CONSENT VS ACQUIESCENCE: HOW FEMINIST THEORY SHEDS LIGHT ON THE ABUSE OF THE CONSENT DOCTRINE IN SEARCH AND SEIZURE LAW
Josephine Ross

There is a great deal of important feminist theory examining the concept of consent in sexual assault cases. This area of scholarship serves to challenge the status quo and has sometimes impacted the law to make it fairer and less onerous for victims of assault. While the prosecution of sexual assault continues to create difficulties for those facing consent defenses, the difficulties are not based on a lack of feminist understanding or feminist theory. It is time to inject this scholarship into the debate over the meaning of consent in the context of search and seizure.

The consent to search doctrine allows the government to by-pass Fourth Amendment rights by claiming that the individual consented to the invasion of her privacy. As with sexual assault cases, there is usually a factual disagreement over whether the individual was acquiescing to behavior based on a power imbalance or whether there was true consent given for the intrusion. As with rape prosecutions in the middle of the twentieth century, fact-finders (judges) tend to read consent simply because the woman in question did not try to run or fight back, ignoring the power imbalance between the police and the individual. Consent has become the primary method for police to justify searches of individuals on the street, in cars, in buses and in airports.

In the film “Monster,” there’s a scene where the protagonist is trying to leave prostitution and get an office job when a police officer confronts her, intimates that he could have her arrested unless she goes with him for a quick sexual encounter. The film is based on the life of Aileen Wuornos, a woman executed in Florida for murdering several men. Naturally, Wuornos, played by Charlize Theron, goes with the officer and performs the sexual act requested. Was the police officer guilty of sexual assault or did Wuornos consent? I argue that the law should view the concept of consent as distinct and alien from acquiescence to someone with the power to detain or arrest. Now change the facts a little. Instead of looking for sex, the officer asks to search Wuornos’ bag, intimating that otherwise she could be arrested. Was the search consensual? Should there be a difference between acquiescing to a violation of one’s privacy (the Fourth Amendment) and acquiescing to an intimate encounter (sexual assault)? Should the court consider the tone of voice used by the police officer in either situation? My answer is consistent. As Justice Souter wrote in a dissent, “A police officer who is certain to get his way has no need to shout.” US v. Drayton, 536 US 194, 212 (2002). As with sexual assault, the law should not confuse acquiescence with consent where one party has the power to detain or arrest another.

There is a hidden cost to the consent doctrine in the Fourth Amendment. Individuals come to court feeling like they suffered a personal violation only to be informed that the intrusion was their own fault. Literally, the consent doctrine informs hundreds of individual criminal defendants that they asked for it. Feminist theory has much to tell us about the court system’s use of fiction to maintain power imbalances.