwanted sex] to the escalated risk of injury and the humiliation of a lost fight;” in other words, they may “submit to survive.” [FN233] Each of these situations has its counterpart in search and seizure law. In consensual

search cases, the subject assents, either verbally or by remaining silent. It is this assent that is confused by law as consent, or, by analogy to rape law, as a failure to adequately resist an officer's advances.

One situation MacKinnon mentions as likely to cause victims to say yes to unwanted sex is where a woman is “socialized to passive receptivity.” [FN234] Children generally are raised to passive receptivity vis-à-vis police. From an early age, adults teach children to stop when police activate lights or sirens, to stop when an officer raises his hand in a certain position, and to drive forward when police gesture in another way. Moreover, the people most likely to be stopped by police, blacks and Hispanics, are particularly socialized to passivity when interacting with police. [FN235]

A second situation MacKinnon mentions as likely to cause victims to say yes to unwanted sex is a situation in which the woman “ha[s] or perceive[s] no alternative to acquiescence.” [FN236] In the search and seizure context, the Court has clearly announced that a person need not be told he had any alternative to compliance because voluntary consent does not require knowledge of one's right to refuse. [FN237] The Supreme Court extended this premise from *Bustamonte* to a new level of Orwellian interpretation in *Robinette*. The latter case involved an encounter that began as nonconsensual, with police seizing the subjects. The Court nonetheless held that such an unwanted seizure may morph into a consensual encounter without any need to inform the subjects that they are free to leave. [FN238] It would “be unrealistic to require police officers to always inform detainees that they are free to go before a consent search may be deemed voluntary.” [FN239] Thus, people detained in a traffic stop may be deemed to have consented to stay and voluntarily interact with the police once the legitimate reason for the stop has passed, and may then unknowingly consent to a search of their property or their person. Like rape victims, civilians may agree to unwanted police intrusions because they “perceive no alternative to acquiescence.” [FN240]

A third situation MacKinnon mentions as likely to cause victims to say yes to unwanted sex involves a woman who “may prefer [unwanted sex] to the escalated risk of injury.” [FN241] Twenty years ago, Richard Uviller used the same word, “risk,” to describe the alternatives to obeying police: “Refusal of requested ‘permission’ is thought by most of us to risk unpleasant, though unknown, consequences.” [FN242] The unknown consequences include a fear of escalation both of lawful and of unlawful force by officers. [FN243] Fear of arrest is a prime example of the threat of lawful force, for as Raymond pointed out, because the suspect is not privy to the officers' information, the suspect does not know if the officers have probable cause to arrest him. [FN244] The enormous power imbalance between police and civilian is buttressed by criminal statutes that make it a crime to disobey orders of the police. [FN245] The Supreme Court recognizes that people would want to avoid an arrest, although the Court tends to write about an arrest as merely a “stigma and embarrassment” [FN246] rather than as an inherently violent act that may lead to further violence against the arrestee. Fear of a lawful arrest may include fear of unlawful rape, for as Brenda Smith observed, sexual abuse can happen on the first night in jail and ‘isn't just a random event that can happen’ only to “bad people.’ [FN247]

Reasonable people may fear injury from excessive force as well as from permissible force when police make a direct request. [FN248] Also, members of over-policed communities are more

likely to be victims of brutality. [FN249] Thus, in addition to fearing that police will use lawful force, suspects may fear illegal or excessive force.

Fear of improper force is compounded by the question of who will police the police. If a man intent on rape uses force, it is possible that someone will alert the police to prevent the event. If police are using excessive force on a suspect, one presumably cannot call for the police to help or call civilians to intervene. A suspect might think that he must do all he can to keep the officers calm, up to and including manifesting “consent” to a search, because he will have no protection if the officers become angry. Hence, in the Fourth Amendment area, people choose to say yes rather than run the risk of refusal.

Note that in the paradigmatic consensual search inquiry, the officer wants something from an individual and tries to find a way to get what he wants within the parameters the Court has set. There is no suggestion that the suspect actually wants what the officer wants. In this way, search law mirrors MacKinnon's paradigm of the sexist aggressor who seeks sexual dominance rather than seeking mutual pleasure. [FN250] Just as some aggressive men learn how to obtain sexual satisfaction without running afoul of rape laws, officers are trained in how to deal with the public so that the officer's chances of obtaining full cooperation are maximized without running afoul of the law. Even good police expect to gather evidence from suspects who need persuasion to say yes (or at least submit) to a search request. [FN251] MacKinnon's model of the aggressive seducer resonates within police-suspect encounters.

Moreover, the power differential between women and men is less than the power imbalance between officer and civilian. No civilian males are authorized to use physical force to maintain their power advantage vis-à-vis women, whereas police may and do use force against suspects. The words of MacKinnon apply squarely to consensual searches: “consent is a communication under conditions of inequality.” [FN252]

B. Susan Estrich

Susan Estrich also condemned rape law for failing to punish most types of nonconsensual sexual aggression and for the intentional “failure to protect female autonomy and freedom of choice.” [FN253] While MacKinnon is best known for her theory of subordination and her view that rape law mirrors the culture's acceptance of coercion and control by men over women, Estrich sought to criminalize much nonconsensual aggression by changing the interpretation of the rape law elements. Three of Estrich's points will be analogized to consensual search doctrine:

1. The law imagines “real rape” as the crime;
2. The law expects women to behave like men;
3. The law prioritizes male satisfaction by blaming the victim.

Estrich coined the phrase “real rape” in her indictment of traditional rape laws that only criminalize a prototypical rape, meaning such conduct as a man's putting a gun to a victim's head and threatening to kill her in order to have intercourse. The law recognized this as rape, regardless of the woman's lack of resistance. “But,” states Estrich, the law “often tell[s] tell us

that no crime has taken place” when the facts are changed, for example, when “less force is used or no other physical injury is inflicted,” or “where threats are inarticulate.” [FN254]

Force or threat of force is an element of rape in almost all jurisdictions. [FN255] Courts defined force narrowly, in a way that Estrich compares to a schoolboy fight, and rejected a more nuanced understanding of threats, force, and coercion:

Force is when he hits me; resistance is when I hit back A second understanding of force, not acknowledged in the law of rape, recognizes that bodily integrity means more than freedom from the force of fists, that power can be exercised without violence, and that coercion is not limited to what boys do in schoolyards. [FN256]

The courts' traditional definitions of force and consent create the “paradox” whereby a court may rule that the “sex was without the woman's consent. [The court may] also say[] that there was no force. In other words, the woman was not forced to engage in sex, but the sex she engaged in was against her will.” [FN257]

Just as the law imagines “real rape” as qualitatively different from rape that occurs without a weapon or fists, “real coercion” within search and seizure law is imagined as something different from the usual situation in which a suspect gives up his rights because he is afraid of the consequences of not acquiescing. Real coercion by the police involves actual violence or spoken threats. Borrowing Estrich's phrasing, the law “often tell[s] us that no [Fourth Amendment violation] has taken place” when the facts are changed, such where “less force is used or no other physical injury is inflicted,” or “where threats are inarticulate.” [FN258] Search and seizure law, like rape, fails to acknowledge that power can be exercised without violence and that bodily integrity means more than freedom from a gun pointed at one's head.

Although there is no explicit force requirement in consent searches, the paradox for searches is almost identical to the rape paradox that Estrich describes. The only difference is that one must substitute the word “coercion” for the word “force” when critiquing search law. The paradox is that the law agrees that a suspect allowed the police to search him or her against his or her will, yet the law “says that there was no [coercion]. In other words, the [man or] woman was not forced to engage in [a search], but the [search] . . . was against [his or] her will.” [FN259] By pointing out how traditional rape law failed to uphold autonomous consent by focusing on force, Estrich's condemnation of the force requirement helps illuminate consensual search law's flawed focus on coercion rather than the wishes of the person seized and searched.

Rape law is constructed with the expectation that women behave like men, explains Estrich. [FN260] The schoolyard fight paradigm, modeled on male-on-male combat, is an example of how this male bias influences the legal definitions of force. [FN261] Another example Estrich gives of how the law expects women to behave like men is found in jurisdictions that invoke a reasonable person standard; incidentally, the jurisdictions whose rape law most resembles the Supreme Court's pronouncements on consensual searches. These jurisdictions define force by inquiring “whether the defendant's acts and statements were calculated to overcome the will of a reasonable woman.” [FN262]

How does a reasonable woman act?, Estrich asks, seeking to expose the discrepancy between how women actually act and how courts expect “a reasonable woman” to act. “Their version of a

reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive The reasonable woman, it seems, is not a schoolboy ‘sissy.’ She is a real man.” [FN263]

Consider the similarities between these rape jurisdictions that employ a “real man” test and the law of consensual searches that uses the objective “reasonable innocent person” test. Whether a search is consensual or not turns on the degree of force employed by the police and whether this force constitutes coercion. Thus, in both rape and search law, how much force or coercion exceeds legal bounds depends upon how much force or coercion is needed to overcome the will of a reasonable person. For rape law, the “reasonable person” has male attributes, even though most rape victims are women. For search law, the “reasonable person” is an innocent person--meaning that there is nothing illegal on his person or in his possession--even though no litigant bringing a motion to suppress fits this profile.

The Drayton Court concluded that a reasonable person would not interpret the officers' words as an order because the policemen's voices were not menacing in tone and because the police used polite questions rather than aggressive commands to solicit consent to a search. [FN264] While rape law imagines that rape victims should act like men, search and seizure law imagines that suspects should act like innocent civilians who would never be intimidated by police officers as long as the officers were polite. In both situations, the law creates a reasonable person who “does not feel vulnerability.” [FN265]

About rape law, Estrich writes: “We could prohibit the use of force and threats and coercion in sex, regardless of ‘consent’” or “[w]e could define consent in a way that respected the autonomy of women.” [FN266] The law chose to do neither.

Rape law's unwillingness to recognize “that power can be exercised without violence” is intentional, Estrich claims, in that it purposely prioritizes “men's sexual satisfaction” over women's autonomy. Writing about those jurisdictions with rape laws that most resembled the law of consensual searches, rape laws that probe “whether defendants' acts and statements were calculated to overcome the will of a reasonable” person, Estrich states:

Such an approach accomplishes two things. First, it ensures broad male freedom to “seduce” women who feel powerless, vulnerable, and afraid; the force standard guarantees men freedom to intimidate women and exploit their weaknesses, as long as they don't “fight” with them. Second, it makes clear that the responsibility and blame for such seductions belong with the woman. Because the will of a reasonable woman by definition would not have been overcome, a particular woman's submission can only mean that she is sub-par as women go. [FN267]

Rape law is set up to blame the victim for her predicament. As Estrich states in the quote above, the normative nature of rape law “makes clear that the responsibility and blame for such seductions belong with the woman.” The law tells women that other women would have resisted; other women would not have allowed the invasion of their privacy.

The narrow definitions of nonconsent and force represented policy choices by the men who wrote and interpreted rape law. Men's autonomy was given a higher priority than women's. Blaming the woman was inherent within this policy choice.

Just as Estrich pointed out that a narrow meaning of coercion in the rape context fails to respect the autonomy of women, [FN268] so does the narrow meaning of coercion in search law indicate a failure to respect the civilians whom police stop on the street. As with rape law, search and seizure law could easily prohibit violations of the Fourth Amendment, regardless of consent. [FN269] Or, search and seizure law could define consent in a way that respects the autonomy of civilian suspects. As with rape law, the Court chose to do neither.

In creating the consent-to-search doctrine, courts intentionally and consciously gave power to the police and deprived civilian suspects of their autonomy, in a similar fashion, as Estrich suggests, to rape law's giving power to men and depriving women of power. Within the search and seizure case law, the decision to allocate burdens on the person resisting the aggression is even more conscious. In *Bustamonte*, the Supreme Court stated that consent searches are necessary because sometimes that is the only way that important evidence is seized. [FN270] In other words, were the Court to implement a definition of coercion that recognized subtle or structural coercion, the Fourth Amendment would block police from searching and this would deprive the government of its useful evidence. In this way, the Court intentionally chose to increase police power to wage the war on drugs and solve crimes, over individual autonomy.

Another similarity between the consent doctrines in rape and in search and seizure law is that the searched suspect is also blamed for allowing the invasion of his or her privacy. Estrich writes that by defining force to exclude many methods of compelling submission, the law "makes clear that the responsibility and blame for such seductions belong with the woman." [FN271] In search cases, the reasonable innocent person standard tells individuals that it is their responsibility to guard their own Fourth Amendment rights. Courts tell consenting defendants that it is their personal failure to refuse a search request that led them to be searched and therefore subsequently arrested and charged. Courts tell such defendants that it was wrong or foolish to fear police reprisals for refusing consent. Traditional rape law might have demanded of a rape victim: Why didn't you push back or try to run? Similarly, contemporary search law might ask a victim of a Fourth Amendment violation: Why didn't you say no when the police asked to search you?

One might say that the law punished Drayton for giving in too easily to the police during the drug interdiction on the bus Drayton was riding. The Court's reasoning suggests that the officers would have allowed Drayton to refuse while they completed their drug interdiction of others on the bus, without any further unpleasant pressure. [FN272] It is as though the Court said to Drayton, Why didn't you tell the police to keep their hands off you and get up and leave the bus, if you subjectively didn't want to be searched? Of course, the law does not really want Drayton to resist any more than the law wants a working prostitute (a type of woman that the law makes freely rapeable, according to MacKinnon) [FN273] to prevent unwanted sex by stabbing her rapist. The ideal search subject would graciously consent because he would want the police to search without regard to Fourth Amendment restrictions. The law is intentionally set up to ensure broad police access to suspects and then blame those suspects when they allow access to their bodies and property.

C. Anne Coughlin

While Susan Estrich is best known for her concept of “real rape” and MacKinnon for her theory of subordination, Anne Coughlin contributes a conception of guilt, namely that rape victims were presumed to be guilty. Her article, “Sex and Guilt,” [FN274] offers insights into how the elements of rape were constructed in response to this presumption against women who alleged that they did not voluntarily consent to sexual intercourse.

The heavy burden placed on rape victims is best comprehended, Anne Coughlin proffered, if we stop thinking that rape law was designed to support female autonomy, and instead view the elements of force and resistance as prescribed to disprove the guilt of the complainant. Historically, engaging in sex outside of marriage was a crime. Unless married, consenting sexual partners were guilty of fornication, sodomy, adultery, or some combination of the three. [FN275] Before consensual sex was decriminalized, “judges . . . would view rape complainants not merely as crime victims, but also as potential accomplices in fornication or adultery.” [FN276] When women claimed rape, they were suspected of committing a crime, and the burden shifted to them to establish their innocence. [FN277]

At common law, a woman was expected to resist a potential rapist to the utmost. Although resistance was never specifically an element of the offense of rape, courts used a woman's resistance to measure the quantity of force used against her. [FN278] Hence, the resistance requirement is linked to the force or threat of force element of rape, the burdensome requirements that made it difficult for women to prove nonconsent. Modern courts have looked at statistics that show that women who fight back are put in greater peril, and such courts use these statistics to explain why resistance should not be demanded of sexual assault victims. [FN279] In hindsight, it seems obvious that victims who resist rapists risk unpleasant consequences. The point Coughlin makes is that common law courts were less concerned with whether a woman got hurt than in making sure that she was not really a participant in a crime.

There are striking similarities, Coughlin notes, between the traditional force and resistance elements in common law rape, and what a criminal defendant would need to prove that she committed an act out of duress. [FN280] The “primary substantive elements of the duress excuse are indistinguishable from the force and resistance elements of rape,” Coughlin noted. At “common law, judges insisted that the duress defense, like the rape offense, was not satisfied by threats of minor physical injury or by threats to harm the actor's reputation or property.” [FN281] Duress places a high burden of proof on those claiming coercion. This comparison helps explain why rape laws included a force element that refused to recognize subtle forms of threats and coercion. That a criminal defendant was subjectively opposed to sexual intimacy would not, without more, serve to extricate him or her from punishment. The duress analogy helps explain the construction of the elements of force, threat, and coercion within rape law.

The force requirement could also disprove the woman's guilt in another way. Not only might force help the victim make out the elements of a duress defense, force might also undercut the volitional aspect of mens rea. “If the woman's bodily movements were produced not by her ‘effort or determination,’ but by the man's exercise of superior physical strength, then she was merely an “inanimate thing.” [FN282] This consideration helps explain why the law demanded force or threats in common law rape beyond that required for robbery or extortion.

Coughlin also draws a parallel to the fraud defenses a woman could raise if she were charged with the crime of fornication or adultery. Common law rape made it difficult for women to claim that their consent was invalid because it was based upon the man's fraud. Fraud was only accepted in common law rape cases "where the woman showed that she reasonably believed that her conduct was nonsexual, such as participating in a routine medical procedure while the man used the procedure as a subterfuge," or where a woman was led to believe she was having sex with her husband. [FN283] "That the woman was induced to engage in sexual intercourse based on some other mistaken belief that she held, even if such belief was created by active deception on the man's part, would be irrelevant to her mental state and, ultimately, to her guilt." [FN284] Coughlin argues that the limited way fraud interacts with consent within rape law is a direct consequence of the presumption of guilt given to rape victims. The rape situation, then, was considered akin to a situation in which a defendant participates in a crime by physically aiding the principal but asserts that she, the defendant, did not share the intention or mens rea with the principal criminal actor due to fraud. A woman charged with the crime of fornication or adultery could make precisely the same mistake-of-fact argument at common law that a rape victim could raise to establish that fraud negated consent.

Just as rape victims were suspected of committing crimes in former times, those who move to suppress evidence on the grounds of governmental overreaching are also suspected of criminal activity. Although he has not been convicted, the defendant questioning his search is as suspect as a woman who admitted to the actus reus of adultery while explaining that she acted against her will. In fact, many scholars consider the current Court to be generally hostile to suppression motions because the Court views such motions as windfalls for criminals. [FN285] For the person with drugs strapped to his thighs whom police search on a bus and whom courts assume to be guilty, subjective nonconsent is no more sufficient than it was for the victim of rape whom common law courts assumed to a violator of sexual norms. The law adds requirements in a way that transforms the question of nonconsent and heightens the burden of proof on the party presumed guilty.

Consenting to a search is not admitting to a crime in the way that consenting to sexual activity ran the risk of admitting to adultery, sodomy or fornication. For consensual searches, the crime the defendant is alleged to have committed is a separate fact pattern from the defendant's consent to be searched. By contrast, in historic rape law, the victim's presumed crime (fornication) merged into one fact pattern with the crime the victim sought to prove against her aggressor (rape). Nevertheless, Fourth Amendment victims must jump through hoops to prove that police officers acted with force or threats or fraud to establish that their search was coercive, similar to common law rape victims. Just as those accused of fornication could not prove their innocence by demonstrating a subjective desire to refrain from having intercourse, so too do search victims fail to meet their burden by simply demonstrating a subjective desire to refrain from allowing the officer's touch. The legal system has a method for altering burdens of proof in a way that disfavors those whom the system views as guilty.

The unsatisfying aspect of Coughlin's analysis is that, theoretically, the criminalization of consensual sex could have worked against men accused of rape. Although she proves that the high level of proof required in rape is premised on the fact that the rape victim is presumed to be guilty, she fails to answer the question of why this guilt does not affect the man charged. Even if

the common law rape defendant succeeded in defending himself by showing that the sexual activity was consensual, he would still be admitting factual guilt to the crime of fornication. If a man's guilt as a sexual partner was paramount, courts could easily have constructed rape laws so that they contained fornication as a lesser included offense, because, if sex occurred, the man would have been guilty of something. For this reason, Coughlin's analysis must be combined with the insights of feminists who argued that rape law privileged male autonomy over female autonomy. Although men and women may have been prosecuted for consensual sex in equal measure, [FN286] the law viewed the woman as more blameworthy.

An understanding of structural inequality between police and defendant is as necessary to search law as an understanding of the male-female paradigm of guilt is necessary to rape law. Just as alleged rapists were not considered guilty even though they confessed to the physical crime of fornication and perhaps adultery, police who search suspects without probable cause to do so are not considered guilty when they argue consent. Taking Drayton's situation as an example, because there was no probable cause or reasonable suspicion to support a search, courts could have considered the police officer guilty of unconstitutional aggression since the defendants' bag was searched without cause even before defendants' bodies were searched without cause. [FN287] Still, the party presumed at fault in the search cases is the alleged victim of the search, just as the party presumed guilty in traditional rape cases was the alleged rape victim. One must understand the structural advantages enjoyed by one party in order to make sense of consent laws that burden one party (women claiming rape, defendants claiming illegal search) while enhancing the autonomy of the other (men defending against rape charges, police defending against suppression motions).

Coughlin sets up a dichotomy that is instructive, namely, that laws either protect autonomy or assume guilt, but not both. Rape laws could have distinguished nonconsenting partners from partners guilty of fornication, while also protecting women's autonomy, but Coughlin has shown that preoccupation with women's possible guilt trumps interest in their autonomy. At one time the Supreme Court interpreted the Constitution as protecting the autonomy rights of the guilty as well as those of the innocent. [FN288] However, current doctrine seems to prove Coughlin correct. The Court either views the litigant as guilty or worthy of protection, but not both. This explains why consent searches have morphed from a strict rule that honors autonomy into a loose standard that focuses on how much pressure courts think police may exert.

While Coughlin points out that rape did not start out as a crime against personal autonomy, the Fourth Amendment arguably did begin by protecting personal autonomy, intentionally creating a right for people to be secure in their persons and property. Following Coughlin's reasoning, one would therefore expect search and seizure law to give more weight to the concept of "against the will" of the victim in defining consent to search. That search and seizure law is as bad as, or worse than, traditional rape law at respecting the personal choice of the individual to consent is informative. The comparison of search law to rape law teaches us that in order to affect change in this area, scholars and courts need to reaffirm autonomy as the primary goal of the Fourth Amendment and the only justification for a consent exception. Coughlin also establishes that it is the presumption of guilt that blocks autonomy. To overcome the presumption of guilt, scholars and courts must reaffirm the principle that criminal defendants are as deserving of autonomy as the alleged "loose women" of yesteryear.

D. Summary of Feminist Theory

There are many parallels between how consent was historically defined when a rape defendant alleged that a woman consented to sex and how courts today define consent when police allege that a suspect consented to the search of her person. Instead of focusing on whether sexual intercourse was wanted or unwanted, as feminist scholars advocated, traditional rape law determined consent based on the amount of force used and whether the alleged victim resisted the male's attentions. Similarly, the consensual search doctrine does not focus on whether police searches are wanted or unwanted. Rather, in deciding motions to suppress, judges determine the validity of consent based on the extent of the force employed by the police and whether the suspect submitted to the officer. Traditional rape law did not recognize that subtle coercion garners mere submission, not voluntary consent. Similarly, consensual search doctrine ignores subtle forms of coercion and treats acquiescence as consent.

MacKinnon's subordination theory applies to Fourth Amendment law of search and seizure. Consensual search law intentionally allows a good deal of unwanted intrusion to count as consent. The law is intentionally erected to allow police to have access to certain types of people. It does this by establishing an objective standard and by requiring force or specific threat of force in order to disprove consent. Most routine violations of people's rights are countenanced; as a general proposition, only deviant behavior by police will lead to suppression of evidence where the government claims consent-to-search. Just as feminism would begin with the woman's point of view, civil libertarians should begin with the suspect's point of view in determining whether or not the suspect gave up his Fourth Amendment protections.

Giving voice to feminism's appreciation of power differentials within search law may also help improve rape law. To rectify coercion in rape, the law could expand the types of coercive behavior that negate consent. A woman who truly fears serious consequences that are not as explicit as a gun to her head should not be expected to say no in order to evince nonconsent. Rather, nonconsent should be the presumption underlying an analysis of the encounter. [FN289] As in traditional rape law, the Fourth Amendment consent doctrine fails to fully protect autonomous individual choice. A true recognition of autonomy as the purpose of laws forbidding sexual assault would include recognition that power dynamics may make it difficult for sexual assault victims to resist the aggressor even when the victims subjectively wish to be left alone. Similarly, a true recognition of autonomy as the purpose of the Fourth Amendment would include recognition of the way that power dynamics may operate when police stop civilians, making it difficult for civilians to resist the wishes of police even when the civilians subjectively wish to be left alone.

Finding no coercion because the atmosphere was "congenial" is like finding that there was no coercion because a rape victim did not resist her abuser. While rape law's objective requirements of physical force and resistance have lessened and even vanished in some jurisdictions in response to feminist critiques, the consent-to-search doctrine has gone in the opposite direction, with a test that is now completely objective. There is, as Raymond points out, a gamesmanship aspect upheld by the Court's reasoning, but there is also an intentional decision on the part of the Supreme Court to privilege police power over civilian autonomy. [FN290]

VI. The Result of Importing Feminist Theory into Fourth Amendment Law

A. Using the “Victim” Perspective for Searches and Seizures

Just as rape victims were told they asked for it by wearing short dresses and not screaming for help, suspects are told they asked for it by extending their arms to be searched. They are told it is their fault that the police touched their thighs or looked in their pockets. They are told that they should have resisted the police incursion, even if resistance risked triggering further charges or unpleasant responses from the police. Currently, courts across the country deny motions to suppress based on the defendants' consent to otherwise unlawful intrusions, while relying on a legal formula that blatantly ignores whether the defendants actually invited the intrusions. If feminist theories of rape are followed within the law of search and seizure, the government would have to find a reasonable basis for searches that does not blame suspects for capitulating to the wishes of police officers.

The primary benefit of borrowing the consent doctrine from rape is that it will bring a victim perspective to the endeavor. Feminist scholars tried to change the laws on rape from a “perpetrator perspective” concerned that rape fantasies would engender false accusations, to a “victim perspective” concerned with women controlling their bodies. This entailed changing the standard from what a fictional reasonable person would do if faced with unwanted sexual aggression to focusing on what the particular victim at issue wanted. The same change needs to occur within search law. [FN291] Whereas MacKinnon reveals the harm in “adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior,” this article reveals similar harm in “adjudicating the level of acceptable force starting just above the level set by what is seen as normal [aggressive police] behavior.” [FN292] Just as MacKinnon would start with the point of view of the woman propositioned for sex, this author would start with the point of view of the man or woman propositioned for a search.

In one anomalous Supreme Court consent-to-search case, *Ferguson v. City of Charleston*, [FN293] the Court truly appeared concerned with the autonomy and dignity of the alleged criminals. *Ferguson* evaluated whether police could seize blood tests performed on pregnant women in a hospital in order to prosecute the women for drug abuse. “Feminist theory on the meaning of ‘consent’ in sexual assault and sexual harassment cases often reflects an understanding of consent that is strikingly similar to that embodied in the *Ferguson* majority's opinion,” wrote Andrew Taslitz. [FN294] Breaking with precedent, the *Ferguson* Court determined that knowing and intelligent waivers were a prerequisite to valid consent. [FN295] The Court appears to have viewed the pregnant women in *Ferguson*, unlike the male drug offenders in *Bostick* and *Drayton*, as deserving of robust privacy rights. The facts of *Ferguson* may have triggered the different response, for the decision takes place against the backdrop of a long-standing feminist enterprise to provide reproductive choice for women. Feminist advocacy in support of privacy and autonomy rights for women is not matched by any social support for alleged male drug carriers. The *Ferguson* women were viewed as innocent although they used illegal drugs, while *Bostick* and *Drayton* were viewed as guilty. No one expects that *Ferguson*'s

holding will be applied to men and women stopped and searched on street corners or during automobile stops. One lesson of Ferguson is that feminist scholarship matters; [FN296] it should be brought to bear on everyone who encounters police coercion. Until the bodily integrity of men in baggy pants on public buses is taken as seriously as that of women in hospital rooms, the consent doctrine will remain the cynical “heads I win, tails you lose” game. [FN297]

Carbado describes the Supreme Court as having a “perpetrator perspective” regarding searched suspects and advocates that the Court adopt a “victim perspective.” [FN298] This perpetrator perspective, in Carbado's view, is one that enforces racial policing. The Court refuses to incorporate the racial impact of police power on minorities into its decision because of a notion that police should not be blamed for societal inequities beyond their control. The perpetrator perspective allows a police officer to exploit vulnerabilities as long as the officer himself did not create the vulnerability. [FN299] The subjective viewpoint would change consent-to-search from a normative decision condoning a certain level of force, to an effort to safeguard individual autonomy and Fourth Amendment protections vis-à-vis police power. [FN300]

This article uses the expression “victim perspective” differently than Carbado's article for he stopped short of calling for a subjective viewpoint. By urging courts to include race as part of the totality-of-circumstances test and to recognize that black men's submission to authority generally does not indicate free choice, Carbado tried to infuse a certain amount of subjectivity into the otherwise objective test. [FN301] I go further than Carbado because I seek to change consent to a totally subjective question that considers the full situation from the victim's perspective, including the victim's likely fear of further inconvenience, potential arrest, and possible brutality. The person's race would be relevant, but so would the fact that the person has something illegal upon his person. It will be almost impossible for the state to overcome the strong inference that, absent coercion, a suspect with drugs on his person will not willingly consent to a search. In fact, I challenge the notion that the concept of consent can be anything other than individual and subjective without doing damage to the dignity of the person whose consent is at issue.

The language of victim and perpetrator reinforces insights from rape law analysis that can apply to the search law context. Acknowledging that the quality of the injury is different in the two situations, one may still think of the woman in *Crash* as a victim even before she was raped. A victim of police overreaching is someone who is coerced into submitting to police conduct that would otherwise be forbidden by the Constitution. A victim perspective would require courts to ask whether the law protects the autonomy of the victim and whether it protects dignity, or whether the law instead allows exploitation of vulnerabilities. Unlike a perpetrator perspective where the concern focuses on aggressors being unfairly penalized for common coercive behavior, a victim perspective cares about the victim's experience.

In addition to building on other scholarship about coercion, the rape analogy adds a new dimension for it cajoles readers into viewing search victims as human beings who have a right to be secure in their persons. Nor is it a stretch to look to rape law, for one should be able to reference a different area of law that uses the same terminology. [FN302] The fact that such different definitions are imposed on the same words signals a degree of terminological distortion that is troubling.

B. Autonomy Should be Recognized as a Primary Goal of the Fourth Amendment

Autonomy and privacy should be articulated as core goals of the consent doctrine. The text of the Fourth Amendment gives “the people” the right to be secure in their persons and property “against unreasonable searches and seizures,” establishing the balance of power between the individual's right to be left alone and the government's need to invade privacy as a means of gathering evidence. [FN303] In 1949, Justice Frankfurter wrote that the Fourth Amendment “protects the security of one's privacy against arbitrary intrusion by police.” [FN304]

Some scholars have discussed better articulation of the focus of search and seizure protections. William Stuntz argued that the definition of privacy be explained in two ways. First, individuals have an interest in keeping information and activities secret from the government. [FN305] Second, “it is about preventing invasions of dignitary interests, as when a police officer publicly accosts someone and treats him as a suspect. Arrests or street stops infringe privacy in this sense because they stigmatize the individual, single him out, and deprive him of freedom.” [FN306] Sherry Colb suggested that in addition to protecting the right to privacy, the Fourth Amendment should have as a secondary purpose the goal of “treating the individual fairly and not utilizing available discretion to target her for unfavorable treatment without a legitimate basis.” [FN307] Recently, Bennett Capers urged the Court to include a combination of these concerns and recognize a commitment to equal citizenship in addition to privacy and the right to be free from unreasonable government targeting. [FN308] Autonomy, along with privacy, should be recognized as a primary purpose of the Fourth Amendment. The right to be left alone includes a right to determine who touches one's body and things. The right to be free from physical touching and restraint by police carries a concomitant right to self-determination, to autonomy.

The consent doctrine is directly tied to individual autonomy because by consenting to a search of his body or property, a person gives up his right to remain free and untouched. Professor Thomas Davies summed up the Fourth Amendment theory of consent as follows:

Consent amounts to a citizen's surrender of an expectation of privacy and an exposure of an otherwise private interest. Under this concept, the sole focus of inquiry is whether a person whose privacy interest was at stake . . . actually gave permission for an intrusion. If such a person gave consent, the Fourth Amendment's reasonableness standard is rendered inapplicable. If no such person gave consent, the protections of the Fourth Amendment apply in full. [FN309]

Nor should it matter that consent is an exception to the privacy rights afforded by the Fourth Amendment. The term “consent” itself implies autonomy and individual choice. Justice Thurgood Marshall wrote that “consent searches are permitted . . . because we permit our citizens to choose whether or not they wish to exercise their constitutional rights.” [FN310] The Court even used the word “dignity” to describe the merits of allowing an individual to choose to be touched or searched. [FN311] Yet, as this article has demonstrated, the Court's rulings fail to accord privacy, autonomy and human dignity to this area of law.

Autonomy should constitute the foundation for interpreting the consent-to-search exception to the Fourth Amendment, just as autonomy has become the foundation for prosecuting rape.

Just as the passenger in *Crash* should have a right to control who puts his hands on her sexual parts, she also should have a right to control whether a police officer touches her hips and her legs for purposes of exerting power over her. At the very least, the Court should agree that everyone should be free from arbitrary searches that are based on the desire to humiliate and degrade, even if they do not constitute sexual assaults. Autonomy should not begin and end with one's sexual anatomy.

Eventually, linking search doctrine to rape law should also improve rape law. Once the law accepts that fear of arrest or detainment, in itself, is a form of coercion, then it should also end the ability of police officers to raise a consent defense to sexual intercourse with people they solicit while on duty.

Scholars who endorse the continued use of a normative, objective model of determining consent, like Simmons, are worried that the cost to society would be too high if courts honestly applied a voluntary consent test. [FN312] Indeed, if MacKinnon's concept of power is given credence, it is difficult to imagine how courts could ever conclude that a person willingly chose to give the police access to their body, without fear of legitimate or illegitimate police injury, or threat of a criminal charge for failing to obey. In contrast to rape allegations, where the benefits of consensual sexual intercourse are recognized, there is no such benefit to consensual searches for someone with contraband upon his person. Hence, the feminist vision would alter the consensual search doctrine as it now exists. Third party consent and apparent authority to consent would survive the change, but it would disallow many searches where the police use the consent doctrine to mask otherwise impermissible behavior. [FN313] Only in those situations can we envision autonomous individuals wanting police to have power beyond the Fourth Amendment restrictions, either because it does not truly impact on their own autonomy (they have no real authority to consent because they have no real privacy interest at stake) or because they have privacy rights but believe that the search will not lead to their own arrest and punishment.

Yet the end of consent searches hardly spells the end of warrantless search options for police. As Justice Scalia has noted, the Fourth Amendment's "warrant requirement" had become so "riddled with exceptions that it was basically unrecognizable." [FN314] Even if police do nothing different, the searches may be justified under other recognized exceptions that exist or that may come into existence to fill the need. Just as the special needs exception to the warrant and probable cause requirements has been expanded to allow increasing intrusions upon passengers at airports, [FN315] the Court might accept a special needs justification for bus interdictions such as those featured in the *Bostick* and *Drayton* cases. Eliminating the broad consent exception will curtail many arbitrary, capricious and racially-based searches, but that is not a bad result to those who value the Fourth Amendment. It simply purifies Fourth Amendment jurisprudence by requiring police to articulate a legitimate purpose for intrusions. Eliminating the consent exception might appear to curtail police power, but one should recognize that it is really the Fourth Amendment itself that detracts from arbitrary police power. Consent search doctrine is a relatively recent phenomena designed to undercut the original scope and power balance of the Fourth Amendment. [FN316] It feigns to accord weight and dignity to the wishes of those who voluntarily gave up their rights while punishing individuals because they submit to those with power over them. There should be no protest against returning the Fourth Amendment to its rightful status.

VII. Conclusion

Figuratively, the law draws a line on the passenger's body in *Crash*. On one side of this figurative line, consent and nonconsent are governed by rape law doctrine, in which feminist scholars have pointed out the importance of recognizing subtle forms of coercion that cause women to submit to unwanted sexual touching. Feminists have sought with varying degrees of success to make the term “nonconsent” synonymous with “against the will” of the woman, a subjective inquiry. On the other side of the line, the Fourth Amendment regards consent and nonconsent as requiring a normative inquiry that has nothing to do with the subjective wishes of the person whose privacy was invaded. When police request permission to search, courts generally ignore the power imbalance and treat acquiescence as consent except when police behave in a particularly egregious fashion. [FN317]

Two common law doctrines that most infuriated feminist rape theorists were force and resistance, requirements that cut against the subjective inquiry of whether a woman wished to have sexual intercourse. This article has shown that Fourth Amendment doctrine has come to embrace similar force and resistance requirements in suppression law. If police convince a court that a suspect submitted rather than resisted, then the court will inquire into the amount of force used by the police to obtain the suspect's cooperation rather than determining if the search was against the will of the person searched. Just as traditional rape law was generally a normative question of male force, placing “the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior,” [FN318] search law has become a normative question of whether police used undue force to obtain cooperation. Currently, Fourth Amendment consent doctrine is totally divorced from a subjective inquiry that determines what the search victim wanted. This leaves people like the driver and passenger in *Crash* vulnerable to police who are no longer constrained by the Fourth Amendment as long as such police know how to obtain “consent” by methods acceptable to courts. The current doctrine does not give “weight and dignity” to the “concept of agreement and consent.” [FN319]

In the end, *Crash* is a film about how interconnected American society is, even as our society's members feel as though they are leading separated and segregated lives. The mistreatment of one person by another ripples out and changes the lives of others. What we can take from this in the consent area is that we should not segregate the victims of police overreaching as if they are separate and distinct from the rest of us. Just as feminists embraced all women and men who were subjected to sexual abuse as worthy of the protection of law, so should legal actors, courts and legislatures alike, quit treating subjects of illegal searches as undeserving of dignity and autonomy. By “adjudicating the level of acceptable force starting just above the level set by what is seen as normal [aggressive police] behavior,” [FN320] courts have protected police access to men and women, and in particular to some of the most vulnerable people in society, such as minorities, the poor, and the youth. As this article has shown, the Fourth Amendment was designed to “protect the security of one's privacy against arbitrary intrusion by police.” [FN321] Thus, as in the rape context, autonomy should be taken with seriousness and respect in the Fourth Amendment context. Rape law changed when legislatures and courts began to take sexual

autonomy seriously. Individual autonomy should be viewed as the core value of the Fourth Amendment, with dignity of choice viewed as the linchpin of the consent exception. Only then will the consensual search exception be given its proper burial alongside the force and resistance requirements in traditional rape law.

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[FN2]. Susan Estrich, *Rape*, 95 *Yale L. J.* 1087, 1150 (1986).

[FN3]. *United States v. Drayton*, 536 U.S. 194, 212 (2002) (Souter, J., dissenting).

[FN4]. Maclin gives this as one of three possible doctrinal foundations for consent searches since the Court has never enunciated the precise basis for the consent doctrine. Tracey Maclin, *The Good And Bad News About Consent Searches In The Supreme Court*, 39 *McGeorge L. Rev.* 27, 29 (2008). The second theory is “that a consent search, technically speaking, is not a ‘search’ under the Fourth Amendment because the subject has relinquished his or her right to be protected by the amendment.” The third theory is “whether a challenged consent search is valid depends on whether the police conduct is ‘reasonable’ under the Fourth Amendment.”

[FN5]. See *Henry v. United States*, 361 U.S. 98, 102 (1959) (“Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been committed”); see also *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. [citations omitted] We have stated, however, that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” [citations omitted] and that the belief of guilt must be particularized with respect to the person to be searched or seized” (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). Where the intrusion is “sufficiently limited in scope and duration,” such as short motor vehicle stops or pat downs of a suspect's outer clothing, the police need reasonable suspicion rather than probable cause. *Florida v. Royer*, 460 U.S. 491, 500 (1983). Reasonable suspicion requires police to justify the stop or frisks by pointing “to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 34 (1968). However, where a suspect consents to the search, the law neither requires probable cause nor reasonable suspicion to engage in the invasion of privacy. This article uses the term “legitimate purpose” to mean whatever the Fourth Amendment would require absent the consent exception, whether it be a warrant or probable cause or reasonable suspicion.

[FN6]. There are many recognized exceptions to the warrant requirement in the Fourth

Amendment, but the government need not prove that any of these exceptions apply where a subject freely consented to the search or seizure. For example, under the exigent circumstances exception, if police have probable cause to believe they witnessed a traffic infraction, they do not need a warrant to stop the car or arrest the suspect.

[FN7]. Thomas Y. Davies, Denying a Right by Disregarding Doctrine: How *Illinois v. Rodriguez* Demands Consent, Trivializes Fourth Amendment Reasonableness and Exaggerates the Excusability of Police Error, 59 *Tenn. L. Rev.* 1, 28 (1991).

[FN8]. Devon Carbado, (E)Racing the Fourth Amendment, 100 *Mich. L. Rev.* 946, 1004 (2002).

[FN9]. See, e.g., Ric Simmons, Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 *Ind. L. J.* 773 n.9 (2005) (listing critics); Christo Lassiter, Eliminating Consent from the Lexicon of Traffic Stop Interrogation, 27 *Cap. U. L. Rev.* 79, 82 (1998); Davies, *supra* note 7, at 28; Maclin, *supra* note 4, nn.161-62 (listing critics of consent rule). As Tracey Maclin pointed out, about fifty years ago, a law review article criticized the legal distinction between a request and an order when uttered by the police. See Caleb Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 *J. Crim. L. & Criminology* 402, 403 (1960) (cited in Maclin, *supra* note 4, at n.6 (2008)). This was echoed in 1988 by H. Richard Uviller (H. Richard Uviller, *tempered zeal* 81 (1988)) (a police request for consent, “however gently phrased, is likely to be taken by even the toughest citizen as a command. Refusal of requested ‘permission’ is thought by most of us to risk unpleasant, though unknown, consequences.”)

[FN10]. See Nelson Tebbe & Robert Tsai, Constitutional Borrowing, 108 *Mich. L. Rev.* (2009) (theorizing about when it is useful to import doctrine from a different area of constitutional law).

[FN11]. *Crash* (Lions Gate Entertainment 2005).

[FN12]. *Id.* In one of the opening lines of the film, a character states: “We’re always behind this metal and glass. I think we miss that touch so much, that we crash into each other, just so we can feel something.”

[FN13]. A court would find the search nonconsensual because the officer did not phrase the order as a request, and because the passenger resisted the officer’s wishes by fighting back. A traffic stop may evolve into a consensual encounter once the police have completed their tasks. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (holding 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”). The recent Supreme Court case *Arizona v. Johnson*, 129 S.Ct. 781 (2009), held that the government need not prove consent even when the passenger is interviewed on matters having nothing to do with the underlying traffic stop as long as it does not significantly prolong the length of detention. A pat-down of the passenger is generally part of a nonconsensual traffic stop that is justified whenever the officer has reasonable suspicion that a passenger is armed and dangerous. *Id.* at 786-88. Ordering passengers out and patting them down reduces the “risk of harm to both the police and the occupants” of a stopped motor vehicle, by

giving the officers “unquestioned command of the situation.” *Id.* at 786 (citing *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)).

[FN14]. Although the husband lacks a right under the Fourth Amendment and rape law to consent to the touching of his wife, the husband's submission creates an important contrast with his wife's resistance, both for the purposes of the film and for the purpose of understanding why submission should not be construed as consent in rape law or search doctrine.

[FN15]. Diana Lumba, *Deterring Racial Profiling: Can Section 24(2) of the Charter Realize its Potential?*, 22 *Windsor Rev. Legal & Soc. Issues* 79, 92-94 (2006). The film is principally about the modern state of race relations in this country.

[FN16]. One may view the film to suggest that the officer initially believes the wife to be white and he is troubled by what he perceives to be interracial coupling. It is possible that even though she is light, not white, some of the same issues still persist for the racist officer. Racialized policing can still occur even if the officer and suspect are both minorities. See Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 *S.W. L. Rev.* 1091, 1092 (2008) (“[E]ven black officers face substantial peer pressure to treat black suspects more harshly than white ones, generating flawed confirming evidence of black guilt.”).

[FN17]. Recent scholarship explores the hyper-masculine culture in many police departments in this country. See Frank Rudy Cooper, “Who's the Man?": Masculinities Studies, Terry Stops, and Police Training (Suffolk Univ. L. Sch. Research Paper No. 08-23, 2009) (available at <http://ssrn.com/abstract=1257183>); Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 *Stan. L. Rev.* 777 (2000). Cooper has written that the use of stop and frisks to humiliate stems from the culture of masculinity that places “an emphasis on demonstrating the aggressive demeanor known as command presence. A corollary of that attitude is that police officers feel the need to punish disrespect.” Cooper, *supra*, at 24. Racialized policing of black men is interconnected to this hyper-masculinity. The efforts of a male citizen to be treated with dignity, particularly a man of color, might bring out the officer's aggressions and create a “duel of manhood” where the officer has to punish the perceived disrespect to the officer's authority.

[FN18]. See, e.g., Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 *St. John's L. Rev.* 535, 557 (2002).

[FN19]. Once the car is properly stopped, police may order the driver out of the vehicle, even for traffic infractions. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977). The Court has expanded this to passengers as well. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998); *Arizona v. Johnson*, 129 S.Ct. 781, 787 (2009). This case also allowed police to detain and question passengers “into matters unrelated to the justification for the traffic stop ... so long as those inquiries do not measurably extend the duration of the stop.” *Johnson*, 129 S.Ct. at 788. The Court did not define how long a detention of passengers would constitute a measurable extension. Police may search a car after an occupant in that car has been arrested where police have “reason[] to believe” the car contains contraband connected to the arrest. *Arizona v. Gant*,

[FN20]. See *State v. Adams*, 836 So.2d 9, 12 (La. 2003) (“Part of the academy instruction ... includes instruction that officers should seek assistance from a female officer to search a female detainee.”).

[FN21]. Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N.D. L. Rev. 67 (2007).

[FN22]. *Whren v. United States*, 517 U.S. 806, 812 (1996) (an improper motive by a police officer does not invalidate “objectively justifiable behavior under the Fourth Amendment.”).

[FN23]. No excessive force, that is, other than the rape itself.

[FN24]. See *United States v. Drayton*, 536 U.S. 194 (2002). See also *Florida v. Bostick*, 501 U.S. 429, 432 (1991) (the fact that officers never removed their guns from zippered clear plastic pouches that they held in their hands, was a factor in the Court's decision that the defendant was not seized in the constitutional sense).

[FN25]. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[FN26]. Sexual harassment law is based on this premise. Janeille Zorina Matthews, *The Color of Sexual Harassment and the Public/Private Divide*, 4 *Hastings Race & Poverty L. J.* 181, 186 (2006).

[FN27]. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

[FN28]. *Id.* at 562 (Powell, J., concurring in part).

[FN29]. *Id.* at 574 (White, J., dissenting).

[FN30]. *Id.* at 549 (majority opinion), 566 (White, J., dissenting).

[FN31]. *Id.* at 558.

[FN32]. *Id.* at 559.

[FN33]. *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (1968); see also Cooper, *supra* note 17, at 48 n.253.

[FN34]. Marc Miller, *The Black Box*, 94 *Iowa L. Rev.* 125 n.33 (2008).

[FN35]. Ric Simmons, *Not Voluntary But Still Reasonable*, 80 *Ind. L. J.* 773, 824 n.1 (2005). In a footnote, Simmons notes that some estimates are even higher. “One police detective estimated that 98% of warrantless searches were based on the consent exception to the warrant requirement.” See Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, *The Search*

Warrant Process: Preconceptions, Perceptions, and Practices 19 (1984); Paul Sutton, The Fourth Amendment in Action: An Empirical View of the Search Warrant Process, 22 *Crim. L. Bull.* 405, 415 (1986); see also Marcy Strauss, Reconstructing Consent, 92 *J. Crim. L. & Criminology* 211, 272 n.7 (2001) (“There is no national clearinghouse for statistics on the number of times police ask for consent to search. And obviously, the published cases that raise the issue of consent are only the tip of the iceberg. For every consent search that ends up in the books, there are likely hundreds that are never disputed, either because nothing was found or because the defendant plea bargained and thus no evidentiary issues were litigated, or even, in rare circumstances, because the person refused consent to search.”).

[FN36]. See *infra*, Section III.

[FN37]. This article is reacting to both the increase in the use of the consent doctrine to defeat contemporary Fourth Amendment challenges and a change in the definition of consent. As Thomas Y. Davies noted, before *Schneekloth* the Court viewed “consent to a police intrusion exactly as consent is viewed in other areas of the law--as an active form of agreement,” a waiver. See Davies, *Illinois/Rodriguez*, *supra* note 7, at 26.

[FN38]. 412 U.S. 218 (1973).

[FN39]. 536 U.S. 194 (2002).

[FN40]. Susan Estrich, *Rape*, 95 *Yale L. J.* 1087, 1093 (1986).

[FN41]. Stephen J. Schulhofer, *Unwanted Sex* 98-99 (1998).

[FN42]. *People v. Liberta*, 474 N.E.2d 567, 576 (N.Y. 1984) (“the purpose behind the proscriptions was to protect the chastity of women and thus their property value to their fathers or husbands”).

[FN43]. “A classic description of the ‘utmost’ or ‘earnest’ resistance requirement is contained in *People v. Dohring*, 59 N.Y. 374, 382-83 (1874): ‘The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death.’” Anne M. Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1, 14 n.49 (1998).

[FN44]. Anne M. Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1, 12, 14 (1998).

[FN45]. See, e.g., Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 *U. Ill. L. Rev.* 953, 1002 n.293 (1998) (listing scholarly works).

[FN46]. Catharine MacKinnon, *Toward a Feminist Theory of the State* 180 (1991). See also Estrich, *Real Rape* 102-03 (1987); Schulhofer, *supra* note 41, at 100-01.

[FN47]. 001-7 MA Jury Instructions Criminal No. 7-1 (“Consider all of the evidence and

consider whether, based upon that evidence, [the victim] was willing or was compelled to submit.”). In Florida, consent “means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent does not mean the failure by the alleged victim to offer physical resistance to the offender.” JICRIM FL-CLE S-225 (2007).

[FN48]. Florida Standard Jury Instructions in Criminal Cases, Part Two, Chap. 11: Sex Offenses, JICRIM FL-CLE S-225 (2007).

[FN49]. Coercion has been defined in recently enacted Florida legislation as the exploitation of authority or the use of bribes, threats of force, or intimidation to gain cooperation or compliance. See West's F.S.A. § 39.01(7)(b)(1).

[FN50]. See Meredith Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Non-Consensual Sex*, 42 *Wake Forest L. Rev.* 1087, 1104 n.91-94 (2007) (“In some jurisdictions, the element of force has been merged into lack of consent.”). For a detailed discussion of some reforms to rape law, see *id.* at 1095-1108; Stephen J. Schulhofer, *Unwanted Sex* 29-46 (1998); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 *Akron L. Rev.* 957 (2008). “The substantive law is now phasing out the force requirement” *Id.* at 958. “When consent is clearly absent courts will bend over backwards to find force.” *Id.* at 969.

[FN51]. 406 A.2d 624 (Md. Ct. Spec. App. 1979).

[FN52]. *Id.* at 478-79 (“[A]nd then I was really scared ... [i]t was more the look in his eyes.”).

[FN53]. *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (reversing a conviction for rape), *rev'd State v. Rusk*, 424 A.2d 720 (Md. 1981) (reinstating the conviction).

[FN54]. See Michelle J. Anderson, *Reviving Resistance In Rape Law*, 1998 *U. Ill. L. Rev.* 953, 959-60 (“Reformers argued that the requirement that a woman resist a rapist to the utmost should be abolished because it forced a woman to act in a way that increased her injury to prove that she was raped The Rusk majority and dissent opinions reveal the responses of courts to the reformers' strategy.”). Note that the early feminist books on rape were published before Rusk, namely Susan Griffin, *Rape: The All-American Crime* (1971) (published eight years before Rusk was decided) and Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975) (published three years before Rusk was decided). Although the Maryland high court affirmed the rape conviction and held that resistance is not an element based on modern understanding of the crime, some scholars have criticized the court for finding force based on “light choking” rather than holding that no force is needed once he intimidated the victim by taking her keys. See Susan Estrich, *Real Rape* 65 (1987).

[FN55]. Phillip N.S. Rumney, *In Defense of Gender Neutrality Within Rape*, 6 *Seattle J. for Soc. Just.* 481, 483 (2007). See also Gerald Leonard, *Toward a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 *Buff. Crim. L. Rev.* 691, 783 n.326 (2003); Stephen J. Schulhofer, *Unwanted Sex* 15, 88 (1998).

[FN56]. Catharine MacKinnon, *Toward a Feminist Theory of the State* 177-78 (1991).

[FN57]. Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 *Chi.-Kent L. Rev.* 951, 953-54 (2000). See also Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 *Tex. L. Rev.* 109, 114 (1991).

[FN58]. 412 U.S. 218 (1973). The Court claimed it was relying on older cases, citing to *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). See also *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921). For a discussion of the evolution of the consent doctrine, see Tracey Maclin, *The Good and Bad News about Consent Searches in the Supreme Court*, 39 *McGeorge L. Rev.* 27, 36-41 (2008). Maclin points out that “consent search cases have not triggered the Justices' new-found concern that their holdings in Fourth Amendment cases be consistent with the Framers' thinking about the amendment.” *Id.* at 27.

[FN59]. *Schneckloth*, 412 U.S. at 248-49.

[FN60]. See, e.g., *Cal. Jury. Instr.-Crim.* 10.65 (stating that a reasonable and good faith belief of voluntary consent is a defense).

[FN61]. *Schneckloth*, 412 U.S. at 233.

[FN62]. 391 U.S. 543 (1968).

[FN63]. *Id.* at 548-49.

[FN64]. See, e.g., *United States v. Mendenhall*, 466 U.S. 544, 557-58 (1980). The Court determined that a woman consented to accompany some officers to a room for a strip-search of her person based in part because she was “not told that she had to go to the office, but was simply asked if she would accompany the officers.” *Id.* It follows that in the majority's opinion, had she been told she had to go to the office, she would have been acquiescing to authority, and therefore would have been coerced.

[FN65]. 42 U.S.C. § 1983 (2000). See Marc L. Miller & Ronald F. Wright, *Secret Police And The Mysterious Case Of The Missing Tort Claims*, 52 *Buff. L. Rev.* 757, 761 (2004) (“The rarity of successful tort suits gave some courts a reason to shift towards a different remedy for police misconduct, the exclusionary rule.”).

[FN66]. *Schneckloth*, 412 U.S. at 220.

[FN67]. *Id.*

[FN68]. Robin West, *Desperately Seeking a Moralist*, 29 *Harv. J. L. & Gen.* 1, 23 n.60 (2006).

[FN69]. *Schneekloth*, 412 U.S. at 249 (“[W]hile the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.”).

[FN70]. *Id.* at 249.

[FN71]. See *Davies*, *supra* note 7, at 31 (“*Schneekloth* edited ‘waiver’ out of the Court's vocabulary of synonyms for consent to avoid any suggestion that consent required a warning of the right to withhold consent.”).

[FN72]. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004) (LaFare agrees that this is still a waiver).

[FN73]. For a discussion of why a *Miranda*-type waiver will not cure the power imbalance, see *infra*, Section III-C.

[FN74]. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) (holding verbal resistance inadequate to establish force element of rape); *Starr v. State*, 237 N.W. 96, 97 (Wis. 1931) (“[T]o constitute rape, woman must resist to utmost, and voluntary submission to the act of intercourse, though yielded after assault and attempt to accomplish the act by force, renders the act wanting an essential element of crime.”).

[FN75]. 536 U.S. 194 (2002).

[FN76]. The majority framed the question of consent as whether “a reasonable person” would know “that he or she was free to refuse” the search. *Id.* at 206. See discussion *infra* on objective innocent person test.

[FN77]. *Drayton*, 536 U.S. at 197.

[FN78]. Could one say that *Drayton* and his friend “consented” to get more favorable treatment? To say he desired favorable treatment assumes that he thinks the police will respond negatively if he withholds consent. After all, *Drayton* knew that the most favorable treatment would come only if the officers did not search him. To suggest that *Drayton* would get more favorable treatment implies that the police were going to search him anyway, that it was not really a request, but an order. People do get worse treatment if they disobey police orders than if they comply. Similarly, the passenger in *Crash* expected more favorable treatment if she did not resist the pat down, which is why she stopped struggling. In neither case is the desire for more favorable treatment a sign of agreement, but rather it is a sign of capitulation.

[FN79]. *Id.* at 210-11 (Souter, J., dissenting) (“When the bus in question made its scheduled stop in Tallahassee, the passengers were required to disembark while the vehicle was cleaned and refueled. App. 104. When the passengers returned, they gave their tickets to the driver, who kept them and then left himself, after giving three police officers permission to board the bus in his absence. [citation omitted] Although they were not in uniform, the officers displayed badges and

identified themselves as police. One stationed himself in the driver's seat by the door at the front, facing back to observe the passengers. The two others went to the rear, from which they worked their way forward, with one of them speaking to passengers, the other backing him up.”).

[FN80]. *Id.* at 199 (majority opinion). The dissent wrote that “interdiction is not a consensual exercise.” *Id.* at 211 (Souter, J., dissenting).

[FN81]. *Id.* at 200.

[FN82]. *Id.* at 204.

[FN83]. *Id.* at 212 (2002) (Souter, J., dissenting).

[FN84]. *Estrich*, *supra* note 40, at 1089, 1092.

[FN85]. See *Carbado*, *supra* note 8, at 1018; Angela Harris, *Gender, Violence, Race and Criminal Justice*, 52 *Stan. L. Rev.* 777 (2000).

[FN86]. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

[FN87]. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991). The last case to use the subjective test was *United States v. Mendenhall*, 446 U.S. 544 (1990). For a list of cases that explicitly rejected the subjective factors after *Bostick*, see Ric Simmons, *Not “Voluntary” But Still Reasonable*, 80 *Ind. L. J.* 773, 782 n.59 (2005).

[FN88]. *Bostick*, 501 U.S. at 438. The Court claims the innocent person test was already established in earlier cases and cites *Florida v. Royer*, 460 U.S. 491, 519 n.4 (Blackmun, J., dissenting) and *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (“This ‘reasonable person’ standard ... ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”).

[FN89]. *Bostick*, 501 U.S. at 438.

[FN90]. *Id.* (“Clearly, a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant only if the cooperation is voluntary. ‘Consent’ that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse. The question to be decided by the Florida courts on remand is whether *Bostick* chose to permit the search of his luggage.”).

[FN91]. *Id.* at 437-38 (“We do reject, however, *Bostick's* argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs.” *Id.* The majority goes on to quote *Chesternut*, 486 U.S. at 574 (“This ‘reasonable person’ standard ... ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”).

[FN92]. Bostick, 501 U.S. at 439.

[FN93]. Drayton, 536 U.S. at 208 (Souter, J., dissenting).

[FN94]. To have standing under the Fourth Amendment, defendants do not contest that drugs were in fact found on their person for purposes of motions to suppress. Although there are cases where individuals consent to searches where police find evidence that incriminates another, the majority of cases that end up in criminal court involve the alleged consent by non-innocent defendants.

[FN95]. See Simmons, *supra* note 9, at 782.

[FN96]. Drayton, 536 U.S. at 206.

[FN97]. Joshua Dressler, *Understanding Criminal Procedure* 263 (2005).

[FN98]. Drayton, 536 U.S. at 199.

[FN99]. Gerard E. Lynch, *Why Not A Miranda For Searches?*, 5 *Ohio St. J. Crim. L.* 233, 234 (2007). Judge Lynch expresses some misgivings about the fact that he and other judges find in favor of the police when consent is an issue. He notes: "I frequently have to find the facts of police-citizen encounters. This is a difficult task, and in any given case the preponderance of evidence test favors belief in the police versions of these transactions. But even if the police version were more than fifty percent likely to be true in every case, it is not one-hundred percent sure to be true in almost any case, and the aggregate number of errors in our fact-findings must necessarily be significant." *Id.* See also Douglas M. Smith, *Comment, Ohio v. Robinette: Per Se Unreasonable*, 29 *McGeorge L. Rev.* 897, 937 (1998) ("Absent an unlawful claim of authority to search, or some physically coercive conduct by the police, a defendant who answers 'yes' to a request to search by the police is almost surely to be found to have voluntarily consented").

[FN100]. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 *Sup. Ct. Rev.* 153, 172 (2002).

[FN101]. *Id.* at 170.

[FN102]. Susan Caringella, *Addressing Rape Reform in Law and Practice* 3-12 (2008).

[FN103]. In 1982, Professor Dershowitz wrote: "Almost all police lie about whether they violated the Constitution in order to convict guilty defendants." Alan M. Dershowitz, *The Best Defense* xxi (1982). Dershowitz' point of view "is shared by many participants in the criminal justice process." Max Minzner, *Putting Probability Back Into Probable Cause*, 87 *Tex. L. Rev.* 913, 933 (2009) (describing a recent survey of participants in the Chicago criminal justice system regarding law enforcement perjury at suppression hearings and finding that only 25% of prosecutors [and none of the defense attorneys surveyed] believed police never lie in court.). See

also Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037 (1996). See Carbado, *supra* note 8, at 957 n.61 (listing references).

[FN104]. Strauss, *supra* note 35, at 213 (“Establishing viable consent relies on a process that at its worst encourages police perjury, and at its best, distortion. Judges are forced in many ways to either acknowledge the perjury or look the other way.”).

[FN105]. Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 Buff. L. Rev. 1483, 1492 (2007).

[FN106]. *Id.* at 1501-02 nn.39-40.

[FN107]. *Id.* at 1501 (“Under this approach, a request to terminate the encounter makes it consensual, while the absence of such a request also reflects consent.”).

[FN108]. *Id.* at 1483.

[FN109]. *Id.* at 1504.

[FN110]. *Id.* at 1503.

[FN111]. Moreover, where there is no probable cause, an officer may become more suspicious of the person who withholds consent and that added degree of suspicion might be enough to cause an officer to determine that he has probable cause to arrest the individual who withholds consent. By analogy, case law has established that a person may be free to leave an encounter, but if he leaves too quickly in a high crime neighborhood, this provides enough suspicion for an officer to stop and detain the person. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Alternatively, if consent fails, police may redouble their efforts to gather enough information to justify a search based upon reasonable suspicion. This may require a lengthier detention than if the person consented in the first place.

[FN112]. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); see also *Arizona v. Johnson*, 129 S.Ct. 781, 784 (2009) (during a traffic stop, the police were within their authority when they ordered out a passenger and frisked him even when the officer questioned him on a matter unrelated to the traffic stop, and had no ‘cause to believe any occupant of the vehicle is involved in criminal activity.’).

[FN113]. *Virginia v. Moore*, 128 S.Ct. 1598 (2008).

[FN114]. In a survey of drivers in the southern portion of the New Jersey Turnpike done to determine the extent of racial profiling, Maclin notes that a “count of the traffic surveyed for speeding indicated that 98.1% of the vehicles on the road exceeded the speed limit;” thus, potentially 98.1% of the vehicles could have been stopped for speeding and the vehicles' drivers potentially arrested. See Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 347 (citing a letter from Judge Robert E. Francis to Counsel, Re: *State v. Pedro Soto* (Mar. 4,

[FN115]. While this author has heard the term “attitude ticket” in criminal courts, the phrase was first introduced into scholarship by Clark D. Cunningham in *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 *Cornell L. Rev.* 1298, 1320-22 (1992). In that case a black man was arrested in part because he told the police: “You don't have permission to look in my car nor can you look without my consent.” *Id.* at 1323. The judge denied a motion to suppress, and when the government dismissed the case, the judge put the following on the record: “Well, I said on the record from the very beginning that there was no question in my mind that it was an attitude ticket. I'm not saying that that's even improper. The police officers do have a good deal of discretion. We see it every day. We give a man a badge and a gun and a bunch of training and put him out on the street, we have to assume that they have some discretion and give them some discretion to operate. I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it. If the person had behaved in a different manner the ticket never would have happened and I don't find fault with the Prosecutor in bringing it, I don't find fault with the Prosecutor in dismissing it.” *Id.* at 1328-29.

[FN116]. Cooper, *supra* note 17, at 24; Harris, *supra* note 17, at 777.

[FN117]. Cooper, *supra* note 17, at 24.

[FN118]. *Id.* at 19 n.99 (citing Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *The Gender of Desire: Essays on Male Sexuality* 25 (2005)).

[FN119]. For instance, on November 26, 2006, in Queens, New York, one Latino and two African-American men, all unarmed, were shot at a total of fifty times by both plainclothes and uniformed NYPD officers when they attempted to drive away in an SUV. Manny Fernandez, *In Bell Case, Black New Yorkers See Nuances That Temper Rage*, *N.Y. Times*, April 27, 2008, at A1. Sean Bell, an African American man, was fatally shot, and his two friends severely wounded. Two of the five officers, including the officer who fired the first shot, were also African American. Nevertheless, many have suggested that had Bell and his friends been white, the officers would not have shot at them so aggressively. Three of the five officers were charged in the shooting, and all three officers were found not guilty. *Id.*

[FN120]. Cooper, *supra* note 17, at 57-60 n.297 (citing Joyce Jones & Eric L. Smith, *Policing the Police*, 30(11) *Black Enter.* 38 (2000)).

[FN121]. Nadler, *supra* note 100, at 175. See Maclin, *supra* note 4, at n.6. (citing Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry Into the “Consensual” Police-Citizen Encounter* 124 (Oct. 1999) (Ph.D. dissertation, Rutgers University) (on file with *McGeorge Law Review*)) (social scientists generally agree “that when a police officer gives an order, command, or makes a request he expects compliance,” and given the asymmetrical power relationship, a “refusal to consent to a search is a clear challenge to the officer ... If the policeman did not want to search, why would he have asked?”).

[FN122]. Nadler, *supra* note 100, at 177. These findings are similar to empirical data presented by Tracey Maclin from Illya Lichtenberg's dissertation. Maclin writes: "For example, [Lichtenberg's] empirical research revealed that motorists in Ohio consent to searches of their automobiles during traffic stops 'for one primary reason: fear of reprisal if they refused.' [Lichtenberg's] data also revealed that motorists were 'unaware of their legal right to refuse,' believed that 'refusals [to allow searches] are futile,' 'fear[ed] police reprisal or added inconvenience from a refusal,' and '[a]lmost none of the subjects [surveyed] felt that the officer would honor their decision to refuse.' In other words, most motorists believed that 'the search [would] be conducted with or without their consent.'" Maclin, *supra* note 4, at 79.

[FN123]. Nadler, *supra* note 100, at 187-88. See *id.* at 189 ("Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language--part of that burden is carried by the badge and gun.").

[FN124]. *Id.* (citing Jennifer L. Vollbrecht, Michael E. Roloff, & Gaylen D. Paulson, *Coercive Potential and Face Threatening Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 *Int'l J. Conflict Mgmt.* 235, 244 (1997)) (discussing a study that concluded that "those who have authority apparently need not activate coercive potential through their discourse. Their roles are sufficient to do so.").

[FN125]. Nadler, *supra* note 100, at 208 ("From the perspective of the bus passenger to whom the police turn their attention, the police uniform and gun were indeed sources of discomfort, not assurance--just the opposite of the majority's assertion."). Nadler criticizes the majority's decision in *Drayton* that factors such as the presence of badges, uniforms, or guns "should have little weight in the analysis." *Id.* at 177 (citing *Drayton*, 122 S. Ct. at 2112).

[FN126]. See Carbado, *supra* note 8.

[FN127]. *Id.* at 953. Comparing police behavior towards hypothetical groups, Carbado writes that "the black group is likely to be subjected to more extended and probing screening than the white group. Other things being equal, the officer will likely ask the white group fewer questions and his temperament is likely to be less hostile." *Id.* at 982.

[FN128]. *Id.* (citing Christopher A. Darden, *In Contempt* 110 (1996)). For a complementary discussion of race as performance, see Anthony Paul Farley, *The Black Body as Fetish Object*, 76 *Or. L. Rev.* 457, 465 (1997).

[FN129]. Carbado, *supra* note 8, at 1019 (citing Robert L. Johnson & Dr. Steven Simring, *The Race Trap: Smart Strategies For Effective Racial Communication in Business and in Life* 121-22 (2002)). Carbado refers to it as "the racial survival strategy of performing obedience for the police." *Id.* at 954

[FN130]. Carbado, *supra* note 8, at 985 (citing Robert L. Johnson & Dr. Steven Simring, *supra*

note 129, at 127).

[FN131]. Carbado, *supra* note 8, at 1019 (quoting Robert L. Johnson & Dr. Steven Simring, *supra* note 129, at 121-22) (emphasis added).

[FN132]. *Id.* at 958-59, nn.64-65 (citations omitted).

[FN133]. *Id.* at 958.

[FN134]. *Id.* at 956.

[FN135]. See *id.* at 966.

[FN136]. See *id.* at 1017; see also *id.* at 1013 (In order to establish that one is not a criminal, “people of color will have to give up more of their privacy--will have to consent to more intrusive searches--than whites to erase the suspicions an officer may have about their criminality.”).

[FN137]. *Id.* at 985 (“They grow up with racial stories of police abuse-- witnessing them as public spectacles in the media, observing them firsthand in their communities, and experiencing them as daily realities. Put another way, race-based policing is part of black people's collective consciousness.”).

[FN138]. See *id.* at 1030 n.331; David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 *Law & Contemp. Probs.* 71, 92 (2003).

[FN139]. See Nadler, *supra* note 100, at 220 n.242; Melissa Whitley, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, Comment, 49 *B.C. L. Rev.* 263, 264 (2008) (“In April of 2005, the Bureau of Justice Statistics released results from a survey of 80,000 people which indicated that minority drivers were three times more likely to have their vehicles searched following traffic stops than white drivers.”); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 *Law & Contemp. Probs.* 71, 92 (2003) (“[S]eventy-eight percent of all those searched during police stops at the southern end of the New Jersey Turnpike were blacks and Latinos” in the year 2000.).

[FN140]. Cooper, *supra* note 17, at 13. Cooper calls these masculinity contests a “[f]ace-off between men where one party is able to bolster his masculine self-esteem by dominating the other.” *Id.*

[FN141]. See Carbado, *supra* note 8, at 966.

[FN142]. See *id.* at 1014.

[FN143]. *Id.* at 974.

[FN144]. Id.

[FN145]. Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes To Convicting The Innocent: The Informants Example*, 37 Sw. U. L. Rev. 1091, 1129 nn.268-69 (2008) (“Police and judges are subject to the same subconscious biases as the rest of us.”).

[FN146]. Tracy Jan, *Racial Talk Swirls with Gates Arrest*, Boston Globe, July 21, 2009, at A1.

[FN147]. President Barack Obama, Press Conference, July 22, 2009. President Obama said that police in Cambridge, Massachusetts, ‘acted stupidly’ in arresting a prominent black Harvard professor last week after a confrontation at the man's home.

[FN148]. James Crowley, *Incident Report from Henry Louis Gates, Professor, Harvard University* (July 16, 2009), available at <http://www.amnation.com/vfr/Police%20report%20on%20Gates%20arrest.PDF>.

[FN149]. Id. at 2.

[FN150]. Id. (“I became aware that Off. Carlos Figueroa was standing behind me.”).

[FN151]. Id.; Peter Schworm & John Ellement, *Gates Tapes Show Confrontation, Don't Answer Question of Blame*, Boston Globe, July 28, 2009, at A1 (“After a week of controversy over the racially charged episode, which has dominated the national conversation and cast President Obama into a fierce debate on race relations, the more than four minutes of audio provide no clear vindication for either side. The recordings, edited to cull out unrelated radio calls, were made as part of regular department procedures in which 911 calls and conversations between officers and the dispatch center are taped around the clock. Brief snippets of a man's voice can be heard in the background in three separate radio transmissions. What he says is difficult to make out, but he is speaking loudly and emphatically. At one point he appears to say, ‘I'm outraged.’”).

[FN152]. Crowley, *supra* note 148, at 2 (emphasis added).

[FN153]. See *United States v. Pasqualino*, 768 F. Supp. 13, 15 (D.Mass. 1991) (citing *Commonwealth v. A Juvenile*, 368 Mass. 580, 583 (1975)) (“an individual may not constitutionally be arrested for being an ‘idle and disorderly person’ solely on the basis of offensive and abusive language”; “statute may only reach conduct ‘which involves no lawful exercise of a First Amendment right.’”). See *Commonwealth v. LePore*, 40 Mass. App. Ct. 543, 546 (App. Ct. 1996), review denied 423 Mass. 1104 (1996) (“To be disorderly, within sense of statute proscribing disorderly conduct, conduct must disturb through acts other than speech; neither a provocative nor a foul mouth transgresses statute.”).

[FN154]. See Joan Vennoch, *Machismo and the Gates incident*, Boston Globe, July 23, 2009, at A17.

[FN155]. President Barack Obama, Press Conference, July 22, 2009 (“But I think it's fair to say, number one, any of us would be pretty angry; number two, that the Cambridge police acted stupidly in arresting somebody when there was already proof that they were in their own home; and, number three ... that there's a long history in this country of African Americans and Latinos being stopped by law enforcement disproportionately.”).

[FN156]. This language comes from the Supreme Court. Recently, it was cited with approval by Justice Ginsburg in *Arizona v. Johnson*, 129 S. Ct. at 786. “The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized ... if the officers routinely exercise unquestioned command of the situation.” *Maryland v. Wilson*, 519 U.S. 408, 414 (1997) (quoting *Michigan v. Summers*, 452 U.S. 692 (1981)); see *California v. Brendlin*, 551 U.S. 248, 258 (2007). Attitude tickets generally may be explained by police policy in controlling the streets and controlling the encounters. While white men and women may receive attitude tickets, the cultural understanding of defiance is necessarily interpreted within the prism of race.

[FN157]. Transcript: 911 Call and Police Radio Dispatches in the Arrest of Henry Louis Gates Jr., ABC News, July 27, 2009, available at <http://abcnews.go.com/Politics/story?id=8185376&page=1>. See also Abby Goodnough, 911 Tape Raises Questions in Gates Case, *N.Y. Times*, July 27, 2009.

[FN158]. David Abel, Caller in Gates Case Would Act Again, *Boston Globe*, July 30, 2009, at A1.

[FN159]. See *Terry v. Ohio*, 392 U.S. 1 (1968) (recognizing the right of individuals to walk away).

[FN160]. Interestingly, the officer told the press that he gave more leeway to Gates than others before arresting him, which seems to connote that the officer is more likely to punish poor attitudes among the younger and less educated. See Joan Vennochi, *Machismo and the Gates Incident*, *Boston Globe*, July 23, 2009, at A17.

[FN161]. Harry G. Levine & Deborah Peterson Small, *The Marijuana Arrest Crusade in New York City: Racial Bias in Police Policy 1997-2007*, available at <http://www.nyclu.org/node/1736>.

[FN162]. *Id.*

[FN163]. See I. Bennett Capers, *Policing, Race, and Place*, 44 *Harv. C.R.-C.L. L. Rev.* 43 (2009) (discussing the ramifications of racial policing on communities of color).

[FN164]. See Nadler, *supra* note 100, at 177.

[FN165]. Raymond, *supra* note 105, at 1504.

[FN166]. *Id.* at 1483.

[FN167]. Civilians might not know the type of training the officers received. For example, are the officers trained in community policing methodology or in paramilitary-style policing? “In many cities, moreover, the police at least occasionally use paramilitary squads to patrol ‘high-crime’ neighborhoods—which of course is another way to say poor, minority neighborhoods.” David Alan Sklansky, *Is The Exclusionary Rule Obsolete?* 5 Ohio St. J. Crim. L. 567, 576 n.47 (1997). For a list of books on the militarization of the American police, see *id.*; Jessica M. Weitzman, *They Won’t Come Knocking No More: Hudson v. Michigan and the Demise of the Knock-And-Announce Rule*, Note, 73 Brook. L. Rev. 1210 nn.13, 130 (2008).

[FN168]. Carbado, *supra* note 8, at 985 n.161, 1014. See generally Andrew E. Taslitz, *Stories Of Fourth Amendment Disrespect: From Elian To the Internment*, 70 Fordham L. Rev. 2257, 2271 (2002).

[FN169]. See, e.g., Adrian Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court's Conception of Voluntary Consent*, 1997 U. Ill. L. Rev. 215, 247-48; Robert Ward, *Consensual Searches, The Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 Touro L. Rev. 451, 477 (1999); Carbado, *supra* note 8, at 1026-30; John M. Burkoff, *Citizen Ignorance, Search Me?*, 39 Tex. Tech. L. Rev. 1109 (2007); Gerard E. Lynch, *Why Not A Miranda For Searches?*, 5 Ohio St. J. Crim. L. 233 (2007).

[FN170]. Nadler, *supra* note 100, at 165 (2002) (“In some respects, the Court’s explicit refusal to require a Miranda-type warning in Fourth Amendment situations is indeed significant, especially after *Dickerson v. United States*. Nevertheless, I will argue that Drayton’s holding regarding police warnings is a red herring that only serves to distract attention from the real issue: the fiction of consensual encounters and consensual searches.”).

[FN171]. *United States v. Mendenhall*, 446 U.S. 544, 547-48 (1980).

[FN172]. See, e.g., Steven Zeidman, *To Plead Or Not To Plead: Effective Assistance And Client-Centered Counseling*, 39 B.C. L. Rev. 841, 842 (1998) (discussing a case where defense counsel explained on the record “that his practice was to advise clients of the factual strength of the state’s case in light of applicable law and then to allow them to make their own decisions as to how to plead to the extent they were capable” (quoting *Trahan v. Estelle*, 544 F.2d 1305, 1319 (5th Cir. 1977) (Goldberg, J., concurring))).

[FN173]. Judge makes sure the waiver is knowing and voluntary. See Fed. R. Crim. Pro. 11.

[FN174]. See Cooper, *supra* note 17, at 47-48.

[FN175]. See *id.* at 58.

[FN176]. 392 U.S. 1 (1968).

[FN177]. Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect,”* 56 Okla. L.

[FN178]. Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 387 (1998).

[FN179]. See Carbado, *supra* note 8, at 985 n.161.

[FN180]. John M. Burkoff, *Citizen Ignorance, Search Me?*, 39 *Tex. Tech. L. Rev.* 1109, 1140 (2007) (“Waivers of Miranda rights are commonplace.”).

[FN181]. See Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 *Tex. Tech. L. Rev.* 1239 (2007); Christopher Slobogin, *Lying and Confessing*, 39 *Tex. Tech. L. Rev.* 1275 (2007); Talia Fisher, *The Confessional Penalty*, 30 *Cardozo L. Rev.* 871 (2008).

[FN182]. For a discussion on how people actually understand the Miranda warning, see Mosteller, *supra* note 181.

[FN183]. See *Drayton*, 536 U.S. at 200, 205; see also *Bostick*, 501 U.S. at 435-36.

[FN184]. See *Drayton*, 536 U.S. at 195; see also *Bostick*, 501 U.S. 429 (gun in plastic pouch held at waist level not threatening).

[FN185]. *Drayton*, 536 U.S. at 195.

[FN186]. See Nadler, *supra* note 100, at 189. See Raymond, *supra* note 105, at 1503 n.43 (stating that some police brutality cases begin because a civilian refuses to comply with an officer's request).

[FN187]. See Nadler, *supra* note 100, at 156. Similarly, Devon Carbado concluded that “the Court's [consent search] analysis is not really about voluntariness; it is about creating the fiction of consent to legitimize searches for which the government has no prior justification.” See Carbado, *supra* note 8, at 1023.

[FN188]. George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 *Miss. L.J.* 525, 541 (2003).

[FN189]. See Simmons, *supra* note 9, at 775; see, e.g., David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 20 (1999) (arguing that consent searches and “free to leave” cases do not recognize the extent to which police encounters always reflect a show of authority).

[FN190]. See Simmons, *supra* note 9, at 775. Simmons writes that “courts must acknowledge and accept, as they do in the confessions context, that some amount of compulsion will always exist in this encounter, and determine the acceptable level of compulsion, which ought to be more than is allowed in the confession context.” *Id.* at 823.

[FN191]. *Id.* at 774 (“The idea that these defendants [in Drayton] acted voluntarily is at once absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence.”).

[FN192]. *Drayton*, 536 U.S. at 207.

[FN193]. *Id.*

[FN194]. George Orwell, *Politics and the English Language* (1946), available at http://www.george-orwell.org/Politics_and_the_English_Language/0.html.

[FN195]. *Id.* (political prose was formed “to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind”).

[FN196]. George Orwell, *Animal Farm* (1945).

[FN197]. *Id.* at 148.

[FN198]. *The American Heritage Dictionary of the English Language* (4th ed. 2006). Consent also arises in many other contexts besides rape and searches, such as contract law. Those are fruitful areas for further comparison.

[FN199]. David Eddings, *Guardians of the West* 163 (1987).

[FN200]. See *Lynch*, *supra* note 99.

[FN201]. *Schneckloth*, 412 U.S. at 227.

[FN202]. See *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Dunaway v. New York*, 442 U.S. 200 (1979); but see *United States v. Mendenhall*, 446 U.S. 544, 566-67 (1980) (dissent argues that facts in that case show only acquiescence to authority).

[FN203]. *Drayton*, 536 U.S. at 207.

[FN204]. *Id.*

[FN205]. Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 *Chi.-Kent L. Rev.* 359, 374-80 (1993).

[FN206]. Susan Estrich, *Rape*, 95 *Yale L. J.* 1087, 1092 (1986).

[FN207]. *Id.* at 1094. See also Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 87 (1987).

[FN208]. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward*

[FN209]. *Id.* at 652.

[FN210]. *Id.*

[FN211]. *Id.* at 650.

[FN212]. *Id.* at 652.

[FN213]. *Id.*; see also Maclin, *supra* note 114, at 372-73 (“Instead, the Court appears to focus on whether a challenged police intrusion is rational from a police perspective.”).

[FN214]. MacKinnon, *supra* note 208.

[FN215]. *Id.*

[FN216]. See Simmons, *supra* note 9.

[FN217]. Joshua Dressler, *Understanding Criminal Procedure* 263 (2002).

[FN218]. Drayton, 536 U.S. at 212 (Souter, J., dissenting) (“[T]hey would prefer ‘cooperation’ but would not let the lack of it stand in their way ... there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied.”).

[FN219]. Estrich, *supra* note 40, at 1126 (comparing to robbery).

[FN220]. MacKinnon, *supra* note 208, at 649.

[FN221]. See Simmons, *supra* note 9, at 782.

[FN222]. See Carbado, *supra* note 9, at 968-69.

[FN223]. Generally, if the police violate the Fourth Amendment before the alleged consent occurs, courts will not allow the search. This focus on police misbehavior in determining coercion is connected to the normative aspect of search and seizure's *de facto* force requirement. See *Bostick*, 501 U.S. at 433.

[FN224]. See, e.g., *United States v. Jaquez*, 421 F.3d 338, 342 (5th Cir. 2005) (citing *United States v. Chavez-Villareal*, 3 F.3d 124, 128 (5th Cir. 1993)) (consent can sometimes cure the underlying taint; courts consider three factors: “(1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct.”).

[FN225]. See MacKinnon, *supra* note 208, at 648.

[FN226]. Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study Of The Drug War, Racial Profiling And Arvizu*, 47 *Vill. L. Rev.* 851 (2002).

[FN227]. See MacKinnon, *supra* note 208.

[FN228]. *Id.* at 650 (emphasis added).

[FN229]. Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 *Vand. L. R.* 1321, 1361-63 (2005) (listing articles that criticize MacKinnon's view); Schulhofer, *supra* note 41, at 82-83.

[FN230]. Schulhofer, *supra* note 41, at 82-83.

[FN231]. *Id.*

[FN232]. Individuals are taught as children to obey authority figures and this cultural tradition is reinforced in schools. See Barrio, *supra* note 169, at 236.

[FN233]. MacKinnon, *supra* note 208, at 650. See Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 *Hastings Womens's L. J.* 37, 49, 60 (2004) (discussing MacKinnon and arguing that in consent searches, courts “should explicitly examine whether an individual was less powerful than the police in the specific case, and whether the police exploited or benefited” from their power).

[FN234]. MacKinnon, *supra* note 208, at 650.

[FN235]. See generally Carbado, *supra* note 8, at 946-67. “People of color are socialized into engaging in particular kinds of performances for the police.” *Id.* at 967. “Should a police officer ask a Latino for permission to search his belongings, pressure exists for that person to say yes.” *Id.* at 971-72.

[FN236]. MacKinnon, *supra* note 208, at 650.

[FN237]. *Schneckloth*, 412 U.S. at 248-49.

[FN238]. *Ohio v. Robinette*, 519 U.S. 33 (1996).

[FN239]. *Id.* at 39-40.

[FN240]. MacKinnon, *supra* note 208.

[FN241]. *Id.*

[FN242]. H. Richard Uviller, *tempered zeal* 81 (1988) (emphasis added) (quoted in *Maclin*,

supra note 4, at 28).

[FN243]. See Maclin, supra note 4.

[FN244]. See Raymond, supra note 105, at 1483.

[FN245]. For example, the District of Columbia, D.C. Code § 22-405(b), makes it a crime punishable for up to 180 days for anyone to “assault [], resist[], oppose[], impede[], intimidate[], or interfere[] with a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties.” In *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177 (2004), the Court upheld the arrest of a man for failing to identify himself when police approached him and repeatedly asked him to. When police have reasonable suspicion to believe that an individual is about to engage in a crime or has engaged in a crime, police may request identification and arrest him or her for invoking his right to remain silent.

[FN246]. *Schneckloth*, 412 U.S. at 227-28.

[FN247]. Carrie Johnson, Panel Sets Guidelines for Fighting Prison Rape, *Wash. Post*, June 23, 2009, at A4 (“Political protesters, people accused of driving under the influence of alcohol and substance abusers have shared harrowing incidents of rape while in custody, sometimes while spending only one night behind bars.”).

[FN248]. See Raymond, supra note 105, at 1503-04 nn.43-44 (“There are certainly police brutality cases in which the triggering incident was the victim's failure to obey police orders, even though police had no reasonable suspicion and therefore no legal basis to compel compliance.”).

[FN249]. See David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 *Ind. L.J.* 659, 677 (1994) (“The unfortunate fact is that Terry and its progeny have resulted in stops and frisks of residents of inner cities--primarily poor persons, African Americans, and Hispanic Americans--far out of proportion to their numbers, and often without justification.”). Harris writes that “African Americans, Hispanic Americans, and poor people are likely to find themselves in such high crime areas, simply because they live and work there.” *Id.* at 681. Compare I. Bennett Capers, Policing, Race, and Place, 44 *Harv. C.R.-C.L. L. Rev.* 43, 65-66 (2009) (“Who is scrutinized, who is stopped, who is questioned, and who is frisked is too often based on ‘racial incongruity,’ --the presence of a minority in a predominantly non-minority neighborhood, or the presence of a non-minority in a predominantly minority neighborhood.”).

[FN250]. See Harris, supra note 85, at 796-98 (hypermasculine policing in a culture of honor leads to police brutality, mostly against men of color).

[FN251]. See generally Cooper, supra note 17.

[FN252]. MacKinnon, supra note 208 (*italics added*).

[FN253]. Susan Estrich, Rape, 95 Yale L. J. 1087, 1122 (1986).

[FN254]. Id. at 1092.

[FN255]. Id. at 1107.

[FN256]. Id. at 1105.

[FN257]. Id. at 1111.

[FN258]. Id. at 1092.

[FN259]. Id. at 1111.

[FN260]. Id. at 1095 (“But while the focus is on the female victim, the judgment of her actions is entirely male.”).

[FN261]. Id. (“But most of the time, force has been defined according to the woman's will to resist, judged as if she could and should fight like a man.”).

[FN262]. Id. at 1118.

[FN263]. Id. at 1114.

[FN264]. Drayton, 536 U.S. at 199 (majority opinion). The dissent wrote that “interdiction is not a consensual exercise.” Id. at 211 (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.).

[FN265]. Estrich, *supra* note 253, at 1114.

[FN266]. Id. at 1095.

[FN267]. Id. at 1118 n.88.

[FN268]. Id. at 1095.

[FN269]. This would do away with the consent search exception entirely and force police to obtain warrants or only investigate when they had sufficient suspicion for doing so.

[FN270]. Schneckloth, 412 U.S. at 227 (1973) (“[A] search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”). In addition, the “Court has ... acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws” where police lack reasonable suspicion for a non-consensual encounter. Id. at 225. “Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the

security of all would be diminished.” *Id.* (citing *Haynes v. Washington*, 373 US 503, 515 (1963)).

[FN271]. *Estrich*, *supra* note 253, at 1118 n.88.

[FN272]. The fact that Drayton and his friend know that the police would not have allowed them to say no without repercussions makes the blame-the-victim attitude even worse. Just as the rape victims are sometimes told that the court believed she could have done more to resist without any harm to her person, even where she felt she was in danger.

[FN273]. *MacKinnon*, *supra* note 208 (criticizing rape law for dividing women into categories, with some types of women permitted to withhold consent and others not).

[FN274]. Anne M. Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1 (1998).

[FN275]. Note that Coughlin does not mention sodomy.

[FN276]. Coughlin, *supra* note 274, at 37.

[FN277]. See *id.* at 31-32.

[FN278]. Michelle J. Anderson, *Reviving Resistance In Rape Law*, 1998 *U. Ill. L. Rev.* 953, 996-97.

[FN279]. See *Rusk v. State*, 406 A.2d. 624, 635 n.15 (Md. Ct. Spec. App. 1979), *rev'd* 424 A.2d 720 (Md. 1981) (Wilner, J., dissenting) (“Extensive research into thousands of rape cases indicates that attempts at self defense, such as screaming, kicking, scratching and use of tear gas devices and other weapons, usually have provoked the rapist into inflicting severe bodily harm on the victim.”). The dissent notes that police warn rape victims not to resist their attacker: “You should not immediately try to fight back. Chances are, your attacker has the advantage.” *Id.* at 635.

[FN280]. Coughlin also addresses all the potential defenses to a criminal charge and their analogies. For example, a person charged with robbery who engaged in the actus reus of the crime might allege that she lacked the mens rea for the charge, that she lacked that volitional aspect of actus reus, or that she was acting under duress. Coughlin, *Sex/Guilt*, *supra* note 274, at 48-49.

[FN281]. *Id.* at 37-38.

[FN282]. *Id.* at 35.

[FN283]. *Id.* at 32.

[FN284]. *Id.*

[FN285]. See, eg., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 *Wm. & Mary L. Rev.* 197, 236-39 (1993); Donald Dripps, *Living with Leon*, 95 *Yale L.J.* 906 (1986) (discussing the advent of the good faith exception to Fourth Amendment violations in *United States v. Leon*, 468 U.S. 897 (1984) (“For two decades the Court refused to recognize any such exception, reasoning that if “subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be “secure in their persons, houses, papers, and effects,' only in the discretion of the police.' Leon's departure from this position is explicable only in the context of growing judicial discontent with the exclusionary rule.”) (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964))).

[FN286]. Coughlin, *supra* note 274, at 26 (“For my purposes, it is sufficient here to remark the durability of the official prohibition of nonmarital intercourse and, more importantly, to notice that it was among the earliest offenses articulated by lawmakers in this country and that, in some eras and in some regions, the prohibition was vigorously enforced against both men and women.”).

[FN287]. *United States v. Drayton*, 231 F.3d 787, 788 (11th Cir. 2000) (reversing conviction because there was no valid basis for a search once consent was not proved to be free from coercion), *rev'd* 536 U.S. 194 (2002) (ruling that facts supported trial judge's determination that defendant consented to the search, so the court need not suppress the evidence).

[FN288]. See *Weeks v. United States*, 232 U.S. 383 (1914) (establishing suppression as part of Fourth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961).

[FN289]. Whether or not the fearful woman must behave like a reasonable woman when she submits to unarticulated coercion is a different question. Susan Estrich makes the argument that the reasonableness question should be switched to a question of whether or not the criminal defendant made a good faith mistake. In this way, consent continues to be a subjective question but men are protected by traditional mens rea requirements. See Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1097 (1986). Fear that police might charge a rape victim with a crime if she does not assent to sex would constitute coercion that negates consent in this expanded definition of coercion. Even an unspoken threat of arrest should count so that women who have sex with police officers on duty would all have the ability to bring a rape charge even if they submitted to overtures by the officers. This is a topic to be pursued once the search doctrine is changed.

[FN290]. See Raymond, *supra* note 105.

[FN291]. An honest recognition of coercion would spell the end of the consent exception in almost all situations other than third party consent.

[FN292]. MacKinnon, *supra* note 208, at 649.

[FN293]. 532 U.S. 67 (2001).

[FN294]. Andrew Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 Duke J. Gender L. & Pol'y 1, 40 (2002).

[FN295]. The knowing waiver was a thin reed to base the decision, for since Ferguson, some police departments are setting out to craft such waivers. Instead, the Court should have recognized that the situation of the women was inherently coercive.

[FN296]. Taslitz, *supra* note 294, at 40 (“Feminist theory on the meaning of ‘consent’ in sexual assault and sexual harassment cases often reflects an understanding of consent that is strikingly similar to that embodied in the Ferguson majority’s opinion on the consent-to-search doctrine under the Fourth Amendment.”).

[FN297]. Raymond, *supra* note 105, at 151 (“Under this approach, a request to terminate the encounter makes it consensual, while the absence of such a request also reflects consent.”).

[FN298]. See Carbado, *supra* note 8, at 970.

[FN299]. See *id.* at 972.

[FN300]. Not all feminists advocated a subjective approach to rape law. See Schulhofer, *supra* note 41, at 31 (“[W]orried that statutes making consent a formal issue at trial would focus attention on the dress, behavior, and prior sexual experiences of the victim ... nearly all the feminist reformers of the 1970’s concluded that the best course was to eliminate from the statutes all reference to the victim’s consent and to focus instead on the conduct of the assailant.”).

[FN301]. Carbado, *supra* note 8, at 1000-01, 1003.

[FN302]. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459 (2010).

[FN303]. In addition, case law outside the consent doctrine credits the Fourth Amendment with protecting individual privacy even beyond one’s person or property. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

[FN304]. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

[FN305]. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1021 (1995).

[FN306]. *Id.*

[FN307]. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 Colum. L. Rev. 1456, 1464 (1996).

[FN308]. Capers, *supra* note 163, at 73-74.

[FN309]. See Davies, *supra* note 7, at 28.

[FN310]. *Schneckloth v. Bustamonte*, 412 U.S. 218, 283 (1973). Justice Marshall went on to write, “Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.” *Id.* at 283 (Marshall, J., dissenting). Carbado wrote, “Central to the Supreme Court's Fourth Amendment consent jurisprudence is the notion that ... people should be free to decide whether and to what extent to subject themselves to governmental intrusions.” Carbado, *supra* note 8, at 1004.

[FN311]. *United States v. Drayton*, 536 U.S. 194, 207 (“In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own.... It reinforces the rule of law for the citizen to advise the police of his or her wishes.”).

[FN312]. *Simmons*, *supra* note 9.

[FN313]. See, e.g., John-Robert Skrabanek, *Apparent Authority in Computer Searches: Sidestepping the Fourth Amendment*, Comment, 97 Ky. L.J. 721, 723-24 (2008-2009); S. Matthew Cook, *Third Party Consent Under the United States and Utah Constitutions: Should Utah Adopt the Federal Standard?*, 1999 BYU L. Rev. 381, 389 (1999) (“By the mid-1970s the Court finally articulated the modern test to determine the validity of third-party consent. The test focuses on whether the third party and the defendant share common authority over the property to be searched.”). Then in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), “the Supreme Court expanded the third-party consent doctrine by holding that a third party can give effective consent even though the third party has no actual authority to give consent.” Cook, *supra*, at 382.

[FN314]. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

[FN315]. Robert C. Power, *Changing Expectations Of Privacy And The Fourth Amendment*, 16 Widener L.J. 43, 55-58 (2006).

[FN316]. See Maclin, *supra* note 4; Davies, *supra* note 7.

[FN317]. Civilians often view police requests for consent as polite orders. Sometimes courts distinguish between defendants who say “yes” to the request to search and those who are silent, but in the seminal case of *Drayton*, for example, silent submission was treated as consent. See *United States v. Drayton*, 536 U.S. 194 (2002).

[FN318]. MacKinnon, *supra* note 208, at 649.

[FN319]. *Drayton*, 536 U.S. at 207.

[FN320]. MacKinnon, *supra* note 208, at 649.

[FN321]. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

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