SUBMISSION IS NOT CONSENT:
UNIFYING SEARCH & SEIZURE WITH THE LAW OF SEXUAL ASSAULT

- “[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) i

- “A police officer who is certain to get his way has no need to shout.” ii (Justice Souter, criticizing the majority’s reinterpretation of the consent exception to the Fourth Amendment)

INTRODUCTION

It is generally agreed that feminism’s most dramatic contributions to criminal law, if perhaps to legal culture in general, has been the effort to transform the law of rape. 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 the Fourth Amendment rules of search and seizure.

Consent is a concept of particular concern both to rape law and to search and seizure. Under rape law, if a person voluntarily consents to sexual conduct, then there is no criminal offense. For search and seizure law, where an individual voluntarily consents to an invasion of his body or privacy rights, the consent exception allows the government to by-pass Fourth Amendment rights. Police do not have to prove that they had a good reason to detain someone or search them as long as they can convince a judge that the individual gave consent. As with sexual assault cases, there is usually a factual disagreement over whether the individual was consenting or merely submitting to police
authority when they allowed the officer to search them. Both areas of law define coercion as the opposite of consent. However, the Supreme Court has interpreted the consent doctrine for search and seizure in a way that mocks the word consent.

There are benefits from cross-referencing the two doctrines. Fourth Amendment law would benefit greatly from feminist analysis of the consent doctrine that so far has only addressed consent within the law of sexual assault. The law of sexual assault should be clearer in instances where the person committing the rape is a police officer or someone in a position of power and authority. For both doctrines, consent should not be confused with acquiescing to authority. By definition, acquiescing to authority should vitiate consent.

Consent has become the primary method for police to justify searches of individuals on the street, in cars, in buses and in airports. There has been near universal criticism of the Supreme Court’s decisions on the Fourth Amendment consent exception. Feminist critiques of traditional rape to the current consent-to-search exception provides a new and I think useful way to illuminate the Court’s Orwellian conclusions.

At the same time that feminism was transforming the aim of rape law into protecting female autonomy, the consent to search exception was going in the opposite direction. The consent exception in the law of search and seizure was being transformed into a doctrine that harkens back to common law rape requirements. As with rape prosecutions in the middle of the twentieth century, courts appear blind to the power imbalance between the parties. The Court has essentially read in a force requirement into the consent exception, so that judges will decide an individual consented if the police used no extra amount of force, and where the individual did not verbally resist an officer’s commands.

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. Commentators have noted how rape victims often feel victimized a second time by the court system.iii Much of this criticism is focused towards date rapes where defense counsel attempts to prove that the victim actually consented.iv Literally, the consent doctrine informs thousands 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.

WHY UNIFY TWO DIFFERENT CONSENT DOCTRINES

A. The film Crash

There is a scene in Crash that provides a perfect intersection of Fourth Amendment and sexual assault law. In particular, the film helps us consider the concept of nonconsent when faced with a request by someone in authority. 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. The driver is a black man coming home at night with his lighter-skinned wife, played by Thandie Newton. The couple appear well-off, drive a nice car 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 officer (played by Matt Dillon) begins to touch the passenger (played by Thandie Newton) as she stands with her hands on the hood of the car dressed in a shimmering dress and heels, in a pat down that travels down her leg and then moves up under her dress. This scene brings together the law of rape with the law of search and seizure. Not only should this be classified as sexual abuse or rape, it should also be understood as non-consensual in the 4th Amendment sense, long before the humiliation took on a decidedly sexual bent.

Americans have inherited the right to be free from government invasions of their privacy unless the government has a good reason to do so. The film Crash is a jumping off point for whether there should be 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. Its intrusiveness did not suddenly begin at the time the officer’s hand went up her skirts. Just as the passenger in Crash...
should have a right to control who puts her 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, feminists can 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.

Newton’s character in *Crash* is not subtle in her refusal of the officer’s advances. 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 this resistance that arguably causes the officer to treat her as he does, teaching both her and her husband who has the power. Defense attorneys speak of their clients receiving an “attitude ticket” meaning that the police used their discretion to arrest and charge because the officers wanted to teach their client a lesson about respect. By portraying the cost of resistance, the film illustrates the broad discretion enjoyed by police. This discretion is central to understanding why civilians generally comply with police requests.

The passenger’s outward resistance to the officer makes good drama, but it avoids the reality that many civilians will not show outward resistance to a police officer even when they subjectively wish the officer would stop imposing his will on them. A slight alteration in the film facts will bring submitting women and men into sharper focus as a major problem in both rape law and the Fourth Amendment consent doctrine. Many sober women do not resist or argue with police about exiting a car or being searched. Even if the passenger in *Crash* had been fearful and had gone along with what the police officer wanted in order to protect her husband from arrest, this should still constitute a nonconsensual touching. Had the passenger never said no nor objected out loud, she would still be subjectively withholding her consent, just as robbery victims often hand over their money without verbal opposition during a holdup. An example of coerced submission is depicted by the husband in *Crash*, who dares not tell the officer to stop even though the officer pretends to give him the power to stop the abuse. Viewers understand that this is not because the husband wishes the officer to continue. In fact the husband is humiliated by this powerlessness, and the officer intended this humiliation.
There are many reasons why civilians who are approached by the police would feel coerced into saying yes when they mean no. Civilians know that police have the awesome powers to detain, to search, and to arrest. Most civilians also know that police have wide discretion in exercising this power. What people do not know, is how these particular officers are going to exercise their discretion. While people know the reason the officer approaches probably has to do with investigating crime, civilians would not know whether the officers are trained in community policing methodology or in paramilitary-style policing. Also unknown is whether the officers harbor any personal prejudices that might operate against the people stopped, whether it be about their age, class, race, nationality, gender, attire, or any combination. Depending upon one’s class and community, some fear a long delay or receiving a ticket, while others fear an arrest.

In *Crash*, the threat is much less specific and more ominous than even an arrest. “They had guns,” explains the husband 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. The husband’s words express the reality that there is a power distinction between officer and civilians where guns are important not so much because they will be used to shoot, but because they are emblematic of this power. Whenever one person 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. As Margaret Raymond records, some police brutality cases begin because a civilian refuses to comply with an officer’s request. An officer need not threaten arrest for the intimidation factor to be present.

This scene from *Crash* brings together two different questions about the law of consent. The law asks whether the passenger consented to the touching in determining whether the officer committed a rape or sexual assault. The law also asks whether the woman consented to the touching as a Fourth Amendment inquiry. By starting with an example that combines zealous search and seizure with sexual misconduct, I hope the reader will be encouraged to see the common threads of these two different consent doctrines.

**B. Autonomy as a Shared Goal**
For readers who might still protest that sexual assault is a grave invasion of privacy and are insulted that this article compares a mere pat-frisk with a rape, or compares a police officer doing his job with a sexual deviant, consider this. In certain situations, a sexual assault may actually be less intrusive of an individual’s autonomy and privacy rights than a frisk or search.

The magnitude of the privacy rights at stake in search and seizure law can be gleaned from the film *Monster*, based on the life of Aileen Wuornos, xi a woman executed in Florida for murdering several men. There’s a scene in the film where Wuornos is trying to leave prostitution and goes for an office job interview when a male police officer confronts her on the street, intimates that he could have her arrested unless she goes with him for some free sex. Not surprisingly, given that choice, Wuornos performs the sexual act requested. Even though Wuornos is repulsed by sexual contact with men at this point in her life, she values freedom from arrest higher than she does freedom from a forced sexual encounter. While forced sexual conduct is often devastating, unwanted searches and arrests can also be personally destructive, involving a range of encroachments on privacy, from handcuffs, to loss of one’s freedom for days or years, stigma of arrest, stigma of conviction, and a multitude of collateral consequences such as potentially, a ban on voting, and unemployment. In addition, there is an increased likelihood of unwanted physical contact after an arrest, including strip searches and assaults by other inmates. Currently, the law minimizes the profound effects of unwanted searches.

There are some differences between consent to search and consent for sex. The two consent doctrines arise in different ways. For sexual assault, non-consent is an element that must be proved beyond a reasonable doubt by the government at trial. Generally, a jury determines whether there was consent or not. In contrast, consent under the Fourth Amendment is a pretrial matter. While the search and seizure provisions of the bill of rights limit police actions, these limits do not apply where an individual is found to have consented to the privacy invasion. When the government seeks to justify a search or seizure by invoking the consent exception, the burden is on the government to prove by a preponderance of the evidence that the individual consented to the search. If the judge finds that there was consent, the government need not prove that the officer satisfied the
Fourth Amendment’s usual requirement for privacy invasions, such as probable cause to believe the individual was engaged in crime. Common sense suggests that it would be difficult for the government to prove consent-to-search because it seems unlikely that individuals would voluntarily choose to be searched or voluntarily choose to be detained. Although people might consent to searches of other people, one would rarely expect someone to voluntarily consent to a search of her own person, especially if it might lead to an arrest or conviction. While people often choose to engage in consensual sexual activity, there is no true parallel reference to this within search and seizure.

Feminist theory forces us to ask whether personal autonomy a value in Fourth Amendment jurisprudence similar to autonomy concerns underlying modern sexual assault statutes. It also requires us to ask who benefits when courts switch the burden onto the victims of Fourth Amendment violations to prove their submissions to authority were nonconsensual, when the law ostensibly places the burden on the government. While individual autonomy is the professed goal of the Fourth Amendment as it is has become with rape, the Court has been principally concerned with permitting police access to civilians when they otherwise lack legal justification. Applying the feminist lessons of power and domination to the police-civilian context helps us recognize the aggressive role society assigns to police and the passive role society assigns to civilians and how suppression rules that operate like archaic rape laws reaffirm that hierarchy.

CONSENT UNDER SEXUAL ASSAULT LAW

Feminism has much to say about drawing the line between consent and coercion in the context of rape law. The insights of scholars have changed the law in many jurisdictions to make it easier to prove rape or other forms of sexual assault, but there is still much to accomplish.

Nonconsent is part of a set of interrelated elements for rape law that traditionally requires that the sexual contact be done without consent and against the will of the complainant, and accomplished with force or threat of force. The burden is on the government to prove that the alleged victim did not consent to the sexual contact. Although some statutes have been rewritten, much of the change has come through courts
redefining the meaning of the elements. This work of changing old definitions has come about as the result of women’s rights activists and feminist scholars. Many of the terms are the same in Fourth Amendment and rape law, especially the phrases “voluntary consent” and “coerced submission.”

In traditional rape and in modern interpretations, consent is synonymous with voluntary choice, and the opposite of coercion. In Florida, for example, a jury is told 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.” This is a modern instruction that specifically notifies jurors that the historic requirement of resistance is obsolete.

By defining consent to exclude coerced submissions, the law recognized that submission is different from voluntary consent. Otherwise one could say that a woman with a gun pointed to her head consented to sexual activity because it was the better choice given the circumstances. For this reason, the law has always recognized that coercion invalidates consent. Once coercion is found, the law does not expect the victim to verbalize or communicate his or her lack consent. After all, submission may be accomplished with silent acquiescence or may even include a “yes sir” to the person holding the weapon.

Coercion is not necessarily defined with any precision in rape law, although it helps define consent since coerced submissions are by definition, not voluntary. Justice Frankfurter once wrote about the difficulty of defining what is voluntary, albeit in the context of determining whether statements made to police violate due process. “Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are ‘voluntary’ in the sense of representing a choice of alternatives.” Thus, the Court has long recognized that it is a normative question of where to draw the line between voluntary consent and coerced consent. It is a normative question whether an aggressor’s sexual advances are coercive enough to vitiate consent. Historically, the law had great difficulty when the coercion was more subtle than a threat of bodily harm. The narrower the definition, the more difficult it is for victims to succeed at trial, and the fewer rights
individuals have to control their bodies. The problem of narrowly defining coercion continues in some states. Susan Estrich has criticized the limited definition of coercion in the modern jurisdiction of Michigan, where, if “a man coerces a woman to engage in sex by threatening to fire her from her job or destroy her property or reputation, he has not used force of coercion within the definition of the statute.”\textsuperscript{xvii} Clearly, she writes, this statute did not “define consent in a way that respected the autonomy of women.”\textsuperscript{xviii}

Notice that the Florida jury instruction above makes consent a subjective test. The jury is not asked whether a reasonable person would consent but whether the actual complainant consented. States also interpret “against the will” as a synonym for lack of consent.\textsuperscript{xix} In this way, the element of consent is a purely subjective standard.\textsuperscript{xx} This is in stark contrast to consent under search law, discussed in the next section of this article.

The definition of coercion within rape law is often tied to the elements of force or threat, and to a requirement that the complainant resist the aggressor. Common law courts required rape victims to resist to the utmost, any unwelcome advances.\textsuperscript{xxi} Even before the rape scholarship started, common law resistance had mutated into a requirement that the victims resist to some degree.\textsuperscript{xxii} While less onerous, this burden was still great. Resistance was a judicially created element that served to corroborate or disprove a woman’s version of events to protect men from false allegations.

Obliterating the resistance requirement within rape has long been a goal of feminist scholars. Estich complained that rape “is the only crime which has required the victim to resist physically in order to establish the crime.” [add MacKinnon here, Brownmiller too] Historically, the subjective consent test was undercut by a resistance requirement. The resistance prong interacted with the coercion element to make it more difficult for women to explain that they submitted due to intimidation. Although women faced with a weapon were permitted to submit and maintain their right to define what occurred as rape, those who were intimidated were expected to fight. In practical terms, this meant that women were supposed to come to court bruised and hurt to substantiate their claim that this was nonconsensual.

Scholars complained that the resistance requirement demanded that women act like men. In reality, women were more likely to submit to aggressive actions than were men, in part because of relative physical strength, and in part because of cultural norms.
Although nonconsent was a subjective question, resistance turned a subjective inquiry into an objective one. The resistance requirement really asked courts to determine how a reasonable man would behave in this situation.

Scholars also showed how the resistance requirement assumed that alleged rape victims were criminals or potential criminals. Ann Coughlin compared the element of resistance to the criminal defense of duress, explaining that at common law, women who claimed they were raped were expected to prove that they were not willing participants in a criminal enterprise, namely sex out-of-wedlock. Challenging the view of victims as criminals served to give victims real rights, including greater dignity in courts. Taking away the criminal stigma also helped towards the goal of giving all women the right not to be intimidated into sex.

Most scholars strove to diminish the resistance requirement so that a verbal “no” would be all the resistance necessary to prove nonconsent. Feminist criticism of the resistance requirement has successfully removed it from most of the current landscape of sexual assault law. Verbalized disagreement is still a form of resistance. Feminist scholars still strive to expand the definition of coercion so that there were more instances where a woman need not verbalize her opposition when an aggressor was sufficiently intimidating. Whenever a court requires a woman to verbally resist when she feels coerced to submit, this constitutes a modern resistance requirement. A narrow definition of coercion that excludes the victim’s subjective understanding that the aggressor is intimidating operates as a resistance requirement and changes the subjective consent element into an objective test.

How does modern rape law address the situation where an individual fears arrest by a police officer, who takes advantage of an individual by obtaining sexual favors? Is this consent or submission, threat or non-threat? The scene in Monster provides a vivid example of how police officers may obtain “consent” by virtue of their power to arrest. Wuornos submits to the officer’s request without protest. Even though she did not object and even though she submitted to obtain a benefit from the officer, this should also be recognized as a nonconsensual encounter. An officer’s situational use of power can cause silence and acquiescence and should be viewed as coercion. Moreover, threat of arrest should constitute force or threat of force.
One case that gave construed coercion narrowly was a situation in Pennsylvania where a foster parent threatened to return his daughter to detention if she did not comply with his demand for sex. \textsuperscript{xvi} The Pennsylvania Court held that this did not constitute “threat of forcible compulsion” as required under the statute and “therefore the submission was a result of a deliberate choice and was not an involuntary act.” \textsuperscript{xvii} Quite rightly, the case has sparked scholarly criticism \textsuperscript{xxviii} Detention may be different from an arrest in some qualitative respect, but both should be treated as a threat. As discussed elsewhere in this paper, an arrest is a form of violence. Not only does an arrest constitute a seizure of the person in the Fourth Amendment sense of force, but it threatens future violence and devastating consequences for the civilian. Here, rape law could benefit from search and seizure law that generally construes a police officer’s threat to arrest as coercion. \textsuperscript{xxix} 

The Pennsylvania case illustrates how the historic interpretation of threat of force bleeds into concepts of coercion and voluntary consent. \textsuperscript{xxx} If the statute also requires a physical threat, this should really be a separate inquiry from consent. The complainant in that case certainly did not subjectively consent and only submitted because of the power inequity between the parties. Common law limited threats of force to threats of physical force. Some modern courts read the physical threat requirement into the definition of coercion so that coercion is defined quite narrowly. Search and seizure law only requires consent of a person with authority, the focus should be on consent and coercion for comparison purposes. However, I argue that courts interpreting the Fourth Amendment consent exception have created a de facto force or threat element as a matter of search and seizure law. Some of the same criticisms aimed at the force or threat element of rape law, apply with equal force to search and seizure law.

Still more problematic to rape law is the situation where a police officer does not actually state that he will arrest the sexual assault victim, but she fears that he will. Given that consent is a subjective test in sexual assault law, it should not matter whether the threat of arrest is express or implied. While a jury might not believe a victim’s testimony that she did not want to have sex with the officer and did so because of a perceived threat, the test is subjective, so if the jury believes her, the government has established the element of consent. Credibility determinations by a jury are a consideration in
determining the fairness of rape doctrine. Yet, the first problem is making sure the jury is given the instruction that allows them to understand a threat of arrest should vitiate consent, and that a fear of arrest is a form of threat.

Dorothy Roberts writes about how rape law fails to recognize the “implicit threat of violence” where women may fear that men will turn violent even if no threat was made. Estrich also criticizes the situation “where threats are inarticulate” and the courts “often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.” The law thereby “celebrates male aggressiveness and punishes female passivity.” Force or threat of force is not a pertinent inquiry, feminists have argued, because it insufficient to encompass many of the ways that women are coerced into engaging in behavior against their will.

Under rape’s force or threat of force element, a court may decide that threats must be verbalized or expressed in some way. Even with such precedent, courts should recognize the power differential between officer and civilian and not require an articulated threat of arrest during an encounter instigated by an officer. Crash illustrates some deeply held fears, at least within minority communities, that when police have the power, things can get ugly quickly when the civilians do not comply with police requests. It is unwise to separate out situations where the threat of arrest is not articulated, but where apprehension of such use of power arises inherently from the power imbalance between the parties.

The power to arrest must be recognized as a form of threat or coercion even if the officer does not explicitly state that he will arrest the civilians if they do not perform the sexual deeds that he requests. The consequence of this rule is that police who are in uniform and on duty take a risk of being subject to criminal laws against sexual assault when they solicit sexual activity from a civilian. Because of the inherent danger of coercion, the burden should lie with the police who seek consenting adults for sexual behavior while on duty. However, unlike with child rape, the burden should remain on the government to prove beyond a reasonable doubt that the alleged victim only submitted because she feared arrest or some other form of detention.

In current rape law, in the situation of the victim who is afraid a police officer will arrest her if she does not “agree” to his requests, the government might have difficulty
proving that the officer engaged in force or threat of force where the officer did not realize the effect of his authority upon her. Lack of consent, however, is clear. Search and seizure law should be easier for victims of abuse because the consent exception does not require that the individual prove force or threat of force. However, the reader will see echoes of force and resistance requirements read into consent to search case law.

Rape scholars ask whether the risk of mistake should be born by the aggressor or the complainant. If determining whether a person was sexual assaulted is a wholly subjective question, then the aggressor bears the full risk. If the question is objective, asking what a reasonable woman would do or what a reasonable would understand from the woman’s actions, then the government bears the full risk. In parsing out the risk, there is no need to make the elements of rape objective, for the accused is protected by a mistake defense. Almost all states allow the defendant to submit a reasonable mistake defense to the element of non-consent. This serves to appropriate the risk of good faith mistake onto the person claiming nonconsent, just as victims of Fourth Amendment violations bear the burden under the good faith defense in Section 1983 actions and now under suppression law.

Feminists have had success in challenging the force element in rape law. The element of force should be satisfied simply by the sexual act itself because sexual intercourse without consent constitutes force, scholars have argued. New Jersey’s High Court adopted this approach, announcing in a sexual assault case that the government need not shoulder any separate requirement of force to prove rape. This interpretation of sexual assault focuses on whether there was consent rather than the type or quantity of force used to commit the act. It keeps the focus on the subjective experience of the victim rather than the perpetrator’s perspective or what a reasonable person would think. There are disagreements about whether the focus should be on the defendant or complainant’s actions in evaluating whether a sexual assault occurred. By diminishing the force requirement so that it creates no independent burden on the government, the case may be proved totally from the perspective of the person victimized by the aggressive actions of another. Advances in eliminating force as an element prove the benefit of keeping the focus on women and the benefit of a subjective inquiry rather than an objective one.
CONSENT UNDER SEARCH AND SEIZURE LAW

A. Definitions of Consent, Voluntary and Coercion Harken Back to Common Law Rape

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 how the law defines consent in the context of search and seizure law, courts could come up with completely inconsistent results even where, in both instances, the woman is submitting to the officer’s superior power rather than consenting.

It is difficult to overestimate the importance of the consent doctrine in legislating the balance of power between police and citizens. The overwhelming majority of searches do not involve warrants and over 90% of these warrantless searches are based upon the consent exception. Consent bypasses the usual Fourth Amendment rules that require sufficient reasons for police to exercise power over civilians. Ordinarily, the constitution requires that police have reasonable suspicion that persons are involved in a crime before detaining them, reasonable suspicion that they are armed or dangerous to conduct a pat-frisk of their outer clothing, and probable cause to search them further or hold them against their will for a prolonged period of time. The consent exception obviates such an inquiry because the individual waives her Fourth Amendment rights by agreeing to help the officers out. Given the extent of the consent exception, in practical terms, the consent doctrine has supplanted the written Fourth Amendment for police encounters outside the home.

The Supreme Court announced the standard for consent for searches and seizures in a 1973 case called Schneckloth v. Bustamonte. The Court specifically declined to treat waiver of Fourth Amendment rights as similar to waiving trial rights, deciding that officers have no obligation to inform a civilian that she has a right to withhold consent. Voluntariness was made the touchstone of consent and the Court held that the government has the burden of proving that the consent was “not the result of duress or coercion, express or implied” based on all the circumstances.
On the surface, the criteria for consensual searches announced in *Schneckloth* mirrors rape law. As in rape law, consent must be voluntary. Similar to rape law, consent “does not include coerced submission.” Nor does *Schneckloth* state that a person consenting to a search must offer physical resistance to the officer. “Acquiescence to power is not consent,” the Court succinctly stated in a case following *Schneckloth*. As scholars have pointed out in the context of rape, the meaning given these phrases is what matters. Reading the definitions, one would think that civilians have a right to be free from unwanted intrusions absent a police officer’s Fourth Amendment right to seize or search. One would expect that consent is a subjective inquiry, that coercion would include an implied threat of arrest, 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.

*Schneckloth* involved a traffic stop where the police asked everyone in the car for identification, asked everyone to step from car and then received “consent” to search the car. 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 this time.’”

The significance of congeniality becoming the standard for whether there was voluntary consent can be gleaned from discussions of rape law. Feminist theory revealed that traditionally, “real rape” imagined a man hitting a woman over the head to gain sex even though most rapes are much more subtle. Similarly, search law imagines “real nonconsent” as a police officer with a gun pointed at someone’s head. Importing *Schneckloth* into a sexual assault context, how would a common law 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? If a rape scene was described as congenial and no specific threat of force uttered, the common law judge would rule that the man must be acquitted because the force requirement was not met. Congeniality is the opposite of physical force. Although the officers in this case 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.

The Schneckloth 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. In one well-known case, the woman took off her own clothing during the sexual encounter and still the court of appeals found this fact to be insignificant⁴⁸ in determining whether the victim had consented to a man who had taken her car keys before persuading her to visit his home.⁴⁹ Although the Maryland high court affirmed the rape conviction and held that resistance is not an element based on modern understanding of the crime, scholars have criticized the court for finding force based on “slight choking” rather than holding that no force is needed once he intimidated the victim by taking her keys.¹

Schneckloth is at war with itself. On the surface, the case defined consent to search in line with consent doctrine in rape law when the Court held that for a consent search to be valid, it 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 was defined as being free from coercion. However, the way the Court analyzed the facts in order to uphold the consent search is reminiscent of the earlier history of consent rape cases where the courts would find consent as a matter of law based on the fact that the force was insufficient to overcome the will of the victim.¹ 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 begun to demand more of the courts in rape cases but before women entered law school in greater numbers and created change in this area. 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 another direction. While sexual assault law looked more at the subjective understanding of the person claiming she did not consent, Fourth Amendment law began eliminating the subjective inquiry almost entirely.
B. Modern Search Cases Require Nonconsenting Civilians to Resist Police

In 2002, the Supreme Court decided the seminal case of *U.S. v. Drayton*, where officers boarded a bus for drug interdiction, searched everyone’s luggage and frisked the two defendants who then sought to suppress the evidence found on them. The Court upheld the pat-frisks based on the defendants’ supposed consent although the individuals in question clearly had no wish to be patted down or searched. Once more the Court used words such as “voluntary” and “consent,” but again imposed force and resistance requirements onto civilians who seek Fourth Amendment protections and challenge the government’s position that they consented thereby relinquishing their right to be free from unreasonable searches and seizures.

The two defendants in *Drayton* were traveling from on an interstate bus with a large quantity of drugs taped to their thighs. The men had gone through some lengths to intentionally conceal their illegal goods so it is difficult to imagine any set of circumstances where the men would consent to have police pat them down or search their person. 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.” 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?” 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 eagerness 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.
The Court upheld the trial judge’s factual determination that the two men consented, reasoning in part that since the officers “did not address anyone in a menacing tone of voice,” 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.” This reasoning in *Drayton* revisits *Schneckloth*’s discussion of the “congenial” atmosphere. As the dissent in *Drayton* succinctly stated, a “police officer who is certain to get his way has no need to shout.” It makes no sense for courts to separate out situations where police specifically threaten arrest from other police encounters, as the *Drayton* Court did. A direct threat to arrest is recognized as coercion, just as traditional rape courts viewed threats of physical harm as coercive. By separating out actual threats as coercive, the Court excluded the tacit threats, for anyone in defendants’ position would have reasonably feared arrest as one possible consequence of failing to cooperate with the interdiction. Such reasoning enforces a notion that real nonconsent is akin to real rape, requiring a weapon or a struggle. Unless the officer used the kind of physical force the Court associates with “real rape” or “real nonconsent,” then the officer behaved appropriately and his evidence will not be suppressed, even when the civilian’s submission is involuntary under modern standards of rape law.

The *Drayton* decision ignited strong criticism. Ric Simmons wrote: “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.” Janice Nadler stated 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.”

Margaret Raymond recently analogized the Court’s jurisprudence to a “gamemanship model” where the Court imagines a fictional world where individuals would be able to freely exercise a choice when police officers make requests. Raymond points to many reasons why the current model of suppression is ill-conceived when it demands that individuals refuse requests from police officers. Her analysis illuminates the problematic definition of coercion adopted by the Court in *Drayton* and other cases. 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. Only the
officer knows if he has probable cause to arrest or is only on a fishing expedition for incriminating evidence. Likening a civilian’s choices to the “heads I win, tails you lose” game, 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 can be obeyed or an order that must be followed. Even where the civilian is legally “free to walk away,” the officer might decide to punish the civilian for doings 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.” Where the police lacked Fourth Amendment justification for the stop, the person should have been free to decline the request, but even in these situations, “[t]here are certainly police brutality cases in which the triggering incident was the victim’s failure to obey police orders,” she notes.

Raymond’s research points to the enormous discretion that officers are afforded in the field. Their discretion to arrest or not allows police to punish people who seem disrespectful while letting others go who committed the same infraction. Police power to arrest has increased in recent years with Supreme Court cases that established the authority of police to arrest whenever police pull over a driver for a misdemeanor traffic infraction. A recent case determined that even if an arrest violates state law, such as where states forbid arrests for seatbelt violations, the arrest is still reasonable for Fourth Amendment purposes. This means that police have the discretion to arrest almost anyone who they stop in a car. As the ability to arrest grows, the intimidation factor also grows, and civilians must give up their Fourth Amendment rights if they want to try to avoid an attitude ticket or worse.

Raymond’s documentation of the consequences of failing to submit to police officers establishes that the line drawn by the court between coercion and consent is insupportable. The decision must also be understood as imposing a resistance requirement on the civilians, akin to common law rape where a woman was expected to resist to the utmost. Modern courts have looked at statistics that show that women who fight back are put in greater peril to explain why the law of sexual assault should not demand resistance in determining whether there was consent or simply submission. Raymond has shown the civilians who fight back, or just say no, are put in peril.
Voicing one’s opposition, saying “no” to a request, is a form of resistance. While many rape scholars support this requirement when individuals come to the relationship on equal footing, one cannot require verbal resistance when the power differential is too great. Rape victims might express assent when told to do something by those who have the power to hurt them. Even common law rape did not require a victim to say no to someone wielding a gun or a knife. 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. 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. In other words, a nonconsenting civilian is expected to resist the officer, even if it means that she may be arrested or worse, in the process.

The common law rule of resistance has been discredited. As Anne Coughlin observed, this rule dates back to a time when the woman who claimed she was rape was deemed to be a criminal for engaging in sexual activity and therefore she had to prove essentially that she was under duress. Finding no coercion because the atmosphere was “congenial” is like finding that there was no coercion where a woman is stopped by an individual with more power and access to a weapon and detained for a while, because she did not fight against her abuser.

Interestingly, the Drayton Court makes no distinction between the first passenger (Brown) who allegedly says “sure” when a search of his person was requested, and the second passenger (Drayton) who remained silent but complied by lifting his hands to allow the police to place their hands on his body. The Court is correct that words of agreement are hardly indicative of whether there is true acceptance or approval of a plan of action laid out by someone in authority. However, this also means that the Court views silent acquiescence the same as voicing consent.

While Raymond points to a gamesmanship, I point to an intentional decision on the part of the Supreme Court to keep civilians in a powerless position, just as the structure of common law rape kept women in a powerless position regarding their
personal autonomy. Feminist theorists criticized how the courts traditionally created a narrow definition of coercion in rape law, based on fear that women would otherwise invent lies and innocent men would be stigmatized. Within rape law, resistance by women was required, even where it meant that the woman would get hurt defending herself. The resistance requirement that was banished around the time that adultery was decriminalized has now reappeared in the current law on consent searches.

C. The Orwellian “Reasonable Innocent Person” Test

One of the scholarly critiques of the resistance rule in traditional rape is that courts were treating women as if they were men. Victims of sexual assault were expected to fight back the way men are socialized to fight, but historically, victims of sexual assault were all female. Thus, while consent is a subjective inquiry in rape law, the resistance rule added an objective, “reasonable man” component to the burden of establishing rape. Because the objective test was skewed towards someone other than the victim, the resistance test undermined the consent doctrine, turning a subjective inquiry into an unfair, objective test. Similarly, the consent exception to the Fourth Amendment has replaced the subjective consent test with an objective test skewed towards someone other than the civilian searched.

The consent doctrine has been mutating from a quest in Schneckloth that combined a subjective consent approach with an objective component, to a purely objective test. In Florida v. Bostick, the Supreme Court announced that this “reasonable person” test presupposes an innocent person. In the Court’s words, “a 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.” Bostick had argued convincingly that “no reasonable person would freely consent to a search of luggage that he or she knows contains drugs.” The Court embraced the imaginary innocent person to prevent criminal defendants generally from defeating the government’s claim of consent.
The innocent person test creates cognitive dissonance even within Bostick’s short majority opinion. The Court writes that the “question to be decided by the Florida courts on remand is whether Bostick chose to permit the search of his luggage.” Yet, this cannot be true for elsewhere the Court implicitly acknowledged that Bostick (who had drugs) did not consent. More importantly, the Court explains that it will not consider whether someone who had drugs consented. Rather, 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 therefore they will not be bothered further. An imaginary innocent person might be motivated to help the police. If the lower courts decide that an imaginary reasonable innocent person would have consented, then Bostick will have consented as a matter of law, even though the Court knows he did not.

This “reasonably innocent person test” was affirmed in Drayton, where 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 body where they had carefully secreted drugs. 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. The majority framed the question of consent as whether “a reasonable person” would know “that he or she was free to refuse” the search. This objective language built on prior consent cases where the Court similarly ignored the subjective aspect of the totality-of-the-circumstances test and focused on whether the police behavior was objectively reasonable.

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. 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’.”

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 testified that they used
a questioning style rather than command phrasing. Feminists have noted that perspectives can vary depending upon the power one wields within a situation. For example, a date rape encounter will probably be remembered as more congenial by an alleged perpetrator than by an alleged victim. It is the officers in *Drayton* who testified to the phrasing and tone of their commands. This compounds the problem of choosing an objective test over a subjective one, and choosing a reasonable innocent person over a reasonable person in the shoes of the alleged victim of an improper search.

Ric Simmons explicated the consent doctrine and designated *Drayton* as “the midpoint” in the Court’s evolution from a focus “on whether or not the subject acted voluntarily, to a more nuanced objective test that focuses on the amount of compulsion used by the law enforcement officer.” “Officially, the subjective prong is still viable,” notes Simmons. “But 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.”

In Animal Farm, George Orwell drew a fictional example of how totalitarian regimes twist language in order to legitimize power. The Court behaves in an Orwellian fashion when it utilizes the term consent in situations where there was clearly no consent. Turning to the dictionary, consent is generally defined as “[t]o give assent, as to the proposal of another; agree.” Applied in rape law, consent means “against the will of the victim.” Yet in *Drayton*, consent means that a court believes the evidence is valuable; it has nothing to do with whether there is true assent or any agreement. Under the current test, the only real question is whether the court is offended by the manner in which the individual was coerced into giving up the evidence. The Court does not wish to apply a true test to determine if individuals are simply obeying authority rather than assenting to a request, because evidence the government values will be lost. By redefining a word, the Court shifts the power balance between government and individual and between police and neighborhoods.

Although consent now means an acceptable level of coercion, the Court still calls the exception “consent” so that it need not admit that it is changing the balance of power since the words are the same. By continuing to call the exception “consent” the Court will not seem to be overreaching when it holds that the Fourth Amendment protections shall
not be applied. After all, when a person waives their rights, how can they turn around later and demand that they be enforced? Few know the current state of the law, perhaps only police, judges and those in a specific part of the legal field know that the person does not actually waive her rights, that it is the government itself (in the form of the courts) that waives her rights whenever the government wishes to condone the actions of the police.

Feminists have criticized sexual assault law for framing the doctrine in order to allow juries to compare victims to men who might be expected to run or fight back. Aside from the resistance requirement that is mostly banished from sexual assault statutes, the definition of consent in rape cases is subjective. Hopefully there would be an outcry if rape victims were deemed to consent to overtures they clearly did not want because judges found that an imaginary reasonable person would have consented. If judges applied an objective test to rape cases as they do in Fourth Amendment litigation, juries would decide if a rape victim consented based not on her particular circumstances, but on the circumstances of a reasonable person. Perhaps the jury may decide for themselves what characteristics this fictional reasonable person contains – the gender, strength, and even the state of mind of this archetype regarding sexual activity. After all, people vary widely in their receptivity to sexual proposals.

The “reasonable innocent person” is even worse than the “reasonable person” test because the archetype excludes the very people whose consent is at issue. Every time the government argues that there should be no suppression of evidence at trial because the defendant consented to the search, the individual defendant is not an innocent person. Thus, in analogizing to sexual assault, it would be more accurate to compare the innocent doctrine to a definition of the reasonable rape victim as one who liked to be overpowered. For example, a judge could find that the passenger in Crash consented to be sexually touched because other women (who liked to be overpowered) would enjoy the attentions of a handsome officer. This would have the same “air of unreality” as the Drayton Court’s conclusion that when the passenger lifted up his arms to allow the police to search the place he had carefully secreted drugs, he was consenting to be searched because reasonable innocent bus passengers might consent to searches to enhance their safety.
D. Improper Police Motives

Currently, we have seen that in consent-to-search cases, the Court is concerned with police behavior, especially any overreaching. Scholar Joshua Dressler summed up 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.”

Thus, in Drayton, the Court does not discuss why the defendant would raise his hand for a search when his friend was just arrested; rather, it considers the tone of voice of the officers and at what point the two men were seized. Drayton even entangled the question of whether there was consent with the question of whether there was an improper seizure. 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 what I view as similar to the force requirement in rape law. If the police behave in a way that the court considers to be rogue behavior, then the search will be suppressed; otherwise the fictional reasonable innocent person will consent. Voluntariness and true consent have nothing to do with the standard. Scholar Joshua Dressler summed up 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.”

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.

Consider what will be off-limits to the Court if the passenger in Crash were arrested an moved to suppress something found on her person. The attitude of the police officer in Crash is particularly abhorrent. He engaged in racial profiling and racial motivation when he stopped the car, and searched the “suspects” out of a desire to humiliate and subjugate. Suppression case law prevents inquiry into police motivations altogether. Racist behavior is protected. So is behavior motivated by a desire to retaliate or punish.

As long as the government can point to a reasonable police objective in
detaining or searching an individual or place, then the nefarious motives of individual officers have no bearing on Fourth Amendment legitimacy.

Applying the Fourth Amendment to the victims in Crash, a court will find that there was a seizure of both persons at the time the S.U.V. was stopped. However, short detentions such as motor vehicle stops require less than probable cause under the Fourth Amendment.\textsuperscript{xciv} Reasonable suspicion\textsuperscript{xcv} is easily satisfied by police testimony that the female passenger jumped up as if she had been committing an “unnatural” sexual act on the driver, leading the officer to suspect prostitution and dangerous driving. Once the officer stopped the car, court decisions allow police to detain the occupants for up to twenty minutes or more, without further justification. Courts allow police to order out the driver of the vehicle for their own protection\textsuperscript{xcvi} and order the passenger out of the car, even if the only reason the car was stopped was an automobile defect such as a burned-out tail light.\textsuperscript{xcvii} It is irrelevant that people of color are stopped more than Caucasians or that this particular officer used the traffic violation as a pretext to stop the driver because he was black.\textsuperscript{xcviii}

When the officer in Crash touched the sexual organs of the passenger, he no longer could point to a reasonable police objective, and that conduct would clearly violate the Fourth Amendment. However, a court might uphold the frisk had the officer only felt outside of her dress. Frisks are also justified on less than probable cause, if an officer reasonably believes a subject may be armed. Thus, the government may not need to resort to the consent exception to uphold the search. Still, they might be able use the consent exception if the officer convinced a judge that his “pat-down” stopped before he put his hand under her clothing; this assuming that the passenger complied with the officer’s request to stand against the car as most would. Moreover, before the officer crosses the line with his hands, it might be difficult for the passengers to articulate the ways in which the officer deviated from the job of ferreting out crime. The officer might remember a congenial atmosphere and the focus would be on the officer’s permissible use of force. It is difficult to determine whether the officer’s lecherous and bullying attitude would be relevant to this inquiry. Again, the inquiry is often labeled objective and trial courts might not allow defense attorneys to probe the officer’s subjective thoughts.\textsuperscript{xcix}
Who is on trial in suppression cases? Arguably the police are on trial under current doctrine, and this pretext rule is akin to a rape-shield for police. There is a contradiction within Fourth Amendment law that focuses the consent inquiry on the conduct of the officers but allows racist and otherwise unprofessional conduct. This contradiction is magnified after the recent case of *Herring* created a good faith exception that possibly applies to all suppression motion. The Court reasoned in *Herring* reason that suppression was only warranted in intentional and egregious instances: “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”

Historically, reasonableness may have been the lynchpin of the Fourth Amendment, but the suppression area has moved from a negligence standard to a reckless or intentional standard. In a contradictory fashion, the Court continues to permit pretext policing, upholding behavior that deliberately violates individual privacy for non-law enforcement reasons, while forbidding suppression of negligent police conduct unless defense counsel can show that it was deliberate.

**D. A New Rule to Respect Autonomy**

Rape scholars have not come to any agreement about whether the focus of sexual assault should be on the victim or on the assailant. Some scholars think that the victim should be the focus since subjective consent is the sine qua non of rape. Others have written that the focusing on the victim’s actions results in “putting the victim on trial.” It would be better, these scholars suggest, if the focus was upon the aggressor and his behavior.

There is a similar discussion starting among scholars regarding the consent exception to search and seizure. Margaret Raymond suggests that the focus should be on the officers and courts should not even inquire whether a defendant consented. “In the consensual encounter context, courts should apply a test that asks whether the conduct of the officers in question was reasonable in an interaction with a person as to whom there was no reasonable suspicion of criminal activity.” ric Simmons makes a similar proposal. Ric Simmons’ answer to the crisis of legitimacy is for the Court to rename its test, continuing to use an objective inquiry but not pretending to apply a voluntary test.
While I agree with Professor Simmons that there is a problem with legitimacy, I part company with his judgment about the benefits of a shift towards the objective. In contrast, I argue for keeping the concept of voluntary consent, but giving those words their proper meaning. This keeps the gaze on the alleged victim of the Fourth Amendment violation, using a subjective test, and is most similar to more progressive rape statutes.

Simmons makes two persuasive arguments that a focus on law enforcement behavior is superior to a focus on the individual’s subjective experience. First, he places a high social value in consent searches because they allow police to conduct investigations absent probable cause or reasonable suspicion. If courts honestly applied a voluntary consent test, the cost to society would be too high. Guilty individuals will not voluntary consent so police would be forced to refrain from gathering important materials when they lacked probable cause or reasonable suspicion.iii Second, Simmons considers that reasonableness is the touchstone of the Fourth Amendment. Whether “defendants acted ‘voluntarily’ is irrelevant under traditional Fourth Amendment jurisprudence,” Simmons argued, “because the lynchpin 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.”xiv

Addressing Simmons’ argument that reasonableness is lynchpin to the Fourth Amendment and therefore consent should be an objective inquiry, I disagree that the Fourth Amendment reasonableness applies to the question of consent. Rather, consent circumvents the reasonableness tests embedded within the Fourth Amendment. Thus, the consent exception undermines the balance already in place. 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 individual autonomy and the government’s need to invade privacy as a means of gathering evidence. When the government succeeds in establishing consent in any given case, it avoids the rigors of the Fourth Amendment reasonableness inquiry. Currently, the consent exception has rewritten the Fourth Amendment’s reasonable clause that requires justification before police exercise their power to detain and search.

When the government proves consent, patently unreasonable searches survive. To
say that the police were reasonable in obtaining consent by asking to search in polite
tones is a thoroughly different inquiry than whether the police have good information that
leads them reasonably to believe there is evidence of a crime. Consent should be the
exception, not the rule. Thus, if someone invites an officer into her home to talk about an
event, that person should not be allowed to later assert the officer needed a warrant when
the officer seizes obviously illegal pornography on the table before him. The
displacement of the Fourth Amendment reasonableness standard is legitimate when a
person freely takes some action that notifies the other side that they need not follow the
rules.

Currently the law does not deem it consent when suspects open their homes to
police falsely claiming to have warrants, but Simmons’ reasonableness standard invites
the Court to overrule this precedent, based on its own normative balancing of the costs
associated with excluding evidence the police seize in a non-violent manner. If the
Court continues its evolution in the consent arena, it may completely overwrite the Fourth
Amendment clause requiring search warrants as well as the clause requiring that
warrantless intrusions be reasonable. Not only should reasonableness not be the talisman
for consent, in fact, the Court undermines the Fourth Amendment balance of power when
it substitutes a reasonableness test (that it calls the “consent” exception) to replace the
reasonableness test set forth in the Fourth Amendment.

Simmons’ argument that relinquishing information obtained through consent
searches would be too high a cost, is also the primary motivation for the Supreme Court
to part company with the plain meaning of the word “consent.” “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” reasoned the Schneckloth Court. In other words, evidence found
outside of the Fourth Amendment is useful for law enforcement objectives. While
Simmons and the majority of Supreme Court justices are correct that an honest voluntary
test would change the results in a large number of cases, this is not necessarily a bad
result. Restoring the balance of power to what it was under the Fourth Amendment before
the consent doctrine ballooned to its current size would simply alter police behavior the
same way that the decision in Mapp v. Ohio changed conduct when it held that the
exclusionary rule applied to the states. Many have noted that the police have become more professional since Mapp was decided in 1961, perhaps in response to the Fourth Amendment. In addition, the Supreme Court has unburdened the police in multiple other ways since Mapp was decided, such as by allowing frisks and detentions on less than probable cause, allowing searches of cars without a warrant, and expanding the ability to execute administrative searches, to name a few areas of Fourth Amendment retraction. Most recently, the Court created a good faith exception where defendants sought suppression. Herring v. U.S. held that where a police officer acts unreasonably but not recklessly or deliberately (and without looking at the officer’s subjective intent), the evidence obtained as a result of this conduct should not be suppressed. Therefore, the government’s fear of hamstrung police is but a remote possibility. Returning closer to levels of checks and balances on the police laid out by the Framers of the Fourth Amendment or the Framers of the Fourteenth Amendment hardly seems a cause for alarm. It simply takes the audacious step of enforcing the same balance of power between police and community that was envisioned by the founders of this republic.

Rape law changed when legislatures and courts began to take autonomy seriously. Autonomy should be important in the Fourth Amendment context as well. In 1949, Justice Frankfurter wrote that the Fourth Amendment “protects the security of one’s privacy against arbitrary intrusion by police.” Autonomy should be viewed as the lynchpin of the Fourth Amendment, and voluntariness should be the lynchpin of the consent exception. “Those who would sacrifice liberty for security deserve neither,” attributed to Benjamin Franklin, cautions us about trading our collective liberty for the drugs and other evidence found when courts allow police to substitute intimidation for reasonableness.

[Section here on how laws particularly affect communities of color. Quote Paul Butler and others]

Just as Estrich pointed out that a narrow meaning of coercion in the rape context fails to respect the autonomy of women, so too does the narrow meaning of coercion in consent-to-search indicated a failure to respect the men and women who police stop on the street.
Conclusion

\[\text{\textsuperscript{i}}\text{Susan Estrich, Rape 95 yale L J 1087 (1986).}\]
\[\text{\textsuperscript{iii}}\]
\[\text{\textsuperscript{iv}}\]
\[\text{\textsuperscript{v} Crash [put info about it here –]. Director Paul Haggis has stated that the film was inspired by a real life incident in which his car was carjacked in 1991. Matt Dillon, who played the racist police officer was nominated for the Oscar for Best Supporting Actor for this role.}\]
\[\text{\textsuperscript{vi} In one of the opening lines of the film, a character states: “We're always behind this metal and glass. I think we miss that touch so much, that we crash into each other, just so we can feel something.”}\]
\[\text{\textsuperscript{vii} played by Terrence Howard.}\]
\[\text{\textsuperscript{viii} In the context of the film Crash, it is clear that the passenger verbally voiced her nonconsent to be frisked or touched underneath her dress. Thus, the film portrays both a nonconsensual seizure under the Fourth Amendment and a rape.}\]
\[\text{\textsuperscript{ix} See Margaret Raymond, The Right To Refuse And The Obligation To Comply: Challenging The Gamesmanship Model Of Criminal Procedure, 54 Buff. L. Rev. 1483 (2007)}\]
\[\text{\textsuperscript{x} Margaret Raymond, The Right To Refuse And The Obligation To Comply: Challenging The Gamesmanship Model Of Criminal Procedure, 54 Buff. L. Rev. 1483, 1503, and fn 43 (2007).}\]
\[\text{\textsuperscript{xi} played by Charlize Theron – (she gets an Oscar too I think)}\]
\[\text{\textsuperscript{xii} Susan Estrich, Rape 95 Yale L J 1087, 1093 (1986);}\]
\[\text{\textsuperscript{xiii} See Anne Coughlin, Sex and Guilt, 84 Va L Rev. 1 (1998)}\]
\[\text{\textsuperscript{xiv} [R R’s quote both voluntary language as well as opposite of coercion]}\]
\[\text{\textsuperscript{xv} CRIM FL-CLE S [add westlaw cite]}\]
\[\text{\textsuperscript{xviii} Estrich}\]
\[\text{\textsuperscript{xix} Massachusetts for one. See jury instructions.}\]
\[\text{\textsuperscript{xxi} See Anne Coughlin, Sex and Guilt, 84 Va L Rev. 1 (1998)}\]
\[\text{\textsuperscript{xxii} Coughlin, Sex and Guilt, 84 Va L Rev.}\]
\[\text{\textsuperscript{xxiv} Estrich warns that the change may simply be cosmetic. “The victim of rape may not be required to resist to the utmost as a matter of statutory law in any jurisdiction, but the definitions accorded to force and consent may render “reasonable” resistance both a practical and a legal necessity. In the law of rape, supposedly dead horses continue to run.” Id at 1091.}\]
Commonwealth of Pennsylvania, v. Mlinarich, 518 Pa. 247; 542 A.2d 1335 (1988). There is some argument about whether the case is binding within the state because of the size of the panel of judges deciding. It has never been overruled. [cite Berkowitz]

Id. at 1341, 19 and 259.

See Victoria Nourse, The "Normal" Successes and Failures of Feminism and the Criminal Law; 75 Chi.-Kent L. Rev. 951; 2008; p. 957-58 (“If what was taken from her were money, of course, these would be crimes of fraud or extortion. And yet, rape law's idea of force-as-physical-force leaves us with the unpalatable conclusion that the same conduct should fare differently when what is obtained is sex.”); Mustafa T. Kasubhai, DESTABILIZING POWER IN RAPE: WHY CONSENT THEORY IN RAPE LAW IS TURNED ON ITS HEAD; 11 Wis. Women's L.J. 37; (1996); Crystal S. Deese; RAPE AND THE REQUIREMENT OF FORCE: IS THERE HOPE FOR PENNSYLVANIA AFTER PENNSYLVANIA v. BERKOWITZ; 4 Am. U. J. Gender & Law 167 (1995) (the decision represents a court working out the legislature’s decision to erase the resistance requirement); Crystal S. Deese; RAPE AND THE REQUIREMENT OF FORCE: IS THERE HOPE FOR PENNSYLVANIA AFTER PENNSYLVANIA v. BERKOWITZ; 4 Am. U. J. Gender & Law 167; 1995.


Id. at __ (“Indeed, the victim in this instance apparently found the prospect of being returned to the detention home a repugnant one. Notwithstanding, she was left with a choice and therefore the submission was a result of a deliberate choice and was not an involuntary act.”)


Estrich, Rape 95 Yale L J at 1092.

[several article cites here]
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!

Although the Court does not want to call it a “waiver” of rights, and therefore some scholars refrain from using that word, I use because consent does serve to waive 4th Amendment rights. [Cite to LaFave here]

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

Id. at 248 (“while 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.”)

412 U.S. at 248 – 49.

[AJ – please find if the S Crt ever gave this sentence – or something close]

[check if they asked everyone to step from car]

Schneckloth 412 U.S. at 220

Ashley – crt’s views - [irrelevant?]

Rusk v. Maryland, 43 Md. App 476 (1979) [Ashley – this is the intermediate crt -- I need the highest court here too – First, whichever court cites to the fact of the clothing, and then maya a quote from the highest crt – use your judgement]


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 of objective innocent person test]

Id. at 195 [where traveling].

Id. at 210-211 (dissent). [Id., at 47-48 also] How facts described in the dissent:

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. Id., at 77-78. 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. Id., at 47-48 Id. at 210-211 (dissent).

Id. at 199 [majority opinion]. The dissent wrote that “interdiction is not a cooperative exercise” U.S. v. Drayton, 536 U.S. 194, 212? (2002)(Souter, J dissenting, joined by Stevens and Ginsburg)

Id. at 200

Id. at 204.


Simmons, Not Voluntary But Still Reasonable, 80 Ind. L. J. 773, 775 (2005).


Id at 1501-1502, fns 39 & 40.

Id. at 150 (“Under this approach, a request to terminate the encounter makes it consensual, while the absence of such a request also reflects consent.”)

Margaret Raymond, The Right To Refuse And The Obligation To Comply: Challenging The Gamesmanship Model Of Criminal Procedure, 54 Buff. L. Rev. 1483 (.2007)

Id. at 1503, and fn 43. [Raymond]

See Atwater v. City of Lago Vista, 532 U.S. 318 (2001) ; see also Virginia v. Moore, 128 S. Ct. 1598 (2008) (held that even where there is no power to arrest as a matter of state law, the arrest is still not unreasonable as a matter of Fourth Amendment law).
Cite Rusk case – stats

Drayton (dble chk); see also Bostick (gun in plastic pouch held at waist level not threatening)

See Anne Coughlin, Sex and Guilt, 84 Va L Rev. 1 (1998)

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

Florida v. Bostick 501 U.S. 429, 438 (1991). The Court claims the innocent person test was already established in earlier cases and cites Royer, supra, 460 U.S., at 519, n. 4, 103 S.Ct., at 1335, n. 4 (BLACKMUN, J., dissenting) and Chesternut, 486 U.S., at 574, 108 S.Ct., at 1980 (“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”).

* Bostick, 501 U.S. at 439.

** Bostick, 501 U.S. at 438

Id at 206.


536 U.S. at __ (dissent)

Id. at fn. 63. (Simmons also points out that there is a variance even within Drayton between language that suggests that the test remains a question of whether the defendant actually gave voluntary consent even while the focus and decision turn on the conduct of law enforcement.)Simmons, Not Voluntary But Still Reasonable, 80 Ind. L. J. at 782

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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.” CRIM FL-CLE S

Although there are cases where individuals consent to searches where police find evidence that incriminate another, the majority of cases that end up in criminal court involve the alleged consent by non-innocent defendants.

Drayton 536 U.S. at 205 [majority]; and at 208 (dissent)

Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE [p 263?]

Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE [p 263?]

[from Podgor text – find the 22% likelihood figure/ compare the 45% figure for PC]

*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.”)
Subjective beliefs of the officer may be excluded from the hearing as irrelevant because of the pretext rule, although police often testify that a subject would have been free to leave if they chose.

Raymond at 1535.

Simmons, Not Voluntary But Still Reasonable, 80 Ind. L. J. 773, 775 (2005). Simmons writes “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.

Id at 774 & 823.[Simmons] (“The idea that these defendants [in Drayton] acted voluntarily is at once absurd, meaningless, and irrelevant under traditional Fourth Amendment jurisprudence.”)

Search warrant requirements may also be waived if there is valid consent. However, unlike warrantless searches, the Supreme Court has not yet replaced Fourth Amendment search warrant requirements with the amorphous consent test whenever police find the warrant requirement inconvenient.


Terry v. Ohio

See ANDREW TASLITZ [his bk] (arguing that because the Fourteenth Amendment made the Fourth Amendment applicable to the states, courts should look to 1865 when determining the intent of the Framers.) [check to make sure 1865 is the date of ratific of 14th]


Estrich